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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

THE "LIFE CYCLE" OF A CASE BEFORE THE CONSTITUTIONAL COURT

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I. INTRODUCTION:

The Austrian Constitutional Court has been established in 1920. It is - apart from a Constitutional Court in Czechoslovakia, which has been founded at the same time but has never taken up its work - the oldest Constitutional Court in Europe. It is located in Vienna and consists of a President, a Vice President, twelve members and six substitute members. The substitute members replace the members in their absence.

The President, the Vice President, six members and three substitute members are appointed by the Federal President on the recommendation of the Federal Government. Six other members and three substitute members are appointed by the Federal President on the basis of the recommendations of the two Chambers of Parliament. The members and substitute members are judges under the Constitution. They are independent and can be removed from office only by a judgement of the Constitutional Court itself for special reasons (loss of nationality, incapability, etc.) The members are appointed for lifetime, but their office ceases with the end of the year in which they reach seventy years of age. Members of the Federal Government, a *Land* Government, of the two Chambers of Parliament or any other general representative body or persons who are employed by a political party cannot become members of the Constitutional Court. If they take over any such office after their appointment, they have to resign from the Constitutional Court.

The Constitutional Court elects permanent reporting judges from among its members for a term of three years. The Vice President may also act as a reporting judge. Presently, nine out of fourteen judges act as permanent reporting judges. Each of them is supported by two scientific assistants and a secretary.

The Austrian Constitutional Court does not sit permanently, but gathers in general four times a year to Court sessions which last about three weeks each. The sessions regularly take place in March, in June, in September and in December of each year. The President can summon the Vice President and the members also to intermediate court sessions. The Court sessions are exclusively reserved for oral hearings and deliberations of pending cases. The time in between the Court sessions is dedicated to the preparation of draft decisions and to the finalisation of decisions taken by the Court, as well as to the preparation of their service on the parties.

The rules governing the competences, the organisation and the procedure of the Constitutional Court are partly laid down in the Federal Constitution Act (*Bundes-Verfassungsgesetz - B-VG)* itself, partly in the Federal Law on the Constitutional Court (*Verfassungsgerichtshofgesetz 1953 - VerfGG 1953*).

II. COMPETENCES OF THE CONSTITUTIONAL COURT

Art. 137 *B-VG*: Monetary claims under public law

Art. 138, Art. 126a and Art. 148f *B-VG:*	Disputes as to jurisdiction; declaration of competence
Art. 138a *B-VG*:	Applications for the determination of the existence and implementation of agreements between the Federation and the *Länder* or among the *Länder*
Art. 139 *B-VG*:	Review of the lawfulness of regulations
Art. 140 *B-VG*:	Review of the constitutionality of laws
Art. 140a *B-VG*:	Review of state treaties
Art. 141 *B-VG:*	Supervision of elections, popular initiatives and referenda, and declaration that a person has been removed from office
Art. 142 and Art. 143 *B-VG*:	Impeachment
Art. 144 *B-VG*:	Complaints against the breach of constitutionally guaranteed rights
Art. 145 *B-VG*:	Violations of international law (inapplicable)

III. GENERAL PROCEDURAL REQUIREMENTS (FOR ALL TYPES OF PROCEDURES BEFORE THE CONSTITUTIONAL COURT):

In its proceedings the Constitutional Court applies the Federal Law on the Constitutional Court. Save as otherwise provided in this Law, the Code of Civil Procedure and the Introductory Law thereto shall apply by analogy (Art. 35 *VerfGG*).

Each application addressed to the Constitutional Court is registered by the Registry under a reference number which is composed of three elements: a capital letter indicating the type of proceedings (e.g. B for *Beschwerden* - complaints against the breach of constitutionally guaranteed rights according to Art. 144 *B-VG*), a consecutive number, and the year of registration.

