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Austrian Constitution, The

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History

Fundamentals

The Austrian Constitution, as it is in force today, dates back to October 1, 1920. Its roots, however, go back in many senses to the second half of the nineteenth century when the Austrian state was transformed, step by step, into a constitutional monarchy. This was a difficult process as Austria; in the first half of the century, it was an antidemocratic, authoritarian, and legitimist state intended to defend and impose these visions and ideologies also in other European countries (especially in the "Metternich era," 1809–1848). Eventually, with the so-called "December Constitution" of 21 December 1867, Austria became a "constitutional monarchy," still having, however, a monarch with far-reaching prerogatives, veto rights, and the power to proceed with emergency legislation.

The Constitution of 1 October 1920 was the result of a revolutionary development but at the same time the constitutional system created in this context incorporates elements of the constitutional monarchy (D'Orlando 2009; Schmetterer 2021). This is the case, for example, for some fundamental rights, for the Constitutional Court which finds a predecessor in the "Reichsgericht" of 1869, for the Administrative Court ("Verwaltungsgerichtshof") which had a predecessor with the same name, created in the years 1867/1876, and for the existence of legally defined and constitutionally recognized countries ("Länder"). In general, it can be said that the historic development of the Austrian Constitution is therefore characterized by elements of revolutions (1918 and 1945), ruptures, continuities, and discontinuities, but also evolutionary development (Jabloner 2020).

Creation and Development of the Austrian Constitution of 1918–1920

The revolutionary events leading to the enactment of the Austrian constitution date back to the final days of World War I when, on 21 October 1918, within the Old Austrian Parliament, the "Reichsrat," the representatives of the German-speaking areas, took the initiative to form a "Provisional Parliament of the Germans in Austria" ("Provisorische Nationalversammlung der Deutschen Österreichs"). The ensuing constitutive process had been lasting for nearly two years, a period characterized by intense debates and outright conflicts, by a continuous consolidation and extension of the draft's material content and ending up in a compromise with some pivotal questions remaining unsettled. The Paris peace negotiations which took place partly in parallel

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had also considerable repercussion on the outcome of this constitutive process.

On 30 October 1918, the "seceding part of the Austrian Parliament" seized sovereign power for the German-speaking parts of the Empire with the "Decree on the Fundamental Institutions of the State German-Austria" ("Beschluss über die grundlegenden Einrichtungen der Staatsgewalt," StGBl 1918/1). On 12 November 1918, "German-Austria" ("Deutschösterreich") was declared a democratic Republic to constitute part of the German Republic. By the Act of 21 October 1919, the prohibition of accession, stipulated by Article 88 of Treaty of Saint Germain of 10 September 1919, was taken into account and this state's name was officially changed from "Deutschösterreich" to "Österreich." This "Act on the State form" ("Gesetz über die Staatsform") continued, however, to deny Austria's state continuity with the Austrian-Hungarian Empire, while this (partial) state continuity was clearly accepted in Article 177 of the Treaty of Saint Germain on the state responsibility for the War.

In parallel, also on the level of the single regional countries ("Bundesländer"), a constitutive process took place as provisional country parliaments were constituted. Some of these countries issued a declaration of accession to the German-Austrian Republic. On 14 November 1918, a federal act declared the seizure of state sovereignty in the countries. The constitutive process on the level of the single regional countries may have been legally irrelevant or even an absurdity but it sent local political signals to Vienna conveying the message that the new Republic had to be a federal one, a wish heeded by the act of 14 November 1918.

The democratic foundation of this constitutive process was further strengthened by the holding of general elections for a constitutive parliament ("Konstituierende Nationalversammlung") on 16 February 1919. From then on the constitutive process was driven by parliamentarians of the Republic, elected by the general electorate including, for the first time, also women. The Subcommittee of the Constitutional Committee ("Unterausschuss des Verfassungsausschusses") elaborated the constitutional draft with Professor Hans Kelsen as an advisor. The final document was adopted on 1 October 1920 by the constitutive parliament as Constitutional Act N. 1 (BGBl. 1920/1) and entered into force on 10 November 1920.

This constitution was based on the following guiding principles:

- The democratic and the republican principle with an (originally) dominant parliament composed of two chambers, the "National Council" ("Nationalrat") and the "Federal Council" ("Bundesrat"), representing the federal countries and a president as a head of state, elected for four years by the two chambers of the parliament as Plenary Assembly ("Bundesversammlung") and having predominantly representative functions.
- The federal principle, implemented by the creation of a Federal Republic composed of nine federal countries with rather limited competences. The dimension of these competences, as definitely defined in 1925, was considered to lie at the "lowest level" possible for a state still to be qualified a "Federal Republic," with a clear concentration of power in Vienna having been demanded by the Socialist Party and also been favored by the Christian Democrat leader Ignaz Seipel (Adamovich et al. 2020a, p. 79).
- Legal continuity: On the basis of the "Legal Transfer Act" of 1920 all acts and regulations of the Empire and the federal countries, as far as they were compatible with the new constitutional order, were transferred to the Republic. Thereby, the basis was set for the newly created constitutional order to become operative notwithstanding the fact that many details of this order had to be adapted in the aftermath.
- Lack of a new, coherent catalogue of fundamental rights: Due to the strong rivalry between the conservatives and the left characterizing the whole life of the "First Republic" (1918–1938), it was not possible to integrate a new catalogue of fundamental rights into the constitution. Only isolated provisions in the constitution had a fundamental rights character. For the (predominant) rest it had been

necessary to adopt fundamental rights rules of the Empire (in particular the "Basic Act on the General Rights of Nationals of the Kingdoms and Countries represented in the Council of the Realm," the "Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger für die im Reichsrate vertretenen Königreiche und Länder" of 21 December 1861). A further source of fundamental rights applicable in Austria (especially in the field of minority rights) became the State Treaty of Saint Germain 1919 (Kolonovits 1999, Hilpold 2001).

Further Developments Until 1938

A first broader constitutional reform happened in 1925 (BGBl. 268): This reform was, first of all, designed to definitely enact the federal principle, further enlarging, however, at the same time, the competences of the federal state. At the same time, at the country level, the administrative systems, previously characterized by the existence of both federal and country systems, were rationalized and merged through the creation of the "Office of the Country Government" ("Amt der Landesregierung") which became also an organ of the (newly created, indirect) federal administration.

- A further, extensive constitutional reform was enacted in 1929. Democracy had come under growing pressure by authoritarian forces. In way of a compromise between the struggling groups and with the intent to provide more stability for the country, the radical parliamentarian system with an overall dominant position of the parliament was supplanted by elements of a presidential republic with (somewhat) enlarged presidential powers. Now it was the president who nominated and dismissed the government. Further, newly obtained powers of the president concerned an emergency ordinance power, the power to dissolve the parliament and the high command of the federal army. The parliament lost further authority by the fact that the president, from then on, had to be elected directly by the people.

The formal designation of the constitution was also changed to "Federal Constitution in the version of 1929" ("Bundesverfassung in der Fassung von 1929"), a title preserved until 31 December 1994.

Internal political strife and external pressure continued to mount also afterward. In 1933, after the retreat of all three parliamentary presidents, Federal Chancellor Engelbert Dollfuss took the power and closed the parliament. In violation of the constitution, he ruled via emergency regulations and in 1934 he released a new authoritarian constitution with fascist traits. In radical departure from the Kelsen constitution of 1920 the enabling law empowered the government to issue acts and even constitutional acts. Now "God was the source of all law" (Tálos 2013, p. 82; see also Balthasar 2021, p. 229ss, for whom the retreat of all three presidents of the National Council had been the primary reason for the demise of the Kelsen Constitution).

On 12 March 1938, Austria was occupied by Hitler Germany. During World War II Austria was considered an occupied and not a belligerent nation. As a consequence, Austria took the position that it bore no responsibility for World War II. Austria was freed by the allied forces in 1945 which occupied the country in the aftermath. Austria regained fully sovereignty only by the State Treaty of 15 May 1955.

Already in 1945, however, Austria was reconstituted as a democratic Federal Republic. The "declaration of independence" issued by the parties SPÖ, ÖVP, and KPÖ of 27 April 1945 declared Austria's annexation by the German Reich as null and void and the reconstitution of Austria in the spirit of its constitution of 1920.

The Constitution Building Process Starting in 1945 (Elements)

The reconstitution of Austria's pre-authoritarian democratic legal order happened again through "transfer legislation" (Überleitungsgesetze). On 1 May 1945, the provisional government issued two "Transfer Acts":

- The "(First) Constitutional Transfer Act ("(Erstes) Verfassungs-Überleitungsgesetz" "V-ÜG 1945," StGBl 1945/4) which reactivated the constitutional order as it was in force on 4 March 1933.
- The "Legal Transfer Act" ("Rechtsüberleitungsgesetz," "R-ÜG," StGBl 1945/6) for all acts below the constitutional level issued after 13 March 1938 and compatible with the democratic order of the free Republic of Austria. As a consequence, for a long time, the Austrians (ordinary) legal order continued to evidence considerable similarities with the German one.

