

Vienna Online Journal on International Constitutional Law

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■ PREFACE

Claudia Fuchs & Konrad Lachmayer

The Right to a Fair Trial in the Case-Law of the Austrian Constitutional Court

In a 2007 judgement, *Vilho Eskelinen and others vs Finland*, the European Court of Human Rights (ECtHR) considered the scope of the right to a fair trial (Article 6 ECHR) in the context of civil proceedings, referring in particular to the acceptable length of proceedings and the necessity of an oral hearing. Apart from these questions it was the extension of Article 6 to disputes concerning civil servants that attracted interest: Until then, the ECtHR's jurisprudence had recognised a separate category of "political rights" barring the application of rights deriving from Article 6 ECHR. Thus, cases involving civil servants, conscripts, non-criminal tax disputes, election disputes, and refugees have always been declared inadmissible insofar the complainants relied on this Article.

The evolution regarding civil servants, emanating mainly from the *Eskelinen*-judgement, posed a challenge to constitutional adjudication on the Member States' level. National Constitutional Courts, including the Austrian Constitutional Court, who until then followed the ECtHR's exemption-judicature concerning civil servants, had to consider the modified case-law. Indeed, in recent cases the Austrian Constitutional Court – notwithstanding critical remarks concerning the ECtHR's newly adopted approach – also changed its standing jurisdiction to ensue the *Eskelinen*-jurisprudence (see inter alia VfSlg 18.309/2007).

The *Eskelinen*-judgement gives the most recent example on the impact of the ECHR as a whole (in Austria enacted on the level of constitutional law) and the ECtHR's quite dynamic judicature on Austria's legal order. It also marks the most recent step in a changeful history of the implementation of Article 6 ECHR in domestic law. With regard to the broad scope of guarantees granted under this provision, its effects can be spotted in an abundance of organizational and procedural provisions in the domestic legal order.

In this issue, the Constitutional Developments Section puts a focus on the Austrian Constitutional Court's case-law on Article 6 ECHR. *Philipp Cede* gives an introduction to the relevant decisions. Recent judgements on the matter are discussed by *Katharina Egyed*, *Johanna Fischerlehner* and *Anke Sembacher*.

■ PREFACE ■

Also in this issue: *Bedanna Bapuly* takes a close and critical look at the European Arrest Warrant.

Recently published books in the field of international constitutional law are reviewed by *Caroline Kerschbaumer* and *Tobias T. Molander*.

Claudia Fuchs & Konrad Lachmayer

Editors-in-Chief

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Bedanna Bapuly

The European Arrest Warrant under Constitutional Attack

INTRODUCTORY REMARKS

European constitutional law is, *inter alia*, aiming at establishing an Area of Freedom, Security and Justice. The integration of these policy fields into the dimensions of European constitutional law can bring about far reaching constitutional dynamics: The EU has advanced from its original economic focus to a widespread supranational entity with competences and functions far beyond economics and trade. While building an Area of Freedom, Security and Justice within the EU, judicial cooperation in criminal matters is a key element.

Today criminal threats to society are globalising. Interaction and cooperation between the different constitutional levels are obviously indispensable in order to respond to the challenges. The European Arrest Warrant (EAW) is one of the EU's answers to these threats. Precisely the EAW turned out to be one of the most striking examples interlinking international, European and domestic, in particular, constitutional law. Where these systems collide we perceive forms of constructive cooperation on the one hand and frictions on the other.

Following the ambition of the ICL approach of linking various systems and levels of constitutional law and analysing their interrelations in the constitutional network this contribution seeks to depict some of the fundamental legal questions at stake when it comes to the implementation and enforcement of the EAW.

I ASPECTS UNDER INTERNATIONAL LAW

The mechanism traditionally called extradition¹ has been in the past and still is the subject of numerous bi- and multilateral international agreements.² This part of the article will give an outline on the agreements and conventions governing extradition which paved the way for the FD on the EAW. The FD on the EAW changes the extradition relations of the EU-MS and brings them under a new system.

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- 1 The etymological origin of extradition derives from the Latin words "ex" and "traditio" (hand over), it means the surrender of an alleged criminal usually under the provisions of a treaty or statute by one authority (as a state) to another having jurisdiction to try the charge
 - 2 In 2004 a Model Treaty of the UN was presented as a useful framework that could be of assistance to States interested in negotiating and concluding bilateral agreements aimed at improving co-operation in matters of crime prevention and criminal justice. See http://www.unodc.org/pdf/model_law_extradition.pdf.

The European Convention on Extradition (ECE 1957)³ entered into force in 1960 was ratified⁴ by 47 states, including Israel and South Africa. It established the dual incrimination requirement instead of the list model which was quite common in bilateral agreements. It provided for the extradition of persons wanted for criminal proceedings or for the carrying out of a sentence. However, it does not apply to political or military offences and any Party may refuse to extradite its own citizens. With regard to fiscal offences (taxes, duties, customs), extradition may only be granted if the Parties have decided so in respect of any such offence or category of offences. Extradition may also be refused if the person claimed risks the death penalty under the law of the requesting State.

To a limited extent the ECE is still applicable even after the FD on the EAW came into force. First of all two questions arise: 1. as to whether a FD can be considered a treaty in terms of the Vienna Convention of the law of treaties (1960). According to art 59(2) Vienna Convention a treaty is suspended by a later treaty; 2. Can a Convention be replaced by a FD without having properly denounced (art 31 ECE)? The answers must be negative.

Second, transitional provisions e.g. in relation to Romania demand their application in the event that the person sought has been arrested before 1 January 2007 on the basis of a request for provisional arrest issued by a Member State, and the request for extradition has not yet reached in Romania, the extradition procedure set forth in the ECE (1957) will continue to apply.

Third, based on art 32 FD France made a declaration according to which, as a requested (executing) state, it will continue to deal with requests relating to acts committed before November 1, 1993 in accordance with the extradition system applicable before January 1, 2004 (ordinary extradition law).

Austria applies the old regime on facts occurred prior to August 7, 2002 (which is the date of entry into force of the FD and the retroactive effect of the EuJZG is not provided for).

The Czech Republic did not make any statement under art 32 FD nevertheless applies the EAW only as of (and as to cases committed after) 1 November 2004. The Czech Republic made a notification to the Council of Europe under art 28(3) ECE⁵ which resulted in the very unpleasant fact that ten/six EU-MS informed the Ministry of Justice that they deny cooperation under the extradition regime regarding offences committed before November 1, 2004, if the Czech Republic is

3 See this Council of Europe Convention <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=024&CM=8&CL=ENG>.

4 For the ratification list see: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=024&CM=8&DF=&CL=ENG>.

5 Art 28 (3) Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties. Contracting Parties which exclude or may in the future exclude the application of this Convention as between themselves in accordance with this paragraph shall notify the Secretary General of the Council of Europe accordingly. The Secretary General shall inform the other Contracting Parties of any notification received in accordance with this paragraph.

the requesting/requested State. Only Austria, Hungary, Germany, France, Lithuania, Slovakia and Slovenia agreed to cooperate in such old cases.⁶

Fourth, constitutional prohibitions to extradite own nationals partly prevent(ed) the full application of the FD. In some of the Member States (parts of) the Implementation Acts have been declared void (in Germany the whole act was annulled; in Cyprus and Poland parts of the implementing rules infringed constitutional rights)⁷ and so the ECE resumed applicability (between these states). Consequently, some other MS (Hungary and Spain) refuse(d) surrender of their nationals to those states (Germany) as a matter of reciprocity. They considered EAWs as classic extradition requests and consequently applied the ECE. Naturally, this amounts yet to further breaches of EU law.

Fifth, as a matter of course the ECE still applies to relationships between EU-MS and third countries being parties to the ECE.

Two Additional Protocols were concluded. The Additional Protocol of 1975⁸ reduced the political offences exception⁹ and extended the *ne bis* exception to judgements rendered in 3rd states parties to the Convention:

It should be noted that the Protocol supplements the original Articles 3 and 9 of the Extradition Convention (concerning, respectively, political offences and *ne bis in idem*) but does not modify the existing texts of those articles.

The Additional Protocol of 1978¹⁰ brings a novelty with regard to the communication line instead of the diplomatic channel the ministries of the states concerned communicate directly. Furthermore, the protocol contains provisions relating to the extension of accessory extradition to offences carrying only a pecuniary sanction (Chapter I); the extension of the Convention to fiscal offences (Chapter II); judgments *in absentia* (Chapter III); amnesty (Chapter IV); and the communication of requests for extradition (Chapter V).

Since these Protocols were not ratified by all parties to the Convention its impact remained limited:

A few states cooperated more intensively based on the Benelux Convention 1962 on extradition and cooperation in criminal matters which foresaw the dual incrimination requirement with a minimal maximum penalties of six months instead of one year as under art. 2 ECE. It did not foresee the military offense exception but an absolute nationality exception as opposed to the optional one under art 6 ECE. Bi- and multilateral facilitating agreements have been concluded as well. The agreement of 26 May 1989 (Donostia – San Sebastian Agreement) on simplifying the transmission of extradition requests by fax and the Brussels

6 This results in the unpleasant result that the ten countries are now as save haven for offenders wanted for crimes committed prior to 1 November 2004 by the Czech Republic and the Czech Republic is so with regard to the six countries. See Svetlana Kloučková, *The European Arrest Warrant and its Implementation in the Member States of the European Union* http://www.law.uj.edu.pl/~kpk/eaw/raports/Questionnaire_The_Czech_Republic.pdf.

7 See chapter III.

8 <http://conventions.coe.int/Treaty/en/Treaties/Html/086.htm>.

9 The European Convention on the suppression of terrorism (1977) also reduced the applicability of the political offence exception. See <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=090&CL=ENG>.

10 <http://conventions.coe.int/Treaty/en/Treaties/Html/098.htm>.

Convention of 1995 on the simplified extradition procedure¹¹ which provided for an accelerated extradition with the consent of the requested person did not enter into force however and thus worked only between the MS making declarations on its preliminary effect.

The same holds true for the EU Dublin Convention on extradition between Member States (1996).¹² This Convention entered into force between only twelve EU Member States on 29 June 2005. Most of the Member States that have ratified the Convention have made reservations. It supplemented international agreements such as the European Convention on Extradition (1957), the European Convention on the Suppression of Terrorism (1977) and the European Union Convention on Simplified Extradition Procedure (1995). Despite the entering into force of the FD on the EAW on 1 January 2004 the Convention was and is still applicable in exceptional cases.

The Convention aims to facilitate extradition between the Member States; it indicates the circumstances in which the extradition procedure is applicable. These cover offences which are punishable under the law of the requesting Member State by deprivation of liberty or a detention order for a maximum period of at least 12 months and under the law of the requested Member State by deprivation of liberty or a detention order for a maximum period of at least six months. Conspiracy to commit certain crimes and membership in a criminal organisation were recognised as extraditable offences. (art 3).¹³ The Convention temporary (for five years) provided for an option not to extradite own nationals (art 7), subsequently and subject to a reservation nationality is no ground for refusing extradition any longer. Furthermore the Convention abandoned the political and fiscal offence exception. Extradition may not be refused on the ground that an offence is statute-barred in the requested state, except for cases though where the offence falls under amnesty.

Whereas the ECE established the so-called "rule of speciality" which prohibits the prosecution of an extradited person for any offence committed prior to his surrender other than that for which he was extradited (provided there is no exceptional consent by the requested state). The EU Convention on Extradition distinctly departs from this speciality rule as it allows prosecution and punishment for offences other than those having effected the extradition, and without the consent of the requested state, when the acts concerned are not punishable by imprisonment or when the extradited person consents (art 10 para 1) or when a corresponding declaration was made by the respective MS (art 11).

11 OJ 1995 C 78, 2; http://www.imolin.org/doc/amlid/Belgium_Convention_10_March_1995_English.pdf.

12 Council Act of 27 September 1996, adopted on the basis of Article K.3 of the Treaty on European Union, drawing up the Convention relating to extradition between the Member States of the European Union (<http://europa.eu/scadplus/leg/en/lvb/l14015b.htm>).

