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German, Berlin and Regional Elections 2021 in Berlin

What happened? What is known and what is unknown?

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Abstract

In September 2021, Berliners not only elected the Bundestag, but also the Berlin House of Representatives, the 12 district assemblies and decided on a referendum. In total, there were six decisions to be made on five ballots – an unusually large number for Berlin.

On election day (e-Day), an unprecedented number of problems and errors arose. It is undisputed that these should not have occurred and should never happen again. Those affected were the voters, some of whom had to wait an unusually long time to cast their ballots. Fortunately, the weather was sunny and not too warm, so no one had to queue outside the polling station in the rain. The Berlin Marathon taking place on the same day, with all its road closures, also made it difficult to solve some of the problems that arose during the day.

The work for the election volunteers at the polling stations was very demanding, and in many cases the counting lasted until well after midnight. Polling stations that ran out of ballots during the day had to temporarily suspend voting until new ballots arrived, which led to some dissatisfaction and complaints from voters. Moreover, several polling stations remained open well past the official closing time of 6 p.m., causing some voters to cast their ballots after the initial media forecasts were released.

After e-Day, many official complaints were filed: For the Bundestag election, the complaints were directed to the Bundestag's Committee for the Scrutiny of Elections (CSE). For the Berlin election, the complaints are filed directly to the Constitutional Court of the State of Berlin (BCC). In addition to others, the acting Berlin election commissioner has filed a complaint with the Berlin Constitutional Court against two of 78 constituencies in which the errors may have been relevant to the mandate. In general, the complainants are calling for the elections in the affected constituencies to be repeated.

The incidents during the Berlin elections received extensive press coverage, with reports containing factual information, half-truths, and outright falsehoods. The reporting made it clear how limited the knowledge of the difficult matter of election organization and the underlying laws is in some cases, as no intent can be assumed in the case of false reports. Aspects were scandalized that were part of normal everyday electoral life and had certainly occurred in elections before – for example, estimates of preliminary results. The unintentional mistakes of the election organization were mentioned in the same breath as intentional rigged elections. Comparisons with dictatorial countries² were not shied away from even more than a year later, after much educational work and reviewing of the incidents had been done.

This article addresses several areas: the organization in the administration, the volunteer election staff in the polling stations, the voters, the journalists, the politicians and the institutions involved in the aftermath. A key question is what legal consequences have resulted, will result, or could result. Did the unfortunate events violate the principle of universal, equal, secret and direct election, which is enshrined in Article 38 (1) sentence 1 of the Basic Law for the Bundestag election and in Article 39 (1) of the Berlin Constitution for the Berlin election, in such a way that the election must be repeated in whole or in part? Have the errors led to unreasonable restrictions on the exercise of the right to vote area-wide? What is the smallest possible intervention to cure or compensate for the errors?

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² See beside others: <https://www.berliner-zeitung.de/news/wahlpannen-in-berlin-karlsruher-richter-sieht-zustaende-wie-in-einer-diktatur-li.273785> [accessed 11.1.2023]

Some of these questions have already been decided by the courts, while others are still awaiting a decision. The aim of this article is to provide an analysis, as far as possible, of why the errors occurred and to determine whether they are unique or whether they have their roots in the legal, organizational, and political framework. The article tries to do justice to the complex electoral organization with many actors and also to explain the complicated situation to the international community. However, there is no question that the mistakes and shortcomings should not have happened. The reader should note that the author of this article was the Deputy Election Commissioner of this election and the Acting Election Commissioner during the period when all the analyses were conducted.

1. The setting

The September 2021 elections were very special for Berlin (see Rockmann 2021): Never before have voters in Berlin had to make so many decisions at once. Voters elected on the national level parties and candidates for the Bundestag (two votes on one ballot), on the state level the Berlin House of Representatives (two votes on two ballots), on the district level the District Assembly (one vote) and decided on a Berlin referendum about housing issues³. Further, it was an election during the COVID pandemic, which meant polling stations had to meet health guidelines to make voting safe for polling station staff, voters and observers.

In Berlin 2,468,919 persons were eligible to cast their vote for the Bundestag⁴, 2,447,6005 for the Berlin House of Representatives as well as for the Berlin referendum, and 2,737,5626 voters for the 12 Berlin District Assemblies. The numbers differ due to the legislation that defines eligibility to vote (see Rockmann 2021). As a result, election officials faced three types of voters: People who were eligible to vote in all six elections and received all five ballots, people who voted exclusively for the Bundestag, or people who were eligible to vote only for the district assembly.

The electoral bodies are defined in Section 8 of the Federal Election Act. The responsible persons at the three hierarchical levels are: The Federal Election Commissioner (= German Returning Officer), the State Election Commissioner, and the Constituency/District Election Commissioner. Each level has an election committee, which is chaired by the respective responsible election commissioner (see Rockmann 2021). Meetings are open to the public and must be announced in advance. Each of the levels is free of directives according to the electoral law and must fulfill its tasks on its own responsibility. The Senate Department of the Interior is responsible for the electoral law governing elections in Berlin and the districts and monitors its proper implementation.

Voting in Germany, including Berlin, can be done in three ways: at a polling station on election day, at a district election office before election day (in-person early voting), or by postal voting (early voting). On election day, mobile ballot boxes for voting at home are not available for citizens who are unable to visit a polling station⁷. In such cases, people have to use the option of postal voting before election day. Votes cast at the polling station will be counted there immediately after closing on e-Day. All other votes will be counted from 6 p.m. on e-Day in counting centers belonging to one or more electoral districts of a constituency.

Due to the COVID situation, the election management assumed that the proportion of voting before e-Day would be higher than in past elections. Against this background, it was decided to set up 2,256

³ Title of the referendum: "Expropriating Deutsche Wohnen and Co". Due to the high prices for rental apartments in Berlin, an initiative is calling for the Senate to draft a law that includes criteria that could lead to the socialization of large housing stocks – more than 3,000 apartments (see arguments of the initiative and the Senate of Berlin – in German language only: <https://www.berlin.de/wahlen/abstimmungen/deutsche-wohnen-und-co-enteignen/allgemeine-informationen/artikel.1115174.php> [27.1.2023]).

⁴ See <https://www.wahlen-berlin.de/wahlen/BU2021/AFSPRAES/index.html> [accessed 18.1.2023]

⁵ See <https://www.wahlen-berlin.de/wahlen/BE2021/AFSPRAES/index.html> [accessed 18.1.2023]

⁶ See <https://www.wahlen-berlin.de/wahlen/BE2021/AFSPRAES/bvv/index.html> [accessed 18.1.2023]

⁷ The German Federal Election Order stipulates for mobile teams for special election districts: The local authority shall determine the election time for the special election district in consultation with the governing body of the facility within the general election time based on actual need. If necessary, the respective district election authority may establish a polling station in correctional institutions, socio-therapeutic institutions, prisons, nursing homes and convents (see: §61-64).

polling stations (PS) on election day, to which an average of 1,100 eligible voters were assigned. This was 457 PS more than in previous elections. In fact, around 39 % of voters opted for the postal vote before e-Day⁸. Therefore, on average, 432 of the assigned voters went to a PS on e-Day.

The PS were staffed by a minimum of five and a maximum of nine polling staff members who performed their service as volunteers. They worked from 7 a.m. until finalizing the counting. During the opening hours from 8 a.m. to 6 p.m., the staff are allowed to take shifts as long as four members are present in the PS. For all PS and the postal vote counting centers 34,000 volunteers were deployed. Polling staff heads and secretaries participated in a two-hour voluntary training⁹ made available by the respective district. PS staff were paid a maximum of 80 euros for the e-Day including counting¹⁰.

In Germany, no electronic devices are used in polling stations – neither for voting, counting votes, checking IDs, nor for keeping the electoral roll. The staff at the polling stations therefore had the task of verifying the identity of the persons by an official photo ID, finding and verifying the name of the person in the electoral roll assigned to the polling station, handing out the ballot papers corresponding to the voting entitlement, and supervising the voting processes (queuing, use of the voting booth, insertion of the ballot paper into the correct ballot box, etc.). Voting on e-Day always begins at 8 a.m. and ends regularly at 6 p.m. If voters who arrived before 6 p.m. are still queuing when voting closes, they must be given the opportunity to cast their ballots. Staff must ensure that no one lines up after 6 p.m. Immediately after the polls close, counting begins and should not be interrupted until the results are tabulated and reported to the district office.

