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The procedure at the Austrian Constitutional Court in cases concerning disputes between different powers

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Before considering the main topic of this seminar I want to give you some essential information on the Austrian Constitution and introduce you to some pecularities of Austrian constitutional law:

The Austrian Federal Constitution which was enacted in 1920 contains no strict rule to incorporate constitutional amendments in the Constitution (as it is stipulated e.g. in Art. 79 sub-para. 1 of the *Bonner Grundgesetz*). Therefore only the most important provisions of Austrian constitutional law are incorporated into the Federal Constitutional Law (*Bundes-Verfassungsgesetz* which is the constitutional charter) while there exist numerous other constitutional laws aside of - or outside - the Constitution or even individual constitutional provisions interspersed among law statutes in the rank of ordinary law.

The Austrian Constitution lacks furthermore a so-called perpetuity clause meaning that essential parts of the Constitution cannot be changed legally (unlike in Germany; Art. 79 sub-para. 3 of the *Bonner Grundgesetz*). However, the Austrian Constitution - just like any constitution - is based on certain fundamental principles which form the core of the state's political system.

Though the opinions about the number of the leading principles differ their content is not disputed. These fundamental principles are democracy, a republic and federalism as well as the rule of law. One can also add the liberal principle (the basic human rights) and the separation (sharing) of powers as separate fundamental principles while others hold the opinion that those two principles are comprised by the other ones.

A specific legal meaning is attached to these leading constitutional principles in the Austrian Constitution. Each amendment of (ordinary) constitutional law is subject to a qualified majority of the two chambers of the Austrian Parliament, being the National Council (*Nationalrat*) and the Federal Council (*Bundesrat*). Additionally, such amendments can only be enacted when at least half of the National and Federal Council's members attend; the amendment must be explicitly designated as (formal) constitutional law. 'Any total revision of the Federal Constitution' is, moreover, subject to a referendum to be held pursuant to Article 44, para. 3 of the Federal Constitutional Law (*B-VG*). An overall amendment ('total revision') is deemed as such if one or more fundamental principles are substantially changed or even removed. Constitutional law being enacted without following this strict procedural request and causing such a total revision would be unconstitutional and would have to be annulled by the Constitutional Court.

Thus, the Austrian Constitution distinguishes between two different levels of federal constitutional law, the ‘fundamental constitutional order’ consisting of the fundamental principles, and ordinary constitutional law. Based on the same idea of the "pyramid of norms" - developed by *Adolf Merkl* and *Hans Kelsen* - there is ordinary law beneath the rank of constitutional law while regulations (normative acts issued by administrative organs) are subordinate to law. Such a clear distinction of the different hierarchy of norms is an essential condition for constitutional jurisdiction.

But let me once more come back to the fundamental principles illustrating clearly both structure and essence of the Austrian Constitution thus providing us with the necessary knowledge for a better understanding of the Constitutional Court's jurisdiction to settle possible conflicts of powers.

According to Article 2 of the Federal Constitutional Law (*B-VG*) Austria is a Federal State comprising nine independent federal states (*Länder*). The **principle of federalism** emanates from the installation of a more or less autonomous legislation (including constitutional legislation) of the *Länder* and a more or less autonomous administration of the *Länder*. The *Länder* take part in legislation and constitutional legislation through a state chamber, the Federal Council (*Bundesrat*) and participate in federal administration (so-called indirect federal administration). Compared to other federal states (like Germany or the USA) the principle of federalism is not very highly developed in Austria. The most important legislative powers are clearly allocated to the Federation. The *Länder* may for instance not exercise jurisdiction over federal matters (exclusive power of the Federation) and - most important - the power to distribute the powers lies with the Federation.

Not only this quite unbalanced distribution of powers provokes from time to time conflicts of the legislative powers but also newly developing legal matters (environment protection, waste treatment and waste disposal, town and country planning) can be a source of quarrels. It is mostly very difficult to figure out which of the legislators is (or was) to regulate such new legal matters because the terminology used by the constitutional legislator of 1920 in the relevant constitutional provisions on distribution of powers (Articles 10 to 15 *B-VG*) does rarly comprise them. Sometimes neither the one nor the other legislator is competent to issue a certain law because the matter in question is amalgamated with the legislative powers of both the Federation and the *Länder* to an unsolveable extend.

