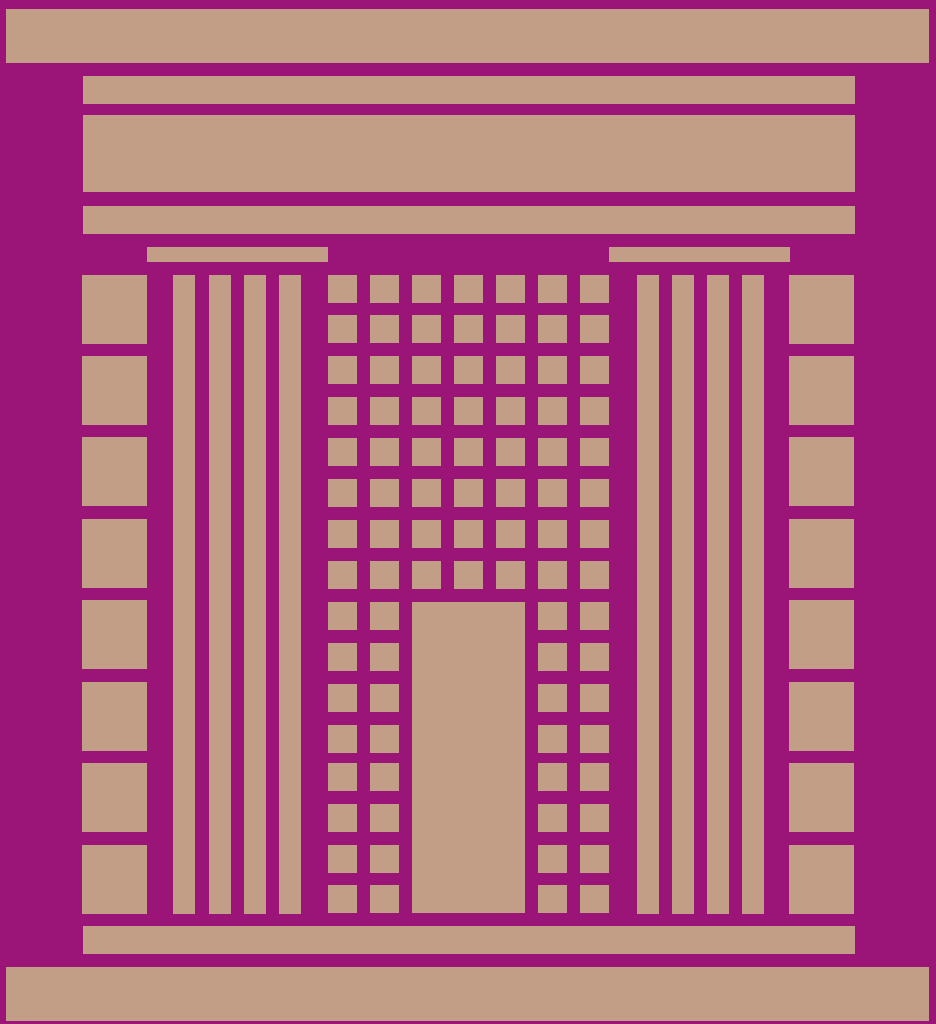
Constitutional Court of Austria

Activity Report 2021



vfgh
Verfassungsgerichtshof
Österreich


VERFASSUNGSGERICHTSHOF

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Foreword

In 2021, as in previous years, the Court again fulfilled its core function with hardly any hindrance, despite the adverse circumstances of the pandemic. This is primarily attributable to the hard work and dedication of the Judges and all the staff members of the Court.

2021 was another year marked by important judgments and decisions rendered by the Constitutional Court.

In connection with the fight against the pandemic, further landmark judgments were pronounced. Starting in the summer of 2021, the Court's judicial work in matters of asylum and aliens law was directly concerned with issues arising in the context of the political upheaval in Afghanistan. In the first half of the year, the Constitutional Court was confronted with special challenges in proceedings on differences of opinion voiced in the "Ibiza Committee of Inquiry". For the first time in its history, the Court had to apply for enforcement by the Federal President pursuant to Article 146 paragraph 2 of the Constitution.

The work load remained high. The number of proceedings ending in a judgment by the Court was comparable to that of previous years, as was the very short duration of the proceedings by international standards. Nevertheless, it became clear that the Court now needs additional staff and space in order to maintain its accustomed standard of quality in the performance of its tasks and ensure that the duration of proceedings remains reasonable in the years to come. A temporary improvement was achieved through the conversion of the room used for the Court's deliberations and the multiple use of other rooms.

Verena Madner
Vice-President of the Constitutional Court

Christoph Grabenwarter
President of the Constitutional Court

The programme of events of the Constitutional Court was subject to certain restrictions, but some events took place nevertheless. The celebration of the 100th anniversary of the Constitutional Court, originally planned for October 2020, was held one year later. Within the framework of a ceremonial event, broadcast live on television, Andreas Voßkuhle, former President of the German Federal Constitutional Court, and the acclaimed writer Sabine Gruber delivered impressive lectures. Their speeches have also been reproduced in this Activity Report.

After a year's interruption, international contacts with face-to-face meetings were also resumed. Among the highlights were a meeting of all German-speaking Constitutional Courts and the European Courts of Justice and a visit by our Court to the German Federal Constitutional Court.

However, the primary purpose of this Report is to provide what readers rightly expect of any activity report: a clear and concise overview of the Court's work.

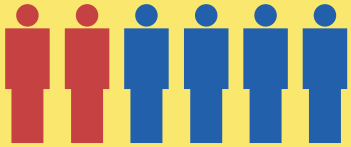
I

14
Members

28.57%
Women

71.43%
Men

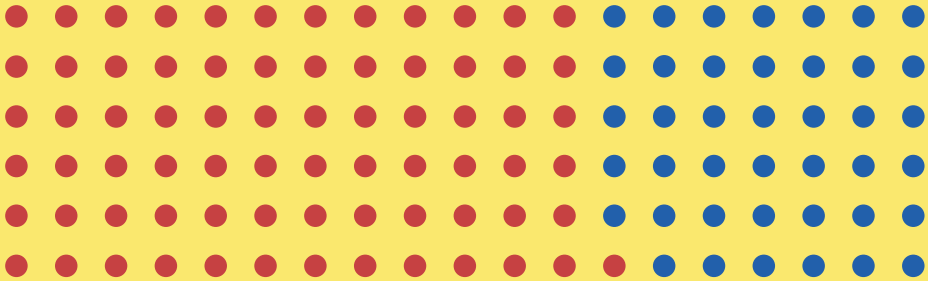
6
Substitute Members



33.3%
Women

66.7%
Men

114
Employees



63.72%
Women (73)

36.28%
Men (41)

Budget 2021

€ 18.085 million

Website 2021

1.3 million
total visits

8.9 million
page impressions

Citizens' Service 2021

150
written submissions per month

100
telephone enquiries per month

118 days
average duration of proceedings

1 year

2021 in Numbers

The Constitutional Court may in particular be called upon to deal with

- Complaints against rulings by administrative tribunals
- Applications for review of laws, regulations and state treaties
- Complaints against territorial authorities on grounds of certain property claims
- Challenges to Elections
- Disputes regarding parliamentary committees of enquiry

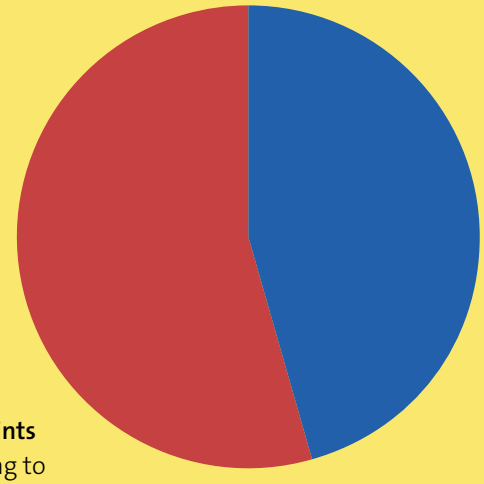
2
Conflicts of jurisdiction

6
Challenges to Elections
according to Art. 141 B-VG

5,332
new cases

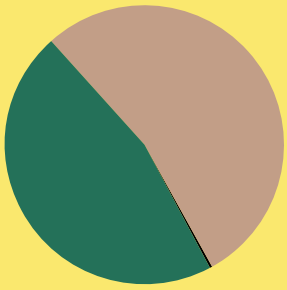
26
Complaints
according to Art. 137 B-VG

6
Disputes regarding parliamentary committees of enquiry
according to Art. 138b B-VG



54.3 %
Asylum cases
(2.491)

4,588
Complaints
according to Art. 144 B-VG



46.2 %
Applications for review of regulations
(322)

53.7 %
Applications for review of laws
(374)

0.1 %
Applications for review of state treaties
(1)

697
Applications for review of legal norms

180	Applications by courts
64	Ex-officio
248	Individual applications
195	Applications by a party to a law suit
10	Others

II

Personnel

The Collegium of Constitutional Court Judges

The Constitution Court consists of the President, the Vice-President, twelve other members and six substitute members, all of whom are appointed by the Federal President on the basis of proposals submitted by the Federal Government, the National Council or the Federal Council (the two Chambers of the Austrian Parliament). They resign from office in the year in which they reach the age of 70.

The Members of the Constitutional Court enjoy the guarantee of judicial independence.

They are supported by 113 non-judicial employees of the Constitutional Court.

Changes in Its Composition

At the beginning of June 2021, Dr. Wolfgang Brandstetter resigned from his position as a Member of the Constitutional Court. In September of that year, he was succeeded by Dr. Michael Mayrhofer, who had been appointed Substitute Member of the Constitutional Court in May 2021.

Professor Dr. Michael Mayrhofer was born in Linz in 1975. He studied law at the Johannes-Kepler University Linz (JKU), where he obtained his doctoral degree in law in 2003. From 2003 to 2005, Michael Mayrhofer worked as a law clerk at the Constitutional Court. Having held an assistant position at the Institute of Administrative Law and Administrative Doctrine at JKU, he obtained his post-doctoral qualification in constitutional law, administrative law and European law in 2014. Since 2016, Michael Mayrhofer has been Professor of Public Law and Dean of the School of Law at JKU. He became a member of the Bioethics Commission at the Federal Chancellery in 2017 and has headed the continuing education program of the Austrian Academy of Administrative Justice since 2018.

In December 2021, the Federal President appointed Dr. Daniel Ennöckl LL.M. as a (new) Substitute Member proposed by the Federal Government. He was sworn in by the President of the Constitutional Court in January 2022. Professor Dr. Daniel Ennöckl LL.M. was born in Linz in 1973. He is Professor of Public Law and Head of the Institute of Law at the University of Natural Resources and Life Sciences, Vienna.

Judges Rapporteur

Judges rapporteur are elected by the plenary of the Constitutional Court from among its members for a period of three years each. Re-election is allowed.

During the first half of the reporting year, the Constitutional Court had thirteen Judges rapporteur, a number which was subsequently reduced to twelve, including the Vice-President. In 2021, Dr. Ingrid Siess-Scherz, Dr. Andreas Hauer, Dr. Michael Rami and Dr. Johannes Schnizer were re-elected Judges rapporteur.

