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A Kelsenian model of constitutional adjudication

The Austrian Constitutional Court

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For a general introduction to Austrian Constitutional Law in English see *Manfred Stelzer*, An Introduction to Austrian Constitutional Law[2] (2009) and, more recently, *Manfred Stelzer*, The Constitution of the Republic of Austria: A Contextual Analysis (2011); for a brief summary of the most important proceedings before the Austrian Constitutional Court see *Ronald Faber*, The Austrian Constitutional Court—An Overview, ICL-journal 2008, No. 1, 49.

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Abstract For more than hundred years the "American system" of adjudication, mastered by one Supreme Court vested with the power to review not only judicial, but also administrative as well as legislative acts enjoyed the virtual monopoly to serve as the role-model of Constitutional review. When the Austrian Constitution was enacted in 1920, however, it was supplemented by an "Austrian system" of adjudication essentially designed by *Hans Kelsen*; creating a specialized body to review the constitutionality of legislative acts; the first Constitutional Court. This article provides an introduction to the Court's organization and proceedings.

Zusammenfassung Mehr als hundert Jahre lang war das „amerikanische System", in dem ein Supreme Court befugt ist auch administrative und legislative Akte auf ihre Verfassungsmäßigkeit zu überprüfen das alleinige Vorbild für die Organisation von Verfassungsgerichtsbarkeit. Mit der österreichischen Bundesverfassung von 1920 wurde es durch ein wesentlich von *Hans Kelsen* geprägtes „österreichisches System" ergänzt, in dem eine spezialisierte Institution zur gerichtlichen Überprüfung der Verfassungsmäßigkeit administrativer und legislativer Akte vorgesehen war – der Verfassungsgerichtshof. Dieser Beitrag soll einen Überblick über die Struktur und die Verfahren des Verfassungsgerichtshofs bieten.

I. Constitutional review: an "American" system—an "Austrian" system

When "*Marbury v. Madison*" was decided in 1803, *John Marshall*, then Chief Justice of the United States Supreme Court, invoked a principle *supposed to be essential to all written constitutions*, whereas *a law repugnant to the constitution [was] void* and that courts were thus capable to review statutes and ordinances with regard to their constitutionality;[1] as it was *emphatically the province and duty of the judicial department to say what the law is*.[2] This "American system" of constitutional adjudication enjoyed the virtual monopoly to serve as the role-model of judicial review for more than hundred years.[3] Many countries,[4] Japan among them,[5] should follow the US-American example by creating a system of adjudication mastered by one Supreme

[1] *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

[2] *Ibidem* 177. There, of course, exists a vast (introductory) literature on this judgment which makes it virtually, if not factually impossible to refer to select pieces of scholarship in English at this point. For a German introduction see e.g. *Winfried Brugger*, Kampf um die Verfassungsgerichtsbarkeit: 200 Jahre Marbury v. Madison, JuS 2003, 320; or *Werner Heun*, Die Geburt der Verfassungsgerichtsbarkeit—200 Jahre Marbury v. Madison, Der Staat 2003, 267.

[3] Marbury v. Madison, of course, was *per se* essential for the determination of judicial review in the US on the federal level. For the historical development of judicial review on the State Court level see *William Nelson*, Changing Conceptions of Judicial Review, U Pa L Rev 1972, 1166.

[4] For the role-model function of the US model of Judicial Review and a comparison of this system to different approaches see *Mark Tushnet*, Marbury v. Madison Around the World, Tenn L Rev 2004, 251.

[5] Which is, however, structured in a rather centralized manner when compared to its US archetype, as the Supreme Court is according to Art 81 of the Japanese Constitution the only Japanese court explicitly empowered to review the constitutionality of legislation. For the lower courts' powers to interpret the constitution in the Japanese legal system see the Food Staple Management, Minshu 1950, 73.

Court vested also and in particular with the power to review administrative as well as legislative acts.