A second Constitutional Transfer Act of 13 December 1945 (StGBl 196) reconstituted the federal competence structure. On 19 December 1945, the B-VG 1920 in the version of 1929 became again fully operative.

By the "Moscow Memorandum" of 15 April 1955 ("Moskauer Memorandum"), the political basis was laid for Austria regaining full sovereignty, an event accomplished one month later, on 15 May 1955, by the Vienna State Treaty ("Wiener Staatsvertrag"). Only after the complete withdrawal of the occupying forces, Austria, on 26 October 1955, declared unilaterally, by a constitutional law, its "permanent neutrality." In the aftermath, this act was notified to all countries with which Austria had diplomatic relations. A considerable part of these countries recognized Austria's neutrality, again by unilateral acts. Thereby, according to the Austrian official position, Austria's neutrality status had been internationally recognized (Hilpold 2010, 2019).

In 1958 Austria acceded to the European Convention on Human Rights (ECHR). In 1964 the ECHR was attributed constitutional level.

Accession to the European Union, finally accomplished in 1995, required a thorough revision and modernization of the Austrian legal order, a challenge still ongoing. This accession meant a "total revision" of the Austrian constitution according to Article 44 B-VG and required therefore a referendum which resulted on 12 June 1994 in a two-thirds approval.

From 2003–2005, the "Austria Convention" or "Constitutional Convention" tried to draft a modernized constitution with a new fundamental rights catalogue and a coherent structure superseding the disparate system of Austrian constitutional law as it came into being over time. This attempt failed but nonetheless this convention provided valuable input for subsequent partial reforms, such as the "Constitutional Adjustment Act" of 2008. "Bundesverfassungsrechtsbereinigungsgesetz" (B-VGN BGBl I 2008/2) and the reform of the administrative justice of 2012 (in force since 2014) by which this branch of the judiciary was transformed into a two-tier system with a Federal Administrative Court ("Bundesverwaltungsgericht") as the first instance and the existing Administrative Court ("Verwaltungsgericht") becoming the second instance (court of appeal, a "Supreme Administrative Court") has been requested since long by the ECHR.

Basic Elements of Austrian Constitutional Law and Practice

Formal Structure of the Austrian Constitutional System

Austrian constitutional law is not contained in one single document but has, as to its structure, a multilayered, diffuse nature.

At its core stands the "Bundes--Verfassungsgesetz B-VG" with 152 articles. Outside the B-VG there are many acts of constitutional rank. They are called "Bundesverfassungsgesetze" (BVG). Furthermore, there are norms in ordinary acts with constitutional rank. On a whole, there are over 1.000 provisions in the Austrian legal order which have constitutional rank.

There are mainly two reasons for this development which undermines considerably the transparency of the Austrian constitutional system:

- The Austrian constitutional system is very flexible: It has been characterized as one of the most flexible in the world and the reason for this was found in the year 1920 when there was

no real believe in democracy which was considered to be a transient status (Stelzer 2021, p. 38).

In principle, according to Article 44 para. 1 B-VG constitutional acts or provisions are adopted by the National Council with a majority of deputies present and a majority of two-thirds of the votes casted, provided that these norms are expressly qualified as "constitutional." In case of constitutional provisions limiting country competences, the relevant decisions have to undergo an equivalent procedure in the federal council. In case of a "total revision" of the constitution also the approval of the amendment by a referendum is needed (Article 44 para. 3 B-VG). The B-VG contains no definition of the term "total revision." It is generally considered that such a total revision takes place if the "basic principles" of the constitution (again a concept not defined by the constitution) are abrogated or modified in their essence, also as a result of successive legislative measures.

Formally, any constitutional reform, whether in the ordinary or in the qualified procedure (Article 44 para. 3 B-VG), is allowed. There is no "eternity clause" like in the German constitutional law (Article 79 para. 3 GG). Seen in a material prospective, however, Austria is obliged by a series of international obligations, in particular in the field of human rights, which cannot be derogated without disruption also of the constitutional order.

- It has become political practice in the National Council to elevate ordinary law or provisions to a constitutional rank in order to grant them more stability in case of shifting political majorities and/or to exempt these provisions from scrutiny by the Constitutional Court. As a result of this process of "constitutionalizing at will" ("Gelegenheitsverfassungsgesetzgebung," Stolzlechner/Bezemek, 74) it becomes more and more difficult for the (ordinary) legislator to steer the legislative process and to guarantee a systemic structure for the legislative order (Ibid.).

The "Basic Principles" ("Grundprinzipien," "Baugesetze") of the Austrian Constitutional Order

As mentioned, the Austrian constitutional order does not define the "basic principles." They are implied by Article 44 para. 3 B-VG as their abrogation or modification in their very essence will constitute a "total revision" of the constitution to be subjected to a referendum.

Not even in literature a unanimous position as to what norms can be defined as "basic principles" can be found, but the main divergences in these approaches can be traced back to different systematic qualifications of the various principles.

Prevailingly, the following principles are seen to be "basic principles":

- The democratic principle
- The rule of law
- The federal principle
- The republican principle
- The separation of powers

For some, also the "liberal principle," comprising fundamental rights protection, can be qualified as a basic principle, but for others these concepts can be subsumed under the "rule of law" principle (Khakzadeh 2022, p. 18).

Basic principles have regularly a programmatic nature but this quality is not sufficient to qualify them as basic principles. They have rather to find expression in specific substantive norms of the constitution and to become structural elements of this order, as a "constitution within the constitution" or a "constitutional nucleus" ("Verfassungskern") (Stolzlechner and Bezemek 2018, p. 89).

Alongside the "basic principles," the Austrian constitution (and also country constitutions) contain mere programmatic norms that set "state goals" ("Staatszielbestimmungen"). These state goals constitute a partial abandonment of the original Kelsen approach of 1920 to merely lay down the "rules of the game" ("Spielregelverfassung"), i.e., to provide neutral norms for the functioning of the constitutional order and in particular for the interaction of the single constitutional organs

(Neisser 2021, p. 24). State goals are heavily "value loaded" but at the same time they end up in being simple "confessions" for ideals without legal obligation to pursue them and even less a specific procedure to attain them. Their insertion brings, however, the Austrian constitution and the Austrian constitutional dialogue closer to the European and the international constitutional reality characterized by an ever-growing relevance of values. They find partly further implementation in specific protective norms and they can be of relevance as a reference for interpretation of other constitutional and ordinary norms.

"State goals" of such a kind are the "permanent neutrality" ("immerwährende Neutralität," "BVG Neutralität" 1955), the "comprehensive state defense" ("umfassende Landesverteidigung," Article 9a B-VG), "sustainability, comprehensive environmental protection, and animal protection" ("BVG Nachhaltigkeit" 2013), the "guarantee of an independent public radio and television service" ("BVG Rundfunk" 1974), the "prohibition of reengagement with national-socialist activities" (Art. 9 and 10 Vienna State Treaty and § 3 VerbotsG), "equal treatment of men and women" (Art. 7 para. 2 B-VG), "equal treatment of persons with disabilities" (Art. 7 para. 1 B-VG), "comprehensive economic equilibrium" (for territorial entities, state, countries, municipalities, Art. 13 para. 2 and Art. 3 B-VG), and the "protection of minority groups" (Art. 8 para. 2 B-VG).

The Interpretation of Constitutional Law

Starting point of the interpretation of constitutional law are the rules developed in legal interpretation generally: literal interpretation, grammatical interpretation, systematic interpretation, teleological interpretation, and historic interpretation in their interaction. To some extent, however, Austrian constitutional practice has developed specific interpretative principles, particularly to rule out that the judiciary would have too strong an influence on the further development of the constitution. To this end, the "petrification rule" ("Versteinerungstheorie"), as a variant of the historical interpretation method, was conceived. According to this concept, constitutional rules had continued to be applied according to the understanding attributed to them at the time of their adoption in the context of their normative implementation (Öhlinger and Eberhard 2019a, pp. 33ss.). This concept gained considerable importance, for example, as to the division of competences between the federal state and the countries. It has been described as the "essence of Austrian federalism" (D'Orlando 2020, p. 156). Generally, reference is made to this end to October 1, 1925, when federalism was enacted in practice by a constitutional reform. The Austrian constitutional system is, however, as set out, rather fragmented, its elements are of different epochs, and it is often designed to give "specific answers to specific questions" ("Antwortcharakter") while remaining vague in its content. More and more international elements are entering this system and in particular in the fundamental rights area a dynamic, evolutive, teleological approach is prevailing, in Austria, as in other European countries (see Zagrebelsky 1997). On a whole, the teleological approaches available for the Constitutional Court are multivariegated, thereby also considerably increasing the interpretative powers of this Court. At the same time, EU law is gaining ever more importance, evidencing in the Austrian constitutional reality ("Verfassungswirklichkeit") growing normative and interpretative conflicts.

