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## **Some aspects of the case law of the Austrian Constitutional Court on Art. 6 ECHR**

### **I. BACKGROUND**

Austria is a member to the European Convention on Human Rights (ECHR) since 1958. Within the domestic legal system, a constitutional bill of 1964<sup>1</sup> clarified the Convention's formal status as constitutional law.<sup>2</sup> This status has a twofold implication. First, while initially having taken the view that the ECHR was not more than a mere programmatic statement,<sup>3</sup> the Austrian Constitutional Court soon came to accept that the Convention grants individual, enforceable rights.<sup>4</sup> The Convention may thus be relied upon by individuals before the courts, most notably before the Constitutional Court in complaints against administrative rulings for "violation of a constitutionally guaranteed right".<sup>5</sup> Second, the Convention's rank as constitutional law makes it a yardstick for legislation and subjects ordinary laws to scrutiny by the Constitutional Court.

Article 6 paragraph 1 of the Convention defines the scope of application of the right to a fair hearing by reference to the term of a "determination of civil rights and obligations" or "of any criminal charges". With regard to disputes falling under one of these two categories, the provision grants the right to a public hearing before an independent and impartial tribunal within reasonable time. Paragraph 2 stipulates the presumption of innocence, paragraph 3 contains a set of minimum procedural rights for those charged with a criminal offense (adequate time and facilities to prepare their defense, access to legal representation, right to examine witnesses against them or have them examined, right to the free assistance of an interpreter).

The right to a fair hearing as set out by Article 6 ECHR takes a central place within the catalogue of rights and freedoms guaranteed by the Convention. The path of its implementation in domestic law and practice has been (and still is) an intricate one. This is partly due to the structure of the Austrian Constitution's traditional concept of administrative remedies and court system, also possibly to a certain misjudgement, at the time of ratification, of the potential breadth of

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1 Federal Gazette (= Bundesgesetzblatt = BGBl.) 59/1964.

2 Austrian Constitutional Court collection of cases (subsequently cited as: VfSlg.) 5100/1965.

3 VfSlg. 3767/1960, 4122/1961.

4 VfSlg. 4792/1964.

5 Complaint to the Constitutional Court under Article 144 Bundes-Verfassungsgesetz (B-VG).

scope of Article 6 ECHR by the Austrian government<sup>6</sup> and partly to the subsequent dynamic approach adopted by the European Court of Human Rights in the interpretation of the terms "civil rights and obligations" and "criminal charges".

When signing the Convention, Austria took two reservations affecting the scope of the procedural rights set out by Article 6 ECHR. The first one explicitly refers to Article 6 ECHR and states that "The provisions of Article 6 of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitution Law". The mentioned Article of the Federal Constitutional Law provides for the principle of oral and public court hearings (before ordinary courts) and enables legislation to introduce exceptions to this principle. The second reservation relates to Article 5 ECHR (right to liberty and security). It provides that this Article shall be "so applied that there shall be no interference with the measures for the deprivation of liberty prescribed in the laws on administrative procedure, BGBl. [Federal Gazette] No. 172/1950, subject to the review by the Administrative Court or the Constitutional Court as provided for in the Austrian Federal Constitution". The intent of this reservation was to protect the domestic system of administrative law, parts of which include the imposition of detentions and prison sentences by administrative authorities (subject only to an ex post review by the Supreme Administrative Court and the Constitutional Court), from being outlawed by the guarantee, contained in Article 5, demanding that prison sentences may only be imposed by courts and that any detention may be challenged in proceedings by which their lawfulness shall be decided speedily by a court.

In order to understand the strained relationship between Article 6 ECHR and the domestic system of remedies, it is useful to cast a glance at the structure of the court system as originally established by the Federal Constitutional Law. Matters belonging to administrative law are decided by administrative authorities whose decisions are not subject to review by the ordinary courts but fall under the jurisdiction of special courts acting as "administrative" courts, namely the Supreme Administrative Court<sup>7</sup> and the Constitutional Court.<sup>8</sup> The Constitution makes a distinction between the ordinary court system ("Gerichtsbarkeit", Articles 82 – 94), subordinated to the Supreme Court (Oberster Gerichtshof) as its highest instance, on the one hand, and the Supreme Administrative Court and the Constitutional Court, on the other hand, the latter courts being competent for review of the legality of individual administrative acts (Supreme Administrative Court), respectively the review of legality of administrative regulations and the review of constitutionality of administrative acts and laws (Constitutional Court).

A complaint to the Supreme Administrative Court allows for the review of the legality of the impugned individual administrative act, after exhaustion of the administrative remedies. As to the facts of the case, the Supreme Administrative Court is limited to a review of the consistency of the consideration of evidence by

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6 This is suggested inter alia by *Grabenwarter*, *Verfahrensgarantien in der Verwaltungsgerichtsbarkeit* (1997) 386.

7 Verwaltungsgerichtshof.

8 Verfassungsgerichtshof.

the administrative authority and may not reassess the facts on its own. The complaint to the Constitutional Court is limited to reviewing whether such an act infringed the appellant's constitutionally guaranteed rights or if the administrative act had been adopted in application of an unconstitutional general norm. Neither the complaint to the Supreme Administrative Court nor the complaint to the Constitutional Court provide a full-fledged judicial assessment of legality and facts. Thus, the very structure of the system of administrative review as established by the Federal Constitutional Law already bore the seeds for a large part of the tensions between the right to a fair trial as guaranteed by Article 6 ECHR and the domestic legal practice.

