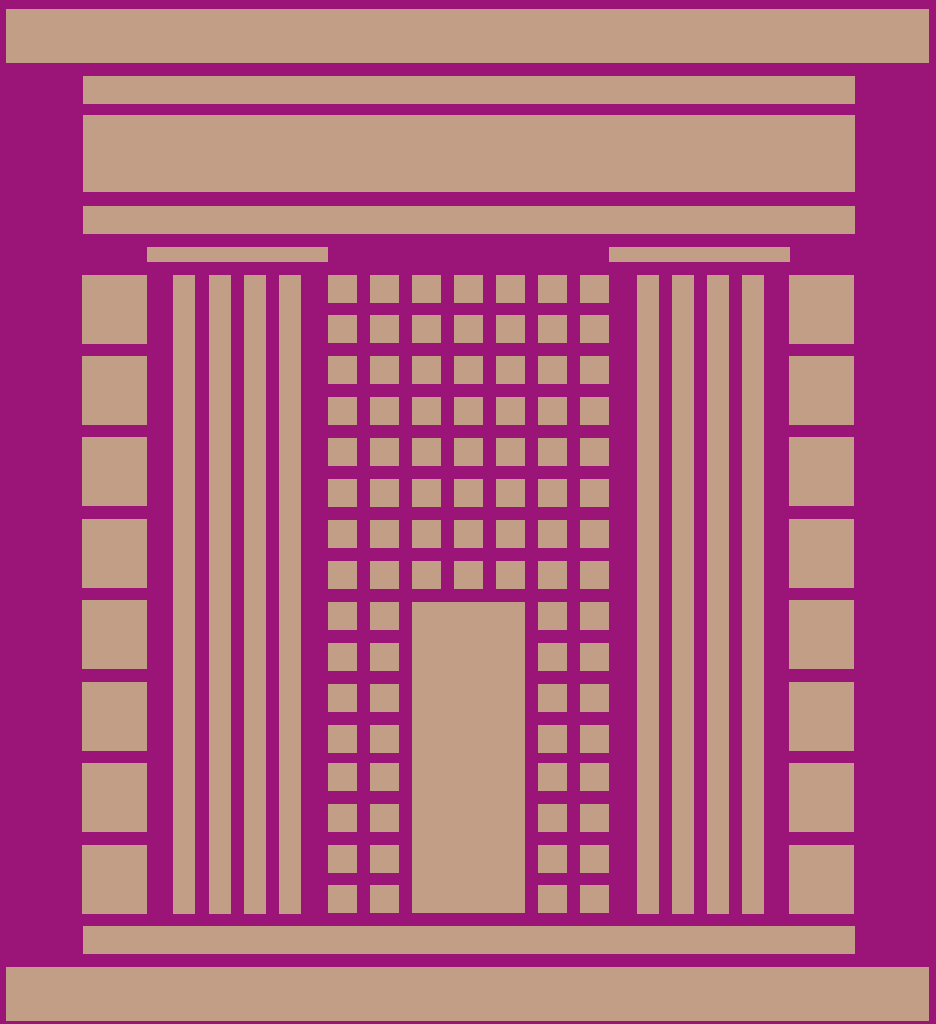
Constitutional Court of Austria

Activity Report 2022



vfgh
Verfassungsgerichtshof
Österreich

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Foreword

Like the years preceding it, 2022 was shaped by the COVID-19 pandemic. The pandemic not only affected the way the Constitutional Court worked. The review of measures taken to combat the pandemic was a key focus of the Court's judicial activities during the year. There were notable decisions concerning the constitutionality of the Mandatory COVID-19 Vaccination Act (COVID-19-Impfpflichtgesetz) and of the restrictions on the unvaccinated during lockdown. The Constitutional Court also issued rulings on restrictions in the arts and culture and hospitality sectors.

The number of complaints concerning the law relating to asylum and aliens received during the period under review was as high as ever. The Court's caseload relating to parliamentary committees of inquiry took on a new dimension: In no fewer than 96 cases, the Court ruled on disputes relating to the submission of files and disagreements regarding committee matters. The workload resulting from the sheer number of cases was compounded by the complexity of many largely new questions of constitutional law, and the statutory requirement for decisions to be rendered within four weeks added time pressure.

For the first time in its history, the Constitutional Court last year declared a provision of an international treaty to be unconstitutional. The Court held that a provision of the Headquarters Agreement entered into between the Republic of Austria and the Organization of the Petroleum Exporting Countries (OPEC) contravened Article 6 of the European Convention on Human Rights because the rules regarding the immunity accorded to this international organization prevented one of its former employees from accessing the labour court.

In the middle of the year, the Constitutional Court found that the ability to receive channels broadcast by the Austrian Broadcasting Corporation (ORF) without paying the licence fee (the "streaming loophole") contravened the principle of equal treatment; the repeal of the relevant provisions of the ORF Act (Bundesgesetz über den Österreichischen Rundfunk, ORF-G) sparked a lengthy discussion regarding financing of public broadcasting.

In connection with the monitoring of housing cooperatives by the Styrian audit office (Landesrechnungshof Steiermark), in December 2022 the Constitutional Court repealed a provision of the Constitution of the Land of Styria as incompatible with the Federal Constitution. Under that provision, the power of the Styrian audit office to monitor activities of the housing

Christoph Grabenwarter
President of the Constitutional Court

Verena Madner
Vice-President of the Constitutional Court

cooperatives was ultimately created not by the legislator but by contractual agreements between the Styrian Land government and private legal entities.

As the pandemic waned in the second half of 2022, the Constitutional Court was again able to open its doors to visitors and strengthen contacts with the general public. The Court's open day, which took place on Austria's National Day on 26 October, and Constitution Day on 1 October, when the Constitutional Court commemorates the adoption of the Austrian Constitution in 1920, both took place in the same form as before the pandemic. In addition to these events, the Constitutional Court welcomed numerous groups of visitors, in particular groups of young people and schoolchildren. For several months, visitors were also able to view the Court's exhibition on the great constitutional expert and former Constitutional Court judge Hans Kelsen. A project to light up the facade of the Constitutional Court building in celebration of fundamental and human rights provided another opportunity for the Court to engage with civil society.

The Court also revived efforts to strengthen its international relations. As well as participating in international conferences such as the meeting of the German-language constitutional courts in Lausanne (Switzerland), the Constitutional Court also welcomed international guests such as the President of Latvia, the President of the French Constitutional Council and the Chair of the Conference of European Constitutional Courts from the Republic of Moldova.

This Activity Report takes a look back over the key aspects of the Court's judicial work and other activities during the year.

I

meetings of plenary sessions (per half day)

70

138 days
average duration of proceedings

1 year

2022 in Numbers

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

- Complaints against rulings by administrative tribunals (Art. 144 B-VG)
- Applications for review of laws, regulations and state treaties (Art. 139, 140, 140a B-VG)
- Lawsuits against territorial authorities on grounds of certain property claims (Art. 137 B-VG)
- Challenges to elections (Art. 141 B-VG)
- Disputes regarding parliamentary committees of inquiry (Art. 138b B-VG)

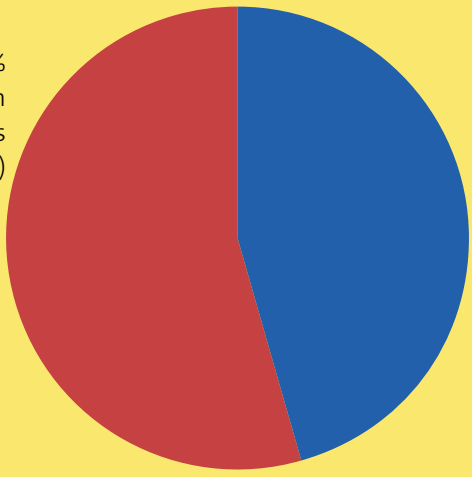
5
Conflicts of jurisdiction
according to
Art. 138 Abs. 1 B-VG

14
Challenges to elections
according to
Art. 141 B-VG

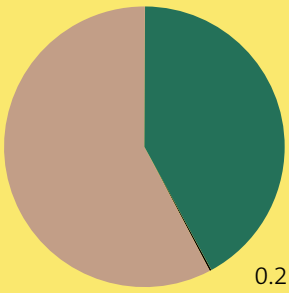
4.293
new cases

23
Lawsuits
according to
Art. 137 B-VG

96
Disputes regarding parliamentary committees of inquiry
according to
Art. 138b B-VG



3,536
Complaints
according to
Art. 144 B-VG



617
Applications for review of legal norms
according to Art. 139, 140, 140a B-VG

209	Applications by courts
52	Ex-officio proceedings
157	Individual applications
195	Applications by a party to a lawsuit
4	Others

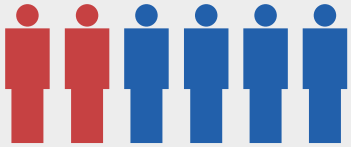
Personnel, Budget, Website

14
Members

28.57%
Women

71.43%
Men

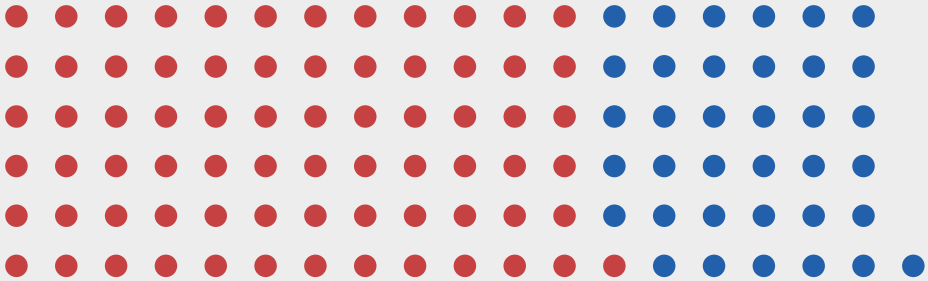
6
Substitute Members



33.3%
Women

66.7%
Men

109
Employees



66.97%
Women (73)

33.03%
Men (36)

Budget 2022

€ 17,329 million

Website 2022

1.4 million
total visits

6.5 million
page impressions

Citizens' Service 2022

85
written submissions per month

90
telephone enquiries per month


2. AVG

II

Personnel


ÖSTERREICH
IST EINE
DEMOKRATISCHE
REPUBLIK

The Constitutional Court Judges

The Constitutional 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.

Judicial independence is guaranteed to the Members of the Constitutional Court.

They are supported by staff of 109 employees.

Changes in the Court's Composition

In December 2021, the Federal President appointed, upon proposal of the Federal Government, Daniel Ennöckl as Substitute Member of the Court. He was sworn in by the President of the Constitutional Court in January 2022 and succeeded Michael Mayrhofer who had been appointed as Member of the Court in September 2021.

Daniel Ennöckl was born in Linz in 1973. Since 2021, he has been Professor of Public Law and head of the Institute of Law at the University of Natural Resources and Life Sciences Vienna. Since 2022, he has also been deputy head of the Department of Economics and Social Sciences at this University.

Judge Rapporteurs

Judge Rapporteurs 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 twelve Judge Rapporteurs, a number which was subsequently increased to thirteen, including the Vice-President. In 2022, Michael Mayrhofer was elected for the first time, Markus Achatz und Sieglinde Gahleitner were re-elected Judge Rapporteurs.

The Members and Substitute Members of the Constitutional Court

Members

1

Christoph Grabenwarter

Born in Bruck an der Mur in 1966, full professor at the Vienna University of Economics and Business, Member since 2005, Vice-President from 2018 to February 2020, President since February 2020. Appointed upon proposal of the Federal Government.

2

Verena Madner

Born in Linz in 1965, full professor at the Vienna University of Economics and Business, Vice-President since 2020. Appointed upon proposal of the Federal Government.

3

Claudia Kahr

Born in Graz in 1955, former Head of Department at the Federal Ministry for Science and Transport, Member since 1999. Appointed upon proposal of the Federal Government.

4

Johannes Schnizer

Born in Graz in 1959, former Senior Civil Servant of the Parliamentary Administration, Member since 2010. Appointed upon proposal of the Federal Government.

5

Helmut Hörtenhuber

Born in Linz in 1959, former Executive Director of the Regional Parliament, honorary professor, Member since 2008. Appointed upon proposal of the Federal Government.

6

Markus Achatz

Born in Graz in 1960, full professor at Johannes Kepler University Linz, certified public accountant, Member since 2013. Appointed upon proposal of the National Council.

7

Christoph Herbst

Born in Vienna in 1960, attorney-at-law, Member since 2011.
Appointed upon proposal of the Federal Council.

8

Georg Lienbacher

Born in Hallein in 1961, full professor at the Vienna University of Economics and Business, Member since 2011.
Appointed upon proposal of the Federal Government.

9

Michael Holoubek

Born in Vienna in 1962, full professor at the Vienna University of Economics and Business, Member since 2011.
Appointed upon proposal of the National Council.

10

Sieglinde Gahleitner

Born in St. Veit im Mühlkreis in 1965, attorney-at-law, honorary professor, Member since 2010.
Appointed upon proposal of the Federal Council.

11

Andreas Hauer

Born in Ybbs an der Donau in 1965, full professor at Johannes Kepler University in Linz, Member since 2018.
Appointed upon proposal of the National Council.

12

Ingrid Siess-Scherz

Born in Vienna in 1965, former Senior Civil Servant of the Parliamentary Administration, Member since 2012.
Appointed upon proposal of the Federal Government.

13

Michael Rami

Born in in Vienna in 1968, attorney-at-law, Member since 2018.
Appointed upon proposal of the Federal Council.

14

Michael Mayrhofer

Born in Linz in 1975, full professor at Johannes Kepler University Linz, Substitute Member April to September 2021, Member since September 2021.
Appointed upon proposal of the Federal Government.

Substitute Members

Robert Schick

Born in Vienna in 1959, Presiding Justice of the Supreme Administrative Court, honorary professor, Substitute Member since 1999.
Appointed upon proposal of the National Council.

Werner Suppan

Born in Klagenfurt in 1963, attorney-at-law, Substitute Member since 2017.
Appointed upon proposal of the Federal Council.

Nikolaus Bachler

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

Daniel Ennöckl

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

Angela Julcher

Born in Vienna in 1973, Justice of the Supreme Administrative Court, honorary professor, Substitute Member since 2015.
Appointed upon proposal of the National Council.

Barbara Leitl-Staudinger

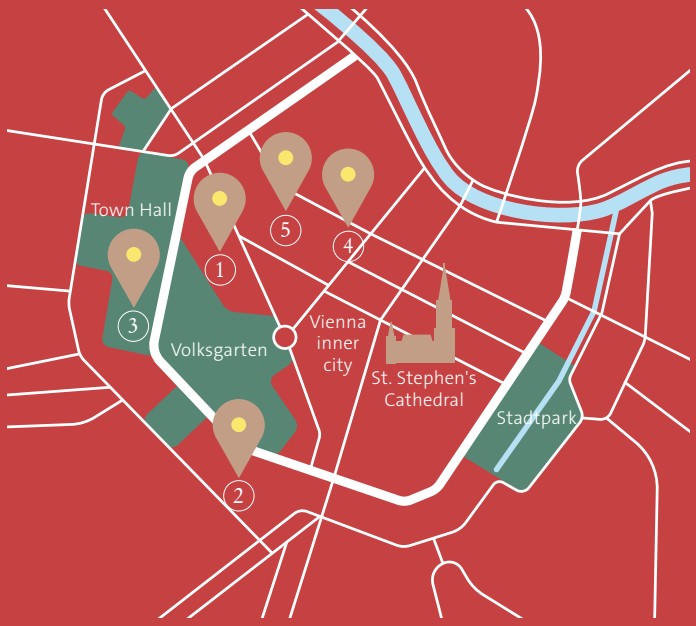
Born in Linz in 1974, full professor at Johannes Kepler University Linz, Substitute Member since 2011.
Appointed upon proposal of the Federal Government.

