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**“Mini-conference”
on
Effects and execution of constitutional review decisions**

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REPORT

**“EFFECTS AND EXECUTION OF
CONSTITUTIONAL COURT JUDGEMENTS”**

**by
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This topic has already been the subject of Workshops that took place in Tbilisi, Georgia, in 1997 and in July 2008 in Baku, Azerbaijan. I have resisted the temptation to just repeat my address given at the Tbilisi workshop; however, I do hope you pardon one or the other repetition that is unavoidable in the given context.

1. Introduction

Let me recall the very general conclusion that the execution of judgements, the enforcement, is a legal instrument of utmost significance for the effectiveness of the legal order. The possibility of the state to enforce rules also against the will of the person or the legal entity affected forms the basis of the specific significance of positive law. Enforcement is not the only, but one of the most important instruments to make positive law effective.

If we speak about the execution of Constitutional Court judgements, the subject matter is that the rules applied by the Constitutional Court become effective. The norm issued by the Constitutional Court in its judgement shall have legal consequences.

All decisions of the Austrian Constitutional Court are structured in a way that they are divided into the finding (Spruch) and the reasons (Entscheidungsgründe, Begründung). A very important point is that only the finding of the Constitutional Court judgement has a normative effect in the above mentioned sense. Only the finding is accessible to enforcement. The reasons of a Constitutional Court judgement cannot be the subject of execution - like the reasons of any judgement given by a court of the ordinary judiciary or any decree issued by an administrative authority.

2. The legal basis for the execution of Constitutional Court judgements (Art. 146 of the Federal Constitution Act - Bundes-Verfassungsgesetz - B-VG)

The scientific doctrine agrees that the term "execution" used by Art. 146 B-VG has the meaning of "enforcement" by compulsion. This may only be considered in cases where the Constitutional Court pronounces in its finding an obligation to perform a certain activity. Execution is excluded in case of declaratory or merely constitutive judgements. The latter applies especially for cases where the Constitutional Court renders a cassatory judgement. If the Court annuls a legal act, the constitutive effect takes place when the legal effect of the judgement enters into force. There is no room for execution. E.g. when the Constitutional Court annuls a statute the constitutive effect of the judgement comes to pass as a rule with the promulgation of the finding in the respective Federal or Länder Law Gazettes.

Art. 146 paragraph 1 B-VG entrusts the ordinary courts with the execution of certain judgements. According to this provision the ordinary courts are assigned to execute judgements concerning pecuniary claims under public law (Art. 137 B-VG) as well as judgements deciding on differences of opinion regarding the interpretation of provisions regulating the competence of the Audit Office (Art. 126a, 127c B-VG).

More difficult is the interpretation of Art. 146 paragraph 2 B-VG, which states: "The enforcement of other judgements by the Constitutional Court is incumbent on the Federal President. The enforcement shall in accordance with his instructions lie with the Federal or Länder authorities, including the Federal Army, appointed at his discretion for the purpose. The request to the Federal President for the execution of such judgements shall be made by the Constitutional Court."

Which judgements have to be executed according to the instructions of the Federal President? In line with the case law of the Constitutional Court, not only formal judgements but also other Court decisions (court orders - Beschlüsse) are subject

to this provision. For instance, decisions imposing the refund of the costs of the proceedings to the successful complainant or applicant have to be executed by the Federal President in the scope of Art. 146 paragraph 2 B-VG. In this case the Federal President's instruction regularly again entrusts the ordinary courts with the execution. In practice, this has remained the only constellation where the Federal President has ever been involved in execution matters.

Legal doctrine also mentions the obligation to publish the annulment of a legal norm as an important issue in this context, if the Constitutional Court decrees this obligation in the finding of its judgement, which in fact it regularly does. However, the involvement of the Federal President never had any practical significance here.

3. Which Constitutional Court judgements are enforceable at all?

Considering the large variety of powers of the Austrian Constitutional Court, it is not easy to answer the question: What is the tenor of the finding of a Constitutional Court judgement and which judgements are enforceable at all?

As already mentioned, in only two cases the B-VG confers jurisdiction with regard to the execution of judgements of the Constitutional Court on the ordinary courts: Judgements concerning monetary claims under public law (Art. 137 B-VG) and judgements on differences of opinion regarding the interpretation of provisions regulating the competence of the Audit Office (Art. 126a B-VG).

The enforcement of all other judgements lies - according to Art. 146 paragraph 2 B-VG - with the Federal President. However, the answer to the question which type of judgement may be subject to enforcement is controversial. The prevailing opinion in the scientific doctrine is as follows:

Art. 138 paragraph 1 B-VG (conflicts of competence, declaration of competence):

In cases of disputes regarding conflicts of competence between certain state organs (e.g. between ordinary courts and administrative authorities, between ordinary courts and the Asylum Court, between the Asylum Court and the Administrative Court, between the Constitutional Court and all other courts, between the Federation and one Land or between various Länder among themselves) an execution is impossible because the Constitutional Court judgement itself resolves the competence question by way of a declaratory act.