In the 2021 election, there were specific rules in place for the order of counting because of the six votes on five ballots. The staff had four counting packages: The Bundestag 2nd vote followed by the 1st vote was to be counted first, then the Berlin House of Representatives 2nd vote followed by the 1st vote, then the District Assembly, and finally the referendum. Staff were instructed to report the results to their district office by phone immediately after each completed package.

The first results for the 1st and 2nd votes for the Bundestag arrived as early as 6:38 p.m. – 64 % of PS delivered their Bundestag results between 7 p.m. and 10 p.m., while 13 % did not determine their results until early the next morning. Final results were announced on October 14, 2021 during the Berlin Election Committee meeting. Turnout for the federal election reached the usual level of 75.2 % (2017 = 75.6 %). Due to the same e-Day, turnout for the Berlin House of Representatives was higher than usual at 75.4 % (2016 = 66.9 %; re-run 2023 = 62.9 %) and for the district assemblies at 69.6% (2016 = 62.3 %; re-run 2023 = 58.1 %).

During e-Day, more than usual minor and major errors occurred. The complaints concern voting by persons who are not eligible to vote (see Chapter 4.2), use of copied ballots (4.3), failure to hand out all needed ballots to voters (4.4), distribution of ballots that belong to another constituency (4.5), temporary closure of polling stations during voting hours (4.6.1), and unusually long waiting times to cast the vote (4.6.2).

On October 14, 2021, the Berlin Electoral Commissioner asked the Berlin Senate to relieve her of her duties and took responsibility for the electoral errors that had occurred on e-Day and during the preparation of the elections. The Expert Commission¹¹ analyzing the election errors titled her role with the phrase "queen without country", since her ability to influence the actions of the electoral constituencies is very limited by the electoral law itself and by the administrative autonomy of the Berlin districts. Nearly a year later, on October 1, 2022, the position was reappointed by the Berlin government.

⁸ In Germany, postal ballots are processed in so called postal ballot stations (PBS) on E-Day beginning at 3 pm. Berlin had 1,507 PBS during the 2021 elections. In the stations had the duty to open and count the postal ballots after checking that the voting card was signed. It is not possible to vote in a PBS, but it is open for the public to observe.

⁹ There is currently no legal possibility to make such a training mandatory.

¹⁰ The Senate Department of Finance has decided on the amount of expense allowances for the volunteers at the request of the Interior Senate, and more money has always been requested than granted. For the upcoming re-run of the Berlin election, 240 euros will be paid to the volunteers.

¹¹ See report of the expert commission: <https://www.berlin.de/sen/inneres/presse/weitere-informationen/artikel.1223722.php>, page 38, 2nd paragraph [accessed 18.1.2023]

In the meantime, the deputy state election commissioner and author of this article took over all duties. This included, among other things, reporting on all complaints to the Bundestag and the Berlin Constitutional Court, as well as preparing for possible (partial) new elections in the case of corresponding court decisions.

2. Responsible institutions handling complaints

The relevant election laws for the Bundestag election and the Berlin election open up the right of appeal to different groups of people. Anyone who was eligible to vote for the Bundestag could complain about the Bundestag election, including people who do not live in Berlin. In contrast, not everyone eligible to vote for the Berlin House of Representatives could complain about the House election. As a result, the number of formal complaints about the Bundestag election held in Berlin was much higher, at 1,959 than the number of complaints about the Berlin House election, at 35.

2.1 Bundestag election

An appeal against the Bundestag election may be lodged by a) any person entitled to vote for the Bundestag, irrespective of his or her place of residence, and b) any group of persons entitled to vote and in an official capacity, c) the respective State Electoral Commissioner, d) the Federal Electoral Commissioner, and e) the President of the Bundestag. The complaint may be submitted formlessly in writing and must include a statement of substantiation. The complaint must be filed no later than two months after the e-Day (see WahlPrG §2¹²).

To file a complaint, it must be submitted to the Committee for the Scrutiny of Elections (CSE) of the Bundestag. This committee, consisting of members from all parties in the Bundestag, prepares a proposal for the Bundestag on how to handle the complaints. The Bundestag decides about the CSE proposal or its modification. The decision shall specify in detail what action is to be taken and how and where any necessary re-election is to be held.

If the persons entitled to appeal are not satisfied with the decision of the Bundestag, they may appeal to the Federal Constitutional Court (WahlPrG §16; German Basic Law Art. 41 Abs. 213 and § 48 Abs. 114 Federal Constitutional Court Act). On the one hand, the court examines whether the electoral law applied is consistent with higher-ranking law, in particular with the German Basic Law. On the other hand, it examines whether the electoral law was applied correctly in the context of the complaints submitted. In other words, the court has no investigative power of its own: The court is limited to the content of the complaint.

The decision of the Federal Constitutional Court (FCC) is binding. In general, the decision must be made in such a way that the intervention (e.g., a partial re-run) remedies the identified election errors and does not unnecessarily go beyond them. If a re-election is required following the final decision of the court, it must be conducted within 60 days of the decision. Until now, the Federal Constitutional Court has never declared an election invalid in its entirety. However, the detection of electoral errors helps to ensure that future elections will meet the legal requirements.

2.2 Berlin House of Representatives and District Assemblies election

Complaints about Berlin elections must be submitted directly to the Berlin Constitutional Court (BCC). In contrast to Bundestag elections, eligible voters in Berlin are not entitled to file an objection. That is only possible for those individuals affected by decisions of the election administration (e. g. persons who are not on the electoral roll through no fault of their own), political parties, the Berlin Senate for Internal

¹² See https://www.gesetze-im-internet.de/wahlprg/_2.html [accessed 27.1.2023]

¹³ See https://www.gesetze-im-internet.de/gg/art_41.html [accessed 27.1.2023]

¹⁴ See https://www.gesetze-im-internet.de/bverfgg/_48.html [accessed 27.1.2023]

Affairs (as the institution responsible for electoral law) and the Berlin Election Commissioner (VerfGHG §40 (3)¹⁵). This explains the low number of complaints in contrast to the federal election.

Like the Federal Constitutional Court, the Berlin Constitutional Court has no own investigative power and ex officio investigations are not possible. Their decisions must be limited to the content of the complaints. Complaints must be submitted in writing no later than one month after the official publication of the final results. The court's decision is final – there is no higher authority that could be appealed. The final decision must be implemented within 90 days.

The decision of the BCC can be challenged under certain conditions with a constitutional complaint (in contrast to an election complaint) at the Federal Constitutional Court: In the event of the BCC making decisions that run counter to the decisions already rendered by the Federal Constitutional Court and the BCC has not submitted its proposed decision to the Federal Constitutional Court in advance. This provision has the background of ensuring a constitutional order uniformly in all 16 federal states (German Basic Law Art. 28 (1)). Such a constitutional complaint cannot be filed by the Berlin election authorities but by any natural or legal person. Therefore, it is not possible for the Berlin election commissioner.

2.3 Two independent decisions on the same subject?

Admittedly, the title of this section oversimplifies the matter somewhat, because the Bundestag and Berlin elections are not based on the same law. Nevertheless, for both elections, the question of whether or not, for example, a two-hour wait to vote is unreasonable should be answered consistently. The same applies to individual consequences: Did voters who did not want to wait for two hours, therefore turned away and later did not return to the polling station, lost their constitutionally guaranteed right to vote, or is the expectation justified that they take it upon themselves to wait or to return for such an important democratic act?

To clarify the incidents, transparency, consistency, and credibility are repeatedly emphasized as necessary to address doubts about the democratic system. Procedures and decisions that fulfill these attributes are certainly an important step in this direction, even if the consequences for the results of the Bundestag and Berlin elections may of course vary.