This "American system", however, turned out not the only option to design a system of judicial review. In 1920, when the Austrian Constitution was enacted,[6] it was supplemented by an "Austrian system" of a specialized body created to adjudicate the legality of government action as well as to review the constitutionality of legislative acts—a *Constitutional* Court.[7]

The idea of a specialized Constitutional Court, again, dates back to the late nineteenthcentury when it was introduced by *Georg Jellinek* who thought of such a court not only as a State Court to decide on questions of conflicts of competence between different legislators but also between majority and minority factions in parliament with regard to the substantive constitutionality of statutes.[8] The proposal's realization in the Austrian Constitution, however, caused a heated scholarly debate. *Carl Schmitt*, chief opponent of a judicial system of constitutional review argued that such a system would not have the consequence of adjudicating politics but quite on the contrary to politicize the judiciary,[9] thereby, as some assume, disregarding that the theoretical concept of his intellectual adversary *Hans Kelsen*, who widely is regarded as "father" not only to the Austrian Constitution but also to the idea of creating a system of specialized constitutional adjudication,[10] does not perceive law and state as separate phenomena. Thus *Kelsen* saw such a political function of a constitutional court not as a problem; rather protecting the state than threatening its foundations.[11] Still it should take some 30 years more for the "Austrian approach" to become an example that eventually was copied numerously around the globe.[12]

II. The most active Constitutional Court?

The Austrian Constitutional Court has been a highly active court from the very outset: Between June 1921 and May 1932 it repealed three federal statutes and nine state

[6] Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1920, 10.11.1920.

[7] It has to be taken into account that the Austrian Constitutional court *de iure* is not to be considered as the first example of a judicial body entrusted with the singular power of constitutional review. The Constitution of the Czechoslovak Republic had established a comparable system already by March 1920—see *Herbert Haller*, Die Prüfung von Gesetzen (1979), 67. However, this court never ruled on the constitutionality of a statute; its competence thus remained theoretical—see *Ludwig Adamovich*, Der Verfassungsgerichtshof der Republik Österreich—Geschichte—Gegenwart—Visionen, JRP 1997, 1.

[8] *Georg Jellinek*, Ein Verfassungsgerichtshof für Österreich (1885).

[9] *Carl Schmitt*, Das Reichgericht als Hüter der Verfassung, in Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954[4] (2003) 98.

[10] *Felix Ermacora*, in a Review of Georg Schmitz, Karl Renners Briefe aus Saint Germain mit ihren rechtspolitischen Folgen, ÖJZ 1992, however, attributes the idea of creating an Austrian System of constitutional adjudication not to *Hans Kelsen* but to *Karl Renner*, then Chancellor of the First Austrian Republic.

[11] *Robert Van Ooyen*, Die Funktion der Verfassungsgerichtsbarkeit in der pluralistischen Demokratie und die Kontroverse um den "Hüter der Verfassung", in Van Ooyen (ed), Wer soll der Hüter der Verfassung sein?, (2008) I, XVIII–XX.

[12] See *Peter Häberle*, Verfassungsgerichtsbarkeit XIV (1976); for additional references see, for example, *Claudia Fuchs*, Verfassungsvergleichung durch den Verfassungsgerichtshof, JRP 2010, 176 (177).

laws, thereby exceeding all other European Courts assigned with the task of constitutional adjudication in their entirety.[13]

The fact that the Austrian Constitutional Court has to be considered as the most active constitutional Court all over Europe may not have changed; the numbers have: In 2009 the Court ruled on more than 5,400 applications. Among these were 379 motions for judicial review. 56 statutes were at least partially repealed by the Constitutional Court in 2009.[14]

In this article I would like to give a basic idea about institution and proceedings of this, perhaps still most active, Constitutional Court, paying particular attention to its role as "negative legislator" created to safeguard the democratic process by monitoring the legislator's activities.[15]

III. Organization and proceedings

A. Organization

The Court is composed of a President, a Vice President, twelve additional members and six substitute members standing in for the regular members in cases of conflict of interest or illness, for example (Art 147 para 1 B-VG).

