

## **4<sup>th</sup> Congress of the World Conference on Constitutional Justice**

### **National report: Austria**

#### **I. The different concepts of the rule of law**

##### **1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?**

Article 18 Federal Constitution expressly provides for the principle of legality underlying the practice and organization of the administration: “The entire public administration shall be based on the law.” In addition, the Constitutional Court (see, e.g., VfSlg. 2455/1952) assumes the Constitution to be founded on a basic principle of *Rechtsstaat*, which appears to be addressed by the very first Article of the Federal Constitution (“Austria is a democratic republic. Its law emanates from the people.”) but is nowhere specified in greater detail.

##### **2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?**

What the principle of *Rechtsstaat* precisely stands for is debatable. From the Constitutional Court's point of view, a *Rechtsstaat* has to guarantee legality, legal certainty and legal protection, e.g. by way of establishing (a system of) effective institutions like the ordinary courts of law, administrative courts and the Constitutional Court (see e.g. VfSlg. 11.196/1986). Thus, the Constitutional Court understands *Rechtsstaat* in a rather formal sense, since it essentially refers to the existence of certain (effective) institutions. However, the Constitutional Court reads the Constitution in a rather substantive way in order to assume an implicit constitutional principle of *Rechtsstaat* in the first place (see answer 1). The principle of *Rechtsstaat*, as interpreted by the Constitutional Court, can be clearly distinguished from the broader, more dynamic rule of law-concept. Scholars interpret

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*Rechtsstaat* in a formal and substantive way: In essence, the formal *Rechtsstaat* is a state bound by law; the substantive *Rechtsstaat* is a state guaranteeing fundamental rights.

**3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?**

Owing to its far-reaching competences (see Articles 137-145 Federal Constitution as well as answers 10, 14 and 15), the Constitutional Court ensures respect for the rule of law in all fields of law. Most importantly, constitutional review of parliamentary statutes in itself must be seen as giving effect to the constitutional principle of *Rechtsstaat*, given that this mechanism ensures that even legislation is strictly based on, and in line with, the (Federal) Constitution.

**4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.**

According to the Constitutional Court, a *Rechtsstaat* has to guarantee legality, legal certainty and legal protection, e.g. by way of establishing (a system of) effective institutions like the ordinary courts of law, administrative courts and the Constitutional Court (see e.g. VfSlg. 11.196/1986 and answer 2).

Based on this idea, the Constitutional Court, for example, has found it to be unconstitutional if legal remedies in general have no suspensive effect (VfSlg. 11.196/1986), if time-limits for legal remedies are all too short (VfSlg. 15.529/1999) or if there are no legal remedies at all against the resumption of criminal proceedings (VfSlg. 16.245/2001). The legislator also has to ensure that if an executive authority interferes with rights of persons, this interference has to be reviewable (and therefore has to be performed in a way that corresponds to the forms of state behavior linked to the system of judicial review in place; VfSlg. 13.223/1992, 13.699/1994). The *Rechtsstaat* is also deemed to be at stake, if laws or regulations are enacted as constitutional provisions (in response to – or in order to counteract – rulings of the Constitutional Court) with the consequence that the Constitutional Court is prevented from examining their conformity with the Constitution (including fundamental rights). Taken all too often, such measures would undermine the power of the Constitutional Court (e.g. VfSlg. 11.756/1988). For the same reason, a constitutional provision stating that all public procurement laws of the States in force at a certain date should be deemed constitutional was found to be contrary to the principle of *Rechtsstaat*, since it had the effect

of exempting the statutes in the field of public procurement from the Constitutional Court's power of review (VfSlg. 16.327/2001).

**5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.**

The concept of *Rechtsstaat* has not so much changed over time in case-law but rather recently in the Constitution itself due to the establishment of administrative courts of first instance on 1 January 2014.

**6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?**

To some extent, Austria's accession to the European Union in 1995 has modified the principle of *Rechtsstaat*: The exclusive competence of the Constitutional Court for the review of laws is insofar affected as directly applicable EU Law takes precedence, in its application, over contrary national law. In addition, EU Law, in some instances, does not meet the stricter national requirements of legality, according to which especially executive acts have to be determined to a comparably high degree by law. Finally, according to the well-established case-law of the Constitutional Court, parliamentary statutes implementing EU directives into national law are exempt from constitutional review insofar as national legislation is fully determined by the directive to be implemented (see, e.g., VfGH 15.6.2016, G 25/2016, concerning the European arrest warrant).