The formal complaints can be classified in seven categories for Bundestag and Berlin Elections¹⁶:

1. Organizational issues (Berlin Marathon on e-Day, covid procedure in the PS, etc.)
2. Absentee voting (missing and incorrect ballots, failure to deliver needed materials on time)
3. Polling stations (number of booths and ballot boxes, relocation of polling stations)
4. Ballots (more 1st than 2nd votes, missing ballots, incorrect ballots delivered to voters, ballots copied to make up for missing ballots, ballots not delivered / handed to voters)
5. Polling station queues and opening hours (PS still open well after official opening time, waiting time of more than 60 minutes; closing during opening time because of missing ballots)
6. Voter eligibility (people not eligible to vote cast their ballots, no ID checks)
7. Counting procedure (estimation of preliminary results, many invalid ballots, changes of the preliminary at the final result)

Complaints must be sufficiently substantiated in order to be accepted by the bodies: The mere assertion that one has seen on television that the people waiting in the queue in front of the polling station have

¹⁵ See http://www.lexsoft.de/cgi-bin/lexsoft/justizportal_nrw.cgi?xid=167858,41 [accessed 27.1.2023]

¹⁶ See beside others – all in German language: <https://www.berliner-zeitung.de/mensch-metropole/wahlpannen-in-berlin-das-chaos-wird-immer-offensichtlicher-li.232061>; <https://www.tagesschau.de/inland/berlin-bundestagswahl-pannen-101.html>; <https://www.rbb24.de/politik/beitrag/2022/05/berlin-landeswahlleiterin-ulrike-rockmann-kritik-pannen-verfassungsgericht.html>; <https://www.n-tv.de/politik/Berliner-Bezirk-schaetzt-Wahlergebnisse-article22837618.html>; <https://www.rbb24.de/politik/wahl/abgeordnetenhaus/agh-2021/beitraege/berlin-wahl-unregelmaessigkeiten-wahlfehler-falsche-stimmzettel.html>; <https://www.berlin.de/sen/inneres/presse/weitere-informationen/artikel.1223722.php> and OSZE (en) report: <https://www.osce.org/odihr/elections/germany/493561> [accessed 10.1.2023]; OSCE Needs assessment mission 2023 report see: <https://www.osce.org/files/f/documents/2/a/536410.pdf> [accessed 27.1.2023]

left, and one therefore assumes that they have not voted, is not sufficient substantiation. In contrast, it is sufficient to submit an affidavit that one has personally witnessed unauthorized voting, for example.

The responsible institutions handling the complaints must decide whether the incidents are a) related to the elections and b) are election irregularities. Electoral irregularities are all violations of electoral regulations by electoral bodies or third parties during the entire electoral process and thus affect not only the e-Day but also all election preparations and post-electoral activities like recounting, meetings of the committees etc.

If the errors identified are classified as electoral errors, it must be decided whether it can be assumed with a high degree of probability that the composition of the body to be elected may be affected by the errors. This must not be merely a theoretical possibility: It must be a concrete and not completely unlikely possibility based on general experience of life; conjecture or purely speculative assumptions are not sufficient (a.o. BVerfGE¹⁷ 146, 327 (341) year 2017). Legal experts refer to the question of whether the electoral errors made it highly likely that the composition of the elected body is unbearable (Schreiber p. 440; a. o. BVerfGE 103, 11 (134) year 2001).

Furthermore, it must be decided which consequences are most proportionate. Consequences could be drawn for the next election – for example, by changing the law. This is what happened in 2012, for example, when the Federal Constitutional Court ruled that the calculation of seats in the Bundestag was not constitutional and therefore has to be changed for the next election. In worse cases, a partial or complete re-run of the election must be considered, like 2014 in Stendal due to manipulation and 2016 in Hameln due to wrong ballots in one PS. Nevertheless, a one-to-one re-run will never be possible: In between the election and a re-run, the voting population in the respective area has changed, people have moved in and out. The results of the original election are known, i. e. strategic decisions can be made based on the experience after the original election, the votes of deceased people are lost, young people have reached the required age and are now eligible to vote, etc.

In the case of the 2021 elections in Berlin, media and politicians of certain parties were very quick to call for a complete re-run of all elections. The case law has so far been guided by decisions of the Federal Constitutional Court, which emphasize the constitutional aspects of the democracy requirement in the continued existence of the elected and stress that the decision on the election review must be justified in this respect (e. g. BVerfGE 103, 111 (135) year 2001). The elected parliament is a high-value good. In weighing the conflicting interests, it may be more reasonable to live with the error than to try to correct it. Errors therefore do not automatically lead to the invalidity of the election or parts of the election. It would have to be weighed, for example, whether a possible change in the parliament from 147 persons by one seat to 148, with all other elected persons remaining constant, would justify re-electing the entire parliament.

3. Actions and decisions so far¹⁸

The institution handling the election complaints (see Chapter 2.3) must decide whether a) the complaint is related to the elections and whether b) is it substantiated. Subsequently, it is necessary to analyze c) what consequences they have for the election results and d) what can be done to “heal” the errors. In points c) and d), the decisions for the Bundestag and Berlin elections may differ due to the different electoral laws.

Concerning point d), the third recommended resolution and report of the CSE listed seven possible options of general relevance (Report 20/4000 pg. 5, sec. 2¹⁹): 1. No re-run, 2. full re-run and 3.–7. re-run in some constituencies and election districts depending on occurred errors (see Chapter 4).

¹⁷ BVerfGE = Federal Constitutional Court decision

¹⁸ Reporting date = 13.3.2023

¹⁹ See <https://dserver.bundestag.de/btd/20/040/2004000.pdf> [accessed 10.1.2023]

3.1 State and district election commissioners

After e-Day, the schedule for the Berlin election administration was very tight. The deadline for the state election committee to determine the Bundestag results determined by the Federal election commissioner was October 11, followed by the Berlin election committee on October 14, 2021. Before the state election commissions could determine the results, the district election commissions had to decide on the district results.

Because of the large number of complaints received by the state and district election authorities, a great deal of investigation had to be carried out before the commissions could do their work. All complaints received from the press, the public, election authorities, etc. had to be investigated. PS staff were interviewed and PS protocols were analyzed. It was clear from the beginning that it was impossible to resolve all the complaints submitted in the time available. Therefore, the main focus was on complaints that could have an impact on the outcome, i.e., that are relevant to the mandates.

The State Election Commissioner informed the Federal Election Commissioner in detail prior to the meeting of the Berlin State Election Committee to determine the Bundestag results. Since the State Election Commissioner did not assume that the errors would have an impact on the result (1st and 2nd vote), she did not file a complaint. However, this was done by the Federal Election Commissioner (see Chapter 3.3).

The State Election Committee for the Berlin elections had to decide on the basis of the decision of the district committees on the first and second votes for the Berlin House of Representatives. The Commission's protocol discusses in detail the errors that occurred²⁰ and the analysis of the consequences for both types of votes. The commission established the results and the State election commissioner announced that she would lodge an appeal. She appealed against the results of the first vote in two Berlin House of Representatives constituencies in Charlottenburg-Wilmersdorf and four constituencies in the district Marzahn-Hellersdorf. The reason for this was that over a period, ballots for the 1st vote were not handed out to voters or ballots from another constituency were handed out. This means that either the votes are missing or are invalid. Since the difference between the person elected and the person in second place was very small in these constituencies, mandate relevance was possible (see Chapter 4.4, 4.5).

3.2 Berlin Constitutional Court

The electoral complaints had to be submitted in writing to the Berlin Constitutional Court (BCC) within one month of the announcement of the final result in the official gazette. In the course of the following months, the court ask for information from the state and district election administration and ordered all 2,256 protocols from the polling stations.

A court date with a hearing of objectors and affected parties was scheduled for September 28, 2022²¹. The hearing was open to the public, but not broadcasted for public access. It began with the announcement of the court's preliminary decision and was followed by the court's press statement during a break²². The preliminary decision to repeat the Berlin elections in their entirety, was based mainly on information gathered from the protocols of the polling stations.

Subsequently, some involved stakeholders made their statements, such as the State Election Commissioner, a representative of the Berlin Senate of the Interior, a representative of the President of the Berlin House of Representatives, the two parties that filed complaints²³. The members of the BCC did

²⁰ See <https://www.berlin.de/wahlen/wahlen/wahlen-2021/ergebnisse/internet-voe.pdf> [accessed 27.1.2023]

²¹ See: <https://www.ito.de/recht/justiz/j/berliner-verfassungsgerichtshof-wahlen-wiederholen-verhandlung-kommentar-schaden-fuer-demokratie/> [accessed 27.1.2023]

²² See: <https://www.berlin.de/gerichte/sonstige-gerichte/verfassungsgerichtshof/pressemitteilungen/2022/pressemitteilung.1249350.php> [accessed 27.1.2023]

²³ The parties are "Partei für Arbeit, Rechtsstaat, Tierschutz, Elitenförderung und basisdemokratische Initiative (Die Partei)" and "Alternative für Deutschland (AfD)".

not ask any questions or comment on the statements²⁴. The reporting institutions and parties requested to be allowed to present their statements in written form, which the court later approved.