13 The requested member state must extradite, even if "conspiracy" and involvement in a "criminal association" are no punishable acts under its national law (Article 3.1). In assessing whether a conspiracy or an association is actually aimed at committing a crime, the requested state shall refer to "information in the arrest warrant or another decision to the same effect" (Article 3.2). This means, remarkably, that a person shall be extradited, even if she is not accused, or even suspected, of having herself committed any crime.

Besides that the EU has concluded Extradition Agreements with third countries (e.g. USA in 2003). Apart from this there exist bilateral extradition agreements i.a. between the USA and Austria.¹⁴ A protocol to the EU-US Agreement provides for rules when an EAW and an extradition request simultaneously issued.¹⁵

The ever growing number of international bilateral agreements and multilateral conventions was accompanied by Additional Protocols some of which did not or only partially enter into force. Besides that numerous declarations and reservations were made. Consequently, a highly complicated and dynamic web of treaty relations combined with the traditional lengthy procedures of diplomatic channels made the extradition system difficult to handle and enforce and little efficient.

II THE EUROPEAN UNION LAW PERSPECTIVE

From a Common Market to an Area of Freedom, Security and Justice

It was only with the Treaty of Maastricht that the EU cooperation in criminal matters was institutionally given a home in the third pillar and started to gain cloud. The Treaty of Amsterdam proclaimed the objective of creating an Area of Freedom, Security and Justice, thus judicial cooperation in criminal matters constitutes a fundamental feature in order to achieve this goal. Parts of the third pillar (immigration and asylum) were shifted into the first pillar restricting the competence of the ECJ though to preliminary rulings initiated by courts against whose decisions there is no judicial remedy (art 68 EC). As regards parts of the third pillar MS could nevertheless opt for full jurisdiction of the ECJ. With the Treaty of Amsterdam the Schengen *acquis* relating to immigration and asylum matters was incorporated into EC law and since then falls under the Communitarian regime¹⁶ with some opt-outs though (DM, UK, IRL)¹⁷. However the policing elements thereof and the Schengen Information System fell under the third pillar. Admittedly, sometimes these fields overlap which makes it difficult to achieve consistent enforcement and interpretation of rules and thus legal certainty.

The European Council in Tampere (1999) concluded¹⁸ with a road map in order to realise an Area of Freedom, Security and Justice. Mutual recognition¹⁹ of

14 The Convention on the surrender procedure between the European Union on the one hand, and the Republic of Iceland and the Kingdom of Norway on the other was subject of a judicial preview initiated by the President of Hungary. The Constitutional Court of Hungary declared some provisions of the act transposing the international treaty into Hungarian law unconstitutional (Decision 32/2008). Thanks to Petra Bard for providing me with this recent information.

15 http://www.parlament.gv.at/PG/DE/XXII/BNR/BNR_00595/imfname_060256.pdf.

16 See *infra*.

17 On the other hand Switzerland acceded to the Schengen regime.

18 http://www.europarl.europa.eu/summits/tam_en.htm.

19 The principle of mutual recognition was inserted on a British (!) initiative (Cardiff 1998) and gained Scandinavian support due to a high degree of substantial similarity of norms in the countries concerned. The British proposed that extradition should be replaced by arrest warrants

judicial decisions was declared as the cornerstone of judicial cooperation in civil and criminal matters:

VI. Mutual recognition of judicial decisions

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

35. With respect to criminal matters, the European Council urges Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.

36. The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.

As Keijzer argues in Community law the principle of mutual recognition originates from the Common Market.²⁰ In civil law the concept of mutual recognition exists, too and is laid down in the Brussels Convention 1968 and the Lugano Convention (1988) which later on became EC-Regulation 44/2001. In criminal law the principle of mutual recognition is realised by the rule of *ne bis in idem* which is applied in favour and not to the detriment of the accused and can be found in art 54-56 Schengen Implementation Convention.

Recognition of foreign criminal court decisions to the detriment of the accused also exists only if the dual incrimination requirement is fulfilled. This holds true for the ECE (1957) and the European Convention on the International Validity of Criminal Judgements (The Hague 1970). The Convention on the transfer of sentenced persons (Strasbourg 1983) establishes conditions and procedures for an optional recognition and defines the conversion of a foreign sentence according to the values of the administering state. So far, the EU Convention on the

based on mutual recognition with abolition of the dual incrimination requirement. The UK and IRL had gained experience in the past with "backed warrants" and wanted all but being forced to uniformity.

20 The following passage on the principle of mutual recognition is largely inspired by Nico Keijzer, *The European Arrest Warrant Framework Decision between Past and Future in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006), 17-20.*

enforcement of foreign criminal sentences (Brussels 1991) is only provisionally applied between the Netherlands, Germany and Latvia.

A COM Communication on mutual recognition of final decisions in criminal matters²¹ and a Programme of Implementing measures²² containing a list of 24 measures followed the Tampere Conclusions. In 2003 the adoption of a FD of the execution of orders freezing assets or evidence²³ paved the way for the FD on the EAW and the surrender procedures between Member States.²⁴

In times of insecurity following 9/11²⁵ and the biggest enlargement *ante portas* the FD on the EAW and the surrender procedures between Member States²⁶ (henceforth FD-EAW) was adopted.²⁷ Highly contested issues such as the dual criminality requirement and nationality exceptions had to be overcome. What remains to be mastered are persistent frictions between providing security on the one hand and guaranteeing fair trials based on procedures pending (at least partial) harmonisation.

The Framework Decision being a third pillar instrument "for the purpose of approximation of laws of the MS" is based on art 34 (2) b EU.²⁸ It is binding upon the MS as to the result to be achieved, but leaves to the national authorities the choice of form and methods. It does not entail direct effect (art 34 (2) b) and thus requires implementation in the MS.²⁹ Despite the fact that the FD had to be implemented by 31 December 2003 only half of the MS did so on time, only by the end of 2004 all EU member states but Italy, Germany and the Czech Republic had implemented it. Generally, they implemented the EAW correctly, partly, the implementing acts deviated from the FD and e.g. added grounds for mandatory refusal of an extradition.

As far as the interpretation of the FD is concerned, despite the fact that it was drafted in French, all language versions are equally authentic. As a legal instrument of the third pillar .

21 COM (2000) 495 fin.

22 OJ 2001, C 12, 10.

23 OJ 2003, L 196, 45.

24 Steve Peers, Mutual Recognition and Criminal Law in the European Union: Has the Council got it Wrong?, CMLR (2004), 5-36 (26 et seqq).

25 The COM made its proposal two weeks after 9/11. Under pressure the EP was consulted twice without the three weeks time provided for in art 39(1) EU. National parliaments had little influence. See Nico Keijzer, The European Arrest Warrant Framework Decision between Past and Future in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006), 24.

26 2002/584/JHA, OJ C 364, 18.12.2000, p. 1.

27 Matthias J. Borgers, Implementing Framework Decisions, CMLR (2007) 44, 1361-1386.

28 This was questioned by the Belgium Cour d' Arbitrage in a preliminary reference to the ECJ. See *infra* in chapter III.

29 Consequently the entry into force differs from country to country. Data on the entry into force of the country specific implementation acts was summarised by Nico Keijzer, The European Arrest Warrant Framework Decision between Past and Future in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006), 62, fn 154. For BG and RO it entered into force on the day of their accession i.e. 1.1.2007

MS may declare that the ECJ shall be empowered to give preliminary ruling on the validity and interpretation of the FD (art 35 EU). Such declaration must specify which court(s) may request for a preliminary ruling. Amongst the EU-15 Denmark, France, Ireland and the UK have not accepted the jurisdiction of the ECJ, amongst the new MS only the Czech Republic has opted-in (art 35(3) b EU). Spain opted-in on the basis of art 35(3) a. Accordingly, only courts against whose decisions there is no judicial remedy are entitled to refer to the ECJ. The obligation to refer to the ECJ was laid down in Austria, Belgium, Germany, Greece, Italy, Luxembourg, the Netherlands, Spain and the Czech Republic.³⁰

An unexpected integrational moment for the Area of Freedom, Security and Justice happened with *Pupino* when the ECJ approximated the third pillar to the first one by holding that the application of national law needs to be in conformity with the wording and purpose of a framework decision (it must not be *contra legem*).³¹ *Peers*³² argues convincingly that general principles of Community law apply to the third pillar as well. These include obviously the application of human rights as stipulated by art 6 (2) EU (including of course equality and non-discrimination) and interpreted in the light of the ECHR: Furthermore, the ECJ ruled on the applicability of the principles of legal certainty and non-retroactivity. The principles of subsidiarity and proportionality, of conferred powers and the right to defence do also apply.

What is new under the EAW?

The FD-EAW brought along some major changes four of which are addressed to in the following:

1. Principle of mutual recognition and thus, partial abolition of dual criminality
2. Judicialisation of the procedure
3. Simplified and quicker extradition procedures
4. Surrender of nationals

As to the scope of an EAW it may be issued in compliance with art 7 ECHR for acts which were punishable under the law of the issuing Member State at the time when they were committed as well as at the moment of the issuing of the EAW by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months. The content of an EAW is summarised in art 8 and a model form is attached to the FD on the EAW.³³

30 Nico Keijzer, *The European Arrest Warrant Framework Decision between Past and Future in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant* (WLP, Nijmegen 2006), 62, fn 164.

31 ECJ 16 June 2005, case C-105/03, *Pupino*, ECR (2005) I-5285 para 47.

32 Steve Peers, *Salvation Outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi Judgments*, CMLR (2007) 44, 883-929, (926 et seqq.).

33 For detailed comments on art 8 see Nico Keijzer, *The European Arrest Warrant Framework Decision between Past and Future in: Elspeth Guild, A Challenge for European Law: The*

1. The Principle of Mutual Recognition and the Partial Abolition of Dual Criminality

Pursuant to the list of art 2 (2) 32 offences no longer need to fulfill the dual criminality requirement. Dual criminality was abolished due to the long validation procedures in order to find out what the offender actually did. In the past, some elements of facts may not have been relevant under the law of the issuing MS and were thus not investigated. This information may have been decisive for the sentencing state, though. Consequently the old system requiring dual criminality in any case was often characterised by the failure to submit requested and indispensable information.

The new system however brings along a number of problematic issues and challenges as well. The list of 32 offences³⁴ contains numerous vague terms³⁵ that need authoritative clarification. Non-verification presupposes dual criminality, and therefore must be based on agreed definitions of extraditable offences. For some offences it might not be difficult to agree on terms based on existing international agreements. For others like murder, rape, racketeering it will not be easy to find common denominator definitions of conduct for which dual criminality needs not to be checked.

It is true that mutual recognition per se does not require the abolition of dual criminality. Values in extradition law differ on several points between the MS. If Cassis is acceptable in France it cannot be poisonous in Germany. Offences like "murder, grievous bodily injury" are interpreted quite controversially in the MS. If euthanasia is performed in accordance with the regulations it is acceptable in the Netherlands, it is still illegal in Poland. If abortion is performed lawfully in the Netherlands and Belgium,³⁶ it is still considered unconstitutional in Ireland.

Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006), 58-61.

- 34 Participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, laundering of the proceeds of crime, counterfeiting currency, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism, xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.
- 35 What exactly falls under the term of "fraud", "racism and xenophobia", "sabotage", "racketeering and extortion"?
- 36 The Belgian Implementation act declares abortion and euthanasia not to be covered by "murder, grievous bodily injury" of the list of art 2(2) FD and constituting a mandatory ground for refusal of the EAW. The Dutch approach is different, therefore if an EAW is sent to the Netherlands concerning a physician who has in the state of issue performed an act of euthanasia that under Dutch law is lawful, the requested person will be arrested and surrendered. However

Because of these differences, extradition without respecting the dual incrimination requirement may eventually amount to violations of those different values. Having to surrender individuals for acts that are not punishable, even lawful, the infringement of rights and values is at stake. This sensitive issue contains plenty of potential for tension.

