

Federal Constitutional Court – Press office

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Judgment of 3 March 2009 – 2 BvC 3/07 and 2 BvC 4/07

Use of voting computers in 2005 *Bundestag* election unconstitutional

The Federal Constitutional Court rendered judgment on two complaints concerning the scrutiny of an election, which were directed against the use of computer-controlled voting machines (so-called voting computers) in the 2005 *Bundestag* election of the 16th German *Bundestag* (see German press release no. 85/2008 of 25 September 2008). The Second Senate decided that the use of electronic voting machines requires that the essential steps of the voting and of the determination of the result can be examined by the citizen reliably and without any specialist knowledge of the subject. This requirement results from the principle of the public nature of elections (Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law (*Grundgesetz* – GG)), which prescribes that all essential steps of an election are subject to the possibility of public scrutiny unless other constitutional interests justify an exception. Accordingly it is, admittedly, constitutionally unobjectionable that § 35 of the Federal Electoral Act (*Bundeswahlgesetz* – BWG) permits the use of voting machines. However, the Federal Voting Machines Ordinance (*Bundeswahlgeräteverordnung*) is unconstitutional because it does not ensure that only such voting machines are permitted and used which meet the constitutional requirements of the principle of the public nature of elections. According to the decision of the Federal Constitutional Court, the computer-controlled voting machines used in the election of the 16th German *Bundestag* did not meet the requirements which the constitution places on the use of electronic voting machines. This, however, does not result in the dissolution of the *Bundestag* because for lack of any indications that voting machines malfunctioned or could have been manipulated, the protection of the continued existence of the elected parliament prevails over the electoral errors which have been ascertained. To the extent that the manner in which the German *Bundestag*'s Committee for the Scrutiny of Elections conducted the proceedings was objected to, the complaint for the scrutiny of an election was unsuccessful.

In essence, the decision is based on the following considerations:

I. The objections to the errors of the proceedings for the scrutiny of elections which had been conducted before the German *Bundestag* were unsuccessful. Even though the duration of the proceedings between the lodging of the objection to the election and the German *Bundestag*'s decision was more than a year, this is not yet a serious procedural error. The duration of the proceedings alone does not deprive the German *Bundestag*'s decision of its foundation. Nor is the fact that the Committee for the Scrutiny of Elections refrained from conducting an oral hearing of the complainant's objection to the election, and also apart from this did not deliberate in public, a serious error which deprives the German *Bundestag*'s decision of its foundation.

II. The principle of the public nature of elections, which results from the fundamental decisions of constitutional law in favour of democracy, the republic and the rule of law prescribes that all essential steps of an election are subject to the possibility of public scrutiny unless other constitutional interests justify an exception. Here, the examination of the voting and of the ascertainment of the election result attains special significance.

The use of voting machines which electronically record the voters' votes and electronically ascertain the election result only meets the constitutional requirements if the essential steps of the voting and of the ascertainment of the result can be examined reliably and without any specialist knowledge of the subject. While in a conventional election with ballot papers, manipulations or acts of electoral fraud are, under the framework conditions of the applicable provisions, at any rate only possible with considerable effort and with a very high risk of detection, which has a preventive effect, programming errors in the software or deliberate electoral fraud committed by manipulating the software of electronic voting machines can be recognised only with difficulty. The very wide-reaching effect of possible errors of the voting machines or of deliberate electoral fraud make special precautions necessary in order to safeguard the principle of the public nature of elections.

The voters themselves must be able to understand without detailed knowledge of computer technology whether their votes cast are recorded in an unadulterated manner as the basis of vote counting, or at any rate as the basis of a later recount. If the election result is determined through computer-controlled processing of the votes stored in an electronic memory, it is not sufficient if

merely the result of the calculation process carried out in the voting machine can be taken note of by means of a summarising printout or an electronic display.