All of the Court's members must have completed academic legal studies or studies in law and political science and must have held a professional appointment which requires the completion of these studies for at least ten years. They are appointed by the Federal President (Art 147 para 2 B-VG).

President, Vice President, six permanent members and three substitute members are appointed based on the request of the Federal Government. These members and the substitute members are to be selected among judges, administrative officials, and professors holding a chair in law. Three further members are appointed based on the request of the National Council and the remaining members upon request of the Federal Council. Interestingly, three members and two substitute members must have their domicile outside the Federal capital, Vienna—a requirement embodying Austria's federal structure. All members stay on the court until the end of the year they turn to be seventy years of age.

[13] *Theo Öhlinger*, Die Entstehung und Entfaltung des österreichischen Modells der Verfassungsgerichtsbarkeit, in Funk ea (eds), Der Rechtsstaat vor neuen Herausforderungen. Festschrift für Ludwig Adamovich (2002) 581 (585).

[14] See the Court's activity report 2009, 18 <vfgh.at/cms/vfgh-site/vfgh/taetigkeit.html>.

[15] Cf *Hans Kelsen*, Wesen und Entwicklung der Staatsgerichtsbarkeit, 5 VVDStRL (1929) 30, 53–56, 80–81.
To make clear how widely accepted this function is, it may be necessary to emphasize that the Constitutional Court's capacity to repeal decisions by the legislator has never caused as heated debates against the backdrop of a so called "counter-majoritarian difficulty" (see *Alexander Bickel*, The Least Dangerous Branch [1962]) in Austria—as it did in the US, for example. Quite on the contrary, academic critique often gives the impression the Austrian legislator had to justify the enactment of constitutional provisions (substantively) overturning decisions by the Constitutional Court—see *Christoph Bezemek*, Materielle Perspektiven eines formellen Verfassungsverständnisses, in Holoubek/Martin/Schwarzer (eds), Die Zukunft der Verfassung—Die Verfassung der Zukunft. Festschrift für Karl Korinek (2010) 437 (447 f).

The position of a member of the constitutional court is designed not as a principal occupation but as a secondary avocation in addition to the member's principal occupation (attorneys, law professors, administrative officials[16]).[17] Such a concept of a "court of dignitaries" is indeed advantageous by adding continuing practical experience of the Court's members to its jurisprudence. However, it also may raise problems given the immense caseload the court has to face—which (at least partially) are addressed by the fact that the members have a staff of up to four law clerks assisting them in drafting their opinions.

The Court's decision-making body is the Plenary which is quorate when—apart from the member presiding—eight other members are present (§ 7 para 1 VfGG [Constitutional Court Act]). The Plenary meets for quarterly sessions. Members that have been chosen to serve as Case Reporters prepare "their" cases in such a way that they can be discussed in the Plenary during the session. Cases that are, in a judicial sense, more easily resolved are dealt with in the smaller committee, the so-called "small assembly" (kleine Besetzung).

B. Proceedings

1. Specialized but not exclusive

Before discussing the Court's jurisdiction it may prove to be important to provide for a basic understanding of the Austrian court system, as the Constitutional Court enjoys special but not elevated or exclusive status, partly also in constitutional matters. Rather, the Austrian legal system provides for three High Courts: Besides the Constitutional Court, these are the Administrative Court which is assigned to the legal review of decisions of administrative authorities but lacks jurisdiction to review any violations of constitutional law, and the Supreme Court as court of last resort in civil and criminal matters (and thus in matters decided by the so called *ordinary* courts). The Constitutional Court has no power to review decisions by the Administrative Court or the Supreme Court (and ordinary courts in general). All decisions by the ordinary courts are subject only to review within the judiciary, also with regard to alleged violations of fundamental rights.

