

## The Austrian Constitutional Court

Peter Moser\*

### Historic Introduction

Each country in the world has been established and is based upon basic constitutional principles which form the core of its political system. The 18th century British politician Bolingbroke stated in 1733:

“By constitution, we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain principles and reasons that compose the general system, according to which the community has agreed to be governed.”

In the western world this “general system” is widely ascribed to the idea of democracy. Particularly outside the sphere of western civilization the term “western democracy” has become a catch-word which makes us forget, however, that with the rare example of the city-state of Athens in the fifth century B.C. and some features of the early Roman republic there never existed a western tradition of democracy before the American and French revolution. Only in Switzerland and to some extent in England democratic developments had originated earlier.

What we name “western democracy” today did not evolve peacefully, but had to be fought for through revolutions, unrest and wars. Basic rights, liberalization and power-sharing of the people had to be wrestled from feudal and absolute regimes.

This was not different in the case of Austria. After the defeat of France in the Napoleonic Wars the Austrian Emperor was the only and absolute ruler. His power first was severely challenged by the revolution in 1848 of the rising

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\* Ambassador, Embassy of the Republic of Austria

middle class of citizens. The emperor had to abandon his capital city. A liberal constitution was promulgated by the citizens, but within one year the emperor crushed this "people's power" with his mighty army and resumed his oppressive absolute and militaristic regime.

Two lost wars in 1859 and 1867 with disastrous economic consequences forced the emperor finally to give in and grant for the first time an effective constitution which already bore the features of a modern and liberal democracy.

### **Features of Austria's Constitution**

The present constitution of the Republic of Austria dates back only to 1920, when after the downfall of the Habsburg Empire the territory of today's Austria severed the centuries old links with Hungary and the other nationalities within the empire and became a small nation of its own.

The word "constitution" under Austrian law consists however not only of the text of the proper Federal Constitution of 1920, but of numerous provisions which have been enacted by the parliament with a qualified majority and have been promulgated explicitly as a "constitutional provision". The sum of those constitutional provisions together with the text of the Federal Constitution consists, of course, to a great extent of those provisions and assemblage of laws to which Bolingbroke's definition refers to.

The proper Federal Constitution and the numerous constitutional provisions are, however, not on the same level as far as the mechanics of their revision are concerned. Certain changes of the constitution would be regarded as "total revisions" and would require the approval by a national referendum. The doctrine calls these provisions the "basic constitutional principles".

There are different opinions as to details, but one could say that the basic constitutional principles are the following:

1. *Democratic Principle* (article 1 of the Federal Constitution): The entire law of the republic and all acts of authorities, courts and administration alike emanate from the will of the people expressed in general elections. Those

acts are justified as the indirect expression of the will of the people.

2. *Republican Principle* : which in 1920 meant the abolishment of the monarchy.  
3. *Federal Principle* : legislative and executive powers are divided between the Federation (central government) and the nine Federal States. The rules of the separation of the powers between the Federation and the States are very complicated and there is a continuous struggle to change and amend these rules.

4. *Separation of Powers* : between the legislature, administration and judiciary.

5. *Rule of Law* : the rule of law expresses a legal doctrine of fundamental importance for the Austrian constitution. Art. 18 of the Federal Constitution reads as follows: "The entire public administration shall be based on law".

According to the prevailing interpretation "administration" in the sense of art. 18 includes the judiciary. All decisions of the judiciary and of administrative authorities have to be backed by laws (regulations on the basis of law and proper laws) which in their turn must be backed by the constitution. Within this system of lower and higher level of different laws each individual and legal entity may fight the decisions by means of legal remedy and finally when their compliance with the constitution itself is challenged beyond the remedies by means of petitions in special courts.

These special courts therefore serve as the final protection of the legality and constitutionality of the decisions of the public administration and of the federal or state laws on which they are based.

The Austrian Federal Constitution has in its chapter 6 provided for two main courts for this purpose, namely the Constitutional Court and the Administrative Court.

Apart from these two courts, the Austrian legislature had followed an international fashion to establish an additional body for the control of the administration which is neither a court nor an authority. Austria has taken the Swedish Ombudsman as an example and has established the office of the People's Attorney which deals with complaints of individuals. The People's

Attorney's Office, consisting of three members, is appointed by the parliament, does not issue judgements or decrees, but tries to achieve the proper functioning of the administration by directly contacting and corresponding with the authorities concerned.

### **The Constitutional Court and Administrative Court**

The origins of both these special courts date back to 1867, when the Emperor had to concede not only a first constitution, but also a catalogue of human and basic rights and special courts to protect these rights and the new constitution.

