Strasbourg, 25 July 2013

CDL-JU(2013)004
Engl. Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with

THE CONSTITUTIONAL COURT OF GEORGIA

CONFERENCE

ON
"THE THEORETICAL AND PRACTICAL ASPECTS OF REVIEWING THE CONSTITUTIONALITY OF THE CONSTITUTIONAL NORMS"

Batumi, Georgia
29-30 June 2013

REPORT
by

Ms Britta Adamovich-Wagner
(Secretary General, Constitutional Court, Austria)

I. The Austrian Federal Constitution Act is based on certain basic constitutional principles which have supremacy over all other constitutional law. Austrian constitutional law is therefore characterised by two different layers: "simple" constitutional law which can be enacted and amended by a two thirds majority of votes in Parliament[1], and constitutional law belonging to the basic constitutional order which can only be amended or abolished by a "total revision of the Constitution" ("*Gesamtänderung der Bundesverfassung*")[2]. Amendments to the Constitution which provoke a "total revision" must additionally be submitted to an obligatory referendum. In its absence they would be regarded as unconstitutional and could be repealed by the Constitutional Court.[3] As a consequence, "unconstitutional constitutional law" may exist in Austria.

First and foremost, the Constitutional Court safeguards the primacy of the Constitution by assessing the constitutionality of "simple" laws[4]. This power together with the Court's competence to review the legality of ordinances[5] (i.e. general legal norms issued by an administrative authority) secures that in the long ran no general legal norm will persist which is in contradiction with the respective superior layer in the hierarchy of norms, if it is challenged before the Constitutional Court or if the Court has the possibility to review it *ex officio*.

According to the Austrian Federal Constitution Act, norm review in general – and in particular the review of legal provisions – is featured by the following characteristics:

- It is monopolised with the Constitutional Court.
- Apart from one single exception[6] the review always takes place *ex post*.
- The Constitutional Court repeals normative acts upon application by institutions and individuals or *ex officio* in case it has to apply a presumably unconstitutional legal provision in pending proceedings.
- Principally, the repeal has *ex nunc*-effect and is effective *pro futuro*. The Court may set a time limit for the going out of force of a law. However, the reviewed legal norm is no longer applicable to the case(s) that gave reason for the review.
- The Constitutional Court reviews the conformity of "simple" laws with the Constitution which forms the standard of review for its legal control.
- Under specific circumstances the Constitutional Court may also review constitutional law. In this (very exceptional) case the Court would measure the constitutional provision against the basic principles of the Constitution.
- European Union Law is no standard of review for the Court because of its primacy over any kind of domestic law, including constitutional law. The only exception thereof is the Charta of Fundamental Rights of the European Union.[7]

---

[1] Article 44 para. 1 Federal Constitution Act (*Bundes-Verfassungsgesetz,* B-VG): "Constitutional laws or constitutional provisions can be passed by the National Council only in the presence of at least half of the members and by a two thirds majority of votes cast; they shall be explicitly specified as such ("constitutional law", "constitutional provision").

[2] Article 44 para. 3 B-VG: „Any total revision of the Federal Constitution shall upon conclusion of the procedure pursuant to Article 42 above but before its authentication by the Federal President be submitted to a referendum by the Federal people whereas any partial revision requires this only if one third of the members of the National Council so demand."

[3] *Berka*, Verfassungsrecht, 4th Ed., p. 35.

[4] Article 140 Federal Constitution Act (*Bundes-Verfassungsgesetz*, B-VG).

[5] Article 139 B-VG.

[6] Article 138 para . 2 B-VG: "The Constitutional Court preventively determines upon application of the Federal Government or a *Land* Government on the basis of a draft whether an act of legislation (or execution) falls into the competence of the Federation or the *Länder*. The judgment is summarised in a "legal rule", which is an authentic interpretation of the respective constitutional provisions, has constitutional status, binds all state organs (including the legislator and the Constitutional Court itself) and is published in the Federal Gazette."