The Members and Substitute Members of the Constitutional Court

Members

DDr. Christoph Grabenwarter

Born in Bruck an der Mur in 1966
Full professor, Vienna University of Economics and Business, Member since 2005, Vice-President from 2018 to February 2020, Repeatedly elected Judge rapporteur, President since February 2020, Appointed upon proposal by the Federal Government

Dr. Verena Madner

Born in Linz in 1965, Full professor, Vienna University of Economics and Business, Vice-President since 2020, Elected Judge rapporteur, Appointed upon proposal by the Federal Government

Dr. Claudia Kahr

Born in Graz in 1955, Former Director General within the Federal Ministry of Transport, Innovation and Technology, Member since 1999, Repeatedly elected Judge rapporteur, Appointed upon proposal by the Federal Government

Dr. Johannes Schnizer

Born in Graz in 1959, Former Senior Civil Servant of the Parliamentary Administration, Member since 2010, Repeatedly elected Judge rapporteur, Appointed upon proposal by the Federal Government

Dr. Helmut Hörtenhuber

Born in Linz in 1959, Former Executive Director of the Regional Parliament, Honorary professor, Member since 2008, Repeatedly elected Judge rapporteur, Appointed upon proposal by the Federal Government

Dr. Markus Achatz

Born in Graz in 1960, Full Professor at JKU in Linz, Certified public accountant, Member since 2013, Repeatedly elected Judge rapporteur, Appointed upon proposal by the National Council

Dr. Christoph Herbst

Born in Vienna in 1960, Attorney-at-law, Member since 2011, Repeatedly elected Judge rapporteur, Appointed upon proposal by the Federal Council

Dr. Georg Lienbacher

Born in Hallein in 1961, Full professor at the Vienna University of Economics and Business, Member since 2011, Repeatedly elected Judge rapporteur Appointed upon proposal by the Federal Government

Dr. Michael Holoubek

Born in Vienna in 1962, Full professor at the Vienna University of Economics and Business, Member since 2011, Repeatedly elected Judge rapporteur, Appointed upon proposal by the National Council

Dr. Sieglinde Gahleitner

Born in St.Veit im Mühlkreis in 1965, Attorney-at-law, Honorary professor, Member since 2010, Repeatedly elected Judge rapporteur, Appointed upon proposal by the Federal Council

Dr. Andreas Hauer

Born in Ybbs an der Donau in 1965, Full professor at JKU in Linz, Member since 2018, Repeatedly elected Judge rapporteur, Appointed upon proposal by the National Council

Dr. Ingrid Siess-Scherz

Born in Vienna in 1965, Former Parliamentary Commissioner, Member since 2012, Repeatedly elected Judge rapporteur, Appointed upon proposal by the Federal Government

Dr. Michael Rami

Born in in Vienna in 1968, Attorney-at-law, Member since 2018, Repeatedly elected Judge rapporteur, Appointed upon proposal by the Federal Council

Dr. Michael Mayrhofer

Born in Linz in 1975, Full professor at JKU in Linz, Substitute member April – September 2021, Member since September 2021, Appointed upon proposal by the Federal Government

Substitute Members

Dr. Robert Schick

Born in Vienna in 1959, President of the Senate of the Supreme Administrative Court, Honorary professor, Substitute Member since 1999, Appointed upon proposal by the National Council

Mag. Werner Suppan

Born in Klagenfurt in 1963, Attorney-at-law, Substitute Member since 2017, Appointed upon proposal by the Federal Council

Dr. Nikolaus Bachler

Born in Graz in 1967, Judge of the Supreme Administrative Court, Substitute Member since 2009, Appointed upon proposal by the Federal Government

Dr. Daniel Ennöckl LL.M.

Born in Linz in 1973, Full professor at the University of Natural Resources and Life Sciences, Vienna, Substitute Member since 2021, Appointed upon proposal by the Federal Government

Dr. Angela Julcher

Born in Vienna in 1973, Judge of the Supreme Administrative Court, Honorary professor, Substitute Member since 2015, Appointed upon proposal by the National Council

MMag. Dr. Barbara Leitl-Staudinger

Full professor at JKU in Linz, Substitute Member since 2011, Appointed upon proposal by the Federal Government

For detailed CVs of the members and substitute members, please refer to the website of the Constitutional Court:
https://www.vfgh.gv.at/verfassungsgerichtshof/verfassungsrichter/members.en.html
https://www.vfgh.gv.at/verfassungsgerichtshof/verfassungsrichter/substitute_members.en.html

III

Judiciary

Overview of the Most Important Judgments and Decisions Rendered in 2021

COVID-19

In 2021, the case law of the Constitutional Court focused on the legal provisions (laws and regulations) adopted in the context of the pandemic.

At the beginning of the year, the Constitutional Court considered 93 applications filed already in 2020; another 328 applications were filed in the course of the reporting year. Faced with a total of 421 applications, the Court rendered 334 judgments and decisions in the reporting year. In 74 cases the applications were successful, as the contested provisions (many of them regulations issued under the COVID-19 Measures Act (COVID-19 Maßnahmengesetz) were found to be at least partly unlawful or the contested administrative court decision was annulled.

Judgment of 10 March 2021, V 574/2020

Distance learning

The Court dismissed several individual applications to repeal provisions of the COVID-19 School Regulation 2020/21 (COVID-19-Schulverordnung), as amended by Federal Law Gazette II 478/2020, of the Federal Minister of Education, Science and Research, by which all schools were required to provide for distance learning for the period from 17 November to 6 December 2020.

The Court saw no reason to disagree with the measure taken by the Federal Minister, which he considered to be necessary at the time of his decision for the aforementioned period on the basis of the criteria documented in the Regulation.

However, the organization of distance learning imposes a substantial burden on pupils, parents and legal guardians, and the teaching staff. In particular, this form of teaching cannot guarantee, in the long term, that schools fulfil their educational mission pursuant to Article 14 paragraph 5a of the Constitution (Bundes-Verfassungsgesetz, B-VG), according to which the best possible intellectual, spiritual and physical development of children and adolescents is to be ensured. The intensity of the burden on those concerned increases with the length and frequency of distance learning.

In dealing with the contested measure, the Court therefore had to take into account that the school year 2020/2021 started with presence learning. As of 3 November 2020, distance learning was introduced on an obligatory basis for higher-level secondary schools from grade 9 onwards, middle- and higher-level vocational schools and vocational colleges. Finally, distance learning was ordered for all schools for the period from 17 November to 6 December 2020.

Given the prevailing scientific uncertainty regarding the spread of COVID-19, the data on the epidemiological situation contained in the Regulation at the time of its adoption and, in particular, the possibility of providing pedagogical care on school premises up to grade 8 pursuant to section 39 of the COVID-19 School Regulation 2020/21 (COVID-19-Schulverordnung), the order to provide distance learning for the aforementioned period, i.e. the period for which the lawfulness of this measure was to be assessed by the Court, was not disproportionate in relation to the importance of the objective pursued.

Nor did the order to provide distance learning violate the right to education. Concrete obligations of the State regarding the organization and structuring of the school system cannot be derived from Article 2, first sentence, of Protocol No.1 to the ECHR; this guarantee of the right to education is not in conflict with the order to provide for distance learning for a certain period of time.

Judgment of 10 March 2021, V 573/2020

Vienna Contact Tracing Regulation

The Court found that those of provisions of the Regulation of the Municipal Office of the City of Vienna requiring the disclosure of information for the purpose of contact tracing in connection with suspected cases of COVID-19, Official Journal of the City of Vienna 41/2020, were unlawful.

In the case of a far-reaching power granted by way of a regulation, which permits severe interferences with fundamental rights, the procedure leading up to the adoption of the regulation is required to specify, in clear and comprehensible terms, the legally relevant circumstances which the regulation is based on and how the weighing of opposing interests required by law was performed. The official documentation of the procedure of adopting the regulation is not an end in itself, but serves the purpose of safeguarding the legality of administrative action.

The administrative file submitted by the authority having issued the regulation, which provides the basis for adoption of the Contact Tracing Regulation (Contact-Tracing-Verordnung), contains no reference to the criteria underlying the adoption of the contested regulation. The correspondence submitted only shows which amendments to the text of the draft regulation were made in consultation with the persons in charge within the Municipal Office of the City of Vienna for reasons of data privacy and, in particular, to improve the readability and comprehensibility of the provisions of the Regulation. Hence, it was not possible for the Constitutional Court to derive on the basis of which concrete circumstances the authority considered the provisions of the Contact Tracing Regulation to be necessary and adequate.

Judgment of 24 June 2021, V 593/2020

Prohibition of click & collect in retail trade

The Court dismissed an application to repeal section 5 of the COVID-19 Emergency Measures Regulation – COVID-19 Emergency Measures Regulation of the Federal Minister of Social Affairs, Health, Care and Consumer Protection (COVID-19-Notmaßnahmenverordnung) as amended by Federal Law Gazette II 528/2020 – regarding the prohibition to enter the customer area of retail trade establishments on foot or by any means of transport for the purpose of picking up goods.

The COVID-19 Emergency Measures Regulation served the objective of preventing the further spread of COVID-19 through a drastic reduction of social contacts, motivated by the high numbers of infections, the anticipated overload of intensive-care units in the autumn and winter of 2020, and the fact that the measures previously imposed had not been sufficient to contain the infection. The Regulation therefore provided for a comprehensive package of measures, including a far-reaching ban on entering retail trade establishments on foot or by any means of transport, with only few exceptions.

In principle, this prohibition for private customers to enter retail trade establishments on foot or by any means of transport applied to all sites of retail establishments, except for establishments or goods indispensable to meet the basic needs of everyday life. Given the objective of the Regulation, the absence of a (further) exemption for trade in stationery goods was neither non-objective nor did the Federal Minister in charge surpass the wide scope of decision-making due to him.

It is true that stationery goods were of particular importance for many people working from home or engaged in distance learning during the lockdown.

However, from an average perspective, the Federal Minister justifiably assumed that temporarily resorting to online trade in stationery goods was reasonably feasible and easier than in other areas exempted from the entry ban.

Nor was the interference with the right to engage in work and the fundamental right to private property disproportionate, as the ban only applied for a period of ten days and online trade was not prohibited at any point in time.

Judgment of 24 June 2021, V 87/2021

Obligatory testing upon exit from Tyrol

The Court dismissed an application to repeal the COVID-19 Virus Variant Regulation of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection (COVID-19 Virusvarianten-verordnung), as amended by Federal Law Gazette II 85/2021 and Federal Law Gazette II 98/2021, by which persons staying in the region (Land) of Tyrol (with the exception of certain districts) were not allowed to cross the borders of the territory of Tyrol during the period from 12 February to 10 March 2021, unless they carried a negative antigen or PCR test result.

The contested regulation neither violated the right to freedom of movement of persons (Article 4 paragraph 1 of the Basic State Law [Staatsgrundgesetz, StGG], Article 2 of Protocol No.4 to the ECHR) nor the provision of section 24 of the Epidemics Act of 1950 (Epidemiegesetz 1950), which is to be interpreted in light of these guarantees. The restriction of the freedom of movement served the purpose of health protection, i.e. the prevention of the further spread of COVID-19 or a certain variant of the virus. Furthermore, the obligation to present a test certificate represented a means well-suited to reach the goal of preventing the further spread of the virus by persons infected with COVID-19.