Owing to the cautious interpretation in the early period after the conclusion of the European Convention of Human Rights and due to Austria's reservations on Article 5 and 6 ECHR, however, these tensions did not become imminent for a considerable period of time. In VfSlg. 5100/1965, an early decision where the Constitutional Court considered a specific matter<sup>9</sup> to fall under the definition of "civil rights of obligations", it held that the limited a posteriori review of legality available in form of the complaint to the Supreme Administrative Court was sufficient, even though this Court may not assess the facts, is prevented from deciding on the merits and confined to deciding by cassation. A restrained approach became apparent also from the generous interpretation given by the courts to the reservations on Article 5 and 6 ECHR. By way of an a fortiori argument, the Austrian Constitutional Court and the European Court of Human Rights applied the reservation on Article 5 ECHR not only to prison detention but also to fines: this meant that the requirement of access to a fair hearing was satisfied, as regards cases of administrative detentions and fines, by the possibility to introduce a complaint with the Supreme Administrative Court. The Constitutional Court also gave a very broad reading to the material scope of the reservation on Article 5 ECHR in applying it not only to "the measures ... prescribed in the laws on administrative procedure, BGBl. [Federal Gazette] No. 172/1950" but likewise to any provisions on administrative offenses existing at the time of these laws or subsequently adopted, yet substantially equivalent offenses.<sup>10</sup> Furthermore, it interpreted the reservation on Article 5 ECHR as inhibiting, for the purpose of all the offenses belonging to the category covered by the reservation on Article 5 ECHR, also the (criminal) procedural guarantees stemming from Article 6 ECHR.

In the opinion of the Constitutional Court, however, the reservation on Article 5 precludes an individual's procedural rights only insofar as legislation had made use of the reservation: As far as the relevant statutory procedural rules did not provide (or at least suggest) otherwise,<sup>11</sup> the Constitutional Court accepted<sup>12</sup> to

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9 The case concerned provisions on the entitlement to compensation for damage caused by game.

10 VfSlg. 5021/1965, 7210/1973, 8234/1978, 7814/1976, 8930/1980, 9158/1981, 10.237/1984.

11 In such instances, the Court referred to the reservation, VfSlg. 7210/1973, 10.678/1985. In some cases, it was unclear whether the Court's statements were based on the fact that legislation had made use of the reservation (VfSlg. 10237/1984).

12 These cases departed from the Courts previous position (i.e. VfSlg. 6275/1970, 6552/1971, 6577/1971, 7210/1973) which excluded any possibility of applying the procedural guarantees in matters covered by the reservations.

give effect to the procedural rights flowing from the Convention under the Article 6. In VfSlg. 8111/1977 for example, the Court was called to decide on a violation of the presumption of innocence (Article 6 paragraph 2 ECHR). It left the question open whether the administrative offense was covered by the reservation, pointing to the fact that the procedural provisions applicable did not contain any element opposing the applicability of the presumption of innocence. Under the same approach the Court decided on the accused's right to adequate time for the preparation of his defense.<sup>13</sup>

The attitude was different when it came to the reservation on Article 6 regarding the right to an oral hearing. Here, the Court initially appeared to take the view that, regardless of whether the statutory rules allowed for hearings, the reservation generally excluded the ability to invoke the right to an oral hearing.<sup>14</sup>

Additionally, despite its wording referring to a constitutional provision (Article 90 of the Federal Constitutional Law) exclusively dealing with ordinary courts,<sup>15</sup> the courts interpreted the reservation on Article 6 as allowing for exceptions to the principle of an oral hearing not only in ordinary court proceedings but – "a fortiori" – in administrative law matters as well.<sup>16</sup> Consequently, while the guarantee of Article 6 ECHR did protect access to a fair procedure before an impartial tribunal, it did not, according to that view, prevent legislation from introducing or keeping rules in place that constrained the procedure to the written form.

## **II. THE DEVELOPMENTS REGARDING THE SCOPE OF APPLICABILITY OF ART. 6 ECHR**

### ***1. The early approach on the scope of "civil rights and obligations"***

The evolving understanding of the material scope of the "civil limb" of Article 6 ECHR is an interesting example of the influence exerted by the European Court of Human Rights on the interpretation of the Convention by the national courts. Although it did not restrict the scope of the term "civil rights and obligations" to matters formally assigned to adjudication by civil courts,<sup>17</sup> the Austrian Constitutional Court initially interpreted the term as primarily relating to private

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13 VfSlg. 10.067/1984.

14 VfSlg. 7208/1973.

15 Strictly speaking, the wording of the reservation refers to Article 90 of the Federal Constitutional Law which relates to oral hearings in procedures before ordinary courts in the sense of the term "Gerichtsbarkeit" (meaning "judiciary" as opposed to "Verwaltung" which means "administration").

16 ECtHR 16.7.1971 *Ringeisen*, Série A 13 § 98, 23.4.1987 *Ettl*, 12/1985/98/146, §§ 42, 43; Austrian Constitutional Court VfSlg. 7208/1973, 11.569/1987, 11.855/1988, 13.012/1992, 13.432/1993, 14.210/1995, 14.909/1997, 15.081/1998.