According to Art. 138 paragraph 2 B-VG the Constitutional Court determines - upon application of the Federal Government or a Land government - whether an act of legislation or execution falls into the competence of the Federation or the Länder. As this is a declaratory judgement, execution is not possible.

Art. 138a B-VG (agreements between the Federation and the Länder):

The Constitutional Court judgement on the determination of the existence and the implementation of agreements between the Federation and the Länder or among the Länder is also a declaratory judgement, execution is not possible.

Art. 139, Art. 140, Art. 140a B-VG (norm review proceedings):

A judgement annulling a statute or an ordinance or declaring the illegality of an international treaty is not enforceable because the annulment occurs eo ipso as a rule with the promulgation of the respective findings of the Constitutional Court judgements in the respective Law Gazettes. As already mentioned, the obligation to promulgate the finding of the Constitutional Court might be executed under the condition that the Court has so pronounced in its finding.

Art. 141 B-VG (electoral control):

As regards judgements on the challenge of elections, popular initiatives and referenda execution is excluded since all acts that have to be taken have an immediate constitutive legal effect.

Art. 142, 143 B-VG (impeachment):

In impeachment cases execution is impossible in so far as the conviction leads to the forfeiture of office.

Art. 144 B-VG, Art. 144a B-VG (complaints of individuals against administrative decrees or decisions of the Asylum Court)

The annulment of administrative decrees or of decisions of the Asylum Court may not be subject to execution since the Constitutional Court abolishes the challenged legal act or declares its unconstitutionality. The legal obligation of the administrative authorities and the Asylum Court to "restore without delay the legal position in accordance with the legal conception of the Constitutional Court" (§ 85 paragraph 2 and § 88a of the Constitutional Court Act) is a legal consequence of the judgement and may not be enforced on the basis of Art. 146 paragraph 2 B-VG.

Art. 148f B-VG (disputes on provisions with regard to the competences of the Ombudsman Board):

In the case of differences of opinion regarding the interpretation of provisions regulating the competence of the Ombudsman Board the Constitutional Court renders a judgement which provides an authentic interpretation of the legal provisions in question in a declaratory judgement which is not enforceable.

4. The execution of the annulment of ordinances in the light of recent developments in Austria ¹

Only recently, this question has gained significance in Austria, not only as a scientific one, but also in practice. The so-called "dispute on topographic road signs" ("Ortstafelstreit") in the province of Carinthia has caused some quite special problems.

Art. 7 sub-paragraph 3 second sentence of the State Treaty for the Re-establishment of an Independent and Democratic Austria (State Treaty of Vienna) 1955 - which is in the rank of the constitution - stipulates among others, that in administrative and judicial districts, where there is Slovene or mixed population, topographical terminology and inscriptions shall be in Slovene language as well as in German. The Constitutional Court has defined an area with mixed population as an area where the percentage of the minority in a locality exceeds 10 % during a longer period of time. If this is the case, an administrative district with mixed population may be assumed according to the State Treaty of Vienna. § 2 (2) sub-paragraph 1 of the Ethnic Groups Act (Volksgruppengesetz) had provided that bilingual topographical road signs should only be put up in territorial areas where "a relatively significant number (one quarter)" of the Austrian citizens resident there belonged to the ethnic group; the Constitutional Court annulled this provision as unconstitutional, because it contradicted the mentioned provision of the State Treaty of Vienna. The Constitutional Court held in the following that the State Treaty of Vienna directly obliges the administrative authorities to implement the respective bilingual topographical road signs in areas where a share of more than 10 % of the population speaks Slovene. The omission of this obligation by the competent administrative authority entailed the illegality of

¹ I wish to thank Prof. DDr. Heinz Mayer, Dean of the Faculty of Law at the University of Vienna, for making available to me a - still unpublished - manuscript dealing with this topic in much detail.

many ordinances implementing topographical road signs (in German language only), which have been annulled by the Constitutional Court many times.

Each time the Governor of Carinthia had fulfilled his obligation to publish the annulments in the Carinthian Law Gazette. However, he had never enacted ordinances in accordance with the legal conception of the Constitutional Court laid down in the reasons of the respective judgements.

It is evident that these judgements may not be subject to execution. The cassation of the ordinances as such is not enforceable because it is a merely constitutive act. On the other hand, the Governor had fulfilled his obligation to duly publish the annulments as provided by the Constitution.

The obligation to issue ordinances in accordance with the judgement of the Constitutional Court, however, does not result from the finding of the judgement but from provisions in another statute (Road Traffic Act). The fulfilment of this obligation is, of course, not enforceable on the basis of Art. 146 paragraph 2 B-VG.