The Austrian Constitution, International Law, and the Law of the European Union

International Law

The Austrian constitution of 1920, as conceived with the prevailing contribution by Hans Kelsen, was designed as an open, international law-friendly system. This ensuing academic discussion, with the participation of both positivist and naturalist law philosophers, exercised considerable international influence on the conception of the relationship between national constitutions and international law up to this date (Köck 2021). In the old dispute between dualist and monist conceptions, the fathers of this constitution opted for a (moderate) monism with a predominance of international law, while contrasting national law should not be automatically

derogated but generate a state obligation to bring conflicting national rules in conformity with international law (national law is to be brought into conformity with international law via a relationship of "delegation" and not automatically via "derogation").

Depending on the nature of the international law sources and their impact on the national constitutional order different provisions of the Austrian constitution relate to international law.

On the basis of Article 9 para. 1 B-VG, customary international law as well as general principles of international law are adopted on a continuous basis by the Austrian constitutional system:

> The generally recognized rules of International Law are valid parts of Federal law.

As to the rank of these norms, the prevailing view seems to be that these rules are to be situated between constitutional norms and ordinary law.

International treaties are concluded, as a principle, by the federal president (Art. 65 para. 1 B-VG) who has also the duty to control their conformity with Austrian constitutional law. The applicable procedure varies, however, according to the impact of the provisions on the national constitutional order:

According to Article 50 para. 1 B-VG, the conclusion of "political, law-amending, and law-supplementing" treaties by the president presupposes the previous authorization by the National Council. While the concept of "political treaties" is of uncertain contours, it is in essence the law-setting prerogative by the parliament that shall be protected by this provision.

As to other treaties, falling outside Article 50 para. 1 B-VG, the president can delegate the treaty conclusion competence to the government or to single ministers (Art. 66 para. 2 B-VG). This delegation was issued already in 1920 attributing the respective power in relation to the related norm-setting in internal law.

Treaties ratified by the National Council have the rank of ordinary law and accordingly they have to be published by the federal chancellor in the Official Federal Journal ("Bundesgesetzblatt," "BGBl.," Art. 49 para. 1 B-VG). All other treaties have the rank of regulations ("Verordnungen") and have, as a consequence, to have a specific legal basis (Art. 18 para. 2 B-VG).

Since 2008, in order to enhance transparency in the legislative process, state treaties have no longer the power to modify the Austrian constitution. State treaties, in conflict with the Austrian constitution, require the adoption of a separate, ordinary constitutional modification procedure.

At the time of approval of a state treaty, the National Council (or, for treaties outside Art. 50 para. 1 B-VG, the president) can decide to which extent the state treaty in question shall be implemented by the adoption of acts ("special transformation clause," Art. 49 para. 2 n. 4).

According to Art. 16 para. 1 B-VG, federal countries can, in matters within their own sphere of competence, conclude state treaties with states, or their constituent states, bordering on Austria. The respective treaty is ratified by the president.

The Austrian constitution is also open for the cooperation with international organizations. On the basis of Art. 9 para. 2, "single" sovereign rights can be attributed to such organizations.

Law of the European Union

Austria's accession to the European Union on 1 January 1995, due to the concomitant far-reaching transfer of political powers to the European Union and further emphasized by the autonomy of this legal order, its supremacy, and the direct effect of (part) of its provisions, deeply impacted on the democratic principle, on the federal principle, and on the rule of law principle. Therefore, this accession was considered to imply a total revision of the Austrian constitution on the basis of Art. 44 para. 3 B-VG and had to be subjected to a referendum. Accession to the EU required first creating the necessary constitutional requisites and then adapting the constitution accordingly. The first step was set by the "Constitutional law on EU accession" ("EU-Beitritts-BVG", BGBl 1994/744) which, after approval by a referendum, allowed the ratification of the accession treaty. The second step consisted in the adaption of the Articles 23a–23f of the B-VG by the "Accompanying act to the EU accession act" ("EU-Beitritts-Begleit-BVG," BGbl. 1994/1013).

The Lisbon treaty of 2007, in force since 1 December 2009, required further amendments, in particular with regard to neutrality law and the guarantee of subsidiarity (see now the Articles 23a–23 k B-VG).

The provisions in the Articles 23a–23 k regulate in detail Austria's participation in the EU decision process, the active and the passive electorate for the EU Parliament (Art. 23a), the nomination of Austrian representatives for EU organs (Art. 23c), the position of the Austrian countries in the integration process (Art. 23d), the involvement of the parliament in the EU norm-setting process (Art. 23e, Art. 23f, and Art. 23i), the implementation of the EU subsidiarity principle in the national norm-setting process (Art. 23 g and Art. 23 h), as well as Austria's full accession to the Common Foreign and Security Policy (CFSP, Art. 23j).

EU accession impinged considerably on the competences of the countries. This loss of competences could only partially be remediated by the introduction of enhanced information and consultation rights (see in particular Art. 23e). Art. 23j in connection with Art. 42 para. 7 TFEU raises the question what is left of Austria's neutrality (see Hilpold 2010 and Hilpold 2019). However, large parts of the population still struggle to accept these changed legal realities and Austrian politics behaves accordingly.

Competences in the Federal State

General Considerations

Austria has been constituted as a Federal Republic mainly as a result of a political compromise between the socialist forces preferring a unitary state and the conservatives opting for pronounced federalism, as the Republic of Austria is a country with a capital, Vienna, with a prevailingly socialist or socialdemocratic orientation and a prevailingly conservative countryside. In the Austrian constitutional reality, the unitarian elements are, however, clearly predominant, also due to practical necessities in a country of a relatively small geographic size. On the other hand, especially in the periphery and with conservative voters, the adherence to the federal principle is strongly felt and, therefore, even marginal elements of federalism are forcefully defended. Commitment to federalism, be it sincere or only lip service, is a constant in everyday politics in Austria. Others see federalism, as practiced in Austria, as antiquated, as a source of continuous conflict, as conducive to useless duplicities and additional bureaucracy. Repeatedly, endeavors were started to overcome this situation but with no result up to this date.

Any serious reform attempt would, however, have to overcome enormous hurdles.

First of all, as set out above, the federal principle is a constitutional principle and its abrogation or essential modification would signify a "total revision" of the Constitution according to Art. 44 para. 3 B-VG. Furthermore, any restriction of the countries' competences would have to be accepted by the federal council with a two-thirds majority and the presence of the majority of its members (Art. 44 para. 2 B-VG). In case of reforms extending the countries' competences they have a right of opposition (Art. 42 para. 2 B-VG).

At first sight, the commitment by the Austrian constitution toward federalism is a very strong one: According to Art. 15 B-VG, the "general competence" in legislation and administrative execution lies with the countries while any competence of the federation has to be attributed explicitly. In practice, however, most competences of greater relevance are attributed to the federation according to the enumerative principle and so the competences of the countries range clearly second. Often, rather narrow competences out of larger thematic subjects are attributed to the countries. As the Austrian constitution follows the principle that competences between the federation and the countries have to be clearly separated – there is no "concurring" competence in Austria ("principle of strict separation of competences" – "strikte Trennungsordnung") – the specific identification of competences is of great importance, adding thereby a further source of conflict.

The most important competence rules are to be found in the articles 10–15 B-VG, even though many more specific rules can be found in other

constitutional provisions. Competence norms have to be set by the federation ("Kompetenzkompetenz"), by constitutional norms.

The articles 10–15 B-VG regulate only competences in the field of legislation and public administration. The competence situation in private administration ("Privatwirtschaftsverwaltung") and jurisdiction ("Gerichtsbarkeit") are regulated in Austria in a particular way (Stolzlechner and Bezemek 2018, p. 163).

As to private administration, there are no competence rules in the Austrian constitutions. Consequently, both the federation and the countries are free to act as legal entities in the field of private law. There are both advantages and disadvantages to this peculiar normative situation: On the one hand, it allows both the federation and the countries to act flexibly but, on the other hand, these entities may even counteract each other's public law competences by acting through private law instruments in the respective areas (Berka 2021a, p. 126).

As to jurisdiction, in Austria the federal element is relatively pronounced: While matters of ordinary jurisdiction (in private and criminal matters) as well as constitutional jurisdiction lie in the exclusive competence of the federation, in the field of administrative jurisdiction (Art. 129–136 B-VG) the situation is more complex:

The federation is competent for the Supreme Administrative Court (Verwaltungsgerichtshof – VwGH), the Federal Administrative Court ("Verwaltungsgericht des Bundes," "Bundesverwaltungsgericht," BVerwG), and the Federal Finance Court ("Verwaltungsgericht des Bundes für Finanzen," "Bundesfinanzgericht," BFG).

Each country has its own "Country Administrative Court" ("Verwaltungsgericht des Landes," "Landesverwaltungsgericht," LVwG). They are country entities ("Landesbehörden") and the judges of these courts are staff of the respective countries.