17 The Court accepted that the decision on matters of private law is no prerogative of civil courts but may be assigned to administrative authorities; VfSlg. 6936/1972. The Court also made clear that the requirements of Article 6 ECHR for „tribunals" are not the same than the domestic constitutional requirements for „courts"; with regard to ordinary (civil) courts the Constitution provides standards that go beyond the requirements of Article 6 when it comes to the impartiality and independence of the judges (see VfSlg. 8523/1979).

law matters usually arising between individuals, such as the matters that are generally to be decided by civil courts.<sup>18</sup> This kind of narrow view is confirmed by an early judgement<sup>19</sup> in which the Court relied, for the purpose of the interpretation of the term "civil rights and obligations" in the sense of Article 6 ECHR, to the scope of the constitutional provision on the empowerment of the Federal legislation to legislate on private law matters ("Zivilrechtswesen", Article 10 para 1 no. 6 of the Federal Constitutional Law). The early approach meant that litigation against administrative restrictions stemming from public law, although they might have some bearing on the private law interests of the parties, did not fall under the protection of Article 6 ECHR for they did not, in the view of the Constitutional Court, involve the determination of "civil rights and obligations". This "formal" understanding is illustrated by the early case law of the Constitutional Court. In principle, this case law is partly still relevant today but it has been partly overruled, and, with time, the limits have moved: As time drew on, the case law, influenced mainly by the European Court of Human Rights, progressively included more and more areas of law into the scope of Article 6 ECHR.

The order in which the examples below are listed shall reflect the degree to which the matters can arguably be said to come into the vicinity of the sphere of "civil rights and obligations" (latter examples in the list, having successively been included in the scope) – or whether, to the contrary, a matter was, and still is, clearly regarded as falling outside of the scope of "civil rights and obligations" (former cases in the enumeration):

- Conscription, more precisely exemptions from conscription or alternative service,<sup>20</sup> matters of income taxation<sup>21</sup> and customs duties<sup>22</sup> or other taxes (e.g. drink taxes,<sup>23</sup> wage taxes<sup>24</sup>), clearly belong to the matters of law relating to the particular allegiance of the individual to (or his contribution to) the common weal as embodied by the state; those matters do not constitute "civil rights and obligations". Administrative measures such as an order, issued by the department of motor vehicles, to undergo a medical examination<sup>25</sup> (failing which the drivers licence might be withdrawn) or the issuing of residence permits or residence prohibitions<sup>26</sup> pursuant to immigration law are no matters falling under the definition of "civil rights or obligations";
- Decisions on the conferral or refusal of construction permits,<sup>27</sup> on an order of suspension of construction,<sup>28</sup> the issuing of demolition orders and similar

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18 VfSlg. 5100/1965.

19 VfSlg. 5666/1968.

20 VfSlg. 8856/1980, 11.069/1986.

21 VfSlg. 6732/1972.

22 VfSlg. 7492/1975.

23 VfSlg. 9749/1983.

24 VfSlg. 9882/1983.

25 VfSlg. 9955/1984.

26 VfSlg. 8996/1980.

27 VfSlg. 9203/1981.

28 VfSlg. 10.913/1986.

measures<sup>29</sup> based on building regulations typically belong to the traditional sphere of public law not being encompassed by the scope of Article 6 ECHR. Here, the European Court later developed a view differing from the domestic view.

- Disciplinary proceedings against public servants<sup>30</sup> or disciplinary measures in the liberal professions (doctors, lawyers, pharmacists) initially did not constitute a matter falling under the civil aspect of Article 6 ECHR. Typically, they do not fall under the "criminal" side of Article 6 either. In a case of 1976, the Constitutional Court reacted to the European Court of Human Rights case law by acknowledging that, according to the ECtHR's *Engel*<sup>31</sup> judgement, impending disciplinary measures (against a public official) might constitute a "criminal charge" falling under Article 6 ECHR provided that the sanctions at stake reach a certain level of severity.<sup>32</sup> In the case at hand however, the Court decided that under the disciplinary provisions at issue, no such severe sanctions could possibly be imposed, wherefore the case did not raise an issue under Article 6 ECHR. This was reaffirmed in later cases, as in VfSlg. 10.749/1986, in which the Court denied to classify disciplinary measures against a doctor in the form of fines as constituting a dispute over "civil rights" and pointed to the fact that the sanction did not reach a severity such as to constitute a "criminal charge".

The emphasis changed when the Court had to decide on the regulations concerning disciplinary measures against pharmacists: These rules for pharmacists provided for sanctions reaching as far as the ban from the profession or the prohibition to manage a pharmacy. These sanctions were considered to be so severe that they were regarded to come up to a "criminal charge" within the meaning of Article 6 ECHR.<sup>33</sup>

- According to an earlier decision of the Constitutional Court,<sup>34</sup> the granting of a patent by the patent office belongs to public law, thus being out of the reach of Article 6 ECHR, whereas the disputes between individuals on the violation of the patent rights, which are settled by ordinary Courts anyway, fall under private law and are therefore protected by the guarantee. Owing to this interpretation, in a case of 1968, the Court initially see no need to examine whether the appeals commission competent to decide on appeals against the refusal to grant a patent (whose decisions are not subject to review by the Supreme Administrative Court) satisfied the requirements of an "independent tribunal". This changed after the ECtHR's *Ringeisen* case: In 1973 the Constitutional Court took a closer look at the patents appeals commission and came to the conclusion that this commission fulfills the

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29 VfSlg. 5627/1967, 6911/1972.

30 VfSlg. 4710/1964, 6375/1971, 7907/1976.

31 ECtHR 8.6.1976 *Engel v The Netherlands* (App no 5100/71 et al.) Série A no. 22.

32 According to the *Engel* case, the degree of severity triggering the requirements of Article 6 for "a criminal charge" was fulfilled if the penalty that was at stake exceeded two or three days of arrest.

33 VfSlg. 11.506/1987.

34 VfSlg. 5684/1968, 9198/1981.

requirements of an independent tribunal, rendering it unnecessary for the Court to decide whether the granting of a patent did actually qualify as a decision on a civil right or obligation.<sup>35</sup> It was more than thirty years later that the Court came back on this question in VfSlg. 17.792/2006, when it took account of the development of the case law developed on the level of the European Court of Human Rights by deciding that the granting of a patent constitutes a decision on a civil right triggering the applicability of the procedural guarantees of Article 6 ECHR.