1. General requirements for applications:

Applications addressed to the Constitutional Court shall be submitted in writing (Art. 15 subparagraph 1 *VerfGG).*

The application shall contain a reference to the article of the Federal Constitution Act which forms the basis of the application to the Constitutional Court, a statement of the facts and a precise claim (Art. 15 subparagraph 2 *VerfGG*).

If an application does not satisfy the above mentioned requirements, it will be rejected by the Constitutional Court on procedural grounds without giving the applicant the possibility to

correct it.

Apart from a few exceptions, applications to the Constitutional Court must be submitted by a duly authorized lawyer. If an applicant cannot afford such a lawyer, he can apply for legal aid.

After the registration of the application the President assigns each case to a permanent reporting judge (Art. 16 *VerfGG*). The distribution of the cases among the reporting judges is not regulated by law or regulation; in theory, the president is not bound to any rules when exercising this important task. In practice, however, he has to take into account the following criteria: Have equal or similar cases already been prepared for decision by one of the existing reporting judges? Are equal or similar cases pending? Is the workload of the Court well balanced among the reporting judges? Does a particular case require a specialist in a certain field (e.g. tax law)? Are various applications of a particular applicant concentrated with one of the reporting judges ("regular customers")? In order to answer these questions, the Constitutional Court is equipped with a computerized file information system which - contrary to the documentation of judgements and decisions - also contains details of the still pending cases (i.e. reporting judge, registration number, date of entry, name of applicant, the opposing authority involved, a brief statement on the contents of the application, as well as the legal provisions on which it is based).

Once an application is assigned to one of the reporting judges, this judge conducts the preparatory proceedings independently. Regularly, the formal requirements will be checked at first. An application which does not satisfy the requirements laid down in the *VerfGG* will be returned to the applicant in order to enable him to correct it (Art. 18 *VerfGG*). A number of defects, however, cannot be corrected and lead directly to the rejection of the application (see above).

It lies especially in the discretion of the reporting judge to initiate preparatory proceedings in the technical sense (see below) or to propose the immediate rejection on procedural grounds or - in case of a complaint against the breach of constitutionally guaranteed rights based on Art. 144 *B-VG* - the refusal because the complaint does not have any reasonable prospect of success or when the clarification of a constitutional question cannot be expected. It is, however, never the reporting judge himself, but always the Constitutional Court which takes - after deliberation - the final decision.

2. Preparatory proceedings (Art. 20 *VerfGG*)

When a case cannot be finalized in such a simple way the reporting judge initiates the preparatory proceedings. Decisions whose sole purpose is to resolve procedural issues which at this stage and those solely concerned with preparations for the hearing shall be adopted by the reporting judge without any need for a decision by the Court.

In the preparations for the hearing (the deliberation) the reporting judge may decide, *inter alia*, to hear the interested persons, witnesses and expert witnesses, to secure production of official documents or files and to obtain information from the opposing authorities involved. The authority involved shall be required to produce these documents and files. Where the authority involved has not submitted these documents and files or pleadings in defence or only part of it, the Constitutional Court, after first expressly informing the authority of the consequences of its failure, may deliver judgement on the basis of the applicant's claim.

In the majority of cases the preparatory proceedings consist only in serving copies of the application on the opposing authority which issued the impugned act and possible other parties

involved. The opposing authority is being informed that it is at liberty to draw up pleadings in defence within a certain period of time. Other parties involved can draw up statements. Pleadings and statements are registered and served on the applicant, who again is allowed to comment on them.

When the reporting judge considers a case ready for deliberation he prepares a draft decision which is copied and distributed - together with further necessary information (application, pleadings in defence, statements) - to all other members of the Constitutional Court. The draft decision also contains the proposals of the reporting judge as to a possible oral hearing and to the composition of the Court (plenary session or "reduced composition" - see below) in which the case shall be deliberated. The case will be included in the agenda for the next court session.