In the field of administrative justice there are therefore both competences of the federation and of the countries.

The Four Different Competence Situations in Accordance with Art. 10–15 B-VG

In general, on the basis of the articles 10–15 B-VG four different competence situations for legislation and execution can be distinguished:

1. Federal competence both for legislation and execution (Art. 10 B-VG)

   Art. 10 B-VG enlists a large number of important competences and gives proof of the fact that there is a clear preeminence of the federation in the distribution of competences. Examples are finance, economic, and commercial law, labor law, health regulation, large parts of security matters, and military affairs.

2. Federal competence for legislation, executive competence for the countries (Art. 11 B-VG)

   Examples are citizenship, traffic police, environmental impact assessment, and animal protection.

3. Federal competence for setting basic principles, countries are competent for legislation in detail and for execution (Art. 12 B-VG)

   Examples are social assistance, hospitals, and nursing homes. Basis principle legislation has to be qualified explicitly as such and it has to leave some leeway for country legislation. In default of such a legislation countries are free to legislate without having to attend the determination of federal principles.

4. Country competence both for legislation as for execution (Art. 15 B-VG)

   As set out, the Austrian constitution seemingly pays deference to the federal principle by establishing this competence as a rule, rendering it, however, at the same time, largely void by the introduction of a great number of federal competences.

   Examples for such an exclusive competence are country constitutions ("Landesverfassungen"),

tourism, hunting, environmental protection, local security, and building.

5. Specific rules for schooling, public procurement, and taxation

Competences in these fields are regulated separately, overall in an even more complex way in an attempt to reconcile federal and local interests in these fields.

In Austria, the regulation of schooling is regularly the subject of fierce political and ideological disputes and also of conflicts between the federation and the countries. Art. 15 B-VG contains a complex structure of competence allocation, difficult to construe and even more difficult to implement. Here, within one competence category, a general competence for the federation is established and at the same time, for specific situations, reference is made to other competence allocations rules. More pronounced competences are attributed to the countries in the fields of nursery and primary schools.

In the field of public procurement Art. 14b B-VG establishes again a general competence rule for the federation as this subject makes part of commercial and economic law where Austria has to respect international and European obligations. As far as countries are involved in such procedures, they are allocated also some regulative and executive competences.

With regard to taxation and fiscal federalism, two relevant laws have to be distinguished: the "Constitutional Finance Act" ("Finanz-Verfassungsgesetz," F-VG 1948) and the "Financial Compensation Act" ("Finanzausgleichsgesetz," FAG), an act periodically revised and issued on the basis of the F-VG.

The F-VG sets the generic framework by establishing the principle that each entity has to bear the costs for its competences ("Kostentragungsprinzip") and distinguishes general categories of taxes according to the question to whom the revenue is attributed (exclusively to the federation, the countries, or the municipalities, or in shared form). For these general categories (but not for specific taxes!), the F-VG allocates also the legislative and the executive competences. The FAG attributes specific tax to one of these categories.

In practice, legislation on most taxes as well as their collection fall into the competence of the federation, while countries are allocated some smaller taxes as well as a very limited competence to introduce their own taxes. Municipalities may take advantage from a delegated taxation right. The effective distribution of tax revenues is then largely the result of negotiations between the federation and the countries, whereby specific criteria (for example, size of the population) find application in order to render this distribution process as fair and as objective as possible.

6. Special cases

While in principle the competences between the federation and the countries are neatly separated, there are exceptions to this rule, partly to be found in the constitution, partly developed by the jurisprudence.

Thus, so-called "annex competences" ("Annexkompetenzen") are of a subsidiary nature in regard to the main competence and follow the respective competence allocation rule. This is the case, for example, for administrative procedure rules.

In some cases, the federation can take recourse to so-called "necessity competences" ("Bedarfskompetenzen") if there is a necessity for uniform rules. Art. 11 para. 2 B-VG refers to this "necessity" with regard to administrative procedural law; Art. 10 para. 1 n. 15 B-VG in relation to measures in case of war.

The constitutional jurisprudence has developed the concept of "cross-sectional matters" ("Querschnittsmaterien") that resembles the concept of "shared competences," as an explicit rule, however, unknown to the Austrian constitutional order. Practice has revealed that there are complex situations of life reality that do not fall squarely into one of the competences as devised in 1925. In such situations (typical examples are environmental issues, regional planning, or protection against catastrophes) parallel competences can exist.

Interpretation of Competences

In order to preserve the federal order (an, in particular, to protect the competences of the countries, limited as they are, from erosion by the ordinary legislator), the Austrian constitutional jurisprudence has developed the "petrification rule" ("Versteinerungsgrundsatz") according to which competences have to be interpreted in the sense applicable when they came into being (mostly on 1 October 1925) according to the meaning resulting from the systematic of ordinary legislation of that time.

Interpreted restrictively, the application of the petrification rule would mean that new issues not covered by any existing competence rule would fall into the competence of the countries on the basis of the general competence rule stated by Art. 15 B-VG (Berka 2021a, p. 135). To avoid such a solution, hardly reconcilable with the overall spirit of the federal principle as enshrined in the Austrian constitution, the principle of "intra-systematic norm evolution" ("Prinzip der intrasystematischen Fortentwicklung") has been conceived. In substance, this concept further extends the applicability of the petrification rule, so to exclude gaps in the competence order and to exclude the automatic application of the default rule in Art. 15 B-VG in a way not intended by the fathers of the Austrian constitution. In this sense, the "intra-systematic norm evolution" can also be seen as a subspecies of the historic interpretation rule. This principle is, however, not without problems. It has been said that it introduces an element of arbitrariness and that the Constitutional Court has in some cases overstretched this concept (Stelzer 2014, p. 46). In practice, the traditional, more restrictive application of the petrification rule seems to prevail, also because it was possible to develop further auxiliary interpretation methods helpful to smooth the consequences of the predominant application of the petrification rule.

One of these theories is the "perspective doctrine" ("Gesichtspunktetheorie"), related to but not identical with the doctrine of the "cross-sectional matters." According to the perspective doctrine, one single issue of life reality can be addressed under different perspectives. For example, building a factory may involve issues of commercial law, industrial law, environmental law, building and planning law, and security issues. As a consequence, concurrent competences may be involved and a larger number of administrative acts (permits) may be required. However, by taking recourse to the petrification principle, again this complexity may be reduced (Öhlinger and Eberhard 2019a, p. 137). At the same time, also this doctrine attributes decisive power to the Constitutional Court for the determination of the "right" competence basis.

Whether there is a "federal interpretation doctrine" in Austrian constitutional law, according to which in case of doubt preference should be given to the country competence, is controversial at best. Mostly such an assumption is rejected in Austrian constitutional doctrine, even though some hints in this direction might be found in the constitutional jurisprudence. A nuanced approach seems appropriate in this area. If an argument for a stronger emphasis on the federal element, corresponding to the constitution, should be looked for, the reasoning could go as following: While the commitment of the Austrian constitution toward federalism is not a very strong one, the federal principle as such has to be preserved and in case of erosion to be defended.

Both the federation and the countries have to act in loyal cooperation. Federal and country competences rank equally. Nonetheless, competence conflicts are, also because of the extreme complex regulation of this matter in the Austrian constitution, often unavoidable. The have to be resolved, in a preventive way or in a subsequent step, by the Constitutional Court, by request of the country or the federal government.

As to the preventive control, according to Art. 138 para. 2 B-VG, the Constitutional Court can be asked to examine whether a legislative proposal is in adherence with constitutional law. Subsequent ("repressive") control is possible on the basis of Art. 140 B-VG (also via an autonomous initiative by the Constitutional Court in a pending procedure).

Legislation and Further Competences in the Federal State

General Remarks

For the parliament, the Austrian constitution opted for a two-chamber system, with a "National Council" ("Nationalrat") and a "Federal Council" ("Bundesrat") representing the regional elements.

The National Council, composed of 183 deputies elected directly by the electorate, is the more important, more powerful body in respect to the Federal Council presently composed of 61 members delegated by the countries.

The two-chamber system is discussed in many countries where it still applies (Classen 2021, p. 168). In Austria the continuing existence of the Federal Council is strongly related to the intention of preserving at least the semblances of a federal state, even though the Federal Council has not only little powers but gets also little attention in the general political discussion.

The National Council ("Nationalrat")

The National Council is elected every five years by all Austrian citizens with a minimum age of 16, while all Austrian citizens with a minimum age of 18 can stand as candidates. In international comparison, in Austria the threshold for the right to vote is therefore set at a rather low level. Only in case of convictions by final judgment for major offences the right to vote is excluded. There is no obligation to vote.

The 183 seats in the National Council are attributed on the basis of the proportional system. This principle is somewhat attenuated by the introduction of a minimum percentage barrier of 4% parties have to overcome in order to have their votes counted in the distribution of seats. In alternative, also winning a so-called "basic mandate" ("Grundmandat") suffices to be considered for the further distribution of seats. Attribution of a "basic mandate" requires obtaining the minimum number of votes in one electoral section for the attribution of at least one seat.