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

Things to Know: The Locations of the Constitutional Court – a Short History



Pursuant to Article 5 of the Constitution (Bundes-Verfassungsgesetz, B-VG), the bodies of Austria's highest authorities at federal level, including the Constitutional Court, are located in Vienna, Austria's capital. The Constitutional Court has been situated in Vienna's first district, at Freyung 8, for ten years. Where was the Constitutional Court previously located, including its precursor during the Habsburg Monarchy, the Imperial Court (Reichsgericht)?

1. Bankgasse 10
2. Hotel Britannia, Schillerplatz 4
3. Parliament, Rathausplatz 6
4. The Bohemian Court Chancellery, Judenplatz 11
5. Freyung 8

Established as the final act of the Cisleithanian Constitution of 1867, the Imperial Court began activities in the building at Bankgasse 10 in 1869. Originally, space was used that had previously been occupied by the Presidential Chancellery of the Council of Ministers. Public hearings of the Imperial Court were held in the building housing the Lower Austrian Government Offices at Herrengasse 11. Beginning in 1876, the Imperial Court was located at Schillerplatz 4, in the former Hotel Britannia. This edifice, originally built for the 1873 World Fair, was purchased by the state in 1874. Departments of the Ministry of Justice were housed here temporarily as was the Supreme Court, and later the Imperial Court was also located here permanently (on the first floor).

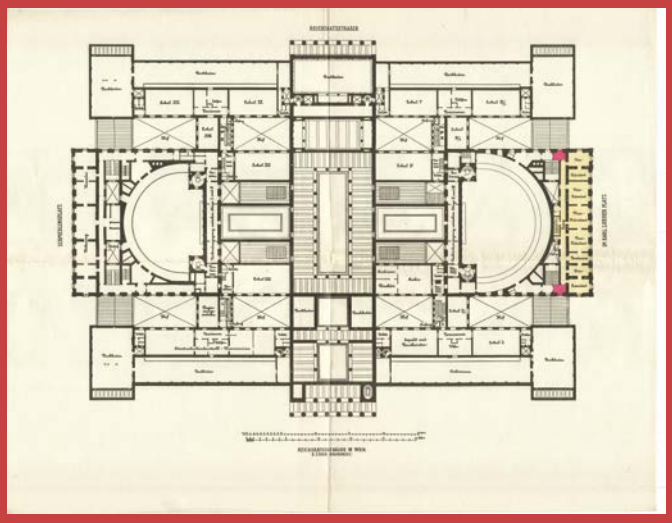
The Imperial Court's powers included decisions on jurisdictional disputes between courts and administrative authorities as well as between autonomous regional authorities of the Länder or regional authorities and the supreme government authorities (Kompetenzgerichtsbarkeit) and decisions on pecuniary claims against and between territorial authorities (Kausalgerichtsbarkeit). Additionally, the Imperial Court reviewed decisions by administrative bodies and courts (Sonderverwaltungsgerichtsbarkeit). As part of the latter, the Imperial Court ruled on alleged violations of political rights stipulated in the Constitution, providing important case law in the field of the protection of fundamental rights. When the Republic of German-Austria was established on 30 October 1918, the Imperial Court was adapted to reflect the republican legal system as a first step. The provisional National Assembly passed the Act Establishing the German-Austrian Constitutional Court (Gesetz über die Errichtung des deutschösterreichischen Verfassungsgerichtshofes) on 25 January 1919, transferring to it the responsibilities of the former Imperial Court. Almost one month later, on 24 February 1919, the new judges officially took over duties.

The Constitutional Court was continuously located at Schillerplatz 4 until May 1923, when it moved into the Parliament building. Because of the strict austerity measures specified in the Geneva Protocols, including a reduction of public

administration buildings and civil servants, the former location could no longer be retained, while adequate space was apparently available in the Parliament building. The Constitutional Court was located on premises on the first and second floors of the wing of Parliament now adjacent to the park in front of the City Hall (Rathauspark). The address was known as Karl-Lueger-Platz 6 until 1926 and then later as Rathausplatz 6.

(1) Hotel Britannia, Schillerplatz 4

(2) Parliament, Rathausplatz 6



(3) Plan of the Parliament building showing the space occupied by the Constitutional Court

The Wiener Zeitung newspaper described the relocation on 16 May 1923 as follows (p. 3):

Das neue Heim des Verfassungsgerichtshofes. Die Übersiedlung des Verfassungsgerichtshofes in das Parlamentsgebäude ist in den letzten Tagen vollzogen worden. Der Eingang ist ausschließlich am Dr. Karl Lueger-Platz 6. Die Räume des Verfassungsgerichtshofes bilden für sich ein abgeschlossenes Ganzes und ein Übertritt in andere Räume des Parlamentsgebäudes ist durch Absperrung, teilweise durch Vermauerung der Verbindungstüren unmöglich gemacht worden. Im zweiten Stocke befindet sich der frühere Empfangssalon für den ehemaligen Kaiser und die zirka 20.000 Bände zählende Bibliothek des Verfassungsgerichtshofes. Über eine Wendeltreppe gelangt man vom zweiten Stock in die Räume des Präsidiums und zweier ständiger Referenten. Der Präsident, der Vizepräsident und die vier ständigen Referenten haben eigene Amtsräume. Die Einrichtungsgegenstände sämtlicher Kanzleien und Amtsräume wurden dem Verfassungsgerichtshof aus den Beständen einer der früheren Zentralen zur Verfügung gestellt. Die nächste Verhandlungssession im Verfassungsgerichtshof findet im Juni statt.

"The new home of the Constitutional Court. Relocation of the Constitutional Court to the Parliament building has been completed in the past few days. The Court's only entrance is located at Dr. Karl Lueger-Platz 6. The premises occupied by the Constitutional Court have been designed as a separate unit and it is no longer possible to access other rooms of the Parliament building, as connecting doors have been either permanently barricaded or walled in. The room previously used as a reception salon by the former Emperor and the Constitutional Court library, containing some 20,000 volumes, are located on the second floor. A spiral staircase leads from the second floor to rooms occupied by the presidium and two judge-rapporteurs. The president, the vice-president and the four judge-rapporteurs have separate offices. All of the chambers and offices have been furnished with items made available to the Constitutional Court from the inventories of previous central public institutions. The next hearing session of the Constitutional Court will be held in June."

The 1934 Constitution did not provide for a separate Constitutional Court. The Administrative Court and the Constitutional Court were merged under a newly established High Federal Court (Bundesgerichtshof). A dedicated Constitutional Senate of the High Federal Court was then tasked with rudimentary responsibilities falling under constitutional jurisdiction. The Constitutional Senate continued to have its offices in the Parliament building.

When the Republic of Austria was restored in 1945, the Constitutional Court was reinstated, initially on a provisional basis between late 1945 and early 1946, and then permanently by mid-1946. The Constitutional Court was 'temporarily' located in the former Bohemian-Austrian Court Chancellery at Judenplatz 11 (postal address: Wipplingerstraße 7).

The stately baroque palace, designed by well-known architect Johann Bernhard Fischer von Erlach, was mainly used by the Administrative Court, which had also been recently reinstated. The High Federal Court, without the Constitutional Senate, had already moved into the palace in October 1936. Thus, after being embedded in a common organization during the High Federal Court period (1934–1938), the two courts now shared a common building. The post-WWII era presented new challenges. Without any means of appropriate heating, the rooms could not be used in winter. Initially, the Constitutional Court desired as a "permanent solution [...] renewed residence [...] in the Rathauspark wing of the Parliament building." The "rooms in that wing of Parliament" were "most suitable, as if designed especially for the Constitutional Court." This request, though frequently repeated in activity reports until 1948, remained unheard. Consistently growing space needs were initially met through (shared) use of an additional building in Jordangasse, and in the end through renting flats on the street known as Tiefer Graben. The temporary location at Judenplatz was to last 67 years.

Only after a tedious search was a new location identified in Vienna's historic centre. In August 2012, the Constitutional Court found a new home at Freyung 8.

The building was erected between 1916 and 1921, based on a neoclassical design by popular architects Ernst Gotthilf and Alexander Neumann. The original purpose was to house a major bank, the "Österreichische Creditanstalt für Handel und Gewerbe" (in short: Creditanstalt) and today the ground floor houses an art gallery: the "Bank Austria Kunstforum Wien". The two architects were also responsible for other well-known bank buildings that still dominate Vienna's city centre, including Wiener Bankverein (Schottengasse 6–8), known today as "Haus am Schottentor/Interspar" and N.Ö. Eskompte-Gesellschaft (Am Hof 4), now Hotel Park Hyatt.

Passing the main entrance of the building now housing the Constitutional Court, visitors are greeted by a grand staircase leading up to the first floor, with chambers of historic value that are listed as architectural heritage. Here the President and the Vice-President of the Constitutional Court as well as other officials have their offices. The main courtroom where the Court holds public hearings is also located on this floor. The upper floors house the offices of judges, constitutional court clerks and administrative staff. The library as well as an event centre, used for gatherings including conferences, are located on the fifth floor.

Since the autumn of 2020, the Constitutional Court building has displayed – in addition to the flags of the European Union and the Republic of Austria – the flag of the Austrian federal state (Land) currently chairing the Federal Council (Bundesrat). This is intended to symbolically express, at the seat of the Constitutional Court, its special status as a joint body of the Federation and the Länder ("the link joining the dual structures of the Federation and the Länder into a higher unit"; AB 991 BlgKNV).

4 The Bohemian Court Chancellery at Judenplatz 11

5 Freyung 8 with Constitutional Court

A Summary of the Most Important Judgments and Decisions of 2022

COVID-19

During the year under review, the Constitutional Court dealt with a large number of decisions concerning the constitutionality of measures introduced to counteract the spread of the SARS-CoV-2 virus and the consequences of the pandemic.

In addition to the 110 applications from 2020 or 2021 pending at the beginning of 2022, a further 391 applications were submitted during the course of the year. This made 501 applications in total in 2022, for which the Court issued 448 decisions. Four applications were successful, meaning that the provision challenged in those cases (all relating to regulations enacted under the COVID-19 Measures Act [COVID-19-Maßnahmengesetz, COVID-19-MG]) was found to be at least partially unlawful or the administrative court decision challenged was repealed.

3 March 2022, V 231/2021

Mandatory PCR testing in night-time hospitality

Application to repeal as unlawful provisions of the Second COVID-19 Opening Regulation (2. COVID-19-Öffnungsverordnung), Federal Law Gazette II 278/2021, as amended by Federal Law Gazette II 321/2021.

Dismissed

From 22 July to 15 September 2021, customers wishing to enter catering establishments were generally required to provide proof that they presented a low epidemiological risk. Entry to hospitality establishments "in which increased mixing and interaction among customers can be expected to occur", i. e. discotheques, clubs and dancing establishments, however, was limited to individuals who were vaccinated or had undergone a PCR test. Those who had recovered from COVID-19 but were unable to show a negative PCR test result were therefore prohibited from visiting such places.

This departure from the principle of equal treatment of vaccinated or recovered individuals and those who have (only) been tested is admissible if it is essential on epidemiological grounds. The information used for decision-making (as documented in the administrative files) and the epidemiological situation when the Regulation was enacted – particularly the spread of the significantly more infectious Delta variant – show that: the Federal Minister did not exceed his discretion by differentiating between vaccinated and recovered individuals.

The Federal Minister plausibly showed that epidemiological conditions in night-time hospitality establishments are particularly unfavourable due to increased mixing among a mainly young clientèle with a low vaccination rate, on the one hand, and the higher levels of aerosols produced by speaking loudly, singing and dancing in such settings, on the other hand.

In light of the epidemiological situation documented in the administrative files and the uncertainty prevailing in the studies at the time regarding the likelihood of transmission of the virus by recovered patients, the Federal Minister considered that a PCR test was necessary. This did not constitute unjustified discrimination (of recovered individuals) compared with vaccinated individuals. In connection with this, the distinction made between PCR and antigen tests was also lawful because it reflected the differing levels of accuracy of these tests.

17 March 2022, V 294/2021

Lockdown for the unvaccinated I

Application to repeal as unlawful provisions of the Fifth COVID-19 Protective Measures Regulation (5. COVID-19 Schutzmaßnahmenverordnung, 5. COVID-19-SchuMaV), Federal Law Gazette II 465/2021, as amended by Federal Law Gazette II 467/2021.

Dismissed

The provisions challenged imposed a 24-hour lockdown during the period from 15 to 22 November 2021. Individuals were permitted to leave their homes on certain grounds only. Those compliant with the "2G-rule", i. e. those with proof of vaccination (in German "geimpft") or recovery (in German "genesen") and children under the age of 12 were exempted from restrictions. Those without proof of vaccination or recovery were additionally prohibited from entering shops, catering establishments and hotels, as well as leisure and cultural facilities.

The COVID-19 Measures Act (COVID-19-MG) requires decisions to be taken quickly, typically in a context of uncertainty: Epidemiological conditions change rapidly and knowledge relating to new infectious diseases or disease variants is often incomplete. The Act requires the authority to take one step at a time when imposing and implementing measures, monitor for effects which are not fully foreseeable, and, where applicable, introduce corrections via new measures. Additionally, the authority is required to assess changes ex ante. New information coming to light subsequently which indicates that a measure should have been enacted differently does not render the authority's original decision unlawful. The concerns challenging the constitutionality of the provisions were therefore unfounded.

The lockdown restrictions applicable to those without proof of vaccination or recovery were intended to prevent the further spread of COVID-19 and the collapse of the healthcare system. The restrictions thus pursued an objective of public interest. It was reasonable for the Federal Minister responsible to assume that limitation of contacts and mobility constituted effective means of achieving that objective.

In fact, the lockdown restrictions challenged applied only to part of the population, specifically individuals without proof of vaccination or recovery. In light of the high number of new daily infections with the Delta variant, the Federal Minister considered the lockdown to be appropriate and necessary for the purpose of effectively preventing the further spread of COVID-19 and overloading of the healthcare system. In forming this view, the Minister relied on the scientific knowledge available when the Regulation was enacted (as documented in the administrative files).

It was reasonable for the Federal Minister to assume that unvaccinated persons were at significantly higher risk of becoming infected with SARS-CoV-2, passing on the virus, and suffering serious illness imposing a burden on the healthcare system. His decision that testing alone was insufficient to avert the forecast critical overloading of the healthcare system was likewise unobjectionable. Individuals who are tested but are not vaccinated or recovered are not immune to COVID-19.

As regards the right to private and family life, numerous exemptions from lockdown restrictions were put in place to enable people to exercise family rights, fulfil family obligations and maintain specified family and private relationships. In light of the circumstances prevailing at the time when the Regulation was enacted, therefore, there was no indication that the lockdown restrictions were unreasonable.

The Court also found that there were no concerns regarding the restrictions on entry to certain premises for individuals without proof of vaccination or recovery which accompanied the lockdown restrictions. The objective pursued by those restrictions, i.e. preventing the spread of COVID-19 and thereby protecting human health and maintaining the functioning of the healthcare infrastructure, constitutes a public interest. It was also documented in the administrative files that the mandatory use of face masks in shops, which had been introduced on 8 November 2021, had not been enough to bring the rapid growth in new infections under control.

The distinction made between vaccinated and recovered individuals on the one hand, and individuals without proof of vaccination or recovery (i.e. individuals who had only been tested) on the other, did not violate the principle of equal treatment. The COVID-19 Measures Act provides that any such unequal treatment must be founded on scientifically justifiable assumptions indicating that there are significant differences regarding the spread of COVID-19. This was clearly the case for the Fifth COVID-19 Protective Measures Regulation. In light of the available scientific knowledge and the epidemiological situation, the Federal Minister was correct to consider that there were significant differences in terms of the risk of spreading COVID-19 between immunized individuals and individuals who had (only) been tested.

29 April 2022, V 23/2022

Lockdown for the unvaccinated II

Application to repeal as unlawful provisions of the Sixth COVID-19 Protective Measures Regulation (6. COVID-19-Schutzmaßnahmenverordnung, 6. COVID-19-SchuMaV), Federal Law Gazette II 537/2021, as amended by Federal Law Gazette II 24/2022.