To some extent arbitrariness with regard to the listed offences occurs.³⁷ Some elements of a crime cover a broader spectrum in one country than in another.³⁸ Additionally, discrepancies between the different language versions create confusion to the law applicants and ultimately can lead to the refusal of an extradition for felonies that are labelled identically but do not fall under the said offense in the requested country, thus in reality dual criminality is assumed but not fulfilled.³⁹

For offences other than those covered by para 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute (at the moment when the authority decides on surrender, not at the moment of commitment) an offence under the law of the executing (requested) Member State, whatever the constituent elements or however it is described (irrespective of legal qualification, type of penalty, labelling of the crime).

The fundamental rights standard guaranteed by art 6 EU⁴⁰ and art 3 FD establish mandatory grounds for refusal of the EAW. These apply

territoriality and extraterritoriality exceptions exist and can lead to an optional non-execution if the EAW relates to offences which:

- (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
- (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

37 This may lead to complicating instead of simplifying things: e.g. illicit trafficking in cultural goods is on the list, but possession of stolen cultural goods is not, robbery is, receiving stolen property is not. Whether the accused has robbed or traded in such goods can only be discovered in the course of the trial. (Nico Keijzer op.cit., p. 38).

38 Nico Keijzer op.cit., p. 36 lists examples such as "computer-related crime" which constitutes a larger term than the French term of "cyber criminalité"; "rape" (in French "viol") covers in England & Wales and France penetration involving genital organs or the anus, in Germany no such requirement is needed, in the Netherlands any sexually motivated penetration is punishable, in other states compulsion or threat of physical force are elements of the crime, in others lack of consent of the victim suffices. In case of such discrepancies the EAW will be refused if the offence does not fall under the category in the list version of the implementing act of the requested state which in the end can lead to frustration between MS.

39 "Compulsion" (in German "Nötigung") in Austria and Germany includes threatening someone with making a false report of crime, whereas such the threat as such is not punishable in the Netherlands. Escaping from prison is a crime under German, but not under Dutch law, the suppression of documents constitutes a crime under Austrian and German law, but not under Dutch law, giving a dud cheque amounts to a crime in Belgium and Germany but not in France and the Netherlands, mailing pornographic material to non-minors is no crime in the Netherlands (unless it includes child pornography) but it is one in England and Wales. Furthermore differences may arise with regard to inchoate crimes or the preparation (not having resulted in an attempt) of a serious crime.

40 Art 1 (3) FD-EAW

- "1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State."

Some MS have laid down additional grounds for a mandatory refusal in their implementing act.⁴¹

2. Judicialisation of the procedure

Lengthy and cumbersome administrative procedures via diplomatic hierarchic channels belong to the past. Direct communication lines between judicial authorities constitute a true accomplishment. According to art 2(1) the EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

3. Simplified and quicker extradition procedures

By introducing time limits the FD made another major step in adjusting procedures to current needs. A final decision must be taken within 60/90 days, surrender within 10/exceptionally 20 days after the final decision (art 17, 28). Unfortunately, the FD is silent on remedies. The Implementation acts of Austria and the Netherlands do not offer legal remedies at all which must be deplored in terms of the rule of law aspects. Considering the fact that judgments *in absentia* as well as the different interpretation of the *ne bis* principle in the various MS may have heavy implications on the guaranteeing a fair trial. Neither should one forget that MS are quite sometimes convicted for violating art 6 ECHR by the Strasbourg Court.

4. Surrender of nationals

In continental Europe the extradition of own nationals was constitutionally banned in many countries as opposed to the UK's legal world. The idea behind

41 E.g. Cyprus Art 13 (d) (e) (f) of Law 133(1)/2004. See Elias A. Stefanou, Andreas Kapardis, The First Two Years of Fiddling around with the Implementation of the European Arrest Warrant in Cyprus in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006), 79.

this ban was the protection of citizens from trial under foreign law and language. The extradition of nationals was agreed by the international community in order to try the most cruel and inhuman crimes before International Criminal Tribunals (e.g. ICTY The Hague). International agreements between parties of the Council of Europe like the ECE provided for a nationality exception and many parties to the ECE made use of respective declarations. The Dublin Convention was the first EU's attempt to abolish this protection in the long run: According to art 7 declarations could only be made temporarily.

In general, the FD on the EAW does not protect nationals from extradition of their country. However art 5 (3) allows MS to subject surrender of their nationals (including residents) for purpose of prosecution to the condition that the requested person is returned after trial to serve the sentence back home in the requested state. This optional ground for refusal has been made mandatory by many implementing acts. Similarly art 4 (6) FD-EAW states that if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.⁴²

Under art 33 (1) FD a special provision applies to Austria that may refuse the enforcement of an EAW with regard to Austrian citizens until 31 December 2008. As a matter of reciprocity Czech authorities do not surrender Czech suspects to Austria.⁴³ The Czech Republic and Luxembourg have, for their part, made statements that are inconsistent with Article 32 of the FD in that they concern European arrest warrants for which CZ and LU are both issuing States and executing States. In the case of CZ, this difficulty has been resolved by the adoption of an amendment to the transposition law which came into force on 1 July 2006. In addition, CZ now accepts and issues arrest warrants for offences committed before 1 November 2004, except in the case of its own nationals.⁴⁴ In several MS⁴⁵ constitutional conflicts infringing upon constitutional rights and principles arose which will be analysed in the following chapter.

42 For an analysis of these two articles see: Nico Keijzer op. Cit. p. 42-45.

43 Contrary to that attitude the Portuguese Supreme Court stated that the lack reciprocity can not be an obstacle to cooperation in the EU. See Case A, p 2 http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Portugal_Constitutional_Court.pdf.

44 <http://www.libertysecurity.org/article1576.html>.

45 Portugal and Slovenia anticipated and overcame these difficulties before transposing the Framework Decision. France also carried out a constitutional revision by means of a law of March 2003. This constitutes the first revision of the constitution caused by secondary EU legislation and it reads as follows: art 88(2) "Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted under the Treaty of the European Union. Before the amendment art 5 (1) Statute of 1927 prevented the extradition of French nationals. However bilateral conventions provided for the extradition of nationals. Art 6(1) ECE allowed for the refusal of extradition of own nationals. In 1994 the Conseil d'Etat declared that the prohibition to extradite nationals is not a constitutional rule. In 2002 the Prime Minister consulted the Conseil d'Etat's opinion on the transposition of the FD. The Constitutional Law Committee of Parliament of Finland previews bills and scrutinizes EU measures as to their constitutionality. § 9 (3) Constitution "Finnish citizens shall not be prevented from entering Finland or deported or extradited or transferred from Finland to another country against their

III CONSTITUTIONAL CHALLENGES

The Case of Germany

A citizen of double German and Syrian nationality was kept in custody in Hamburg and supposed to be extradited to Spain for prosecution for participation in a criminal association and with terrorism (financial and logistical support of Al-Qaeda network, activities in Spain, Great Britain and Germany) awaiting in Spain an imprisonment up to 20 years. Already in 2003 Spain requested his extradition based on an International Arrest Warrant. In 2004 an arrest notice was issued via SIS, i.e. an EAW for extradition. In Germany he was under investigations for acts between 1993 and 2001. The arrest warrant was issued and the judicial authority of Hamburg declared the extradition admissible on the condition that the execution of the sentence would take place in Germany.

The complainant challenged the order at the CC (BVerfG)⁴⁶ which issued a temporary injunction suspending the surrender to Spain. The CC held⁴⁷ that the EAW Act⁴⁸ infringes fundamental rights since under art 16(2) GG German citizens are protected from extradition, it is therefore unconstitutional as it concerns substantive law. The entire Act was declared void, the challenged decision held unconstitutional and overturned. In its reasoning the BVerfG stated that the German legislator did not use its discretion allowed by the FD, it did not transpose the optional grounds for refusal (i.e. refuse execution if it relates to offences committed on German territory or which were committed outside German territory in a EU MS requiring extradition and German law does not allow prosecution for the same offense when committed outside German territory) and stated the lack of sufficient legal protection in the surrender procedure. Furthermore the principle of non-retroactivity of criminal laws was breached by the act but the FD (art 34) provided for temporal limitations which were ignored by the legislator.

Dissenting opinions were attached: these had regard to abolishing the entire act, argued that the voidness should have been grounded on the principle of subsidiarity and that the declaration of nullity was unfounded (Judge Gerhardt).⁴⁹

The EuHbG was fully annulled and the old legal framework governed extradition again.

Clearly this led to a failure to comply with EU obligations.

will" was in evident conflict with the EAW and therefore urgent constitutional reform was needed and resulted in a timely and conform implementation of the FD, too.

46 Simone Mölders, European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005, German Law Journal (2005) vol 07, 01, 45 -57 (46 et seq).

47 Judgement of 18 July 2005, 2 BvR 2236/04 http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Germany_Constitutional_Court_e.pdf.

48 The German constitution was modified in 2000 in order to allow for the extradition of own nationals. This became necessary in order to fulfill UN Sec. Res. establishing ICTY, ITCR and in order to join the ICC and to comply with art 31 (1b) EU. Art 16 (2) "No German may be extradited to a foreign country. The law can provide otherwise for extraditions to a EU MS or to an international court as long as the rule of law is upheld."

49 NJW, 58 (2005), 2297, 2299, 2302 et seqq.

The new act addresses CC's central complaints maintaining some of the defects of the old act, adding even new ones:⁵⁰ the two-stage extradition procedure is maintained, it incorporates the implementing act into the existing law instead of creating a single coherent piece of legislation. The executive continues to play a crucial role in the procedure. A complicated system is created, according to which the executive shall declare in advance whether it plans to grant extradition or not. Then the courts have to check permissibility and at the same time review the ex ante envisaged granting decision. The practicability and constitutionality of this system remain questionable.

Germans can be extradited only if the criminal acts show a genuine link to the territory of the requesting state. Is this not the case: dual criminality is required, again the compatibility with European law is questionable. Furthermore, long term residents are disregarded in the new law, although the CC did not object to the equal treatment of Germans and long term residents.

The Case of Poland

The Circuit Court of Gdansk examined based on an EAW a request for surrendering the Polish national Maria D. for the purpose of criminal proceedings against her in the Netherlands.

Art 55 forbids the extradition of Polish nationals. The FD was transposed by amending the Code of Criminal Procedure (Chapter 65a governs the Polish courts issuing an EAW, and chapter 65b refers to EAW issued by another MS concerning a person staying in Poland). The Tribunal⁵¹ stated that "extradition" is defined in such manner as to exclude "surrender" under the EAW from its scope. Art 607s § 1 CCP stipulates that the EAW may not be executed in respect of a Polish national if she does not consent to surrender. Art 607t § 1 "In the case an EAW was issued for the purpose of prosecution of a person who is Polish or enjoys asylum in Poland, surrender may take place upon the condition of sending the person back to Poland after final judgement."

Art 607t § 1 is inconsistent with art 55(1). The Polish Tribunal unanimously decided to postpone the binding force of the challenged provision for 18 months and demanded a constitutional amendment.⁵²

The Amendment of art 55 reads as follows:

Article 55

(1) The extradition of a Polish citizen shall be prohibited, except in cases specified in paras 2 and 3.

50 Florian Geyer, *The European Arrest Warrant in Germany – Constitutional Mistrust towards the Concept of Mutual Trust in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006)*, 121 et seq.

51 Judgement of 27 April 2005, P 1/05 http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Poland_Constitutional_Court.pdf.

52 Adam Gorski, Piotr Hofmanski, Andrzej Sakowicz, Dobrosława Szumiło-Kulczycka, *The European Arrest Warrant and its Implementation in the Member States of the European Union*, http://www.law.uj.edu.pl/~kpk/eaw/raports/Questionnaire_Poland.pdf.

(2) Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: 1) was committed outside the territory of the Republic of Poland, and 2) constituted an offense under the law in force in the Republic of Poland or would have constituted an offense under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

(3) Compliance with the conditions specified in para. 2 subparas 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.