- The restrictions on real property transactions (requirement of an approval by an administrative authority) were still considered to be falling outside of the domain of civil rights and obligations according to a Constitutional Court's decision in 1970.<sup>36</sup> The Court had to abandon this position very shortly after this decision, in view of the European Court of Human Rights' case law:

## **2. Expanding the scope**

The European Court of Human Rights' *Ringeisen*<sup>37</sup> judgement of July 16th 1971 had a major influence on the case law of the Constitutional Court. In *Ringeisen*, the European Court of Human Rights held that the granting of a permit for land transaction involves the "determination of civil rights and obligations" within the meaning of Article 6 ECHR.

An assessment of the repercussions of this judgement must consider the following background of domestic law: The nine Länder have enacted laws restricting the acquisition of real property. These laws are executed by authorities whose decisions are typically subject to an appeal to a regional property transaction commission. In some Länder, the Commission's decision is then, by virtue of an express provision to that effect, subject to a complaint to the Supreme Administrative Court, in other Länder, the commissions were established as commissions under Article 133 para. 4 of the Federal Constitutional Law, a provision which excludes the jurisdiction of the Supreme Administrative Court,<sup>38</sup> provided that, by law, the commission's members are not bound by instructions, that they are presided by a judge and that their decisions are not subject to repeal or alteration by administration.<sup>39</sup>

The Austrian Constitutional Court joined the European Court of Human Rights' view on the classification of land transaction permits. Consequently, the Court had to decide on whether the applicable system of remedies was in conformity with Article 6 ECHR. In those instances where the relevant land transaction law provided for a decision by a commission under Article 133 paragraph 4 of the Federal Constitutional Law without granting access to a complaint to the Supreme Administrative Court, the Constitutional Court went on to scrutinize whether the

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35 VfSlg. 6995/1973.

36 VfSlg. 6134/1970.

37 ECtHR 16.7.1971 *Ringeisen v Austria* (App no 2614/65) (1971) Série A no 13.

38 Unless otherwise provided by ordinary law.

39 Today's version of the Article is slightly different but in general has the same effects.

norms on the composition of the respective commission were such as to fulfill the demands of an "independent tribunal". It concluded that the provisions on the land transfer commissions of Carinthia<sup>40</sup> and Salzburg<sup>41</sup> were unproblematic since they were subject to challenge before the Supreme Administrative Court, wherefore the demands of Article 6 ECHR were considered to be met under the approach adopted in VfSlg. 5100/1965. In this judgement, the Court held the remedy of the complaint to the Supreme Administrative Court to be sufficient even though it allowed only for a cassation of the authorities decision after a review of its legality without full reassessment of the facts. Also, the Court upheld the systems established in Lower Austria,<sup>42</sup> Upper Austria<sup>43</sup> and Styria,<sup>44</sup> where, despite the statutory exclusion of an appeal to the Supreme Administrative Court, it found no unconstitutionality, since the provisions establishing the competent land transfer commissions contained sufficient safeguards to allow to characterize the commissions as "independent tribunals" in the sense Article 6 ECHR. Here, the Court held that a term of office of three years was a sufficient with regard to safeguarding the Commission's members' independence.<sup>45</sup>

The land transfer commission of Tyrol<sup>46</sup> however, was held to be insufficient in the light of Art. 6 ECHR because neither the complaint to the Supreme Administrative Court was available nor did the provisions governing this commission satisfy the criteria required to treat it as an "independent" tribunal: These provisions stipulated the mandatory participation of a member of the Land government in the commission and did not specify any term of office for the other members, a circumstance that led the Court to conclude that the members were subject to recall at any time without further prerequisites.

The same reasoning led the Court to repeal as unconstitutional the provisions on the establishment of the land reform boards established pursuant to the agricultural land planning acts whose decisions were not subject to appeal before the Supreme Administrative Court. These boards have the task of regulating the consolidation of agricultural land, which includes the reattribution of property among neighbouring owners of agricultural land. It was clear to the Court that this amounts to the determination of a civil right. In its previous case law,<sup>47</sup> the Court had still taken the view that the composition of the reform boards could not be questioned under Article 6 ECHR for the rules on their establishment were predetermined by a specific constitutional provision (Article 12 of the Federal Constitutional Law) which, being the special norm and having the same normative rank, took precedence over Article 6 ECHR: However, under the influence of the *Ringeisen* case, the Court came to reconsider on this view and decided in VfSlg. 7284/1974 that, insofar as the composition of these boards mandatorily included

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40 VfSlg. 7068/1973.

41 VfSlg. 7230/1973.

42 VfSlg. 7630/1975.

43 VfSlg. 8309/1978.

44 VfSlg. 8317/1978.

45 VfSlg. 8317/1978, 8501/1979.

46 VfSlg. 7099/1973.

47 VfSlg. 5741/1968, 5943/1969, 6044/1969, 6508/1971.

members of government, and in view of the fact that the rules did not specify the term of office<sup>48</sup> of the board members (making them recallable at any time), the boards did not satisfy the demands of independence resulting from Article 6 ECHR.<sup>49</sup>

### **3. Facing the boundaries set by the constitutional framework**

The year 1987 brought two important decisions both regarding the civil the criminal aspect of Article 6 ECHR. The evolution of the case law of the European Court of Human Rights not only caused the Constitutional Court to react but also led to legislative amendments of the Constitution designed to face the challenges that turned out to be unsolvable under the existing framework.