The fundamental **principle of the separation of powers** is not explicitly stipulated in the Constitution but embodied through numerous individual constitutional provisions serving to implement it. As the Federal Constitution contains a - complicated - concept of reciprocal dependence and controlling mechanisms one should rather speak of a sharing of powers. Its concept is of organizational and substantive nature though focussing on the organizational part:

Parliaments (*Nationalrat, Bundesrat, Landtage*) must concentrate on legislation and may control the administration or participate in the administrative process in cases provided for by constitutional law. The administration has to implement the laws enacted by the parliaments. According to the socalled principle of legality - a cornerstone of another fundumental principle, namely the **rule of law** - "the entire administration must be based on law" (Article 18 para. 1 *B-VG*). Thus, neither administrative nor judicial authorities may perform any action lacking a statutory basis; administration and the judiciary are subordinate to legislation. Parliament on the other hand may not influence the judiciary in any other way than by statute (statutes as well as regulations - norms with a generally binding effect issued by administrative authorities - in turn are subject to review by the Constitutional Court). Furthermore the Constitution stipulates the separation of administration and the judiciary "in all instances". This means that an authority must not be court and administrative authority at the same time; instructions must not be issued between courts and administrative authorities and vice versa; there must not be an appeal from a court to an administrative authority and vice versa. In this context one should add that the legislator is free to allocate the execution of a matter either to the courts or the administration.

Furnished with this brief outline of the relevant parts of Austrian constitutional law I want to enter into the report's main topic.

I. According to Article 138, para. 1 *B-VG* the Constitutional Court decides upon conflicts of competence between

- courts and administrative authorities
- the Administrative Court and all other courts, particularly between the Administrative Court and the Constitutional Court itself as well as between ordinary courts and other courts
- the *Länder* and between the Federation and a *Land.*

The term "competence" is a synonym term for "jurisdiction". The power of the Court is restricted to decide on (true) conflicts of jurisdiction and not to decide on questions concerning the substantive legality of an act of an authority (VfSlg. 1351/1930). The Court is only authorized to review and to determinate the jurisdictional (*formalrechtliche Frage*) question whether a court or an administrative authority has to decide a certain matter and not the substantive question of a decision's contents and its legality (VfSlg. 1341/1930).

The jurisdiction of the Court pursuant to Article 138, para. 1 *B-VG* presupposes a conflict of competence. Such a conflict arises only if two or more authorities claim their exclusive jurisdiction to decide the same matter ("affirmative - **positive** - **conflict of competence**") or deny it ("denying - **negative** - **conflict of competence**"). Consequently, one authority claims or denies its competence illegaly. Accordingly there is no such conflict if e.g. two competent authorities claim their jurisdiction (competitive competence) or if two incompetent authorities deny their jurisdiction.

The same matter means that the main issue must be concerned and not a preliminary question. The Court's review whether there is identity of a matter is not based on the (authorities') decisions issued or to be issued but based only on the statutorily determined distribution of jurisdiction. Thus, the application to settle a such dispute and the arguments of a party are not decisive for the Court's review. If the Court finds that there was no conflict of competence according to the legal situation it has to reject the application (because of its incompetence pursuant to Article 138, para. 1 *B-VG*; VfSlg. 3490/1959, 4437/1963). Yet, the applications which were submitted by the party to a court on the on hand and to an administrative authority on the other hand are decisive for the Constitutional Court's review of the question whether there is identitiy of the matter (VfSlg. 1643/1948).

The criteria of the positive conflict of competence namely that two or more authorities "claim their jurisdiction" means that those authorites must have entered into proceedings aiming to pass a decision on the merits. If a court and an administrative authority have already delivered a decision in the same case Article 42.1 of the Federal Law on the Constitutional Court (*VerfGG*) stipulates that an application for a settlement of such a dispute can be filed with the Court only until a decision (on the main issue) has become final. This means that the conflict is settled as soon as there is a final decision. As regards the Court's relevant precendent only a final decision of a court terminates the conflict (VfSlg. 1643/1948; see also Article 43.1 and 43.2 *VerfGG*).

The criteria of the negative conflict of competence namely that two or more authorities "deny their jurisdiction" requires that the authorities rejected the applications of the party on procedural grounds (alleging their incompetence). According to the Court's precedent such decisions need not to be final ones (VfSlg. 2856/1955, 13087/1992), can even be delivered in

an informal way (VfSlg. 3798/1960, 11861/1988) and the party concerned is not bound to fight his/her case through all instances (VfSlg. 2687/1954, 3483/1958).

I. 1) Procedure:

a) Conflict of competence between a court and an administrative authority (Article 138.1.a of the Constitution - *B-VG*; Article 42 of the Federal Law on the Constitutional Court - *VerfGG*):

In case of a positive conflict of competence a court getting aware of the conflict has to continue its proceedings for the time being, while the administrative authority is obliged to discontinue its proceedings and to report on the case to the highest administrative authority.

The highest competent administrative authority of the Federation or a *Land* has to submit the application to the Constitutional Court within four weeks following the end of the day on which it had official notice of the dispute (Article 42.2 *VerfGG*); additionally the applicant authority immediately has to notify the court concerned of the filing of this application (Article 42.4 *VerfGG*); as soon as this notification is received the court's proceedings are suspended until the Constitutional Court has issued its judgment (Article 42.5 *VerfGG*).