Dismissed

The provisions challenged extended restrictions on individuals without proof of vaccination or recovery from the virus for the period from 21 to 30 January 2022.

The COVID-19 Measures Act (COVID-19-MG) provides that lockdown restrictions can only be imposed subject to a strict review of compliance with the principle of proportionality. In reaching its decision, the authority must carry out a balancing of interests indicating the grounds on which the measures concerned are regarded to be indispensable. These criteria were satisfied at the time when the 7th Amendment to the Sixth COVID-19 Protective Measures Regulation, Federal Law Gazette II 24/2022, was adopted.

Forecast bed occupancy on normal and intensive care wards is an important indicator for the authority when assessing the epidemiological situation and determining whether the statutory requirements for imposing specific measures are satisfied. However, the number of hospitalized COVID-19 patients is not the only indicator of imminent overloading of the healthcare system. The authority must also include other relevant factors in its assessment, particularly personnel resources and medical infrastructure other than beds.

By the relevant period (21 to 30 January 2022), the situation on the intensive care units had improved. By 20 January 2022, following the "Delta wave" in November 2021 and entry into force of the Sixth COVID-19 Protective Measures Regulation on 10 December 2021, the number of COVID-19 patients in intensive care units nationwide had fallen steadily. There was no risk in any of Austria's Länder that the percentage of ICU beds occupied by COVID-19 patients would exceed 33 %, which had been defined as the threshold for critical systemic risk.

At the same time, however, the responsible Federal Minister was facing the highest nationwide seven-day incidence rate since the start of the pandemic. A sharp rise in infections with the new Omicron variant, which had been identified as a variant of concern and had quickly displaced the previously dominant Delta variant, had been recorded all over Austria. A conclusive assessment of the characteristics of the Omicron variant and its effects on the healthcare system was not yet possible in light of the data available at the time the Regulation was enacted.

However, the evidence and data on which the Federal Minister's decision was based already suggested that due to the modified characteristics of this virus variant, a very high number of simultaneous infections, illnesses and people in isolation could be expected. Thus, although the course of the disease in those infected with the new variant was expected to be milder, a rise in hospitalizations was likely. Further staff shortages in the healthcare sector were also anticipated. The care and treatment of COVID-19 patients is particularly personnel-intensive, and a higher staff-to-patients ratio is required on COVID-19 wards.

The Federal Minister plausibly assumed that, with regard to the Omicron variant, unvaccinated and inadequately immunized individuals presented an elevated risk of spread (new infections) and systemic risk (hospitalization). When the 7th Amendment to the Regulation was enacted on 20 January 2022, the Federal Minister regarded an extension of the lockdown restrictions by a further ten days to be indispensable to prevent an imminent collapse of the healthcare system or similar emergency.

The 24-hour lockdown restrictions constituted a serious interference with the fundamental rights of affected individuals, in particular the right to private and family life and the right of free movement. This was all the more true for those without proof of vaccination or recovery, as this measure had already been in place for them for a number of weeks. The lockdown restrictions were nevertheless found to be proportionate overall: In implementing this measure, the responsible Federal Minister was pursuing a public health objective of significant importance. In addition, there were numerous exceptions to the lockdown restrictions specifically taking into account the fundamental rights of the affected individuals.

The Court also had no concerns regarding the extension of the rule limiting entry to shops to vaccinated or recovered individuals which accompanied the lockdown restrictions. As of late January 2022, additional, less stringent measures, such as social distancing rules and mandatory use of FFP2 facemasks, were already in force but had not been sufficient to bring infections under control. In extending the "2G-rule", the Federal Minister did not exceed the discretion accorded to him by the COVID-19 Measures Act, nor did the contested differentiation by immune status violate the principle of equal treatment. When the Regulation was enacted at the end of January 2022, available studies regarding the Omicron variant, which had only been discovered at the end of November 2021 and had grown rapidly to become the dominant variant in Austria, were characterized by numerous uncertainties. However, the information on which the decision was based, as documented in the administrative files, shows that the Federal Minister continuously kept up with the latest scientific discussion in the international arena and included it in his deliberations. When he took his decision, therefore, it was reasonable for him to assume that individuals with proof of vaccination or recovery presented a significantly lower epidemiological risk than those who had not been immunized.

30 June 2022, V 3/2022

Lockdown for the unvaccinated III

Application to repeal as unlawful a provision of the Sixth COVID-19 Protective Measures Regulation (6. COVID-19-Schutzmaßnahmenverordnung, 6. COVID-19-SchuMaV), Federal Law Gazette II 537/2021, as amended by Federal Law Gazette II 601/2021.

Granted

The COVID-19 Measures Act (COVID-19-MG) sets out the reasons for which it is permitted to leave home when a lockdown is in force. These permitted purposes include going out to meet basic daily needs. This exception from lockdown rules, which is based on constitutional rights, cannot apply only to immunized or tested individuals. It follows that business premises at which basic daily needs can be met must be accessible without restriction to vaccinated, recovered and tested persons.

The notion of "basic daily needs" cannot be construed without taking into account the duration of a lockdown. According to the COVID-19 Measures Act, the duration of a lockdown period is commonly limited to ten days. If a succession of such periods of lockdowns ultimately results in a lockdown time lasting for weeks or even months, the basic daily needs exception provided for in law will have a different meaning than in the case of a lockdown period of only ten days.

The Sixth COVID-19 Protective Measures did not take adequate account of this. Given the total duration of the lockdown restrictions concerned (eleven weeks), basic daily needs also include activities such as visits to a hairdresser. This was not reflected in the Regulation, however.

30 June 2022, V 312/2021

Prohibition on entry to art and cultural facilities

Application to repeal as unlawful a provision of the Fifth COVID-19 Emergency Measures Regulation (5. COVID-19-Notmaßnahmenverordnung, 5. COVID-19-NotMV), Federal Law Gazette II 475/2021.

Granted

The Regulation challenged imposed a nationwide lockdown (including for those who were immunized) from 22 November to 11 December 2021. During this period, entry to the customer areas of cultural facilities was prohibited without exception. By contrast, gatherings for public worship were excluded from the scope of the Regulation (section 18 paragraph 1 subparagraph 7).

The Court found that there were no concerns regarding the constitutionality of the prohibition on entry to cultural facilities per se. This measure was an appropriate means of counteracting the spread of COVID-19, specifically the Delta variant then dominant. The measure was necessary and – given that its duration was limited to 20 days – proportionate, and so did not infringe freedom of artistic expression, which is constitutionally protected.

However, it was contrary to the principle of equality to exempt gatherings for public worship in any form from the restrictions imposed by this lockdown – regardless of whether those gatherings took place outdoors or in an enclosed space, took the form of a religious service, prayer or other religious observance or customs, and regardless of the number of participants. By contrast, artistic activities carried out together with others, unless in settings of practising or rehearsal for professional purposes with a fixed group of participants, and thus the sharing of artistic creation with others, was prohibited outright.

There is no conceivable objective justification for such a difference in treatment of religion and art. Both religion and art – separately, but frequently also intertwined with one another – are among the basic needs of a civilized society. In both cases, the exercise of certain fundamental rights together with or before others is of special importance.

The objective of the Fifth COVID-19 Emergency Measures Regulation was to prevent all gatherings as far as possible. In that context, there is no difference between gatherings for religious purposes and gatherings for artistic purposes that would justify the de facto prohibition of gatherings protected under Article 17a Basic State Law (Staatsgrundgesetz, StGG) while continuing to permit gatherings protected under Article 9 of the European Convention on Human Rights (ECHR).

23 June 2022, G 37/2022

Mandatory vaccination against COVID-19

Application to repeal the Mandatory COVID-19 Vaccination Act (COVID-19-Impfpflichtgesetz, COVID-19-IG), Federal Law Gazette I 4/2022.

Dismissed

Mandatory vaccination constitutes an interference with the right to private life. Although the obligation of vaccination cannot be enforced by direct coercion, the only option open to individuals who do not want to be vaccinated is to move to a domicile outside Austria or accept the risk of penalty. This interference with the individual's physical integrity and right of self-determination is to be qualified as severe.

Making vaccination mandatory serves the very important public interest of protecting human life and health. The purpose of a high vaccination rate is to prevent the spread of COVID-19 in order to protect vulnerable persons who cannot be vaccinated for medical reasons. If the risk of the disease taking a severe or lethal course is reduced, overloading of the healthcare infrastructure will be avoided and the infrastructure will be available to the entire population.

Making vaccination mandatory is to be qualified as a particularly severe interference with the right of self-determination. It can be justified only if it is "indispensable" for achieving the legislator's legitimate objective. In this context it must also be considered if other – equally effective but less intrusive – means are available to achieve the set objectives, e. g. by limiting mandatory vaccination to certain professions or occupations, specific groups of persons or certain institutions.

The Mandatory COVID-19 Vaccination Act requires the competent Federal Minister to continuously evaluate the necessity of mandatory vaccination and, if appropriate, to suspend the duty of vaccination completely or under certain conditions. The Federal Minister has fulfilled this obligation under the Act by suspending mandatory vaccination, for the time being, until 31 August 2022 by adopting a corresponding regulation.

That being the legal position, there are no concerns under constitutional law as regards the Mandatory COVID-19 Vaccination Act.

Committee of Inquiry into Allegations of Corruption in the Austrian People's Party (ÖVP)

An amendment providing that committees of inquiry must be established when one quarter of the members of the National Council so demand (Article 53 paragraph 1 of the Constitution [Bundes-Verfassungsgesetz, B-VG]) was introduced on 1 January 2015. At the same time, Article 138b paragraph 1 of the Constitution conferred responsibility for deciding on applications relating to the establishment and activities of committees of inquiry on the Constitutional Court.

After the committee of inquiry established on 22 January 2020 to investigate alleged corruption in the Federal coalition government of the Austrian People's Party (ÖVP) and the Freedom Party of Austria (FPÖ) (the "Ibiza" Committee of Inquiry) had completed its activities, following two extensions, on 22 September 2021, a further committee of inquiry was established on 9 December 2021 at the demand of National Council members from the Social Democratic Party of Austria (SPÖ), the Freedom Party of Austria (FPÖ) and the New Austria and Liberal Forum (NEOS) to clarify allegations of corruption against Austrian People's Party government members (the Committee of Inquiry into Allegations of Corruption in the Austria People's Party).

In the year under review, the Constitutional Court had to decide on applications seeking a decision on disagreements on the obligation to provide information to the Committee of Inquiry (Article 138b paragraph 1 subparagraph 4 of the Constitution) and – for the first time – applications seeking a decision on disagreements regarding the admissibility of requests for the taking of evidence (Article 138b paragraph 1 subparagraph 3 of the Constitution) and the need for and interpretation of an agreement to avoid interference with the activities of the prosecution authorities (Article 138b paragraph 1 subparagraph 6 of the Constitution).

21 June 2022, UA 1/2022

Analysis and submission of electronic communications

Application to assess the obligation of the Federal Minister of Justice to comply without delay with two requests for further evidence.

Dismissed

On 7 April 2022, one quarter of the members of the Committee of Inquiry asked the Federal Minister of Justice to comply with two requests for further evidence dated 26 January 2022. These requests concerned the analysis of electronic communications between the former Secretary General at the Federal Ministry of Finance, Thomas Schmid, and individuals closely associated with the Social Democratic Party of Austria (SPÖ) or the Freedom Party of Austria (FPÖ). The electronic communications were seized by the Central Public Prosecutor's Office for Combating Economic Crime and Corruption (Wirtschafts- und Korruptionsstaatsanwaltschaft, WKStA) as part of its investigation into the matter referred to as the "Ibiza affair".

As reason for her failure to comply with the requests promptly, the Federal Minister of Justice stated that the requests for evidence were subject to a consultation procedure initiated on 15 February 2022 which had not yet concluded.

The interests of prosecution must be weighed against the interests of parliamentary scrutiny in a consultation agreement (section 58 paragraph 4 of the Rules of Procedure for Parliamentary Committees of Inquiry [Verfahrensordnung für parlamentarische Untersuchungsausschüsse, VO-UA]). This provision stipulates that the files and records of, and evidence gathered by, prosecution authorities have special status. This special status is underscored by the fact that in accordance with Article 138b paragraph 1 subparagraph 6 of the Constitution (B-VG), the question of whether an agreement to avoid interference with the activities of the prosecution authorities can be brought before the Constitutional Court. If it were possible to compel the submission of files or records which are the subject of an ongoing consultation procedure, clarification of the need for a consultation agreement would be unimportant.

The chair of the committee of inquiry must initiate a consultation procedure without delay at the request of the Federal Minister of Justice (section 58 paragraph 2 of the Rules of Procedure for Parliamentary Committees of Inquiry); once the procedure has been initiated, the Federal Minister's obligation to comply with requests for evidence is suspended. This suspension can adversely affect both effective parliamentary scrutiny via the committee of inquiry and the rights of the parliamentary minority with regard to the taking of evidence and the conduct of proceedings. Consultation procedures are therefore required to be carried out swiftly and cease to have suspensive effect after three months.

As of 5 May 2022, the date on which the application was lodged with the Constitutional Court, the obligation of the Federal Minister of Justice to comply in full with the requests for further evidence of 26 January 2022 was suspended due to the consultation procedure pending. As the Minister of Justice had demonstrated adequate grounds (i.e. suspension due to the consultation procedure) for her failure to take the evidence requested promptly, the application was dismissed.

29 June 2022, UA 4/2022

Submission of files and records of the Central Public Prosecutor's Office for Combating Economic Crime and Corruption

Application to declare unlawful a resolution of the Committee of Inquiry that denied a factual connection between a request for the taking of evidence and the subject matter of the investigation.

Dismissed

On 25 May 2022, one quarter of the members of the Committee of Inquiry demanded that the Federal Minister of Justice should submit to it a complete copy of the database of the internal "Usermail" account of the Central Public Prosecutor's Office for Combating Economic Crime and Corruption, particularly emails concerning superiors and individuals at superordinated hierarchical levels. The Committee of Inquiry rejected this demand on the same day by majority resolution.

The Constitutional Court assesses the constitutionality of such resolution disputing a factual connection with the subject matter of the investigation in light of the grounds set out in both the resolution itself and the demand to which the resolution refers. It is for the disputing parties to state the main reasons why a demand for the taking of evidence does or does not fall within the scope of the subject matter of the investigation and is thus of (potential) abstract relevance. The requirements concerning this statement of reasons, in both the demand for the taking of evidence and the resolution disputing a factual connection with the subject matter of the investigation, depend on whether or not the demand falls within the scope of the subject matter of the investigation.

The demand for the taking of evidence at issue here did not request the taking of evidence but the submission of files and records by the Federal Minister of Justice. While in the case of requests for the taking of evidence it is sufficient that there is a connection with the subject matter of the investigation, in the case of demands for the submission of files and records a more restrictive provision applies under Article 53 paragraph 3 of the Constitution (B-VG), requiring that those files and records fall within the scope of the subject matter of the investigation. It was not obvious to the Constitutional Court that the files and records requested fall within the scope of the subject matter of the investigation. The demand for the taking of evidence was so broad and undifferentiated that it also covered many matters with no connection to the subject matter of the investigation whatsoever. Nor did it include any restrictions specifying, for example, that only files and records of abstract relevance for the subject matter of the investigation were to be submitted. In addition, the Committee of Inquiry showed clearly and comprehensibly that the requesting members of the Committee of Inquiry did not state adequate grounds in support of their demand for the taking of evidence. The statement of grounds for the demand consisted only of the assertion or presumption that email communications within the Central Public Prosecutor's Office for Combating Economic Crime and Corruption might contain criticism of superiors and thus information of relevance for the subject matter of the investigation. However, a request for further evidence cannot seek the submission of files and records without providing more specific information. On the contrary, the specific questions within the scope of the subject matter to be investigated by means of the further evidence obtained through the request must be comprehensibly disclosed in the demand for the taking of evidence itself.