(4) The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.

(5) The courts shall adjudicate on the admissibility of extradition.

The Polish case shows that the conformity with EU law was considered more important than the constitutionality.⁵³ The violation of the constitution was accepted for a maximum time of one and half years according to art 190 (3) of the Polish Constitution. Certainly one never knows how legislative projects develop especially in times when the government lacks respective Parliamentary majorities or does deny or ignore the position of the "negative legislator". In this case, fortunately a corresponding amendment was passed in time. Had the legislator not acted in time or in compliance with European requirements this had led after the expiry of the 18 months to a violation of EU law. This had been a violation under the third pillar thus initiating an infringement procedure would not have been an option neither.⁵⁴

The Case of the Czech Republic⁵⁵

A petition was lodged by a group of parliamentarians challenging provisions of the Criminal Code and the Code of Criminal Procedure (CCP) implementing the

53 This was heavily criticised in literature and it seems that it was even ignored by ordinary courts. See Kazimierz Bem, *The European Arrest Warrant and the Polish Constitutional Court Decision of 27 April 2005* in: Elspeth Guild, *A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant* (WLP, Nijmegen 2006), 133.

54 With regard to judicial protection under the third pillar see Steve Peers, *Salvation Outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi Judgments* in CMLR (2007) 44, 883-929. Should the Treaty of Lisbon enter into force from 2014 onwards, the COM will have the power of initiating infringement procedures against MS failing to transpose FDs in the field of judicial cooperation in criminal matters. However the UK opted out of this novelty increasing judicial protection in the EU.

55 Judgement of 3 May 2006, PI ÚS 66/04 http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Czech_Constitutional_Court.pdf.

FD as to their violation of fundamental rights guaranteed in the Charter of Fundamental Rights and Freedoms, in particular art 14(4) stipulating that "No citizen may be forced to leave his homeland". The petitioners aimed to construe a constitutional principle banning the extradition of one's nationals and referred to the constitutions of Estonia (art 36 para 2), Lithuania (art 13 para 2), Poland (art 52 para 4), Hungary (art 69 para 1), Slovenia (art 48), Germany (art 16 para 2), Finland (art 9 para 3), France (art 88 para 2 no 3), Italy (art 26), Portugal (art 33 para 3) and Spain (art 13 para 3) which prevent nationals from extradition. The Constitutional Court however took into consideration that some countries had already modified their constitutions (Germany and France), that in other countries like Greece and Denmark this matter was governed by statutory law only and that in many countries there had not existed any ban at all (Belgium, the Netherlands, Luxembourg, Sweden, UK and Ireland and Malta).

The CC also referred to *Pupino* stipulating that "the interpretation of domestic law must be in conformity with the FD". However it makes no mention of what if this is not possible but points to "loyal cooperation in the third pillar."

CC emphasised that "if Czech citizens benefit from the advantages relating to the law of EU citizenship, it is natural that along with the advantages they should also accept a certain measure of responsibility.", "EU citizenship brings also obligations along" and that since the "Human Rights protection at the EU level corresponds to MS level" a "fair trial up to Czech standards suffices", and quoted in para 86:

"In 2003 the ECJ stated that 'Member States have a mutual trust in each other's criminal justice systems, and each of them recognises the criminal law that applies in the other Member States, and this is so even in cases where the application of their own law would produce a different result' (Cases C-187/01 and C-385/01, the criminal proceedings against *Hüseyin Gözütok* (C-187/01) and *Klaus Brügge* (C-385/01), [2003] ECR I-1345, Paragraph 33)."

Interestingly the CC also took into consideration:

"96. In drawing these conclusions we must have regard not only to the protection of the rights of persons suspected of having committed crimes, but also to the interests of the victims of crimes. From the standpoint of protecting the rights of the victim and those suffering damages, it would generally appear to be more practical and more just for the criminal proceedings to take place in the State in which the crime was committed ..."

The Czech legislator, like the German, also failed to provide for additional grounds for refusing to execute an EAW, if it relates to offenses committed on Czech territory (art 4 (7) FD). Czech courts would indirectly rely on the FD and refuse to execute Czech citizens as well as long term residents.

The CC declared that there was no incompatibility with art 39 Charter neither according to which "only the law determine which conducts constitute a crime and what punishment, ... can be imposed" a provision that was alleged of being incompatible with the abolishment of dual criminality art 2(2) FD. Finally, the implementing act (CCP) was upheld.

The dissenting opinions pointed out that the concept of values connected with criminal proceedings varies from MS to MS, and in the same way varies the assessment of what is permissible. All that despite the fact that all are signatories to the ECHR. "we cannot lower the HR standards laid down in the Constitution".

Judge Wagnerova even deplored that the "implementation act was carried out carelessly".

The Case of Cyprus

On 7 November 2005, the Supreme Court of Cyprus has taken a significant decision with regard to the implementation and enforcement of the Framework Decision on European Arrest Warrant.⁵⁶

The Supreme Court of the Republic of Cyprus upheld the decision of a District Court of Limassol in an appeal brought before it by the Attorney General against that decision which concluded that the arrest of a Cypriot national charged of tax fraud and his surrender to the United Kingdom's judicial authorities on the basis of a European arrest warrant, cannot be effected, as the national law transposing the Framework Decision into the domestic legal order⁵⁷ is incompatible with art 11(2)f of the Constitution prohibiting the extradition of Cypriot nationals to any other country:

Art 11(2) "Nobody is deprived of her liberty except where law provides so

(f) for the arrest or detention of a person in order to prevent his entry into the Republic without a permit or in the case of an alien against whom procedures have been instituted to have him expelled or extradited."

The two main arguments submitted by the Attorney General in the appeal, namely that the European arrest warrant procedure does not amount to an extradition but constitutes just the surrender of the sought person and, that, in any case the principle of the supremacy of Community law over the domestic legislation of the Member States should apply *mutatis mutandis* with regard to the law of the European Union, were rejected by the Court with the following reasoning:

"a. even though the nature of the European arrest warrant was discussed, mainly through references to the decision of the Polish Tribunal on the same matter, the Court decided that irrespective of its nature and whether that amounts to extradition or not, it could not find an appropriate legal basis in the Constitution justifying the arrest of a Cypriot national for the purpose of surrendering him/her to the competent judicial authorities of another Member State on the basis of a European arrest warrant. The reasons justifying the arrest of persons are exhaustively enumerated in the Constitution and none of them may be interpreted as allowing the arrest and surrender of Cypriot nationals to another member state. It could not therefore interpret national law in conformity with the law of the European Union.

b. Framework decisions issued on the basis of art 34 of the Treaty on European Union, are not directly effective. The expected results which are binding on the Member States, may be achieved only through transposition 'with the appropriate legitimate procedures existing in each Member State'. According to the Court, this has not been done in Cyprus, as the provisions of the relevant legislation transposing the framework

56 Attorney General vs *Konstantinou*, Full Bench of the Supreme Court summarised by Elias A. Stefanou, Andreas Kapardis op.cit., 83 et seq.

57 Law 133(1) /2004.

decision on the European arrest warrant are in conflict with the provisions of the Constitution. With this reasoning, the Court concludes, even though not explicitly, that framework decisions may not be considered superior to the Constitution."⁵⁸

Following the decision of the Supreme Court and taking into account the consequences this entails for the fulfillment of the obligations of the Republic of Cyprus under the Treaty on European Union, the Government has decided to proceed with the submission to the House of Representatives of a proposal for the amendment of the Constitution.

In the meantime and until the Constitution was amended, the Cypriot competent authorities were not be in a position to execute any European arrest warrants issued by the competent authorities of other Member states, against Cypriot nationals. This means that the international law instruments (ECE 1957, European Convention for the Fight against Terrorism of 1997 and the Dublin and Brussels Convention) were still applied until the 5th Amendment was adopted on 27 June 2006,⁵⁹ which confers precedence to European Union legislation over provisions in Cyprus Constitution. According to the basic provision inserted as Article 1A of the Constitution:

"No constitutional provision shall be construed as invalidating laws enacted, acts resolved or measures taken by the Republic, which become necessary as a result of the obligations undertaken by Cyprus as a European Union member state, nor shall they hinder from Regulations, Directives or other acts or binding legislative measures enacted by the European Union or European Communities or their institutional organs or competent authorities on the basis of the founding Treaties of the European Union or the European Communities , from producing legal effect in the Republic."

Art 1A in combined reading with art 179⁶⁰ acknowledges the supremacy of EU law over the domestic provisions, be they constitutional or derivative. More precisely, the precedence of EU provisions of either primary or secondary nature over the derivative Cypriot law is contemplated. Even when discussing the amendment of art 11(2)⁶¹ no distinction was made between EC and EU law.⁶²

Art 11(2) f now reads as follows:

"No person shall be deprived of his liberty save when and as provided by law in the following cases: ...(f) ... arrest or detention of a citizen of the Republic for extradition or surrender purposes, save that the following provisions are respected: (i) The arrest or detention of a citizen of the Republic for extradition purposes on the basis of a European arrest warrant is possible only with respect to facts that postdated or acts that were performed after the date of the Republic's accession to the European Union".

58 http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Cyprus_Constitutional_Court.pdf.

59 Law 127(I)/2006.

60 Art 179 "No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution or any obligation imposed on the Republic as a result of its participation as Member State of the European Union".

61 Alexandros Tsadiras, Case Law Cyprus Supreme Court, CMLR (2007), 44, 1515-1528 (1527). Tsadiras writes of the "depillarisation" in the arguments of the SC as well as Cypriot Parliament.

62 Ibid. 1526.

This amendment makes it now possible that Cypriot nationals are extradited following an EAW. Besides the delayed amendment a further critique is indispensable: the possibility of extraditing Cypriots is restricted to offences committed after Cyprus' accession which is in blatant violation of new MS's obligations.

The Case of Belgium

In answer to the preliminary reference of the Belgium Cour d'arbitrage⁶³ the ECJ ruled for the first time on the FD-EAW.⁶⁴ As opposed to the doubts of the NGO arguing that the issue should have been settled by a Convention instead of a FD the ECJ held, that the EAW could have been governed by a Convention as per article 34 (2)(d), but at the same time it stated that the Council enjoys discretion to decide upon the appropriate legal instrument, and confirmed that the adoption of this third pillar legal act was in conformity with art 34(2) b EU. With regard to the second set of questions alleging the violation of the principle of legality the ECJ held that the FD does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract. Although art 2 (2) FD-EAW dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State. In response to the third argument concerning the EAW alleged violation to the principles of equality and non-discrimination, owing to the unjustified differentiation between the offences listed under article 2 (2) providing for the abolition of double criminality requirement on one hand, and all the other crimes where surrender is conditional on the executing Member State's recognition of the criminal liability on which the arrest warrant is based, on the other hand, the ECJ justified the rationale behind the differentiation by the principle of mutual recognition and the high degree of trust and solidarity between the MS.

IV. THE EUROPEAN DIMENSION OF THE CONSTITUTIONAL DECISIONS

Since the FD on the EAW is a third pillar instrument the jurisdiction of the ECJ is first dependent on MS's explicit acceptance and second, its scope is limited as compared to the one within the supranational first pillar. Even before the ECJ ruled on the effect and consistent interpretation of a FD in *Pupino* some laws implementing the FD on the EAW were constitutionally challenged.

63 The first question related to the conformity of the Framework Decision on the European arrest warrant with Article 34 of the TEU, which says that Framework Decision may be adopted for the purpose of approximation of the laws and regulations of the Member States.

The second one related to the conformity of the partial derogation of the dual criminality requirement with Article 6 of the TEU, and more specifically with general principles of equality and non-discrimination.