The catalogue of human and basic rights of 1867 in fact became an integral part of the Federal Constitution of 1920. The name of the special courts of 1867—Imperial Court and State Court—were however changed in 1919 to their present names.

The main competence of the Administrative Court is the dealing with individual petitions against decrees of the administrative authorities of last instance if the petition pleads for violation of an ordinary law by misinterpretation or because of violation of the procedural rules. If however, a violation of a basic right is pleaded which has the rank of a constitutional provision, the petition has to be filed with the Constitutional Court. A petitioner can, of course, file two petitions at the same time, one with the Administrative Court, the other with the Constitutional Court, if he thinks that the administration has violated both his rights guaranteed by the constitution and the other rights. The Constitutional Court may refer the matter to the Administrative Court if it finds that no basic right was violated by the administration.

The Administrative Court deals also with petitions for the breach of the obligation of the Authorities to decide cases within the legally set period of time. In case an authority is unwilling to make any decision asked for by an individual, the Administrative Court can act on behalf of the tardy or reluctant authority.

The Constitutional Court has far more competences in number than the Administrative Court safeguarding not only basic rights of individuals but serving as a last control of different constitutional provisions and rules.

### **The Composition of the Constitutional Court**

The Constitutional Court is located in Vienna. It consists of 14 members and 6 deputy members who replace regular members in case of their absence. The members are appointed by the Federal President after proposal of the Federal Government, and both the houses of the parliament, namely the National Council and the Federal Council. The president, vice-president, 6 members and 3 deputy members are proposed by the Federal Government. The other 6 regular members and deputy members are taken from a list of three candidates. The National Council sets up the list of three candidates for the appointment of three regular and two deputy members. For the remaining three members and one deputy member the list of three candidates for each appointment is proposed by the Federal Council.

The members and the deputy members proposed by the Federal Government must be selected from among judges, administrative officials and university professors holding a chair in law. At least three members and two deputy members appointed from the list of the parliament must have their domicile outside the Federal capital Vienna. These provisions shall guarantee a balanced mixture of different law opinions coming from different professional and regional backgrounds.

The members and deputy members are judges under the constitution. They are appointed for lifetime(limited however to the age of 70 years), they are independent and can be removed from office only by the court itself for various particular reasons(e.g. loss of nationality etc.). A member of the federal parliament or state parliament, city council etc. or a person, who is employed by a political party cannot become a member of the Court.

The Constitutional Court is not divided into tribunals. The decisions are

reached in meetings of all 14 justices, the quorum being at least the presence of the president or vice president and eight of its members.

### **The Competences of the Constitutional Court**

Art. 137 to art. 148 of the Federal Constitution enumerate the competences of the Constitutional Court. Several articles had been amended and expanded in the course of the history till the recent past, reflecting the ever increasing complexity and demands on a constitution in our rapidly changing and developing society. The following list of competences follows the text of the Federal Constitution.

#### **\*Article 137 (Claims Under Public Law)**

The Constitutional Court is competent to decide pecuniary claims against the federation, the federal states and the regional communities, if such claims are not subject to ordinary legal process or to a decree by an administrative authority.

Claims against the federation, the federal states and the communities under private law are subject to ordinary legal process at the civic courts. Pecuniary claims based on public law are in most cases settled by a decree of an administrative authority, so that the Constitutional Court has a residuary jurisdiction only. Consequently there are very few cases before the Constitutional Court, as for instance claims between the federation, the federal states and the communities, whereby the plaintiff states that the distribution of tax revenues among them is not in accordance with the relevant laws.

#### **\*Article 138 and Article 126 a (Conflicts of Distribution of Powers of Various Kinds)**

The Constitutional Court issues judgements in matters of such conflict:

- between courts and administrative authorities,
- between the Administrative Court and all other courts, in particular between the Administrative Court and the Constitutional Court itself,
- between ordinary courts and other courts,

- between the federation and the federal state,
- between one federal state and another.

The Constitutional Court, furthermore, determines, on application of a federal government or a state government, whether a statute or an act of the execution (administration or judiciary) falls within the jurisdiction of the federation or the federal states.

According to article 121 an Audit Office has to examine the administration of public funds by the federation, the states and communities and other legal entities (e.g. state owned companies). Divergencies of opinions between the Audit Office, the federal government or a federal minister or state government on interpretation of provisions which prescribe the competence of the Audit Office are decided by the Constitutional Court.

\*Article 138 a

According to art. 15a of the Federal Constitution the federation and the federal states may execute a treaty on various matters of common interest (pollution laws etc.). In cases of a treaty between the federation and one or more federal states, the Constitutional Court may issue a declaratory judgement on application of the federal government or a state government with respect to the following issues:

- Does a valid treaty exist?
- Has the federation or the respective federal state performed its obligation under the treaty?