#### **3.1. The Constitutional Court's reaction regarding the "civil limb"**

In VfSlg. 11.500/1987, the Court engaged in an in depth discussion of the ever more widening understanding, by the European Court of Human Rights, of the scope of Article 6 ECHR. In an analysis of the preceding case law of the European Court of Human Rights the Constitutional Court came to the conclusion that the European Court of Human Rights went beyond the initial meaning of the concept of "civil rights and obligations" at the time of the drafting of the Convention, respectively at the time of Austria's accession to it. The judgement's critical analysis focussed on the broadening interpretation of the term as it became apparent through the cases *Ringeisen v Austria*<sup>50</sup> (concerning real proerty transaction permits), *König v Germany*<sup>51</sup> (concerning the withdrawal, by the administration, of the authorisation to run a clinic), *Sporrong and Lönnroth v Sweden* (on a construction prohibition issued following an expropriation permit)<sup>52</sup> and the case *Benthem v The Netherlands*<sup>53</sup> (on the refusal to grant a license to operate an installation for the delivery of liquid gas). The Constitutional Court concluded that Austria's constitutional system, as it existed at the time, did not allow for a general departure from its system based on a strict separation of powers between a hierarchic administration and independent courts, where matters of private law are assigned to courts and matters that traditionally belong to the field of public law are assigned, not to Courts, but to a hierarchic

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48 The lack of rules on the term of office was decisive also for other cases: VfSlg. 10.800/1986.

49 A subsequent amendment of the law changed the composition of the boards and introduced the availability of a complaint to the Supreme Administrative Court against their rulings, the Court deemed the structure under the new law to comply with Article 6 ECHR, see VfSlg. 7574/1975, 10.080/1984 (based on the accessibility of the Supreme Administrative Court) and 9430/1982 (based both on the accessibility of the Supreme Administrative Court and the sufficient level of independence of the board).

50 ECtHR 16.7.1971 *Ringeisen v Austria* (App no 2614/65) Série A no 13.

51 ECtHR 28.6.1978 *König v Germany* (App no 6232/73) Série A no 27.

52 ECtHR 23.9.1982 *Sporrong and Lönnroth v Sweden* (App nos 7151/75, 7152/75) Série A no 52.

53 ECtHR 23.10.1985 *Benthem v The Netherlands* (App no 8848/80) Série A no 97.

administration which is not subjected to other forms of judicial review than the limited type of review by the Supreme Administrative Court and the Constitutional Court. Furthermore, it pointed out that the power to establish, within the administration, independent commissions under Article 133 paragraph 4 of the Federal Constitutional Law was not unlimited considering that this Article is an exception from the principle of a hierarchical administration. It held that a general introduction of courts competent to decide, in all matters of administrative law, directly on the facts and merits, was excluded by the constitutional framework as it stood. Consequently, the Court held that it could not follow the approach adopted by the European Court of Human Rights and would have to remain faithful to the traditional delimitation between (typically) civil and (typically) administrative law, even if the European Court of Human Rights should find the preservation of this concept, domestically, to be in violation of the Convention. To redress such a violation would then not be within the powers of the Constitutional Court but would require a constitutional amendment.

For matters of administrative law, therefore, the Constitutional Court maintained the view that the concept of a decision by an administrative authority under the limited review by the Supreme Administrative Court was not in breach of Article 6 ECHR.<sup>54</sup>

The Court, however, recognized that there are certain types of disputes that, even though they are assigned to a decision by administrative authorities, are comparable with private law disputes between individuals. As opposed to the "normal" cases of administrative law, for which, from the constitutional point of view, no remedy beyond the ordinary complaint to the Supreme Administrative Court is necessary, this category of disputes requires, in the eyes of the Court, the competence of a "tribunal" to decide on the facts of the case. The Court's decisions defining the said category of disputes, for which the Court found the label "inner core" (Kernbereich) of Article 6 ECHR, concerned the following matters:

- administrative rulings on contracts between doctors and social security under social security law,<sup>55</sup>
- administrative rulings on compensation for damage caused by hunting or game,<sup>56</sup>
- administrative rulings on compensation for expropriation,<sup>57</sup>
- administrative rulings on compensation for the classification of land as area under wildlife protection,<sup>58</sup>
- administrative rulings on rents<sup>59</sup> or operating costs,<sup>60</sup>

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54 The case concerned a construction permit. The view was reaffirmed in cases concerning a road construction permit (which was the basis of an expropriation); VfSlg. 11.645/1988.

55 VfSlg. 12.083/1989, 11.725/1988.

56 VfSlg. 11.591/1987, 11.646/1988, 11.826/1988.

57 VfSlg. 11.760/1988, 11.762/1988, 16.692/2002.

58 VfSlg. 13.807/1994, 17.242/2004.

59 VfSlg. 12.003/1989.

60 VfSlg. 14.292/1995.

- administrative rulings on compensation between neighbouring owners of hunting grounds,<sup>61</sup>
- land transfer permits,<sup>62</sup>
- etc.

### 3.2. Further developments on the criminal aspect

In the case VfSlg. 11.506/1987, the Constitutional Court held the disciplinary sanctions applicable to pharmacists to amount to a type of sanctions severe enough to trigger the applicability of the guarantees enshrined in Article 6 ECHR for "criminal charges". The decision is remarkable in two ways:

First, the Court held that the relevant measures of disciplinary law were not a matter covered by Austria's reservation on Article 5 ECHR since this reservation referred solely to the area of administrative offenses which does not encompass disciplinary law. Second, it stated that due to the character of the complaint to the Administrative Court being a limited a posteriori review of legality, the possibility to file a complaint with the Supreme Administrative Court could not be regarded as a remedy sufficient in the light of the right to access to a "tribunal" competent to decide on the determination of a criminal charge. Consequently, the Constitutional Court's interpretation required the legislator to reconfigure the composition of the authorities competent to decide on disciplinary matters in order to create an instance in line with the concept of a "tribunal".