Voting is secret. Postal votes are possible; all votes arriving until 5 pm of the voting day at the electoral office are counted.

In the electoral process parties play an important role. They prepare the list of their parties' candidates. By preferential votes voters have some say on which candidates make it into the National Council, but this influence is a rather limited one. Parties find constitutional recognition by the "Party Act" of 1975 which in § 1 (being of constitutional rank) declares the existence and the plurality of political parties as "essential elements of the democratic order." Consequently, Austria has introduced a system of party financing which is extremely generous in international comparison. At the same time, however, it privileges parties which are represented in the parliament while not providing for any financing of other parties (Stelzer 2014, p. 16). Private financing of parties underlies strict rules which are, however, inadequately implemented so that circumvention of these rules may become a calculable risk with moderate sanctions. There is an ongoing discussion in Austria whether more extensive control rights about party financing should be attributed to the Public Audit Office ("Rechnungshof").

In Austria, parties are closely intertwined with organizations representing the so-called "social partners." These are the "Austrian Trade Union Federation" ("Österreichischer Gewerkschaftsbund"), the "Labor Board" ("Arbeiterkammer"), the "Federal Board of Commerce" ("Bundeswirtschaftskammer"), and the "Agricultural Board" ("Landwirtschaftskammer"). While the first two entities are close to the Social-Democratic Party SPÖ, the last two are related to the Austrian Peoples Party ÖVP (Stelzer 2021, p. 37).

Therefore, a simple reading of the Austrian constitution and an attempt to sort out how democracy effectively works in Austria may deliver a misleading picture if the emphasis is laid merely on the letter of this document. The "social partners" mentioned are not only important stakeholder in the consensus building process but they have also considerable influence on the selection of candidates for the party lists and eventually on the choice of the candidates who make it into the parliament (Haider-Quercia 2019, 137ss.).

This fact as well as the limitation of party financing for parties represented in the parliament provides stability and consensus orientation but at the same is also conducive to rigidities, bargaining, and limitation of the political competition.

Parliamentarians enjoy immunity for their opinions expressed and their votes given (however, not in the case of slandering). They enjoy immunity also for their political activities outside the parliament. Criminal investigation and prosecution against a parliamentarian is possible only after the "demand for extradition" ("Auslieferungsantrag," i.e., demand for a waiver of immunity) has been approved by the chamber the parliamentarian pertains.

No parliamentarian may be a member of more parliamentarian bodies (National Council, Federal Council, or European Parliament) and the mandate of a parliamentarian is incompatible with the presidency of the Public Audit Office, the membership of the Ombudsman Office, and the exercise of highest functions in the judiciary. On the other hand, there is no incompatibility with membership of the government, although, however, members of the government, for the time they are part of the government, hold their mandate in parliament in abeyance.

Parliamentarians are representatives of the population as a whole and therefore free as to how they intend to exercise their mandate. In this, in principle, they cannot be obliged to pursue a party policy. In practice, however, there are indirect ways for political parties to exercise some control on "their" deputies: According to § 7 of the Rules of the National Council ("Geschäftsordnung des Nationalrats"), so-called "clubs" can be formed within the National Council by at least five deputies. These clubs benefit from a series of material benefits which can be passed on to single deputies. Clubs are free to condition membership on a certain behavior, in particular when it comes to voting ("club pressure," "Klubzwang"). Deputies not respecting the orders by the club can be expelled from the club and face subsequently considerable hurdles in practical parliamentarian work. Since 2013, it has no longer been possible to change the club during an ongoing parliamentary term. All these measures have considerably strengthened the position of political parties while creating a situation which is of dubious conformity with the constitutional norm of the free mandate (Berka 2021a, p. 180).

Parliamentarian work within the National Council is directed by the president or the second or the third president, elected by the National Council (Art. 30 para. 1 B-VG) but de facto determined by the three major parties. Due to the negative experience of the past, after their election and during an ongoing parliamentarian term, there is no possibility to remove the presidents from office and if neither of them should be available the most senior deputy assumes this office so that there will always be a deputy able to direct parliamentarian work in the National Council.

Among all the functions exercised by the National Council, the most important is surely the legislative one.

Usually, legislative proposals are presented by the government but also a group of least five deputies can start such initiative. For an initiative to be started from within the Federal Council the threshold is higher: Here, a simple majority is needed or the support of at least one-third of its components. Furthermore, a popular initiative ("Volksbegehren," Art. 41 para. 2 B-VG) is possible: with a least 100.000 voters or at least one-sixth of the voters of three countries signing. In a pre-start procedure one per thousand voters has to sign this initiative. Even for an initiative that obtains the necessary popular support there is no obligation whatsoever by the National Courncil to adopt the text.

In Austria, a binding referendum is foreseen only in case of a total revision of the Constitution (Art. 44 para. 1 B-VG). In case of other constitutional reform, one-third of one of the two parliamentary chambers may request a referendum (Art. 44 para. 3 B-VG). For a referendum on an ordinary law a request by simple majority within the National Council is needed.

Finally, the National Council may also ask the Austrian electorate to decide on more general questions of nationwide relevance (Art. 49b B-VG). This decision is not binding but the National Council can, of course, decide to stick

to the decision as it has done in the only case of such a referendum started up to this moment: the referendum on the mandatory military service (Berka 2021a, p. 210). The elements of direct democracy are rather weak in the Austrian constitutional order. Repeatedly demands for a strengthening of these elements come up. Political scientists and jurists are uncertain whether this would be a good idea and see both positive and negative effects in such a (possible) reform (Ehs and Willroider 2013).

Further functions by the National Council regard the national budget, control rights, and some administrative functions.

As to the budget, this is discussed within the National Council which is also competent to authorize it and to control its implementation. Of great importance are the control rights by the National Council; it is here where the opposition can most actively monitor the governmental activity.

In practice, the most important instrument are the parliamentary inquiries to be presented by at least five deputies (Art. 52 B-VG). As opposition parties bemoan, the efficacy of this instrument has been somewhat diminished in the last years by insufficient and reticent answers by the responsible ministries.

In the last years, considerable relevance has obtained the instrument of the parliamentary inquiry committee on a specific concluded event (Art. 53 B-VG), also because such a committee, since 2015, can be instituted at the request of at least a quarter of the parliamentarians, and therefore also by a parliamentarian minority. These committees have also coercive powers at their disposal. In testimony hearing, testimonies are subject to the duty of truth. False testimony is pursued by a criminal proceeding.

In theory, the no-confidence vote foreseen in Art. 74 B-VG would be the strongest control instrument at all. Both the government as any single minister needs the confidence by the parliament. By a simple majority vote of no-confidence any minister and the government as a whole can be removed from office. On the other hand, on the basis of Art. 71 B-VG, the president may entrust the outgoing government or single ministers after having left their office (or their state secretaries or senior officials) with the continuation of these functions on a "provisional" basis (there is no time limit).

Votes of no-confidence are often proposed by the opposition but regularly rejected by the majority. The removal of the Kurz government from office by a motion of no-confidence in spring 2019 as a result of the disclosures associated with the "Ibiza video" was a striding exception and marked a turn in the political history of the Second republic, unique both in its causes and in its consequences (Beham 2019).

As mentioned above, according to Article 50 para. 1 B-VG, the conclusion of "political, law-amending and law-supplementing" treaties by the president presupposes the approval of the National Council.

The Federal Council ("Bundesrat")

Members of the Federal Council are not elected directly by the electorate but by the country parliaments. The number of deputies one country assembly can elect for the Federal Council depends on the size of its population and goes from a minimum of 3 to presently a maximum of 12.

The competences of the Federal Council in the legislative process are far more limited than those of the National Council. As a principle, this chamber can only delay the legislative process by a "suspensive veto" ("suspensives Vetorecht") to be exercised within eight weeks after receiving the text approved by the National Council. By a vote of persistence ("Beharrungsbeschluss," to be taken by the majority of its members), the National Council can, however, overrule the suspensive veto.

In some cases, however, when the interests of the countries are more immediately concerned, the consent by the Federal Council, usually by a simple majority, is required. Constitutional acts, however, limiting the countries competences, require the presence of a two-third majority of Federal Council's member (Art. 44 para. 2 B-VG).

Visibility and political weight by the Federal Council are further reduced by the fact that it is

has no powers as to the determination of the federal budget (Art. 42 para. 5 B-VG).

Some competences attributed to the Federal Council formally emphasize its position as the second parliamentarian chamber but in practice are of little relevance: This is the case for the legislative initiative to be exercised by a majority vote or by one-third of its members (Art. 41 para. 1 B-VG) or for the right to start a popular referendum on constitutional reform (by the request of one-third of the Federal Council's members).

The Federal Council was conceived to represent country interests but its practical work has been dominated by partisan interests (Stelzer 2021, p. 40).