The decision of the BCC was announced on November 16, 2022²⁵. The court ordered a full re-run of the House and district elections. The decision was passed by a vote of 7-2. There was a written statement on the minority vote that doubted the necessity of the full election re-run. The re-run election was then scheduled by the State Election Commissioner for February 12, 2023.

After the decision of the BCC, the only legal remedy available was a *constitutional* complaint to the Federal Constitutional Court (FCC). Such complaints were lodged by parties and private individuals but not by the Berlin Senate. In addition to the constitutional complaint, an issuance of a temporary restraining order was also requested by some applicants to prevent the elections on February 12, 2023 before the court decides on the matter. On January 31, 2023, the FCC ruled that it would reject the requested order to prevent the elections²⁶ (2 BvR 2189/22). The pronouncement has been made so far without providing reasons. The re-run was conducted on February 12, 2023. A decision of the FCC on the merits is expected in March 2023.

3.3 Bundestag and its Committee for the Scrutiny of Elections (CSE)

With regard to the German Basic law (Article 41), the Bundestag itself has to handle the complaints about the Bundestag election and the election of the German candidates for the European Parliament on the first level. The CSE prepares the decision and therefore organizes the documentation and hearing with the involved.

Among others, the Federal Election Commissioner filed an objection²⁷ against the Bundestag election in Berlin contesting the validity of the election to the 20th German Bundestag and recommended a re-run in six of 12 constituencies. His objection refers to the following constituencies: 75 Berlin-Mitte, 76 Pankow, 77 Reinickendorf, 79 Steglitz-Zehlendorf, 80 Charlottenburg-Wilmersdorf and 83 Friedrichshain-Kreuzberg – Prenzlauer Berg Ost (constituency in two districts). He argued that the 1st vote in constituency 77 could be affected because, with 1,788 votes, the difference between the winning candidate and the second was small (see Table 2, column 16). Further, he calculated that one party²⁸ needed only 802 more votes to gain one more mandate. Although the turnout was high, he argued that it was very likely that the turnout would have been even higher because many people went home without voting due to the long queues at the PS. The Berlin State Election Commissioner did not file an objection because she did not consider the election errors happened to be relevant to the mandate (see Chapter 4).

The CSE held a hearing²⁹ with the Federal Election Commissioner and the Berlin Election Commissioner on May 24, 2022. The hearing lasted almost six hours and was streamed on the Internet. It was conducted, among other things, to resolve the disagreement in reporting between the two election commissioners. The disagreement was not on the question of whether the electoral errors occurred, but on the question of their reliably proven extent and thus their number and relevance to the mandate.

²⁴ See also <https://verfassungsblog.de/merkwuerdiges-und-bedenkenswertes-bei-der-wahlpruefung-in-berlin/> [accessed 13.3.2023]

²⁵ See: <https://www.berlin.de/gerichte/sonstige-gerichte/verfassungsgerichtshof/pressemitteilungen/2022/pressemitteilung.1265423.php>; https://www.berlin.de/gerichte/sonstige-gerichte/_assets/21-154-urteil-fuer-homepage.pdf [accessed 25.1.2023]

²⁶ See <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2023/bvg23-013.html> https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2023/01/rs20230125_2bvr218922.html [accessed 31.1.2023];

²⁷ See Word-protocol of the hearing <https://www.bundestag.de/resource/blob/899768/d6bb0b4e812ec9fb529f25354c37ac1e/protokoll-data.pdf> [accessed 27.1.2023]

²⁸ The Social Democratic Party needed 802 votes more for another mandate.

²⁹ See: <https://www.youtube.com/watch?v=bqxT8-GekAY> [accessed 27.1.2023]; protocol: <https://www.bundestag.de/resource/blob/899768/d6bb0b4e812ec9fb529f25354c37ac1e/protokoll-data.pdf> [accessed 27.1.2023]

The CSE proposed to the Bundestag on March and September 2022 the rejection of 465 complaints^{30,31}, most of which concerned problems in Berlin. The predominant reason for rejection was that the complainants did not explain in a comprehensible manner why their doubts about the proper conduct of the election had arisen. Frequently, reference was made only to media reports. For the remaining 1,713 complaints concerning Berlin, the CSE proposed to repeat the Bundestag elections in 419 election districts spread over the 12 constituencies for the 1st and 2nd vote³². The main reasons were that in 339 districts (PS) the CSE stated validated elections errors, such as closing the PS after 6:30 p.m., closing the PS during e-Day, wrong ballots handed to voters and persons voting being not eligible (see Chapter 4).

When a part of an election is repeated, the result of the electoral districts participating in the re-run must be subtracted from the original result and replaced by the result of the repeat. In Berlin each electoral district has one PS, but not necessarily a counting center responsible only for the vote-by-mail ballots of this district (1:1 mapping). In some vote-by-mail counting centers, ballots from different electoral districts in the same constituency are counted together - which means that it is not possible to determine in retrospect which results belong to which electoral district. Therefore, if one district counted in a center has to be repeated, then all the others counted in the same center have to be repeated as well. As a consequence, in addition to the 339 electoral districts with problems, another 80 had to be included in the re-run list.

The resolution was adopted in the CSE by the three governing parties against the two opposition parties. One of the opposition parties argued for a complete re-run, the other for a re-run in six constituencies. The CSE-proposal was adopted in the Bundestag on November 10, 2022 by 374 votes out of 657, with 252 votes against and 31 abstentions. The turnout for the roll call vote was 89 %.

An appeal against the decision of the Bundestag may be lodged with the Federal Constitutional Court within two months. If no appeal is lodged, the decision of the Bundestag becomes final. Any re-run elections ordered by the decision must be held within 60 days. In this case, 17 complaints against the Bundestag decision have been filed with the Federal Constitutional Court, including complaints from two opposition parties³³. The FCC will therefore have to decide on issues that arose in an identical manner in the Bundestag and Berlin election, albeit with different effects on the results, and on which the BCC has already made its decision, which in turn is being appealed to the FCC. As of the article's publication date, possible decision dates are not known.

4. Complaints in Detail

Immediately after the election, Berlin's state election commissioner in cooperation with the districts began analyzing the possible impact of the election errors on the results. She had to decide promptly whether to file complaints against the result by the end of November 2021. As a result, a complaint was filed for the Berlin House election (see Chapter 3.1), but not regarding the Bundestag election. Although some facts had to be revised and added after November 2021, she clearly stated in the hearing before the Bundestag Election Scrutiny Committee in May 2022 and in the hearing before the Berlin Constitutional Court in September 2022 that she would not revise her decision on her objections even if she could. There is, of course, no question that a large number of errors occurred, but her assessment remains that their relevance to the mandate does not reach a level such that the resulting outcome for the Bundestag and Berlin House of Representatives elections is considered in wide parts or in total unacceptable: In her opinion, the perpetuation of elected parliaments weighs more heavily.

The complaints included several issues that are undoubtedly election errors. The focus is further on all complaints that could be relevant to the mandate. This includes all matters in which voters were unable to vote for organizational errors (missing ballots) or received incorrect ballots and therefore their vote

³⁰ See <https://dserver.bundestag.de/btd/20/023/2002300.pdf> and [accessed 27.1.2023]

³¹ See <https://dserver.bundestag.de/btd/20/011/2001100.pdf> [accessed 27.1.2023]

³² See <https://dserver.bundestag.de/btd/20/040/2004000.pdf> [accessed 27.1.2023]

³³ See: <https://www.sueddeutsche.de/politik/wahlen-karlsruheafd-und-union-gehen-fuer-wahlwiederholung-nach-karlsruhe-dpa.urn-newsml-dpa-com-20090101-221201-99-738058>; [accessed 27.1.2023]

was invalid³⁴. Additionally, voting after 6 p.m. and long queues are addressed without making a legal assessment of whether these events should even be considered.

The Berlin and the districts election administration's power to resolve complaints is limited. The state and district teams evaluated the protocols of the polling stations, interviewed the poll staff on a voluntary basis and spoke to complainants. If polling staff did not respond, election administrators had no authority to subpoena them; only the ESC and the courts involved have this power. The latter may also order sealed envelopes containing election documents, such as ballots, to be opened to resolve complaints (see Chapter 4.3).

In general, the clarification procedure for e-Day complaints about polling stations was as follows: First, it was checked whether a relevant matter was mentioned in the PS protocol. If not, district offices attempted to contact the head of the PS to obtain more information. The next step was to classify the incident as either proven electoral malpractice or not, as disputed, or as unsolved if no further information could be obtained. The findings were collected and legally evaluated using all the options available to the electoral bodies.