The approach adopted for pharmacists' disciplinary law was then carried over to the disciplinary law of other professions.<sup>63</sup> In VfSlg. 11.512/1987, the Court decided that the sanctions provided for in the barristers' disciplinary statute justified treating the accusation of a disciplinary offense as a criminal charge. The disciplinary commission competent to decide on the matter qualified as a tribunal, wherefore the unavailability of further remedies was not objectionable.<sup>64</sup>

Besides disciplinary law, other areas turned out to be out of the reach of the reservation regarding Article 5 ECHR. Even though the Court accepted to apply the reservation to all administrative offenses similar to the ones mentioned by its wording (i.e. mainly those existing in the year 1950),<sup>65</sup> the relevance of the reservation diminished as legislation evolved and introduced new kinds of offenses in all different parts of administrative law. It was only a question of time before the Court had to decide on the constitutionality of such a type of provision. Starting from 1984, the Constitutional Court repealed laws in a series of cases on the account that they contained sanctions not covered by the Austrian reservation in respect of Article 5 ECHR and that the imposition of sanctions of this kind requires the accessibility of a remedy to a tribunal with full

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61 VfSlg. 12.774/1991.

62 VfSlg. 15.350/1998, 15.488/1999.

63 For civil engineers: VfSlg. 11.569/1987; for public accountants VfSlg. 11.872/1988.

64 Reaffirmed in VfSlg. 11.682/1988 and many other instances.

65 See above, footnote 10 and corresponding text.

jurisdiction on the law and the facts, a condition not fulfilled by the existing review by the Supreme Administrative Court.<sup>66</sup>

### 3.3. The introduction of the Independent Administrative Tribunals<sup>67</sup>

An amendment of the Federal Constitutional Law published in the Federal Gazette No. 685/1988 introduced the Independent Administrative Tribunals as an appeals instance on all matters of administrative penal law. Additionally, the ordinary legislators have been empowered to charge the Independent Tribunals with the competence to decide on appeals in other matters of administrative law. The Independent Administrative Tribunals qualify as tribunals within the meaning of Article 6 ECHR.

## III. THE ORGANIZATIONAL AND PROCEDURAL GUARANTEES

The following observations are meant to give a brief overview of some aspects of the organizational and procedural guarantees flowing from Article 6 ECHR as they have been adjudicated by the Austrian Constitutional Court.

### 1. An "independent and impartial" tribunal

In the *Sramek* case,<sup>68</sup> the European Court of Human Rights was called to decide on the fairness of a procedure conducted by the regional real property transactions commission of the Land Tyrol. Having purchased a plot of land, the applicant submitted the contract for approval, and approval was granted by the authorities of the first instance. According to the Tyrolean land transaction laws such an approval is subject to appeal to the regional appeal commission by, amongst others, the parties to the contract or the Transactions Officer, a public agent charged with the representation of the government in the proceedings and acting thus as a party opposed to the individual requesting the approval. In the case at hand, the Court found that one of the three civil servants who sat in the regional appeals commission had the Transactions Officer as his hierarchical superior. Regardless of the fact that the members of the commission were formally free from instructions from the executive (including the Transaction Officer), the hierarchical subordination of one of the commission's members to the Transaction Officer acting as a party against the applicant was sufficient to render the commission objectionable in the light of the requirements of independence.

The *Sramek* case caused the Constitutional Court to examine once again the constitutionality of the norms establishing the property transactions authorities of the Land Tyrol. Eventually, it held that, while the impairment to independence

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66 VfSlg. 11.834/1988, 12.162/1989, 12.948/1991.

67 Unabhängiger Verwaltungssenat (plural: Unabhängige Verwaltungssenate).

68 ECtHR 22.10.1984 *Sramek v Austria* (appl no 8790/79) Série A no 84.

detected in *Sramek* was not a specific feature of the statute itself,<sup>69</sup> it could affect the decisions taken by the regional commission, provided that, as in *Sramek*, a link of subordination exists between the transactions officer acting as a party and one of the members of the commission at the date of the decision.<sup>70</sup>

Similar issues arose with respect to the participation of experts in similar commissions qualifying as "tribunals". Even as the land reform boards had been reshaped into independent bodies and subjected to a complaint to the Supreme Administrative Court, their independence was still challenged on the account that the legal rules requiring agricultural experts to sit as members of the boards could render the boards unconstitutional: In VfSlg 7574/1975, 8544/1979 and 8828/1980, the Constitutional Court rejected this claim, pointing to the fact that the participation of agricultural experts was specifically provided for in Article 12 of the Federal Constitution and could therefore not be questioned.

This did not mean that the participation of experts was no issue at all. In VfSlg. 11.131/1986 the Court held that that the simultaneous participation of an commission member as expert delivering an expertise on the facts to be assessed by the commission and as a member of the commission taking part in the decision amounts to a violation of impartiality. It stressed that such a practice forces the applicant to argue and even polemicize against the views of one of the commission members, a situation that casts doubts on whether the commission's decision is still guaranteed to be an impartial one.

Similar considerations led to the annulment of provisions of the Food Law. The case was brought to the Constitutional Court by the Austrian Supreme Court after Austria had been found to have violated the Convention in a case involving a criminal procedure in food law.<sup>71</sup> The law set up a system in which the food expert who examines a given food sample and delivers an expertise on the incriminated products is at the same time responsible for reporting the suspicion to the authorities. Formally, the system invested the expert with the function of a neutral and impartial auxiliary of the court. At the same time, he was responsible for reporting the suspect and the law gave him a dominant position in the procedure, which led the Constitutional Court to find the provisions contrary to the demands of fairness enshrined in Article 6 ECHR.

