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ACCESS TO ELECTORAL RIGHTS

AUSTRIA

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Access to Electoral Rights

Austria

Joachim Stern & Gerd Valchars

1. Introduction

The right to vote for Austrian citizens has been significantly extended over the last twenty years concerning the age of the voters, the inclusion of people with disabilities and of prisoners and convicts. Also, Austrians permanently living abroad have been included in the electoral register and, have therefore been granted the right to postal voting at the national level alongside Austrians temporarily abroad. At the regional and local levels, the franchise for people permanently abroad is rather limited and has been practically made accessible for people temporarily abroad only when a general absentee ballot system was introduced in 2008.

When looking at foreigners' rights to vote only the absolute minimum as demanded by EU law is provided for. An attempt to extend voting rights at the local level to third country nationals in Vienna has been found unconstitutional in 2004.

2. Eligibility: Who has electoral rights under national law?

2.1. Citizen residents

2.1.1. Age: The age threshold for voting at all levels was lowered from eighteen to sixteen years of age in 2007. At the same time the age for running as a candidate was changed from nineteen to eighteen years of age. Only for running as president the required age is 35 years.

2.1.2. Mental disabilities: Until 1987 citizens under legal guardianship were automatically disenfranchised from all elections. The Constitutional Court found this too blanket a

restriction since it did not differentiate between the reasons for and the degree of guardianship: the law stripped people of their right to vote and the right to be elected even if the guardianship was just the result of a minor mental disability or restricted to certain financial aspects.¹ As a result, the legislator decided not to introduce any disenfranchisement on the grounds of disability anymore.

2.1.3. Persons convicted of criminal offences: According to the Austrian Constitution, forfeiture of the right to vote and to stand for election can only ensue from a court sentence.² Until recently, anyone who had been convicted by a domestic court of one or more criminal offences committed with intent and sentenced with final effect to a term of imprisonment of more than one year automatically lost the right to vote.³ Disenfranchisement ended six months after the sentence had been served. In 2010, in the Case of *Frodl v Austria*,⁴ the European Court of Human Rights considered this regulation to be in violation of Art 3. Prot. 1 of the European Convention on Human Rights. The Court found the provision to be an automatic and blanket restriction, not taken by a judge, and thus not considering the particular circumstances. Moreover, there was no link between the offence committed and issues relating to elections and democratic institutions as set out in the Court's judgment in the case of *Hirst II v UK*.⁵ The Electoral Law for the National Council (the popular first chamber of parliament) was consequently amended.⁶ The new criteria give criminal courts the right to exclude people who are convicted to an unconditional sentence of at least one year for a list of offences: high treason and other offences against the state; offences against supreme organs of the state; treason; offences against the military; offences relating to elections and referenda; negatively influencing Austria's relation with foreign states; genocide; membership in a criminal or terrorist organisation; terrorism; national socialist crimes and propaganda; abuse of power in relation to elections and referenda. Moreover, any conviction to more than five years for a criminal offence committed with intent can form the basis of an exclusion. The judge has to "take into account the special circumstances of the case" – which requires a proportionality test. Convictions of Austrians by foreign courts cannot be taken into account.

The disenfranchisement now ends immediately after the sentence has been served, unless the person is considered dangerous and sent to a ward. In that case the disenfranchisement lasts as long as the detention in the ward does, and thus it might be for life. If the sentence ends after the day the official register of voters for an upcoming election has been drawn up, the person has to register actively. Other than that he or she will be automatically included in the register again. Interestingly enough, prisoners who have the

¹ VfSlg 11.489/1987.

² Art. 26 (5) B-VG.

³ For a historical overview see *Stern*, Wahl und Zelle. Das EGMR-Urteil Frodl. Rückblick und Ausblick [Elections and Imprisonment. The ECtHR's Judgment in the Case of Frodl v Austria. Background and Future Implications.] in *juridikum* 2/2010, pp. 174-189.

⁴ ECtHR April 8, 2010, *Frodl v Austria*, appl. no. 20201/04.

⁵ ECtHR (GC) October 6, 2005, *Hirst v. the United Kingdom* (no. 2), appl. no. 74025/01.

⁶ § 22 NRWO as amended by BGBl. I Nr. 43/2011.

right to vote are by law not considered to reside in the community where the prison is located but at their former place of residence.