If the highest competent administrative authority fails to comply with the four weeks' term Article 42.3 *VerfGG* stipulates that the court involved shall have jurisdiction to decide the matter.

The persons involved in the proceedings may put a request to the highest competent administrative authority to do the application bringing the case before the Constitutional Court. If the administrative authority concerned does not file the application within a term of four weeks the party of the administrative proceedings are entitled to lodge such an application with the Constitutional Court within another four weeks (subsidiary entitlement; Article 48 *VerfGG*).

b) **Conflict of competence between courts (Article 138.1.b of the Constitution - *B-VG*; Article 43 of the Federal Law on the Constitutional Court - *VerfGG*):**

In case that a positive conflict of competence has arisen between the Administrative Court and another court, between the Administrative Court and the Constitutional Court or between an ordinary court and another court the Constitutional Court may only deliver a judgment until one of the courts mentioned above has delivered a final judgment on the merits (Article 43.1 *VerfGG*). The court which has delivered the final judment is then the one having sole jurisdiction (Article 43.1 *VerfGG*).

Otherwise the Constitutional Court has to settle the dispute as to jurisdiction and to start its proceedings as soon as the it is aware of the conflict because of a notice given either by a court involved in the conflict or the parties concerned or because of the files of a case pending before the Court itself. All courts involved in such a conflict are obliged to give notice. Article 48 *VerfGG* stipulates again a subsidiary entitlement for the parties to lodge an application to the Court.

As soon as the Constitutional Court starts its proceedings those before the court concerned are suspended until the Constitutional Court has passed its judgment (Article 43.5 *VerfGG*).

c) **Conflict of competence between administrative authorities of the Federation, the *Länder* or between administrative authorities of different *Länder* (Article 138.1.c of the Constitution - *B-VG*; Article 47 of the Federal Law on the Constitutional Court - *VerfGG*):**

In case that a positive conflict of competence has arisen between an administrative authority of the Federation and an administrative authority of a *Land* or at least between two administrative authorities of different *Länder* each of the governments concerned is entitled to lodge the application asking the Court to settle the dispute (Article 47.1 *VerfGG*).

Such a conflict can only arise between administrative authorities executing administrative matters of different territorial entities (such as of the Federation or of the *Länder*). Therefore a dispute as to jurisdiction taking place between an administrative authority of the direct federal administration (e.g. General Post office) and an administrative authority of the indirect federal administration (the Governor of a *Land* = *Landeshauptmann*) is not to be settled by the Constitutional Court because this conflict remains within the administration of the Federation (VfSlg. 3531/1959).

The application to settle such a conflict must be submittted to the Constitutional Court within a term of four weeks following the end of the day on which the applicant government had official notice of the conflict (Article 47.2 *VerfGG*); the applicant government is obliged to give immediately notice of the application to the other government concerned (Article 47.3 *VerfGG*).

The application suspends the proceedings pending before the administrative authorities in question (Article 47.4 *VerfGG*).

The parties of the proceedings pending before the administrative authorities are again subsidiarily entitled to lodge such an application (Article 48 *VerfGG*).

In all cases of a negative conflict of competence (Article 138.1.a-b of the Constitution - *B-VG*; Articles 42,43,47 of the Federal Law on the Constitutional Court - *VerfGG*) it is <u>always and only the party</u> whose applications have been rejected either by a court or by an administrative authority who is entitled to lodge the application with the Constitutional Court asking to settle this conflict of competence (Article 46.1, 50.1 *VerfGG*).

If there is an oral hearing before the Constitutional Court it has to summon all parties concerned. The **judgment** issued by the Court has to determine which authority (judicial or administrative) has the jurisdiction in the matter in question and has to annul all acts of either a judicial or an administrative authority which are contrary to the judgment. [*This is the unique possibility that the Constitutional Court may annul a judgment/decision passed by an ordinary court! According to Austrian constitutional law the Court is not authorized to review the judiciary.*]

The territorial entity of which an authority wrongly claimed or wronlgy denied its competence has to refund the party's expenses of the proceedings. If an applicant has withdrawn the application to settle a conflict of competence before the oral public hearing has

started (or before the Court's deliberations have started) the applicant may be ordered to refund those costs which have already been incurred by the other parties concerned (Article 52 *VerfGG*).

Besides of the Constitutional Court's jurisdiction to settle conflicts of competence which have already occured the Constitutional Court has another important jurisdiction, which actually aims to avoid possible conflicts:

II. According to Article 138.2 of the Constitution - *B-VG* the Constitutional Court **determines** on the application either of the Federal Government or of a *Land* government whether an act of legislation or administration (= any act of administration - e.g. judgments, administrative decisions/decrees and so on) falls within the **competence** of the Federation or of the *Länder*.