4.1 Overview

In the following subsections, several types of errors that were substantiated in the complaints are presented. In summary, this picture emerges for 2,256 polling stations on e-Day:

- In all 12 Bundestag and all 78 Berlin House of Representative constituencies, polling stations with minor or major problems could be found.
- 52 % polling stations closed at 6 p.m.; 37 % between 6:00 to 6:30 p.m.
- 11 % of the polling stations closed after 6:30 p.m., just over two-thirds of them (68 %) reporting no significant problems.
- 5 % of the polling stations had to temporarily interrupt the voting procedure during e-Day due to missing ballots
- The turnout rate for Bundestag election was with 75.2 % in the usual range (2017 = 75.6 %³⁵). The turnout for the 2021 election to the Berlin House of Representatives was not comparable to that of 2016, as the Bundestag election was held on the same day, resulting in a higher voter turnout (2021 = 75.4 %; 2016 = 66.9 %)

What effects of the errors can be analyzed in the aftermath? The electoral errors must be broken down to the constituency level in order to determine the effects on the 1st vote. For the Bundestag, there are 12 constituencies and for the Berlin House of Representatives election 78. Because of the large number of constituencies for Berlin House of Representatives elections, it is more likely that even a few errors can cause effects, especially for the 1st vote. Influences on the 2nd vote can only be analyzed for the Berlin elections, since the calculation for the Bundestag is in the responsibility of the Federal Election Commissioner. Therefore, reference is made to his published estimate about the effects.

4.2 Persons not entitled to vote voted

Complaints were made that persons not entitled to vote voted and that no ID checks were carried out. For example, one complaint alleged that a person younger than 18 voted for the Bundestag, even though he or she was only eligible to vote for the Berlin District Assembly (see Chapter 1).

When entering the polling station, it is sufficient to present the election notification to the PS staff handing out the ballots. After marking the ballots, an official document (valid or expired) with a photograph must be presented to the PS staff registering the person in the electoral roll (§ 52 Berlin LWO). Due to this sequencing, which is specified in an ordinance, it happened in individual cases that persons not presenting the notification received ballots for elections for which they were not eligible to vote. However, the error should have been noticed at the latest when the person was marked on the

³⁴ See for further complaint categories: <https://dserver.bundestag.de/btd/20/040/2004000.pdf> [accessed 27.1.2023]

³⁵ See: https://www.wahlen-berlin.de/wahlen/BU2021/AFSPRAES/WB/SB_B07-01-03_2021j04_BE.pdf [accessed 27.1.2023]

electoral roll, which had a separate column for each election. In this case, the persons had to tear up the ballots they had received by mistake.

In this election in particular, showing the election notification had the advantage that the PS staff immediately saw for which elections the person was eligible to vote and could thus select the ballots needed (one for Bundestag only, one for district assembly only or five for all elections). Errors are known from two PS: It is documented that a total of 15 ballots for the Bundestag and Berlin House election were cast by minors who were not eligible to vote.

4.3 Copied ballots used in PS (Berlin elections only)

Some public service employees in district Friedrichshain-Kreuzberg³⁶ decided when they realized that missing ballots would not arrive in time to make photocopies of the ballots for Berlin House of Representatives and district elections. Here, the Bundestag election was not affected³⁷.

Due to the format of the ballots³⁸ and the available copying equipment, it was not possible to copy them 1:1 in the same format. Therefore, the possibility cannot be completely ruled out – although it is not very likely – that voters' decisions were influenced by the format.

The number of copied ballots handed out should have been documented in the PS protocols, but this was not the case. Thus, the number of copied ballots is not known, nor is the number of affected constituencies in the district (maximum 6). The data could be obtained by opening the sealed ballot packets, which the election authority cannot do without a court order.

In this case, the state and the district election commissioner took the view that copying was permitted because the election regulations only stipulate that “official ballots” had to be used (Berlin election regulations §49 (1)) and the ballots were official by the fact that they had been copied by the appointed election staff. The Berlin Constitutional Court assessed the situation differently, but did not order the sealed packages to be opened to publicly determine the actual number and the distribution among the parties. The court estimated the number of copied ballots, without relying on any empirical basis, at about 3,000.

4.4 Ballots not handed out to voters (Berlin elections only)

Polling station staff are responsible for handing out to voters all the materials they need to cast their votes (State Election Code, LWO § 42 b)). The fact that in some cases not all ballots were handed out is documented in the protocols or annexes of the polling stations and constitutes an election error. Ballots for the 1st and 2nd vote are affected in 62 polling stations of 34 House constituencies. It can be assumed that this mistake was made by the staff without intention and all needed ballots were handed out immediately after the error was noticed by the staff or voters. However, if voters did not realize that they were not handed all of the ballots, mistakenly checked off all of the elections for them on the voter roll, casted their vote, and left the polling station, their vote was lost for the missing ballot. The error happened even though the staff was trained, suggesting that perhaps the overall situation was overwhelming for some.

One possible reason for this type of error is the comparatively large number of ballots to be issued (five) and the fact that the two votes for the Bundestag election were on one ballot, but the two votes for the election of the Berlin House of Representatives were on two different ballots.

³⁶ See also: <https://www.merkur.de/politik/berlin-wahl-wahlhelfer-kopierer-wahlzettel-bundestagswahl-pannen-91020692.html> [accessed 27.1.2023]

³⁷ See: <https://dserver.bundestag.de/btd/20/040/2004000.pdf> (chapter 7.3, page 73) [accessed 27.1.2023]

³⁸ Example: the ballot was too long for A4 or A3 format; see <https://www.berlin.de/wahlen/wahlen/wahlen-2023/stimmzettel/musterstimmzettel-2023-friedrichshain-kreuzberg.pdf> [accessed 8.3.2023]

- In 26 of 78 constituencies the 1st vote ballot was temporarily not handed out to the voters resulting in 3,514 missing votes³⁹
- In 15 of 78 constituencies the 2nd vote ballot was temporarily not handed out to the voters resulting in 1,507 missing 2nd votes

The distribution among the constituencies is of particular interest for the 1st vote (for access to the table please contact the author). This error alone was already critical for two House constituencies (0406 and 1001), where the difference between the winning and second-place candidate was 19 and 70 votes, while the ballots not cast were 22 and 509. In these two cases, the Berlin State Election Commissioner filed an appeal because it is not unlikely that these missing votes could have made a difference in the outcome.

4.5 “Wrong” Ballots handed to voters

The 2021 election was not the first in which Bundestag ballots were misallocated to polling stations in a constituency. The reason for this type of election error is that the boundaries of the districts responsible for distribution and the Bundestag constituency boundaries are not identical. In the case of Berlin, this means that two districts have to deliver two different types of Bundestag ballots in their district area, depending on the address of the PS (see Rockmann 2021).

The cause of the error in the Berlin House of Representatives elections is not entirely clear. Each district had between five and nine House constituencies. The error could have been caused by an undetected incorrect delivery of the election ballots to the districts. According to reports, not all delivery cartons were sorted by ballot type or had an incorrect labeling⁴⁰. This fact was discovered days before e-Day, but it was apparently impossible to fully check the more than 10 million ballots that were packaged. Accordingly, the PS staff was instructed to check the Bundestag and Berlin ballots. Unfortunately, this was not done in every PS. If the error was discovered either by staff or by voters, PS staff ordered and received the correct ballots for their constituency as fast as possible. All voters who had already voted with the wrong ballots without realizing it casted an invalid ballot for the 1st vote.

*Bundestag election*⁴¹:

- In four of 12 Bundestag constituencies, a number of wrong ballots for Bundestag election were handed out to voters making 495 decisions for the 1st vote invalid.

*Berlin House of Representatives election*⁴²:

- In 12 constituencies in 5 districts, wrong ballots for the 1st vote were handed out to voters making 1,908 votes invalid.
- In 5 constituencies in the district Friedrichshain-Kreuzberg, wrong 2nd vote ballots were handed to the voters. 1,969 votes were affected. These votes were not given invalid due to the legal assessment of the Berlin election commissioner. The argument was that the 2nd vote is a vote for the party⁴³. All parties available in the respective constituencies were on wrong ballot. The fact that the persons named on the party list were not the right ones for the constituency, if the party had a district list, was seen as less important than a loss of votes due to invalidity. The Berlin Constitutional Court decided differently⁴⁴: They did not see interpretation of the election bodies covered by the law (Berlin State Election Law § 15 Abs. 2 Nr. 1 Alt. 2). However, they did not order the determination of the actual number and the counting of the votes, so the influence on the result is empirically unknown and remains hypothetical.