64 ECJ 3 May 2007, case C-303/05, *Advocaten voor de Wereld*, ECR (2007) I-3633.

In the past, rarely and few⁶⁵ Constitutional Courts sought the judicial dialogue with the ECJ. Observing the case-law of the "European Constitutional Court" (and a good number of arguments can be brought forward to call it like this) over the years, one can not deny its impressive integrative power. Mainly preliminary references made European law look like it is today. This procedure is the expression of cooperation in the multi-level European system. Thus, domestic judges being European judges at the same time contribute to this development. This judicial dialogue is not characterised by hierarchical thinking but by mutual inspiration and it intends to contribute to an emerging European legal culture leaving behind statism and interpretative tools confined to the nation-state.

The Belgium Cour d'arbitrage encouraged by an NGO was the first to seek interpretative help regarding the FD on the EAW from the ECJ under art 35 EU. The reference challenged the validity of the FD and alleged the violation of the principle of legality, equality and non-discrimination by abolishing the dual criminality requirement in art 2(2) FD on the EAW. From a European perspective this reference attacked even more than the core of the FD touching upon substantive and procedural grounds. The ECJ taking account of the ongoing constitutional debate in the MS upheld the FD, explicitly referred to the solemnly declared Fundamental Rights' Charter and to the mutual trust being indispensable for and third pillar action justifies dispensing with the verification of double criminality.

It is interesting to note that the Constitutional Courts of the new Member States of Poland and the Czech Republic as well as the Supreme Court of Cyprus exercised a kind of "de-pillarisation" in their legal reasoning by highlighting in this context the supremacy of EU(!) law,⁶⁶ thus proving – consciously or unconsciously – their EU-friendliness.

"The same reasons that led the Court in *Costa v ENEL* to proclaim the primacy of EC law are easily transposed to the EU legal order. The EU is similarly established for an indefinite period, and provided with its own organs (actually the same organs as the EC), and, in a functional sense, legal personality.

Furthermore, the Union has practical competences, transferred to it by the Member States, allowing the Union to do such diverse things as adopting a common definition of terrorism, imposing sanctions against third states, helping out victims of crime and sending troops and policemen on peacekeeping missions across the Globe after concluding international treaties solely in the name of the Union. As a corollary, it can thus be argued that in those areas the sovereignty of the Member States has been limited. From there it does not take much imagination to submit that the Member States have thus created a legal order which is binding upon them, even if no enforcement mechanism similar to Arts 226 to 228 TEC is available. Moreover, in light of the duty to abstain laid down in Art. 11(2) TEU and the presence of the preliminary

65 The Austrian did so three times, the Lithuanian and the Italian once.

66 The ECJ has not yet ruled on the supremacy of the third pillar. The following elements justified the supremacy of EC law in *Costa/ENEL*: Community has its own institutions (now Art. 7 EC), its own personality, its own legal capacity and capacity of representation on the international plane (Art. 281, 282, 291 and 300 EC) and real powers stemming from a limitation of sovereignty or transfer of powers from the States to the Community (Art. 5 EC and the relevant EC Treaty provisions).

reference procedure in Art. 35 TEU one would be hard pressed to deny that the drafters of the Treaty shared the concern that the executive force of EU law 'cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty' ".⁶⁷

However, when severe constitutional conflicts arise we witnessed in the past that the question as to who is the final arbiter does not bring satisfying solutions in a system where constitutional, international and supranational rules are intertwined. Cooperative constitutionalism⁶⁸ can bring constructive and viable solutions and find "harmony in diversity".

Poland and Cyprus annulled the implementing rules conflicting with their constitution. Poland postponed the effect of declaring the rules unconstitutional and asked ordinary courts to rule in compliance with European obligations even if this infringes the constitutional right of Polish citizens not to be extradited assuming that the legislator would repair the constitutional defect within 18 months despite of forthcoming elections. Cyprus violated its duty to loyally cooperate in time "It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, (...) were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions."⁶⁹. So did Germany, where the Constitutional Court underlines the intergovernmental character of the third pillar, openly distrusts the legal systems of the other Member States and declared void the implementing act in its entirety, although only parts of it were challenged (non-implementation of art 4 (7) FD,⁷⁰ missing judicial review and containing retroactive effects).

As opposed to that the Czech Constitutional Court emphasised on the mutual trust among the Member States (and referred to respective judgements of the ECJ para 86) sharing common values and human right standards (this can be challenged however i.a. considering the number of convictions of MS by Strasbourg, further reasons are given in the dissenting opinion by Judge Wagnerová), focused on the Czech Republic's obligation to fulfill international obligations (art 1(2) of the constitution) and to loyally cooperate according art 10 EC, proved openness with regard to other constitutions (para 74, 75), the Polish CC (para 81) and academic writing (para 88).

Poland and Cyprus admitted the impossibility of a consistent interpretation of the ban of extraditing own nationals (when Poland ruled on that question *Pupino*⁷¹ has not even been delivered yet). Komárek criticises that Poland missed

67 Koen Lenearts, Tim Corthaut, Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law (2006) 31 *European Law Review* 3, 287.

68 András Sajó, Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy (2004) 2 *Zeitschrift für Staats- und Europawissenschaften* 3, 351.

69 *Pupino*, para 42.

70 The Czech legislator also renounced on implementing another optional refusal ground with regard to offences committed on Czech soil (art 4 (7) FD on the EAW).

71 One must bear in mind that consistent interpretation can only refer to criminal procedure and not to substantive criminal law. See also Opinion of AG Kokott in *Pupino* para 42.

its chance of interpreting the ban in conformity with EU law since art 31(3) of the Polish Constitution provides for grounds limiting the scope of the ban in order to protect public security and public order.⁷² Yet, the Constitutional Tribunal successfully escaped an open constitutional conflict and sets an outstanding example as to how to reconcile conflicting situations and simultaneously protect the coherence of the European legal order.

The Czech CC found a European way of interpretation and avoided any constitutional conflict by rewriting the constitution,⁷³ arguing with the inherent dynamism of legal concepts (the responsibility that necessarily came along with the rights of European citizens and modified the constitutional ban, the contemporary standard of human rights and shared values) and with the fact that the principle of legal certainty suffices for Czech citizens and lawful residents to expect trial in the Czech Republic for offenses committed on its territory. *Pollicino*⁷⁴ praises the Czech CC for its "acceptance of the idea of constitutional pluralism as a paramount parameter for constitutional conflicts settlement" as to substantive law on the one hand, and as to methodology and procedural law for its application of a "dialogic and communicative theory of inter-constitutional law" on the other.

Contrary to what was expected or feared from enlargement sceptics the new MS, thanks to their constitutional judges, prove to be truly European, getting inspiration from their colleagues elsewhere and willing to enter into comparative arguments. The Polish Tribunal referred to constitutional amendments and practise in other MS and took account of the impact of its decision on a European level by emphasising on the importance of realising an Area of Freedom, Security and Justice and thus intensified cooperation in criminal matters. But then, it did neither recall ECJ decisions, nor could it consider a preliminary reference since Poland did not opt to submit to the ECJ's jurisdiction under the third pillar.

Reference to *Pupino* was made by the Czech CC which took into consideration a reference but then renounced considering that the case could be resolved by mere interpretation.

Karlsruhe, traditionally self-referential, fully neglected the *Pupino* judgement despite the fact that it had been delivered recently before its judgement and considered the German Constitution as the only standard for measuring third pillar instruments. Additionally, its decision provoked Spanish Courts to henceforth treat requests for surrender from the German side as conventional ones, thus multiplying the non-compliance factor. In the past the jurisprudence of the German Constitutional Court served as an orientation for many, especially

72 Jan Komárek, European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles", CMLR 44 (2007) 9-40 (18).

73 The CC stated that the implementation of the FD is not unconstitutional, however an individual EAW might be, but a "hypothetical and unlikely" situation does not provide ground for annulment.

74 Oreste Pollicino, European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems 9/10 (2008) 1314-1355 (1348).

some of the new Member States.⁷⁵ But in terms of European constitutionalism, Germany can still learn from the new Member States.

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75 The Czech CC when ruling on the constitutionality of the challenged provisions indirectly even questioned some statements of the German CC.

Philipp Cede

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 1964¹ clarified the Convention's formal status as constitutional law.² This status has a twofold implication. First, while initially having taken the view that the ECHR was not more than a mere programmatic statement,³ the Austrian Constitutional Court soon came to accept that the Convention grants individual, enforceable rights.⁴ 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".⁵ 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

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 government⁶ 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 Court⁷ and the Constitutional Court.⁸ The Constitution makes a distinction between the ordinary court system ("Gerichtsbareit", 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

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 matter⁹ 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.¹⁰ 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,¹¹ the Constitutional Court accepted¹² to

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.¹³

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.¹⁴

Additionally, despite its wording referring to a constitutional provision (Article 90 of the Federal Constitutional Law) exclusively dealing with ordinary courts,¹⁵ 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.¹⁶ 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,¹⁷ the Austrian Constitutional Court initially interpreted the term as primarily relating to private

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.¹⁸ This kind of narrow view is confirmed by an early judgement¹⁹ 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,²⁰ matters of income taxation²¹ and customs duties²² or other taxes (e.g. drink taxes,²³ wage taxes²⁴), 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 examination²⁵ (failing which the drivers licence might be withdrawn) or the issuing of residence permits or residence prohibitions²⁶ 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,²⁷ on an order of suspension of construction,²⁸ the issuing of demolition orders and similar

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.

measures²⁹ 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 servants³⁰ 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*³¹ 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.³² 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.³³

- According to an earlier decision of the Constitutional Court,³⁴ 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

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.³⁵ 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 1970.³⁶ 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*³⁷ 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,³⁸ 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.³⁹

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

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 Carinthia⁴⁰ and Salzburg⁴¹ 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,⁴² Upper Austria⁴³ and Styria,⁴⁴ 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.⁴⁵

The land transfer commission of Tyrol⁴⁶ 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,⁴⁷ 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

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 office⁴⁸ of the board members (making them recallable at any time), the boards did not satisfy the demands of independence resulting from Article 6 ECHR.⁴⁹

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*⁵⁰ (concerning real proerty transaction permits), *König v Germany*⁵¹ (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)⁵² and the case *Benthem v The Netherlands*⁵³ (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

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.⁵⁴

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,⁵⁵
- administrative rulings on compensation for damage caused by hunting or game,⁵⁶
- administrative rulings on compensation for expropriation,⁵⁷
- administrative rulings on compensation for the classification of land as area under wildlife protection,⁵⁸
- administrative rulings on rents⁵⁹ or operating costs,⁶⁰

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,⁶¹
- land transfer permits,⁶²
- 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.⁶³ 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.⁶⁴

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),⁶⁵ 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

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.⁶⁶

3.3. The introduction of the Independent Administrative Tribunals⁶⁷

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,⁶⁸ 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

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,⁶⁹ 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.⁷⁰

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.⁷¹ 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.⁷² The tribunal's members must be independent from instructions,⁷³ their term of office must be defined by law,⁷⁴ they can only be recalled for reasons explicitly specified

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;⁷⁵ 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.⁷⁶

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.⁷⁷

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

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.⁷⁸ 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.⁷⁹

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.⁸⁰

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.⁸¹

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.⁸²

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.⁸³

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.⁸⁴ 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.⁸⁵ 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.⁸⁶ 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 educated⁸⁷ or has been informed of his rights); otherwise an implicit waiver can be deemed where the appeal was lodged by counsel.⁸⁸ 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.⁸⁹

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

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.⁹⁰

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.⁹¹

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.⁹²

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.

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Anke Sembacher

No public hearing - a violation of Art. 6 para. 1 ECHR

Austrian Constitutional Court
Judgement from June 12th, 2006
B 260/05, VfSlg. 17.855

Facts of the case

On 18 March 2004, the complainant bought the plot of land, registered as N° 998 of the cadaster community *Dietmanns* N° 21005, comprising 0,8738 hectares. With its notification of 21 June 2004, the Real Property Transactions Authority, responsible for *Waidhofen an der Thaya*, denied its approval for the transaction. The subsequent appeal against this notification was lodged with the Lower Austrian Regional Real Property Transactions Commission, including a formally expressed request to hold a public hearing in this case. The appeal was eventually dismissed, whereby this decision was based on the argument that the primary goal of the Lower Austrian Real Property Transactions law was not – as proposed by the complainant – the preservation or creation of viable farms, but instead their consolidation. In the eyes of the commission, aspects of consolidation, as found in the other interested buyer, prevailed over the complainant's arguments. No public hearing was held.