This does not prove to be a problem with regard to the review of decisions of administrative authorities due to the fact that the Constitutional Court may be addressed in constitutional matters (Art 144 B-VG). Concerning the alleged illegality of statutes and ordinances applied in proceedings before ordinary courts, however, the system allows for improvement:

Albeit the Supreme Court and appellate courts do have the obligation to address the Constitutional Court when applying statutes and ordinances while questioning

[16] Administrative officials on active service who are appointed members are to be exempted from all official duties (Art 147 para 2 B-VG).

[17] Members of the Federal Government, or a State Government, members of a representative body or of the European Parliament, and finally persons who are employed by or hold office in a political party are not eligible for appointment to the Constitutional Court (Art 147 para 4 B-VG). Persons who held such positions in the past five years are not eligible for appointment to president or vice president of the Court (Art 147 para 5 B-VG).

their legality (Art 89 B-VG),[18] the parties to the suit have no means to enforce this process;[19] being only entitled to propose for such proceedings to be initiated with the court not being bound to the party's view. Moreover, the parties are barred from filing an individual complaint to the Constitutional Court in pending cases. Because of the ordinary court's obligation to initiate such proceedings whenever such questions arise this should not inflict damage upon the Austrian system of legal protection. However, often the ordinary courts do not restrain themselves to expressing mere concerns regarding statutes and ordinances before the Constitutional Court but tend to rule themselves on the merits in these issues.[20] Thus, in recent years ideas for reform have been discussed,[21] in particular by facilitating individual access to the Constitutional Court.[22]

2. Areas of jurisdiction

However, already the Court's current areas of jurisdiction are broadly defined: Apart from tasks one may consider to be typically assigned to a Constitutional Court such as the review of statutes and ordinances, the Court also has to rule on certain matters that are not linked with a Constitutional court's jurisdiction in the first place. Simplifying rather complex procedural issues, the Court's areas of jurisdiction may be outlined as follows:

- Competences of the Court of Auditors (Art 126a B-VG)
- Certain Pecuniary Claims (Art 137 B-VG)
- Conflicts of Jurisdiction (Art 138 para 1 B-VG)
- Determination of Competence of States and Federation (Art 138 para 2 B-VG)
- State-Federation Agreements (Art 138a B-VG)
- Review of Ordinances (Art 139 B-VG)
- Review of the Republication of Ordinances, Statutes and Treaties (Art 139a B-VG)
- Review of Statutes (Art 140 B-VG)
- Review of Treaties (Art 140a B-VG)
- Electoral Matters (Art 141 para 1 a–b B-VG)

[18] For the Constitutional Court's case law concerning this obligation see Verfassungsgerichtshof [Constitutional Court] VfSlg 8552/1979.

[19] Oberster Gerichtshof [Supreme Court] 02.06.2001, docket No. 4 Ob 88/06d.

[20] See, for example, the Austrian Supreme Court's decision Oberster Gerichtshof [[Supreme Court] 16.12.1992, docket No. 9 Ob S 20/92, not to file an application with the Constitutional Court upon request of a party for repeal of a provision which had by then been subject to *ex officio* proceedings by the Constitutional Court for 13 days and was eventually repealed—Verfassungsgerichtshof [Constitutional Court] VfSlg 13.498/1993.

[21] See, for example, *Harald Eberhard*/*Konrad Lachmayer*, Constitutional Reform in Austria—Analysis and Perspectives, ICL—Journal 2008, 112.

[22] In order to respond to the problem that courts may refrain from addressing the Constitutional Court when the legality of the provision applied in a case is doubted by one of the parties, proposals for a so called "subsidiary complaint" (filing a complaint with the Constitutional Court regarding the legality of a provision applied by the courts) have been drafted—see *Christoph Bezemek*, Der Subsidiarantrag, JRP 2007, 303.

