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The Interplay between the Austrian Constitutional Court and the European Court of Human Rights

by

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Introduction

States and their nationals increasingly do not exist in isolated positions. Whatever happens on this planet can rapidly affect state policies, economic demands and private lives. To build a solid foundation of security in international affairs more and more international regulations tend to be elaborated. All of them have in common the hope that the rule of law will be accepted as a universal principle. On the other hand, the legal system of a state reflects its specific culture as it was developed in the course of its history. The transfer of regulations developed in other legal communities or on international level often tends to be complicated. Comparative studies make visible which difficulties arise, when partial integration of foreign rules into the own system takes place. Interesting - nevertheless - can be the ideas which are behind regulations of another system and some of them may be helpful to strenghten the own system.

In this sense I would like you to understand my following remarks on the Austrian legal system - especially in its relationship with the European Convention of Human Rights and with the European Court of Human Rights in Strasbourg.

The Austrian System

In Austria a high number of fundamental rights is guaranteed on the level of constitutional law. This means that these rights cannot be abolished by simple legislation. Only within narrow boundaries can they be modified or restricted. Among these fundamental rights we find the entire number of Human Rights as guaranteed by the European Court HR. The reason for this is, that Austria did not only acceed to the European Convention HR but has incorporated the whole Convention into Austrian Constitutional Law.

With the 1919/1920 Federal Constitution a Constitutional Court was established and entrusted with the task of reviewing the law. It must annul laws, if they were contrary to the fundamental rights laid down in the Constitution. The fundamental rights thus primarily were of relevance vis-à-vis the legislature. The legislature must draft its rules and regulations in such a way, that they were in line with the fundamental rights and the system of values created by them.

Although it is generally recognized that the legislature must respect the values protected by constitutional law, such as for example, personal freedom, equality, freedom of expression and property, in the relation between the state and its citizens, the question arises, whether it is under an obligation to extend this system of values also to the relations between private parties. Under Art 53 European Convention HR there is without doubt an obligation to guarantee fundamental right protection also between private parties.

The procedure of declaring laws void may be initiated by individuals by appealing against an administrative decision based on an unconstitutional law. In the field of civil and criminal law such procedures must be initiated by second-instance courts or the so-called Supreme Court itself in cases of doubt about the constitutionality of a law on which their decision is to be based. To give you an idea as to the frequency of this procedure: in 2006 almost 250 such cases occured and in about 60 of them laws had to be declared totally or partially void. In most cases the equality principle had been violated.

The fundamental rights are of course also binding for the courts and administrative authorities. Even if the laws are in compliance with the Constitution, there may be violations of fundamental rights in their application. The law might have been disregarded or the discretion in taking the decision been exercised in an incorrect manner.

Two Supreme Courts have the competence of final decision, whether fundamental rights have been violated:
on one hand the so-called "Supreme Court" in cases of civil and criminal law,
on the other hand the Constitutional Court in the field of administrative law.
Both courts can be appealed to by parties who did not succeed in the instances before.

The Interplay between the Courts

Both Supreme Courts in Austria as well as the European Convention HR base their decision on Human Rights on the same legal text. The question arises whether differences in interpretation occur and if so, how they were coped with.

In the first years after accession to the European Convention HR in 1958 it took Austrian courts and legislation time to get used to the new situation. Looking back after nearly 50 years I can affirm that the cooperation works.

One aspect of the rule of law - the principle of fair trial - shall serve as example, how the state's legal system had to be adapted on different levels.

The right to be tried without undue delay

One of the important aspects of fair trial is the right to be tried without undue delay - Justice delayed is justice denied.This includes not only the time until the trial begins, but the total length of the prodeedings, including a possible appeal to a higher tribunal up to a supreme court.

There are two provisions by law in the field of administrative law which may be interesting in this context. The are made to prevent undue delay.

In the field of Austrian administrative law which to some extent is considered as part of civil law by the European Court HR the applicant may bring his case before the next instance if the first one fails to decide within 6 months. In case of delay of the second instance the case can be brought before the the Supreme Administrative Court.

Another regulation exists in administrative criminal cases. If the independent tribunals do not decide on an appeal within 15 months the first decision is abolished. There is no punishment.