As plausibly documented in the underlying files, an increased incidence of the COVID-19 virus variant B.1.351 in the Land of Tyrol or parts of it was to be assumed at the time of adoption and during the period of validity of the contested Regulation. With a view to the goal of preventing the further spread of the virus, the duty to present a test certificate therefore proved to be proportionate. Moreover, it did not severely interfere with the right to free movement, as the freedom of movement of persons was not impaired within the territory of Tyrol. Furthermore, as long as the Regulation remained in effect, the Federal Minister continuously reviewed the necessity of such restriction on the basis of the development of infection numbers.

The fact that the obligation to present a test certificate also applied to persons with antibodies to COVID-19 did not constitute a violation of the principle of equality. Considering the criteria underlying the regulation and documented therein, it was to be assumed that such antibodies only provided limited protection against the COVID-19 variant B.1.351.

As regards the reasonableness of the intended tests and testing procedures, the contested obligation to present a test certificate, which also applied to members of the parliamentary bodies, did not constitute an infringement of the freedom to exercise a political mandate pursuant to Article 56 paragraph 1 of the Constitution (Bundes-Verfassungsgesetz, B-VG).

Judgment of 24 June 2021, V 2/2021

Restriction of the number of participants in funerals

The Court found that section 12 paragraph 1 subparagraph 7 of the 2nd COVID-19 Emergency Measures Regulation (COVID-19 Notmaßnahmenverordnung), according to which (for the period from 26 December 2020 to 24 January 2021 – "Third Lockdown") the number of participants in funerals was limited to 50 persons, was unlawful.

The contested restriction constituted an interference with the right to respect of private and family life (Article 8 ECHR) and, as far as funerals performed in

accordance with religious rites are concerned, the freedom of religion (Article 9 ECHR). The provision had a legal basis, pursued legitimate targets and was suited to serve the achievement of these goals. However, when viewed in its entirety, the specifics of the provision proved to be disproportionate:

Forbidding (even) closely related persons to participate in funerals constitutes a substantial interference with a fundamental right. For many people, bidding a last farewell to closely related persons is an essential act that can neither be repeated nor substituted. In view of this importance of funerals, the decision-making basis documented in the Regulation did not sufficiently demonstrate that the contested restriction met the requirements of proportionality, particularly in view of the fact that no such restrictions were provided for other gatherings equally protected by fundamental rights. The congregation of mourners traditionally held after funerals in indoor premises of catering establishments, which harbours an increased risk of infection, was prohibited at that time through other provisions of the 2nd COVID-19 Emergency Measures Regulation (2. COVID-19 Notmaßnahmenverordnung).

Judgment of 23 September 2021, V 5/2021

"Take-away" ban at ski huts

The Upper Austrian COVID-19 Measures Regulation, according to which take-away of food and beverages at catering establishments inaccessible by motor vehicles on a public road was forbidden, was found to be unlawful.

The objective of the contested Regulation was to prevent gatherings of people in the immediate surroundings of catering establishments in skiing regions and, thus, reduce the risk of infection with COVID-19 among skiers exercising their sport. The goal of health protection pursued by this measure is of substantial importance. In view of the epidemiological situation prevailing at the time of adoption of the Regulation, as documented in the recommendation issued by the Corona Commission on 22 December 2020, there are no grounds on which to object to the authority issuing the Regulation, provided the latter regarded a ban on take-away of food and beverages at catering establishments in skiing regions as necessary for the achievement of this goal.

However, there is no objective reason why the Regulation should exclusively refer to the criterion of (non)accessibility of the catering establishment by motor vehicles on a generally accessible public road. The mere fact that a "ski hut" is accessible via a public road is no reliable indication of whether there is enough space around the establishment for people to consume food and beverages while keeping at the required minimum distance from one another. The reference to accessibility via a generally accessible public road as a differentiating feature therefore violated the principle of objectivity derived from the principle of equality.

Judgment of 15 December 2021, G 233/2021

COVID-19 Financing Agency

The Court dismissed an application filed by a third of all Members of Parliament representing the Social Democratic Party (SPÖ), the Freedom Party (FPÖ) and the Neos Party to repeal the provisions governing the non-sovereign granting and review of COVID-19 financial aid by the COVID-19 Financing Agency (Finanzierungsagentur des Bundes GmbH [COFAG]).

The Act on the Establishment of a Corporation Managing the Wind-down of State-Owned Participations (Bundesgesetz über die Schaffung einer Abbaubeteiligungsgesellschaft des Bundes, ABBAG) provides a sufficient basis for the guidelines on the granting of state funds issued by way of a regulation by the Federal Minister of Finance in agreement with the Vice-Chancellor. Moreover, these guidelines are subject to the principle of equality, which means that financial aid granted to economic operators must be based on objective criteria.

Nor do the provisions of the COVID-19 State Aid Audit Act (COVID-19-Förderungsprüfungsgesetz) constitute an (unlawful) mix of sovereign and non-sovereign actions. The businesses concerned can raise claims to state aid by ordinary legal procedure. Disputes regarding the repayment of such aid are also to be settled by the ordinary courts. Complaints against enforcement action taken by the tax authorities in proceedings reviewing the aid granted can be filed with the competent administrative court.

The "Ibiza Committee of Inquiry"

Pursuant to a constitutional provision (Article 53 of the Constitution) adopted on 1 January 2015, a committee of inquiry has to be set up upon the request of one quarter of the members of the National Council. At the time of adoption of this new constitutional provision, the Constitutional Court was assigned the jurisdiction to decide on applications in the context of the establishment and the activities of such committees through Article 138b of the Constitution. This includes, in particular, the power to decide on applications requesting a decision on disputes regarding the obligation to submit information to the committee of inquiry (Article 138b paragraph 1 subparagraph 4 of the Constitution) and on complaints raised by a person alleging to have been violated in his/her rights, such as rights to honour, reputation and privacy, through the conduct of a member or body of a committee of inquiry or the committee itself (Article 138b paragraph 1 subparagraph 7 of the Constitution).

Judgment of 3 March 2021, UA 1/2021

Transmission of files and documents by the Federal Ministry of Finance

The Court considered that the Federal Minister of Finance has to transmit the mailboxes as well as electronic files of certain employees of the Federal Ministry of Finance saved locally or on the server from the period of time covered by the inquiry, except for purely private files and communication as well as emails and files already transmitted to the committee.

In a first step, it is up to the body obliged to transmit information to assess whether the files and documents requested for the committee of inquiry are within the scope of the committee's investigation pursuant to Article 53 paragraph 3 of the Constitution. The refusal to transmit the documents requested must be accompanied by a reasoned statement that such documents are not within the factual scope of Article 53 paragraph 3 of the Constitution, as they are not related to the subject matter of the inquiry. A mere reference to the fact that certain files and other documents are not within the scope of the inquiry does not justify the refusal to transmit such information. Alongside the obligation to make a statement to that effect, the body concerned also has to substantiate the reason why the individual files and documents – otherwise covered by the duty of transmission pursuant to Article 53 paragraph 3 of the Constitution – are of no (potential) abstract relevance.

Given that the Federal Minister of Finance did not fulfil this duty of justification to the "Ibiza Committee of Inquiry", he is obliged to transmit the files and documents in question.

The fact that the mailboxes of employees and their files saved locally or on the server have already been deleted does not change the fundamental obligation to transmit these files and documents.

Decision of 5 May 2021, UA 1/2021-39

Application for enforcement addressed to the Federal President

The Members of the Committee of Inquiry subsequently announced that the Federal Minister had not met the obligation derived from the Court's judgment of 3 March 2021. Pursuant to Article 146 paragraph 2 of the Constitution, the Court thereupon decided on 5 May 2021 to file an application requesting the Federal President to enforce its decision.

In doing so, the Court considered that decisions demanding that files and other documents be transmitted to a committee of inquiry constitute an order of performance which can be enforced within the meaning of Article 146 paragraph 2 of the Constitution.

In the course of the preliminary procedure, the Constitutional Court requested the missing documents. The Federal Minister transmitted two data carriers with a total of 15,090 emails, including 7,287 emails that had already been transmitted to the Committee of Inquiry, while another 7,803 emails were deemed to be "private" by the employees concerned were excluded.

The application for enforcement therefore covered the aforementioned 7,803 emails, as well as other files and documents in case the Federal Minister had not transmitted all the requested files and documents to the Constitutional Court.

The Federal Minister of Finance thereafter delivered several batches of additional documents to the Committee of Inquiry, the last one on 16 June 2021. By letter of 17 June 2021, the Members of the Committee of Inquiry informed the Federal President that the materials submitted were "still incomplete". By resolution of 24 June 2021, the Federal President therefore designated a judge of the Higher Criminal Court of Vienna, sitting as a single judge in accordance with the distribution of cases, to enforce the judgment of 3 March 2021. In particular, the judge was instructed to safeguard the data specified in the judgment of 3 March 2021, view them in order to establish if they were subject to the duty of transmission, and transmit the data covered by the duty of transmission to the Committee of Inquiry by 15 July 2021 at the latest. On 2 July 2021, the judge in charge of the matter informed the Federal President that the safeguarding of the data covered by the Federal President's order was largely completed.

Judgment of 10 May 2021, UA 3/2021

Transmission of files and documents by the "Think Austria" staff unit

The Court held that the Federal Chancellor is obliged to transmit the files and documents of the Think Austria staff unit, as well as other organizational units of the Federal Chancellor's Office, regarding the activities of the Think Austria staff unit during the period of time covered by the inquiry.

The purpose of proceedings pursuant to Article 138b paragraph 1 subparagraph 4 of the Constitution is to decide on disputes arising between the committee of inquiry or one quarter of its members and a body obliged to transmit information to the committee of inquiry. It is therefore indispensable that the body under an obligation of transmission has to produce not only those files and documents which, in that body's opinion, are of abstract relevance to the subject matter to be investigated, but also files and documents the latter has not qualified as being of abstract relevance. It is only through such (comprehensive) transmission of files and documents that the Constitutional Court is enabled to assess whether the refusal to comply with this obligation was justified and lawful.

This obligation to submit files and documents to the Constitutional Court is not in conflict with sections 79e et seq. of the 1979 Civil Servants Employment Act (Beamten-Dienstrechtsgesetz 1979). Provisions of employment law,

such as the provisions of the 1948 Contractual Public Employees Act (Vertragsbedienstetengesetz 1948), do not release the body subject to this obligation pursuant to Article 53 of the Constitution and Article 20 paragraph 3 of the Constitutional Court Act (Verfassungsgerichtshofgesetz) to submit the requested files and documents (completely) to the Constitutional Court to enable the latter to fulfil its duty of rendering a decision pursuant to Article 138b paragraph 1 subparagraph b of the Constitution.

If the body obliged to transmit information does not or not sufficiently justify the refusal to submit the files and documents to the committee of inquiry, the files and documents requested by a quarter of the members of the committee of inquiry are deemed to be within the scope of the investigation. Hence, the Court has to pronounce that all files and documents in question must be submitted to the committee of inquiry. Consequently, the body under an obligation of transmission is not allowed to justify its refusal by referring to the absence of abstract relevance of the information requested.