2.2. Citizens abroad

Until 1989, Austrian citizens without permanent residence in Austria were excluded from the electoral register and thus had no right to vote. The Constitutional Court found this to be in violation of the principle of equality of citizens and of the constitutional provision that forfeiture of the right to vote and to stand for election could only ensue from a court sentence (see above 2.1.3).⁷ The laws were amended in the following years, allowing citizens abroad to be included in the register. Their votes are allocated to the constituency of their former place of residence in Austria. If no such place exists there is a list of ranked criteria for determining where their votes will be counted: their parents' last residence in Austria, their place of birth, the place of residence of relatives, the seat of their employer, real estate in Austria, property, or other relations.

At the same time the right to effectively cast the vote by mail from abroad, which had to that date been considered incompatible with the principle of effective personal voting and with the secrecy of the ballot,⁸ was provided for. The introduction of postal voting from abroad in the 1990s also allowed citizens temporarily abroad to effectively participate in elections at the national level for the first time (see below).

Since then, at the national level there is no more legal distinction between citizens temporarily abroad and citizens permanently abroad. Both have the right to vote in all elections and referenda. At the provincial level only three provinces - Lower Austria, Tyrol and Vorarlberg - provide voting rights to citizens permanently abroad. However, since it is technically possible to declare a principal domicile in Austria without living there, the line between non-resident citizens and citizens temporarily abroad is hard to draw. The same applies to the local level: here, non-resident citizens generally enjoy no voting rights. However, two provinces - Burgenland and Lower Austria - allow voting rights for persons with a "secondary domicile" ("*Zweitwohnsitz*", a domicile but not the principal domicile). This can enable citizens who live outside the country to vote for local elections more easily but still does not include people without any domicile in Austria. Looking at the actual possibility to cast a ballot when abroad at the regional and local levels, it was only after the introduction of general postal voting in 2007 that postal voting for regional and local elections has been introduced.

2.3. Foreign residents:

Third country nationals do not enjoy any electoral rights at any level. In 2002 the Vienna Provincial Parliament enacted a law allowing third country nationals after five years of residence in the city to vote and be elected at district level for the so-called urban district councils (*Bezirksvertretung*) similar to EU-citizens. In 2003, in a highly problematic judgment the Constitutional Court found these provisions to be in conflict with the democratic principle of the Austrian constitution: even though the constitution contained no

⁷ VfSlg 12.023/1989.

⁸ Cf VfSlg 10.412/1985; *Nowak*, EuGRZ 1985, 184.

restriction to Austrian citizens for the Viennese district councils, the Court found that the limitation to Austrian citizens found at other levels formed part of the so called “democratic principle” as one of the six pillars of the constitution. The right to vote of third country nationals for the district councils was hence found to be in conflict with this “democratic principle” and abolished before it was ever enacted.⁹

3. Electoral rights of EU citizens

The EU Council Directive on local elections has been fully implemented by January 1, 1995 when Austria joined the European Union.¹⁰ Regarding EU citizens’ right to vote at local level there has been no case law in domestic courts or the CJEU. The right to vote at local level is defined as the right to vote for the municipal councils (*Gemeinderat*) in eight out of nine provinces. In Vienna, which is both a Province and a Municipality at the same time, the right to vote is restricted to urban district councils (*Bezirksvertretung*) and is not granted for the municipal council (*Gemeinderat*), which also functions as the provincial parliament (*Landtag*). Urban district councils only exist in the city of Vienna and Graz, in the latter case the right to vote is granted in municipal elections and additionally in urban district council elections.¹¹ In those provinces where mayors are directly elected (Burgenland, Carinthia, Upper Austria, Salzburg, Tyrol and Vorarlberg) the right to vote is also granted in these elections, although there is no corollary right to stand as candidate. Eligibility for the post of a mayor is also restricted in most provinces where mayors are indirectly elected.

In some provinces, EU citizens have to register in the electoral registry, in others voters are registered automatically. Austrian citizens are in any case registered automatically. In Tyrol the right to vote is granted only after one year of residence if the stay is “obviously only temporal”,¹² - a general condition applicable for Austrian and EU citizens alike.

