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**MINI-CONFERENCE ON  
“THE RULE OF LAW”**

**REPORT**

by  
**Ms Britta ADAMOVICH-WAGNER**  
**Secretary General, Constitutional Court of Austria**

## I.

On March 14, 2012 the Austrian Constitutional Court has delivered a remarkable judgment in which it claims jurisdiction for ex post-review when applying the Charter of Fundamental Rights of the European Union<sup>1</sup>.

This result was by no means self-evident, because the entire law of the European Union does not have the formal rank of constitutional law in Austria, although – according to the Austrian Constitutional Court’s case-law – it enjoys supremacy even over national constitutional law. According to the principles of Austrian law prevailing until the mentioned judgment, the essential legal term for the jurisdiction of the Constitutional Court, namely a “constitutionally guaranteed right”, requires a right guaranteed by formal constitutional law.

For every constitution the difference between formal and material constitutional law is essential, although there are different opinions on the question when one is dealing with material constitutional law. On the other hand, it is commonly agreed to that formal constitutional law consists of those legal provisions which have been enacted in accordance with the rules of the constitution for their enactment and which are explicitly denominated as constitutional law.

In Austria, the formal understanding of constitutional law prevails. This is quite understandable because this understanding does not entail delimitation problems. However, this formal understanding of constitutional law also bears certain risks, because it is tempting for the legislator to drown constitutional law in regulations which do not belong to it because the material component is left aside. Everybody who has an idea of Austrian constitutional law knows what I mean.

The question what is material constitutional law gains special significance in connection with international treaties, which have to be classified in the hierarchy of norms according to their material content, but do not have the formal rank of the constitution. This problem has become even more relevant when the Charter of Fundamental Rights of the European Union entered into force on December 1, 2009, but it has been eliminated by the initially mentioned judgment.

The formal understanding of constitutional law is of utmost importance for legal protection. Without legal protection that guarantees their observance, human or fundamental rights are more or less useless. This legal protection may of course be shaped quite differently. In Austria, the legal term “constitutionally guaranteed rights” plays an important role. Only the protection of such rights falls within the jurisdiction of the Austrian Constitutional Court, and, without any doubt, what is meant by this term reflects the formal understanding of constitutional law. Also an international treaty may contain “constitutionally guaranteed rights”, if it is directly applicable.

However, since an amendment to the Federal Constitution Act in 2008<sup>2</sup>, it is no longer possible to conclude international treaties in the rank of constitutional law. If an international treaty is amending or supplementing the constitution, a special federal constitutional law has to be enacted. Special provisions exist with regard to international treaties which amend the basic regulations of the law of the European Union. A large number of provisions in constitutional rank contained in international treaties lost this rank as a consequence of a federal constitutional law aiming at the simplification of the Austrian constitutional order (BundesverfassungsrechtsbereinigungsG<sup>3</sup>), which had been enacted together with the just mentioned constitutional amendment.

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<sup>1</sup> U 466/11 et al.

<sup>2</sup> BGBl. I 2/2008.

<sup>3</sup> BGBl. I 2/2008.

Austria's accession to the European Union caused another severe problem. Before, it was possible to integrate norms regulating international obligations into the domestic "hierarchy of norms". As regards the European Union's legal system, this form of integration did no longer work. It was not the Accession Treaty that had been given the rank of the Constitution, but the Austrian Accession Law<sup>4</sup>, a constitutional law that had been subject to a referendum. Not a single provision of primary or secondary Community Law had the rank of the Constitution, although also constitutional law may be superseded by European Union law which consequently takes supremacy over any category of national law.<sup>5</sup>

A great problem was therefore caused by the Charter of Fundamental Rights of the European Union which – like the entire primary Union law – does not possess constitutional rank, and is therefore – if considered merely formally – not in a position to constitute "constitutionally guaranteed rights". In line with the principles developed by the case-law of the Constitutional Court, its application on the highest level would have been within the jurisdiction of the Administrative Court on the one hand, and the Supreme Court (for Civil and Criminal Matters) on the other. As a consequence, in future there would have been three highest courts in Austria adjudicating on fundamental rights. This consequence would have been very undesirable for the Austrian Constitutional Court which has therefore decided otherwise now. Pursuant Article 51 paragraph 1 the Charter of Fundamental Rights is addressed to the member states "only when they are implementing Union law". There can be no doubt that the Charter of Fundamental Rights is directly applicable Union law, above all when considering its wide accordance with the ECHR.