Decision of 10 May 2021, UA 4/2021

Transmission of files and documents of the Federal Chancellor's Office

The Federal Chancellor is obliged to transmit to the committee of inquiry the complete mailboxes, as well as the files saved locally or on the server, of the Federal Chancellor, the Federal Ministers at the Federal Chancellor's Office and certain employees of the Federal Chancellor's Office relating to the period of time covered by the investigation.

As a body subject to the duty of transmission, such as the Federal Chancellor, is obliged to transmit all files and documents requested by one quarter of the members of the Committee of Inquiry, unless he is able to sufficiently justify why certain files and documents are not of (potential) abstract relevance to the subject matter of the inquiry. While the Federal Chancellor complied with his duty to make such a statement, he failed in his duty to justify his refusal to the "Ibiza Committee of Inquiry". Thus, he is obliged to transmit all files and documents requested by one quarter of the members of the Committee of Inquiry.

Upon expiry of the (additional) deadline set for the body under a duty of transmission by the committee of inquiry or one quarter of its members pursuant to section 27 paragraph 4 of the Rules of Procedure for Parliamentary Committees of Inquiry (Verfahrensordnung für parlamentarische Untersuchungsausschüsse), the transmission of files and documents to the committee of inquiry can be denied only for the reasons stated in Article 53 paragraph 4 of the Constitution (if the lawful decision-making process of the Federal Government or any of its members or its direct preparation is adversely affected) if special circumstances prevail in a specific case (e.g. if facts concerning the lawful decision-making by the Federal Government or any of its members or its direct preparation may have been subject to new developments since the end of the deadline pursuant to section 27 paragraph 4 of the Rules of Procedure for Parliamentary Committees of Enquiry). However, the body subject to a duty of transmission has to raise and justify such circumstances to the committee of inquiry without delay.

Decision of 25 September 2021, UA 6/2021

Transmission of chat recordings

The complaint filed that the transmission of chat recordings on a seized mobile telephone to the "Ibiza Committee of Inquiry" had violated constitutionally guaranteed privacy rights (Article 138b paragraph 1 subparagraph 7 of the Constitution) was rejected on formal grounds.

Persons concerned by the transmission of files or documents to a committee of inquiry can only lodge a complaint against the body that allegedly transmitted files or documents unlawfully to the committee of inquiry. A complaint against the committee of inquiry itself is not possible in such case.

Nor can a complaint be lodged against the distribution of the files and documents

to the members of the committee of inquiry, as this is an internal parliamentary procedure under the responsibility of the President of the National Council. Neither the chairperson of the committee of inquiry nor the judge overseeing the proceedings are authorized to examine the documents transmitted for their abstract relevance to the subject matter of the investigation and exclude them from distribution to the members of the committee of inquiry.

The (alleged) transmission of chat recordings by Members of the Committee of Inquiry to third parties is not considered to be an action performed by these members "in the exercise of their profession". A complaint to the Constitutional Court is therefore to be ruled out on these grounds, too. As the alleged conduct is not subject to parliamentary immunity, the complainant has the possibility of taking legal recourse by other means.

Judgment of 6 October 2021, UA 2/2021

Fundamental rights (such as rights to honour, reputation and privacy) of respondents

The complaint lodged by a respondent against the conduct of a member of the "Ibiza Committee of Inquiry" was dismissed.

Although the complainant is not a "public figure" comparable to a politician, in her function as a member of the supervisory board of a semi-public company she has to tolerate being criticized more extensively than any other private individual. The contested statements refer to the qualification of the complainant for her function as a member of the Supervisory Board of Austro Control GmbH, by which the Member of the Committee of Inquiry at least implied that the complainant, given her prior knowledge, is not qualified for the activity as a member of the Supervisory Board of Austro Control GmbH. Against the background of the investigative function of a parliamentary committee of inquiry, which also covers the personnel policy of semi-public enterprises, the assessment by the Member of the Committee of Inquiry is considered to be within the framework of permitted criticism. The complainant had the possibility of countering the contested assumption, which was worded as a question. Furthermore, the complainant failed to reply to neutrally worded and simple questions regarding her training and her qualification for the position of a member of the supervisory board of a semi-public enterprise or gave evasive answers.

Freedom of Opinion and Other Fundamental Rights

In proceedings pursuant to Article 144 of the Constitution, the Constitutional Court, having received complaints based on an alleged violation of rights by rulings or decisions rendered by the administrative courts, examines whether a constitutionally guaranteed right of the complainant (e.g. the right to equality of all citizens before the law, the right to respect of private and family life, the right to engage in work or the right to freedom of opinion) has been violated. In accordance with the case law of the Court, a fundamental right subject only to restrictions provided for by law is violated if a decision was taken in the absence of a legal basis or on the basis of the application of an unconstitutional law, or seemingly on the basis of a law (the application of which would be absolutely unthinkable), or if the decision is based on an interpretation that would render the law unconstitutional. In judicial review proceedings, too, constitutionally guaranteed rights serve as a standard of review, provided corresponding concerns have been expressed.

Judgment of 4 March 2021, E 4037/2020

Right to access to information

The Court held that the right to freedom of expression was violated through the refusal to provide information on the continued payment of remuneration to former Members of the National Council.

Article 10 paragraph 1 of the ECHR does not establish a general duty of the State to provide information or guarantee access to information. However, a right to access to information may exist on a case-by-case basis. In the case before the Court, the criteria developed in the case law of the European Court of Human Rights were met. The information demanded within the framework a journalist's research work served the interest of transparency plausibly invoked by the complainant and a debate on the remuneration of Members of the National Council. It was therefore suited to contribute to an issue of public interest. Moreover, there were no indications that the information demanded was not ready or available. The refusal to meet the request for information therefore constituted an interference with the right to freedom of expression.

However, providing the information demanded would constitute an interference with the right to data privacy of the former Members of the National Council concerned. This fundamental right and the right to access to information, encompassed in the right to freedom of expression, therefore have to be weighed against one another. The Act on the Duty to Provide Information (Auskunftspflichtgesetz) opens up the possibility of weighing such interests, as required, and arriving at an appropriate balance of the fundamental rights positions involved.

Without any doubt, the activities of Members of the National Council, including their remuneration, are matters of considerable interest to the public. Former elected office-holders who have no earned income, are entitled to continued payment of remuneration. Thus, this entitlement depends on their private circumstances. However, continued payment of remuneration cannot be considered separately from a former elected office. Hence, there is substantial public interest in obtaining knowledge of such continued payments. Compared to that, the opposing interest of former Members of the National Council in the secrecy of information as to whether and for what period of time they received continued payments of remuneration takes second place.

The refusal to provide such information therefore constituted a disproportionate interference with the constitutionally guaranteed right to access to information enshrined in Article 10 of the ECHR.

Judgment of 26 February 2021, E 4697/2019

Exemption from the ban on face coverings

The Court held that the right to freedom of expression was violated through the imposition of a monetary fine under the Anti-Face-Covering Act (Anti-Gesichtsverhüllungsgesetz).

The incriminated behaviour of the complainant (wearing of a cow costume and a cow mask at an advertising event of the dairy industry) certainly is a form of communication reflecting the complainant's intention to criticize the conditions of milk production by various means, including the distribution of leaflets on this topic. Dressing up as a cow is a stylistic feature intended to attract people's attention and convince them of the complainant's opinion

Legal Basis: Art. 13 StGG; Resolution of the Provisional National Assembly of 30 October 1918; Art. 6 Austrian State Treaty; Art. 10 ECHR	**Fundamental rights of communication** These provisions guarantee several "freedoms":	
	individual freedom of expression	**Freedom to form opinions** The freedom to form one's own opinion **Freedom of expression** The freedom to express one's own opinions and to to pass on news and information **Freedom of information** The freedom to receive news and ideas
	Freedom of the media	**Specific press, broadcasting and film freedoms**

that milk production causes suffering to animals. The contested decision by the Higher Administrative Court of Lower Austria, which confirms the imposition of a fine pursuant to section 2 of the Anti-Face-Covering Act, interferes with the freedom of expression enshrined in Article 10 paragraph 2 of the ECHR. Article 10 paragraph 2 of the ECHR allows such interferences, but given that the exercise of this freedom involves duties and responsibilities, they must be provided for by law and necessary.

As can be derived from the case law of the European Court of Human Rights and the Constitutional Court, the use of special stylistic features must be permitted in the exercise of the right to freedom of expression. Against this background, and in accordance with a constitutionally based interpretation of paragraph 2 of section 2 of the Anti-Face-Coverings Act, an exemption from the general prohibition is allowed "within the framework of artistic, cultural or traditional events", which is understood to include the use of a special stylistic feature (in this particular case: an animal mask) as part of the "free expression of opinion". However, this does not affect the powers of the security services and the associated duties of cooperation and acceptance, especially with a view to the establishment of a person's identity pursuant to section 35 paragraph 3, second sentence, of the Security Police Act (Sicherheitspolizeigesetz).

Based on this interpretation of section 2 paragraph 2 of the Anti-Face-Coverings Act and the fact that the complainant used the cow mask and the cow costume in the context of an advertising event of the dairy industry for the purpose of drawing attention to the conditions of dairy production which, in his opinion, cause suffering to animals, the Constitutional Court holds that this conduct is covered by the exemption of section 2 paragraph 2 of the Anti-Face-Coverings Act. A fine which was nevertheless imposed on the complainant violates the complainant's constitutionally guaranteed right to freedom of expression.

Judgment of 6 December 2021, G 247/2021

Adoption by registered partners

The Court dismissed a party's application to repeal section 191 paragraph 2 of the General Code of Civil Law (Allgemeines Bürgerliches Gesetzbuch, ABGB); interpretation of this provision in conformity with the Constitution is possible and appropriate.

In accordance with the law in effect, single individuals as well as married couples and registered partners have the right to adopt a child. In the case of a single person adopting a child, it is possible that the adoptive parent lives in a registered partnership and the adopted child, in practice, is brought up by both partners. Moreover, a registered partner may elect to adopt the biological child of the other partner. These possibilities exist regardless of the sexual orientation of the adopting persons.

The legislator assumes that adoption in such constellations may be not only in the child's best interest, but even advisable for this reason. Pursuant to section 194 paragraph 1, first sentence, of the General Code of Civil Law, the court has to examine each individual case in order to verify if the adoption of a child is in the child's best interest and if a relationship equivalent to that between biological parents and their children exists or is to be developed.

For the Constitutional Court, there is no doubt that the legal prerequisites for adoption and, in particular, conditions conducive to the child's benefit can exist in a stable, long-term partnership. An interpretation of the contested provision that would generally exclude registered partners from the possibility of joint adoption would be in violation of Article 8 in conjunction with Article 14 of the ECHR and the principle of equality.

The contested provision therefore is to be interpreted to the effect that the possibility of joint adoption is not limited to married couples. Nor can a prohibition of joint adoption, simultaneously or consecutively, by two persons living in a registered partnership be derived from any other provision.

Legal Questions Regarding the Organization of the State

Several judgments focused on questions regarding the organization of the State, such as the question whether the fact of a public authority being bound by the decision of another, non-public institution is compatible with the principle of the rule of law. Other matters concerned the question whether the performance of sovereign tasks by an independent entity under public law is compatible with the controlling power of the supreme bodies, the compatibility of an "exclusion of liability" with Article 23 of the Constitution, or the order that alternative service by conscientious objectors be dealt with as a matter outside the framework of the Federal Army and its consequences for the powers of public authorities.

