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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**Workshop on
"The execution of judgments of Constitutional Courts"
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**The execution of judgments of Constitutional Courts and bodies of equivalent
jurisdiction - Country report**

**by
Ms B. Wagner
Austria**

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 be 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 (not the 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 may summon the Court 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*).

It is important to stress that the Austrian Constitutional Court - contrary to other courts of this type, especially the German Constitutional Court - has no power to review acts of the ordinary judiciary. The last instance in civil and criminal cases in Austria is the Supreme Court for Civil and Criminal Matters. Problems entailed by the fact that an ordinary court does not respect a judgement of the Constitutional Court can, therefore, not arise in Austria.

It is furthermore important to point out that the Austrian Constitutional Court can exercise its powers upon application only. The Court cannot enter into proceedings on its own initiative. Only when a case is already pending with the Constitutional Court and the Court has doubts as

to the constitutionality of a law (or the legality of a regulation or the legality of a state treaty) it has to apply to decide the case, the Court may suspend the proceedings and initiate norm review proceedings *ex officio*. After the conclusion of the norm review proceedings the Court will decide the original case accordingly.

II. Recently established Constitutional Courts must be concerned about the strength of their position within the framework of a new, democratic constitution and a changed political reality. It is therefore quite understandable that they wish to dispose of mechanisms provided for in the constitution to ensure the implementation of their judgements by the respective state organs concerned.

In the following I shall try to point out that - regardless of the theoretical importance of the possibility to execute a Constitutional Court's decision - this question has only very limited significance in practice.

I would like to make a distinction between the enforceability (i.e. the question as to whether a decision is accessible to enforcement at all) and the execution (i.e. the "juridical-technical" aspect of the enforcement) of a Constitutional Court's decision.

The question as to whether a judgement is enforceable and subject to execution depends on the type of competence in the framework of which the Constitutional Court is acting.

III. THE COMPETENCES OF THE AUSTRIAN CONSTITUTIONAL COURT AND THE EFFECT OF DECISIONS:

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

Under this article the Constitutional Court is competent to decide pecuniary claims under public law against the Federation, the *Länder* and the communities if such claims are not subject to proceedings before a court of ordinary jurisdiction or to proceedings before an administrative authority.

In its judgement the Constitutional Court may either hold that the claim was founded or may dismiss it. The judgement is enforceable before the ordinary courts (see below).

Art. 138,

Art. 126a and

Art. 148f B-VG: Disputes as to jurisdiction; declaration of competence

The Constitutional Court decides upon conflicts of competence between courts and administrative authorities, between the Administrative Court and all other courts, particularly between the Administrative Court and the Constitutional Court itself, between ordinary courts and other courts, between the Federation and a *Land* and between two or more *Länder* (Art. 138 para. 1 B-VG).

In its decision the Constitutional Court has to resolve the conflict of competence and has to determine the competent authority (court).

According to Art. 138 para. 2 the Constitutional Court decides, upon application of the Federal government or of a *Land* government, whether legislative, administrative or jurisdictional matters fall into the competence of the Federation or of the *Länder*.

The decision of the Constitutional Court determines the competence, but the declaration of competence is then set out in a "legal rule" ("*Rechtssatz*") which has to be published promptly by the Federal Chancellor in the Law Gazette.

The Constitutional Court furthermore decides upon differences of opinion between the Audit Office (Art 126a *B-VG*), or the Ombudsman institution (Art. 148f *B-VG*), on the one hand, and the Federal government or a Federal minister (also a *Land* government in the case of the Audit Office), on the other hand, on the interpretation of legal provisions which regulate their competences.

The decision of the Constitutional Court is an authentic interpretation of the rules on legal competences. The decision is declaratory (see also below).

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*

According to Art. 15a *B-VG*, the Federation and the *Länder* can enter into treaties on matters of common interest (e.g. environmental pollution laws, etc.). Art. 138a *B-VG* states that in the case of a treaty between the Federation and one *Land* or more *Länder*, the Constitutional Court can issue a declaratory decision, upon application of the federal government or of a *Land* government, on whether a valid treaty exists and whether the federation or the respective *Land* has performed its obligations under the treaty.