- Seating of Members of Representative Bodies (Art 141 para 1 c–e B-VG)
- Review of Popular Petitions, Plebiscites, and Referenda (Art 141 para 3 B-VG)
- Political and Legal Accountability of Members of Government (Art 142 and Art 143 B-VG)
- Decisions of Administrative Bodies (Art 144 B-VG)
- Judgments of the Asylum Court (Art 144a B-VG)
- Violations of International Law (Art 145 B-VG)
- Competences of the Ombudsman (Art148f B-VG)

Some of the matters referred to above, as questions of impeachment for example, are without doubt of great theoretical weight but have turned out to be of rather low practical importance; the adjudication of violations of international law on the other hand, has not been enforced by federal law as stipulated in the constitution, and, thus, has never been part of the Court's jurisdiction.

Such variances of practical importance and doctrinal fertility are not unusual, of course. However, they imply rather to focus on those matters that seem of greater interest for the purposes of this article: Conflicts of Jurisdiction and Competence, the Court's jurisdiction in administrative matters, and, of course, judicial review of statutes and ordinances.

3. Conflicts of jurisdiction and competence

a. Conflicts of jurisdiction

According to Art 138 para 1 B-VG the Constitutional Court rules on conflicts of jurisdiction

- between (ordinary) courts and administrative authorities;
- between (ordinary) courts and the Asylum Court, or the Administrative Court;
- between the Asylum Court and the Administrative Court

and

- between the Constitutional Court itself and all other courts.

Additionally the Court rules on conflicts of jurisdiction

- between federal authorities and state authorities or between states authorities amongst themselves.[23]

Such conflicts of jurisdiction or competence may arise in a positive or in a negative way:

[23] As mentioned above, the Constitutional Court also rules on the jurisdiction of the Court of Auditors and the Ombudsman (Art 126a B-Vg and Art 148f B-VG); these issues, however, will not be discussed in this paper.

- If two (or more) bodies claim jurisdiction in the same cause[24] a positive conflict of jurisdiction arises.[25]
- A negative conflict of jurisdiction arises if two (or more) authorities have objected to their jurisdiction in the same cause.[26]

In both constellations the Constitutional Court has not only to decide which body has jurisdiction in a certain case but also to repeal any acts (thus also any acts of ordinary courts) contrary to its judgment;[27] the last point being of particular importance given the Constitutional Court's general lack of jurisdiction over acts of the judiciary.[28]

b. Conflicts of competence

Furthermore the Constitutional Court determines in advance whether the Federation or the States are competent to pass an act of legislation or to take executive action (Art 138 para 2 B-VG). The Federal Government and the State Governments are entitled to apply to the Constitutional Court for such rulings. This procedure is particularly interesting as it allows, while limited to questions of competence, for an ex ante assessment of draft statutes and ordinances the parties have to produce before the Court (§§ 54 and 55 VfGG). The ex ante character of the Court's determination according to Art 138 para 2 at the same time, however, brings about the inadmissibility of an application as soon as a statue or ordinance has been enacted.

The Constitutional Court's determination is summarized in a statement ("Rechtssatz") published in the Federal Law Gazette. The statement is binding, also for the Constitutional Court itself and, thus, enjoys the same effect as a Constitutional provision ("authentic interpretation").[29]

4. Special administrative jurisdiction and Asylum Court

As stated above, the Court may be addressed with regard to decisions of administrative authorities under certain conditions. This so called "Special Administrative Jurisdiction" (Sonderverwaltungsgerichtsbarkeit—Art 144 B-VG) as well as the Court's function as last resort in asylum matters (Art 144a B-VG) are of great practical importance for at least two reasons.[30] First from a quantitative viewpoint: The major part of the Constitutional Court's case load stems from these two aspects of

[24] The problem whether a matter has to be regarded as the "same cause" may not be easily resolved; basically the question has to be raised whether a certain legal provision is to be applied to the same facts of a case—see [Constitutional Court] VfSlg 1643/1948.

[25] See, for example, Verfassungsgerichtshof [Constitutional Court] Vflsg 13.337/1993.

[26] See, for example, Verfassungsgerichtshof [Constitutional Court] VfSlg 16.682/2002.

[27] See *Theo Öhlinger*, Verfassungsrecht[8] (2009) 459.

[28] Above III.B.1.