Judgment of 17 June 2021, G 47/2021

Competence of the Army Personnel Office in matters of alternative services

The Court repealed a phrase in section 34b paragraph 2 of the Alternative Service Act (Zivildienstgesetz), as amended by Federal Law Gazette I 16/2020, as unconstitutional.

By adopting the 1974 Alternative Service Act, the (constitutional) legislator not only introduced individual provisions on alternative service, as already contained in the 1955 Military Service Act (Militärdienstgesetz), but created two fundamentally separate systems. Since the introduction of alternative service in 1974, the exclusion of conscripts refusing armed military service from the organizational structure of the Federal Army has been comprehensively implemented. Given the system in place at the time of the constitutional legislator's decision, the provision stating that alternative service is to be organized outside the organizational framework of the Federal Army (section 1 paragraph 5 of the Alternative Service Act), enshrined in constitutional law since 1994, also means that administrative tasks relating to alternative service must not be performed by authorities, such as the Army Personnel Office, governed by the Federal Minister of Defence and serving functional purposes of the Federal Army.

Judgment of 14 December 2021, G 232/2021

Granting of work permits

The Court repealed section 4 paragraph 3 of the Foreign Nationals Employment Act as unconstitutional; the repeal will take effect as of 30 June 2023.

Pursuant to section 4 paragraph 3 of the Foreign Nationals Employment Act (Ausländerbeschäftigungsgesetz), the granting of work permits is subject to the unanimous endorsement by the regional advisory board, which comprises the head of the regional office of the Labour Market Service and representatives of the social partners. Through this provision, the exercise of the decision-making power of a public authority is made dependent on the decision taken by a body that is no public authority itself. However, it is contrary to the principle of the rule of law to thus prevent the competent authority from assuming responsibility for an independent assessment of the prerequisites for the requested permit and taking its own decision.

This applies all the more, as the co-decision power of the regional advisory board also extends to complaint proceedings before the Federal Administrative Court. The act does not contain any basis for the assumption that the Federal Administrative Court would have to grant a work permit under conditions other than those considered by the regional advisory board, which include (except in certain special cases) the unanimous endorsement by the regional advisory board.

Judgment of 16 December 2021,
G 390/2020

Accreditation of study courses and private institutions of higher learning by an independent institution under public law

The Court saw no reason to repeal the provisions of the Higher Education Quality Assurance Act (Hochschul-Qualitätssicherungsgesetz) regarding the mandate given to the Austrian Agency for Quality Assurance and Accreditation (AQ Austria) to perform the accreditation of private universities and study courses at institutions of higher learning.

Given the organizational concept of the Constitution, which is characterized by the controlling power of the supreme bodies (Article 20 paragraph 1 of the Constitution), any administrative act performed by bodies not bound by instructions is subject to authorization under constitutional law. Since the amendment to the Constitution by Federal Law Gazette I 2/2008, such authorization has also been enshrined in Article 20 paragraph 2 of the Constitution. Accordingly, bodies entrusted with the performance of certain tasks of sovereign administration can be released from the duty to follow instructions given by their superordinate bodies, provided a right of supervision by the supreme bodies, appropriate to the task in question, is foreseen.

The authorization provided for in Article 20 paragraph 2 of the Constitution also applies when tasks of sovereign administration are transferred to non-governmental (outsourced) legal entities. However, such transfer is only allowed within the limits generally set for the transfer of sovereign powers to non-governmental legal entities.

Entrusting AQ Austria with accreditation tasks in the field of higher education meets these requirements of constitutional law: The tasks transferred to AQ Austria are governed by Article 20 paragraph 2 subparagraph 1 of the Constitution ("knowledgeable review"), given that the members of the Board of AQ Austria must have an appropriate professional qualification. Moreover, the Federal Minister has a right of supervision in line with the nature of these tasks, which also includes the authority to recall members of the Board of AQ Austria. Furthermore, accreditation decisions are subject to approval by the Federal Minister.

Nor have any tasks been transferred to AQ Austria that are part of the core tasks of public administration and therefore excluded from outsourcing.

The provision of section 24 paragraph 6 of the Higher Education Quality Assurance Act, on the basis of which the Board of AQ Austria adopted detailed provisions on the prerequisites for accreditation and the methods and procedural principles to be applied by way of a regulation, authorizes the Board of AQ Austria to issue a regulation in a constitutionally admissible manner. This authorization to issue a regulation is sufficiently specific, does not concern a core task of public administration, and does not involve a decisive change in the weighting of the tasks of the Board of AQ Austria as compared to the tasks remaining within the remit the competent Federal Minister.

Judgment of 16 December 2021,
G 224/2021

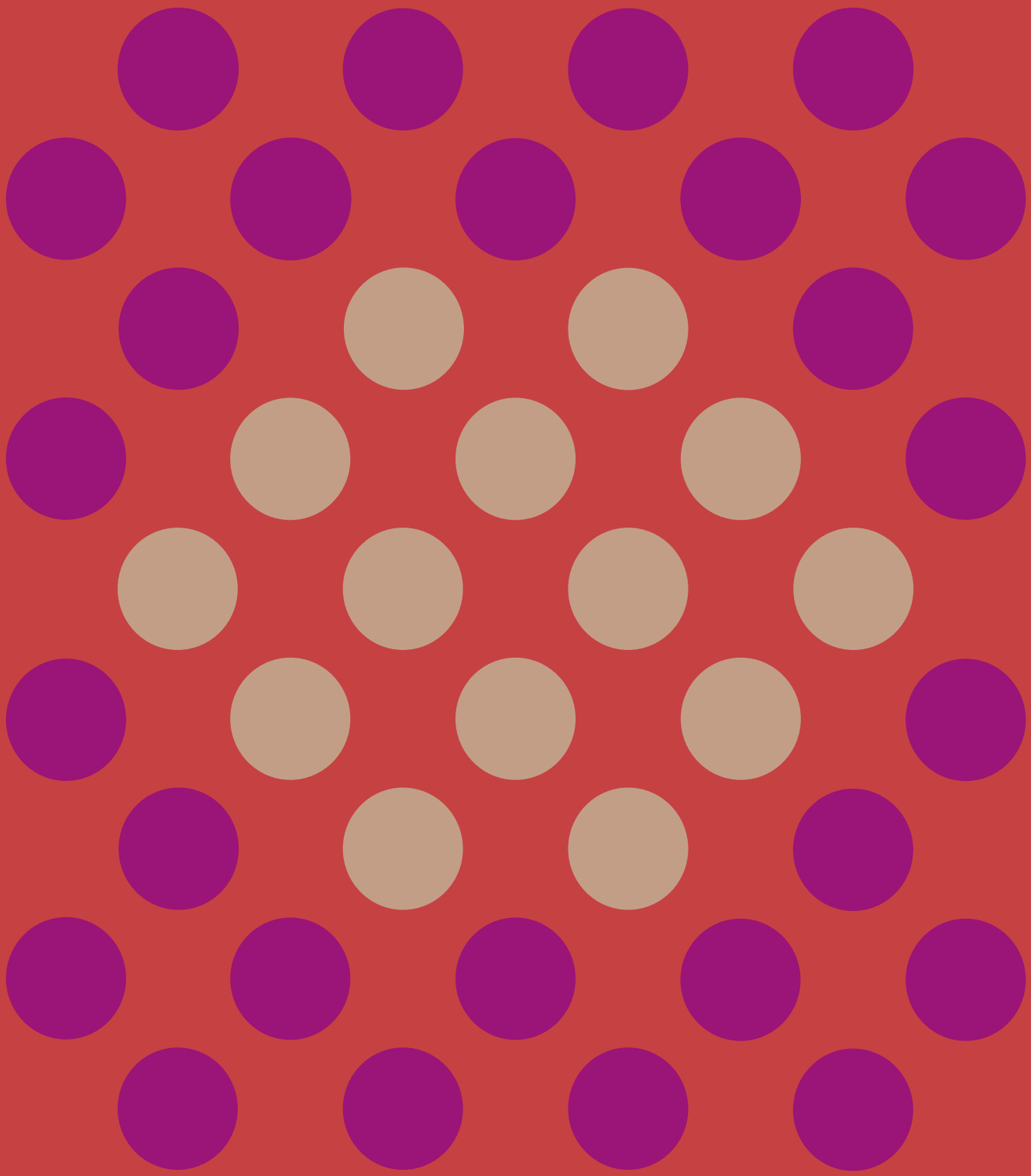
Liability of federal authorities for losses caused by the unlawful exercise of banking supervision

The Court dismissed applications by parties to repeal section 3 paragraph 1, second sentence, of the Financial Market Supervisory Authority Act (Finanzmarktaufsichtsbehördengesetz, FMABG) as unconstitutional.

The provision of section 3 paragraph 1, second sentence, of the Financial Market Supervisory Authority Act, according to which in a case of banking supervision wrongly exercised by the Financial Market Supervisory Authority (Finanzmarktaufsichtsbehörde, FMA) only legal entities subject to supervision have the right to hold federal authorities liable for their official actions, does not violate Article 23 of the Constitution. Admittedly, the law governing the supervision of the financial market also serves to protect creditors, but protection is to be provided for creditors (investors and depositors) in their entirety. Such protection is an element of functional protection, which is an important objective pursued by legislation on financial market supervision. A requirement under constitutional law to extend official liability to indirect pecuniary losses suffered by creditors of banks and other financial institutions cannot be derived from Article 23 of the Constitution.

Moreover, from the perspective of equal treatment, no objections are to be raised against the legislator's conclusion, especially against the background of the impacts of the 2008 financial crisis, that the economic consequences of a possible insolvency of a bank should not be passed on to the taxpayer by way of official liability.

IV



Events and International Relations

Constitution Day 2021 Speeches

Andreas Voßkuhle

Magic Dwells Not Only in Each Beginning

On the Model Character of the Austrian Constitutional Court as an Independent Constitutional Court

I. Introduction

The adoption of the Austrian Constitution at the last session of the Constituent National Assembly 101 years ago on 1 October 1920 not only marked a caesura in the history of Austria, but also stands for the beginning of a unique institutional success story, the international impact of which has no equal. By virtue of Articles 137 to 148, the Austrian Constitutional Court was established as a "specialized court for the settlement of constitutional disputes", independent in organizational terms and endowed with far-reaching powers, especially the power to review legal norms. Admittedly, the Czechoslovak Constitution, adopted a few months earlier on 29 February 1920, also provided for a specialized constitutional court, but it did not become operational until November 2019 and was, for all practical purposes, eliminated after a short while through the so-called enabling acts. The Austrian Constitutional Court was to become the model followed by all independent constitutional courts, especially those established after the Second World War, not least the German Federal Constitutional Court.

Against this background, it is a great honour and a personal pleasure for me to address you on the occasion of this very special Constitution Day. Let me take the opportunity to convey to you the best wishes of Professor Dr. Stephan Harbarth, President of the Federal Constitutional Court, and the former and active judges of the Federal Constitutional Court in a spirit of unique friendship with you and the Austrian Constitutional Court. At the same time, I should like to use the occasion of the great 100-year jubilee, which we are celebrating in retrospect today, to trace the influence of the Austrian Constitutional Court on the development of constitutional justice in Europe and the world. To this end, I have identified seven fields of attention that in my opinion illustrate the model character of the Austrian Constitutional Court in an exemplary manner.