In the field of civil or criminal law executed by ordinary courts, there is no time limitation by Austrian law and I have to confess that in quite a lot of cases Austria is condemned by the European Court HR.

The assessment of what this court considers undue delay depends on the circumstances of the case such as: 1) what is at stake for the applicant, 2) the complexity of the case, 3) the conduct of the parties, and 4) the handling by the authorities.
In criminal law the situation of the victim has to be considered as well.

If there the argumentation may get very difficult and the case shows that there is a violation the court of Human Rights only argues, that the whole time from the beginning to the final decision – as there are no exceptional circumstances – is too long. In other cases he decides that – for example – one court was totally inactive for more than two years and that would be enough to decide on undue delay. In such a case the Administrative Court of Austria was addressed. This court has been

really overburdened for many years. The European Court HR would have taken this into consideration, but only if the situation had been a short-term one: therefore the state of Austria was found guilty. The state ought to provide for a better organization, more money or more personnel.

Of all rights under the Convention undue delay.produces by far the biggest workload for the European Court HR. The majority of applications is founded at least additionally on this procedural guarantee.This fact is a main reason why the Court is constantly overburdened.

The European Court HR sometimes took for its own decision the same amount of time, which it considered as undue delay at state level. To be just we must admit the Court's workload resulted from responsibility for hundreds of Mio people. Meanwhile reorganization and renewal of the procedure have been undertaken.

Public Hearing

Art 90 of the Austrian Constitution stipulates, that hearings before a court in civil and criminal cases shall be oral and public. Exceptions are, however, permitted and have always been made both as regards the restriction of publicity and the total absence of an oral hearing. In order to safeguard these exceptions vis-à-vis Art. 6 ECHR, Austria made a reservation to the effect, "the provisions of Art. 6 European Convention HR shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Art. 90 of the Constitution.....".

It subsequently turned out that the term civil rights enshrined in Art. 6 European Court HR is interpreted by the European Court of HR in a broader sense than under the Austrian legal system. This means that matters which in Austria are not classified as belonging to the sphere of "civil law" but to public law (administrative law) are covered by Art 6 European Convention of HR. Prodeedings in these matters (for example real estate transaction prodeedings) were conducted by administrative authorities without public hearing. For quite a long time this restriction was considered admissible also by the European Court of HR in its case law since it was covered by the Austrian reservation although strictly speaking, the reservation merely relates to "judicial" and not administrative prodeedings.

Later on, the European Court HR abandoned this view, invoking Art. 57 European Convention HR which prohibits reservations of a general character and also stipulates that any reservation shall mention - and contain a brief statement of - the

law concerned. Since the Austrian reservation does not fulfill this requirement , the Court expressly held (in the case of Eisenstecken vs. Austria of 3.Oct. 2000, Appl. no 29 477/95) that the Austrian reservation was invalid.

At the next appropriate opportunity the Constitutional Court abandoned its previous case-law in favour of the vew held by the European Court HR (VfSlg. 16.402). The Austrian Court noted, that the invalidity of the reservation made it necessary to hold a public hearing before a tribunal also in administrative proceedings, in which a decision is taken on the core area of civil rights. It can thus be said that the Constitutional Court usually follows the case law of the European Court of HR.

In order to foster confidence in the administration of justice and ensure a fair hearing of the parties proceedings have to be open to the general public. According to the maxim that justice should not only be done but should be seen to be done, the public has the right to know how justice is done and what decisions have been taken.

Tribunals

Like in any other legal system there is a division of powers established in the Austrian system. Especially distinct this is true for a separation of jurisdiction from the administration. Civil an criminal suits fall into the competence of the ordinary courts. The remaining state activities except for legislation is considered to be administration. State legislation has nearly unlimited choice for drawing the borderline and thus attributing competences to either the ordinary courts or administrative bodies. With regard to the administration it is necessary to mention that this state activity takes place under the ex post control of the Constitutional Court (major mistakes such as the violation of human rights) and the Administrative Court (minor mistakes). Those two courts are often referred to as the two supreme Courts of Public Law.

An Austrian specialty in this context is the existance of administrative criminal law: in minor cases – (either in the sense of moral charges or in terms of foreseen penalty). In these cases the decision is taken by administrative bodies, with the possibility of appeal – in the long run to the Administrative and the Constitutional Court.