The complainant challenged this decision on the basis of Art. 144 B-VG, claiming a violation of her constitutionally guaranteed rights to equal treatment of all Austrian citizens, to freedom of land acquisition, to inviolability of property, to a fair trial before a lawful judge, to a public hearing before an impartial tribunal as put forth in Art. 6 para. 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) as well as the application of an unconstitutional law.

When reasoning the asserted violation of Art. 6 para. 1 ECHR, the complainant argued that against her explicit request and given the fact that next to a legal question also questions concerning the facts had been at issue, no public hearing had been held.

The Lower Austrian Regional Real Property Transactions Commission opposed these arguments in its refutation and put forth that it was not within the discretion of the commission to hold an oral and public hearing, asserting that there was no legal basis for such a hearing before the commission. Moreover, the commission argued, the facts of the case were clear, even when considering the complainant's appeal, and the sole question that remained for the case was of purely legal nature.

Relevant Provisions

Art. 6 ECHR – Right to a fair trial¹

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
..."

The Ruling of the Austrian Constitutional Court

The Austrian Constitutional Court found it to be beyond question that proceedings and decisions on the approval of land transfer fall within the core of "civil rights" (VfSlg. 16.402/2001).

Next, it put forth that according to the jurisprudence of the European Court of Human Rights (ECtHR) in *Jacobsson vs. Sweden* (ECtHR 19/2/1998, ÖJZ 1998, 935; similar in arguments, but finding a violation of Art. 6 ECHR: *Alge vs. Austria*, ECtHR 22/1/2004, ÖJZ 2004, 477) any proceeding subject to the requirements of Art. 6 ECHR before a court deciding as first and last instance at the same time contains a right to a public hearing, if not exceptional circumstances dispensed the court from doing so². The ruling then gives examples for such exceptional circumstances: clear and undisputed facts, sole existence of a legal question of simple nature, unambiguous waiver of the right to a public hearing, no question of public interest at discussion.

The Court then draws attention to the fact that the complainant had explicitly requested a public hearing – a request that the commission concerned had countered with the assertion that a public hearing would not be foreseen by the applicable law. Subsequently, the Austrian Constitutional Court clarifies that while the Lower Austrian Real Property Transactions Act of 1989 might not contain any provisions regulating the question of public hearings, Art. II para. 2 Nr. 17 of the EGVG (Introductory Law to the Acts on Administrative Procedure) provides for the application of the AVG, the Administrative Procedure Act, on proceedings

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- 1 The European Convention on Human Rights and Fundamental Freedoms was signed by Austria on 13 December 1957 and subsequently ratified on 3 September 1958, the same day it entered into force. With the Constitutional Law published in Federal Law Gazette 1964/59, the ECHR retroactively became part of Austrian constitutional law, making Austria to this point the only member state according this status to the Convention (see also Christoph Grabenwarter, *Europäische Menschenrechtskonvention*, 3rd edition [2008] p. 16.)
 - 2 In *Fischer vs. Austria* (ECtHR 26 April 1995, Application no. 16922/90) found that Austria had violated Art. 6 ECHR by not holding a public hearing in the case of a businessman who had requested such hearing and whose case posed not only legal questions, but also important factual questions (para. 44).

concerning land transfer, thus serving as a basis for public hearings in § 39 para. 2 and § 40 et seq. of the Act.

Until the ruling at hand, the Austrian Constitutional Court held that the AVG did call for hearing public to the parties, but not to the general public (VfSlg. 6808/1972). However, it now also finds that nothing in the AVG prevents such a public hearing accessible for the general public (in this line: VfSlg. 16.894/2003).

Next the Austrian Constitutional Court dealt with the question whether the Lower Austrian Regional Real Property Transactions Commission's assumption of a clear set of facts in the present case had been legitimate or not. It was not. The Commission assumed the complainant had been a farmer within the definition of the Lower Austrian Real Property Transactions Act and that the sales contract had to be denied approval as the prognosis for the second interested buyer was better for the consolidation of a capable farming community as opposed to the preservation or consolidation of farm land. With this, the Court found, the Commission had already anticipated a possible result of a public hearing, as a hearing should serve to collect evidence and to discuss this evidence with the parties. At the time of the decision of the Commission, the facts of the case could not have been considered clear. Moreover, no exceptional circumstances were identified which could justify the omission of a public hearing.

For these reasons, the Austrian Constitutional Court found that the Lower Austrian Regional Real Property Transactions Commission had violated the complainant's right to a fair trial pursuant to Art. 6 para. 1 ECHR by not holding a public hearing.

Conclusion

The Austrian Constitutional Court is quite clear when it comes to the point of applying the guarantees of Art. 6 para. 1 ECHR to proceedings concerning the transfer of real property, a field of law keeping Austrian and European authorities and tribunals constantly busy. As Art. 6 para. 1 ECtHR ties its guarantees to the existence of "civil rights" in the dispute, it is now recognized, bearing the longstanding jurisprudence in mind, that the concept of "civil rights" comprises real property transfer law. However, in the future it will be necessary to take a second, if not closer, look at the question whether "civil rights" should not also cover legal matters such as asylum law or other areas, which up to now are excluded³ from the applicability of Art. 6 ECHR.

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3 The ECtHR has held in the past that asylum law, even though it might have enormous implications on the family and private life of an applicant as well as on his or her employment, does not fall under the scope of Art. 6 para. 1 ECHR.

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Katharina Egyed

No doubts about the appearance of independence and impartiality of the Carinthian Independent Administrative Panel

Austrian Constitutional Court
Judgement of June 20th, 2008
B 61/07

The Circumstances of the case

On 16th November 2005 the Völkermarkt District Administrative Authority (Bezirkshauptmannschaft) convicted the applicant under the Motor Vehicles Act ("Kraftfahrgesetz"). The appeal, which the applicant filed against this decision with the Carinthian Independent Administrative Panel, was dismissed on the merits on 20th November 2006. The applicant filed a complaint with the Austrian Constitutional Court. He alleged violations of his right to a fair trial as well as his right to be judged by the competent authority. In his opinion, the member of the Carinthian Independent Administrative Panel, dealing with his case, did not fulfill the requirements established in Art 6 § 1 ECHR. The applicant had doubts as to the "appearance of impartiality".

Relevant Constitutional Law

Art 6 § 1 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), which has the rank of an Austrian federal constitutional law, reads:

"Article 6 – Right to a fair trial

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Art 129b Austrian Federal Constitution ("Bundes-Verfassungsgesetz", hereinafter B-VG) reads:

"Art 129b (1) The independent administrative tribunals consist of a Chairman, a Deputy Chairman, and the requisite number of other members. The Land Government appoints members for at least six years. No fewer than a quarter of the members have to be drawn from professional appointments in the Federation.

(2) The members of the independent administrative tribunals are not bound by any instructions in the performance of the tasks referred to them in accordance with Arts. 129a and 129b. Business shall be allocated in advance among members of the independent administrative tribunals for the period regulated by Land legislation; a matter devolving upon a member of an independent administrative tribunal in accordance with this allocation may only in case of his being prevented from the discharge of his responsibilities be removed from him at the ruling of the Chairman.

(3) Members of the independent administrative tribunals may before expiry of the period of appointment be removed from office only in the legally specified instances and only at the resolution of the independent administrative tribunal.

..."

The Court's Assessment

The legislature, who established the Independent Administrative Panels in 1988, wanted to create authorities which fulfilled the requirements of independent and impartial tribunals established in Art 5 and 6 ECHR.

According to the standing jurisdiction of the Constitutional Court, the Independent Administrative Panels, which could be regarded as "tribunals" within the meaning of Art 6 § 1 ECHR, shall not cast doubts about their independence and impartiality. The deciding factor is not just the personal impartiality, but the "appearance of impartiality" (eg VfSlg. 11.131/1986, 15.439/1999, 15.507/1999, 16.959/2003, 17.990/2006).

The Constitutional Court referred to the judgement of the European Court of Human Rights in the case of *Belilos v Switzerland* (Appl no 10328/83), ECHR 29. April 1988, in which the European Court of Human Rights held:

"Nonetheless, a number of considerations relating to the functions exercised and to internal organisation are relevant too; even appearances may be important ... In Lausanne the member of the Police Board is a senior civil servant who is liable to return to other departmental duties. The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues. A situation of this kind may undermine the confidence which must be inspired by the courts in a democratic society.

In its earlier jurisdiction, the Constitutional Court found – in consequence of the jurisdiction of the European Court of Human Rights – a violation of Art 6 § 1 ECHR if the appointment of the member was limited and if there were special circumstances that cast doubts about the appearance of independence and impartiality of the Independent Administrative Panel (eg VfSlg. 17.990/2006).

In the present case, the Constitutional Court could not find a violation of Art 6 § 1 ECHR.

The members of the Carinthian Independent Administrative Panel are not bound by any instructions in the exercise of their functions (see Art 129b § 2 B-VG, Art 5 § 1 Carinthian Act on the Independent Administrative Panel ["Kärntner Verwaltungssenatsgesetz", hereinafter K-UVSG]); they are appointed for a term of six years and can only be displaced earlier for the reasons provided in Art 5 § 3 and 4 K-UVSG.

Due to the fact that the members of the Carinthian Independent Administrative Panel are not bound by any instructions, special reasons have to occur to cast doubts about their independence and impartiality.

The member of the Carinthian Independent Administrative Panel, which decided the present case, was appointed for a term of six years on 1st May 2003. Prior to his appointment he worked for the Provincial Government's Office at the department of environmental legal matters ("Amt der Kärntner Landesregierung, Abteilung für Rechtliche Angelegenheiten des Naturschutzes").

The District Administrative Authorities are subordinated to the Provincial Governor, who is the head of the Provincial Government's Office. They decide matters of the indirect federal as well as the land's administration. For that reason, the Völkermarkt District Administrative Authority, which convicted the applicant, was bound by instructions of the Carinthian Provincial Governor if he decided on violations of the Motor Vehicles Act.

The member of the Carinthian Independent Administrative Panel which dealt with the present case did not work for the Völkermarkt District Administrative Authority prior to his appointment. His prior work for the Provincial Government's Office does not cast doubts as to his independence and impartiality. Furthermore, the member of the Carinthian Independent Administrative Panel decided on an appeal about the Motor Vehicles Act, a matter on which he did not decide prior to his appointment.

Because of these circumstances, the Constitutional Court had no doubts as to the appearance of independence and impartiality of the member of the Carinthian Independent Administrative Panel. The court held that there was no violation of Art 6 § 1 ECHR and that the decision did not violate any other fundamental right relied on the applicant. Consequently the Constitutional Court dismissed the application.

Note

The present case, in which the Constitutional Court did not find a violation of Art 6 § 1 ECHR, is in accord with his earlier jurisdiction (eg VfSlg. 11.131/1986, 15.439/1999, 15.507/1999, 16.959/2003, 17.990/2006). In the court's opinion, the deciding factor was that the member of the Carinthian Independent Administrative Panel, which dealt with the present case, did not cast doubts as to the appearance of independence and impartiality because of his prior work for the Provincial Government's Office.

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■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Johanna Fischerlehner

Administrative penal proceeding and remedy against administrative delay

Austrian Constitutional Court
Judgement of November 6th, 2008
G 86, 87/08

Facts of the case

The Austrian Constitutional Court had to decide on two complaints against rulings of the Independent Administrative Tribunal (Unabhängiger Verwaltungssenat [der Länder]). The first complaint was against the decision of the Independent Administrative Tribunal of Lower Austria (B 1323/07) concerning an offence of § 3 para. 1 in conjunction with § 28 para. 1 number 1 Law on the employment of foreigners ("Ausländerbeschäftigungsgesetz"). The second one was against the ruling of the Independent Administrative Tribunal of Upper Austria concerning an offence of the same ordinance (B 1817/07). Both applicants claimed (among others) a violation of their right to a fair proceeding within a reasonable time under Article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) as a consequence the Administrative Penal proceeding period that was too long.