## II.

In its former case-law the Constitutional Court generally acted on the assumption that Union law does not form a standard for its review<sup>6</sup>. After the Court's judgment as of March 14, 2012, this case-law concerning Union law before the entry into force of the Lisbon Treaty may not be transferred to the Charter of Fundamental Rights. The Constitutional Court held in this judgment, that the Charter of Fundamental Rights forms an area distinctly separated from the "Treaties" of European Union Law.

The designation of the competent courts and the organisation of the proceedings concerning claims which should guarantee the protection of the citizen's rights derived from the direct effectiveness of Union law fall – in the absence of a regulation by Union law in this field – into the competence of the Member States; of course, these conditions must not be disadvantageous in comparison to comparable claims under domestic law.

From the case-law of the Court of the European Union the Constitutional Court gathers that Union law demands that rights guaranteed by directly applicable Union Law must be enforceable in a procedure as it exists for comparable rights based on the legal orders of the Member States (so-called "principle of equivalence").

For European Law's scope of application, the Charter of Fundamental Rights guarantees "rights" in the same way as does the Austrian constitutional order in the form of "constitutionally guaranteed rights". The Preamble emphasises that the "Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, ..., the ECHR, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights."

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<sup>4</sup> BGBl. 774/1994.

<sup>5</sup> VfSlg. 15.427.

<sup>6</sup> E.g. VfSlg. 15.753, 15.810.

In Austria, the ECHR is directly applicable and has the rank of the constitution<sup>7</sup>. The rights guaranteed by the Convention are “constitutionally guaranteed rights” in the meaning of Article 144 as well as of Article 144a of the Federal Constitution Act whose protection rests with the Constitutional Court. As results from the Explanations to the Charter of Fundamental Rights, many of its rights follow corresponding rights of the ECHR in terms of wording and intention.

Against the background of the Principle of Equivalency developed by the Court of the European Union the Constitutional Court had to examine in which way and in what proceedings rights of the Charter of Fundamental Rights could be enforced on the basis of the domestic legal situation.

Pursuant to Article 144 Federal Constitution Act, the Constitutional Court has the power to review whether “constitutionally guaranteed rights” have been violated by last instance administrative decrees. The legal protection system of the Federal Constitution Act is based on the assumption that the enforcement of a violation of “constitutionally guaranteed rights” shall be concentrated with one single instance, which is the Constitutional Court. This Court should also be the only one to adjudicate on such violations caused by general norms, namely by laws and regulations, and shall be the only instance entrusted with the power to repeal such legal norms.

As stated in its Art. 51 the Charter of Fundamental Rights contains “rights” and “principles”; it has not yet been clarified which provisions should be qualified how and what is the significance of the difference. However, in any case in the scope of application of Union Law many provisions of the CFR – the “rights” – fulfill the same task as do “constitutionally guaranteed rights” in the autonomous Austrian legal order. In view of the intention of a wide identity in terms of content and formulation with the ECHR whose rights are “constitutionally guaranteed rights” in Austria, there are large areas of protection with overlapping contents. It would contradict the Austrian Constitution’s concept of a centralised constitutional jurisdiction if the Constitutional Court were unable to adjudicate on the basis of the – often equivalently worded – rights in the Charter of Fundamental Rights.

Therefore, the Constitutional Court has concluded that – on the basis of the domestic legal situation – the Principle of Equivalence entails that the rights guaranteed by the Charter of Fundamental Rights may be enforced before the Constitutional Court as “constitutionally guaranteed rights”, and, furthermore, that they may form a standard of review in norm review proceedings with regard to laws and regulations within the scope of application of the Charter of Fundamental Rights. This applies in any case if the guarantee of the Charter equals in terms of wording and determinateness the “constitutionally guaranteed rights” in the Austrian Constitution.

As a matter of fact, the different guarantees contained in the Charter of Fundamental Rights partly have an entirely different normative structure and some of them do not equal „constitutionally guaranteed rights“, but rather „principles“, like for instance provided in Articles 22 or 37 of the Charter. Therefore it has to be decided in each individual case which rights of the Charter form a standard of review in proceedings before the Constitutional Court.

