

The Constitutional Court on the Protection of the People's Rights and Liberties

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Excellences, Ladies and Gentlemen,

first of all, I would like to thank you for the invitation and on behalf of the President of the Austrian Constitutional Court, Professor Christoph Grabenwarter, I want to convey congratulations for the 25th Anniversary of the Constitutional Court of the Kingdom of Thailand.

It is a great honor to give you a brief overview of the work of the Austrian Constitutional Court on the protection of fundamental rights of the people, seven years after the then President Holzinger made a visit to your Court.

Coming back to the topic of my presentation, I want to start with the remark, that safeguarding constitutionally guaranteed individual rights is the core function of the Constitutional Court.

Although the Austrian Federal Constitutional Law does not include a formal "bill of rights", it has a "Basic Law on Fundamental Rights of the Citizens" stemming from the 1867 Constitution of the Monarchy.

Ratifying the European Convention for the Protection of Human rights and Fundamental Freedoms in 1958, laid ground for a major step forward in constitutional justice in Austria. Most of you might know the Convention that contains for example:

The right to life, prohibition of torture, prohibition of slavery and forced labor, right to liberty and security, right for a fair trial, no punishment without law,

right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to peaceful enjoyment of property, right to education, right to free elections by secret ballot, right of liberty of movement, abolition of death penalty in all circumstances, to name just a few of them.

This convention was granted the rank of national constitutional law by explicit constitutional order in 1964. It equals in status to other genuinely national fundamental rights and thus is directly applicable. At the national level, the fundamental rights enshrined in the Convention have the same status and importance as the fundamental rights laid down in the Austrian Constitution itself.

Since 1995, Austria is a member of the European Union. In 2000, the European Union solemnly proclaimed a Charter of Fundamental Rights, and in 2009, this instrument was declared to be part of the Union law with binding force not only for the Union but also for all Member states when implementing Union law.

In 2012, the Austrian Constitutional Court ruled that the rights and freedoms ensured by this Charter can be invoked before the Constitutional Court as constitutionally guaranteed rights and as such form a standard of review in judicial review proceedings.

After having roughly laid out the constitutional framework of civil rights and liberties I would like to give you a brief overview of the Austrian court system.

The Austrian Court system has three High Courts:

The Constitutional Court, the Administrative Court and the Supreme Court.

The Administrative Court has the function to review the legality of administrative acts, in particular of judgments and decisions from the regional administrative courts that have been established in 2014. In this regard it has no right of jurisdiction on violations of constitutional law.

The Supreme Court is the court of last resort in civil and criminal matters. It reviews judgments and decisions of the civil and criminal courts.

Finally, there is the Constitutional Court, which is also a court composed of independent judges but has to fulfil specific judicial functions.

So let me explain at this point, how the Austrian model of constitutional justice works:

The most important achievement of the new republican constitution of 1920 was that the power to review the constitutionality of parliamentary statutes and to repeal them in case of their unconstitutionality was concentrated and monopolised with an institutionally independent court, specialised in constitutional questions.

This model of constitutional justice clearly differs from the American model, according to which every judge – especially the Supreme Court – may review the constitutionality of a statute itself and leave it unapplied in an individual case if it is found unconstitutional.

Scientific findings of the Vienna School of Legal Theory, whose most prominent representative was *Hans Kelsen*, formed the theoretical basis for this model of constitutional justice created by the Federal Constitutional Law of 1 October 1920.

The essential aspects of this conception can be outlined as follows:

On the one hand, the necessary precondition for any kind of constitutional justice is the legal existence of a constitution as the basic legal order of the state which clearly differs from other legal norms. On the other hand, it is necessary that the constitution has primacy over all other legal norms, a primacy that results from its special democratic legitimation and its enhanced legal validity. Against this background, the legal norms of a certain legal order do not exist unrelatedly side by side. They are rather structured in a hierarchy of norms (*in German „Stufenbau der Rechtsordnung“*), in a way that the constitution forms the highest ranking legal norm on which all other legal norms are based, namely the so-called simple laws, general and individual norms issued by administrative authorities as well as court decisions.

The main difference between the constitution and simple statutes lies in the different conditions of their creation. In Austria, the enactment of a constitutional law requires a two thirds majority in Parliament and the explicit denomination as a „constitutional law“; a total revision of the constitution additionally requires the majority in a referendum. The latter was the case when Austria became a member of the European Union in 1995.