With regard to European Parliament elections Austrian citizens with permanent residence in Austria are automatically registered whereas EU citizens with a permanent residence in Austria have to register themselves once. Unlike Austrian resident citizens, citizens abroad do have to register. Their registration is valid for ten years and can be renewed. Three months before expiration, relevant authorities have to inform the expatriate about the near expiration about the possibility to re-register. The right to vote can be exercised by postal voting; there are no other methods of absentee voting. Electronic voting has been discussed recently and introduced for the elections to the student’s councils to test its technical possibilities. The procedures have encountered severe difficulties and have been found in contradiction to the

⁹ VfSlg 17.264/2003; cf *Perchinig*, *Kein Wahlrecht ohne roten Pass*, *juridikum* 2004, pp. 178-181; *Valchars*, *Defizitäre Demokratie* (2006), pp. 83-97.

¹⁰ Bundesverfassungsgesetz, mit dem das Bundes-Verfassungsgesetz in der Fassung von 1929 geändert wird sowie das EWR-Bundesverfassungsgesetz und das EGKS-Abkommen-Durchführungsgesetz aufgehoben werden (Bundes-Verfassungsgesetz-Novelle 1994 - B-VGN 1994), BGBl. Nr. 1013/1994.

¹¹ Municipal councils and Vienna’s urban district councils are by European law defined as “basic local government units”. Cf Council Directive 96/30/EC of 13 May 1996 amending Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals. L 122/14, 22 May 1996

¹² § 7 (1) Gesetz vom 7. Juli 1994, mit dem die Wahl der Organe der Gemeinde geregelt wird (Tiroler Gemeindevahlordnung 1994 - TGWO 1994), LGBl. Nr. 88/1994.

principle of transparency of elections by the Constitutional Court, since it was impossible for electoral commissions to verify the results.¹³

4. Exercising electoral rights

4.1. National and regional elections

4.1.1. Voter registration

In national elections, resident Austrian citizens are automatically registered while EU citizens and TCNs do not possess voting rights. Citizens abroad have to register themselves. In regional elections only three provinces (Lower Austria, Tyrol and Vorarlberg) out of nine provide voting rights for citizens permanently abroad. Registration is required once and valid for a maximum of ten years. After ten years non-resident citizens are no longer eligible in regional elections.

4.1.2. Casting the vote

In both national and regional elections eligible voters can cast their vote at the polling station in the district where they are registered. This is considered as being the regular voting method. In case the voter is not able to personally attend the polling station where he or she is registered, an absentee ballot card can be demanded at least four days before the elections in writing or two days before the elections in person; that absentee ballot card can be cast at any polling station in the country (in regional elections in the respective province only) or be sent by mail. In national elections and in provinces where non-resident citizens have a right to vote in regional elections, non-resident voters can cast their vote by absentee ballot at any polling station in the country (in regional elections in the respective province only) or by mail.

4.1.3. Running as candidate

Both resident citizens and citizens abroad have the right to run as candidates in national elections. There are no restrictions to non-resident citizens such as time limits referring to the time spent abroad or the requirement of a previous residence in the country. In provinces where non-resident citizens do enjoy the right to vote, they are – under the same conditions as citizen residents - eligible to run as a candidate as well.

4.1.4. Assimilated or special representation of citizens residing abroad

Non-resident citizens' votes in national as well as regional elections are incorporated into the broader voting total and are counted by “assimilated representation” based on biographical ties (see above 2.2).

¹³ VfSlg 19.592/2011; cf *Pentz*, E-Voting in the Austrian Students' Union elections 2009 was unlawful. Austrian Constitutional Court Judgment from 13 December 2011, V 85/11 et al, icl-journal.com Vol 6, 1/2012, pp. 124-129, <http://www.internationalconstitutionallaw.net/download/5f1aced0ac5c1404ea3527aa50ddede4/Pentz.pdf> [Nov 27, 2012].

4.2. Local elections

Until 2008, voters could only cast their vote in local elections when present in the community on Election Day. Since the introduction of general postal voting, the same principles as in national and regional elections apply to the local level: voters who are temporarily absent, including people being temporarily abroad on Election Day, can demand an absentee ballot card. As described above (see above 3.) EU-citizens cannot run as mayor in most provinces, but are allowed to stand as candidates for the elections of municipal councillor (*Gemeinderat*) or district councillor in Vienna and Graz (*Bezirksrat*). Citizens permanently abroad are not represented.

