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a) Austria / **b)** Constitutional Court / **c)** / **d)** 01.07.2016 / **e)** W I 6/2016 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting.**

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

4.9.11.1 Institutions – Elections and instruments of direct democracy – Determination of votes – **Counting of votes.**

4.9.11.2 Institutions – Elections and instruments of direct democracy – Determination of votes – **Electoral reports.**

4.9.12 Institutions – Elections and instruments of direct democracy – **Proclamation of results.**

4.9.13 Institutions – Elections and instruments of direct democracy – **Judicial control.**

5.3.41.3 Fundamental Rights – Civil and political rights – Electoral rights – **Freedom of voting.**

5.3.41.4 Fundamental Rights – Civil and political rights – Electoral rights – **Secret ballot.**

Keywords of the alphabetical index:

Election, leak, influence outcome / Election, vote, procedure, protocol / Election, voting, secrecy / Electoral law, infringement.

Headnotes:

The system of postal voting is in conformity with the constitutional principles of voting in person and secrecy of ballots. However, votes may only be handled and counted by the collegiate election boards, the representative composition of which is seen as a specific guarantee for a transparent and impartial carrying out of elections.

If state authorities transmit results of the vote count prior to the closing of the election, this runs counter to the principle of freedom of voting.

A challenge to an election must be allowed if proven infringements of legal provisions aiming to prevent manipulations affect a decisive number of votes, regardless of whether or not manipulations have actually occurred.

Summary:

I. Pursuant to Article 141 of the Federal Constitution, the Constitutional Court was requested to review the second round of the presidential elections of 22 May 2016. The complaint was made by the representative of the candidate defeated, Mr Norbert Hofer, claiming that the provisions regarding postal voting were unconstitutional, and that the election results had been affected by widespread irregularities.

II. In 1985, the Court had held that postal voting is contrary to the constitutional principles of secrecy of ballots and of voting in person. However, in 2007, the Constitution was amended to the effect that postal voting may take place. Therefore, postal voting must be seen as an exception to the principle of voting in person; as regards secrecy of ballots, the Constitution (as amended in 2007) must be interpreted as expecting the voter to assume greater responsibility for protecting the secrecy of his or her ballot.

When creating a legal structure specifying postal voting, the legislator must both try to comply with the constitutional principles of voting and make sure that the constitutional provisions allowing postal voting are not frustrated by complicated and impractical safety regulations.

The Court could not find that the legal provisions on postal voting go beyond what is absolutely necessary to enable this method of voting. In particular, the Constitution (as amended in 2007) cannot be interpreted in such a way as to allow postal voting only where voters are virtually not able to cast their vote in person at a polling station on election day. As a consequence, although voters are required to

specify a reason for requesting a voting card, these reasons need not be verified by the municipal authorities issuing the card.

Finally, the Court conceded that there may be a (theoretical) risk of voting cards being manipulated during delivery; this risk, however, does not affect the constitutionality of the law as such.

The Court recalled that legal provisions on elections aiming at preventing abuse or manipulation must be applied strictly in accordance with their wording. After testimony from about 90 witnesses had been heard, it turned out that irregularities in dealing with the postal ballots had occurred in several election districts:

According to Article 14a Act on the election of the Federal President (*Bundespräsidentenwahlgesetz*) (as amended in 2015), the head of the District Election Board, in the presence of the other members of the Board, shall examine whether the voting cards received are not damaged. If cards are found to be damaged, they shall be separated. Afterwards, the head of the District Election Board shall open the voting cards (not damaged), remove the inner envelopes containing the ballots and put them into a box. Finally, after having mixed these envelopes thoroughly, the District Election Board shall open the inner envelopes, remove the ballots and count them.

The Court insisted that any activities directly related to the counting of votes must be performed by the election board as a collegiate body, i.e., in the presence of all members of the board duly invited to take part in the board meeting. Under the relevant electoral law, all political parties are expressly entitled to nominate members of the boards. Therefore, this specific collegiate structure of the election authorities is meant to ensure transparency and impartiality in the establishment of the election result.

Auxiliary staff who are not members of the election board may support the board in performing its tasks, but they may only do so in the presence of the collegiate body of the board. By no means must they be allowed to count votes without being supervised.

The District Election Board, acting as a collegiate body, is also responsible for opening (ripping open) the voting cards. If voting cards have already been opened by unauthorised persons, it will no longer be possible to determine whether these cards may be included in the counting of votes.

The Court found that the said provisions (aiming to prevent manipulations) had not been complied with in fourteen election districts (Innsbruck-Land, Südoststeiermark, Villach, Villach-Land, Schwaz,

Wien-Umgebung, Hermagor, Wolfsberg, Freistadt, Bregenz, Kufstein, Graz-Umgebung, Leibnitz, Reutte). These infringements violated both the relevant electoral law and the constitutional principle of secrecy of ballots.

As the winner of the election, Mr Alexander Van der Bellen, had been elected by a very slim margin of some 30.000 votes, these irregularities (which concerned some 77.000 postal ballots, of which some 41.000 votes were for Mr Van der Bellen) may have had an influence on the election result.

In this context, the Court recalled that if it is proven that the law has been infringed to an extent that these infringements may have had an influence on the election result, it is of no relevance if manipulations have actually occurred or not.

The Court ruled that although the infringements of the law governing the postal voting system had occurred in some election districts only, the second round of the presidential elections had to be repeated in Austria altogether.

The reason for this ruling was that citizens who have applied for a voting card can exercise their voting right in various ways: by mail, but also in person at their own local polling station, at another polling station in their own district, or at a polling station in a district other than their own. As a result, the votes counted in the various election districts are mixed.

To give an example: If someone has applied for a voting card in Linz, but casts his or her vote in person in Salzburg, this vote counts as a valid vote cast in Salzburg. If the Court were to rule that the election has to be repeated in Linz only, the voter could again apply for a voting card, but may this time use it to cast his or her vote in person at his or her local polling station in Linz. In that case, the voter would have cast two valid votes: the first vote counted in Salzburg (because in this district the election is not repeated and the result remains valid) and the second valid vote counted at the repeat election in Linz.

However, one and the same person must be prevented from voting twice. Therefore, a repeat election only for postal voters, or only in certain election districts, had to be ruled out.

Finally, the Court also agreed with the applicant that the principle of freedom of voting had been violated by government bodies transmitting information received on the results of the count of votes to the Austrian Broadcasting Corporation (ORF), the Austrian Press Agency (APA), other media and research bodies before the closing of the election.

The Court noted that if such information is spread systematically, a situation may occur in which results of the count and reports thereon are leaked and disseminated rapidly, especially via social media. In the present case, the Austrian Press Agency had sent out a report, hours before the closing of the election, implying that Mr Hofer was likely to win the election and that a turnaround of the result was no longer considered probable.

In view of the close result of the election, reports on the probable outcome of the election, based on counting results transmitted by official bodies, may have had an influence on the election result.

For this reason as well, the runoff election of the Federal President had to be repeated in its entirety in all of Austria.

The Court made it clear that the Ministry of the Interior (which is in charge of carrying out federal elections) has to ensure that such infringements do not occur in future elections. Therefore, the practice of transmitting results of the count prior to the closing of the election is to be discontinued.

Languages:

German.