The Federal President ("Bundespräsident") and the Federal Government ("Bundesregierung")

Austria's president is elected directly by the electorate among candidates eligible for the National Council with a minimum age of 35 years (Art. 60 B-VG). A candidate is elected in the first ballot by the absolute majority of the votes given. If no candidate obtains an absolute majority in the first ballot, a runoff election is held between the two candidates who have received most votes.

The president stays in office for six years and can stand once for a reelection for a second term. Thus, as a maximum, a president can stay in office for comprehensively 12 years. The president can be removed from office by a referendum, after a majority vote of the Federal Assembly ("Bundesversammlung," the two chambers of the parliament acting together) convened by the federal chancellor after a two majority vote by the National Council with the participation of the majority of its members.

The president enjoys, furthermore, a qualified immunity which again can be lifted only by the Federal Assembly through a similar procedure as it applies for requests for a removal from office (Art. 63 B-VG).

The Constitutional Court decides about accusations of a "violation of the constitution" (Art. 68) presented by the Federal Assembly after a request by the National Council or by the Federal Council. For such an accusation a two-thirds majority of the votes casted and the presence of a majority of both chambers are required. The president is removed from office by a condemnation of the Constitutional Court.

As head of state the president does not only represent the Republic externally but has internally competences touching upon all three state powers, while formally standing at the top of the executive. The president's position has been somewhat strengthened by the constitutional reform of 1929 but on a whole the representative functions still prevail. Recently, it has been speculated that in Austria the constitutional framework would offer more power to the presidents than they have taken avail of during the Second Republic. In reality, however, most acts of the president need to be countersigned by the federal chancellor or by the competent minister. On the practical level, the president has the most extensive influence on the overall political reality when it comes to the formation or the dismissal of the government. In theory, the Austrian president is free to act in this context as he or she deems it fit. In reality, however, any government will depend on having the political support by a majority. In substance, the president will have some leeway in this field but the respective power has to be exercised with care and circumspection as otherwise the reputation of this function, the most important asset of the president, would be tarnished.

In theory, the federal president has also the power to rule by decree ("Notverordnungsrecht," Art. 18 para. 3–5 B-VG) with legislative effects in manifest cases of absolute urgency, to avoid irremediable damage for the people, while the National Council is not able to exercise its functions. This power has never been used since its introduction in 1929 as the conditions mentioned were never given.

In a formal sense, the federal president is also a supreme administrative organ (Öhlinger and Eberhard 2019a, p. 225) but in substance these powers are very limited (Grabenwarter and Holoubek 2022, p. 387).

In a material, substantive sense the supreme organ of the administrative power is the federal government. The single ministers are nominated by the president at the proposal of the federal chancellor (Art. 70 B-VG). The president may also reject a proposal. Ministers are the highest organs of the administrative branch they are heading (Art. 77 B-VG). The federal chancellor has no power to issue directives for single ministers ("Weisungsrecht"). They are also members of the federal government, presided by the federal chancellor with the competences specifically attributed to this organ (Art. 69 B-VG).

The federal administration can be organized in direct or in indirect form. Indirect administration is the rule and takes places through the country administrations with the country governor ("Landeshauptmann") as the responsible organ bound by the directives of the government and the ministers. The cases of direct administration are many and important as to their nature (Adamovich et al. 2022a, p. 197ss.).

At the country level, the country government, formed by country governor and the other members of government (country ministers, "Landesräte"), stands at the top of the administration (Art. 101 B-VG). Similarly, as it happens in the federal government, the country governor has no directive power ("Weisungsrecht") toward the country ministers but an important coordinative function. At the technical-administrative level, the country government is assisted by a unitary "Office of the Country Government" ("Amt der Landesregierung"), headed by the governor and, for internal, technical aspects, by a director ("Landesamtsdirektor").

"District authorities" ("Bezirkshauptmannschaften") operate as local administrative authorities as country agencies and also in the context of the indirect administration on the basis of instructions by the federation.

The Judiciary

The Ordinary Judiciary

Art. 82 B-VG refers to the ordinary judiciary, composed of the Criminal and the Civil Courts, as a federal matter. At present, it is composed of 115 District Courts ("Bezirksgerichte"), 20 Provincial Courts ("Landesgerichte"), four Provincial Courts of Appeal ("Oberlandesgerichte"), and one Supreme Court ("Oberster Gerichtshof").

While there is some element of participation of lay judges in civil and criminal proceedings (in criminal proceedings regarding severe offences, in civil proceedings mainly in labor conflicts, "Schöffen" and "fachkundige Laienrichter"), jurisdiction is exercised mainly by professional judges who are public officials ("Beamte"). They are nominated by the Minister of Judicial Affairs on the basis of – nonbinding – proposal by a selection commission. They stay in office until the age of 65 and enjoy a high degree of independence.

Different is the situation of the public prosecutors. They make part of the judicial administration but they are not judges. They depend from the Minister of Judicial Affairs who can impart them instructions. This fact is object of continuous criticism, also by international organizations.

Administrative Jurisdiction

As to administrative justice, since 2014 this is a system of two instances with the first instance often described by the "9 + 2" formula: There is an administrative court in each of the nine countries ("Verwaltungsgericht der Länder," "LVwG") and there are two courts at the federal level: the Federal Administrative Court ("Bundesverwaltungsgericht," "BVwG") and the Federal Finance Court ("Bundesfinanzgericht," "BFG").

Within these courts decisions are usually taken by single judges but also decisions by collegiate bodies ("Senate") are possible. Strong criticism has been voiced against the selection process of administrative judges in the nine countries (Zeller 2022, p. 136): Court presidents of the nine federal administrative courts in Austria are appointed in full discretion by the executive power. These presidents are endowed with enormous power, in particular over judicial careers. Once appointed they decide over the recruitment, supervision, and dismissal of all court personnel. The selection process cannot be legally challenged and no access to

courts exists (this is the same with ordinary judges in Austria).

Allocations of competences between federal administrative courts and country administrative courts follow a similar rule as that devised for the allocation of material competences between the federation and the countries: The LVwG remains competent for all proceedings not specifically attributed to the federal courts (BVwG or BFG; general competence of the LVwG). As to federal courts the competence of the BVwG is the general one (competence of the BFG for complaints against tax authorities; Öhlinger and Eberhard 2019a, p. 287).

As to the types of complaints the administrative courts are competent for, Art. 130 para. 1 B-VG distinguishes the following:

- Complaints against administrative decisions ("Bescheide"). These complaints regard administrative acts directed toward an individual and regulating a legal situation in binding form. The complaint has to be presented within the period of four weeks from the notification of the decision.
- Complaints against administrative measures associated with orders and restrictions but not finding expression in a formal administrative decision ("Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt," "Maßnahmenbeschwerden").
- Complaints of omission ("Verletzung der Entscheidungspflicht durch eine Verwaltungsbehörde," "Säumnisbeschwerde").

  Such a complaint presupposes the existence of a right to an administrative decision and the inaction of the competent authority for the period of (usually) six months.

  The complaint has always to regard the alleged violation of legal norms.

The Supreme Administrative Court ("VwGH") acts as a Court of second instance, for "revisions" ("Revisionen") to be presented within the deadline of six weeks since notification of the decision. Such an appeal to the VwGH is only possible in cases where legal questions of fundamental importance ("Rechtsfragen von grundsätzlicher Bedeutung") have to be solved.

The administrative courts of first instance decide whether this condition is given. However, even if the administrative court denies the revision, an extraordinary revision can be brought to the Supreme Administrative Court which then decides about the admissibility. The VwGH decides in collegial bodies ("Senate"). The revision can be rejected as inadmissibel or as unfounded. Otherwise, the contested decision of the court of first instance is repealed. For the decision in the merits again the court of first instance becomes competent, but also the VwGH can decide in the merits if this seems advisable from the viewpoint of procedural economy.

The VwGH decides furthermore about "vertical" (between the VfGH and an administrative court) and "horizontal" (between administrative courts of first instance) competence conflicts. In case of a competence conflict between the VwGH and the Constitutional Court (VfGH) or between the VwGH and High Court (OGH) the VfGH has the last word.

The Constitutional Court ("Verfassungsgerichtshof," VfGH)

The creation of the Austrian Constitutional Court ("Verfassungsgerichtshof," VfGH) in the year 1919 can be seen as a milestone in the European constitutional law development (Wiederin 2021). Its immediate predecessor was the "Imperial Court" ("Reichsgericht") of 1867, operative since 1869. With the concentrated control of the constitutionality of legal norms (in juxtaposition to the US American model of a decentralized control system), the Austrian Constitutional Court is said to have set an international example (Vincze 2021, p. 211). The Court is composed of a president, a vice president, 12 effective members, and 6 substitute members (Art. 147 B-VG). The VfGH is not a permanently sitting court but it gathers four times a year for three weeks. Special sessions are possible; legal clerks are working on a permanent basis at this Court. To be a judge at

the VfGH is conceived as a part-time activity, a situation that meets with ever more criticism in view of a continuously rising workload (Kirchmair 2022). The argument that contact with "real-life" work experience would be helpful also for the judicial activity appears construed and there is rather the danger of augmenting the danger of conflicts of interests.