II. Austrian constitutional law is easily amendable. As mentioned, an amendment does not require more than a two thirds majority of votes in Parliament and the designation as "constitutional provision".[8] When assessing the constitutionality of "simple" laws, the fact that the Constitutional Court's standard of review is constitutional law means also that this standard itself can be amended by a qualified majority in Parliament. Consequently, the democratically legitimised constitutional legislator has even the possibility to implement political decisions contradicting the case-law of the Constitutional Court, for instance by re-enacting a repealed provision in the rank of formal constitutional law.[9]

In a specific political constellation several such cases have occurred in Austria: From 1986 to 1999 the two major political parties formed a grand coalition, disposing of the majority in Parliament necessary to enact constitutional law. The two parties repeatedly used their majority on the one hand to avoid the consequences of a repealing Constitutional Court judgement and to re-establish the *status quo* by re-enacting the repealed provisions (mostly in a slightly modified form) at constitutional level.[10] On the other hand, sometimes also statutes containing unconstitutional provisions have *a priori* and intentionally been enacted as formal constitutional law in order to immunise them against constitutional review.

In principle, the legislator is entitled to act in this way.[11] However, in exceptional cases, the structure of the Austrian Constitution allowed the Constitutional Court claim jurisdiction for constitutional law review and to show the constitutional legislator where to draw the line.

As mentioned, pursuant to Article 44 para. 3 Federal Constitution Act any total revision of the Constitution may only be effected if the constitutional law in question is submitted to a referendum[12]. However, the term "total revision" is not defined by the Constitution nor does it provide any further explanations.

In an important judgment[13] – which can be regarded as a "leading case" – the Court had to assess upon application of a *Land* government whether the abolishment of *Land* citizenship had to be considered a total revision of the Constitution, in view of its possible significance for the federal structure of the state. Firstly, the Court dealt with the question whether the substantive review of federal constitutional law is at all imaginable. In fact, in an earlier judgment[14] the Court had denied this possibility in the absence of an explicit authorisation by the Constitution and for lack of a standard of review. The case at hand, however, was considered differently: Subject matter of the Court's examination was the formal question whether the law at review had been enacted in a constitutionally correct manner, which doubtlessly falls into the jurisdiction of the Constitutional Court. However, if – as in the case at hand – the question is whether the law entails a total revision of the Constitution and should have been submitted to a referendum, also the assessment of its contents indirectly becomes a preliminary question for the Court's judgment. A precondition for this assessment is the substance of the term "total revision" which is not defined by the Constitution. According to the Court's interpretation, a total revision is a constitutional amendment that essentially modifies or abolishes the basic principles, to which in any case the democratic,

---

[7] See the Constitutional Court's judgment as of March 14, 2012, U 466/2011 et al., available on the Court's website in German and English: http://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf

[8] Article 44 para. 1 B-VG.

[9] *Berka*, Verfassungsrecht, pp. 321.

[10] E.g. VfSlg 9950/1984, 10394/1985 – reaction of the constitutional legislator: BGBl. 106/1986 – reaction of the Constitutional Court: VfSlg. 11829/1988.

[11] *Berka*, Verfassungsrecht, pp. 321,

[12] Such a referendum has to take place after the finalisation of the legislative process and before the authentication by the Federal President.

[13] VfSlg. 2455/1952.

[14] VfSlg. 1607/1948.

the rule of law, and the federal principles belong. The application was dismissed on the merits because according to the Court's assessment the abrogation of *Land* citizenship does not affect the essential elements of the federal principle, and the Court stated that the constitutional law in question had been enacted in a constitutionally correct manner.

The judgment shows that not every constitutional amendment has to be regarded as a total revision of the Constitution. Pursuant to legal doctrine and the case-law of the Constitutional Court [15] the constitutional amendment must seriously affect the basic principles of the Constitution and entail an essential modification of one or more of these principles or of their mutual interrelation. In this case, it is the people as the democratic sovereign who has to decide whether the basic principles Constitution should be substantially changed.

In constitutional practice, the constitutional amendments connected with Austria's accession to the European Union in 1995 represent the first and only example of a "total revision of the Constitution" legitimised by a referendum. These amendments have affected the Austrian constitutional order in many respects: Austria has accepted the legal order of the European Union which became part of the entire legal system in force in Austria. At the same time, the democratic, the federal and the rule of law principles have substantially been modified.

III. Undisputedly, the following principles undisputedly form part of the Austrian basic constitutional order:

- The democratic principle,
- the republican principle,
- the federal principle, and
- the rule of law principle.