**II. New challenges to the rule of law**

**7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?**

The increasing number of persons seeking international protection seems to be an ongoing challenge for the *Rechtsstaat*: In dealing with the current situation, the legislator amended the Asylum Act, the Aliens Police Act and the Federal Office for Immigration and Asylum Procedure Act so as to provide a legal basis for the introduction of an upper limit of applicants for international protection, time-restricted residence permits (three years) for persons who are granted asylum and the prolongation of the waiting period for family reunification concerning persons granted subsidiary protection from one to three years.

In the face of global terrorism, the legislator recently enacted a controversial law facilitating the surveillance of persons too (Federal Act on police state security of 2016).

**8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?**

The increasing number of persons seeking international protection and global terrorism seem to have prompted the legislator to sharpen laws dealing with migration and security (see answer 7). It is not yet clear if these recent legal developments modify the prevailing understanding of *Rechtsstaat* lastingly.

**9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.**

Austria has been a State Party to the European Convention on Human Rights (ECHR) since 1958; it has also ratified most of the additional protocols, in particular all protocols including substantive human rights provisions (except Protocol No. 12). In 1964, the ECHR was granted the rank of constitutional law by explicit constitutional order. Thus, the Convention – equal in status to other genuinely national fundamental rights – is directly applicable constitutional law. At the national level, the fundamental rights enshrined in the Convention have the same status and the same importance as other fundamental rights laid down in the Austrian Constitution. This unique form of incorporation of the Convention established a close link between the jurisprudence of the European Court of Human Rights (ECtHR) and the national application and interpretation of the ECHR. This is particularly true for the Constitutional Court. Since the 1960s, after a short period of hesitation, the Court has accepted the ECHR as a benchmark for judicial review of normative acts. Today, a large number of judgments of the Constitutional Court refer to the case-law of the ECtHR. In particular, in case of "parallel rights", i.e., rights enshrined both in the national catalogue of fundamental rights, especially in the Basic Law of 1867, and in the ECHR (e.g., the freedoms of association or of expression), the Court primarily refers to the relevant provision of the ECHR alongside with the pertinent case-law of the ECtHR as a standard of review. If a certain human rights issue has already been dealt with by the ECtHR, its considerations are mostly adopted by the Constitutional Court – even if that means that the Constitutional Court has to revisit or change its own settled case-law.

Though, in general, the Constitutional Court abides by the rulings of the ECtHR, different views cannot be ruled out. For example, the Constitutional Court – explicitly – did not follow the ECtHR's recent reading of Article 4 of the 7<sup>th</sup> Additional Protocol to the ECHR regarding the exact scope of the right not to be subjected to double jeopardy (see VfSlg. 18.833/2009) or the European Court's understanding of "civil rights and obligations" within the meaning of Article 6 ECHR (see VfSlg. 11.500/1987). Most recently, unlike the ECtHR in various judgments (see, e.g., Herrmann, 9300/07), the Constitutional Court has held that if landowners are legally required to tolerate the use of their land for hunting, this cannot be seen as imposing a disproportionate burden on landowners who are opposed to hunting for ethical reasons (VfGH 15.10.2016, G 7/2016).

Austria has also ratified the UN covenants on human rights; however, unlike the ECHR, these covenants are neither part of the Austrian Federal Constitution nor even directly applicable. Thus, decisions of the UN Human Rights Committee may entail international obligations binding on the Republic, but cannot affect the case-law of the Constitutional Court (see VfSlg. 14.050/1995).

### **III. The law and the state**

#### **10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?**

The Constitutional Court ensures that ultimately all state acts have to comply with and be founded in the constitution (see answer 3). Acts by state powers that are not founded in the constitution can be nullified by the Constitutional Court. The exclusive responsibility to review laws and regulations forms the key element of constitutional justice. The Constitutional Court is also competent to review judgements and decisions of administrative courts and checks for alleged infringements of a constitutionally guaranteed right or on the score of an illegal regulation, an illegal pronouncement on the republication of a law (treaty), an unconstitutional law, or an unlawful international treaty.

#### **11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?**

A Constitutional Court ruling striking down an unconstitutional law or an illegal regulation has to be published in the federal or state law gazette without delay, therefore other courts are bound by the decision as the relevant law or regulation no longer exists and

individual acts, decisions or rulings may no longer be based on it. If the Constitutional Court quashes a ruling by an administrative court, all administrative courts and administrative authorities concerned are obliged to establish immediately, with the legal means available to them, the legal situation corresponding to the legal view of the Constitutional Court in the relevant legal matter.