II. What can we learn from the Austrian Constitutional Court? – Seven fields of attention

1. The theoretical foundation of independent constitutional justice

The first field of attention comes to mind immediately and is directly associated with the man who probably was the most important legal theorist of the 20th century: Hans Kelsen. Together with Karl Renner, Ignaz Seipl, Michael Mayr and Robert Danneberg, Hans Kelsen not only played an important role in the drafting of the Austrian Constitution and sat on the first bench of the Court. Together with the Vienna School of Legal Positivism, he also developed the theoretical foundation of modern constitutional justice that has remained valid to this very day. It is based on at least three fundamental principles, which many of us take for granted, but which were perceived as revolutionary at that time and that could easily be lost sight of again: First of all, any system of constitutional

justice presupposes "a clear distinction between constitutional law, on the one hand, and ordinary law below the level of the Constitution, on the other hand." The theory of the hierarchical structure of the law, established by Adolf J. Merkl and further developed by Hans Kelsen, provided an explanation for this distinction, which means that the democratically legitimized legislature cannot do as it pleases, but is subject to the Constitution. The second fundamental principle concerns the essence of democracy and the frequently raised objection that a handful of judges cannot declare a law adopted by the majority of members of parliament elected by the people to be unconstitutional. It was Hans Kelsen, however, who pointed out that the democratic process cannot be limited to the majority principle, but that an understanding of democracy based on the freedom of the individual necessarily includes the protection of the oppositional minorities and their rights. The third fundamental principle implies that such protection, if it is to effectively check the exercise of power, can best be guaranteed by a "body independent of any state authority". In his lecture delivered in Vienna before the Association of Professors of Public Law in 1928, Kelsen therefore arrived at the following conclusion: "If the essence of democracy is not seen in unbridled domination by the majority, but in a continuous search for compromise between the people represented in parliament by the majority and the minority, constitutional justice is particularly appropriate as a means of translating this idea into reality." Kelsen's assessment is currently proven correct by the disrespect of the constitutional courts in Poland, Hungary and other countries by governments referring to the "will of the people". In view of this alarming development, we cannot emphasize enough that "guaranteeing the protection of minorities in society, of parliamentary and extra-parliamentary opposition, and the freedoms of communication – freedom of opinion, freedom of the press, freedom of assembly and association – is one of the noblest tasks of constitutional courts. In this way, they open up and preserve spheres in which a critical and fruitful social discourse can take place and an atmosphere of free competition for the best political concepts prevails. It is undeniable that constitutional courts have to keep their own limits in mind and must not put themselves in the place of the legislature. However, the recurring difficulty of adequately resolving the tension between democratic majority decision-making and constitutional commitment cannot be used as an argument against the necessity of their existence."

2. Constitutional culture as a functional precondition of constitutional justice

The functionality of a constitutional court depends not only on its powers and its organization. Its cultural context is at least as important. In this respect, too, a great deal can be learned from the Austrian Constitutional Court. As in most other countries, the governing

parties select and propose most of the judges, but, in contrast to the US Supreme Court, there is no valid evidence of decisions being based on political (party) considerations. Certainly, individual decisions are being criticized and there are occasional cases of alleged political bias. However, looking back over the past three decades, we find that such critical moments were exceptions that did not change the citizens' fundamental trust in their constitutional court. This must be due not only to prudent recruiting decisions taken at the political level, but also to the way the judges deal with one another.
The conclusion drawn by Kurt Heller, after 30 years of membership in the constitutional court, in the Festschrift for Gerhart Holzinger is quite revealing: "Besides the professional interest, it was the style of the deliberations that was so enriching, the constant attempts to decide unanimously or by a large majority in order to arrive at a solution that took all arguments into account. I remember numerous occasions when members who had been outvoted on individual issues did not withdraw in a sulk, but continued to work on the reasoning of the majority decision and helped to improve its language through their critical comments. The style of the deliberations, which I found exemplary, was essentially influenced by the Presidents of the Court, and I had the pleasure of serving under four of them. When the Judges met in private, they rarely discussed legal issues. They preferred to engage in conversations on cultural topics, the quality of opera or other musical performances, modern art, and the like. I regard this as essential, because I think that 'mere jurists' are unsuited to exercise a function that demands a great deal of common sense and modesty."

3. Constitutional courts in evolution

"For everything to stay the same, everything must change." This famous quote from the novel "The Leopard", which Tancredi hurls at his uncle, the Prince Don Fabrizio, in a way also applies to constitutional courts. They have to evolve if they are to effectively fulfil their mission over the course of time. The Austrian Constitutional Court has addressed this challenge with remarkable success during the past one hundred years. Three more recent developments deserve to be emphasized in particular:

The most impressive development is the change in the court's interpretation practice, which up to the 1980s was marked throughout by the attitude, critical in terms of interpretation and values, of the Vienna School of Legal Positivism. Even today, there are areas dominated by a historical and systematic perspective, for instance in the interpretation of concepts of jurisdiction, which is still often based on the appropriately named "petrification doctrine" (Versteinerungstheorie). With the discovery of the fundamental rights, "formal modes of interpretation have been increasingly replaced by processes weighing the merits of the case." The "extensive understanding of the principle of equality" appears to be particularly innovative. This has been accompanied by a change in the comparatively very reserved reasoning of the court, which is frequently based on "fundamental-rights formulas". To a growing extent, input from foreign constitutional law has found its way into the reasoning, although the Court refused to take the contents of a foreign constitution into account in its jurisprudence as late as 1973.

A second major line of development is marked by the Court's opening up to influences from the European area of law, which I will come back to later. The third line of development concerns the Court's communication with the public. For a long time, the traditional wisdom applied: courts speak through their judgments, but not about them. This is a point of view that can hardly be conveyed to the enlightened public of the 21st century. Citizens want to understand why the courts decided as they did, they want to know how judges think and work, and they want to have an idea of the context of a decision. This is what their trust in the courts is based on, rather than on an assumption of institutional authority of any kind. At the same time, however, in the age of digital media, courts must make every effort to retain the authority to interpret their own decisions. Hence, the public relations work of the Constitutional Court has changed radically. Whereas in the past, press releases used to be sent out only on the occasion of important decisions, President Ludwig Adamovich was the first to hold a press conference before the beginning of a session, in 1997. He not only conceived the idea of celebrating the Constitution Day, it was also at his initiative that the Constitutional Court set up a website and began to publish annual activity reports. In 2003, President Karl Korinek entrusted the Court's media work to a former journalist, which meant a further professionalization of public relations activities. It is primarily thanks to President Korinek and to President Gerhart Holzinger that citizens were familiarized with the Austrian Constitutional Court and its position in the context of state theory through numerous interviews and extensive radio and television coverage. Certainly, it is not always easy to reconcile effective public relations work with the principle of judicial restraint, but that should not keep us from persisting in our efforts to do so. The Austrian Constitutional Court has acted as a pioneer in this respect.

4. Productive interactions between constitutional practice and constitutional doctrine

Another aspect in which the Court has played a model role is the very close feedback between its own judicial activity and the scholarly discourse, which has a direct impact on the quality and the development potential of judicial decision-making and can only be found in a few other countries. The decision-making practice of the Constitutional Court is not only a central subject of academic teaching: it is also intensively prepared and followed up by legal research. Moreover, the Court benefits from the "import" of judges from academia, given that during the past three decades about one third of all judges were university professors. This is reflected in the aforementioned changes in the Court's interpretation practice and its partial departure from formalistic constitutional thinking.

The Innsbruck School around Günther Winkler and Felix Ermacora, who were both students of Walter Antoniolli, long-time President of the Constitutional Court, and for many years used to hold seminars together with him, may well have been the most important source of inspiration. In any case, in his ground-breaking Innsbruck lecture on "Constitutional justice within the structure of state functions", President Karl Korinek explicitly referred to Günther Winkler, then Chairmen of the Association of Professors of Public Law, when he called upon the Constitutional Court to specify the substance of the provisions of the Constitution in more concrete terms. In this context, anyone who suspects there is a danger of the Court's adopting an overly scientific approach is thinking too much in stereotypes. The fact is that this mix of various professional biographies particularly qualifies the Court to arrive at well-balanced decisions that can have a lasting impact. Whether a person tends to come to the point quickly or prefers to engage in dogmatic subtleties is more likely to be factor of personality.

5. Self-confident reception of European law

I already mentioned the fifth field of attention: the self-confident reception of European law. Austria is the only country in which the European Convention on Human Rights (ECHR) ranks as constitutional law, based on a constitutional act adopted retroactively in 1964. Hence, all rights enshrined in the ECHR can be invoked before the Constitutional Court, just like any national fundamental right. It is therefore not surprising that the case law of the European Court of Human Rights (ECtHR) has had a significant influence on the development of the Constitutional Court's case law, given that the Court increasingly applies the fundamental rights of the ECHR rather than the country's "own" fundamental rights. Without any doubt, this circumstance has clearly strengthened the general acceptance of the ECHR and the case law of the ECtHR in the states party to the Convention. However, it would be wrong to accuse the Constitutional Court of having submitted completely and for no good reason to the ECtHR. On the contrary, there have been a number of recent noteworthy cases in which Vienna did not follow Strasbourg.

Efforts to adopt a constructively critical attitude towards European law also mark the Court's way of dealing with European Union law, which, in principle, is neither a subject of nor a standard for judicial review by the Constitutional Court. Since its landmark decision of 2012, the Constitutional Court has taken the position that the rights of the EU Charter of Fundamental Rights are equivalent to the constitutional rights enshrined in the Austrian Constitution and can be enforced before the Constitutional Court "if the respective guarantee provided by the Fundamental Rights Charter, as worded and determined therein, is equivalent to the constitutional rights guaranteed by the Austrian Constitution". Through this move, the Court has not only opened up to a new standard of review, but has also assumed the role of an independent and widely visible interpreter of Union law, albeit at the price of new requirements of coordination with the Court of Justice of the European Union, to which, in case of doubt, unresolved questions of interpretation must be referred to pursuant to Article 267 paragraph 3 of the Treaty on the Functioning of the European Union (TFEU). Whether and how this complex interaction between two catalogues of fundamental rights will prove its worth in practice is yet to be seen. At any rate, this has not kept the First Senate of the Federal Constitutional Court from taking a similar course in areas of the law fully determined by European law, as shown by its widely noted decision on the right to be forgotten II.

6. Hub of the network of European constitutional courts

Even beyond its original task of exercising its judicial function, the Austrian Constitutional Court has, for various reasons, always played a central role in the "European network of constitutional courts". There are various reasons for this. I have been trying to describe what may be the most important one: The Austrian Constitutional Court has been and still is exemplary in many respects as a specialized constitutional court endowed with the power to review laws. Another reason is its incomparable diplomatic competence, which is characteristic of almost all Austrian institutions, probably on account of their experience dating back to the time of the multi-ethnic empire, and which also holds for the Austrian Constitutional Court. It was among the six founding members of the Conference of European Constitutional Courts in 1972 and not only stood up for Europe at an early point in time, but also helped to overcome occasional points of disagreement between the constitutional courts of the EU Member States. Above all, it was among those which advocated the integration of the constitutional courts of the Eastern European countries and it proved to be an excellent host to major conferences, most recently the 16th Congress of the Conference of European Constitutional Courts in 2014, as well as numerous bilateral meetings. However, it would be wrong to speak of "the Constitutional Court". It was you, esteemed active and former colleagues, who achieved this diplomatic masterpiece and, I hope, will continue to do so for the benefit of all. In my opinion, a great help in this context was a bonding factor that tends to be underestimated in this era of globalization: the German language. German is not only the most widely spoken mother tongue in the European Union, it is also the second most important foreign language in Europe after English and is spoken by about 145 million people in the European Union. It was therefore right and important to promote the use of German as one of the working languages of the World Conference of Constitutional Courts.