Judges at the Constitutional Court are appointed for lifetime and retire at the end of the year in which they reach the age of 70. This could be seen as an instrument assuring stability in constitutional jurisprudence. Appointments more restricted in time, as they are practiced, for example, in Germany or in Italy, have, however, the advantage to allow for a more frequent integration of new generations of lawyers, thereby also avoiding a stiffening of the jurisprudence and an accumulation of excessive power with single judges.

Judges are nominated by the federal president at the proposal of the federal government (president, vice president, six effective members, and three supplementary members), three effective members, and two supplementary members at the proposal of the National Council and three effective members and one supplementary member at the proposal of the Federal Council. There is an ongoing debate in Austria about how to make the selection process of VfGH judges more objective (Ehs and Neisser 2015 and Ehs 2020).

The VfGH decides, according to the Constitution, in plenary session, in practice, however, almost exclusively (in 99% of the cases) in smaller collegial chambers of uncertain constitutional basis (so Öhlinger and Eberhard 2019a, p. 475). Up to this date, no separate (dissenting) opinions are possible at the VfGH, but there are demands, also from the academia, operating in this direction (Ehs 2020, p. 588).

Object of the VfGH's power to review legislative acts are federal and country acts and even constitutional acts (country constitutional acts as to their conformity with federal constitutional law; federal and country constitutional law as to their conformity with the basic principles of the constitution [Öhlinger and Eberhard 2019a, p. 485]).

The VfGH is an organ with pronounced power in the Austrian constitutional system. It is qualified as a "border organ" ("Grenzorgan"), situated as it is between justice and politics and having also competences similar to a legislative organ.

This becomes evident, first of all, in the field of the Court's law reviewing powers, one of the VfGH's most important tasks. Any (federal or country) act can be subject of such a control procedure, either in the context of a specific procedure (this is the general case open also open to individuals) or in an "abstract way" ("abstrakte Normenkontrolle," not open to the individuals but only to parliaments on the federal or the country level or to the federal or the country governments). For norm control procedures initiated by National Council, the Federal Council, or the country councils (if foreseen in the respective country constitution), a request by a third of the members of the respective chamber is necessary. The various specific cases of norm control procedures are set out in Art. 140 para. 1 B-VG.

A "concrete" norm control procedure can be started, first of all, at the request of any court (even of the VfGH ex officio) having doubts about the conformity of an act with the constitution or of a regulation with an act. The essential prerequisite is the preliminary nature of the respective norm in a procedure pending before that court.

For the individual to request a control of an act by the VfGH it is not strictly necessary that a judicial proceeding should be pending. In fact, the individual can present also an "individual request" ("Individualantrag," Art. 140 para. 1 n. 1 lit c B-VG) but the conditions in this case are rather demanding: It is not only necessary to demonstrate that the respective norm already had precise legal effects for the individual and that an abolishment of the this norm would change the legal position of the individual, but the individual has also to evidence that there are no reasonable alternatives available (for example, starting first an administrative procedure and bringing a complaint before the VfGH only after a controversy has been initiated). The individual request is, therefore, a subsidiary instrument.

The legislator has given preference to the application for norm control within a pending

procedure ("Parteienantrag auf Normenkontrolle," Art. 140 para. 1 lit d B-VG). The request can be presented in a pending procedure before the ordinary judiciary after the decision of the court of first instance and under the condition that this decision is appealed.

Since 2015, when the party application for norm control introduced 2013 became operative, applications of this kind have often been presented but have led very rarely to the rescission of a norm by the VfGH.

In an administrative procedure the parties have the possibility to file also an application for a constitutional review of a decision ("Erkenntnisbeschwerde," Art. 144 B-VG, within six weeks). For decisions of ordinary judges such a possibility does not exist, even though requests for the introduction of such a possibility are often coming from theory and practice. The party application for norm control is only a weak substitute for a possibility. The parties have to confide that ordinary courts are applying constitutional norms correctly.

As to the application for norm review in administrative procedures, even if the VfGH dismisses the application, a revision procedure before the VwGH is still possible. Such an application for a "cession" of the procedure ("Abtretung") can be presented as a subordinate request when filing the application before the VfGH ("Eventualantrag") or also after the dismissal of the application by the VfGH within two weeks. Afterward, a six-week deadline for the presentation of the revision begins to start.

A further important competence of the VfGH regard its function as the highest competence judge. Article 138 B-VG acts both as the highest instance in competence conflicts which have already materialized and in an anticipatory way to determine competences in the relation between the federation and the countries.

As to the first case, the VfGH rules about conflicts between judiciary and administrative bodies, between ordinary and administrative courts, and between administrative authorities of different territorial entities.

The supreme position by the VfGH in this area comes best to bear by the fact that it decides also about competence conflicts of this Court with other courts.

As to the VfGH's competence to decide about competence conflicts between the federation and the countries, it regard both legislation and administration. Such an application before the VfGH can be presented, prior to the adoption of the relevant act, either by the federation or a country.

The norm control procedure for regulations follows widely the rules for the norm examination procedures for acts. As such, this competence is atypical for a constitutional court as the reference norm, in respect to which the legality of a regulation is to be examined, is not necessarily a constitutional norm but simply a higher-ranking norm (usually an ordinary law provision).

The VfGH has many other competences which underscore the eminent position of this Court. Among them the following shall be mentioned:

- Pecuniary claims against territorial entities ("Kausalgerichtsbarkeit")

  This competence regard claims based on public law provisions for which no remedy before courts of ordinary justice or administrative decision is available (Art. 137 B-VG). Examples are salary claims of civil servants or the reclaiming of administrative fines after the administrative act on which they were based had been repealed (Stelzer 2014, p. 74). Also actions of state liability as a consequence of violations of EU law fall under this category. This instrument, much acclaimed in academic literature, is, however, hardly effective. This is true for EU Member States in general (see, as to liability for judicial injustice – the "Köbler" jurisprudence [Varga 2022] and for Austria in particular [Hilpold 2022a]).
- Jurisdiction in electoral matters (Art. 141 B-VG)

  These competences regard general contestations against certain elections and in regard to events associated with elections and referendums. Furthermore, also the election of specific subjects (federal president, members of political and industry and business bodies, members of the country governments, and members of the executive organs of the

municipalities, such as mayors) can be contested on this basis.

- Constitutional responsibility claims against the highest federal and country authorities for culpable law violations in the exercise of their office ("Staatsgerichtsbarkeit," Art. 142 B-VG). Such proceedings – of very rare activation – require an act of accusation by the competent political body (for example, for proceedings against the federal president the competence lies with the Federal Assembly). If these accusations are considered to be founded, they can result in a mere act of ascertainment confirming the law violation but also in the loss of the contested political function.
- Contestations against international treaties or Article 15a para. 1 agreements (agreements between the federation and countries and between countries in their area of competence) and their implementation (Art. 138a and Art. 140a B-VG).
- Violations of international law

  This provision in Art. 145 B-VG, of interesting dimension in international comparison, has not yet been activated.

Liability Claims ("Amtshaftung" and "Staatshaftung")

According to Art. 23 B-VG, the Republic, the countries, the municipalities, and the other corporations and bodies of public law can be held liable for damage caused, in culpable and unlawful way, by their organs.

These claims have to be presented before the ordinary judiciary with the demonstration of the following:

- The occurrence of a damage
- Caused by an action or omission of an organ implementing acts (therefore no liability action is possible against the legislators)
- The action or omission by the organ must have been unlawful
- The culpability (dolus or culpa) must be demonstrated

Liability for judicial acts requires the demonstration that the judicial decision was not only wrong but "unreasonable" ("unvertretbar"). This opens broad leeway to the competent court to dismiss liability claims creating thereby considerable cost risks for claimants in a judiciary system with procedural costs which are among the highest in Europe.

No liability claims are possible against decisions of the Supreme Courts (VwGH, OGH, and VfGH). In theory, in such cases, if an EU norm has been violated, a EU liability claims ("Staatshaftungsklage") on the basis of the "Köbler jurisprudence"(Öhlinger and Potacs 2020, p. 210) could come into consideration. As mentioned above, this instrument is, however, largely ineffective.

The same is true for liability claims for legislative injustice. In Austria, for such situations, there is no action available for claiming (national) liability ("Amtshaftung") but EU liability actions are possible also in this case if EU law is violated. Again, this is an instrument of little practical use but the procedural cost risks are reduced as for these claims, as for all EU liability claims, the jurisdiction lies with the VfGH which decides definitely in a one-instance procedure (differently than in other EU Member States).