³⁹ See 1. Publication for Land election commission – later corrected and handed to the Berlin Constitutional Court. <https://www.berlin.de/wahlen/wahlen/wahlen-2021/ergebnisse/internet-voe.pdf> [accessed 27.1.2023]

⁴⁰ See <https://www.berlin.de/sen/inneres/presse/weitere-informationen/abschlussbericht.pdf>, page 28 [accessed 9.2.2023]

⁴¹ See: <https://dserver.bundestag.de/btd/20/040/2004000.pdf> (page 27 ff) [accessed 27.1.2023]

⁴² See: First publication for election commission for Berlin House of Representatives election on 14.10.2021 later corrected <https://www.berlin.de/wahlen/wahlen/wahlen-2021/ergebnisse/internet-voe.pdf> [accessed 27.1.2023]

⁴³ See for example ballot: <https://www.berlin.de/wahlen/wahlen/wahlen-2023/stimmzettel/musterstimmzettel-2023-friedrichshain-kreuzberg.pdf> [accessed 8.3.2023]

⁴⁴ See: https://www.berlin.de/gerichte/sonstige-gerichte/_assets/21-154-urteil-fuer-homepage.pdf, p. 52; [accessed 27.1.2023]

4.6 Temporarily closing and queuing

4.6.1 Closing of polling stations during e-Day

A procedural election error that had never occurred in Berlin before was the interruption of the voting process for a significant period of time due to missing ballots. 117 polling stations had to be temporarily closed during voting time because they ran out of ballots. The temporary closure duration varied between 3 and 180 minutes (mean = 49 minutes, sum = about 6,200 minutes)⁴⁵. For 32 PS the exact day time of closure is not known, for 9 polling stations only the duration (median substituted for the estimation). The time lost amounts to about 100 hours, if one does not take into account that some polling stations "compensated" for the closing time by giving voters still waiting at 6 p.m. the opportunity to cast their vote. This in turn led to opening hours that went well beyond 6 p.m. and caused the next problem that the result forecasts had already been published (see Chapter 4.7). Since the temporary closure is an extraordinary event, the time of day and duration should have been recorded in the polling station protocol. However, this was not done systematically and had to be clarified later by interviewing PS staff.

Several reasons were responsible for running out of ballots: In general, Berlin's election regulations state that the head of a polling station should collect all the material required from the constituency administration office before e-Day and carry it to the polling station on e-Day. This includes the ballots. Due to the number and weight of ballots (3.33 kg per 100 voters), a head of a polling station with 700 eligible voters had to carry 21 kg of ballots in addition to the other materials such as flags, the electoral roll, protocols, etc. This was hardly possible by volume and weight with a bicycle or public transport, so that some PS heads took only a small number of ballots for maybe the first two hours of the opening time. The district administration planned to deliver the remaining ballots on e-Day morning directly to the PS. Although everyone knew that the Berlin Marathon was taking place on e-Day, the resulting consequences in terms of traffic chaos were obviously misjudged. As a result, there were in some cases serious delays in the delivery of ballots, which in the worst case led to a temporary closure.

4.6.2 Unusual long waiting times in polling stations

One main complaint relates to the for Germany unusually long waiting times at some polling stations. Waiting times of 30 minutes at peak times, such as after breakfast, after lunch, just before closing, can be considered as normal and have occurred in many German elections, not only in Berlin⁴⁶. However, in this election, Berliners reported having to wait up to two hours or even longer at some PS.

From the point of view of the Bundestag Election Scrutiny Committee and others, even long waiting times before voting do not *per se* constitute an electoral irregularity⁴⁷. When a waiting period is "reasonable" and when it is "unreasonable" can only be decided on a case-by-case basis. Long waiting times should not occur, of course, and can cause individual difficulties if people are not prepared. But if the situation requires it, it could be argued with the constitutional guiding principle of some obligation of the eligible voters to contribute to such a meaningful act as voting⁴⁸. Otherwise, the integrity and robustness of any election would be jeopardized if even a small number of eligible voters could sabotage an election by occupying the voting booth, individually or in groups, for an hour at a time during the

⁴⁵ These 117 PS were situated in 5 Bundestag and 22 Berlin House constituencies.

⁴⁶ See also: https://www.ndr.de/nachrichten/niedersachsen/kommunalwahl_niedersachsen_2021/Wartezeiten-an-Wahllokalen-Vielerorts-war-Geduld-gefragt,kommunalwahl1336.html [accessed 27.1.2023]

⁴⁷ See <https://dserver.bundestag.de/btd/20/040/2004000.pdf>, page 57, chapter 3.2.4 [accessed 10.1.2023]; See also: https://verfassungsgericht.sachsen-anhalt.de/fileadmin/Bibliothek/Politik_und_Verwaltung/MJ/MJ/lvg/LVerfG-LSA_20210503_21-05_Urteil_anonym.pdf (VerfGH Sachsen-Anhalt, Urt. v. 3.5.2021, LVG 5/21 Rn. 53.) [accessed 27.1.2023]

⁴⁸ See also: In a comparable case, the Hamburg Constitutional Court stated: "The untimely opening of a polling station does not constitute an electoral defect, because the eligible voters, who were unable to vote immediately due to the late non-opening of the polling station, undisputedly had sufficient opportunity to do so later. It is true that they had to go or drive to the polling station twice, which caused them a special effort. However, they have not been excluded from voting." Hamburg Constitutional Court, Judgment of 26.11.1998 - 4/98, para. 64, juris; translation by the author);

usual rush hours. The inevitable queues would then be blamed on the electoral bodies, which have taken no precautions against such obstructions, but cannot legally do so.

Long waiting times can be a result of, e. g., rush hours, individual decision-making time in the voting booth, and procedural errors. The latter need to be scrutinized more closely, as they very likely could have been avoided and should not occur during the next elections.

One temporary factor that hopefully will not return anytime soon has had a significant impact: the COVID guidelines for polling stations, the resulting polling station layouts, and the limited space for voting booths due to the spacing required to be implemented. Some argue that more booths would have reduced the waiting time. That is true until an optimum is reached, beyond that, otherwise, ID and voter list checks, ballot distribution, etc., would slow the process elsewhere. Therefore, a too small number of voting booths can be considered a preparation error in all cases where a correspondingly large PS room⁴⁹ would have been available. However, many PS with only two booths did not report any problems and finished the voting on time (52 %) or between 6:01 – 6:30 p.m. (37 %) after all waiting voters were processed.

Ultimately, the length of time voters spend in the voting booth is a crucial factor. Actually, six crosses on five ballots are quickly made if you have given it enough thought and made a decision beforehand. In Germany, as in other countries, efforts are being made to arouse voters' interest in the content of the election as well as the processes leading up to it: This is done, for example, through election advertising by the parties, TV discussion programs, the Wahl-O-Mat (Election-O-Mat⁵⁰) of the Federal Institute for Political Education and information provided by the authorities about the voting procedure also in easy-to-understand language. In addition, all ballots were posted on the walls in the room in front of the polling station, and voters were asked to study them before entering. So, voters generally had the opportunity to get information in advance.

Of course, all PS that had to close because of missing ballots also had longer waiting times. Some polling stations did not close and allowed partial voting, i. e. people could vote with the existing ballots for some elections and make up the missing vote later⁵¹. Most polling stations did not allow this legally permitted partial voting, but closed completely until the missing type of ballot arrived. Voters had the choice of either waiting until the reopening or leaving and returning later⁵².

Since temporary closings of polling stations had never happened before, the PS staff were confronted with a completely new situation, which in some cases overwhelmed them. The closing itself was documented in the protocols or subsequently witnessed by PS staff. Documentation on the actions of waiting voters during the closure period is rudimentary. Therefore, there is no total figure or data differentiated by constituency about how many voters were affected and how many of them waited, returned later to cast their (missing) vote(s) or went home without voting at all.