The Federal Constitution Act contains programmatic provisions of normative character proclaiming the democratic, the republican and the federal principles. [16] By these proclamations, however, their substance does not disclose itself. Their concrete embodiment can only be deduced from other legal norms which in its entirety shape their institutional profiles and the system of the basic principles. *Sedes materiae* are always those provisions by which these principles are implemented.[17]

The rule of law principle is not explicitly mentioned in the Federal Constitution Act. It can be derived from a variety of regulations and institutions of constitutional law. The Constitutional Court[18] has developed a definition according to which all acts of state organs must be based on the law and indirectly on the Constitution, and a system of legal protection institutions must safeguard that the permanent existence of only such acts is guaranteed which are in conformity with legal acts at a higher level of law. Inherent[19] to the rule of law principle are the principle of legality[20], the legal protection system with regard to ordinary judiciary and administration, constitutional justice, the protection of fundamental rights and separation of powers.

In view of the aforementioned, it is the existence of a layer of constitutional norms superior to "simple" constitutional law which forms the theoretical basis for qualifying the Constitutional Court to review constitutional law. The basic principles form the standard of review against

[15] VfSlg. 2455/1952.
[16] Article 1 B-VG: "Austria is a democratic republic. Its law emanates from the people."; Article 2 para. 1 B-VG: "Austria is a federal state."
[17] E.g. *Adamovich/Funk/Holzinger/Frank*, Österreichisches Staatsrecht, Vol. 1, 2nd Ed., pp. 132.
[18] VfSlg. 2929/1955, 8279/1978, et al.
[19] *Berka*, Verfassungsrecht, pp. 55.
[20] Article 18 B-VG: "The entire public administration shall be based on law."

which “simple” constitutional law can be measured. Since major amendments to the basic principles require a mandatory referendum as an enhanced condition for their creation, the Court also examines them with respect to the lawfulness of their enactment procedure pursuant to Article 44 para. 3 Federal Constitution Act.

“Permanent provisions” do not exist in the Austrian constitutional order. Article 44 para. 3 determines the possibilities and the limits of constitutional legislation. The scope of substantive amendments is unlimited. The concept of a “total revision of the Constitution” entails that no provision of Austrian constitutional law is unalterable. If a constitutional amendment meets the approval of the people in a referendum, even a radical transformation of the Constitution could be implemented (e.g. the abolishment of Austria’s federal structure or the introduction of a presidential republic). [21] However, limitations for interferences with the basic constitutional order are imposed by international law, European Union law and by politics.[22]

IV. Besides the mentioned “leading case”, another two important judgments are of great relevance:

- VfSlg. 11829/1998: Review of Section 103 para. 2 Motor Vehicles Act (constitutional provision)

In 1988, during the time of a grand coalition, and after the constitutional legislator had already set aside several Constitutional Court judgments in other fields of law[23], the Court reviewed *ex officio* a provision of the Motor Vehicles Act, which had been enacted as a constitutional provision, after two earlier versions of the same provision, enacted on simple law level, had been repealed by the Constitutional Court before.[24]

The provision concerned the obligation of a motor vehicle owner to provide information on who has driven the vehicle by which an administrative offence had been committed. If the owner himself had been the driver he would have had to incriminate himself. The refusal was sanctioned by an administrative fine. The Constitutional Court reviewed the provision under aspects of the principle of accusation[25] and under Article 6 ECHR. In line with its case-law[26] and in view of its commitment to interpret constitutional provisions in conformity with the basic principles of the Constitution[27], the Court did not consider the constitutional provision unconstitutional. It held that, in case of doubt, a constitutional provision must not be ascribed a meaning which puts it in conflict with the basic principles of the Constitution.