In general, administrative courts and administrative authorities follow and respect the case-law of the Court.

According to the Federal Constitution, there are three supreme courts in Austria, i.e., the Constitutional Court in “constitutional” matters, the Administrative Court in matters of administrative law and the Supreme Court in civil and criminal law matters. Although each of these courts has its own jurisdiction, conflicts may arise in certain areas, in particular when it comes to the question of whether a law is unconstitutional or may be applied in such a way that it complies with the Constitution.

**12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).**

The principle of *Rechtsstaat* requires that a law clearly and precisely states which kind of conduct leads to (criminal) punishment to enable individuals to act as law abiding citizens (see, e.g., VfSlg. 18.516/2008). The same principle also sets standards for the publication of laws and regulations; e.g., the Constitutional Court has held that, for a regulation to be lawful, its publication must include the name of the acting administrative body (see, e.g., VfSlg. 19.810/2013).

As for constitutional standards for the application of law (by courts), e.g., independence, impartiality, ne bis in idem, nulla poena sine lege, the Constitutional Court refers to Article 6 ECHR as well as the relevant case-law of the ECtHR (cf. answer 9).

**13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?**

Individual acts by private actors that are allowed to exercise public function are also subject to review by the (Administrative) Courts and ultimately the Constitutional Court.

**14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an**

**effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?**

In Austria, public officials are fully accountable for their actions, both in law and in practice. Misconduct may result in disciplinary measures as well as in civil and criminal penalties. The relevant legal sources of accountability are public sector employment legislation, the Federal Act on Public Liability of 1949, and the Penal Code of 1974. E.g., abuse of authority shall be punished by a term of imprisonment of six months at the lowest and five years at the highest (§ 302 Penal Code).

Public officials are, as a rule, not exempted from prosecution. To some extent, only members of Parliament and the Federal President enjoy immunity. As for members of Parliament, they may never be made responsible for votes cast in the exercise of their function. With a view to oral or written statements made in the exercise of their function, they can only be held liable by the respective parliamentary body. Apart from that, criminal prosecution may only take place with the consent of the respective parliamentary body. Similarly, also the Federal President cannot be prosecuted but with the prior consent of the Federal Assembly.

#### **IV. The law and the individual**

**15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.**

Individuals may lodge a complaint with the Constitutional Court against a law or a regulation alleging an infringement of their rights directly by unconstitutionality or illegality, if the general act has become effective individually without a judicial decision or a ruling having been rendered (*Individualantrag*; Article 140 (1) (1) (c) Federal Constitution).

Since 2015, individuals may also lodge a complaint with the Constitutional Court against a law or a regulation after a legal matter that has been decided by a court of justice of first instance, alleging infringement of his or her rights because of the application of an unconstitutional law or a regulation that is contrary to law, on the occasion of an appeal filed against that decision (*Parteienantrag*; Article 140 (1) (1) (d) Federal Constitution). This relatively new kind of constitutional appeal is meant to provide a “substitute” for a full constitutional complaint against ordinary court rulings, an instrument that has been requested for many decades but does not exist in Austria to date.

By contrast, rulings of administrative courts of first instance are subject to constitutional review by the Constitutional Court. A constitutional complaint may be brought by all parties to the proceedings before the administrative court, claiming infringement of a constitutionally guaranteed right or infringement of another right on account of the application of an unconstitutional general act, e.g., a law or a regulation (Article 144 Federal Constitution).

**16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?**

The Constitutional Court has developed such case law specifically with a view to the principle of *Rechtsstaat* (for examples see answer 4; the Constitutional Court, for example, has also ruled that asylum seekers need to have the chance to seek legal counsel, VfSlg. 15.218/1998, 19.490/2011). Due to the fact that guarantees relating to the access to courts are also found in the ECHR and the Charter of Fundamental Rights of the European Union the case law does not always refer to the principle of *Rechtsstaat* (e.g. unconstitutionality of the exclusion of legal aid in administrative court proceedings regarding civil rights and obligations, VfSlg. 19.989/2015).

**17. Has your Court developed case-law on other individual rights related to the rule of law?**

See answers 4 and 12.

**18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?**

Yes. The principle of *Rechtsstaat* is used by the Constitutional Court as a general concept that is not explicitly addressed in the Federal Constitution (see answer 1). The Constitutional Court also refers to the principle of *Rechtsstaat* in combination with other fundamental rights (see answers 4, 12, 16).