During the pendant procedure, the Constitutional Court raised concern that the word order "in which only the defendant has the right to appeal" in § 51 para. 7 Administrative Penal Act 1991¹ ("Verwaltungsstrafgesetz 1991", hereinafter VStG) might be unconstitutional and instituted a proceeding to investigate this word order ex officio.

Relevant provisions

§ 51 para. 7 VStG reads:

"Appeal

§ 51. (1) – (6) ...

(7) After expiry of a 15 months' period after an appeal has been served against a fine in a proceeding in which only the defendant has the right to

1 Federal Law Gazette No. 51/1991 as amended on Federal Law Gazette No. 158/1998.

appeal, the fine shall become ineffective by law; the proceeding shall be dismissed. The period of duration of a proceeding in the Constitutional Court, the Administrative Court or the Court of the European Communities shall not be included in this term."

§ 31 para. 3 VStG reads:

"Expiry by the statute of limitation

§ 31. (1) – (2) ...

(3) After expiry of a three years' period from the date mentioned in para 2 no more sentence may be imposed. A sentence must no more be enforced after the expiry of three years from the date it has become final. The period of duration of a proceeding in the Constitutional Court, the Administrative Court or the Court of the European Communities as well as periods during which the enforcement of the sentence has not been admissible, suspended, delayed or interrupted, shall not be included for purposes of counting the expiry for limitation of time."

§ 52b VStG reads:

"Obligation to decide

§ 52b. § 73 AVG (General Administrative Procedure Act) shall be applied only in matters of private prosecution and penal tax law of the Laender. The independent administrative panel of appeal of the Land where the subordinate authority is located has territorial jurisdiction."

Article 132 Federal Constitutional Law ("Bundes-Verfassungsgesetz"; hereinafter B-VG) reads:

"Art. 132. Complaint for breach of the onus to take a decision by administrative authorities including the independent administrative tribunals can be brought by the party who in administrative proceedings was entitled to claim fulfilment of that onus of decision. A complaint for breach of the onus to take a decision in administrative penal cases is inadmissible; this does not apply to private suits and to fiscal penal cases ."

Article 73 General Administrative Procedure Act („Allgemeines Verwaltungsverfahrensgesetz"; hereinafter AVG) reads:

"Obligation to decide

§ 73. (1) Unless provided differently in the administrative rules and regulations, the authorities are obligated to issue a ruling on submissions of parties (§ 8) and appeals without undue delay, however at the latest within six months after receipt. Provided that the legal provisions applicable result in different terms for the decision of combined proceedings (§ 39 para 2a), the term with the latest expiry date shall apply.

(2) In case the ruling is not issued within the term allowed for the decision, the party may request in writing that the higher authority having jurisdiction in the matter shall be in charge to take the decision; however, if an appeal against the ruling would be permitted to be filed with the independent administrative panel of appeals, the latter one shall be in charge of the decision (request for

transfer of jurisdiction). The request of transfer of jurisdiction shall be filed with the higher authority (the independent administrative panel of appeal). It shall be rejected if the delay is not mainly due to a fault of the authority.

(3) The deadline for the decision of the higher authority (the independent administrative panel of appeal) starts on the day on which the request for the transfer of jurisdiction is received."

Article 6 para. 1 ECHR reads:

"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Article 13 ECHR reads:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Ruling of the Constitutional Court

Due to § 51 para. 7 VStG the fine shall become ineffective by law after expiry of a 15 months' period after an appeal has been served against a fine in a proceeding in which only the defendant has the right to appeal. After this period of time, the decision becomes ineffective by law and the Administrative penal proceeding has to be dismissed².

§ 51 para. 5 VStG as amended on Federal Law Gazette No. 299/1984 – the provision in subject before – excluded just private prosecution. The reason for excluding private prosecution was that in those cases the defendant could take a complaint for breach of the onus to take a decision by the Administrative Court (Article 132 B-VG). Whereafter in all other proceedings the fine had become ineffective by law after expiry of a 15 months' period after an appeal has been served against a fine.

The Austrian Constitutional Court qualified the exclusion of private prosecution as constitutional, since the defendant has the possibility to take a request for transfer jurisdiction (§ 52b VStG in conjunction with § 73 AVG) and – if necessary – a complaint for breach of the onus to take a decision by the Administrative Court (Article 132 B-VG). In all other administrative penal cases a request for transfer jurisdiction and a complaint of breach of the onus to take a decision are inadmissible (§ 52b VStG; Article 132 B-VG). In those cases, only § 31 para. 3 VStG extends cover against administrative's delay. According to § 31

2 See *Walter/Thienel*, *Verwaltungsverfahrensgesetze II*² (2000) § 51 VStG para. 29 ff.

para. 3 VStG, after expiry of a two years' period from the date of termination of the offence, or when the punishable behaviour ended, no more sentences may be imposed. As a result the Constitutional Court questions, if § 51 para. 7 VStG is in accordance with Article 13 in conjunction with Article 6 ECHR.

From the Constitutional Court's point of view, the right to an effective remedy requires legal remedies to expedite the proceedings or to control the proceedings consecutively³. The Constitutional Court agreed that a statutory maximum period of time such as § 51 para. 7 VStG would generally fulfill the requirements of Article 13 ECHR⁴. But as the period of fifteen months within which the authorities have to decide on appeals did apply just in cases, in which only the defendant has the right to appeal, § 51 para. 7 VStG did not ensure the standard of "effectiveness" of the purposes of Article 13 ECHR.

The federal government raised the objection that § 31 para. 3 VStG would guarantee an effective remedy against delays caused by the domestic authorities, since after an expiry of a three year period no more sentences might be imposed. If the proceeding exceeds the reasonable time requirement under Article 6 ECHR, the violation has to be considered in mitigation (§ 19 para. 2 VStG in conjunction with § 34 para. 2 VStG).⁵ Otherwise, the Constitutional Court will reverse the decision.⁶ The Constitutional Court did not agree with the federal government. Firstly § 31 para. 3 VStG could not prevent a violation under Article 6 ECHR without an effective remedy to expedite the proceeding required under Article 13 ECHR and further § 31 para. 3 VStG did not ensure that the written version of the appellate court's decision is submitted to the applicant within the period of three years.⁷

At least the Constitutional Court pointed out that the possibility of mitigation of punishment itself won't be up to standard under Article 13 ECHR. On the one hand, mitigation of a sentence assumes that authorities have to admit a violation under Article 6 ECHR; on the other hand, in cases of minimum sentence, a too long period of proceeding cannot be taken into account by determination of the penalty. Apart from that, the defendant cannot sue out of a decision in which the violation under Article 6 ECHR is expressed.

Therefore the Constitutional Court declared the word order „in which only the defendant has the right to appeal" in § 51 para. 7 VStG with regard to Article 13 in conjunction with Article 6 ECHR as unconstitutional and repealed this word order.

Assessment

In this jurisdiction, the Constitutional Court declares that the right to an effective remedy (Article 13 in conjunction with Article 6 ECHR) requires legal

3 Cp. *Kudla v Poland* (App no 30.210/96) ECHR 26 October 2000; *Scordino v Italy* (App no 36.813/97) ECHR 29 March 2006.

4 *Jancikova v Austria* (App no 56.483/00) ECHR 7 April 2005.

5 VwGH 29.1.2007, 2006/03/0155.

6 VfSlg. 17.854/2006.

7 *Jancikova v Austria* (App no 56.483/00) ECHR 7 April 2005.

remedies to expedite the proceedings or to control the proceedings consecutively. A maximum period of time – such as regularized in § 51 para. 7 VStG – can generally provide an effective remedy against a too long period of proceeding. But as this kind of remedy cannot be called upon as soon as the Administrative penal proceeding includes another person in addition to the defendant and (for example in contrast to private prosecution) a request for transfer jurisdiction (§ 73 AVG) or a complaint for breach of the onus to take a decision by the Administrative Court (Article 132 B-VG) is inadmissible, § 51 para 7 VStG does not offer sufficient legal protection.

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■ BOOK REVIEW

Caroline Kerschbaumer

**Antje du Bois-Pedain:
Transitional Amnesty in South Africa,
Cambridge University Press, 2007,
ISBN 978-0-521-87829-6, 418 pp.**

The South African truth and reconciliation process has been studied widely and many publications have emerged since the completion of volumes 1 to 5 of the report of the Truth and Reconciliation Commission (TRC) in 1998 and after 2003 when volumes 6 and 7 also appeared. It is probably the best known such process since it was the first of this specific kind and is publicly often seen as a big success story. However, the book "Transitional Amnesty in South Africa" by Dr. Antje du Bois-Pedain takes a closer look and examines critically, in a detailed way and comprehensively, the method of granting amnesties to perpetrators who fully disclose the facts of their politically motivated deeds within the framework of South Africa's truth and reconciliation process. This is done in an interdisciplinary way, the most reasonable one when discussing an issue such as transitional justice.

Before reading this book, it is advisable to have knowledge about the South African political history of the past few decades. This is because the book directly starts with describing the amnesty scheme, including its preconditions and the effects of amnesties, the history of the TRC Act as well as its predecessors, and the interpretation of the respective provisions. It might be complicated at the beginning without having the respective background knowledge. Furthermore, du Bois-Pedain describes, on the basis of the decisions of the Cape High Court and the Constitutional Court on a famous case regarding five prominent apartheid victims, the constitutional challenge of the amnesty provisions. Also, some general remarks are made about the work of the Amnesty Committee including problems it faced and the issue of judicial review of amnesty decisions – a rare but interesting phenomenon. Finally, the problem of post-TRC prosecutions regarding persons who did not take part in the TRC process or whose applications were unsuccessful is highlighted.

In order to conduct an in-depth analysis of the practice of the Amnesty Committee, du Bois-Pedain based her study on all 1100 published amnesty decisions released by the Committee from 1996 until 2001. Other primary sources, such as the TRC Report and transcripts of amnesty hearings, are also used. The inclusion of all of these decisions makes the research outstanding and very useful. Although most decisions do not contain full reasoning – limited instead to a description of the conduct of the amnesty applicant, the statement that the applicant has fulfilled the amnesty requirements, and the specific offence for which amnesty is granted – the author found a methodological approach on

which defensible conclusions on the little available information could be made. She analysed the potentially relevant criteria for the success of an application for amnesty and measured the indicative value of the outcome of an application regarding these criteria. The considerable amount of identified detailed statistical data should be pointed out. Within these interesting findings one can find data regarding the political and organisational background of the applicants, the deeds for which amnesty was sought, the hierarchical status of the applicants within their organisations (it shows, for example, that the proportion of applications from commanding persons and leadership figures was very low), the high success rates of applications and similar statistics, numbers and explanations and reasons for them. This information is interesting for those who do thorough research on the topic. However, for others these parts are probably not the most exciting ones.

The following chapters thoroughly highlight the two main elements for receiving amnesty as laid down in the TRC Act: 1) the offence must be of a political nature, and 2) the applicant must comply with the condition of full disclosure.

The first important requirement to receive amnesty was that the applicant must have conducted an "act associated with a political objective". This political offence condition has been interpreted by the Committee widely. In a legal analysis, du Bois-Pedain explains two approaches of the precondition of political purpose – the subjective and the objective understanding – i.e. the consideration of the presence of this element from an *ex ante* or *ex post* perspective. She shows that the political mandate of the applicant was crucial for the Committee's assessment of his or her amnesty application and discusses elaborately the view of the Committee regarding the issue of orders, since it was far more complicated than simply assuming that acting on orders was conditional for receiving amnesty. The author furthermore shows that the Committee's view was a rather pragmatic one, focusing on the political offence condition without a moral evaluation of the applicant's conduct. This is based on the idea that a restrictive interpretation of the conditions for amnesty would not be productive for the whole transitional amnesty scheme, with the consequence that amnesty within the legal framework of the TRC Act does often not correlate with moral deservingness. The moral justification of this amnesty scheme is hence exclusively based on the willingness of full disclosure rather than the moral legitimacy of the deeds committed.