It is important to note that when the Constitutional Court annuls an administrative decree issued by an administrative authority, § 87 paragraph 2 of the Constitutional Court Act stipulates that "the administrative authorities shall be required to use whatever legal means are available to restore without delay the legal position in accordance with the legal conception of the Constitutional Court." In contrast to this provision, for the annulment of an ordinance (or a statute), a legal provision obliging the administrative authorities (or the legislator) to follow the legal conception of the Constitutional Court does not exist.

Does this mean that the legal conception of the Constitutional Court leading to the annulment of an ordinance (or a statute) remains irrelevant? The question is whether a conclusion *e contrario* or *per analogiam* would be appropriate here.

The different legal situation with regard to the annulment of an administrative decree and the annulment of an ordinance may result from the fact that in the first case there is a close relation with the concrete case and the complainant whereas the second case concerns rather abstract legal questions.

5. Some ideas on the binding effect of Constitutional Court judgements

Obviously, this situation leads to the following questions: Is it possible that administrative authorities are bound to the legal conception of the Constitutional Court according to § 87 paragraph 2 of the Constitutional Court Act only when a complaint based on Art. 144 B-VG has laid to the annulment of an administrative decree? May it be possible that the administrative authorities are completely free in other cases to be geared to the Constitutional Court judgement or not?

This fundamental question of constitutional law whose significance does not only affect the basic constitutional order but also the democratic principle and the principle of separation of powers has been answered controversially in the scientific doctrine.

Still, is it possible that - beyond the scope of application of the above mentioned provision in the Constitutional Court Act - there reigns legal freedom and - at the best - a moral obligation to act in line with the legal conceptions of the Constitutional Court?

The above conclusion should at least not be mandatory. If there is a Constitution that binds the organs of the executive power to the law and that provides for a Constitutional Court (and other Supreme Courts) who have the task to control this binding effect, one may conclude that ordinances and statutes have to be interpreted in a sense that corresponds with a

Constitutional Court judgement's reasons, at least then when the Constitutional Court has developed an already well-founded case law. As a result, there can be no doubt that the Constitutional Court (and the other Supreme Courts) also contribute essentially to shape the actually effective legal order in Austria. At any rate, if there is a well-founded case law, this should be endowed with a certain binding character, in a way that its negation must be qualified as "unjustifiable" - entailing specific consequences.

This is not the place to further delve into this difficult problem. The essence is that someone who contravenes the well-founded case law of the Austrian Constitutional Court (and the other Supreme Courts) - without being able to present new important legal arguments and criteria - may not only be assessed on a moral level but is clearly acting in a legally "unjustifiable" manner.

6. Final remarks

I would like to conclude my contribution with some consolatory words.

The aforementioned problem is a singular one. The Austrian Constitutional Court is a highly respected state organ, not only by the general public but also by the institutions subject to its review.

Therefore, the enforcement of Constitutional Court judgements generally does not cause any problems since, as a rule, the other state organs voluntarily comply with these judgements.

7. Appendix

Provisions of the Austrian Federal Constitution Act (B-VG) and the Constitutional Court Act relevant in the given context:

Art. 146 B-VG

"(1) The enforcement of judgements pronounced by the Constitutional Court on claims made in accordance with Art. 137 is implemented by the ordinary courts.

(2) The enforcement of other judgements by the Constitutional Court is incumbent on the Federal President. The enforcement shall in accordance with his instructions lie with the Federal or Länder authorities, including the Federal Army, appointed at his discretion for the purpose. The request to the Federal President for the execution of such judgements shall be made by the Constitutional Court. The aforementioned instructions by the Federal president require, if it is a matter of enforcement against the Federation or Federal authorities, no countersignature in accordance with Art. 67."

Art 126a B-VG

"Should divergences of opinion arise between the Audit Office and a legal entity (Art. 121 para. 1) on the interpretation of legal provisions which prescribe the competence of the Audit Office, the Constitutional Court decides the issue upon application by the Federal Government or a Land Government or the Audit Office. All legal entities must in accordance with the legal opinion of the Constitutional Court render possible a scrutiny by the Audit Office. The enforcement of this obligation will be implemented by the ordinary courts. The procedure will be prescribed by Federal Law."

Art. 127c B-VG

"If the Länder, for their sphere of competence, create institutions equivalent to the Public Audit Office, Land constitutional law may provide for a regulation corresponding to Art. 126a, first sentence. In such case, sentences two to four of Art. 126a apply as well."

Art. 148f B-VG

"If differences of opinion arise between the Ombudsman Board and the Federal Government or a Federal Minister on the interpretation of legal provisions which prescribe the competence of the Ombudsman Board, the Constitutional Court on application by the Federal Government or the Ombudsman Board decides the matter in closed proceedings."

§ 87 paragraph 2 of the Constitutional Court Act

"Where the Constitutional Court has allowed a complaint the administrative authority shall be required, in the relevant case, to use whatever legal means are available to restore without delay the legal position in accordance with the legal conception of the Constitutional Court."