[29] Verfassungsgerichtshof [Constitutional Court] VfSlg 3055/1956.

[30] Even though the two remedies technically differ from another, their basic structure and aim is the same as the court's special administrative jurisdiction (Art 144 B-VG) served as a role-model for shaping the prerequisites of complaints against judgments of the Asylum Court (Art 144a B-VG).

the Court's jurisdiction. In 2009, for example, the Court had to deal with about 5,000 complaints against decisions of administrative bodies or of the asylum court out of 5,500 complaints overall.[31] Secondly, both, but the "Special Administrative Jurisdiction" in particular, serve as starting point for the *ex officio* procedure of constitutional review—a fact that will be discussed below.

The Constitutional Court rules on decisions by administrative bodies and judgments of the Asylum Court when the appellant claims either

- an infringement of a fundamental right ("constitutionally granted right")

or

- the infringement of rights based on another act of general effect, in particular an unconstitutional statute.

The complaint may be filed within six weeks after the decision has been delivered. All other legal remedies must be exhausted (§ 82 para 1 VfGG and § 88a VfGG). The Constitutional Court may quash a complaint (Art 144 para 2 and 144a para 2)

- if it has no reasonable prospect of success

or

- if a decision cannot be expected to solve a constitutional problem.[32]

Practical experience shows that the Court makes use of this opportunity in more than 90% of all appeals.[33]

The Court may repeal the decision but it must not rule on the merits. A repeal has *ex tunc effect*; resuming the procedure that led to the contested decision while obliging the administrative authority or the Asylum court to adhere to the Constitutional Court's opinion.

If the Constitutional Court doubts the legality of one of the provisions (an act of general effect) a contested decision is based on (the Court would, for example, doubt the constitutionality of a statute), it may adjourn the proceedings with regard to the present case and initiate an *ex officio* review, presenting its doubts and subsequently examining (and maybe eventually repealing) the question, before ruling on the decision that led to the *ex officio* proceedings. If the act this decision was based on has been repealed, the decision has to be examined against the backdrop of the henceforth adjusted legal situation.[34]

[31] See the Courts activity report 2009 (Fn 14) 13.

[32] The Court may also reject a complaint on formal grounds—this rather technical option will not be discussed in this paper.

[33] See *Christoph Grabenwarter*/*Michael Holoubek*, Verfassungsrecht—Allgemeines Verwaltungsrecht (2009) 281.

[34] However, the court mostly does not examine the question of an infringement rights too thoroughly but rather confines itself to state it is not certain that the applicants rights were not infringed by the act found to be unlawful—see, for example, Verfassungsgerichtshof [Constitutional Court][Constitutional Court] 08.10.2010, docket No. B 2023/08.

5. Judicial review of statutes and ordinances

The centralized judicial review of statutes and ordinances is the core of the Court's jurisdiction. The Court's power is, however, not limited to the review of the constitutionality of statutes (Art 140 B-VG) but also includes the power to rule on the legality of statutes enacted on a constitutional level in case they conflict with entrenched principles of the constitution ("unconstitutional constitutional law");[35] making the Austrian Constitutional Court a "negative (constitutional) legislator".[36]

As the proceedings for the review of ordinances and statutes are basically structured in the same way I will focus on the Court's review of the latter; pointing at select differences.

It is important to distinguish two different types review:

- "concrete judicial review"; proceedings originating from a pending case,

and

- "abstract judicial review"; proceedings not linked to a particular case.

a. Abstract review

Rooted in Austria's federalist structure as well as in the idea of a formal constitution's minority protective function, according to Art 140 para 1 B-VG the

- Federal Government may contest State laws

and

- State Governments may contest Federal laws.[37]

In Addition to that,

- Federal laws may be contested by one third of the members of the National Council

and

- State laws by one third of the members of a State Parliament if the State Constitution provides for that.

Proceedings of abstract review mainly result from disputes between the political parties or from conflicts originating in Austria's Federal structure; often they have to be understood as final point to a political debate on matters of principle.[38]

[35] See Verfassungsgerichtshof [Constitutional Court] VfSlg 16.327/2001.

