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**“The Constitutional Court in the system of state bodies:
Crucial problems and ways to resolve them”**

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REPORT

**“Problems solved by the Austrian Constitutional Court
and remaining ones”**

by

**Mr Herbert Haller
Judge, Constitutional Court, Austria**

Every Constitutional Court is part of the constitutional system of its state and has a role to play in solving arising problems of this system. Of course such a court is not in the position to solve every problem, but there are many possible ways in which state systems can benefit from a strong constitutional court with a wide range of important competences.

Usually Constitutional Courts are vested with important tasks, which necessarily include political aspects. The Austrian Constitutional Court has the power - and this is remarkable in a system of division of powers with prevalence of the democratic power - to annul unconstitutional laws. In this context the Court is in the position, to proclaim whether this annulment shall be effective *ex tunc*, *ex nunc* (that is *pro futuro* only) or after a certain amount of time (at the most 18 months). The degree of unconstitutionality (how heavy the breach of the constitution is) and the necessity of substitute legislation are relevant for this decision.

Even constitutional laws can be subject to the Courts control, in cases where procedural mistakes are at stake. It must be mentioned, that specific rules exist for constitutional laws which bring about a substantial change to one of the main principles of the constitution. In such a case there is an additional requirement to the 2/3 quorum in parliament: the law must be subject to a referendum. If this is not respected the Constitutional Court has to annul the law. The Constitutional Court is sometimes called a "negative legislator", due to the fact that it declares a growing number of laws invalid. Such decisions also bring about tension between the Constitutional Court and political groups, responsible for the incriminated laws. Sometimes Parliament tries to have the last word in such conflicts. Nearly the same text - as was annulled as unconstitutional - is submitted as a constitutional law. On the other hand the Constitutional Court has already announced very distinctly not to tolerate any circumvention.

The intensity of the mentioned tensions is reduced, as the Constitutional Court can also be regarded as a defender not only of the constitution but at the same time sometimes as a defender of all simple legislators in Austria. At this point it must be explained, that Austria as a federal state consists of 9 provinces (Länder), each with its own legislature acting side by side with the state legislature. State legislature and province legislature coexist on the same level - neither prevails. It is the competence of the Constitutional Court to protect either side in preventing, that one transgresses the borderline as it is drawn in the constitution in a very complicated way.

Further aspects of control are: the violation of fundamental rights, disregard of the requirement of sufficient determination of laws or neglect of organizational principles. Needless to say, that in most cases there are interest groups which whom tensions arise.

To continue with other competences of the Austrian Constitutional Court: the administration is controlled with regard to the lawfulness of regulations and the compliance of last instance decisions with fundamental rights. At this point allow me to make a recommendation: In Austria the European Convention of human rights was accepted as a part of the Austrian Constitution - this proved to be helpful in many ways.

Where politicians are responsible for unlawful acts the media readily give room to extensive reports. Especially in pre-election time this may be feared by politicians because the Constitutional Court has high credibility and authority among the Austrian people, that means among the voters.

Furthermore the Constitutional Court controls all relevant elections. The political impact of such decisions is at least as strong as the possibility to accuse high political officials in case of breach of the law or the constitution.

A last group of competences concerns fiscal issues: The Constitutional Court is the interpreter

of the criteria for the distribution of tax money between the state, the provinces and the communities - as laid down in the constitution and a special law.

Because of its role vis-à-vis laws, the Constitutional Court is called "negative legislator" - as already mentioned - or "third chamber of parliament". With regard to all its competences (to name all of them time forbids me) it is called "a second government" or "the fourth power". You might ask now, why the Court has been vested with so many important powers and why - in a democratic system - it has more accepted authority than parliament or the government.

The answer to this is twofolded:

Firstly the Austrian Constitution has been successful in merging the following main principles: democracy, federalism and the rule of law. In order to be able to protect these principles the Constitutional Court was vested with a rather high number of competences. The Austrian people are well aware of the high quality of their constitution and appreciate therefore the role of the Constitutional Court as guardian of their constitution.

Secondly the Constitutional Court has a long tradition of living up to peoples expectations. Already during the first 10 years of its existence the Constitutional Court earned confidence as its members excelled in devotion to the constitution and high quality of output. For three quarters of a century the court has managed to live up to this reputation.

In positively describing the Austrian system I do not mean to advertise it as the best for any country. The concept of a Constitutional Court must always fit with the constitution as a whole and must be adapted to the legal culture of a country. However sometimes examples may serve as basis for reflections off the own system.

Let me proceed with organizational details. How do we choose our justices? A vacancy is publicly announced with the invitation to file applications. The nominations have political character and are made by different bodies: President, vice-president and 6 justices are nominated by the federal government (unanimous decision), 3 justices are nominated by the first and 3 justices are nominated by the second chamber of the federal parliament (this is the chamber the members are sent by the parliaments of the provinces).The president of the republic appoints the justices.

Reason for incompatibility are membership in a government, a parliamentary body or the communal council. Even if a person resigns from such a post the incompatibility lasts for the whole rest of the period. The same goes for employees or officials of political parties. For the president or vice-president the rules are stricter for them the mentioned incompatibilities must not have existed during the last 4 years.

To make it clear these rules prevent the appointment of persons with too strong affinity to politics. The high workload of a justice may also eliminate certain candidates.

Almost binding are the further routines for the composition of the body of justices. A quarter of the number of justices should come from each of the following professions: lawyers, university professors, judges from ordinary courts or from the Administrative Court and high administrative officials. Since the Austrian justices theoretically are not full time justices they remain in their professions (except those from administration).Therefore the professional experience is continually up-dated and thus integrated in the jurisdiction of the Constitutional Court.

Another relevant specialty is the rule, that appointments are not made for a period or two. Justices remain in office until the end of the year in which they reach the age of 70. This accounts for long periods of working together, resulting in extreme familiarity with the

jurisdiction (not only the own, but although of the International Courts) and an atmosphere of coherence.

An important contribution to the quality of judgements is the rule that the individual voting remains secret. Nor is the number of counter-votes made public. Therefore there is no dissenting opinion. The overridden justice is positively integrated in the further work-process. The point is, to have the full number of justices joined in the elaboration of the reasoning.

Before I end, let me mention three other circumstances which have been found helpful:

The internal deliberation of the justices take place around a round table, securing full eye-contact and equal positions.

Full emphasis is put an the training of the academic staff. This makes the Constitutional Court a favorite training institution and leads to a wide selection of highly qualified support.

The introduction of a professional press bureau helped to increase understanding among the public. The problems of the cases and the significance of the judgements can be communicated first hand.