7. The fragility of constitutional justice

My brief analysis of the model character of the Austrian Constitutional Court would be incomplete if I did not mention the dark moments in its history. They make us aware of the fact that constitutional courts are fragile institutions that may easily be deprived of their functionality if the political "zeitgeist" so permits.

In retrospect, the 1929 constitutional amendment adopted under the pretext of "depoliticization" appears particularly perfidious. This amendment was intended, at first glance, to limit political influences on the appointment of judges, inter alia through the introduction of the incompatibility provision of Article 147 paragraph 4 of the Constitution, pursuant to which not only members of the Federal Government or a state government, but also members of a general representative body as well as employees or other office-holders of political parties were barred from serving on the Constitutional Court. To this end, section 25 of the 1929 Constitutional Transition Act provided for the dismissal of all active judges as of 31 January 1930. Judges appointed for life were thus simply dismissed by virtue of a constitutional act. This brazen attack on judicial independence reveals the true motivations behind the amendment: the removal of undesirable judges. Even before that, the alleged Social-Democratic dominance within the court had been an issue raised by the Christian Socialists. Criticism was fuelled, above all, by the decision on what was called "marriage by dispensation", which was attributed to none other than Hans Kelsen, Judge of the Constitutional Court and Social Democrat, who subsequently refused to be reappointed and left Austria despite an offer by Karl Seitz, the Mayor of Vienna at the time. Other former members of the Court were not reappointed either. However, this process, which is quite outrageous from today's perspective, did not cause any major political upheaval at the time, because the parties had reached an agreement, alongside the reform, in which they redistributed the rights to nominate new constitutional judges. As Adolf J. Merkl rightly remarked, the true goal of the reform was not to "de-politicize" but to "re-politicize" the Constitutional Court. This strategy of "re-politicization" was to set an example followed in other countries in various forms, up to the present day.

The de facto elimination of the Constitutional Court in 1933 also occurred by way of a legal manoeuvre with hardly any attempt to hide what was happening. By issuing a regulation based on the War-time Enabling Act, the Federal Government amended the provisions on the quorum in section 6 of the Constitutional Court Act. As specified therein, the members and substitute members of the Constitutional Court appointed on the basis of proposals by the National Council or the Federal Council were only allowed to participate in its meetings and deliberations and to be invited to do so if and as long as all members and substitute members who had been appointed on the basis of such proposals served on the Constitutional Court (section 6 paragraph 3 of the Constitutional Court Act). Accordingly, the resignation of a single member nominated on the basis of a proposal by the two chambers of parliament was sufficient to deprive six members of their voting rights. This provision was completely impracticable and served a single purpose: to paralyze the Court. The project succeeded. Unfortunately, seven Judges immediately agreed to resign, in breach of their oath of office, after the Federal Chancellery had promised to reappoint them to the newly created Constitutional Court. The fact that only a few of them were actually reappointed is no real consolation.

The new beginning after the Second World War was not easy for the Constitutional Court for various reasons. Up to the 1990s, Austrian legislator, taking advantage of government constellations holding a two-thirds majority in parliament, tended to correct politically undesirable constitutional court decisions by simply reissuing the provisions repealed by the Constitutional Court as unconstitutional in the form of constitutional acts. This practice, which reflects a rather pragmatic political relationship to the country's own Constitution, has been favoured by the absence of a mandatory incorporation requirement: Constitutional amendments do not have to be incorporated into the original document of the Constitution; instead, each individual federal provision can be flagged as a "constitutional provision" (Article 44 paragraph1 of the Constitution). Fortunately, in a noteworthy decision, the Court later put an end to being overruled by the Austrian legislator, referring to the fundamental principle of the rule of law enshrined in the Austrian Constitution and limiting the practice of overruling to exceptional cases. A sense of vulnerability remains, however. Constitutional courts have no troops, and rightly so. They exclusively depend on their acceptance by the political actors and the trust of the citizens. Both must be earned anew every day.

III. Outlook

And this is exactly where my wishes for the future come in. Today we find the jubilarian on the occasion of its 101st birthday in perfect shape. Numerous courageous decisions rendered in recent years, such as those concerning the equal treatment of same-sex relations, the election of the Federal President, the Framework Law on Social Assistance, the use of state "Trojans", the "third gender" or assisted suicide, have further strengthened the respect for the Constitutional Court both in Austria and abroad. The Court's fast reaction to the COVID-related measures through numerous decisions can indeed be called exemplary. Moreover, former President Brigitte Bierlein was even appointed to the position of Federal Chancellor. And Christoph Grabenwarter, one of Austria's most internationally visible and renowned professors of public law, was elected to succeed her in the office of President of the Constitutional Court. This is all very good news. However, it cannot hide the fact that the idea of constitutional justice has come under pressure worldwide, and especially in Europe. Let me therefore conclude with an appeal: Esteemed Judges, remain vigilant; think of the great legacy that has been entrusted to you not only to administer but to further develop; remain committed to strengthening the rule of law in Europe and – this is a personal wish of mine – preserve the clear vision of Austrian positivism. A little bit of disenchantment is always good for us all!

Sabine Gruber
Law Making and Integrity

Ladies and gentlemen,

One morning you will wake up and your hair is white and thinning. No longer bright, your eyes are sunk deep in their sockets, hidden under drooping lids and lined by dark circles. Without your glasses the world looks hazy and blurred.

If you are lucky, you will be able to get out of bed, your first steps will feel as though your body was weighted down by something heavy. Your back is bent or even hunched. Involuntarily, you hold on to the dressing table and then take a deep breath and lumber on. If you own a house with underfloor heating you are probably in your bare feet, otherwise you are shuffling through your rented flat in your old slippers. With each additional year the bathroom will seem further away, breathing will be harder and your muscles will grow weaker.

If you are young, the above words will not resonate with you. If you are young, you probably have never – or only fleetingly – felt how painful the awareness can be that time is irreversible; nor have you felt what it means no longer to be able to return to that blissful state of self-oblivion, because all those minor or major ailments compete for your attention all the time.

Ease and distraction will also depend on your wealth, and if – or to what extent – you will be physically impaired at that moment will partly depend on your background, career and financial wherewithal.

But in any case, whether you like it or not, such a wake-up moment will be a reminder that most of the time available to you has already been consumed, and the only thing left of that sense of eternity you sometimes felt as a child in the boredom of a rainy afternoon is a faint memory or, perhaps, the illusion that some of it has been preserved in the books, in the art you collected or created, or in the property you hope to pass on to your children and grandchildren.

For some, eternity is at most a question of faith; they believe it resides in the hereafter, or they assume – in the face of opportunities missed, untaken or unarisen – that a better life awaits in the great beyond, one that beckons with a reward for the many pains and injustices suffered in the here and now.

The woman before you is not a lawyer. The history of literature knows many famous poets with legal training – Goethe, Kleist, Eichendorff, Heine, Grillparzer, Kafka, etc. – but a woman poet-lawyer?

The woman before you is not even an Austrian; she is an Italian national with German mother tongue, who lives in Vienna and publishes her work in Munich. Well, at least I pay my taxes in Austria. So, what gives me the right to speak on this occasion, to stand here right at the outset painting a picture of your distant or near future?

In all likelihood, you, distinguished ladies and gentlemen, will not spend your final years collecting empty bottles in the street. Nor will you be among those hit by poverty in old age, who by the middle

of the month do not know where the money for food will come from, who are forced to puree or overcook their food because they lack the money for dentures, let alone the necessary pocket money to get a haircut, a pedicure or buy cigarettes.

I am a poet, and I know better than to venture forth into the complex areas of the law, but there are still commonalities between you, the legal experts, and me, the writer: we both deal with reality and we both use the medium of language. But while the law is designed to provide binding rules with which to shape and control social processes, literary works are seismographs of social developments, mirrors of complex, contradictory worlds. Whereas lawyers need to arrive at decisions that resolve or prevent conflicts, whereas the law draws boundaries, as a writer I am allowed or even expected to be ambiguous in my writing. My characters are allowed to cross boundaries and challenge every conceivable human-made order. While state bodies can enforce behaviour in line with civic rules, my literary protagonists are free to disregard our value systems.

Despite the many disparities, the law and literature have one thing in common: they require attentive readers. Just as interpreting the letter of the law starts with the wording, the interpretation of literature should begin with language.

When I was young, plays and novels taught me not to accept reality as something inalterable, to discern the possible room for manoeuvre in both political and social actions. Plays such as Bertolt Brecht's The Caucasian Chalk Circle opened my eyes to the fact that the law does not necessarily equal justice, that the rich and mighty enjoy preferential treatment in a corrupt legal system, that laws must not favour blood relations when – as in Brecht's play – the welfare of a child is at stake. That kinship can be defined by more than just shared blood. Early on, I understood literary imagination as an act of resistance, as a special path to truth.

I come from a non-academic, lower-middle-class family. My father was a typesetter, my mother a housewife. But I was fortunate to be blessed with parents who could best be described as thoroughly decent human beings, whose lives were guided by a sense of justice, who lived a life of honesty, humility and tolerance, whose readiness to work hard and go without in order to ensure an education for their daughters, and whose care for their own family, but also for other people and, especially, the elderly, taught me the meaning of active solidarity.

Until the very end, my father never gave up on his conviction that hard work and integrity could foster the spread of democracy, even though the digital revolution cost him his job and forced him to change direction and although he, as a politically minded newspaper reader of advanced age, realized that an employment relationship such as his own, protected by social legislation, was threatening to become a thing of the past, that the increasing differentiation of social structures caused by market radicalism was leading to a growing number of people being excluded. Perhaps it was his background as a member of the German-speaking minority in the Italian province of South Tyrol/Alto Adige that prevented him from feeling as though he belonged to a national society set apart from foreign nationals and those without rights; or perhaps it was his ability, fostered by his job, to be an attentive reader and think empathically that enabled him to state, without a trace of bitterness or jealous hankering for status, that tax evasion and corruption were usually the only way to accumulate exorbitant pecuniary wealth, and that getting rich by exploiting others or wreaking havoc on nature could never be a valid goal.

A sense of justice starts in the family, the ability to understand and empathise with others is also a question of socialisation and education. It can be inculcated through education, can be acquired by emotional contagion, but it is always the power of our imagination, becoming acquainted with stories and, not least, with literature and art, that makes us emotionally understand and ponder the cruelties and intolerable situations in the world we live in.