In a nutshell, this means that the Constitutional Court – when indicated after requesting the Court of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty of the Functioning of the EU – applies the Charter of Fundamental Rights as a standard of its review for domestic law and will repeal general legal norms which contradict this standard.

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<sup>7</sup> See BGBl. 59/1964.

The applicability of the Charter to acts of organs of the Member States requires that these are “implementing Union law”<sup>8</sup>, which means that the complaint, by which a right guaranteed by the Charter is claimed, falls within the scope of application of Union Law. According to the case-law of the Court of the European Union this scope has to be understood in a wide meaning. Besides the application of directly effective Union law by courts or administrative authorities, also the application of regulations implementing EU Law falls within this scope of application.

### III.

The importance and the consequences of this judgment cannot be overestimated. Since 1964 Austria strives towards a reform of its fundamental rights. Different attempts have been made on different levels. With the exception of a new Constitutional Law on the Protection of Personal Freedom<sup>9</sup> no results have been achieved. In this respect, the problem area was especially in the field of the so-called “social fundamental rights”.

As a matter of fact, under the headline “Solidarity” in its Chapter IV the Charter of Fundamental Rights contains exactly such rights. Rights, and not mere programmatic postulations, such as:

- Article 28: Right of collective bargaining and action
- Article 29: Right of access to placement services
- Article 30: Right to the protection in the event of unjustified dismissal
- Article 31: Right to fair and just working conditions
- Article 33: Right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave
- Article 34: Right social security and social assistance
- Article 35: Right of access to preventive health care and to benefit from medical treatment

All these rights are principally justiciable (before the ordinary courts) and can be a standard of review in norm review proceedings before the Constitutional Court. Admittedly, Chapter IV contains also so-called “principles”, however, these can terminologically be clearly distinguished from the “rights”.

As regards Austria, the Charter of Fundamental Rights is equally important for the concept of human dignity. Until the enactment of the Constitutional Law on the Protection of Personal Freedom, this term was neither part of the Austrian constitutional legal order nor was it part of the ECHR, which, however, refers in its Preamble to the UN Declaration of Human Rights as of December 10, 1948, which uses in its Preamble and in its Article 1 the term “human dignity”. In Austria it was the Supreme Court and later also the Constitutional Court which assigned the term its due place.

Now we are confronted with the legally binding Charter of Fundamental Rights of the European Union which protects human dignity in the first place, namely in its Chapter 1, Article 1. Evidently the wording replicates Article 1 of the Basic Law of the Federal Republic of Germany. Through Article 1 of the Charter human dignity has finally become the central legal norm in the Austrian legal order, and the respective former approaches in science and case-law have thus been confirmed in an impressive manner.

Legal experts agree upon the fact that the legal opinion laid down in the Constitutional Court’s judgment has rendered obsolete the necessity of a reform of fundamental rights in Austria. In

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<sup>8</sup> Article 51 paragraph 1 Charta of Fundamental Rights of the European Union.

<sup>9</sup> BGBl. 684/1988.

fact, because of its comprehensive character the Charter of Fundamental Rights may be regarded as a compensation for the lack of a national codification of fundamental rights.

However, many questions remain still unresolved, like, for instance, the question how to proceed if the legislator has failed to shape in detail the rights guaranteed in Chapter IV "Solidarity". Generally, legislative omission is a challenge to constitutional justice which, as a rule, may not enact legal norms itself.

#### IV.

##### Summary:

- In proceedings in which EU law is involved the Charter of Fundamental Rights has to be regarded like the Austrian Constitution.
- As a consequence, fundamental rights guaranteed by the Charter are constitutionally guaranteed rights which may be enforced before the Constitutional Court.
- From now on, besides the domestic constitutional law and the ECHR the Charter is a further standard of review for the Constitutional Court.
- The legislator and administrative authorities issuing decrees or regulations have to consider the Charter as part of the Austrian Constitution.
- In complaints and applications to the Constitutional Court, in which EU Law is involved, a violation of the rights guaranteed by the Charter may be claimed.
- The Constitutional Court will repeal the decision of an administrative authority if it violates rights guaranteed by the Charter.
- If the Constitutional Court concludes in norm review proceedings that a law contradicts a right guaranteed by the Charter it will repeal this law for unconstitutionality.
- The Constitutional Court will decide these matters without referring questions to the Court of the European Union. If the Court has doubts with regard to the interpretation of the Charter it will request the Court of the European Union for a preliminary ruling.