[36] The Court's legislative powers are purely negative, indeed as the court is not empowered to positively create laws to make up for the legislator's inactivity—Verfassungsgerichtshof [Constitutional Court] VfSlg 14.453/1996.

[37] Abstract review of ordinances (Art 139 para 1 B-VG) is to be carried out upon appeal of the Federal Government (ordinance decreed by state authority) or upon appeal of a State Government (ordinance decreed by federal authority).

[38] Cf *Stelzer*, Introduction (before n. 1) 78.

b. Concrete review

"Concrete review" of a statute or part of a statute, on the other hand, may be initiated by

- the Supreme Court,
- an appellate court,[39]
- an independent administrative tribunal,
- the Asylum Court,
- the Administrative Court,

or

- the Federal Procurement Authority

and finally,[40]

- *ex officio* by the Constitutional Court itself.[41]

If one of these bodies (setting aside the Court itself, of course) doubts the constitutionality of a (part of a) statute it has to apply in a pending proceeding, it is obliged to file an application with the Constitutional Court. As sketched above it is, however, important to note, that the parties of the pending law suit are not entitled to file such an application.[42]

There is no temporal limitation to concrete review: The Court, for example, repealed a provision of the Marital Act dating back to 1938 upon application of an appellate court in 2004.[43]

Perhaps *the* most important question arising when it comes to concrete review is whether a certain statute (provision) has to be applied in a pending proceeding ("Präjudzialität"). The term is rather loosely defined which, again, gives the Court a certain margin in assessing this problem.

The Court grants rather wide discretion in this regard, denying *Präjudzialität* only if it is obvious that a statute (provision) cannot serve as prerequisite to the applicant body's decision. Also the Court itself must only initiate *ex officio* proceedings of review if a certain statute (provision) was to be applied in a pending case.[44]

The applicant body is free to bring forward any constitutional objections regardless whether or not they are of particular importance to the case at hand.[45] The application for repeal has to detail the objections put forward against the constitutionality of the legislative act (§ 62 para 1 VfGG). These arguments constitute the scope of the proceeding. The Court's assessment is limited to whether the challenged provision (statute) has to be considered unconstitutional under the given grounds. Thus, an

[39] Concrete review of ordinances may also be initiated by district courts.

[40] For the Individual Complaint see below III.B.5.c.

[41] Above III.B.4.

[42] Above III.B.1.

[43] Verfassungsgerichtshof [Constitutional Court] VfSlg 17.135/2004.

[44] See for the Court's Special Administrative Jurisdiction above III.B.4.

[45] See, for example, Verfassungsgerichtshof [Constitutional Court] VfSlg 11.282/1987.

application will be dismissed if a provision (statute) does not prove to be unconstitutional based on the arguments presented, even if it may prove to be unconstitutional when assessed from a different perspective. This, of course, may lead to different outcomes of a review procedure concerning the same provision (statute) determined by different arguments.[46] This restriction also applies to *ex officio* proceedings where the Court is bound to review a provision based on the arguments it developed when adjourning the proceedings in a present case.

Against the backdrop of the grounds given for a provision to be unconstitutional the specific subject of review has to be defined. The Court's case law requires

- not to eliminate more from the *acquis* than necessary to solve the constitutional problem

while, on the other hand,

- not to cause a change of meaning for the remaining part of the provision.[47]

Whether and to what extent one of these objectives takes precedent over the other has to be assessed on a case by case basis.[48]

c. Individual complaint

Private individuals (legal entities) may challenge a statutory provision directly, provided they claim

- direct infringement of their rights by the (alleged) unconstitutionality

as far as

- the statute has direct effect on the applicant without a judicial or an administrative decision being issued (Art 140 para 1 B-VG).