The same goes for treaties among the *Länder* if those treaties provide for the exercise of jurisdiction by the Constitutional Court.

Art. 139 B-VG: Review of the lawfulness of regulations

Administrative authorities are entitled to issue regulations (general abstract legal norms) based upon Federal law or *Land* law. The Constitutional Court decides - upon application of institutions (and in a very limited way) of individuals - whether a specific regulation or part of it is in accordance with the law on which it is based.

In the event of finding an illegality, the Constitutional Court will overrule the regulation. In such a case the regulation becomes invalid on the day of the promulgation of the judgement in the relevant gazette. The competent highest administrative authority of the Federation or a *Land* is obliged by the Federal Constitution Act (*B-VG*) itself to promulgate the judgement at its earliest convenience. The Constitutional Court may, however, stipulate a certain period (delay) not exceeding one year before the regulation becomes null and void, or it may overrule a regulation retroactively.

All courts and administrative authorities are bound by a judgement overruling a regulation. (For further details see Art. 140 *B-VG* below.)

Art. 140 *B-VG*: Review of the constitutionality of laws

Federal and *Land* laws can be subject to review by the Constitutional Court in order to determine whether they are in accordance with the Constitution. The Federal Constitution Act (*B-VG*) regulates cases of abstract and incidenter review of norms. Proceedings can be initiated by institutions and - in a very restricted sense - by individuals.

In its judgement the Constitutional Court decides either that the law shall not be overruled (not be declared null and void) for unconstitutionality, or it concludes that the law is unconstitutional, in which case it must overrule the law.

If the Constitutional Court overrules a particular law, it becomes invalid with the promulgation of the judgement in the relevant Law Gazette. The Federal Chancellor or the respective *Land* Governor are obliged by the Federal Constitution Act (*B-VG*) to promulgate the judgement at their earliest convenience. The Court has the possibility to decide that the law shall become invalid after a certain period of time not exceeding 18 months. The Constitutional Court also has the possibility to state in its judgement that the law that has been found unconstitutional shall not be applied to cases still pending with administrative authorities or the Administrative Court either. This can be considered as a retroactive abolition of the law.

All courts and administrative authorities are bound by the decision of the Constitutional Court. An overruled statute is, however, still applicable to those cases which have materialised before the statute has been overruled (except for the case that has caused the norm review proceedings, the "*Anlaßfall*"), for instance cases pending with administrative authorities or the Administrative Court, save it has been overruled "retroactively".

Art. 140a *B-VG*: Review of state treaties

The Constitutional Court may review the legality of state treaties. In certain cases, the Federal Constitution Act (*B-VG*) requires the approval of state treaties by the National Council (second chamber of Parliament) and here the Constitutional Court follows the rules for the review of laws (Art. 140 *B-VG*). Otherwise the review is made in accordance with the provisions of Art. 139 *B-VG*.

In its decision the Constitutional Court has to declare the legality or illegality of a state treaty. The consequence of a declaration of illegality is that such a treaty becomes ineffective in the domestic legal order upon the promulgation of the judgement or after the expiration of a delay set by the Court or retroactively.

Art. 141 *B-VG*: Supervision of elections, popular initiatives and referenda, and declaration that a person has been removed from office

The Constitutional Court reviews the legality of the electoral procedure for the most important elections (e.g. National Council, *Land* parliaments, European Parliament, Federal President,

Land governments, etc.). The Court has to grant the application when the alleged illegality of the electoral procedure is considered proved and when it was sufficient to influence the election result. (If, for instance, the casting of some votes in a particular district was illegal, but the number of illegal votes was so small that it could not have influenced the outcome of the election, the Court would dismiss the application.)

In line with the above mentioned principles, the Constitutional Court decides upon the legality of people's initiatives and referenda.

Federal law and *Land* law stipulate the reasons for the loss of a political position. Among others, loss of membership in the National Council, of a *Land* parliament, of a state or a town council or of the European Parliament are subject to the review by the Constitutional Court. In these cases proceedings are initiated by the respective councils.

When the Constitutional Court grants the application because an ineligible person had been declared eligible, it has to declare the election null and void.

