

■ ARTICLES

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The Austrian Constitutional Court – An Overview

1. ORGANIZATION

The Austrian Constitutional Court (*Verfassungsgerichtshof*) consists of a President, a Vice-President, twelve members and six substitute members. All justices are appointed by the Austrian Federal President on recommendation of the Austrian Federal Government and the two chambers of the federal parliament, the National Council and the Federal Council. All justices remain in office until the end of the year in which they turn 70 years old.

The Court meets at its venue in Vienna for quarterly sessions of three weeks. There is a written procedure. The Court holds public hearings only in rare circumstances. The Constitutional Court Act of 1953 (*Verfassungsgerichtshofgesetz 1953 – VfGG*) governs the workings of the Court. The rule is that the Court sits in plenary session, but most cases are heard by a panel composed of the President, the Vice-President and four rotating justices. Decisions are made by a simple majority. The deliberations and the vote, however, are not public; there is no possibility to deliver a dissenting (or concurring) opinion.

There are between 2000 and 3000 new cases submitted to the Court every year. The average length of the proceedings is nine months.

2. OVERVIEW OF POWERS

The tasks of the Constitutional Court are defined in the Constitution, namely the Federal Constitution Law (*Bundes-Verfassungsgesetz – B-VG*). In order of its practical importance, the Court pronounces on

- the infringement of fundamental rights by an administrative ruling (Art. 144 B-VG);¹
- the constitutionality of statutes (Art. 140 B-VG);²
- the legality of administrative regulations (Art. 139 B-VG);³
- electoral disputes, in particular challenges to elections to the popular representative bodies such as the National Council (Art. 141 B-VG);⁴

1 These cases are cited with "B" at the beginning (for "*Bescheidbeschwerde*"); e.g. B 1083/07 (the 1083rd case on the docket – in chronological order – in the year 2007).

2 These cases are cited with "G" at the beginning (for "*Gesetzesprüfung*"); e.g. G 113/06.

3 These cases are cited with "V" at the beginning (for "*Verordnungsprüfung*"); e.g. V 106/05.

4 These cases are cited with "W" at the beginning (for "*Wahlprüfung*"); e.g. WI-5/06.

- pecuniary claims against the Federation, the *Länder* (provinces) and the municipalities, which are neither to be decided by the courts nor by a ruling of an administrative authority (Art. 137 B-VG) (e.g. remuneration of civil servants; conflicts concerning the financial relationship between the Federation, the *Länder* and the municipalities).⁵

Among others, the Court also rules on conflicts of jurisdiction between courts and administrative bodies (Art. 138 para. 1 B-VG), it determines the distribution of powers between the Federation and the *Länder* (Art. 138 para. 2 B-VG) and – a task of great theoretical but little practical importance – conducts impeachment trials against the highest state officers for violation of the law in the conduct of their office (Art. 142 and 143 B-VG).

The Constitutional Court derives its importance within the Austrian legal system from its power to review statutes and repeal them. Also, the Court can review every administrative decision, making it a (specialized) administrative court for all administrative proceedings. These two powers shall now be looked at more closely.

3. REVIEW OF STATUTES AND REGULATIONS

The Constitutional Court has the sole power to review the constitutionality of statutes; all other courts are prohibited to do so. The centralization of judicial review with a constitutional court as opposed to the incidenter constitutional review by all courts (such as in the U.S.) is the core idea of the Austrian system of judicial review, which is highly indebted to Hans Kelsen, the "father" of the 1920 Austrian Constitution.

There are two different types of proceedings: "concrete judicial review", proceedings originating from a particular case, and "abstract judicial review", proceedings not linked to any particular case.

Abstract review has its origin in the federal structure of the Austrian Constitution. The Court pronounces, on the request of the Federal Government, whether *Land* law is unconstitutional, and likewise on application by a *Land* Government, whether a federal law is unconstitutional. Also, one third of the National Council's and one third of the Federal Council's members may challenge the constitutionality of federal law. This is an important instrument of political control for the minority parties, which for most of the time after WWII was of little practical importance due to coalition governments by the two major political parties, leaving the opposition with less than one-third of the members of parliament. Also, if provided for in its own *Land* constitution, one third of a provincial parliament may challenge any statute of that *Land*.

Most of the time, however, judicial review is initiated by the Constitutional Court itself during a pending proceeding, usually the review of an administrative ruling (see below 4.). If the Court doubts the constitutionality of a statute that it has to apply, it starts the review of this statutory provision in separate proceedings. Concrete judicial review can also be launched by courts and tribunals if they have

5 These cases are cited with "A" at the beginning; e.g. A 26/05.

to apply a statute which might be unconstitutional. Such applications can be filed by the Administrative Court, the Supreme Court, all courts of second instance, the Independent Administrative Panels and – from 2008 onwards – the Asylum Court.

Finally, private individuals may challenge a statute directly, provided that they are directly affected by a specific provision and have no other means of bringing their case to the Constitutional Court.

When carrying out its review, the Court is bound by the arguments raised by an application and cannot repeal a provision on other grounds than those entailed in that application or in its own decision to review. However, judicial review in general covers compliance with all provisions of constitutional law, particularly those specified by the European Convention on Human Rights (ECHR). In one case, the Court has even reviewed a provision of constitutional law itself and rescinded it as being in breach of the basic principles of the constitution (such as the principles of democracy, federalism, separation of powers or the rule of law).