Art 6 of th ECHR states that on civil rights or obligations or any criminal charge independent and impartial tribunals must decide. Signing the Convention Austria made a reservation in respect of administrative criminal cases. The ratio of it was

that these types of cases should remain under the responsibility of administrative bodies. The idea behind this position was that the same administrative bodies, which administer the respective law should deal with petty offences as well. The rule of law would have been guaranteed by means of subsequent control by the supreme Courts of Public Law.

Austria overlooked the fact that the above mentioned reservation (administrative criminal cases) was interpreted in a strictly formal way and applied exclusively to the exceptions stated at the time of joining. Any change of wording after this date would cancel the exceptional status. This would have brought about the necessity to attribute the vast field of administrative criminal cases to the competence of ordinary courts, these being not so familiar with the specific problems of the widely varying fields of administration. In addition it must be seen, that the costs of implementation by courts outnumber by far the costs of the administration.

In order to prevent these consequences the system of legal protection in Austria was modified to a great extent. Because of the significance of the changes they had to be initiated by the constitutional legislator.

By amendment of the Constitution tribunals were established with the purpose to serve as a second instance in administrative criminal cases. As already mentioned they also received a role in civil rights affairs.

The quality of these tribunals has not yet reached its peak.
But the development is still ongoing.

Closing remarks

The obligatory jurisdiction of the European Court of Human Rights today is recognised by all member states of the Council of Europe. The number of judges is equal to the number of member states. In each case a so-called national judge is involved, but it is clear, that judges coming from different legal systems have to work together for every decision. This is one of the reasons why the jurisdiction of the Court is constantly subject to change.

Austria considers it a big advantage to present only persons for nomination as judge, who are fully familiar with the complete national legal system. Since all procedures before the European Court HR start out with mediation, it may be of special interest in cases where a violation is seen to have occuredto show how the

applicant is already given satisfaction through state measures. The European Court HR requires moreover safeguards that such violations do not occur again.
This may require quick action by legislator. Otherwise mediation will be without success.

It is positive to note that the development of jurisdiction is getting more sensitive to violations.

Over the years it became evident that the Austrian system which had been considered nearly perfect in terms of human rights, did not fulfill all of its promises. Adaptations had to be made. This became also necessary in cases where the Convention was amended. The most challenging problems arose when the European Court HR changed its perspective, judging cases as violations, which in former times it had either expressly accepted or not found worth dealing with.

The Austrian Constitutional Court found different possibilities to cope with this change of attitude: in a few cases it could adapt to the changes of international jurisdiction by respectively changing the interpretetion of Austrian laws. As a consequence administrative decisions had to be quashed, because of violation of human rights. In most cases, however, it was necessary to repeal Austrian laws, which used to comply with the Convention before the change of jurisdiction. You will understand that it was a bit difficult to "sell" this necessity to politicians and to the general public. The most severe consequence as a last resort– a change of the Austrian constitution – became inevitable only once.

Although we accept in principle that it is the prerogative of the European Court HR to interpret the Convention, the Austrian Constitutional Court sometimes opposes, if it holds that a single new decision is not convincing. In such rare cases the Court takes great effort to convince the ECHR of its own position. Twice this strategy has been successful. The dialogue between my Constitutional Court and the European Court HR takes place in variations:

In cases likely to be brought before the European Court HR we put special emphasis on good reasoning with special regard to either
- stressing that we are following European Courts HR judgements or
- pointing out how this case cannot be compared with any already existing judgement.
This strategy may help to prevent admission of a case or it may help to avoid condemnation.

Another form of dialogue can be personal meetings between European judges and national Supreme Court judges in Strasbourg or Vienna.

Another exchange - not face to face - is provided for in the course of the procedure - as the Austrian position is represented by a special department of the Federal Chancellery, which has to speak for the government. You must imagine that such dialogues likewise go on between the European Court HR and the other European parties to the Convention. At the same time you can count on the whole of the European legal scientific community reflecting on these developments.

Let me finish with a short summary: I consider it a great help in human rights affairs, that there is an international court securing that neither state legislation nor supreme courts of states fail in in fulfilling the regulations/principles the member states have agreed upon. The jurisdiction of the ECHR brings the European Convention on Human Rights to life, and unites the member states on a common level of human rights.

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