Control Instances: The Ombudsman Board ("Volksanwaltschaft") and the Public Audit Office ("Rechnungshof")

The Ombudsman Board ("Volksanwaltschaft," Art. 148a – 148j B-VG and "Volksanwaltschaftsgesetz 1982") has been created in 1977 along foreign examples which, originating in the Scandinavian area, have, in the meantime, gained international recognition as a flexible instrument to fight maladministration.

In Austria, the Ombudsman Board is composed of three members formally elected by the National Council but in reality nominated by the three largest parties in this chamber. They stay in office for a six-year term and can be reelected once.

This control can be activated, free of charge, by an individual complaint alleging

maladministration by the administration and presented by an individual affected personally by the alleged deficiency ("Missstand") if no other judicial remedy is available. As to judicial deficiencies primarily procedural delays can be contested.

The Ombudsman Board can act also ex officio and initiate a control activity in case of a suspected deficiency. The concept of an "deficiency in the administration" is interpreted broadly and regard a behavior which stands in contrast to the principle of good administration.

Whether this institution operates in a satisfactory way is open to debate. This starts with the nomination of the board's members which are de facto political nominations. They form a group which resembles a collegium of three Ombudsmen. Whether a publication of the findings – against which the claimant has possibility to appeal – in an anonymized report to the National Council is an effective instrument for control and redress is questionable. In the last years a series of reform proposals, starting with a depoliticization and further professionalization of this institution, have been presented (see Hilpold 2022b).

Since 2012 the Ombudsman Board has also had specific competences in the field of prevention of torture and other cruel and inhuman or degrading treatment or sanction (Art. 148a para. 3 B-VG). Two countries (Tirol and Vorarlberg) have their own Ombudsman Boards for the fields of their administrative competences.

The Public Audit Office is regulated in the Articles 121–128 B-VG, as well as in the "Rechnungshofgesetz 1948."

The Austrian Public Audit Office is a control organ acting for the National Council if it controls the administration of federal public funds ("Gebarungskontrolle") and acting for the country councils if it controls the administration of country public funds. Criteria of control are accuracy of accounts, legality, economy, and efficacy of the measures taken and the money spent. The bodies and entities subject to control are determined in detail by the constitution. The Public Audit Office is headed by a president in office for 12 years and not reelectable.

The Public Audit Office determines autonomously its control agenda but the National Council (or at least 20 members of this chamber), the federal government, a federal minister, a country council, a country government, a mayor or a certain number of country deputies (to be determined by the country constitution) can require a special audit.

The Public Audit Office is an important institution for the fight against corruption, a function exercised also by the control and the publication of average incomes or specific incomes of persons in certain sensitive positions (for example, with regard to certain public enterprises). Also the control of party funding is an important field of activity, although political resistance in this area is high.

Generally, it can be said that the Austrian Public Audit Office works very effectively, it enjoys great respect in the population and it has given an important contribution in the struggle against corruption. It is open to debate, however, whether the powers attributed to this institution in Austria suffice, as this institution does not have at its disposal proper sanction instruments. Detailed reports by this institution to the National Council (or the country councils) often remain without immediate consequences. The "Latin model" of Public Audit Offices which conceives these offices as judicial institutions (for example, with their own judicial organs and public prosecutors) has proven to be a particularly effective instruments in the fight against corruption.

Fundamental Rights

The protection of fundamental rights protection evolved slowly in Austria, in a piecemeal approach strongly attached to the past, never resulting in a comprehensive codification as it was the case in many other European constitutional orders. The reason for this cumbersome process can be found partly in history: Since the French Revolution of 1789 Austria saw itself as the bulwark against revolutionary and liberal ideas in Europe and after the Congress of Vienna 1814/1815 the Austrian Empire became the driving force of the Holy Alliance in its attempt to preserve the legitimist and antidemocratic feudal

systems. There were countertendencies also in Austria such as the proposals presented in the revolutionary years of 1848/1849 but it was not until 1862 that the first fundamental rights laws were adopted, with the "Act on the Protection of Domicile" ("Gesetz zum Schutz des Hausrechts") still in force. A further important step forward was set with the "Basic Law on the General Rights of the Citizens" ("Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger") as a consequence of the disruptions of 1866 (military defeat against Prussia and subsequent transformation of the Empire in a double monarchy). The military defeat in World War I signified again a major impetus for readdressing the fundamental rights question, through the passage from a monarchy to a republic and by the peace negotiations in Paris. The peace treaty of St. Germain actually contained some minority rights as well as the right to equality (Art. 68). As to the constitution no consensus was achieved to integrate a comprehensive catalogue of fundamental rights due to radically diverging views between the various political forces. As a substitute, some fundamental rights of the Empire era were transferred to the Republican order. The defeat of the Nazi-Fascist systems opened also for Austria the possibility to partake of the universal human rights development process. The State Treaty of 1955 further strengthened minority protection for the Slovene and Kroatian minority. Of decisive importance was the accession to the European Human Rights Convention (EHRC) in 1958, a treaty attributed constitutional rank in 1964. A further fundamental change was brought about by the accession to European Union in 1995. The EU Charter of Fundamental Rights (CFR), especially after having been attributed the status of primary law in 2009, opened up a wholly new potential. In 2012, the VfGH delivered a ruling (VfSlg 19.632/2012) which seemed to be revolutionary: The VfGH will exercise its general norm control activity also on the basis of the CFR where the guarantees stated by this document "resemble those of Austrian constitutional rights as to their formulation and determinacy." It is, however, open to discussion whether this statement, which received attention and praise on a EU-wide level, in practice really made a substantial difference as of yet. As recently has been stated by a prominent Austrian constitutionalist, the CFR is still widely a foreign element in the Austrian fundamental rights system (Holoubek 2020, p. 169).

The Austrian fundamental rights system is widely disparate and consists of norms of different epochs. It is true that these norms were in many cases suitable for a flexible, dynamic interpretation, especially under the influence of the ECHR. The adoption of a coherent, systematic body of fundamental rights norms, drafted in a modern language and structure, as often promised and never achieved, would be overdue and could mean a quantum leap in fundamental rights transparency and protection in Austria.

Conclusions

The Austrian constitution has been criticized by some as a "wreckage" (famously, Klecatsky), also because of the many amendments (more than 1000 since 1946, often by elevating norms to constitutional rank only with the intent to make abrogation and constitutional control more difficult, Haider-Quercia 2021, p. 720), while others praised it for its alleged "beauty" (by the actual Federal President Van der Bellen). In a more sober vision (see the general tenor of the contributions in Hilpold et al. 2020), it can be argued that the Austrian Constitution, while having provided a stable and adaptable framework for the Austrian Republic to prosper, would need extensive reforms to become fit for the future. In particular, the question of the future of Austrian federalism (costly, complicated, and creating many redundancies as it is) has to be solved. Furthermore, the justice system needs far-reaching reforms, also to allow more efficiency in the fight against corruption whose dimension in Austria has become evident as a consequence of the so-called "Ibiza scandal" of 2019 and the subsequent, still ongoing attempt to identify its basis and ramifications (Lachmayer 2021). The adoption of a coherent, modern, and comprehensive fundamental rights catalogue would also be extremely helpful. Most important of all would, however, be a greater

opening toward EU law. This process might be difficult also because of Austria's relatively late EU accession in 1995 but the steps to be taken are known and broadly discussed in literature (see, for example, Hilpold 2021). At the same time, international challenges such as the Russian aggression against Ukraine also require a repositioning of Austria in the international security system and in this context a thorough examination of its neutrality status whose survival is questionable also from the perspective of EU law (Hilpold 2010, 2019; Jandl 2020, 2022).

Presently, among the most strongly felt issues in the Austrian population international security (where much hope is set in neutrality), the fight against corruption (leading to the request for more transparency and more effective measures against "corruption in recruitment and selection of public officials," "Postenschacher") and consequent control of (illegal) immigration (Hilpold 2023) have to be mentioned. All these worries touch squarely upon constitutional issues and in order to address them effectively, the perception has to ripe that a stronger position in and a more committed collaboration with the European Union is key.

Cross-References

- ▶ Access to Justice
- ▶ Constitution, Interpretation
- ▶ Constitution, Overview, and Definition
- ▶ Constitutional Complaint
- ▶ Constitutional Justice in Europe: Comparative View
- ▶ Constitutional Position of Minorities and the Impact of International Law in Europe
- ▶ Constitutional Principles
- ▶ Constitutions: How Far They Are Ruled by Party Systems?
- ▶ Democracy and Rule of Law
- ▶ Direct and Participatory Democracy Ideologies in Contemporary Constitutionalism
- ▶ Domestic Law and International Law
- ▶ Equal Suffrage as Fundamental Right
- ▶ European Convention on Human Rights and National Constitutional Orders
- ▶ Federalism
- ▶ Federalism in Austria
- ▶ Federalism in Austria
- ▶ Fiscal Federalism
- ▶ International Law and Constitution
- ▶ Rule of Law Concept and Its Development by the EU Constitutional Justice

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