3. Composition of the Constitutional Court (Art. 7 *VerfGG)*:

According to the intention of the *B-VG*, cases, as a rule, shall be deliberated and decided by the plenary session of the Constitutional Court, i.e., in the composition of President, Vice President and twelve members. In order to constitute a quorum, the presence of the President and at least eight voting members is sufficient.

In the following matters there is a quorum when the President and four voting members are present: monetary claims under public law (Art. 137 *B-VG*), disputes as to jurisdiction between courts and administrative authorities (Art. 138 *B-VG*), practically all cases which are resolved in private and, upon application of the reporting judge and with the consent of the President where the Court is dealing with complaints in disputes in which the legal problem has already been sufficiently clarified by case law.

Because of the enormous caseload of the Constitutional Court (presently 4000 to 5000 cases per year) and the longstanding tradition of its case law, the vast majority of cases is deliberated and decided without an oral hearing in the above mentioned "reduced composition" consisting of President, Vice President (whose presence is not required by law) and four voting judges.

The basis for the "reduced compositions" is a list of the (presently nine) reporting judges in an alphabetical order. A specific reduced composition consists - apart from President and Vice President - of the reporting judge and the three judges that follow him alphabetically.

The "reduced compositions" cannot be regarded as panels, for the following reason: Every member of the Constitutional Court is provided with the draft decision and further information drawn up by the reporting judge and is entitled to demand that a specific case shall be deliberated in the plenary session.

4. Oral hearing in public

Art. 19 *VerfGG* states that judgements of the Constitutional Court shall regularly be delivered after an oral hearing in public to which the applicant, the opposing authority and any parties interested shall be summoned.

According to this provision, an oral hearing in public shall take place as a rule. Art. 19 *VerfGG*, foresees, however, an - over the years ever increasing - catalogue of exceptions based on which the Constitutional Court can refrain from oral hearings. The most important exception is that the Court may dispense with an oral hearing when it is apparent from the written submissions of the parties to the constitutional proceedings and the documents submitted to the Constitutional

Court that no further light can be expected to be shed on the dispute in an oral discussion. In addition, upon application by the reporting judge , the Court, sitting in private and without an oral hearing may dismiss an application where there has been clearly been no breach of a constitutionally guaranteed right; settle any dispute where the legal problem has been raised in sufficiently clear terms in a previous judgement of the Constitutional Court and allow an application which led to a declaration that an unlawful regulation or an unconstitutional law or an illegal treaty was void (Art. 19 subparagraph 4 sub-subparagraph 4 *VerfGG*).

Without an oral hearing in public, sitting in private, the Constitutional Court may also refuse to examine a complaint as provided for in Art. 144 subparagraph 2 *B-VG* or reject an application upon procedural grounds (i.e. if the Constitutional Court clearly has no jurisdiction to deal with it, if the statutory time limit has not been observed, if the defect is not covered by the formal requirements, if the case has become definitive and if the applicant was not entitled to bringing the application). Without an oral hearing the Court also decides upon the discontinuation of the proceedings on the grounds that the application has been withdrawn or that the claim has been satisfied (Art. 19 sub-subparagraphs 2 and 3 *VerfGG*).

It is because of this variety of exceptions to the rule, that oral hearings in public in fact take place only about twenty to forty times per year.

The President determines the date of the oral hearings prior to the Court sessions. It must be published beforehand by being fixed to the official notice board of the Court and published in the "*Wiener Zeitung*" (Art. 22 *VerfGG*).

The summons served on the parties of the proceedings regularly contain questions which still need to be clarified. The oral hearing begins with the reporting judge's account which contains a statement of the facts as disclosed by the documents in the case file, the tenor of the applications submitted by the parties and the outcome of any inquiries which may have been conducted. Then the parties are given the possibility to make statements to the questions.