4.6.3 Consequences of closing and queuing

An estimation of the impact of the election errors is reasonable as long as one argues that the facts for this are sufficiently researched and known: This was the position of the Berlin State Election Commissioner responsible at the time. If one in contrast argues, as the Berlin Constitutional Court did, that only the tip of the iceberg⁵³ is known, then an estimate, on the other hand, makes no sense at all. In

⁴⁹ In any case, a general problem can be identified that has accompanied many elections so far: the enormous effort of the districts to find suitable polling stations. A known problem is that these places have to be used again the next day for the original purpose and many official buildings are not available for security reasons.

⁵⁰ See: <https://www.bpb.de/themen/wahl-o-mat/> [accessed 17.1.2023]

⁵¹ Partial voting was possible because the voter roll had a separate tick column for each voter for the Bundestag election, the Berlin election, the district election and the referendum. Therefore, PS employees can tick the elections for which the ballots have already been cast and leave the missing ones open.

⁵² In Berlin, the footpath to the PS should not be longer than 2,000 meters without this being specified in a regulation.

⁵³ See: <https://www.berlin.de/gerichte/sonstige-gerichte/verfassungsgerichtshof/pressemitteilungen/2022/pressemitteilung.1249350.php> [accessed 8.2.2023]

accordance with this logic, the court opted for a complete re-run of the Berlin House and District Assembly election.

Detached from the legal assessment of the incidents, it can be examined whether the errors can be quantified in terms of votes not cast. In order to analyze whether the "lost" votes of people who went home could have had an impact on the outcome, their number and distribution among the constituencies must be estimated. Not much data is available for such an estimate due to the lack of documentation⁵⁴: known is the turnout per polling station in 2021 and in previous comparable elections in the respective areas, for most PS the turnout at 12 noon and 4 p.m. and time and duration of temporarily closing during e-Day and from some PS the duration of queuing.

Mathematically, it is possible to calculate how many people might have cast their vote during the period when the polling stations were closed, using the same procedure as for exceeding the voting time after 6 p.m. (see Chapter 4.7). If one takes the average voting time per polling station affected by closing, the number of booths and the duration of the closure as a basis, the figure comes to about 5,200 voters⁵⁵. However, this figure must be seen against the background that 102 of the 117 polling stations extended their opening hours after 6 p.m., thus somehow compensating for the time lost during e-Day, and no one who was already waiting at 6 p.m. was sent home without casting a vote.

All additional votes with same proportional distribution among all running parties or candidates have no influence on the result. This means that when considering changes due to additional votes, it must be assumed that these voters would have decided differently than the large majority.

1st vote: Looking at the gaps between the constituency winner and the runner-up, the smallest gap in the Bundestag election is 1,788 votes in the constituency 77 (Table 2, column 16). In the Berlin election, 2 out of 78 constituencies with small gaps are critical due to other errors, so that complaints were filed against the result anyhow (see Chapter 4.4, 4.5).

2nd vote: Concerning the 2nd vote for the Bundestag, the federal election commissioner calculated that one party needed 802 votes more for another mandate. For the Berlin elections, the State Election Commissioner calculated that 1,747 votes more for one party would have made a difference: In that case one party would achieve one mandate more and another party would lose one⁵⁶. Given the data and the results achieved by this party (8 % overall), this did not seem very likely. And even if the case occurs, the question to be answered would be whether this change justifies a partial or full re-election.

4.7 Exceeding the election time on e-Day

The election laws clearly state that voting on e-Day begins at 8 a.m. and ends at 6 p.m. Voters still waiting at 6 p.m. must be allowed to cast their ballots (Section 80b (4) sentence 1 of the Land Electoral Code in conjunction with Section 60 sentence 2 of the Federal Electoral Code). The provision allowing voting after 6 p.m. reflects the idea that exercise of the right to vote is more important than possible knowledge of the predicted results already published at that time. However, it undoubtedly assumed that this should be a rare case. This was unquestionably not the case in Berlin in 2021: 1,086 polling stations closed after 6 p.m. – the last one at 8:56 p.m. (see Figure 1). In total, these PS exceeded the opening time by about 22,000⁵⁷ minutes. It is currently an open question whether the courts dealing with the 2021 elections will now provide further guidance on how to address and document such a problem once it has occurred.

⁵⁴ The only exception are three polling stations that closed after 6 p.m. due to missing and undeliverable ballots, even though 140 voters were waiting.

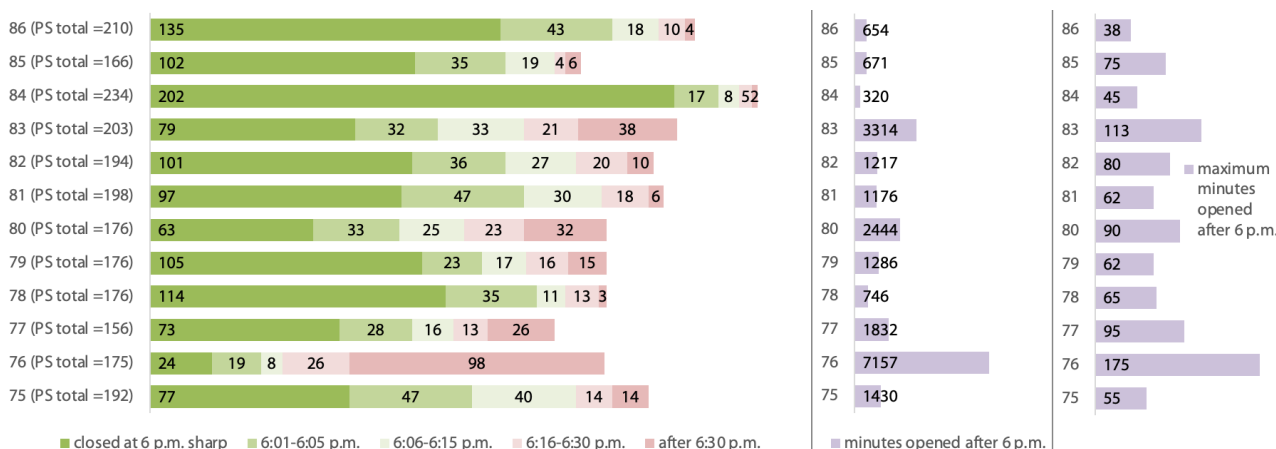
⁵⁵ The idea of more accurately calculating the time it takes a voter to cast his or her ballot by using turnout at 12 p.m. and 4 p.m. was dropped due to lack of data for some PSs and insignificant differences for the others.

⁵⁶ See for the calculation method: https://wahlen-berlin.de/wahlen/Be2021/AFSPRAES/WB/SB_B07-02-03_2021j05_BE.pdf; pages 104 ff. [accessed 14.2.2023].

⁵⁷ 290 minutes of the temporary closure was after 6 pm. However, after the ballots were delivered, voting continued there with voters who arrived before 6 p.m. and were still waiting.

Figure 1: left: Polling stations by closing time of respective Bundestag constituencies; middle: Minutes opened after 6 p.m.; right: maximum of minutes a PS was opened after 6 p.m. in the respective constituency

Example of reading: In Bundestag constituency 76 175 polling stations were available on e-Day. 24 PS closed on time; 98 after 6:30 pm. In total, polling stations in this constituency were open 7,157 minutes longer than scheduled. The maximum was 175 minutes.



Source: https://www.wahlen-berlin.de/wahlen/BU2021/AFSPRAES/DL/Schliesszeit_12_und_16_WB.xlsx; The same analysis can be carried out for the 78 constituencies of the Berlin House of Representatives using the following data https://www.wahlen-berlin.de/wahlen/Be2021/AFSPRAES/DL/Schliesszeit_12_und_16_WB.xlsx [accessed 8.2.2023]

Starting at 6 p.m., broadcast stations are allowed to publish their forecasts based on exit polls and other surveys. These projections are not yet based on counts, as all ballots are counted by hand. As a consequence, this means that persons voting after 6 p.m. could access these forecasts via their cell phones, as their use is not prohibited in PS in Germany as long as one is not already in the voting booth. 6 p.m.-forecasts provide information about the likely outcome for the 2nd vote. The initial forecast for the Bundestag election⁵⁸ deviated from the final results by less than 1 percentage point for all parties. For the Berlin House of Representatives elections, the deviation for some parties was greater this time – by a maximum of 4.6⁵⁹ percentage points.

Until now, PS protocols have not included, by default, information on how many voters cast ballots after 6 p.m. Perhaps this would be useful for the future. Figure 1 shows the data available sequenced by Bundestag constituency. If one argues that the forecast of results at 6 p.m. may have had an impact on the voting decisions of the remaining voters and thus on the election results, one must estimate their number.