23 September 2022, UA 75/2022 and others

Submission of files and records concerning staffing and public procurement contracts

Applications to assess the obligation of the Federal Minister for Arts, Culture, the Civil Service and Sport, the Federal Minister for Climate Action, and the Federal Minister for Social Affairs, Health, Care and Consumer Protection to submit to the Committee of Inquiry files and records concerning staffing and public procurement contracts within the area of operation of their respective ministries.

Rejected

To substantiate their application, the intervening members of the Committee of Inquiry stated that the obligation to submit files and records derives from the general resolution for the taking of evidence (grundsätzlicher Beweisbeschluss) issued by the Rules of Procedure Committee (Geschäftsordnungsausschuss) on 2 December 2021. For that reason, demands for the taking of further evidence were not necessary.

Under Article 53 paragraph 1 of the Constitution (B-VG), a committee of inquiry must be established if one quarter of the members of the National Council so demand. The Rules of Procedure for Parliamentary Committees of Inquiry (Verfahrensordnung für parlamentarische Untersuchungsausschüsse, VO-UA) ensure the necessary involvement of the minority in proceedings, but does not accord it a dominant position. This is reflected, inter alia, in the fact that the right of the minority to issue requests for further evidence is subject to a proviso: The committee of inquiry can issue a resolution disputing a factual connection between the demand for the taking of further evidence and the subject matter of the investigation (section 25 paragraph 2 of the Rules of Procedure for Parliamentary Committees of Inquiry). If a factual connection is disputed, Article 138b paragraph 1 subparagraph 3 of the Constitution permits the minority to challenge the resolution before the Constitutional Court.

Thus the provisions of Article 138b paragraph 1 subparagraphs 3 and 4 of the Constitution and the Rules of Procedure for Parliamentary Committees of Inquiry are based on a system in which the majority within the committee of inquiry must initially decide whether a demand for the taking of evidence is factually connected with the subject matter of the investigation. The minority therefore has no discretion to circumvent the procedure for requesting further evidence by directly approaching the body subject to the obligation to submit evidence, i.e. the Federal Minister in the present case. If the minority were permitted to approach the body required to provide evidence directly in every case, this would render the provisions regarding requests for further evidence (section 25 of the Rules of Procedure for Parliamentary Committees of Inquiry) useless.

The request of the minority asking the Federal Minister to submit files and records was therefore inadmissible. As this request de facto constituted demand for further evidence, the due procedure was as follows: The members of the Committee of Inquiry submit a demand asking for requests for further evidence to be issued; either the majority of the members of the Committee of Inquiry do not dispute that there is a factual connection with the subject matter of the investigation or a resolution disputing such connection is declared unlawful by the Constitutional Court in proceedings pursuant to Article 138b paragraph 1 subparagraph 3 of the Constitution; only if the body required to provide information in the specific case subsequently fails to comply with the request, or does so only inadequately, is the minority permitted to submit an application for decision on a disagreement regarding the obligation to submit evidence in accordance with Article 138b paragraph 1 subparagraph 4 of the Constitution.

The members of the Committee of Inquiry who submitted the applications to the Constitutional Court thus referred the matter to the Court at a time before a disagreement with the Federal Minister concerned could have arisen. As there was not (yet) any disagreement, the applications were inadmissible.

2 December 2022, UA 94/2022

Disagreement on interference with the activities of the prosecution authorities in relation to the summoning of a witness

Application by the Federal Minister of Justice to decide on a disagreement regarding the requirement for, and interpretation of, an agreement to avoid interference with the activities of the prosecution authorities.

Rejected

At the 37th meeting of the Committee of Inquiry on 20 October 2022, a demand submitted by members of the Committee of Inquiry asking that the former Secretary General at the Federal Ministry of Finance, Thomas Schmid, be summoned to appear before the Committee as a witness became effective. In response, the Federal Minister asked the chair of the Committee of Inquiry to initiate a consultation procedure.

The Federal Minister based this request on the fact that the appearance of Thomas Schmid as a witness would jeopardize the purpose of criminal investigations pending at the Central Public Prosecutor's Office for Combating Economic Crime and Corruption because Thomas Schmid's questioning as part of that investigation had not been finished by that time. A risk to the criminal investigations could only be ruled out in relation to those facts (circumstances) on which questioning had already been completed and the record and files of which were accessible. In addition, the consultation agreement of 3 March 2022 specified that those files, or parts thereof, the immediate disclosure of which could jeopardize the purpose of the investigations and which were therefore subject to access restrictions would be submitted only after those restrictions had been lifted. This included file documents of the investigations conducted by the Central Public Prosecutor's Office for Combating Economic Crime and Corruption. This rule prevented the Committee of Inquiry from circumventing the agreement by questioning witnesses on matters dealt with in files subject to access restrictions.

Therefore, on 27 October 2022, the Federal Minister proposed that an (additional) consultation agreement be entered into, clarifying that the Committee of Inquiry would question Thomas Schmid only on facts in relation to which his questioning by the Central Public Prosecutor's Office for Combating Economic Crime and Corruption was complete, and which therefore no longer presented a risk to the purpose of the investigation.

Ultimately, the Federal Minister applied to the Constitutional Court for a decision that the consultation agreement of 3 March 2022 must be construed as also prohibiting the circumvention of the agreement by the taking of evidence by other means (e.g. by questioning witnesses), and that a consultation agreement with the content proposed by the Federal Minister needed to be entered into as regards the questioning of Thomas Schmid as a witness.

However, a disagreement can be decided upon by the Constitutional Court only if the Committee of Inquiry passes a formal resolution expressly disputing the need for the consultation agreement requested by the Federal Minister or disputing a particular interpretation of an agreement already in force.

No resolution unequivocally expressing such opinion on the part of the Committee of Inquiry was issued, however. Because there was therefore no differing opinions constituting a disagreement between the Federal Minister and the Committee of Inquiry, the application was found to be inadmissible.


DEMOKRATISCHE
REPUBLIK

Fundamental Rights

8 March 2022, E 3120/2021

Use of a prohibited symbol at a gathering

Complaint concerning the prohibition of a gathering in Vienna on the subject of "Demonstration for peace and democracy in Kurdistan" due to the announcement that the flag of the PKK (Kurdistan Workers' Party), which is prohibited under the Symbols Act (Symbole-Gesetz), would be used.

Granted

The Symbols Act prohibits the display, exhibition, wearing or dissemination of certain symbols in public. Badges, emblems and gestures are also deemed symbols (section 2 paragraph 1). Since 2019, the prohibited symbols have included the symbols of the "Kurdistan Workers' Party – PKK" group (section 1 subparagraph 5, as amended by Federal Law Gazette I 2/2019). If the ideology of the group is not endorsed or propagated, however, this prohibition is not applicable to publications and periodicals, gestures and pictorial representations, dramatic performances and showings of cinematographic works, and exhibitions (section 2 paragraph 3).

There are no concerns under constitutional law regarding the statutory prohibition on the public display of certain symbols per se. While such prohibition interferes with the right to freedom of expression, the interference is lawful if it is necessary in a democratic society inter alia in the interests of national security, for the prevention of disorder or for the protection of the rights of others (Article 10 paragraph 2 ECHR). It is within the legislator's margin of policymaking discretion to counteract the spread of ideologies which constitute a threat to democracy by prohibiting not groups themselves but the use of their symbols. In light of Article 10 ECHR, however, such prohibition is to be understood as meaning that only the use of the symbol specifically for unconstitutional purposes – namely the propagation or endorsement of the proscribed ideology – is prohibited and punishable.

Under the Assembly Act (Versammlungsgesetz) the authority must prohibit meetings held for a purpose contrary to criminal law or which, if held, would threaten public safety or public well-being. As such measures affect the freedom of assembly in a particularly serious manner, they are permitted only when they are essential for the achievement of the objectives specified in Article 11 paragraph 2 ECHR.

In the complaint, the Vienna Administrative Court (Verwaltungsgericht Wien) upheld the prohibition of the gathering, the purpose of which was to demonstrate for peace and democracy in Kurdistan. The flag of the PKK was to be shown at this demonstration. In its judgment, the Vienna Administrative Court considered that the Symbols Act stipulated a prohibition with direct effect and which the administrative authority with responsibility for public gatherings was also required to observe.

The statutory prohibition on the use of a particular symbol is not in itself sufficient to justify the prohibition of a gathering, however. The Vienna Administrative Court would have been required not only to examine whether the PKK flag was used in pursuit of the proscribed objectives of that movement, it would have been also required to take into account the fact that the (prohibited) symbol was to be used as a stylistic device in a protest against the Symbols Act. In failing to carry out such examination, the decision of the Vienna Administrative Court violated the right to freedom of assembly. The decision challenged was therefore set aside.

29 June 2022, E 1042/2021

Sale of newspapers by provision of self-service pouches

Complaint against the imposition of a fine under the Trade Code (Gewerbeordnung, GewO) 1994 for the unauthorized transportation of daily newspapers for the purpose of sale from self-service pouches.

Granted

Press freedom encompasses the prohibition enshrined in Article 13 paragraph 2 of the Basic State Law (Staatsgrundgesetz, StGG) on requiring official authorization for the publication of newspapers and magazines. This prohibition, referred to as "Konzessionsverbot" in German, means that no permit needs to be obtained from the authorities before commencing a commercial activity as a publisher.

According to the Notice of Promulgation (Kundmachungspatent) to the Trade Code 1859, the "vending" (Verschleiß) of periodicals, particularly newspapers, was excluded from the scope of the Trade Code. This exemption was maintained in light of the rules on freedom of the press introduced in 1867 by Article 13 Basic State Law.

Finally, the exception for certain "press-related" activities was included in the Trade Code 1973, with the word "vending" (Verschleiß)" replaced by "retail sale" (Kleinverkauf). This was done purely in order to make clear that it was the retail sale, and not the wholesaling, of periodicals that was excepte from the provisions of the Trade Code. The distribution of periodicals to end consumers, particularly the sale of newspapers, has never been subject to prior authorization under trade law. The total exclusion of retail sale from the scope of the Trade Code means that there is also no registration requirement under trade law.

The freedom of the press as provided for in Article 13 paragraph 2 Basic State Law must be construed in light of Article 10 ECHR. Thus the entire process of compilation and dissemination of information by the press, particularly journalistic tools and sources, and the distribution of that information via any and all sales channels, is protected by freedom of expression. That includes the distribution of newspapers at public locations. Alongside the media owner and persons attributable to it, external personnel who distribute the periodicals to end consumers are also protected by the freedom of the press. It is beyond doubt that this also applies to the activities of (self-employed) newspaper sellers.

Against this background, the Court did not share the assessment of the Vienna Administrative Court (Verwaltungsgericht Wien) that the main focus of the activities of self-service sellers is the transportation of newspapers:

The fact that the sale of newspapers to end consumers by provision of self-service pouches involves the transportation of those newspapers is not sufficient to exclude this activity entirely from the notion of retail sale and consequently from the protection of the freedom of the press under Article 13 paragraph 2 Basic State Law.

In light of the freedom of the press, it cannot be relevant whether the newspapers are sold to end consumers by a street seller, at a newspaper stand or via self-service pouches (dispensers with separate cash box referred to as "stumme Verkäufer" in German). It is a characteristic feature of the sale of newspapers via self-service pouches that only the end consumer is present at the place of sale when the physical sale takes place. Transporting and setting up the self-service devices, filling the sales pouches and attaching the cash boxes are necessary steps in the physical sale process and are closely connected with distribution to end consumers. Therefore, the activities of self-service sellers are protected by the freedom of the press pursuant to Article 13 paragraph 2 Basic State Law.

The Administrative Court based its decision on the assumption that the activity of self-service sellers was not essentially associated with the retail sale of newspapers and thus could not be deemed to constitute retail sale. The Administrative Court thus attributed to the Trade Code content which, in light of the freedom of the press, it does not have. The contested administrative (penal) decision was therefore quashed.

30 June 2022, G 226/2021

Reception of channels provided by the Austrian Broadcasting Corporation (ORF) via the internet without payment of the licence fee ("streaming loophole")

Application to repeal as unconstitutional the wording "but in any event if the premises of the user of broadcasting receiving equipment (section 2 paragraph 1 of the Broadcasting Fees Act [Rundfunkgebührengesetz, RGG]) are served by channels provided by the Austrian Broadcasting Corporation in accordance with section 3 paragraph 1 via terrestrial (analogue or DVB-T) broadcasting. The start and end of the obligation to pay the broadcasting licence fee and the exemption from this obligation are based on the Federal provisions applicable to television and radio licence fees" in section 31 paragraph 10 of the ORF Act (Bundesgesetz über den Österrichischen Rundfunk, ORF-G) and section 31 paragraphs 17 and 18 ORF Act, as amended by Federal Law Gazette I 126/2011 and Federal Law Gazette I 50/2010, respectively.

Granted

The broadcasting licence fee is payable by anyone who is able to receive channels provided by the ORF via terrestrial transmission, cable network or satellite using broadcasting receiving equipment. The decisive factor here is the capacity to receive, not technical quality and not whether the receiving equipment is actually used to receive these channels or not.

Anyone who has internet-capable receiving equipment which cannot receive channels provided by the ORF via terrestrial transmission, cable network or satellite is not required to pay licence fees. Those people can watch and listen to ORF channels which are transmitted over the internet, however.

Broadcasting is a public function (Article I paragraph 3 of the Federal Constitutional Act on Guaranteeing the Independence of Broadcasting – Constitutional Broadcasting Act [Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks, BVG Rundfunk]). Detailed rules regarding broadcasting and its organization must be set out by Federal law. Such Federal law must contain provisions guaranteeing objectivity and impartiality of reporting, consideration for diversity of opinion, balanced programming and independence of the persons and bodies entrusted with responsibility for broadcasting (Article I paragraph 2 of the Constitutional Broadcasting Act).

The specifications laid down in in Article I paragraphs 2 and 3 of the Constitutional Broadcasting Act serve to accentuate the democratic and cultural significance of public service broadcasting within the overall broadcasting system. The responsibility of the legislator for the functioning and financing of public-service broadcasting arising from this provision is based on the definition given to the term "broadcasting" (Rundfunk) in Article I paragraph 1 Constitutional Broadcasting Act.

In that provision, broadcasting is defined as the dissemination, intended for the general public, of presentations of all kinds, in word, sound and image, using electrical waves without a connecting cable or along or by means of a cable, as well as the operation of technical equipment that serves that purpose. Accordingly, the constitutional definition of the term "broadcasting" includes both a technical and a journalistic component. As regards the technical aspects of broadcasting, the definition focuses on electronic (and not print) media, otherwise neutral as to technology in order to include technological developments. This is the only way to ensure that the guarantees pursuant to Article I paragraphs 2 and 3 Constitutional Broadcasting Act remain effective in a changing technological environment. As regards the journalistic component, it is the mass-media function of broadcasting that is important, resulting in particular from the impact of the combination of words, sounds and images and the influence on the democratic and cultural process of public communication reflected in content and programming.

It is within the discretion of the legislator to define the rules regarding how public-service broadcasting is to be financed. When defining which persons are required to pay a broadcasting licence fee, the legislator is free to standardize, take account of multiple usage and take into consideration aspects of administrative economy and make distinctions in light of social and broadcasting policy objectives.

Financing by way of a broadcasting licence fee as provided for in the ORF Act, i. e. through contributions from all potential consumers of the public-service broadcast channels, also serves to secure the independence of public-service broadcasting. In the broadcasting licence fee model, it is essential that everyone who can potentially receive the broadcasting and thus participate in public discourse via broadcasting is included in statutory financing of the ORF, and that no important group is excluded.

This obligation also extends to broadcast channels which, while they fulfil the journalistic component of the constitutional definition of the term "broadcasting", are disseminated over the internet. This is because "internet broadcasting" is comparable with "regular broadcasting" according to the status and development of communication technology. Therefore, if the legislator fulfils its responsibility to ensure financing for the ORF by opting for a broadcasting licence fee model, it must not exclude

from the obligation to pay the licence fee an essential type of user behaviour.