According to Art. 26 *VerfGG*, the judgement shall - where possible - be delivered immediately after the oral hearing has been closed; it shall be pronounced orally immediately with the essential grounds of the decision. The parties need not be present when the judgement is pronounced. Where the judgement cannot be delivered immediately after the oral hearing it shall be either pronounced in a special hearing in public, notice of which shall be served on the persons concerned immediately after the oral hearing has been closed, or communicated, in pursuance of the Constitutional Court's discretionary power, in writing in a document served on the parties.

5. Deliberations (Art. 30 *VerfGG*)

The deliberation and the vote shall not be held in public. The deliberation begins with the submission of the opinion (i.e. the draft decision, which has been provided to all the members) of the reporting judge, which serves as the basis for the discussion. The vote is taken following the closure of the discussion. The President determines the order in which a vote shall be taken on the different opinions submitted. The voting members give their vote beginning with the oldest (Art. 30 *VerfGG*).

Decisions are being delivered with an absolute majority of the votes expressed. The President does not take part in the vote. However, where one of a number of different opinions expressed receives at least one half of the total number of votes the President shall cast his vote. If he

supports the opinion which received half the votes that opinion shall be established as the decision. (Art. 31 *VerfGG*).

This latter voting procedure does not occur very often, since regularly the plenary session is composed of thirteen voting judges, the "reduced compositions" of five. It may and does, however, happen when the post of the President, who cannot be replaced by a substitute member, is vacant and the Vice President acts in his place; when a member - for reasons whatsoever (illness, reaching of the age limit, death, etc.) can no longer take part in a case whose deliberations have already begun (at this stage the member can no more be replaced by a substitute member); or when a member is suddenly - for reasons whatsoever (see above) - prevented from attending a deliberation and a substitute member cannot be reached in time.

Decisions concerning the refusal of a complaint against the breach of constitutionally guaranteed rights based on Art. 144 *B-VG* or the dismissal of such a complaint on the grounds that a constitutionally guaranteed right has obviously not been violated have to be adopted unanimously.

Except for those cases in which unanimity of vote is required by law, the results of voting remain secret.

Dissenting opinions are not being published. The introduction of the possibility to dissent into the *VerfGG* has been discussed several times in the past and is also of present interest. The most important advantage of such an instrument is evident, since it makes the jurisdiction of the Constitutional Court more transparent. Among the members of the Court this topic is highly controversial. The opponents among the judges fear a loss of authority of the judgements of the Constitutional Court where a dissenting opinion is being published.

6. Costs of the proceedings (Art 27 *VerfGG*)

Costs shall be awarded only where expressly provided for in the *VerfGG*.

Accordingly, in some types of proceedings costs are imposed on the losing party. This is provided for especially in proceedings concerning financial claims under public law (Art. 137 *B-VG*), in proceedings for the review of statutes or regulations initiated by an individual (Art. 139, Art. 140 *B-VG*), and in the case of complaints for the protection of fundamental rights (Art. 144 *B-VG*). In the case of actions concerning financial claims under public law the costs of the proceedings are awarded to the winning party by reference to the provisions on lawyer's fees connected to the sum in dispute. In all other above mentioned cases costs are awarded by reference to a regulation issued by the Constitutional Court itself which fixes lump sums for various stages in the course of the proceedings (e.g. application, oral hearing, etc.).

7. Effect of decisions

The effect of decisions of the Constitutional Court depends on the type of competence exercised by the Court.

a. *Erga omnes* effect/temporary effect

In the following, reference will be made only to the two most important types of proceedings before the Constitutional Court.

aa. Norm review proceedings (Art. 140 *B-VG*)

When the Constitutional court has declared that a Federal or a *Land* statute is void, the judgement will be served on the Federal Chancellor or the *Land* Governor concerned who are obliged by the Constitution itself to publish the judgement without any delay in the respective Law Gazette. Generally, the statute becomes ineffective on the day of the promulgation of the judgement, with the effect that the statute no longer forms part of the legal order.