It is incompatible with the concept of an independent tribunal to allow administration to squash or modify the decisions taken by the tribunal.<sup>72</sup> The tribunal's members must be independent from instructions,<sup>73</sup> their term of office must be defined by law,<sup>74</sup> they can only be recalled for reasons explicitly specified

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69 Wherefore the law itself was not to be repealed as unconstitutional: VfSlg. 10.639/1985; see however VfSlg. 13.001/1992 for an example where the impairment of independence was structurally predetermined by the law.

70 A *Sramek*-type violation of Article 6 ECHR was found in VfSlg. 10.634/1985, 11.142/1986 and VfSlg. 11.211/1986. No such violation was found in VfSlg. 10.696/1985, 10.890/1986, 10.896/1986, 10.922/1986, 10.923/1986, 10.920/1986, 10.993/1986, 11.073/1986, 11.412/1987.

71 ECtHR 6.5.1985 *Bönisch v Austria* (appl no 8658/79) Série A no 103.

72 VfSlg. 11.872/1988.

73 E.g. VfSlg. 11.729/1988.

74 VfSlg. 11.729/1988, 12.083/1989. Of course the law may as well provide for a life-long term.

in the law;<sup>75</sup> a recall must be subject to complaint before the Supreme Administrative Court and the Constitutional Court.

## 2. Presumption of innocence

In VfSlg. 5231/1966 the Court referred to the presumption of innocence established in Article 6 para. 2 ECHR to reject the attempt, in an administrative ruling, to draw adverse conclusions from the sole fact that a person had been subject to criminal prosecution (without having been indicted or even sentenced). Under a similar reasoning, the Court found a violation of a constitutional guaranteed right in a case where the administration based a conviction for a tax offense solely on the tax assessment, thereby shifting the burden of proof for the offense to the accused.<sup>76</sup>

The presumption of innocence prohibits the legislator to formulate criminal provisions in such a way as to require the suspect to bring proof for his compliance with the law. In VfSlg. 11.195/1986, the Court repealed a provision against vagabondage on this account. The offense made punishable a person "roving around without occupation" if he or she could not give proof of his endeavour to seek for a gainful occupation.

On the other hand, the rule contained in § 5 para 1 of the Administrative Penal Act (VStG 1991) stipulating that "*[I]ack of knowledge of the provision of the administrative law violated on the part of the culprit is an excuse only in such cases if proven to be without his fault and if he was not able to realize the illicit character of his doing without knowing the respective provision of the administrative law*" was not found to be in violation of the principle of presumed innocence. Rather than shifting the burden of proof for his innocence to the suspect, this rule, so the opinion of the Constitutional Court in a case of 1994, leaves unaltered the obligation of the authority to prove the objective elements of the offense and exempts it from further enquiry only as far as the alleged lack of the subjective elements can be regarded as implausible.<sup>77</sup>

The decisions VfSlg. 8483/1979 and 8505/1979 concerned the question under what conditions the presumption of innocence allows for previous prosecution to be taken account of as aggravating circumstances for the purpose of the assessment of a penalty in a posterior sentence. The Court decided that the presumption of innocence is not violated as far as the previous facts taken into account as aggravating circumstance are established in a sentence that has become binding; the fact of a pending complaint with the Supreme Administrative or the Constitutional Court against this sentence does however not prevent it from being taken into account as aggravating circumstance.

The applicants in VfSlg. 8950/1980, having been convicted for a number of crimes by Italian courts, challenged their listing in the Austrian register of convictions on the account that both the relevant provisions on the register and the listing itself infringed the principles ensuing from the respect of the presumption

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75 VfSlg. 11.872/1988, 11.933/1988.

76 VfSlg. 8111/1977.

77 VfSlg. 13.790/1994.

of innocence. The Court did not share that view, pointing to the fact that, according to the relevant statute, the registration of a foreign conviction was conditioned on a verification whether the trial preceding the conviction satisfied the requirements of fairness under Article 6 ECHR, and that in the case at hand the registering authority had not contented itself with the fact that Italy was a party to the Convention but also took account of the actual circumstances such as the fairness of the preceding (foreign) criminal procedures.

The presumption of innocence also came into play in media law: The board supervising the objectivity of the Public Austrian Broadcasting Corporation condemned the Corporation for having violated the rules on objectivity by broadcasting a report where a person was denounced of having violated the law. The Corporation brought the case to the Constitutional Court alleging a violation of its right to free speech. The Court, in interpreting the principle of objectivity, made reference to the presumption of innocence as enshrined in Article 6 para 2 ECHR to state that, in view of the right to being "presumed innocent until proved guilty according to law", the principle of objectivity prohibits a public condemnation of a person before he or she is found guilty by the competent courts.<sup>78</sup> In a case of 1995 the Court regarded the provisions in the media law against the denunciation of suspects while still on trial as a justified means to protect the presumption of innocence.

### ***3. A fair procedure and adequate means of defense***

Compulsory representation before the Constitutional Court is not a breach of fairness.<sup>79</sup>

A provision of criminal procedural law that exempts the defendant from being obliged to disclose self-incriminating information while leaving the possibility for prosecution to search and seize incriminating material at his counsel's office without providing for specific safeguards against the utilization of such evidence is unconstitutional.<sup>80</sup>

The entitlement of legal assistance in criminal cases (Article 6 para 3 lit. c) comprises not only the initial assignment of a counsel for the defense but requires that the party is provided with counsel throughout the whole procedure.<sup>81</sup>

A provision, in traffic law, by virtue of which the traffic authority is bound by the results of a breathalyser test without having the obligation to give the suspect the chance, if he wishes so, to take a medical examination on the blood-alcohol level, infringes the principles of a fair procedure.<sup>82</sup>

A non-extendable deadline of four weeks for filing an appeal, applicable in all cases, without regard of the complexity of the case, is not compatible with the demands of fairness.<sup>83</sup>

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78 VfSlg. 11.062/1986.