Although, under a broadcasting licence fee model, the legislator is required to provide detailed and differentiated rules regarding the obligation to pay the licence fee for the reception of the ORF channels via the internet, it is not compatible with a user-based financing model such as the ORF broadcasting licence fee to exclude the reception of ORF channels via the internet altogether.

It is therefore contrary to the Constitutional Broadcasting Act that persons who are only able to receive the channels of the ORF via the internet are not subject to the obligation to pay the broadcasting licence fee. The wording will be repealed with effect after 31 December 2023.

30 June 2022, G 230/2021

Parental status of the mother's same-sex registered partner

Review of the constitutionality of section 144 and specified parts of section 145 paragraph 1 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB), as amended by Federal Law Gazette I 35/2015.

Granted

Under section 144 of the Civil Code, a child's father is the man who is married to the mother at the time of the child's birth. By contrast, a woman who is in a registered partnership with the mother at the time of the child's birth is that child's parent only if the mother underwent medically assisted reproduction not more than 300 days and not less than 180 days before the birth.

In opposite-sex couples who are married or in a registered partnership, the husband or registered partner is the child's father regardless of how the child was conceived. Thus, the man's status as parent does not depend on whether the child was conceived naturally or artificially. By contrast, section 144 paragraph 2 subparagraph 1 Civil Code provides that where two women are married or in a registered partnership, the mother's spouse or partner is deemed to be the "other parent" only if medically assisted reproduction was used. Thus conception by "home insemination" cannot result in the mother's spouse or partner having parental status.

This distinction is based solely on the sexual orientation of the parties concerned. According to the case-law of both the European Court of Human Rights (ECtHR) and the Austrian Constitutional Court, a rule which differentiates according to sex or sexual orientation is required to be based on particularly serious reasons if it is not to be considered as discrimination.

No such reason or justification is apparent, however. In light of Article 8 ECHR, which protects individual self-determination as regards the manner of conception, there are no apparent reasons which could justify a situation which compels women wishing to achieve the protection afforded by the social family unit in a same-sex union to undergo medically assisted reproduction and to deny them other options for conception. Nor is it apparent, from the perspective of the Federal Constitutional Act on the Rights of Children (Bundesverfassungsgesetz über die Rechte von Kindern), which accords particular weight to the best interests of the child, why children of a same-sex couple conceived through "home insemination" should be denied all rights, including rights to maintenance, vis-à-vis the mother's spouse or partner.

The provisions challenged therefore infringe both the principle of equal treatment and the right to respect for family life. These provisions will be repealed with effect after 31 December 2023.

However, the legislator will be required to introduce rules which protect the social family and the interests of the child in the case of children born during an intact marriage or registered partnership between two women. Currently, such rules exist only for cases where the child was conceived through medically assisted reproduction.

29 September 2022, SV 1/2021

Immunity of OPEC from Austrian jurisdiction in employment law cases

Application to repeal as unconstitutional Article 5 paragraphs 1 and 2 and Article 9 of the Agreement between the Republic of Austria and the Organization of the Petroleum Exporting Countries regarding the headquarters of the Organization of the Petroleum Exporting Countries (OPEC), as amended by Federal Law Gazette III 108/2010.

Granted

Pursuant to Article 9 of the Agreement, OPEC enjoys immunity from every form of legal process except in so far as in any particular case OPEC has expressly waived its immunity. At the same time, under Article 6(1) ECHR, everyone is entitled to a fair and public hearing by an independent and impartial tribunal or court established by law which will decide on their civil rights. This also applies in principle to employment disputes involving an international organization accorded immunity by treaty by a convention state.

The widespread practice of according immunity from jurisdiction to international organizations pursues the legitimate aim of ensuring the proper functioning of the organizations free from unilateral interference by individual governments. However, it would be incompatible with the purpose and object of the ECHR if, by attributing immunities to international organizations, the Contracting States did not meet their responsibility of effectively protecting the rights and freedoms enshrined in the ECHR. The ECHR is required to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.

An essential aspect in determining whether the limitation of access to a court inherent in the immunity from national jurisdiction enjoyed by an international organization is proportionate is whether applicants had available to them reasonable alternative means to protect their rights. It is not necessary for the alternative protection to match the national court system in every respect; protection need only be comparable, i.e. equivalent. For international organizations it is accepted that the possibility of recourse to an internal quasi-judicial body can constitute reasonable alternative means of protecting rights. The option of lodging a complaint with the Administrative Tribunal of the International Labour Organization and the possibility of arbitration proceedings both offer reasonable alternative dispute settlement mechanisms.

OPEC has already promised to create appropriate guarantees of legal protection for employment disputes. As long as the Agreement does not guarantee that such a mechanism exists, however, it cannot be presumed that Article 9 of the Agreement limits access to a court in employment disputes in a proportionate manner. Therefore, Article 9, as well as Article 5 paragraphs 1 and 2 of the Agreement which is linked with Article 9, infringe Article 6 paragraph 1 ECHR. The provisions must not be applied by the implementing bodies after 30 September 2024.

1 December 2022, G 53/2022

Pre-trial detention for serious crimes

Application to repeal as unconstitutional section 173 paragraph 6 of the Code of Criminal Procedure (Strafprozessordnung, StPO), as amended by Federal Law Gazette I 19/2004.

Granted

In accordance with section 173 et seq. of the Code of Criminal Procedure, pre-trial detention may be imposed only if – alongside other conditions – one of the grounds for detention specified in section 173 paragraph 2 of the Code of Criminal Procedure applies. Section 173 paragraph 6 of the Code of Criminal Procedure departs from this principle. That provision stipulates that pre-trial detention must be imposed in the case of serious crimes (as defined in section 17 of the Criminal Code) where the sentence is ten years or more, unless it is reasonable to assume, based on specific facts, that all grounds for detention specified in section 173 paragraph 2 of the Code of Criminal Procedure can be ruled out.

By contrast, the Federal Constitutional Act on the Protection of Personal Liberty (Bundesverfassungsgesetz über den Schutz der persönlichen Freiheit, PersFrSchG) ties the deprivation of personal liberty, as one of the most serious interferences with the fundamental rights of the individual, to justification of detailed grounds for detention and requires the applicability of a specific ground for detention to be verified in each individual case. Section 173 paragraph 6 of the Criminal Code of Procedure, however, does not adequately reflect and incorporate these statutory requirements for pre-trial detention. It is open to doubt as to whether such justification and verification is required also to be carried out in the case of serious crimes.

Section 173 paragraph 6 of the Criminal Code of Procedure therefore breaches the requirements arising from Article 2 paragraph 1 subparagraph 2 in conjunction with Article 1 paragraph 3 of the Federal Constitutional Act on the Protection of Personal Liberty that the conditions under which pre-trial detention may be imposed have to be precisely specified by law.

13 December 2022, G 174/2022

Interest-free loan moratorium for consumers and micro-enterprises

Application to repeal as unconstitutional the second sentence of section 2 paragraph 6 of the Second COVID-19 Justice Accompanying Act (2. COVID-19-Justiz-Begleitgesetz), as amended by Federal Law Gazette I 113/2020.

Dismissed

The Second COVID-19 Justice Accompanying Act provides as follows with regard to credit or loan agreements entered into by consumers and certain micro-enterprises before 15 March 2020: Claims of the lender to repayment or payments of interest or redemption which fell due between 1 April 2020 and 30 June 2020 must be deferred for a period of ten months from the due date for payment if, as a result of the exceptional circumstances caused by the spread of the COVID-19 pandemic, the consumer has experienced a loss of income making it unreasonable to require them to makethe payments owed. During that deferral period, the borrower is not considered to have defaulted on payment, and default interest therefore does not accrue.

This statutory loan moratorium – which the applicants expressly did not contest – and the resultant extension of credit agreements constitute a significant interference with the right of credit institutions to arrange their legal affairs or contractual relations in their own discretion (referred to as "Privatautonomie" in German) and thus also their right to protection of property. This applies all the more to the requirement that all of the costs of the moratorium have to be borne unilaterally by the credit institutions.

The provision challenged served an objective of public interest and was an appropriate means of achieving that objective: It gave the borrowers falling under the scope of the loan moratorium time to raise the funds needed to make repayments.

There are a number of factors that can help place the gravity of the interference with the credit institutions' rights in context: Firstly, the loan moratorium was subject to specific conditions. It applied only if the borrowers were in such a difficult financial situation that they would not have been able to meet their payment obligations anyway. However, most credit institutions did not check whether this condition was met in the individual case; they granted the moratorium automatically. In addition, it would have been doubtful whether the borrowers would have been able to meet their obligations under the loan agreements if the statutory loan moratorium had not been granted.

Notwithstanding the above, there was a further justification for requiring the credit institutions to bear the costs of the interest-free loan moratorium. The ECB put in place a number of monetary policy and banking supervision measures intended to mitigate the consequences of the pandemic for credit institutions and the real economy.

In light of these measures, and particularly the extremely favourable refinancing facilities which also benefitted the applicant credit institutions, it is objectively justified to impose the costs of the interest-free loan moratorium on the credit institutions.

Whether these measures provided by the ECB fully compensated the credit institutions for the burdens on them resulting from the interest-free loan moratorium is left open. It is sufficient that these measures provided adequate mitigation for the financial impacts of the moratorium.

Therefore, the provision challenged violates neither the fundamental right to property nor the principle of equal treatment.

14 December 2022, G 287/2022 and others.

Exemption of the media from data protection law

Application to repeal as unconstitutional section 9 paragraph 1 of the Data Protection Act (Datenschutzgesetz, DSG), as amended by Federal Law Gazette I 24/2018.

Granted

Pursuant to the obligation under EU law stipulated in Article 85(1) of the General Data Protection Regulation (GDPR), section 9 paragraph 1 of the Austrian Data Protection Act provides that the provisions of that Act as well as Chapters II (Principles), III (Rights of the data subject), IV (Controller and processor), V (Transfers of personal data to third countries or international organisations), VI (Independent supervisory authorities), VII (Cooperation and consistency) and IX (Provisions relating to specific processing situations) of the GDPR do not apply to the processing of personal data for journalistic purposes by media owners, editors, and employees of a media undertaking or a media service as defined in the Media Act (Mediengesetz).

At the same time, the fundamental right to data protection pursuant to section 1 paragraph 1 of the Data Protection Act guarantees every person the right to secrecy of the personal data concerning them, insofar as that person has an interest in such secrecy which merits protection, especially as regards respect for private life. Section 1 paragraph 2 of the Data Protection Act contains a "substantive reservation" in that respect, permitting legislative interference with that right under certain circumstances. Besides the use of personal data in the vital interest of the data subject or with the data subject's consent, restrictions of the right to secrecy are thus permitted only in order to safeguard the overriding legitimate interests of another person.

It follows from section 1 paragraph 1 in conjunction with paragraph 2 of the Data Protection Act that in principle – unless consent has been given or vital interests of the data subject are concerned – interference by the legislator with the fundamental right to data protection in accordance with section 1 paragraph 1 of the Data Protection Act is permitted only if such interference is necessary to safeguard the overriding legitimate interests of another. Thus, due to the fundamental right to data protection provided for in section 1 paragraph 1 in conjunction with paragraph 2, the legislator is always required to weigh the data subject's interest in protection of their personal data against the opposing (legitimate) interests of another person. Only if safeguarding of those interests of another person overrides the data subject's right to data protection is statutory interference with the data subject's right to data protection permitted.

The absolute and total – and thus undifferentiated – exclusion provided for in section 9 of the Data Protection Act of the application of all (ordinary)

rules of law in the Data Protection Act and the chapters of the GDPR set out above to specifically defined data processing operations for the journalistic purposes of a media undertaking or media service is inconsistent with the requirement in section 1 paragraph 2 of the Data Protection Act providing for an appropriate balance between the interest in protection of personal data and the interest of media owners, editors, copy editors and employees of a media undertaking or a media service in the context of their journalistic activities.

In a democratic society, the media plays a central role as "public watchdog" in the public interest. Article 85(1) GDPR, which stipulates that the national legislator must adopt provisions which "reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes" allows for precisely this. Accordingly, the national legislator must provide for derogations or exceptions from the chapters of the GDPR specified in Article 85(2) GDPR for the processing of personal data in the course of journalistic activity to the extent it considers necessary to allow the media to perform its functions and engage in journalistic activity.

The right to freedom of expression and information therefore requires the legislator to exclude the applicability of certain data protection provisions – i. e. those which are incompatible with the specific features of the exercise of journalism – to data processing for journalistic purposes. The reason for this exclusion is that the unrestricted applicability of all provisions of data protection law to the processing of data for journalistic purposes by media undertakings and media services would be likely to impede journalistic activity to a disproportionate degree or even render it impossible. However, the legislator is required to strike an appropriate and nuanced balance between the interests of individuals in protection of their data, including vis-à-vis the media, and the needs of journalistic activity which are protected under Article 10 ECHR.

This could be achieved, for example, by imposing restrictions applicable to particular persons (such as those provided for in section 9 paragraph 1 of the Data Protection Act, regarding e. g. media undertakings and media services), at particular times (e. g. until publication of a report) or to particular matters (e. g. regarding specific data processing operations or data subject rights). Similarly – to compensate for the exclusion of (certain) provisions of data protection law – the legislator could provide for more stringent requirements concerning internal organization, documentation and technical security arrangements for processed data.

However, the fundamental right to data protection provided for in Article 1 paragraph 1 of the Data Protection Act means that freedom of expression and information cannot be generally prioritized over the protection of personal data. The categorical priority accorded in section 9 paragraph 1 of the Data Protection Act to a fundamental right, specifically the right to freedom of expression and information, over the fundamental right to data protection is inconsistent with the constitutional stipulations in section 1 of that Act.

The fact that actions for data protection breaches resulting from processing of data for journalistic purposes can in specific cases be brought before the ordinary courts (under e. g. the Media Act or section 16 in conjunction with section 1330 of the Civil Code) does not change the fact that the blanket exemption of journalistic activity from the guarantees provided under data protection law is unconstitutional.

This provision will be repealed with effect after 30 June 2024.

Law of Organization of the State

30 June 2022, G 334/2021 and others.

Healthcare governance

Review of the constitutionality of the second, third and fourth sentences of section 23 paragraph 1, the second, third, fourth and fifth sentences of paragraph 2, and paragraphs 4 to 8 of the Healthcare Governance Act (Gesundheits-ZielsteuerungsG, G-ZG), as amended by Federal Law Gazette I 26/2017.

Granted

Review of the constitutionality of section 18, section 19 and section 20 paragraphs 1 and 2 of the Healthcare Governance Act (Gesundheits-Zielsteuerungsgesetz, G-ZG), of section 3a paragraph 3a of the Hospitals and Sanatoriums Act (Kranken- und KuranstaltenG), of section 17 of the Lower Austria Health and Social Care Fund Act (NÖ Gesundheits- und Sozialfonds Gesetz) 2006, of section 10c paragraph 3 of the Lower Austria Hospitals Act (NÖ KrankenanstaltenG), of section 17a paragraph 4 of the Upper Austria Health Fund Act (Oö. Gesundheitsfonds Gesetz) 2013, of section 6a paragraph 6a of the Upper Austria Hospitals Act (Oö. Krankenanstaltengesetz, Oö KAG) 1997, and of section 10 of the Vienna Health Fund Act (Wr. Gesundheitsfonds Gesetz) 2017.

Dismissed

Review of the lawfulness of the Gesundheitsplanungs GmbH Regulation making binding certain parts of the Austrian Structural Plan for Healthcare 2017 (Verordnung der Gesundheitsplanungs GmbH zur Verbindlichmachung von Teilen des Österreichischen Strukturplans Gesundheit 2017, ÖSG VO 2018), and the ÖSG VO 2018 as amended by the Gesundheitsplanungs GmbH Regulation making binding certain parts of the Austrian Structural Plan for Healthcare 2017 (ÖSG VO 2019), where they were in force as Federal regulations.