The Constitution also provides the Constitutional Court with the possibility to decide that a statute shall become ineffective only after a certain period of time which must not exceed eighteen months. The consequence is that a statute that has been considered unconstitutional continues to remain in force for the period of time fixed by the Constitutional Court and has to be further applied until the date the Court has determined for its annulment. An exception to this rule is always the case that has caused the particular proceedings before the Constitutional Court ("*Anlaßfall"*), to which the overruled statute never applies any more.

The Constitutional Court usually makes use of this possibility in order to provide the legislator with sufficient time to produce a new statute that is in conformity with the Constitution, or when the sudden lack of legal provisions would cause problems.

All courts and administrative authorities are bound to the judgements of the Constitutional Court. An overruled statute is, however, still applicable to those cases which have materialized before the statute has been overruled (except for the *"Anlaßfall"*), e.g. cases pending with the administrative authorities or the Administrative Court. It lies then in the discretion of these authorities to adjourn their decision until the promulgation of the Court's judgement or until the time limit set by the Constitutional Court has expired. The authorities can also decide the case on the basis of an unconstitutional statute. A complaint challenging such a latter decision before the Constitutional Court again attacking the (unconstitutional) statute on which it is based would be rejected on the grounds of *res iudicata.*

The Constitution provides the Constitutional Court also with the possibility to state in his judgement that the statute that has been found unconstitutional shall not be applied to pending cases either. This instrument can be considered as a sort of retroactive annulment.

bb. Complaints against the breach of constitutionally guaranteed rights (Art. 144 *B-VG*)

In this type of proceedings the Constitutional Court's judgement shall state whether a violation of a constitutionally guaranteed right of the applicant has occurred, or whether the applicant has been violated in his rights because an unconstitutional statute, an illegal regulation or an illegal state treaty have been applied. When this is the case, the Constitutional Court declares the administrative act void. The administrative authorities are bound to the legal opinion of the Court and are obliged to use whatever means available to restore the applicant's legal position in accordance with the legal conception of the Court.

The decision has no effect *erga omnes*, but concerns only the parties involved.

b. *Res iudicata* effect

In principle, a decision taken by the Constitutional Court is final. If an applicant whose case has

been decided by the Court brings the same case before the court again, his application or complaint will be rejected on the grounds of *res iudicata.*

It is, however, important to remark that the *res iudicata* effect has certain limits in the case of proceedings concerning the review of norms. Alleged doubts about the constitutionality or legality of a general abstract norm determine to some extent the subject matter of the Constitutional Court's proceedings. Consequently, as regards expressly described doubts as to the constitutionality/legality of a legal norm, the Court can decide the issue only once. Such a decision a creates *res iudicata* effect *vis à vis* the same doubts about the same norm in all possible directions. A negative decision, however, does not impede the examination of the same legal norm in the light of other doubts.

8. Enforcement of decisions (Art. 146, Art. 126a *B-VG*)

a. The question to which extent a Constitutional Court's decision can be enforced appears to be enormously important at the first glance. In many cases it is, however, of theoretical importance only and has little practical significance.

According to Art. 146 subparagraph 1 *B-VG* the enforcement of judgements of the Constitutional Court regarding claims under public law (Art. 137 *B-VG*) is carried out by the ordinary courts.

The enforcement of all other decisions is incumbent on the Federal President (Art. 146 subparagraph 2 *B-VG*). Implementation shall in accordance with his instructions lie with the Federal or State authorities, including the Federal Army, appointed at his discretion for the purpose. The request to the Federal President for the enforcement of such decisions shall be made by the Constitutional court.

An important amendment to Art. 126a *B-VG* became necessary in 1993 following a judgement of the Constitutional Court in proceedings regarding a difference of opinion between the Court of Audit, on the one hand, and the Federal Government as well as the Vienna State Government, on the other hand, as to the interpretation of legal provisions governing the competence of the Court of Audit to examine the orderly conduct of affairs of a major Austrian bank. In its judgement, the Constitutional court pronounced that the Court of Audit was competent to carry out the examination. When the Court of Audit officers wanted to start their examination, they were, however, denied access to the premises of the bank.