The legislature is not prevented from using electronic voting machines in elections if the possibility of a reliable examination of correctness, which is constitutionally prescribed, is safeguarded. A complementary examination by the voter, by the electoral bodies or the general public is possible for example with electronic voting machines in which the votes are recorded in another way beside electronic storage. In the case at hand, it need not be decided whether there are other technical possibilities which make it possible for the electorate to trust in the correctness of the procedure of the ascertainment of the election result in a way that is based on its retraceability, thus complying with the principle of the public nature of elections.

Limitations of the possibility for the citizens to examine the voting cannot be compensated by an official institution testing sample machines in the context of their engineering type licensing procedure, or the very voting machines which will be used in the elections before their being used, for their compliance with specific security requirements and for their technical integrity. Also an extensive entirety of other technical and organisational security measures alone is not suited to compensate a lack of the possibility of the essential steps of the electoral procedure being examined by the citizens. For the possibility of examining the essential steps of the election promotes justified trust in the regularity of the election only by the citizens themselves being able to reliably retrace the voting.

If computer-controlled voting machines are used, no contrary constitutional principles can be identified which could justify a far-reaching restriction on the public nature of the election, and thus on the possibility of examining the voting and the ascertainment of the result. The exclusion of ballots unwittingly being marked in an erroneous manner, of inadvertent counting errors and of erroneous interpretations of the voters' will in vote counting does not as such justify forgoing any kind of retraceability of the voting. The principle of the secrecy of the vote and the interest in a rapid clarification of the composition of the German *Bundestag* are also no contrary constitutional interests which could be invoked as the basis of a far-reaching restriction on the possibility of examining the voting and the ascertainment of the result. It is not constitutionally required that the election result be available shortly after the closing of the polls. Apart from this, the past *Bundestag* elections have shown that also without the use of voting machines, the official provisional result can, as a general rule, be ascertained within a few hours.

III. While the authorisation to issue an ordinance, which is granted by § 35 BWG, does not meet with any overriding constitutional reservations, the Federal Voting Machines Ordinance is unconstitutional because it infringes the principle of the public nature of elections. The Federal Voting Machines Ordinance does not contain any regulations which ensure that only such voting machines are permitted and used which comply with the constitutional requirements placed on an effective examination of the voting and a reliable verifiability of the election result. The Federal Voting Machines Ordinance does not ensure that only such voting machines are used which make it possible to reliably examine, when the vote is cast, whether the vote has been recorded in an unadulterated manner. The ordinance also does not place any concrete requirements as regards its content and procedure on a reliable later examination of the ascertainment of the result. This deficiency cannot be remedied by means of an interpretation in conformity with the constitution.

IV. Also the use of the above-mentioned electronic voting machines in the election to the 16th German *Bundestag* infringes the public nature of the election. The voting machines did not make an effective examination of the voting possible because due to the fact that the votes were exclusively recorded electronically on a vote recording module, neither voters nor electoral boards nor citizens who were present at the polling station were able to verify the unadulterated recording of the votes cast. Also the essential steps of the ascertainment of the result could not be retraced by the public. It was not sufficient that the result of the calculation process carried out in the voting machine could be taken note of by means of a summarising printout or an electronic display.

V. The electoral errors which have been identified do not lead to a repetition of the election in the constituencies affected.

The electoral error which results from the use of computer-controlled voting machines whose design was incompatible with the requirements placed on an effective possibility of examining the voting does not result in a declaration of partial invalidity of the election to the 16th German *Bundestag* even if it is assumed to be relevant to the allocation of seats. The interest in the protection of the continued existence of parliament, the composition of which was determined trusting in the constitutionality of the Federal Voting Machines Ordinance, prevails over the electoral error because its possible implications on the composition of the 16th German *Bundestag* can be rated as marginal at most, for lack of any indications that voting machines malfunctioned or could have been manipulated, and because, also in view of the fact that the

established infringement of the constitution took place when the legal situation had not been clarified yet, they do not make the continued existence of the elected parliament appear intolerable.