But, in view of the constitutional legislator’s various previous attempts to bypass the Constitutional Court by re-enacting repealed provisions at the level of formal constitutional law, in a remarkable *obiter dictum* the Court made the following unmistakably clear: An infringement of the basic principles could not only be caused by serious and comprehensive infringements of these principles, like for instance by limiting the Court’s jurisdiction to norm review or by restricting fundamental rights. Also, a number of only partially effective legislative measures, gradually but cumulatively enacted at constitutional level, might in sum result in a total revision of the Constitution. In the case at hand, in view of the constitutional provision’s tightly limited scope of application and in the light of the fact that the re-enactment of this provision at constitutional level did <u>not yet</u> lead to such an excessive accumulation of

[21] *Berka*, Verfassungsrecht, p. 35.
[22] *Adamovich/Funk/Holzinger/Frank*, Staatsrecht, p. 131.
[23] For examples see *Adamovich/Funk/Holzinger/Frank*, Staatsrecht, pp. 135.
[24] VfSlg. 9950/1984 and 10394/1985.
[25] Article 90 para. 3 B-VG.
[26] E.g.VfSlg. 11756/1988.
[27] E.g. VfSlg. 11403/1987,

individual legislative measures that the basic principles of the Constitution were affected, the Constitutional Court did not feel compelled to repeal the provision.

In other words, if parliament systematically overruled Constitutional Court judgments it would tend to gradually paralyse constitutional justice, even if each individual legislative measure – regarded upon alone – would not be in conflict with the basic principles.[28] Given that constitutional review is a decisive element of the rule of law principle, the Constitutional Court implied that several such legislative measures in sum might entail a "creeping total revision" of the constitution. Each individual assessment of every single enactment of a constitutional provision by the constitutional legislator in reaction to a Constitutional Court judgment would not entail a total revision. However, taken all these measures together, there would be a transition from quantity to quality: How many individual measures are necessary in order to exceed the limit?

- VfSlg. 16327/2001: Section 126a Federal Public Procurement Act (constitutional provision)

In 2001 the Constitutional Court repealed a constitutional provision, so far for the first and only time. Except for public law academics, this case was not spectacular but rather of a technical nature. Nevertheless it was a good reason for the Court to demonstrate that, if necessary, it would take the gloves off.

On *Land* level various differently structured public procurement control institutions were established, the constitutionality of which was questionable. In several pending cases the Constitutional Court reviewed provisions of a *Land* Public Procurement Act which authorised the respective control authorities to review and annul also contract awards made by the highest executive *Land* authorities. Pursuant to Articles 19 and 20 of the Federal Constitution Act and according to the case law of the Constitutional Court[29] a controlling function of an administrative authority with regard to decisions by a highest executive authority is impermissible.

At that time and in the light of an expected repeal by the Court, Federal Parliament envisaged enacting homogenous public procurement legislation effective at *Land* level and in accordance with the Constitution. In order to gain time for this complex legislative project the federal legislator made – in good faith – interim adaptations on constitutional level in the Federal Public Procurement Act, aiming at a temporary preservation of the *status quo* with regard to the control institutions at *Land* level. The wording of the respective constitutional provision in the Federal Public Procurement Act was as follows[30]:

"Article 126a. (Constitutional Provision). Provisions of *Land* law in force on January 1st, 2001 and concerning the organisation and the jurisdiction of organs in charge of legal protection with regard to public procurement are not in contradiction with the Federal Constitution." The provision should enter into force on January 1st, 2001 and expire on August 31st, 2002.

In view of this, the Constitutional Court decided that it had to apply this provision when reviewing the *Land* law provisions and initiated *ex officio* its review of the constitutional provision.

In its judgment the Court held that this provision was apparently intended to be an extensive approval of unconstitutional *Land* law provisions, in a way that the Federal Constitution should lose its function as limitation to the *Land* legislator for a specific field of *Land* law. The

[28] VfSlg. 11829/1988.
[29] See VfSlg. 13626/1993, 15578/1999.
[30] BGBl. I 125/2000.

wording, the systematic context, the historically traceable purpose of the provision as well as the context of its creation prohibited the Constitutional Court to interpret the provision in conformity with the basic principles of the Constitution.

The Court understood the provision as an abrogation of its power to review laws in the field of *Land* public procurement law and as a deprivation of the relevance of the Constitution for this field of law.