According to the Court's case law an individual has to be directly affected by a specific provision legally in a disadvantageous manner while lacking other means of bringing their case to the Constitutional Court subsequent to an administrative procedure or on occasion of judicial proceedings (subsidiary character of the individual complaint).[49] Still, bypassing an individual complaint has to be assessed to be a reasonable alternative; thus, for example, the Court's case law would not require an indi-

[46] According to § 209 of the Austrian Penal Code (StGB), for example, certain homosexual conduct between adults and minors was punishable by law. The Court reviewed the provision twice against the backdrop of different legal arguments; dismissed an application for repeal in 1989 (Verfassungsgerichtshof [Constitutional Court] VfSlg 12.182/1989) and eventually repealed the provision on different grounds in 2002 (Verfassungsgerichtshof [Constitutional Court] VfSlg 16.565/2002).

[47] Verfassungsgerichtshof [Constitutional Court] VfSlg 8155/1977.

[48] See, for example, Verfassungsgerichtshof [Constitutional Court] VfSlg 18.159/2007.

[49] See for the manifold questions arising in this regard, *Kerstin Holzinger*, Das Verfahren der Gesetzes- und Verordnungsprüfung, in Holoubek/Lang (eds), Das verfassungsgerichtliche Verfahren in Steuersachen (2010) 225 (232–234).

vidual to commit a misdemeanor or even a felony to address the Court in the event of administrative or criminal proceedings.[50]

Only individuals that are legally affected by the contested provision are entitled to file a complaint, while mere factual effects do not qualify for a complaint before the Court.[51] In addition to that the interference with the individual's legal position has to be actualized[52] and clearly determined by the contested statute.[53]

In any case the application must outline the grounds on which the applicant challenges the constitutionality of the contested provision. Again, the Constitutional Court—according to its own case law—is only entitled to examine a contested provision on the grounds expressed in the application. Again, there is no temporal limitation to file individual complaints.

d. Effects of the repeal

If a provision is found to be unconstitutional, the Court has to repeal it which typically is published in the Federal Law Gazette and enters into force upon expiry of the day of publication. The Court may, however, set a deadline for the repeal to enter into force which may not exceed 18 months (Art 140 para 5 B-VG).

Unless the Constitutional Court states otherwise, a repeal has no *ex tunc* effect; the case because of which the proceedings were initiated being an exception (Art 140 para 7 B-VG).[54] Prior provisions reenter into force unless the Court states otherwise (Art 140 para 6 B-VG) which usually happens.

IV. Concluding remarks

Institution and proceedings of the Austrian Constitutional Court could only be outlined sketchy and in a simplified manner above, of course. One thing, however, is sure: *Carl Schmitt* was wrong in 1931 when he predicted the concept of a specialized Constitutional Court would not encroach upon other countries, Germany among them.[55] The "Austrian Model" of constitutional adjudication proved to be a—maybe unparalleled—success story in the field of constitutional organization after World War II, inspiring scores of constitution-makers to follow its example.

For Austria the Constitutional Court has become an indispensable player in the legal system building and strengthening this position over the 90 years. The more the idea of the constitution as predominantly political phenomenon, excluded from the

[50] See, for example, Verfassungsgerichtshof [Constitutional Court] VfSlg 17.731/2005.

[51] Thus the owner of a hot dog stand may only be economically but not legally affected by an ordinance declaring a ban on turns which, again, hinders the access to the stand—Verfassungsgerichtshof [Constitutional Court] VfSlg 8060/1977.

[52] A merely potential infliction is not considered to be sufficient—see, for example, Verfassungsgerichtshof [Constitutional Court] VfSlg 16.806/2003.

[53] Verfassungsgerichtshof [Constitutional Court] VfSlg 8187/1977.

[54] Above III.B.4.

[55] *Schmitt*, Das Reichsgericht (Fn 9) 6 Fn 1.

rationality of adjudication, faded, the more important the Court's role has become. Nowadays, this is accepted to be a natural consequence of the Court's position as the *Constitution's Guardian*—and it may seem strange to some that it had ever been perceived in a different way.