Anyone who is not old or sick themselves will be hard put to comprehend the situation of those who are vulnerable. Especially at the beginning of the coronavirus pandemic, many people showed affective empathy for those particularly at risk – but the effect was temporary and usually short lived. For empathy to bring about change, we need to deliberately put ourselves in someone else's shoes. Emotions are just a first step, and one that does not entail any moral implications. In other words: an analytical understanding of others is a prerequisite for political thinking, but also for more equitable policies. In the long run, emotions alone are only good enough for the pomp and circumstance of politainment, if that.

During the lockdowns, discussions repeatedly focused on whether the corona measures taken by the government to ensure a functioning healthcare system and, especially, to protect those at higher risk of mortality, were proportionate and whether the absolute priority given to protecting lives was justified given the economic consequences of the quarantine rules. In the social media, but also in public political arguments and among lawyers, this debate incited numerous statements limiting the value of protecting human life.

Those statements made reference to the mental, physical, cultural and social side effects of the quarantine regulations and argued that one could not subordinate everything to the protection of human life. This might, so the arguments went, save people who owing to their age and pre-existing conditions would die very soon anyway.

During the great plague epidemics and the Thirty Years' War, the elderly were seen as nothing but surplus mouths to feed that had to be got rid of. Not even danse macabre scenes painted on cemetery walls were able to instil greater judiciousness in the young. Only the older members of the upper classes were able to preserve their

dignity by wielding power and holding on to their offices for as long as possible. In a similar vein, older farmers used to delay handing over the farm to the next generation because they were immediately demoted to a rank below their own farmhands once the transfer had been made.

The pandemic has reinforced the existing resentment towards the needy elderly and the vulnerable.

Weakness was not considered worthy of protection under historical fascism, and nor is it today, particularly among the new right and neo-fascists. They also keep telling the story of the virus being imported from abroad and have come up with their own, usually foreign, scapegoats to be blamed for the crisis.

One of the achievements of the Enlightenment was the principle that all human beings are equal before the law. Suddenly, this human right, which is enshrined in the constitution and also implies that the weak should be protected from the stronger, is undermined as a consequence of the pandemic. Whereas in pre-Covid times people seemed to admire those besneakered golden agers who are constantly on the go, because – unlike those who need constant care – they keep on consuming and producing and thus meet the exigencies of a neoliberal market society, the onset of the pandemic has seen a debate flaring up around the elderly – regardless of their state of health – that challenges the wisdom of shutting down the entire economy and restricting people's freedom of movement purely in order to protect a mere ten per cent of the population.

Meanwhile, the debate has been extended to the issue of mandatory vaccination. For ethical reasons, children, for whom no vaccine has been approved, and those elderly and sick individuals whose mortality will be demonstrably increased by an infection with COVID-19, are entitled to protection. There is a responsibility that goes beyond self-responsibility, mainly for people in occupations that involve close physical contact with other people, such as the staff of nurseries and schools or caregivers. The law-maker has the remit of preventing anti-vaxxers from putting the life of the most vulnerable at risk.

The chance to live cannot and must not be tied to any human qualities, neither to gender or age, nor to social status or economic profitability and usefulness. In a conversation in the weekly newspaper DIE ZEIT between Jürgen Habermas and law professor Klaus Günther, Habermas said there could be situations that are degrading, such as the circumstances of incurable disease, of abject destitution or a humiliating restriction of freedom, and under those circumstances a person might prefer to die rather than having to lead such an existence. But with the exception of tragically hopeless situations, such a decision can only be taken by the individual affected. No one else, and certainly not a state body bound by fundamental rights, was entitled to take such a decision on behalf of a citizen.

While some are ready to accept a higher mortality rate among the elderly and vulnerable, others blame the older generation for the fact that the young are being hardest hit by the pandemic, paying for the protection of those at risk with the loss of jobs and income. There was a public discussion in the daily DER STANDARD in which it was suggested that the elderly should pay some kind of solidarity compensation to the young. Given that, as of December 2019, about half of all old-age pensions in Austria were below 1,170 euros a month, one wonders whether pitting the generations against each other like this in a contest between young and old – apart from being unconstitutional anyway – could ever be a financially rewarding strategy.

The coronavirus pandemic makes misguided political developments more clearly visible. Everyone seems to have understood by now that the previous levels of economic activity and prosperity can no longer be taken for granted as "quasi normality". We are living through the transition from the industrial society to a post-industrial, globalized society in which financial capitalism has replaced industrial capitalism. The old organisational principles of industrial society are no longer working. Rapid technological developments, uncontrolled financial markets and the greedy pursuit of profit keep widening the gap between the rich and the poor. The high level of mobility that coincides with a loss of social integration, the economy's permanent susceptibility to crises and the question of how to finance one's sunset years trigger a sense of insecurity and dread in many people, even in highly developed, rich and democratically governed countries. They hope for help from the government, from the state, and feel left alone with their problems; their anger is directed against alleged clandestine masterminds, against the Bilderberg Group, the European Union, against foreigners and migrants, and most of all against those politicians who fail to protect "our own people" from everyone else.

Abandoning solidarity with the older generation, a phenomenon we are seeing more often in these times of pandemic, is another token of sheer anxiety about the future. And, even more terrifying, those elderly people who are not among the fit and sprightly foreshadow our own future, our own descent into decay.

Those political parties that exploit such understandable fears to promote their own policy of national isolationism and sovereignist egotism are also seeking to restrict basic democratic rights, disregard legally enshrined standards and international agreements and fuel the call for a strong leader. In doing so they are shaking the very foundations of democracy and, while formally retaining the constitution, attempting to erode its spirit by means of an authoritarian de facto constitution.

Democracies always have enemies, and it is not unusual for undemocratic forces to exploit constitutional loopholes.

The Polish example currently illustrates how quickly and systematically the rule of law can be dismantled. The ruling party not only combats an independent judiciary, they are also poised to ensure

that the EU treaties are declared unconstitutional, especially those that guarantee that – like the other Member States – Poland is obliged to obey the rulings of the European Court of Justice.

The wording of the Austrian Constitution is terse and clear, and its great potential lies in this concise language: by completely renouncing any ornate wording and value concepts it keeps challenging us to solve new social problems by engaging in debate, forging compromise and taking decisions on the basis of a democratic vote.

Constitutional courts, on the other hand, are not secure institutions. What is more, they can only defend themselves qua themselves, by the power of their arguments and reasoning. Which makes it all the more important for them to adhere strictly to the constitution and for their independence to be guaranteed; for the legal system to be transparent and guarantee protection for all; for the courts to prevent the exercise of unlimited power and preclude individual politicians from taking up positions in society that enable them to build and wield unlimited power.

Judith N. Shklar, a US professor of political science, developed a liberal theory on the basis of moral psychology focusing on the losers of history, their political impotence, their fear of cruelty and social deprivation. We must strive to take on the perspective of the weak and the losers in order to fend off the worst from their point of view.

I am ashamed to live in a country which does not even offer shelter to children from Moria or educated Afghan women who struggled to carve out self-determined life for themselves and who are now fearing for their lives ever since the Taliban seized power.

According to German statistics – and the situation is probably similar in Austria – at least 35 percent of the population will be over the age of 60 by the year 2050.

Up until today, the state healthcare system has provided more or less equitable access and ensured the provision of care to the ill and the weakest in our society.

The cost of the system is borne by the community of solidarity. What happens if the social healthcare system increasingly turns into an investor-driven health economy geared to high yields?

What will happen then to the destitute elderly, if even now banks refuse to issue a new credit card to people over 70 – even though they are creditworthy and offer securities, mind you –, if even now there is no legal remedy against age discrimination – in this case in banking and insurance? If even now we hear voices advocating a socially compatible, early demise of the old and sick?
The importance of acting in strict adherence to the constitution becomes particularly evident in times of acute crisis. In order to overcome such crises we need a comprehensive new social contract, a socially balanced and ecologically sustainable model of development. In order for this endeavour to be successful, the basic humanist values of our community, the rules governing democracy and freedoms, the rules for the state and policy-makers and the rights and duties of the citizens need to be guaranteed.

One morning you will wake up and find you are unable to run away from your body. The world will turn its back on you. You will no longer see the person you thought you were looking back at you from the mirror. You will no longer stand up, you will no longer speak, and yet you will still have a voice.

It is the voice of all those who are crowded out from the centre of our society to the margins, it is the voice of the powerless, the wounded, it is the voice of all the citizens who are no longer – or still not – allowed to participate in the political process, who are unable to make their voice heard.

The law also has the duty of compensating for lack of sympathy, of including those whose voice is falling silent or gone.

International Relations

The participants of the meeting of six in Vienna, 6 July 2021, on the steps of the Belvedere

With lockdowns and travel restrictions enforced both regionally and internationally on account of the persisting pandemic, planned international meetings had to be cancelled or postponed, but some of them were again held virtually.

The Congress organized by the Conference of European Constitutional Courts (CECC), which usually takes place every three years, was organized as a video conference with a year's delay. This meant, however, that certain sensitive issues (such as questions regarding membership or the rule of law in some countries) were removed from the agenda, as it was felt that they should be dealt with in a personal discussion.

A bilateral meeting with the German Federal Constitutional Court, originally scheduled for the autumn of 2020, was held online in early May of the reporting year. The majority of judges of both courts participated in this working session to discuss the protection of fundamental rights within the framework of the European multilevel system. The recent case law of the courts on the relationship between European Union law and national law was another topic discussed.

Given the special importance always attributed to this exchange among experts, a physical meeting was arranged after all, thanks to a renewed invitation extended by Professor Stephan Harbarth, President of the German Federal Constitutional Court. This one-day session at the seat of the Karlsruhe Court was also attended by the majority of judges from the two Courts. The topics discussed were the protection of fundamental rights in Europe and the legitimacy of complaints lodged in connection with environmental protection issues. Vice-President Madner and Judge Holoubek presented the Austrian perspective on these topics.

Thanks to more favourable travel conditions in the summer, the Court was then able to hold the meeting of the German-speaking Constitutional Courts and the European Courts of Justice that had originally been planned for March. The Court of Justice of the European Union and the European Court of Human Rights, the German Federal Constitutional Court, the Swiss Federal Supreme Court and the Liechtenstein State Court sent delegations to Vienna for this so-called meeting of six (which derives its name from the number of courts involved). A total of 33 judges gathered to discuss the coexistence of the different catalogues of fundamental rights in the case law of the Courts. Relevant decisions on measures to combat the pandemic in light of the rule of law and democracy were also discussed.

To continue discussions held in the past, President Grabenwarter met with Tamás Sulyok and Ivan Fiačan, the Presidents of the Constitutional Courts of Hungary and Slovakia, in Pannonhalma in Hungary. The conversation focused on the experience of the courts in the course of the pandemic, as well as cooperation between national constitutional courts and the European Courts.

At the international conference organized by the Court of Justice of the European Union in cooperation with the Constitutional Court of Latvia, Vice-President Madner and Judge Schnizer, who spoke about the level of fundamental rights protection within the European Union as a "Rechtsprechungsverbund", represented the Constitutional Court.

Within the framework of short visits, President Grabenwarter met President Harbarth (German Federal Constitutional Court) and President Rajko Knez (Constitutional Court of Slovenia) to discuss specific issues of European law.

In the autumn of the reporting year, President Grabenwarter also participated in two festive events: the ceremony on the occasion of the handover of the presidency at the German Federal Constitutional Court and, as a keynote speaker, the one hundredth anniversary of the Constitution of Liechtenstein in Vaduz.

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