- The estimate is made for each polling station that closed after 6 p.m. or after 6:30 p.m. (Table 1, columns (2) and (3)).
- The number of voters who voted at a polling station that closed to late on e-Day is calculated from the total number of eligible voters (table 1, columns 4 and 7, respectively) minus those who had already voted by mail-ballot before e-Day (columns 5 and 8, respectively).
- Table 2 columns 12 and 16, respectively, show the number of voters who actually voted in the late-closed PSs during e-Day. A total of 759,147 would have been able to do so (Table 1, column (6)), but only 493,392 (65%) voted. Taking these 493,392 voters together with the 489,568 voters (Tab. 1, column (5)) who had already voted by postal ballot, the turnout was 78.7 % (Berlin average 75.2 %). For all polling stations open after 6:30 p.m., the turnout is 80.5 %.
- In order to estimate the average time required by a voter, it is necessary to know for each polling station, in addition to the number of voters, the total voting time available and the number of voting booths (as a limiting factor). Polling stations were open from 8 a.m. to 6 p.m. = 600 minutes. For each

⁵⁸ See <https://www.wahlrecht.de/news/2021/bundestagswahl-2021.html> [accessed 27.1.2023]

⁵⁹ The difference of 4.6 percentage points was predicted for the Greens. At 6 p.m., forecasts were as high as 23.5 %; the final result was 18.9 %.

polling station, the duration of the temporary closure during the voting hours shall be subtracted from this and the additional opening time after 6 p.m. shall be added. For the nine PSs where the duration of temporary closure is not known, the median value is used (49 minutes).

- The total estimated number of voters who cast their ballots after 6 p.m. is about 17,500 and after 6:30 p.m. is about 5,500, with a wide range across constituencies. Comparing the numbers with the 1st vote differences between the winning candidate and the candidate in second place, it is clear that the outcome of the first vote would not have changed even if voters had given all their votes to one candidate after 6 p.m. based on the projections for the second vote (table 2, column 16).

Table 1: Persons eligible to vote in PS that closed after 6 p.m. or after 6:30 p.m. on e-Day by Bundestag constituency

Reading example: In Bundestag constituency 76, 151 of 175 PS were open after 6 pm. 203,542 people were eligible to vote at these PS, of whom 83,715 voted before e-Day, meaning that 120,124 could theoretically vote there on e-Day.

BT-constit ency	PS in constituency			Persons eligible to vote in PS open after 6 p.m.			Persons eligible to vote in PS open after 6:30 p.m.		
	all	PS open after 6 p.m.	PS open after 6:30p.m.	Persons eligible to vote in PS	Persons voted by mail before e-Day	Eligible voters in PS without postal voters	Persons eligible to vote in PS	Persons voted by mail before e-Day	Eligible voters in PS without postal voters
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Berlin	2,256	1,084	255	1,248,715	489,568	759,147	326,846	132,628	194,218
75	192	115	14	128,978	47,761	81,217	18,046	6,724	11,322
76	175	151	98	203,542	83,418	120,124	135,794	56,211	79,583
77	156	83	26	96,814	33,986	62,828	31,966	10,478	21,488
78	176	62	4	66,552	21,643	44,909	4,696	1,899	2,797
79	176	71	15	88,377	40,990	84,278	19,051	8,477	10,574
80	176	113	32	129,292	56,769	72,523	38,473	16,473	22,000
81	198	101	6	118,989	48,747	70,242	7,684	2,914	4,770
82	194	93	10	96,894	34,982	61,912	10,744	3,692	7,052
83	203	124	38	139,563	58,963	80,600	46,505	21,137	25,368
84	234	32	2	28,900	11,377	17,523	1,997	876	1,121
85	166	64	6	77,209	25,052	52,157	7,840	2,236	5,604
86	210	75	4	73,605	25,880	71,017	4,050	1,511	2,539

Source: <https://www.wahlen-berlin.de/wahlen/BU2021/AFSPRAES/downloads.html>

Table 2: Persons eligible to vote in PS that closed after 6 p.m. or after 6:30 p.m. on e-Day by Bundestag constituency

Reading example: In Bundestag constituency (no 76), 83,715 of 120,124 eligible voters cast ballots at PS still open after 6 p.m. throughout e-Day. With an average voting time per voter of 2.3 minutes, 6,126 voters cast their ballots after 6 p.m. After 6:30 p.m., 2,864 people still voted. The gap between the winning candidate and the runner-up was 7,270 votes.

BT-constit ency	Median minutes "in booth" per voter			Voters in PS on e-Day open after 6 p.m.		Voters in PS on e-Day open after 6:30 p.m.		Vote difference between elected candidate in constituency and first losing candidate*
	all	PS closed at 6 p.m.	PS closed later than 6 p.m.	All*	Estimated voters after 6 p.m.	All*	Estimated voters after 6:30 p.m.	
	(10)	(11)		(12)	(13)	(14)	(15)	
Berlin	3.1	3.1	2.9	493,392	17,256	130,520	5,298	
75	3.0	3.0	2.9	50,616	1,055	6,783	120	11,798
76	2.3	2.1	2.3	83,715	6,126	55,602	2,864	7,270
77	2.6	2.6	2.6	39,236	1,425	13,134	390	1,788
78	4.3	4.4	4.3	26,008	535	1,893	55	11,547
79	2.6	2.5	2.6	34,204	971	7,201	168	5,494
80	2.8	2.8	2.7	50,330	1,843	15,273	476	5,403
81	2.7	2.7	2.7	45,423	867	2,930	77	3,430
82	3.1	3.2	3.1	36,555	782	3,978	73	8,426
83	4.0	4.1	3.8	55,921	2,495	18,223	951	34,429
84	3.3	3.3	3.3	11,958	202	873	13	31,239
85	3.9	3.8	4.0	29,615	503	2,899	96	10,155
86	3.1	3.2	3.1	29,811	450	1,731	15	8,773

Source: * <https://www.wahlen-berlin.de/wahlen/BU2021/AFSPRAES/downloads.html>; for information about the time PS were closed on e-Day please contact the author; The same estimation can be done for the 78 Berlin election constituencies.

5. Summing-up

Until these elections, the courts in Germany have taken the position that the smallest possible intervention should be made to correct electoral irregularities; sometimes even no intervention is the lesser of two evils. To make such decisions and to choose the least invasive procedure, all relevant facts have to be known with reasonable certainty. This article has tried to present the situation of the 2021 elections in Berlin and relevant points of the complaints. However, it undeniably leaves many questions open, which could have not yet been answered due to a lack of court orders, or which can never be answered due to a lack of documentation. This is not satisfactory for such an important democratic act as the election and leaves room for long overdue improvements in Berlin's election organization, especially regarding the use of IT support and modern forms of communication and documentation during the e-Day.

Due to the administrative division of labor and responsibilities in Berlin and its districts and the relevant election laws, many actors were involved and responsible for their respective areas. Known and new errors occurred, some of which - in retrospect - might have been foreseeable. Even though the state election officer responsible at the time took overall responsibility and resigned, it seems clear that the overall situation was an overload of available structures and resources.

The Bundestag has made a well-founded, empirically based and coherent decision for a partial repetition of the election; whether the legal assessment of the electoral errors will stand up before the Federal Constitutional Court remains to be seen.

In the election of the Berlin House of Representatives, minor and major electoral errors were detected in 42 of 78 constituencies clearly identified per polling station. A total of 1,844,278 persons voted. Taken together, 5,422 first votes and 3,476 second votes were "lost" because no ballots were handed out or the ballots belonged to a different constituency and therefore had to be declared invalid. The "lost" first votes may have affected the outcome in a very small number of constituencies – which is why complaints were filed. In the case of the second vote, 1,747 more votes for one party would have made a difference *ceteris paribus*, transferring a mandate from one party to another. The former Berlin election commissioner thought this was highly unlikely – others did not, filing complaints in this regard. A possible effect of the number of copied ballots in six constituencies is not (yet) known, but could be clarified by opening the sealed ballot packets under court order. An unknown number of voters may have left the queues without casting their ballots, although this could have been done later in all but three constituencies. It is estimated that about 17,000 voters cast their ballots after 6 p.m., perhaps influenced by the forecasts that had already been released by then. Whether the complete re-run of the election for the Berlin House of Representatives on February 12, 2023 was the smallest possible intervention seems at least questionable from the point of view of the author and former acting election commissioner.

6. Literature

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