With regard to the permissibility of the suspension of the Federal Constitution's normative power the Constitutional Court held that the simple constitutional legislator is not permitted to suspend the effectiveness of the Federal Constitution, not even for only a certain part of the legal order. It is inherent to qualified constitutional law that it is not authorised to deprive itself from its relevance with respect to the layer of law underneath the Constitution. This would be in contradiction with the rule of law principle which requires "that all acts of state organs have to be based on the law and – indirectly – on the Constitution and that effective legal protection institutions exist for the safeguarding of this postulate"[31]. The relevance of the Constitution as well as the Constitutional Court's power to norm review has to be regarded as decisive elements of the rule of law principle. The abolishment of the Constitution's yardstick function for a certain part of the legal order, irrespective of its significance, therefore infringes the rule of law principle. Furthermore, to assume that the simple constitutional legislator were authorised to partly suspend the effectiveness of the Constitution would violate also the democratic principle, because it would partly deprive the people of their constituent power. In view of this result, the Court did not have to examine anymore whether in proceedings pursuant to Article 44 para. 3 Federal Constitution Act the Constitution could be suspended at all.

V. Since constitutional law is part of the Austrian legal order, principally the same interpretation methods apply as for other legal norms. However, its interpretation is featured by some characteristics: The interpretation of fundamental rights requires other maxims than the interpretation of the distribution of powers and responsibilities between the Federation and the *Länder* or of the detailed and complex provisions of electoral law. General principles may be outlined as follows: The first approach is word interpretation, by which the meaning that can be derived from the clear wording of a provision.[32] If the meaning of a provision still remains unclear, systematic, teleological and historical[33] considerations are to be applied.

The principle of "interpretation in conformity with the law" stipulates that in case of doubt general legal norms have to be interpreted in a way that they are in conformity with the respective superior layer in the hierarchy of norms. Simple laws have to be interpreted in conformity with the Constitution.[34] This interpretation principle also applies to constitutional law: Formal constitutional law has to be interpreted in conformity with the basic principles of the Constitution; in case of doubt, preference has to be given to the one that harmonises with the basic principles.[35] Constitutional law at *Land* level has to be interpreted in conformity with the federal Constitution.[36] Other aspects of this principle are the obligation to interpret national law in conformity with international law[37] and with the law of the European Union[38].

[31] VfSlg. 2455/1952.
[32] E.g. VfSlg. 4442/1963, 5153/1965, 10692/1985.
[33] E.g. VfSlg. 4340/1962, 15063/1997.
[34] E.g. VfSlg. 5923/1969, 13907/1994.
[35] VfSlg. 11500/1987.
[36] Vfslg. 13274/1992.
[37] VfSlg. 11500/1987, 16404/2001.
[38] VfSlg. 15427/1999.

VI. The current understanding of the Austrian Constitution is on the one hand marked by the practice of the organs applying the Constitution, and by constitutional doctrine on the other. Among the organs applying the Constitution the Constitutional Court – as the "guardian of the Constitution" – has an outstanding role. But also other constitutional organs like the Federal President, Parliament, the governments of the Federation and the *Länder*, the Administrative Court, the Supreme Court, and the Ombudsman Board have to interpret the Constitution and their practice contributes essentially to the development of the Constitution's understanding. This applies also to the European Court of Human Rights and the European Court of Justice.[39]

Originally, in the field of tension between the Constitution as a mere "ground rule for the game" and the Constitution as a system of values, a formal understanding of the Constitution was prevalent in Austria, not least influenced by the Vienna School of Legal Theory. Constitutional law was understood as the organisational and procedural frame for legislature and politics, allowing them a wide scope of action. Until the late seventies of the past century the case law of the Austrian Constitutional Court had been marked by distinct a judicial self-restraint. The judgments had formal character, especially in the field of human rights. E.g., in connection with two politically sensitive norm review proceedings in the seventies (concerning abortion[40] and university organisation[41]) the Court dismissed the applications. These judgments have been heavily criticised by the opposition party and by legal doctrine. It has to be emphasised that these critics correctly pointed out that also judicial self-restraint may have a political function, because of supporting the legitimacy of the political party in power.

Especially in the context of political questions and constellations concerning fundamental rights, a substantive understanding of the Constitution established itself under the influence of the ECHR in the eighties of the past century. The case law of the Constitutional Court gradually changed to a more and more value-oriented position, giving considerably more substantive significance to human rights. The Court further developed its case law with regard to the principles of protection of confidence and of proportionality inherent to the case law of the European Court of Human Rights. Although the legislator's scope of action continued to exist, it became much narrower.

[39] *Adamovich/Funk/Holzinger/Frank*, Staatsrecht, p. 37.
[40] VfSlg. 7400/1974.
[41] VfSlg. 8136/1977.