The same applies to treaties among federal states if those treaties provide for the exercise of jurisdiction by the Constitutional Court.

\*Article 139 (Examination of Regulations)

The Constitutional Court decides whether a certain regulation of an administrative authority is legal. Administrative authorities are entitled to issue regulations based upon federal or state laws.

The proceeding before the Constitutional Court on the legality of a regulation is initiated:

- by the Constitutional Court itself, if the court would have to apply a regulation in a particular case. If the court has doubts whether a certain regulation was legal, it interrupts the proceeding and opens a separate case for the examination of the regulation.
- upon application of:
  - any court which would have to apply a regulation,
  - the federal government with respect to regulations of state authorities,
  - each state government with respect to regulations of a federal authority,
  - the communities, if a regulation issued by the community was overruled by the supervisory body for communities,
  - the office of the people's attorneys,
  - any individual, if his rights are directly infringed by an illegal regulation effective against the individual without the issuance of a judgement by the courts of a decree of an administrative authority and unless, furthermore, the individual has no other means to bring the matter before the Constitutional Court. The application of an individual for overruling of a regulation is, therefore, a secondary means only to bring the issue before the Constitutional Court.

The judgement of the Constitutional Court may simply overrule a regulation. In such cases the regulation becomes invalid by the promulgation of the judgement in the respective gazette. However, the Constitutional Court may impose a certain period for the effectiveness of its decision. The court may, furthermore, overrule a regulation retroactively.

\*Article 140 (Examination of Statutes)

Federal and state statutes are subject to an examination by the Constitutional Court to determine whether they are in accordance with the constitutional law. This is the most important competence of the Constitutional Court. The court



acts—in a very limited sense—as a legislature. There are a number of reasons why a particular federal or state law may not be in accordance with the federal constitutional law or the state constitutions (with respect to state law). Every year a number of legal provisions are overruled by the Constitutional Court. A few examples shall be given:

The unequal treatment of the pension of a widower and of a widow was found to be contrary to the principle of equal protection.

A provision of a state hunting law was overruled because it contained a regulation of civil law character. Civil law falls under the jurisdiction of the federation and not that of the federal states.

A provision of the Law of the Chamber of Employees whereby the president of the Chamber of Employees of Vienna was automatically president of the Federal Chamber of Employees, was overruled because the president was not directly or indirectly elected by all members of all the chambers of employees of Austria.

The examination of a law may be initiated:

by the Constitutional Court itself, if it would have to apply the law in a particular case. If the court has doubts whether a certain law lies within the frame of the constitution, it interrupts the proceeding and opens a separate case for the examination of that particular law. A reason why there are two separate proceedings is obvious. The parties of the proceedings may be entirely different upon application

- of the Supreme Court or any court of second instance,
- of the Administrative Court.

In both cases the courts are only entitled to file an application with the Constitutional Court, if they would have to apply the respective law in their own proceedings

- of the federal government with respect to state laws,
- of any state government with respect to federal laws,

- of one third of the members of the National Council with respect to federal law,
- of one third of the members of each state council with respect to state law, if the state constitution so provides,
- of each individual, if his rights are directly infringed by an illegal regulation whereby the regulation was effective for the individual without the issuance of a judgement by the courts or a decree of an administrative authority and unless, furthermore, the individual has no other means to bring the matter before the Constitutional Court. The application by an individual for the renunciation of a regulation is, therefore, a secondary means to bring the issue before the Constitutional Court.

If the Constitutional Court overrules a certain Law, this has to be published in the Official Gazette. It becomes invalid by the promulgation in the Official Gazette, unless the Constitutional Court decides that the law may become invalid after a certain period (up to one year). The Constitutional Court may, furthermore, decide that a particular law is overruled retroactively.

\*Article 140 a (Examination of State Treaties):

The Constitutional Court may determine whether state treaties are legal. The constitution provides for approval of certain treaties by the National Council. In such cases the examination by the Constitutional Court follows the rule for the examination of laws otherwise the examination is made in accordance with the provision of art. 139.

\*Article 141 (Examination of Elections)

In a democracy all public acts emanate from the people. As a consequence, there are elections for numerous bodies. Only very few of those elections—the most important ones—are subject to examination by the Constitutional Court, such as:

- elections for the National Council,
- elections for state councils,

- elections for those self-administered bodies which decide on by-laws,
- elections of the Federal President,
- elections to the state governments,
- elections to the town governments.

In case the Constitutional Court finds that an election was illegal, it has to decide whether the entire election or parts thereof have to be repeated, depending on the nature of the illegality.