In case of the granting of an application because an eligible person had unlawfully been deprived of his eligibility, the Court has to decide whether, through this fact, the election of other persons has become void, and whether to anul the election of these persons in consequence.

In cases of any other illegality in the course of an electoral procedure, it is - as mentioned - decisive that this illegality could have had an influence on the result of the election. If such an influence is probable, the decision has to state either that the whole electoral procedure or a precisely determined part thereof are annulled. The election authorities, which have to act in accordance with the decision, are bound by the finding of facts and by the legal opinion of the Constitutional Court.

Art. 142 and

Art. 143 B-VG: Impeachment

The Federal President, the members of the Federal government, the members of the *Land* governments, as well as the president of the Audit Office and the presidents of the state school councils, are subject to impeachment before the Constitutional Court. They can be accused before the Constitutional Court whereby their constitutional liability is brought into play owing to breaches of the law which they have committed in the exercise of their duties.

The proceedings before the Constitutional Court are initiated by an indictment. In its proceedings the Court applies the Code of Penal Procedure. The Court has to decide whether the respective office holder has - at least negligently - violated the legal order.

The decision of the Constitutional Court either states an acquittal or a conviction. In case of a conviction, the Court has to declare the loss of office and - under aggravating circumstances - the temporary loss of political rights. Only in case of a minor violation of the legal order the Court can - without further consequences - declare that a violation has been committed. In this case the convicted state organ will remain in office.

Art. 144 B-VG: Complaints against the breach of constitutionally guaranteed rights

Most cases brought before the Constitutional Court are complaints against decrees of the respective last instance administrative authorities for violation of constitutionally guaranteed rights in the course of the proceedings before the administrative authorities. Such a complaint may also be based on the allegation that there are doubts whether a regulation applied is legal or a law in accordance with the Constitution.

The judgement of the Constitutional Court has to state whether a violation of constitutionally guaranteed rights of the complainant has taken place, or whether such rights have been violated because of the application of an unconstitutional law or an illegal regulation. When such a violation has been proved, the Court has to annul the decree of the administrative authority.

Where the Constitutional Court has annulled the decree the administrative authority is obliged to use whatever means are available to restore the legal position in accordance with the legal opinion of the Constitutional Court.

Art. 145 B-VG: Violations of international law

Art. 145 B-VG states: "The Constitutional Court pronounces judgement on contraventions of international law in accordance with the provisions of a special Federal law."

Such a special Federal law has never been enacted. Since 1920 this constitutional provision has remained inapplicable.

IV. ENFORCEABILITY/EXECUTION OF JUDGEMENTS

The legal situation:

The Austrian Federal Constitution Act (*B-VG*) contains provisions with respect to the execution of judgements of the Constitutional Court:

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. Implementation 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 afore-mentioned 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."

An important amendment to the Federal Constitution Act (*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 the following amendment to Art. 126a B-VG.:

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."

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.

Which decisions are accessible to enforcement?

In only two cases the Federal Constitution Act (*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 declaring the competence of the Audit Office (Art. 126a *B-VG*).

The enforcement of all other judgements lies according to Art. 146 para. 2 *B-VG* (see above) with the Federal President.

The question of which type of judgement can at all be subject to enforcement in a technical 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.

A judgement stating that a **law**, a **regulation** or a **state treaty** (Art. 139, Art. 140, Art. 141 *B-VG*) 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 *Land* 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, Art. 143 *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*, 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.

The jurisdiction conferred on the Federal President has one practical significance: A claim of a party to the **costs of Constitutional Court proceedings** exists only where such a claim is explicitly stated in the Federal Law on the Constitutional Court (*VerfGG*). Accordingly, in some types of proceedings (proceedings on monetary claims under public law, the enforcement of which falls, however, according to Art. 137 *B-VG* into the competence of the ordinary courts, proceedings on norm review initiated by an individual, and proceedings regarding complaints against the breach of constitutionally guaranteed rights) the unsuccessful party (i.e. the respective administrative authority) can be subject to an order for costs. In these cases the costs of the proceedings are awarded to the winning party. Decisions of the Constitutional Court on costs are subject to enforcement upon application of the party. The Constitutional Court then forwards an application to the Federal President, who issues a decree in which he entrusts the enforcement of the decision to the ordinary courts.