On the basis of the legal situation in force at that time, no legal instrument existed to enforce the decision of the Constitutional Court. This situation entailed an amendment to Art. 126a *B-VG*. The revised version now obliges all legal entities to make an examination by the Court of Audit possible, in accordance with the legal opinion of the Constitutional Court. The enforcement of this obligation will be implemented by the ordinary courts.

b. Which decisions are accessible to enforcement?

The question of which type of judgement can at all be subject to enforcement in a wider sense is controversial.

In cases of disputes as to jurisdiction and declaration of competence (Art. 138 *B-VG*), enforcement of judgements impossible because the decision itself has - as a declaratory act - resolved the competence question.

In the case of differences of opinion between the Ombudsman institution and the Federal Government or a Federal Minister on the interpretation of provisions governing competence (Art. 148f *B-VG*), the decision of the Constitutional Court provides an authentic interpretation of the legal provisions in question in a declaratory judgement which is not accessible to enforcement.

The declaration that a statute, a regulation or a state treaty is null and void is not enforceable as such because the annulment occurs *eo ipso* together with the promulgation of the judgement of the Constitutional Court.

Since - as stated above - the competent Federal or State authorities are obliged by the Constitution to promulgate the Constitutional Court's judgement, the question arises, whether the judgement is enforceable as far as this particular obligation is concerned. In the literature, most authors answer this question affirmatively. On the other hand, it can be argued that the obligation to carry out the promulgation is not part of the content of the judgement, but one of its consequences. Since, however, only the content of a judgement can be subject to enforcement, the promulgation cannot be enforced. Only when the Constitutional Court states the obligation expressly in its judgement - which it usually does - enforcement is possible.

As regards the supervision of elections (Art. 141 *B-VG*), execution of the Constitutional Court's judgement cannot be considered, since all acts that have to be taken have a constitutive legal effect.

In impeachment cases enforcement is impossible in as much as a conviction under Art. 142 *B-VG* leads to removal from office. Only when the Constitutional Court imposes a penalty, enforcement is possible.

As regards complaints against the breach of constitutionally guaranteed rights provided for in Art. 144 *B-VG* (constitutional complaint), the judgement declares the contested administrative act void. Accordingly, enforcement is impossible. The obligation of the administrative authorities to act according to the Constitutional Court's judgement is only a consequence of this decision and not part of the contents. It can therefore not be subject to enforcement.

9. The documentation of decisions of the Constitutional Court

Art. 13a *VerfGG* determines that a documentation service (*"Evidenzbüro"*) shall be set up within the Constitutional Court.

The *"Evidenzbüro"* shall have particular responsibility for the summary inventory of judgements and decisions of the Constitutional Court and, where necessary, decisions of other supreme courts, and for the associated documents.

The President has the possibility of appointing a member of the Constitutional Court to direct the *"Evidenzbüro"* . This member shall then be treated in the same way as a permanent reporting judge as regards salary and retirement pension.

Since 1987 no such director has been appointed from among the members of the Court. Head of the *"Evidenzbüro"* is the President himself without additionally benefitting from the specific salary and pension regulation. Three jurists and two secretaries are employed in the *"Evidenzbüro"*.

The rapidly increasing caseload has confronted the Constitutional Court with severe problems. Without an efficient use of the possibilities offered by electronic data procession the Court would not have been able to adjust capacity to demand. The implementation of new information technologies has helped to cope with these problems without additional personnel. Moreover, the length of procedure could have been kept within tolerable limits and the documentation of the various procedural and final decisions could even have been improved.

The Constitutional Court also uses the new information technologies in order to make its judgements and decisions rapidly available for a wide range of interested users in a cost-advantageous way. The Court thereby closely cooperates with the law information system (*"Rechtsinformationssystem"*) in the Federal Chancellory as well as the publishing house *"Österreichische Staatsdruckerei"*.