The Constitutional Court invalidates elections only if the illegality may have an effect on the outcome of the elections. If, therefore, the casting of some of the votes in a particular district was illegal, but the number of illegal votes is so small that they would not have influenced the outcome of the elections, the elections would not have to be repeated.

\*Article 141 (Removal of Persons from Certain Offices)

Federal law and state law provide for certain reasons for the loss of a political function. Subject to examination by the Constitutional Court are the following:

The loss of the membership in the National Council, the Federal Council, in a state council or a town council. An application would have to be filed by the respective council.

The loss of a function in a self-administrative body which decides on the by-laws.

Upon appeal from the decree of an administrative authority whereby the loss of above mentioned functions was declared by the authority.

Renunciation of membership in a town government(mayors, etc.).

Examination of People's Initiatives and Referendums.

The Constitutional Court may decide on the legality of a referendum or a people's initiative.

\*Articles 142 and 143 (Impeachment)

The following office holders are subject to impeachment before the Consti-

tutional Court:

- The Federal President,
- Members of the federal government,
- Members of the state governments,
- the presidents of the state school councils.

The proceeding before the Constitutional Court is initiated by an indictment. The Constitutional Court decides whether the respective office holder has at least negligently violated the law when performing his office. The Constitutional Court may in this connection even act as a Criminal Court.

Although the jurisdiction of the Constitutional Court is very broad, no indictment has been filed since 1945. Even before 1945 there were very few, exceptional cases of very minor importance. The reason is that the right to file an indictment is very limited. If there are serious complaints about an office holder, he is usually forced to resign and the proceeding before the Constitutional Court is not employed.

\*Article 144 (Petitions for Protection of Fundamental Rights)

The great majority of cases brought before the Constitutional Court are petitions against decrees of the highest administrative authorities for violation of “fundamental rights”. The term, fundamental rights, is used as an abbreviation only. The constitution, in fact, uses the term “rights guaranteed by the constitution”.

The jurisdiction of the Constitutional Court is, therefore, based on the statement of the applicant that the administrative authorities have violated a particular right which is guaranteed by a provision of constitutional character. Although most of such guaranteed rights are at the same time fundamental rights in the sense of the ordinary legal language, there are a number of guaranteed rights which nobody would regard as fundamental.

Furthermore, a petition brought before the Constitutional Court may be based on the statement that there are doubts as to the legality of a regulation or

the consistency of a law with the constitution, if the respective regulation or law was applied by the administrative authority.

Subject to appeal under art. 144 is:

—a decree of last instance of administrative authorities

—an act of immediate command or compulsion

by an administrative authority, e.g., arrest or a search.

The petition has to be filed within six weeks after a decree was issued or an act of immediate command or compulsion was performed. If the Constitutional Court in the course of the proceeding has doubts whether a certain regulation is illegal, it interrupts the proceeding and a second proceeding for the examination of the regulation or the law is opened.

The Constitutional Court may then either reject the appeal or invalidate the decree or declare that a certain act of command and compulsion was illegal. The administrative authority must, in its further act (issuance of a new decree), comply with the opinion of the Constitutional Court. The authority losing the case before the Constitutional Court has to reimburse the legal fees of the petitioner, but the legal fees are limited to a lump sum which in many cases does not cover the entire legal costs of a petitioner.

There are many cases where the Constitutional Court rejects a decree because of violation of fundamental rights. This does not necessarily mean that administrative authorities in Austria are less careful in the protection of fundamental rights than elsewhere. As already explained above, the number of rights guaranteed by the constitution goes far beyond what one normally would regard as fundamental rights.

### **The Importance of the Constitutional Court**

The Constitutional Court looks back to a history of over 120 years. It is one of the oldest and highest esteemed institutions of Austrian democracy. As long as the constitution itself was not extinguished by one party dictatorship or foreign occupation, the Constitutional Court always had lived up to its tasks

as a guardian of the constitution and the fundamental rights of the individual citizen.

The independence of the Court and its members keeps the Court above party politics and interests. The professional and regional mixture of the court members impede the predominance of one particular school of thoughts or interpretation and brings a healthy balance of opinions.

Though economic and technological changes in our society bring new legal problems and new challenges, the Constitutional Court so far has mastered them all, the only consequence being the ever increasing number of cases.

Within the system of the Austrian Constitution the Constitutional Court has assumed an indispensable value. The Constitutional Court, originating from the monarchy, has outlived different governments, one party or coalition cabinets alike and could always assert its non-partisan place. In doing so the Constitutional Court is guaranteeing nothing more or less the functioning of our constitution.