Granted

Review of the lawfulness of section 4 and Appendix 2 of the Austrian Structural Plan for Healthcare Regulation (Verordnung zum Österreichischen Strukturplan Gesundheit, ÖSG VO) 2018, where it was in force as a regulation of the Land of Upper Austria, and of section 4 and Appendix 2 of the Austrian Structural Plan for Healthcare Regulation (ÖSG VO) 2018, as amended by the ÖSG VO 2019, where it was in force as a regulation of the Land of Lower Austria.

Dismissed

Legislative and executive power relating to the healthcare system as a whole, including professional regulations applicable to physicians in independent practice, resides at the Federal level. By contrast, legislation regarding hospitals, including independent outpatient clinics, is a regional power, i.e. rests at Länder level. In that domain, the Federation is merely authorized to establish guiding principles for legislation by the Länder.

In light of this division of powers, the Federation and the Länder entered into two agreements: the (open-ended) Healthcare Governance Agreement (Vereinbarung Zielsteuerung-Gesundheit) and the Agreement on Organization and Financing of the Healthcare System (Vereinbarung über die Organisation und Finanzierung des Gesundheitswesens), which is linked with the fiscal equalization arrangement in force in Austria since 2017.

In this second agreement, the Federation and the Länder agree to use the Austrian Structural Plan for Healthcare (Österreichischer Strukturplan Gesundheit, ÖSG) and the Regional Structural Plans for Healthcare (Regionale Strukturpläne Gesundheit, RSGs) as central instruments for integrated healthcare planning. It covers both physicians in independent practice (healthcare system, a Federal power) and hospitals and outpatient clinics (a Länder-level power). The agreement also contains detailed provisions regarding the procedure for preparing the ÖSG and RSGs and for declaring them binding.

The Agreement is essentially implemented by way of the Healthcare Governance Act. Under section 23 of the Healthcare Governance Act, it is the responsibility of Gesundheitsplanungs GmbH, a private limited company established by the Minister of Health, to enact regulations declaring certain parts of the ÖSG and the RSGs to be binding; these parts (referred to as "plan sections", Planausschnitte) are selected by the healthcare governance committees (Zielsteuerungskommissionen) at

Federal and Länder level. The healthcare governance committees consist of representatives of the Federation, the Länder and the social insurance bodies.

There are no concerns under constitutional law regarding this structure. The committees engage in a structured policy planning process which combines expert knowledge with democratic legitimacy.

Before Gesundheitsplanungs GmbH declares a plan section to be binding, it must carry out an evaluation procedure which may result in changes to the plan. In that event, the healthcare governance committee must adopt a new decision. The official responsibility of Gesundheitsplanungs GmbH for the regulation adopted by it consists of reviewing the plan section which has been submitted in order to be declared binding for conformity with the constitution and with the law. A plan section which is found to be unlawful cannot be declared binding. Gesundheitsplanungs GmbH has no margin of (policy) discretion beyond this.

The Federal Minister of Health and the responsible member of the Land government have authority to give directions regarding these declarations. However, they may only use this authority in order to prevent the enactment of an unlawful regulation. Like Gesundheitsplanungs GmbH, they cannot prevent enactment of a regulation on policy grounds.

Additionally, entrusting responsibility to Gesundheitsplanungs GmbH for declaring plans to have binding effect is consistent with the constitutional requirements regarding performance of government duties by a legal entity. While this declaration of binding effect is an important element of strategic health planning, it is not a core function of the administration of the state.

The supreme bodies of the Federation and the Länder also have rights of supervision regarding the activities of Gesundheitsplanungs GmbH which include a sufficiently effective power to remove Gesundheitsplanungs GmbH's executive management.

The responsibility of Gesundheitsplanungs GmbH covers matters relating to both hospitals/outpatient clinics (a Länder-level power) and the healthcare system and physicians in independent practice (a Federal power). However, executive power regarding the healthcare system is subject to the system of indirect Federal administration. Thus, in the sphere of the Länder, the executive power of the Federation is exercised by the Land Governors and the regional authorities subordinate to them; establishing separate Federal authorities for such matters is subject to the consent of the Land concerned (Article 102 paragraphs 1 and 4 of the Constitution). This also applies if functions of the Federal administration are allocated to an independent legal entity.

The appointment of Gesundheitsplanungs GmbH to declare plans in the healthcare system domain binding was therefore subject to the consent of the Länder. No such consent was given, however. Section 23 paragraph 4 of the Healthcare Governance Act therefore violates Article 102 of the Constitution. The provisions will be repealed after 31 December 2023.

As a consequence of the repeal, regulations declaring the Austrian Structural Plan for Healthcare (ÖSG) 2017 binding that were enacted by Gesundheitsplanungs GmbH on the basis of this provision are unlawful where they applied as Federal regulations.

In accordance with section 23 paragraph 5 of the Healthcare Governance Act, legislation at Länder level must make provision for Gesundheitsplanungs GmbH to have responsibility for declaring as binding plans which concern matters under Article 12 of the Constitution, i. e. the law relating to hospitals. This instruction to entrust this responsibility to Gesundheitsplanungs GmbH also requires the Länder to make the necessary arrangements to integrate Gesundheitsplanungs GmbH into their organizational structures. This rule thus goes beyond substantive law relating to hospitals and therefore violates the Federal allocation of powers. The wording will be repealed with effect after 31 December 2023.

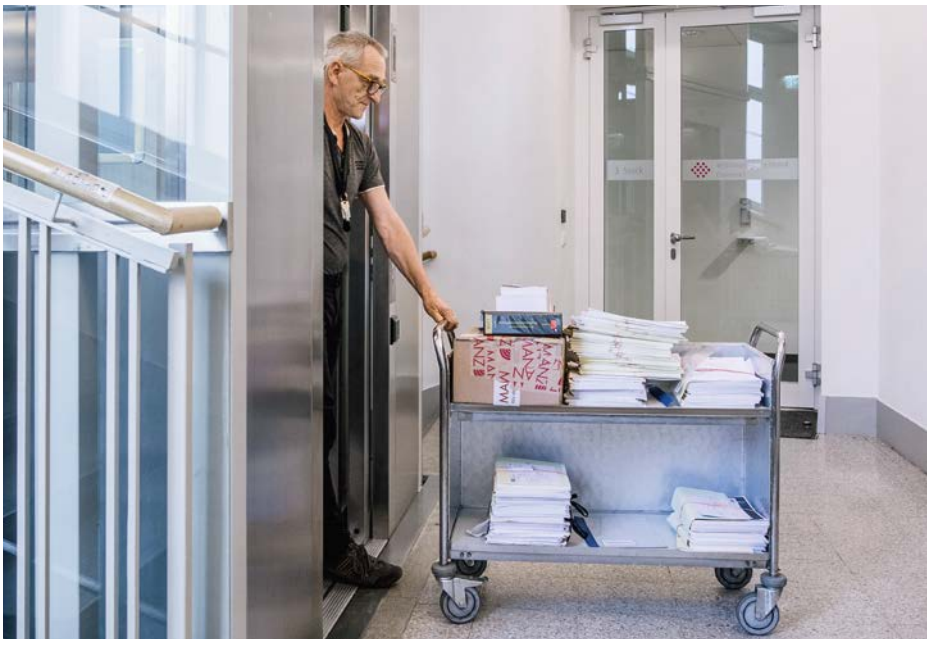
The Court did not agree with the further concern that the Healthcare Governance Act violates jurisdictional rules where it confers power to enact regulations on matters of hospital law (a Länder-level power).

These provisions relate only to planning matters that fall solely within the responsibility of the Federation. This power comprises both overall planning in the area of the healthcare system and basic research in the form of gathering of factual information, including with regard to the hospital domain, as well as planning in the domain of physicians in independent practice, taking into account conditions in the hospital sector. The provisions can therefore be construed to be compatible with the Constitution.

Besides this, it is not unlawful that the Regulation making binding certain parts of the Austrian Structural Plan for Healthcare (ÖSG-VO) 2018 contains provisions relating to both the healthcare system and the law on hospitals. Enacting "mixed" regulations of this kind does not contravene either the separation of executive powers of the Federation and the Länder enshrined in the Constitution, or any other constitutional principles. It does not affect the supervisory power of the supreme executive bodies responsible for the individual matters, nor does it affect legal remedies against such regulations, which are concentrated in the Constitutional Court regardless of the allocation of powers.

Finally, there are no concerns regarding the fact that the hospital acts both at Federal and Länder level require an assessment of needs for independent outpatient clinics, which must be carried out in line with the Austrian Structural Plan for Healthcare (ÖSG) and the Regional Structural Plans for Healthcare (RSGs).

Careful planning in the hospital sector serves to maintain high-quality and well-balanced medical services open to all and prevent the risk of serious harm to the financial equilibrium of the social security system and thus the important public interest in a functioning healthcare system. An assessment of needs is therefore generally permissible. The question of whether the individual needs assessments provided for in the RSGs were carried out in a manner compatible with the Constitution is not a question of constitutionality of the hospitals acts; rather, it concerns the lawfulness of the various structural plan regulations. This question was not the subject of the proceedings before the Constitutional Court, however.



6 December 2022, G 221/2022

Decision on disputes regarding the jurisdiction of a regional audit office

Review of the constitutionality of Article 50 paragraph 1 subparagraph 7 of the Styrian Constitution (Stmk. Landes-Verfassungsgesetz, L-VG) 2010, as amended by State Law Gazette LGBl. 76/2014.

Granted

In accordance with Article 126a of the Constitution (B-VG), disputes regarding the interpretation of the statutory provisions governing the jurisdiction of the Court of Audit (Rechnungshof) are decided by the Constitutional Court. If a regional audit office (Landesrechnungshof) is established in one of the Austrian Länder, a rule corresponding to Article 126a of the Constitution may be provided for by constitutional law at the level of that Land (Article 127c subparagraph 1 of the Constitution). To that effect, Article 50 paragraph 4 of the Styrian Constitution provides that disputes regarding the jurisdiction of the Styrian Audit Office (Landesrechnungshof Steiermark) can be brought before the Constitutional Court.

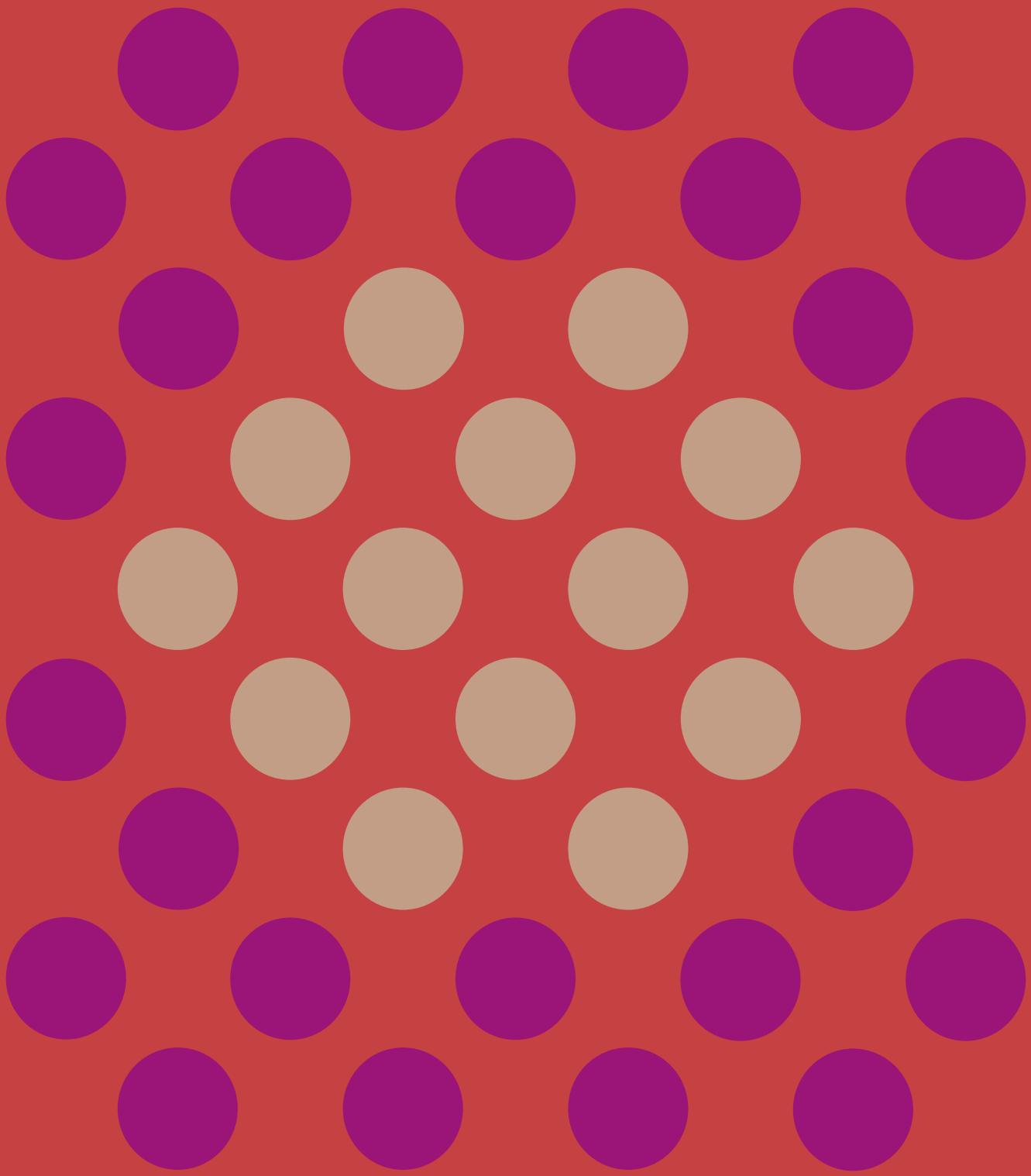
The jurisdiction of the Styrian Audit Office includes the monitoring of the administration of public funds by housing developers who receive housebuilding subsidies, "provided that the Land Government has contractually reserved the right to carry out such monitoring" (Article 50 paragraph 1 subparagraph 7 of the Styrian Constitution). Contractual agreements of this kind have to be concluded by Styria's Land Government. This means that the jurisdiction of the regional audit office to monitor the administration of public funds by housing developers depends on action to be taken by an administrative body and is created only by way of a contractual agreement to be entered with the entity concerned.

This jurisdiction of the regional audit office differs crucially from the jurisdiction of the Federal Court of Audit to monitor the administration of public funds by legal entities in that the jurisdiction of the regional audit office is established by a contractual agreement (to be) entered into for that purpose. Pursuant to Article 121 paragraph 1 and the first sentence of Article 126a of the Constitution, jurisdiction of the Federal Court of Audit may be created solely and directly by formal enactment of a law. Under the Constitution, therefore, only legislative bodies, but not (also) administrative bodies can determine the monitoring powers of the Court of Audit. The requirement that jurisdiction of the Federal Court of Audit can be created solely and directly by formal enactment of a law – and, correspondingly the prohibition that jurisdiction can be created by action of an administrative body – is a key feature of the monitoring function by the Federal Court of Audit. And this feature is also essential for the conception of the "regional audit office" as defined in Article 127c of the Constitution because – even following the amendment of the Constitution by Federal Law Gazette I 98/2010 – the regional audit offices are required to be "analogous" to the Federal Court of Audit.

Thus, to the extent of its jurisdiction provided under Article 50 paragraph 1 subparagraph 7 of the Styrian Constitution, the Styrian Audit Office lacks the necessary property of being "analogous" to the Court of Audit. In principle, the constitutional legislator at Länder level can provide for the regional audit office to have such jurisdiction. However, the constitutional legislator cannot provide for jurisdiction of the Constitutional Court to decide on disputes concerning such jurisdiction.

Therefore, Article 50 paragraph 1 subparagraph 7 of the Styrian Constitution contradicts Article 127c subparagraph 1 in conjunction with the first sentence of Article 126a of the Constitution.