In order to enact simple statutes the simple majority in Parliament is sufficient. The fact that it is more difficult to amend the constitution secures its enhanced legal validity and guarantees a broader democratic legitimation to the basic legal order of the state.

The primacy of the constitution means that any state action must be determined by the constitution or, in other words, must be in conformity with the constitution. This applies to any state action, to legislation as well as to government and administration, and also to the judiciary.

Under *Hans Kelsen's* conception, it should be the Constitutional Court's function to guarantee the primacy of the constitution and to safeguard the constitutionality of any state action. The Constitutional Court should act as the true „guardian of the constitution “!

As such, the main function of the Austrian Constitutional Court is to safeguard the fundamental rights and freedoms guaranteed by the Constitution including the European Convention on Human Rights as well as the Charter of Fundamental Rights of the European Union.

Before the Constitutional Court, fundamental rights issues may arise in two types of proceedings:

- first, in proceedings regarding complaints for violation of constitutionally guaranteed rights (Article 144 Federal Constitutional Law, as amended in 2012), which can only be directed against decisions of regional administrative courts,
- second, less obviously, in proceedings regarding the constitutionality of general norms, especially statutes (Article 140 Federal Constitutional Law), given that fundamental rights form a yardstick for the constitutionality of such general norms.

In order to enable a constitutional review of general norms, all administrative, civil and criminal courts are required to initiate proceedings for such a review before the Constitutional Court if the court has doubts as to the constitutionality of a certain provision that may be applied in a proceeding pending before that court.

In order to strengthen judicial review of general norms, a new specific remedy has been introduced in 2015. Since 1 January 2015, when filing a remedy against an ordinary court decision, all parties to the proceeding may at the same time lodge a constitutional complaint with the Constitutional Court, alleging that a general norm (parliamentary statute or administrative regulation) applied by the court is contrary to the Constitution. Unlike a traditional constitutional complaint, this remedy as well as the Constitutional Court's ruling can only address the statute or administrative regulation contested. If the statute or administrative regulation is repealed by the Constitutional Court, it is exclusively for the court of instance (ruling on the remedy brought by the party) to finally decide the pending case on the basis of the Constitutional Court judgment.

Ordinary courts in 2022 filed 204 complaints, in 65 of them the Constitutional Court repealed the statute or administrative regulation. In the same year under this section also 1,867 complaints of individual persons were made in regard with their asylum procedure; 9% of them were successful.

On the second point – complaints according to article 144 Federal Constitution law - legal provisions may also be challenged by individuals who claim that they are directly affected by the provision challenged, i.e., without an ordinary court or an administrative authority having served a decision which is based on the provision to be challenged. The individual must be directly affected and clearly defining the part of the provision he or she claims to infringe his or her constitutional rights.

As a consequence, this type of constitutional complaint is only admissible if there are no other remedies available before either ordinary courts or administrative authorities. In other words, this constitutional complaint is subject to the principle of strict subsidiarity. Nevertheless 383 complaints were

filed by individuals in 2022. In effect eight cases were repealed by the Constitutional Court.

The relevance of the access for individuals to the Constitutional Court was shown again during the COVID-Pandemic in the last two and a half years.

From 2020 to 2022 mostly individuals made 812 complaints against COVID-related laws or administrative orders with a successful outcome for the plaintiff in 101 cases.

In 2022 the average time from lodging a complaint to the court decision was 146 days, which means that the Austrian Constitutional Court is one of the fastest deciding constitutional courts in Europe.

I want to conclude with stressing again, that in the system of a democratic republic that is governed by the rule of law, it is of great importance for the Constitutional Court fulfilling its role as guardian of the constitution in a way that is positively perceived by the citizens and people living in Austria. As a matter of fact, the public approval of the Austrian Constitutional court increased to 85% in a yearly poll done about the trust in institutions. This position in the top ranking institutions even increased a bit in the time of the COVID-pandemic.

The access to the Constitutional Court for individuals also is an important feature in the “constitutional culture” in the country. This culture has developed for more than hundred years in Austria, and I again, in the name of the Austrian Constitutional Court, congratulate the Constitutional Court of the Kingdom of Thailand to its contribution for developing such a “constitutional culture” in Thailand.

Thank you very much again for the invitation to attend this ceremony and the opportunity to deliver you a glance into the work of the Austrian Constitutional Court.