The Committee's understanding of the concept of full disclosure is discussed subsequently; its legitimacy, its important practical role (more than 40% of unsuccessful applications fail due to reasons which are related to information), its object and scope, and the Committee's principles when assessing testimony. Finally, possible reasons are offered for the fact that many applications do not comply with the full disclosure condition, respective of the temptation of applicants to lie. Regarding the question of what it means to make full disclosure, the author offers diverse views ranging from a reductionist one to a very wide view. The reductionist approach only includes disclosure of all relevant facts which are necessary for the Committee to decide whether an offence was politically motivated. The widest view argues that anything in the knowledge of the applicant, irrespective of the deeds he or she committed and which could be of help for the Committee in investigating the injustices of the past is part of full

disclosure, has to be said. Based on case studies, du Bois-Pedain shows that the Committee chose a middle way which starts at "the incident under consideration" (p. 152) but does not leave the applicant the option to split it into separate acts. Furthermore, it is made clear that full disclosure cannot be equalised with the full discovery of the truth, since full disclosure remains within the applicant's knowledge and memory. This shows the incompleteness of the truth which can be achieved in an amnesty process.

The book further deals with the aims of the amnesty process, which are: revealing the truth, empowering victims, and holding perpetrators accountable. When explaining these notions, the author also compares the normal criminal procedures regarding the achievement of these aims. Although du Bois-Pedain does not give the illusion that a disclosure based voluntary amnesty procedure does not have its gaps in achieving these aims, she finds that it does have several advantages which cannot be found in a criminal process. However, she does not stick to final statements that one way was better than another. This seems credible and comprehensible, since such an answer in general terms cannot be given. The reader therefore does not get indoctrinated by specific arguments, but is rather encouraged to form continuative thoughts for him or herself.

Starting with the assumptions that "full disclosure leads to the revelation of important facts..", "that these are the facts that victims care about and are satisfied with knowing, and that to be forced to disclose these facts publicly is in itself a mechanism by which individual accountability for serious human rights violations is ensured" (p. 174), the author shows that an amnesty process does not reveal "more and better truth" (p. 175) but that a lot of uncertainty, incompleteness and unreliability remain. She discusses the concept of truth, the Committee's procedural practice, limitations, and identifies possible dangers of these practices such as the use of accomplice or hearsay evidence. Keeping in mind the importance of truth-finding and its limits, du Bois-Pedain shows that the Committee does not have the claim to reveal the whole and real truth, but it confines itself to receiving what it understands under full disclosure by the applicants.

An extremely interesting and important part of the study is the issue of victim participation in amnesty proceedings. This is crucial since victims should play the central role in transitional justice processes which is unfortunately often not the case. Reconciliation has to start from a victim's point of view, if they themselves do not forgive the perpetrators, how should the general public forgive them? Du Bois-Pedain found a very fruitful way to approach this issue by introducing and analysing three disparate case studies. These cases very clearly show the different wishes of victims in direct confrontation with the perpetrator, as well as different perpetrator-victim dynamics and different stages of satisfaction in the outcome. In depicting some of the original testimonies of the perpetrators in the process, the author manages to bring forward the feelings of both perpetrators and victims and to show the enormous difficulties, but also the intensity of the reconciling aspects of such a process. This is important since such a big issue as reconciliation cannot be solved by discussing theoretically and objectively; to find a solution it is necessary to listen to the victims' voices and understand them and their requests.

Perpetrator accountability may be the most important objective of an amnesty process – this is argued at the beginning of the respective chapter, followed by an examination to which extent amnesty procedures can fulfil this aim. After explaining the notion of accountability, du Bois-Pedain discusses the advantages and disadvantages of the fact that in the amnesty process the applicants primarily have to avouch their actions as political acts, not as moral wrongs. Retributive and restorative justice theories are discussed and it is shown that the amnesty process does not completely fit into either of those theories. The author therefore suggests a new justice script for transitional societies, stating that politically motivated crime is wrong but through the participation in a reconciliation process perpetrators can redeem themselves. It is furthermore shown that an amnesty process does not ensure apology and forgiveness. However, these notions do influence the process, since explanations by the applicants that their deeds have not been personally motivated by malice can facilitate forgiveness even without the existence of definite apologies.

Du Bois-Pedain also discusses international law obligations to prosecute perpetrators of gross violations of human rights arising from humanitarian, international human rights, and international criminal law and their compatibility with amnesty schemes. She concludes with the statement that in a strictly legal sense, the amnesty scheme of South Africa is not incompatible with international law and leads to the establishment of a human rights culture and is committed to the rule of law.

Finally, the practical success of the conditional amnesty scheme is highlighted. After a phase of winning confidence, it managed to attract large numbers of applicants. The author states that conditional amnesty provides a legitimate and credible response to past injustices without being synonymous with prosecution and examines the practical feasibility, moral defensibility, and legal permissibility of this alternative. Besides a stable political situation and other factual requirements, the most interesting question is the moral one: Is conditional amnesty a morally preferable accountability mechanism compared with the trial-based approach? The major thought for the preferability of the amnesty scheme is based on the idea that a prosecutorial approach could lead to a wrong political message since political and criminal responsibility often do not coincide in such situations.

It seems that all important issues of the South African amnesty process are raised and critically discussed in this book. The changes from one chapter to the next are very comprehensible and follow a logical order. Due to the plenitude of detailed information, this research doubtlessly provides a helpful tool for a deeper understanding of the South African amnesty process. The lecture of this volume definitely leads to a comprehensive knowledge of how the amnesty process in South Africa worked and also more generally of the costs and benefits of such an approach.

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■ BOOK REVIEW

Tobias T. Molander

Jordan J. Paust, *Beyond the Law – The Bush Administration's Unlawful Responses in the "War" on Terror*, Cambridge University Press, 2007, ISBN 978-0-52171-120-3, xiv+311 pp.

Jordan J. Paust, a former Fulbright Professor at the University of Salzburg, takes a closer look at the Bush administration's so-dubbed "war on terrorism" in which the United States embarked after 9-11 and tries to expose violations of international and domestic law that occurred in this conduct. Not only does he intend to highlight alleged violations of law, but he also provides ample pieces of evidence to prove the authorization and acknowledgement of this "dirty war" by the President and his staff (166 out of 299 pages are dedicated to footnotes!). After a short introduction dealing with the general appreciation of the Bush administration concerning international law, Paust focuses on particular problematic areas, such as treatment and detention of prisoners, enemy status, judicial power concerning detainees, constraints on presidential power by the rule of law and the role of military commissions. Summarizing his deeply critical judgement of Mr. Bush's legacy, Paust counters the currently prevailing "unconstitutional and autocratic commander-above-the-law theory" unprecedented in US history by providing a basis of lawful responses to terrorism and highlighting the role of the judiciary in times of peril.

According to the author, a common plan to circumvent international law (especially customary humanitarian law as reflected in the 1949 Geneva Conventions) and deny protection to certain enemies captured – especially members of Al Qaeda and the Taliban – emerged early in the Afghan war against the Taliban regime in 2002. This concept, which in Paust's view stems from the idea that the President should stand above the law, forms a formidable contrast to the international and constitutional legal order. Regardless of the legal categorization of the conflict and the status of the enemy, customary laws of war provide a nonderogable minimum degree of protection to every person that is to be applied in every situation of conflict (especially Common Art 3 of the Geneva Conventions). In addition, human rights law continues to be applicable during times of conflict; many of those rights being peremptory and nonderogable even during times of emergency. All these provisions intend to ensure "humane treatment" of all persons at all times.

Despite the warnings of many people within and without the administration who pointed to the absolute applicability of the relevant norms, the US President and his staff intentionally embarked on their plan to circumvent the Geneva Conventions, the violation of which leads to criminal responsibility under domestic and international law.

Abu Ghraib, Guantanamo and secret detention centres around the world stand for the execution of the plan to avoid compliance with international law in practice. "Harsh interrogation tactics" such as hooding, stripping detainees naked, the use of dogs for interrogations, use of extreme cold and heat, "waterboarding", etc. were labelled by the ICRC (with regard to Guantanamo) as "an intentional system of cruel, unusual and degrading treatment and a form of torture" in 2004. However, instead of investigating complaints about ill-treatment and providing effective remedies for the detainees, "tough" forms of treatment continued and the given executive orders were not revoked.

Many of those subject to special interrogation techniques were also victims of forced disappearance, which is also prohibited by international law in absolute terms. It places the person concerned outside the protection of the law and makes monitoring of detention facilities by international bodies such as the ICRC and consular agents impossible. Such a system is further aggravated, when it is not possible to determine whether an executive decision to detain a person was arbitrary as the detainee is barred from access to judicial review. Considering the low threshold the state has to meet in order to justify detention in times of crisis, the denial of the right to habeas corpus becomes even more awkward. When this system was contested in the case of *Hamdi vs. Rumsfeld (Hamdi I)* the district court referred to the constitutional prescribed system of separation of powers and viable checks and balances and noted:

The standard of judicial inquiry must recognize that the concept of "national defense" cannot be deemed an end to itself, justifying any exercise of [Executive] power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart ..."

Paust further contests the notion that the US can be at "war" with Al Qaeda (in contrast to the Taliban who effectively controlled much of Afghanistan), as the organization does not meet the criteria for state, nation, belligerent or even insurgent. Consequently, members of Al Qaeda do not pass the test for "combatant" status. If the laws of war were to be applied to Al Qaeda, the Pentagon attacked on September 11 would be considered a legitimate military target, it would lead to impunity regarding atrocities committed by terrorist "combatants" targeting legitimate military targets (including collateral damage – although hijacking of a civil aircraft and using it as a means of destruction could not be considered a lawful act of war) and grant prisoner of war status to detained perpetrators.

The US tried to bypass these legal and logical problems arising with blatant violations of humanitarian and human rights law. First, by phrasing the new oxymoronic status of "unlawful enemy combatants" who should neither be granted POW status nor any other rights concerning treatment and detention. Second, these persons fall under the exclusive jurisdiction of specifically designed military commissions and could be denied even minimum due process rights guaranteed in a fair trial. This development was successfully challenged in the Supreme Court's landmark decision *Hamdan vs. Rumsfeld*, but was nevertheless set forth with continuing severe procedural improprieties in the Military Commission Act 2006.

The strength of this book is the direct link shown between violations of law and acts by President Bush, Vice President Cheney, Secretary of Defense Rumsfeld

and other top officials of abetting, authorizing and condoning these violations by putting them into context with extracts from numerous memos, letters, memoranda and quotes. These materials proved to Paust that well documented violations of humanitarian and human rights law, such as those revealed in Abu Ghraib, were not isolated cases of abuse by single soldiers but part of a greater picture.

Paust tries to counter violations of law committed in the name of the Bush administration's "commander above the law theory" during the war on terrorism with a "no man is above the law theory". This approach is characterized by the conviction that even (or especially) the President is bound by domestic as well as international law. Following this theory, the author tries (quite successfully) to prove wrong arguments claimed by the executive and elaborates on the relevant provisions under international treaty and customary law, soft law, domestic law, international as well as US case law and in historical legal documents.

Whether or not the violations of law committed during the war on terrorism will lead to legal consequences, Paust is convinced that there are already political and moral implications as the reputation of the United States has been severely stained and has thus served the terrorists' ambitions, aided the recruitment of new terrorists and exacerbated the ongoing conflict in Iraq and Afghanistan.

"Beyond the Law" reminds the reader that even in times of crises we must not sacrifice our basic values as the ends do not always justify the means: "Men who take up arms ... in public war do not cease on this account to be moral beings, responsible to one another and to God."

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