79 VfSlg. 7564/1975, 7756/1976.

80 VfSlg. 10.291/1984.

81 VfSlg. 9535/1982, 10.326/1985, 13.909/1994.

82 VfSlg. 12.649/1991.

83 VfSlg. 15.786/2000.

#### **4. A public hearing**

In the case *Eisenstecken v Austria*, the European Court of Human Rights declared Austria's reservation on Article 6 ECHR invalid on the ground that it does not fulfill the criteria set out in Article 57 para 2 of the Convention that require that a reservation shall contain a "brief statement" of the laws concerned by the reservation. The Austrian Constitutional Court followed the European Court's view and started to assess the conformity of administrative decisions with the principle of an oral procedure (regarding "civil rights and obligations" beginning with VfSlg. 16.402/2001 and regarding "criminal charges" beginning with VfSlg. 16.424/2002).

The Court developed a differentiated case law on the question whether the omission to hold an oral hearing in proceedings before a tribunal is a violation of Article 6 ECHR. The main ideas can be summarized as follows: The statutory permission, contained in the (ordinary) procedural law, to refrain from a hearing is as such no sufficient justification for the omission of a hearing in the light of the constitutional guarantee of Article 6 ECHR.<sup>84</sup> The statutory terms for hearings can however become a relevant element in the assessment of the question whether the appellant's failure to request a hearing may be treated as an implicit waiver. If the statutory provisions generally provide for a procedure without oral hearing, the appellant's failure to request explicitly for a hearing cannot automatically be treated as a waiver.<sup>85</sup> Even when the statutory provisions do not stipulate the principle of a written procedure but provide generally for an oral procedure while granting the tribunal discretion to refrain from a hearing, the appellant's failure to request a hearing doesn't automatically discharge the tribunal from its constitutional obligation to hold a hearing under Article 6 ECHR.<sup>86</sup> The tribunal may assume an implicit waiver only if the appellant can be deemed to have been aware of the possibility to file an explicit request for the hearing (e.g. if the appellant is legally educated<sup>87</sup> or has been informed of his rights); otherwise an implicit waiver can be deemed where the appeal was lodged by counsel.<sup>88</sup> In the absence of a waiver by the appellant, a hearing may be only be omitted under exceptional circumstances, such as in cases where the facts are not disputed and the legal questions involved are of minor complexity.<sup>89</sup>

#### **5. ... within a reasonable time**

Over the last years the Constitutional Court had the opportunity to decide on complaints against the duration of civil or criminal proceedings. Among the interesting questions raised by these cases is the question how a complaint to the Constitutional Court directed against the administrative ruling concluding a

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84 VfSlg. 16.624/2002.

85 VfSlg. 16.704/2002, 17.373/2004, 17.710/2005, 18.064/2007.

86 VfSlg. 16.894/2003, 16.954/2003, 17.121/2004, 17.375/2004, 17.691/2005.

87 VfSlg. 17.440/2005, 17.924/2006.

88 VfSlg. 17.697/2005.

89 VfSlg. 17.597/2005, 17.598/2005, 17.855/2006, VfGH 3.3.2009, B 1284/08.

lengthy procedure is capable of providing an effective remedy against the duration of the procedure itself.

As regards criminal cases, the Court decided in VfSlg. 16.385/2001 that an unreasonable length of the procedure can constitute a mitigating circumstance to be taken into account in the assessment of the penalty.<sup>90</sup>

In conformity with the case law of the European Court of Human Rights and the Austrian Supreme Court, the Constitutional Court considers that even an excessive length of the procedure is no entitlement to an acquittal or to a mitigation of the sentence under any circumstances. However, even if it can not be taken account of in form of an acquittal (or further mitigation of the penalty) an unreasonable length of procedure must at least be formally stated in the decision of the tribunal.<sup>91</sup>

The same consideration applies to cases involving civil rights and obligations. In cases where the length of the procedure is the only constitutionally relevant deficiency of an administrative ruling challenged before the Constitutional Court, the Court refrains from squashing the ruling on this account since such a step would only extend the length of the procedure. In such cases, the Court confines itself to a declarative decision if such a declaration has not already been made on the administrative level.<sup>92</sup>

In an amendment of 2004, the law on the procedure before the Constitutional Court was amended by the introduction of a procedural requirement according to which complaints to the Constitutional Court against administrative rulings had include the formal request of nullification of the administrative decision. This statutory requirement was repealed by the Constitutional Court in VfSlg. 18.014/2006 on the ground that such a formal requirement would be counterproductive for a party seeking a remedy (only) against the unreasonable length of the procedure and therefore violated Article 6 ECHR in combination with Article 13 ECHR (right to an effective remedy).

#### IV. OUTLOOK

The case law of the Austrian Constitutional Court on Article 6 ECHR has gone through a remarkable evolution during the past 50 years. Procedural issues become relevant in most of the disputes that reach the Constitutional Court. The further development of the case law will remain an interesting subject.

The cases discussed in the present edition of this journal show some examples of recent decisions on the matter.

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90 See also VfSlg. 17.339/2004, 17.821/2006, 17.854/2006, 18.066/2007.

91 VfSlg. 17.308/2004.

92 VfSlg. 17.307/2004, 17.644/2005, 17.666/2005, 18.307/2007, VfGH 26.6.2008, B 304/07.