II. 1) Procedure:

Such an application for the determination of the legislative competence must contain a bill (a draft law) which is intended to be enacted by one of the legislative bodies (Article 54 *VerfGG*).

If the Court shall determine which administrative authority is entitled to issue a regulation the applicant has to attach a draft of this regulation and to name the authority which should adopt it (Article 55 lit. a *VerfGG*). Where the Court shall determine which administrative authority is entitled to implement an act of administration the application must contain the particular facts which are to be regulated and must name the authority which should issue the administrative decree (Article 55 lit. b *VerfGG*).

The Constitutional Court reviews such a draft law or draft regulation exclusively on their compliance with those provisions of the Constitution distributing the powers. The Court never has to review the contents of such drafts or whether they are in accordance with the Constitution or with law (VfSlg. 8830/1980, 9547/1982).

The decision of the Court has only to determine the competence. The determination of competence must be summarised in a "legal axiom" (*Rechtssatz*) which must be immediately published by the Federal Chancellor in the Federal Law Gazette (Article 56.4 *VerfGG*).

Such a legal axiom has - according to the relevant precedents of the Constitutional Court and to the legal doctrine - the efffect of an authentic interpretation of the provisions of the Constitution distributing the powers and has the rank of constitutional law (VfSlg. 3055/1956, 4446/1963). Thus such a legal axiom has binding effect on all authorties (judicial and administrative) as well as on the legislative bodies and finally on the Court itself (VfSlg 9667/1983). Just the (federal) constitutional legislator can change such a finding. This jurisdiction of the Constitutional Court is also called the "preventive review of norms".

III. Differences of opinion - Court of Audit/Ombudsman institution

The Constitutional Court decides upon differences of opinion which arise between the Court of Audit (*Rechnungshof*) and certain legal entities (Federation, *Länder*, communes, assoziation of communes) about the interpretation of legal provisions on the jurisdiction of the Court of Audit (**Article 126a of the Constitution**).

Finally the Constitutional Court settles differences of opinion which arise between the Ombudsman institution (*Volksanwaltschaft*) and the Federal Government, a Federal minister or a *Land* government (**Article 148f of the Constitution**) about the Ombudsman institution's jurisdiction to control the administration.

III. 1) Procedure (Articles 36a-36g of the Federal Law on the Constitutional Court - *VerfGG*):

In the case of differences of opinion about the interpretation of legal provisions governing the Court of Audit's jurisdiction, either the Federal Government or the government of a *Land* or the Court of Audit itself are entitled to apply for a judgment. The Federal Government may apply in matters of federal administration and a *Land* government in case the quarrel concerns administrative matters of a *Land*, communes or assoziation of communes.

A difference of opinion arises if an entity explicitly disputes the jurisdiction of the Court of Audit over an audit, or does actually not allow an audit or if the Court of Audit itself refuses to carry out certain audit measures.

An application to determinate the jurisdiction of the Court of Audit must be lodged to the Court within the term of one year since the difference of opinion arose. The application has the effect that the official action (audit measure - *Amtshandlung*) of the Court of Audit is postponed or suspended until the Constitutional Court passes its judgment.

Parties of the Court's proceedings are the Court of Audit and the legal entity with which the difference of opinion has arisen. (If the legal entity is not a territorial entity the Constitutional Court must ask a statement from those territorial entities - as associated parties - having a holding in the undertaking concerned or to the accouting sphere of which the legal entity concerned is attached.)

The judgment of the Constitutional Court determinates the statutory jurisdiction. If the legal entity concerned is not a territorial entity the Court's judgment must contain the sentence that the legal entity is obliged to enable an audit to be carried out.

According to Article 126a of the Constitution the enforcement of the Court's judgments must be carried out by the ordinary courts. This is due to a constitutional amendment of 1993 which had become necessary in connection with a judgment determining the Court of Audit's jurisdiction to examine the accounts of one of the major Austrian banks (of which both the Federation and the *Land* Vienna had shares; VfSlg. 13346/1993). But when the Court of Audit's officials wanted to start their audit they were denied admittance to the records of the bank.

There ars no costs awarded in proceedings concerning the difference of opinion between the Court of Audit and a territorial entity. Just in proceedings concerning the difference of opinion between the Court of Audit and a legal entity the unsuccessful party (or the one withdrawing the application) may be ordered to pay the costs.

The same procedural statutes (Article 36a - 36e VerfGG) governing the Court's proceedings determining the Court of Audit's jurisdiction are to be applied to the proceedings concerning the differences of opinion arising between the Ombudsman institution and the Federal Government, a Federal minister or a *Land* government about the interpretation of legal provisions on the jurisdiction of the Ombudsman institution.