

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Focus: Bona fides

1. INTRODUCTION

In Austria, one, if not the most frequently applied of all constitutional principles is the principle of equality as put forth in Article 2 of the *Staatsgrundgesetz* (StGG) and Article 7 of the *Bundes-Verfassungsgesetz*, the Austrian Constitution (B-VG). As the principle is drafted rather broadly, and to a certain extent also vague¹, it empowers the Austrian Constitutional Court to apply it in a large variety of cases.

Even though the wording of both Article 2 StGG and Article 7 B-VG confer to the equality "before the law"², it is now common understanding that the principle of equality is also applicable to the legislation, which is bound by the commandment to apply equality to equal facts of cases, to differentiate only when this can be objectively justified. The benefit of such an objective justification can thus only be granted to those differentiations that can be objectively reasoned, to put it bluntly "unequal treatment for unequal facts". The complexity of this endeavour becomes evident when laws are amended, and the amendment interferes with legal positions. In its tradition of applying the principle of equality in a quite open manner, the Austrian Constitutional Court developed the principle of protection for reliance on existing laws or "fidelity clause", setting out requirements for amendments of laws to be admissible under the principle of equality.

2. THE PRINCIPLE

The principle of protection for reliance on existing laws captures the requirement of objectivity in three main areas: a) retroactivity of legal norms, b) interference with legal positions and c) frustration of factual dispositions.³

While there is no general prohibition of retroactivity of legal norms, the jurisprudence sets out borders to it, saying that retroactive changes in law, which impair the legal position of the addressee of the norm with effect for the past, are only admissible when they meet certain prerequisites. The Austrian

1 Walter/Mayer/Kucsko-Stadlmayer, Bundesverfassungsrecht, 10th ed., 2007, 1348.

2 Cf. Stelzer, Verfassungsrechtliche Grenzen des Eingriffs in Rechte oder Vertragsverhältnisse, in: RdA 2001, p. 508 et seq.

3 Walter/Mayer/Kucsko-Stadlmayer, Rz 1365.

Constitutional Courts repeatedly looked at the gravity of the interference with the legal position and at the reasons for the retroactivity.⁴

Interference with legal positions, per se, is also not forbidden. However, the protection is only awarded to those legal positions – based on public law⁵ –, in which the addressee could confide in bona fide. The Austrian Constitutional Court has set up boundaries in form of restrictions concerning the kind and the intensity of interferences. It judges the objectivity of a norm based on the importance of the pursued public interest, the intensity and the abruptness of measures.⁶

When it comes to the examination of the frustration of factual dispositions, the Austrian Constitutional Court requires adequate transition clauses.⁷

While the principle of equality therefore sets boundaries on the one hand, it also creates a margin of appreciation on the other hand. Now this might seem quite obvious when thinking of those areas of law where equal treatment stands at the forefront, such as equality of men and women, equality of people with disabilities, all constitutionally enshrined. However, the principle of equality takes us farther than this; it embraces nearly every matter of daily life, and becomes most evident, when it comes to financial topics such as career plans, pensions, grants, different forms of aids, where changes of legal fundamentals could possibly lead to significant monetary loss.

3. CASES PRESENTED

First of all, *Rene Mertens* looks into the subject of university assistants being transferred from the traditional career model into a new one, VfSlg. 16.687.

The following presentation of decision VfSlg. 17.313 was prepared by *Claudia Priewasser*; it sheds light on the case which dealt with the entitlement for remuneration for exams at the university held by external teaching staff.

In the third review, *Sandra Kramer* presents one of the younger cases, VfSlg. 18.139, dealing with grants upon the death of a member of the Austrian Doctor's Chamber, financed by the chamber's Welfare Fund.

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4 VfSlg. 17.311/2004 (with further references to older cases).

5 Please note that according to the case law of the Austrian Constitutional Court legal positions based on private contracts are subject to the fundamental guarantee of the protection of property (with further references: *Walter/Mayer/Kucsko-Stadlmayer*, Rz 1366).

6 VfSlg. 17.254.

7 *Walter/Mayer/Kucsko-Stadlmayer*, Rz 1366.