IV



Events and International Relations

History of Events in 2022

21 February 2022

Christoph Grabenwarter (President of the Constitutional Court) and Johannes Schnizer (Member of the Constitutional Court) attend the Conference of the Heads of the Supreme Courts of the EU Member States, held in Paris to mark the French presidency of the Council of the European Union.

21–22 March 2022

Bilateral meeting with the Constitutional Court of the Republic of Slovenia in Vienna.
Slovenian participants: Matej Accetto (President of the Slovenian Constitutional Court), Rajko Knez (former President), Rok Čeferin (Vice-President), Špelca Mežnar (Judge), Marijan Pavčnik (Judge), Klemen Jaklič (Judge), Katja Šugman Stubbs (Judge) and Sebastian Nerad (Secretary General)
Austrian participants: Christoph Grabenwarter (President), Verena Madner (Vice-President), Johannes Schnizer (Member), Georg Lienbacher (Member), Ingrid Siess-Scherz (Member)

Topics:
- Review of measures introduced to combat the pandemic'
- Constitutional justice and its function for a state governed by the rule of law

7–8 April 2022

Study visit to Vienna by judges from the Constitutional Court of the Republic of Albania.

Participants of the Albanian Constitutional Court:
Elsa Toska (Judge), Altin Binaj (Judge), Përparim Kalo (Judge)

Participants of the Austrian Constitutional Court:
Stefan Leo Frank (General Secretary), Cornelia Mayrbäurl (Media Affairs), Johannes Schön (Asylum), Josef Pauser (Library), Marianne Bruckmüller (Office of the President), Reinhild Huppmann (International Affairs)

Topics:
- Internal management (Part I): file management and procedure
- Internal management (Part II): publication of decisions – protection of personal data in cases of individual complaints – the use of IT
- Researching and studying methodology
- Distinctions between constitutional and administrative jurisdictions based on the nature of legal acts – normative or individual ones – and the organs which have issued them

2 May 2022

Memorial ceremony for Constitutional Court Judge Kurt Heller (died 2020).

3 May 2022

Exhibition entitled “In the name of the Republic – the Constitutional Court and Hans Kelsen” opens at the Constitutional Court.

5–6 May 2022

Speech on “Human rights as the basis for democracy in Europe” at Eötvös Loránd University in Budapest and award of an honorary doctorate to President Grabenwarter.

25 May 2022

The Circle of Presidents, a preparatory meeting in advance of the XIX Congress of the Conference of European Constitutional Courts (CECC) in Chișinău, is held online. The Constitutional Court of the Republic of Moldova holds the presidency of the CECC until 2024.

31 May 2022

President Grabenwarter and a member of the legal staff of the Constitutional Court talk to apprentices at Siemens City in Vienna about the Constitution, fundamental rights and democracy. The President has been visiting schools regularly for the last three years to encourage interest in topics related to constitutional law.

8 June 2022

Short visit to the Constitutional Court by the President of the French Conseil constitutionnel Laurent Fabius and panel discussion with President Grabenwarter and Vice-President Madner at the Vienna University of Economics and Business.

8 June 2022

Vice-President Madner attends the solemn hearing at the European Court of Human Rights (ECtHR) in Strasbourg.

4 July 2022

Study visit to Vienna by judicial clerks from the German Federal Constitutional Court; guided tour of the building; welcome by President Grabenwarter and Vice-President Madner; meeting and discussion with current and former clerks of the Constitutional Court.

11–12 September 2022

Meeting of the German-language constitutional courts in Lausanne: President Grabenwarter, Vice-President Madner, Members of the Constitutional Court Michael Holoubek and Michael Mayrhofer attend the meeting of the German-language constitutional courts, the CJEU and the ECtHR; opening address on the subject of "Rights of accused persons in covert investigations" by Michael Mayrhofer.

16 September 2022

Short visit to Vienna by two constitutional judges and two assistant judges from the Constitutional Court of Taiwan; President Grabenwarter welcomes the delegation at the Vienna University of Economics and Business.

29 September 2022

Artist Victoria Coeln, President Grabenwarter and Vienna Executive City Councillor for Cultural Affairs Veronica Kaup-Hasler speak at the opening of the "Lichtprojekt 2022" festival of lights on the theme of "Constitution in the light of art".

30 September 2022

Egils Levits, President of Latvia, delivers the speech to mark Constitution Day; the Austrian Federal President and the Federal Chancellor give welcoming addresses.

4–7 October 2022

President Grabenwarter and Marianne Bruckmüller (Office of the President) attend the 5th Congress of the World Conference on Constitutional Justice (WCCJ) in Bali.

7 October 2022

Member of the Constitutional Court Georg Lienbacher represents the Court in Brussels in the dialogue between the European Commission and the heads of the supreme courts of the EU Member States initiated by EU Commissioner for Justice Didier Reynders.

9–10 October 2022

Vice-President Madner attends the 14th Luxembourg Expert Forum on the development of Union Law, organized by the CJEU in Luxembourg presenting a keynote speech on "Green deal – government action of the Union in climate protection and the functions of the law".

9–11 October 2022

Member of the Constitutional Court Michael Mayrhofer virtually attends the 5th Plenary Assembly of the GNEJ – Global Network on Electoral Justice.

20–21 October 2022

Member of the Constitutional Court Georg Lienbacher participates in the ceremony and international conference held in Tirana to celebrate the 30th anniversary of the Constitutional Court of the Republic of Albania and gives a keynote speech on "Constitutional justice and its function for a state governed by the rule of law".

25 October 2022

President Grabenwarter takes part in the panel discussion at an international conference commemorating the 100th anniversary of the constitution of the Republic of Lithuania and the 30th anniversary of the Lithuanian Constitutional Court.

26 October 2022

President Grabenwarter and Member of the Constitutional Court Georg Lienbacher welcome over 800 visitors to the Constitutional Court's open day and answer questions.

16 November 2022

Short visit to the Constitutional Court by Domnica Manole, President of the Constitutional Court of the Republic of Moldova and current Chair of the CECC Circle of Presidents, for an initial meeting and discussion with President Grabenwarter and Vice-President Madner.

17 November 2022

Upon the invitation of the Bavarian Minister of Justice, President Grabenwarter takes part in a panel discussion at the Bavarian Representation in Brussels on the subject of "Multilevel cooperation of the European constitutional courts – moving forward together".

21 November 2022

Trilateral meeting of the Presidents of the Constitutional Courts of the Czech and Slovak Republics and the Austrian Constitutional Court, held in Brno upon the invitation of President Rychetský.

5–6 December 2022

President Grabenwarter attends the Judicial Forum held in Luxembourg to mark the 70th anniversary of the Court of Justice of the European Union.

15 December 2022

President Grabenwarter gives the Constitution Day speech at the Constitutional Court of Slovenia in Ljubljana.

Constitution Day 2022: Speech

Egils Levits

President of the Republic of Latvia

The European Union Member States' Common Model for the Government System of a Constitutional Democracy

I.

I feel highly honoured today to speak before the Austrian Constitutional Court and to celebrate with you such a significant date for a constitutional democracy: the 102nd anniversary of your Constitution. My congratulations to you all!

The anniversary of the Austrian Constitution is a special occasion. To truly appreciate its significance, we need to take a closer look at the significance of the constitution and its impact on our daily lives.

The constitution is a legal instrument that sets the limits of state power and ensures control of power. As a political instrument, the constitution defines the main state institutions, distributing power in a way to ensure highly efficient decision-making processes and to prevent the abuse of power. As a social instrument, the constitution shapes the society we live in, providing a stable framework for the values that society has agreed upon.

Not only for legal experts is the 102nd anniversary of the Austrian Constitution an occasion for celebration. The constitution is important for each and every one of us – because it guarantees democracy, the rule of law and protection of human rights. At the same time, each and every citizen plays an important part in strengthening constitutional values, thus contributing to a functioning constitution. If there is no one to advance the cause of the constitution, it will not translate into practice and remain a dead letter.

The constitution needs judges in order to ensure its application. Whether or not the constitution is truly effective and shapes everyday society, or whether it merely gathers dust on the shelf, ultimately depends on judges, and constitutional judges in particular. The constitutional court brings to life the constitution. Every judge both enforces and safeguards the constitution.

Ladies and gentlemen of the judiciary, I would like to congratulate you most warmly on the Austrian Constitution's anniversary, and I wish you wisdom and energy in your efforts to strengthen Austria's constitutional values.

II.

Latvia and Austria can look back on a long history marked by a relationship of trust and successful cooperation. During the Austrian World Summit in early July of last year, I had the pleasure of meeting with Mr Van der Bellen, the Federal President of Austria.

This morning, we continued our conversation. We exchanged thoughts about bilateral policy matters as well as current issues relating to the European Union, security policy and global policy. Dear Mr President, I am looking forward to collaborating with you, as we move forward the relations between our two countries and contribute to the progress of the EU. With Europe once again facing daunting challenges, effective policy dialogue is of even greater significance.

III.

It is hard to find countries in Europe with constitutions going back 100 years or more – Austria and Latvia are exceptions.

This makes it a special year for Latvia as well. One hundred years ago, on 15 February 1922, the first freely elected parliament of the Latvian people, the Constitutional Assembly, adopted the Latvian Constitution. On the occasion of that anniversary, Latvia also hosted a number of conferences with international participants.

The Austrian Constitution, which was inspired by Hans Kelsen, might be termed our Constitution's big sister. In their basic structure the Latvian and the Austrian Constitutions display certain similarities.

Every constitution reflects the historical period in which it was established – and is nonetheless a living piece of legislation that develops over time. Our two constitutions have survived a full century. Nevertheless, none of the values enshrined therein, as nations committed to democracy and the rule of law, can be seen as antiquated or unsuited to today's modern world. Because the traditional values of any Western democracy remain unchanged: democracy, the rule of law, human dignity, freedom and the right to property.

And modern technologies, such as digital communications, arising long after the Austrian Constitution and the Constitution of the Republic of Latvia, have in no way affected the principles and values underlying any Western society. New communication technologies must not render ineffective human rights such as those to dignity, freedom, equality and a fair trial. Our constitutions therefore need to respond to the challenges arising from today's realities and endeavour to define modified rules for constitutional democracies that uphold constitutional principles and values.

IV.

The European Union is a union of constitutional democracies. It is built on common values and on a common understanding of the basic principles of democracy, the rule of law and human rights. These three elements are the pillars of the model for the government system of a constitutional democracy. Strictly speaking, this model came into being only after the Second World War, even though its elements go back much farther in history.

What marks this model of the constitutional democracy is that these three elements are uniquely balanced in defined proportions and not simply added together. For example, it would not be compatible with the model of the constitutional democracy if democracy strongly outweighed the rule of law. Nonetheless, this balance is not rigid or inflexible, instead it can be adjusted – within certain limits.

V.

What is important to note here is that this model is not embodied in a specific formal structure. Although the systems of government of the Member States of the European differ, each system falls under the same common model. In other words, the common model of all EU Member States prevails as a normative standard for assessing the government system of each individual state, constituting one of 27 variants.

This common model can only be deduced through abstract reconstruction. When reconstructing the model, the key focus is on studying the different legal systems by comparison (comparative law). The basis of the abstract model is defined by identifying the common principles of the 27 government systems, comparing in each case how the three elements of democracy, the rule of law and human rights are embodied and mutually balanced. Other Western states may be used additionally as examples for legal comparison.

Besides comparative law, other components of this abstract model include legal science, and here especially constitutional law, European law, and other non-legal scientific disciplines (such as political science or sociology).

Lastly, important insights can be reaped from the case law of the individual national courts, in particular the Member States' constitutional courts, and the rulings handed down by the Court of Justice of the European Union (CJEU). Recently, particularly the CJEU's rulings on Hungary and Poland have been relevant in this context.

All of these components contribute to reconstructing the constitutional democracy. The Treaties of the European Union require the EU Member States to comply with this common model. This is necessary, first and foremost, on legal grounds, as the Union is only able to function if the government systems of all Member States are founded on the same principles of the constitutional democracy. It would have a strong negative impact on the functioning of the European Union as a whole if one of the Member States had an authoritarian system.

Secondly, compliance with the common model is necessary for policy-making. The European Union goes far beyond an economic union. It is also – and increasingly so – a political union. Yet, a political union is dependent on solidarity among the citizens of its Member States, the binding power of which largely depends on common shared values. The values of a society committed to constitutional democracy strongly differ from the values of a society with another system of government. An authoritarian Member State would therefore strongly limit the sort of solidarity that the European Union needs in order to function as a political union.

VI.

At this point I would like to address the three pillars of this common model: democracy, the rule of law and human rights.

Democracy essentially refers to a political system in which government decisions are legitimized by the majority. It should be possible to ultimately trace all government decisions back to the will of the people, via the chain of democratic legitimacy. Democracy is often seen by society as a given. Yet we should always be aware of the fact that democracy is subject to threats and risks. Democracy consistently faces new challenges, arising from fundamental changes affecting how we live together in society, but also from technology. This is why we need to be consistently watchful, prepared to defend democracy.

As society becomes increasingly complex, the government decisions taken to tackle this complexity through rational means become less and less transparent. Added to this is the impact of social networks. On the one hand, these networks provide a platform to many citizens previously not engaging in public life. On the other hand, they prevent any deeper discussion of core issues, while reducing participation to little more than expression of opinion. These changes reinforce populist trends in the political arena.

The electorate may often find populist rhetoric strongly appealing. Populist groups claim to represent the entire nation or at a minimum a majority of the population, while at the same time accusing their opponents of representing a corrupt elite that must be forced out of power. Such groups offer simplistic solutions to real or imagined problems, without any basis in rational arguments. The prospect of simplistic solutions in the face of a complex world can often be highly appealing to voters.

VII.

This trend is particularly alarming from the standpoint of a constitutional democracy: Populist rhetoric is usually aimed at discrediting and weakening institutions, in the broadest sense, of a constitutional state under representative democracy. In modern mass society, the chain of democratic legitimacy can – with the exception of referendums – vonly be ensured by intermediary institutions of society and government (free media, political parties and NGOs), government institutions (parliament, independent courts) as well as by clearly defined procedures (such as elections).

Populist groups, with their limited appreciation of democracy, associate democracy exclusively with majorities in elections or referendums. Populists especially target independent justice when attacking the system. It would seem a paradox that populism, while verbally espousing democracy, at the same time weakens it through a narrow understanding of what constitutes it. Populism ignores the need for complex mechanisms of institutions and processes, i. e. a system of checks and balances, in order to translate the will of the people into government decisions.

By discrediting democratic institutions and then taking control of them through elections, populists can by seemingly democratic means take over the entire state. Once in power, they attempt to abolish democratic mechanisms in a bid to remain in power. By following this procedure, it is possible to transform a democracy into an undemocratic regime.

VIII.

But democracy is not without defence, or at least should not be. Part and parcel of any constitutional democracy is the notion of a defensive democracy, one that is able to protect its existence. Defensive democracy infers that the freedoms guaranteed by a democracy must not be used to eliminate that democracy. Citizens and institutions alike have the duty of defending and protecting democracy, even when threatened by the majority.

Defensive democracy is a political and legal concept that achieved recognition in post-World War II Europe, especially in Germany (referred to as wehrhafte Demokratie). It was a reaction to the self-destruction of democracy witnessed in Germany in 1933. Numerous constitutional courts in Europe have adopted this legal concept, including those of Latvia, Germany, Italy and others.

A defensive democracy is a political system that prevents the abuse of democratic freedoms to contravene basic democratic principles. Democratic defence mechanisms are triggered whenever anyone attempts to apply freedom of speech or assembly, or any other expression of political freedom, against the democratic order. These mechanisms are designed to thwart any such developments. Democracy cannot permit any attempts to undermine its principles. This is essentially what is meant by defensive democracy.

In Latvia, the principle of defensive democracy derives from Article 1 of the Constitution, the Satversme, and the Latvian Supreme Court has interpreted this principle in detail. I would like to cite here a thesis put forth in a ruling by the Latvian Supreme Court:
"A democratic government system does not have to wait until measures taken specifically to abolish that democratic government system have reached a level where the democratic system has actually become destabilized and is threatened. This is because fending off such threats could require far greater effort on the part of the state, and society might be forced to accept even greater restrictions of rights. Moreover, the outcome would be less certain. It would then perhaps be too late. The state therefore has both the right and duty to prevent any such threat early on." (Supreme Court, 30 April 2013, ruling no. SKA-172-2013, paragraph 20).