If the Court finds the statute unconstitutional, it rescinds the provision or parts of the provision, erasing it from the text. Thus, the Court acts as a "negative lawmaker". If the provision is no longer in force, the Court declares that the provision was unconstitutional. The rescission becomes effective on the day after its promulgation in the Federal or *Land* Law Gazette, unless the Court sets a different date. The Court's judgment in general has no retroactive effect, except for the case in point.

Basically, the same holds true for the review of administrative regulations regarding their compliance with statutory law.

4. REVIEW OF ADMINISTRATIVE RULINGS

In Austria, two distinct courts, the Administrative Court and the Constitutional Court, conduct the review of individual administrative rulings along a different standard of review. While the Administrative Court can be petitioned on the grounds that an administrative ruling violates an individual's right, thus reviewing the legality of the ruling, the Constitutional Court secures the constitutionality of such rulings. This power of the Constitutional Court is therefore referred to as special administrative jurisdiction (*Sonderverwaltungsgerichtsbarkeit*). It makes up to 90% of its caseload.

A complaint requesting judicial review of administrative action by the Constitutional Court is admissible only after exhaustion of all remedies; it can be directed only against rulings of administrative authorities, including the Independent Administrative Tribunals, and the (2008 newly established) Asylum Court. In civil and criminal matters, court decisions can be appealed to the Supreme Court only. There is, however, no appeal from the Supreme Court or the Administrative Court to the Constitutional Court, making all these three Courts, courts of last resort.

Petitioning the Constitutional Court, the applicant has to allege a violation of his fundamental rights (the technical term being "constitutionally guaranteed rights", including the rights enshrined in the ECHR), and/or the applicant can

argue that the decision was based on an unconstitutional statute (or an illegal administrative regulation). The latter complaint seeks to initiate the – above described (3.) – proceedings of judicial review. Upon completion of that review, the Court continues the pending proceedings concerning the administrative ruling, but without the repealed provision, and most likely quashes the ruling.

In order to examine whether fundamental rights have been violated, the Court has created special formulae for each constitutionally guaranteed right; the idea is to delimitate the Constitutional Court's scope of review from that of the Administrative Court. In most cases, applicants allege a violation of the equal protection clause, which is the case if the administrative ruling is based on a statute that violates the clause, if the authority interprets the statute contrary to that clause, or if the authority issues an arbitrary decision.

If the Constitutional Court finds an infringement of fundamental rights, it quashes the ruling and remands the case to the administrative authority, in order to render a substitute ruling in compliance with the findings of the Court.

In order to alleviate an excessive caseload, the Constitutional Court may refuse to hear a case in a simplified procedure if the case has no reasonable prospect of success or if the case does not touch upon constitutional provisions, in other words when it falls within the jurisdiction of the Administrative Court. Approximately four fifths of all complaints are rejected on these grounds. On request of the applicant, the complaint is then assigned to the Administrative Court.

5. REFORM PLANS

In recent years, reform plans have focused on the relationship between the three high courts. One option is to open a route of complaint against the decisions of the Administrative Court and the Supreme Court to the Constitutional Court, when the complainant alleges a violation of fundamental rights or the application of an unconstitutional statute (or an illegal regulation), thus putting the Constitutional Court alone on the top of the judicial system. This system would resemble the constitutional complaint (*Verfassungsbeschwerde*) to the Federal Constitutional Court in Germany.

A less radical idea focuses on the problem that parties to civil or criminal proceedings have no right to initiate judicial review of statutes and regulations applicable in their cases; rather, it is for to the courts to address the Constitutional Court with an application for judicial review. The idea is to broaden access to the Constitutional Court by opening a route of judicial review for individual requests. After the private party petitioned to the Supreme Court and the Supreme Court failed to refer the case to the Constitutional Court, a private party may challenge the constitutionality of that statute before the Constitutional Court.

More urgently, starting in the middle of 2008, the Constitutional Court will face a large load of complaints against rulings of the newly established Asylum Court, which basically replaces the Administrative Court's review of asylum cases. It is expected that almost all of the several thousand appeals in these cases, which were so far addressed to the Administrative Court, will now be directed to the Constitutional Court.

Selected reading (in English)

Herbert Haller, The Control of Administrative Authority: Legal Controls, in: Federal Chancellery (ed), *Public Administration in Austria* (1992) pp. 195ff;
Herbert Hausmaninger, *The Austrian Legal System*, 3. ed (2003) pp. 139 ff;
Kurt Heller, *Outline of Austrian Constitutional Law* (1989) pp. 17 ff
Manfred Stelzer, *An Introduction to Austrian Constitutional Law* (2007) pp. 72 ff

Practical information

The website of the Constitutional Court is www.vfgh.gv.at, which has an English version too.

The decisions of the Constitutional Court are published in yearly case reports (*Verfassungssammlung*); they are also available at the website of the Austrian Legal Information System <http://www.ris2.bka.gv.at/vfgh/>. English translations of selected cases can be found in this journal only.

English translations of the B-VG and the VfGG are available at <http://ris.bka.gv.at/englische-rv/>.

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