IX

Getting back to the European Union's common model, which consists of democracy, the rule of law and human rights, I would like to underscore the important role that judges play in defending the rule of law. Judges strengthen and put into practice the principle of defensive democracy.

The EU's values are not ranked according to any hierarchy. Nonetheless, respect for the rule of law is an essential condition for protecting the other basic values on which the Union rests, specifically freedom, democracy, equality and respect for human rights. Respect for the rule of law is inseparably tied to respect for democracy and fundamental rights. It is not possible to respect democracy and fundamental rights without respecting the rule of law.

The EU Member States have each affirmed their place within Europe as a cultural space and within the legal tradition shared by continental Europe. My perception of the European Union is not only one of a political union but also a union of rights and values, with the rule of law pervading all of these aspects. This makes it all the more important that all of these countries, which are united by common values, develop a common understanding of those values – including a common perception of the rule of law – and that they affirm these values.

In this context, common understanding does not rule out pluralism, and specifically not value pluralism. The Court of Justice of the European Union has made the following statement concerning the nature of European integration: "The common values of Article 2 of the Treaty of the European Union have been identified and are shared by the Member States. They define the very identity of the European Union as a legal order common to those States." At the same time, Article 4(2) of the Treaty of the European Union (TEU) affirms that the European Union respects the national identities of the Member States inherent in the countries' fundamental and political and constitutional structures.

This way it is ensured that any conflict between the values constitutive for the European Union and the values held by Member States can be avoided. On the one hand, our common constitutional traditions are an integral part of EU law, and on the other hand the common values as defined by the EU have been incorporated into the individual national constitutions.

X.

Courts play a decisive role in the concept of defensive democracy, and thus in the rule of law, the second basic element of the constitutional democracy I mentioned previously. Defensive democracy means limiting democratic freedoms in order to preserve them. Determining the limits of democratic freedoms is ultimately the task of independent justice.

This brings us to the second element of the constitutional democracy – the rule of law. In the context of government systems, the rule of law means that decisions taken by the executive and legislative branches, i.e. the two democratic powers acting on the will of the people, will be subject to control by independent justice, with the constitution usually being the ultimate control standard.

XI.

In this connection, it is somewhat alarming to observe the differing attitudes toward the rule of law, and notions of it, increasingly emerging within the European judicial area. This can be seen, for instance, in how the principle of the rule of law is variously practiced in Poland and Hungary – and in the European Union's disputes with these two Member States.

A special challenge recently was the ruling handed down by the Constitutional Tribunal of the Republic of Poland on 7 October 2021. In this judgment the Constitutional Tribunal ruled that certain articles of the Treaty of the European Union are not compatible with the Polish Constitution. The ruling calls into question fundamental principles of the European Union, including the primacy of European law and the principle of loyalty.

Conversely, the Court of Justice of the European Union handed down two judgments on 16 February 2022 in the cases of Hungary (C-156/21) and Poland (C-157/21), both of which had applied for the annulment of Regulation 2020/2092, claiming that it 'circumvented' the procedure laid down in Article 7 TEU. The CJEU rejected the applications of both Hungary and Poland, arguing that these countries had breached the principle of the rule of law. The Court pointed out that breaches of the principles of the rule of law committed in a Member State may seriously affect the sound financial management of the Union budget or the protection of its financial interests.

There was much public discussion in the European Union, referring to the cases using critical terms including 'lawfare'.

XII.

Alongside democracy, the rule of law is the second element of the model government system for a constitutional democracy. In the context of constitutional law, the rule of law requires that all relations between the state and its citizens are governed by law and justice; that the constitution is on top of the hierarchy of all laws and regulations; that independent justice controls actions taken by the executive (and usually also the legislative) branch, evaluating this activity using the constitution as the standard of review; and that the state respects citizens' rights.

These fundamental principles of the rule of law are uniform throughout the European Union. When assessing any potential breach of the rule of law in a specific case, the Court of Justice of the European Union can invoke specifically the common constitutional traditions shared by the Member States, in the shaping of which in turn the various national constitutional courts have a key role.

XIII.

When assessing such breaches of the rule of law, the CJEU has to consider the core of the particular national constitution in general. This core, protected by the particular country's constitutional court, is inherent in the concept of national identity as referred to in Article 4(2) TEU. This approach is required to be taken in order to avoid any conflicts with national constitutional courts.

The national constitutional courts have the final say in determining what makes up the core of their state's constitution, and thus in construing the concept of national identity as referred to in Article 4(2) TEU. In this way, the Member States of the European Union continue to be sovereign states, while, consequently, the European Union is not a state. However, each national constitutional court has to respect the judgments made by the CJEU on matters outside the core of the country's constitution.

XIV.

As final interpreters of the national constitutions, constitutional courts and constitutional tribunals apply a legal procedure to rule on policy issues (in contrast to political institutions including parliaments and governments that follow political procedures to decide the same questions).

As mentioned previously, the constitutional traditions of the Member States represent a separate, independent source of EU law. The CJEU is required to consider this source when making judgments.

This means that a common European constitutional space has formed from the constitutional law of the Member States and from EU law. This common constitutional space has two dimensions: the European dimension and the national constitutional dimension of each of the Member States. These two dimensions exist parallel to one another and autonomously, yet are mutually permeable. National constitutional law is limited by European Union law. The limits are defined based on the principle of the primacy of Union law. Union law, conversely, is influenced and limited by the national constitutional law of each of the Member States, as it invokes common constitutional traditions and as the bodies of the European Union, including the CJEU, respect the national identities of the Member States.

XV.

It remains somewhat unclear nonetheless to which degree national identities need to be respected and who has the last say: the CJEU or the particular national constitutional court involved.

I think we need to differentiate here. I understand and consider it legitimate for each Member State to desire and strive to protect its national identity and core constitutional law. The cores of Member States' constitutions are in many cases similar but not identical. A Member State's constitution, including its core, reflect the country's history and culture as well as other features that are unique to it. Where an issue touches the core of a Member State's constitution, it is the national constitutional court that should ultimately rule on the issue. The CJEU must respect that ruling and subsequently integrate it into its own decision.

These fundamental constitutional values that form the core of a Member State's constitution have developed over the course of that nation's history. Each nation's past experiences have helped shape it and been a source of lessons learned.

Several Member States explicitly mention such experiences in their constitutions. Latvia is among those states. The preamble of our Constitution reflects the core of the Constitution and, at the same time, our national identity. It describes in brief the historical experiences of the Latvian people, such as Latvia's victory in the struggle for freedom (1918–1920), the refusal to recognize foreign occupation between 1940 and 1990, resistance against the occupying power, and how Latvia regained freedom by restoring national independence based on continuity. The preamble of the Latvian Constitution also enumerates the fundamental values and principles of the Latvian state: Latvia as democratic, socially responsible and national state is based on the rule of law and on respect for human dignity and freedom; it recognizes and protects fundamental human rights and respects ethnic minorities. The people of Latvia protect their sovereignty, national independence, territory, territorial integrity and democratic system of government of the state of Latvia.

XVI.

Neither when the European Union was founded nor when a particular Member State joined did the core of any European Union Member State's constitution contain an element that opposed the EU Member States' common understanding of the rule of law, as described above. Any Member State claiming at a later point that their understanding of the rule of law did not correspond to the common understanding but nonetheless was part of the core of their constitution would be withdrawing from the common European constitutional space.

On this issue, the CJEU explicitly ruled: "Indeed, under Article 4(2) TEU, the European Union must respect the national identities of the Member States, inherent in their fundamental political and constitutional structures. However, in choosing their respective constitutional model, the Member States are required to comply, inter alia, with the requirement that the courts be independent stemming from the above-mentioned provisions of EU law" (CJEU 22 February 2022, Case C 430/21, paragraph 43). The specific case addressed here relates to the independence of the courts, which represents a key element of the rule of law.

XVII.

This implies that the Member States' national identities as well as the core of their constitutions are, or must be, homogeneous to some extent. The historical experiences and cultural characteristics or traditions, such as the significance of the national language, may vary strongly among Member States. Yet the understanding of what the rule of law means needs to be largely homogeneous among all Member States. This need results from the European Union's functional requirements, as the EU is more than merely a common economic area and, beyond that dimension, has the character of a political union based on common values.

Of all of the European Union's underpinning principles, the rule of law is the principle that is, and must be, most homogenous among Member States. Further progress in defining what the rule of law means in detail should not, therefore, be a unilateral matter but should take place jointly, with the CJEU and the national constitutional courts participating.

XVIII.

The rule of law is an element of a constitutional democracy that is closely related to human rights, the third element of the constitutional state that I introduced at the outset of this speech. There is no rule of law where human rights are not protected, and vice versa. The rule of law is the decisive mechanism for putting human rights into practice.

The rule of law and human rights are two expressions of one and the same principle – the freedom to lead a life in dignity. The rule of law and human rights are thus inseparably and intrinsically related. The rule of law is the guarantee for the two other elements – democracy and human rights. Without the rule of law, and without independent justice in particular, the existence of democracy and human rights would solely depend on the goodwill of the two political branches of state power: the executive and the legislative branch. This would entail the risk of erosion of democracy and human rights over time..

XIX.

In closing, I wish to point out that the rule of law plays a fundamental role not only in constitutional democracies but also in certain phenomena at international level, in particular the "rules-based international order". The concept of a rules-based international order provides the political foundation for contemporary international law, in other words, for a world peace order.

In view of the recent war in Europe, it is imperative that we strengthen every aspect of the rule of law in all areas.

International relations

The Constitutional Court has always been committed to sharing expertise and maintaining institutional relations nationally and internationally and raising awareness of and interest in Austrian constitutional law, particularly the fundamental rights it guarantees, constitutional justice in general and the Court's activities in particular.

Thanks to progress in handling of the COVID-19 pandemic, many of these exchanges of expertise and information could once again take place in person in 2022.

One important event of the year – which was held online – was the preparatory meeting of the Conference of European Constitutional Courts (CECC). The Circle of Presidents met on 25 May to decide on the subject, date and agenda of the XIX Congress of the CECC. Well in advance of this meeting, the Constitutional Court of the Republic of Moldova, which currently holds the presidency of the CECC, together with a number of other European constitutional courts demanded a vote on terminating (specifically) the membership of the Constitutional Court of the Russian Federation. The Russian Constitutional Court preempted this move, however, by declaring its withdrawal from the Conference of European Constitutional Courts on 5 March.

There was further discussion of this sensitive topic at the 5th Congress of the World Conference on Constitutional Justice (WCCJ), which took place in Bali in October. Here again the event itself was preceded by discussion, initiated by the European regional group (CECC), on the question of the conditions for exclusion of a member from the WCCJ. An amendment to the WCCJ Statute governing the circumstances for exclusion was proposed. On 5 October, shortly before the start of the Congress, the Constitutional Court of the Russian Federation terminated its membership of the WCCJ itself.

After the Congress, a communiqué was adopted emphasizing the contribution of constitutional courts to the prevention and resolution of conflicts, social peace, protection of fundamental rights, preservation of the rule of law and its institutions, and democracy. The text also focused on enhancing the independence of constitutional courts and solidarity with courts facing fierce or unfair criticism or undue pressure by other state powers or the executive or legislative branches. The Bureau of the WCCJ will offer its support in these areas.

In continuing with a previous format of expert discussions (albeit with different participants), a trilateral meeting was held at the invitation of President Rychetský, long-time President of the Czech Constitutional Court, in November. President Grabenwarter and Ivan Fiačan, President of the Slovak Constitutional Court travelled to Brno to take part. All three Presidents agreed on the need to strengthen cooperation in future with constitutional courts that are committed to upholding the values of democracy and the rule of law.

The Swiss Federal Supreme Court organized the meeting of the German-language constitutional courts, the CJEU and the ECtHR ("the meeting of the six" for short) in Lausanne. This meeting of delegations from the Court of Justice of the European Union, the European Court of Human Rights, the German Federal Constitutional Court, the Liechtenstein State Court, the Swiss Federal Supreme Court and the Austrian Constitutional Court is traditionally held every two years and is intended to foster dialogue between these six supreme courts. Key topics discussed in Lausanne were "The role of the judiciary with regard to climate action", "Legal protection for individuals in the context of international sanctions" and "Rights of accused persons in covert investigations". President Grabenwarter, Vice-President Madner, Members of the Constitutional Court Michael Holoubek and Michael Mayrhofer attended on behalf of the Constitutional Court.

In 2022, the Constitutional Court again took up invitations to various international conferences. President Grabenwarter and Member of the Constitutional Court Johannes Schnizer attended a conference in Paris (hosted by all three of France's supreme courts: the Conseil constitutionnel, the Conseil d'Etat and the Cour de cassation) to mark the French presidency of the Council of the European Union.

At the invitation of the Bavarian Minister of Justice, President Grabenwarter joined German Federal Constitutional Court Judge Peter M. Huber, Advocate General at the Court of Justice of the European Union Juliane Kokott and former Vice-President of the European

Court of Human Rights Angelika Nußberger in Brussels for a panel discussion on "Multilevel cooperation of the European constitutional courts – moving forward together".

In December, the President travelled to Luxembourg to attend the Judicial Forum, a special meeting of judges, devoted to the topic "Bringing justice closer to the citizen" held to mark the 70th anniversary of the CJEU.

Soon after that, he gave an address on the subject of the rule of law in Europe at a ceremony at the Constitutional Court of the Republic of Slovenia in Ljubljana.

In June, Vice-President Madner attended the solemn hearing at the European Court of Human Rights and a seminar organized around that event. She also took part in the Luxembourg Expert Forum on the subject of "International challenges – perspectives for the EU's improved ability to act". Topics discussed included guarantees of fundamental freedoms during the pandemic and future opportunities for effective international climate protection.

Member of the Constitutional Court Georg Lienbacher represented the Constitutional Court at a meeting in Brussels aimed at initiating a dialogue between the European Commission and the presidents of all European supreme courts. He also travelled to Tirana to represent the Constitutional Court at an international conference marking the 30th anniversary of the establishment of the Constitutional Court of the Republic of Albania. He gave the keynote speech on "Constitutional justice and its function for a state governed by the rule of law".

Apart from participation in the international events as described above and attendance of other events internationally, the Constitutional Court also issued various invitations to meetings in Vienna in 2022.

In March, it received a delegation from the Slovenian Constitutional Court for a bilateral meeting. Discussions focused on the experiences of both courts in examining measures put in place to combat the COVID-19 pandemic.

In early summer, President of the French Conseil constitutionnel Laurent Fabius visited the Constitutional Court in Vienna. Together with President Grabenwarter and Vice-President Madner, they explored the question of how constitutional courts can help safeguard fundamental rights and the rule of law during a time of crisis, i. e. a pandemic and a war in eastern Europe. Other topics discussed included the role of constitutional courts in relation to environmental protection and the effective enforcement of associated rights.

The President of the Moldovan Constitutional Court and current Chair of the Conference of European Constitutional Courts (CECC) Domnica Manole visited the Constitutional Court for an initial meeting and discussion. She outlined the geo- and sociopolitical problems her country faces and the challenges that the Republic of Moldova must overcome as an accession candidate country before it can comply with EU criteria as a democratic state under the rule of law. The Constitutional Court fully supports these aims and efforts.

In April, judges from the Albanian Constitutional Court travelled to Vienna on a study visit to discuss subjects including structures at the Constitutional Court and the Court's experiences with computer-assisted processes and procedures, its media relations and knowledge management.

After a long time, July saw another bilateral meeting of judicial clerks from the German and Austrian Constitutional Courts. Views and experiences on the topics of "Competences and jurisdiction in relation to parliamentary disputes" and "Challenges of the COVID-19 pandemic" were exchanged in the meeting.

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