

Austria and Article 6 of the European Convention on Human Rights

Theo Öhlinger *

I.

The European Convention on Human Rights (ECHR) has the rank of *directly applicable federal constitutional law* in Austria and is therefore formally fully equivalent to the original catalogue of fundamental rights in the Austrian Federal Constitution, the Basic Law of the State on the General Rights of Citizens taken from the 1867 monarchical constitution. Today the ECHR has a firm place in Austrian high court jurisprudence – though admittedly only after a lengthy trial period¹ – principally, though not exclusively, in the jurisprudence of the Constitutional Court (Verfassungsgerichtshof = VfGH) that has primary competence for deciding on infringements of fundamental rights. The VfGH has displayed almost unreserved readiness to follow the European Commission's and European Court of Human Rights' interpretation of the ECHR and, where necessary, to correct its rulings accordingly.² In fact, several provisions of the ECHR are among the regulations most often cited and applied by the VfGH. One of these is Article 6 of the European Convention on Human Rights.

Article 6 of the ECHR has raised serious problems for Austria, some of them typical for a continental European legal system. Back in 1965 the VfGH was already expressing concern for what it saw as the "almost revolutionary" consequences of the Convention, and sought to limit its impact by issuing restrictive interpretations.³ It gradually retreated from this position, especially in the 1980s, under pressure from the Strasbourg case law and criticism from legal scholars.⁴ However, in the sensational *Mittner* decision of 14 October 1987, the VfGH set a limit to the scope of Article 6 and declared that any broadening of the interpretation would be incompatible with the basic principles of the

* University of Vienna.

¹ See F. Ermacora, M. Novak, H. Tretter (eds.), *Die Europäische Menschenrechtskonvention in der Rechtsprechung der österreichischen Höchstgerichte* (1983).

² See VfGH Slg 7099/1973, 10701/1985, 10634/1985, 10639/1985 (the citation "VfGH Slg" refers to the official annual publication of the decisions of the Court).

³ See VfGH Slg 5100/1965.

⁴ See Nowak, 'The Implementation of the European Convention on Human Rights in Austria', in N. Mikkelsen (ed.), *The Implementation in National Law of the European Convention on Human Rights* (1989) 32.

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Austrian Federal Constitution.⁵ Scarcely less momentous was the *Apothekerkammer* decision handed down on the same day to which the federal constitutional legislature was forced to react.⁶

II.

Article 6 of the ECHR guarantees everyone an entitlement to have civil rights and obligations and criminal charges decided by an independent and impartial court (tribunal) established by law. The *penal* aspect of Article 6 is in conflict with one area of Austrian law, namely *administrative penalties*.

In Austria, administrative authorities – in the first instance the district administrative authorities (Bezirksverwaltungsbehörden) and in the second instance the offices of the Länder governments – can, in a precisely regulated procedure, decide whether a regulation has been infringed and impose fines or even imprisonment.⁷ When administering penalties, these administrative authorities are subject to instructions from governmental bodies (federal ministers or Länder governments). Thus, they are not independent within the meaning of Article 6. Moreover, although decisions of the second instance are subject to review by the Administrative Court (VwGH), such review is essentially restricted to questions of law.

To safeguard its administrative penal laws, Austria declared a *reservation* to the ECHR stating that the provisions of Article 5 of the Convention (sic) would be applied so as not to interfere with the measures for the deprivation of liberty prescribed in the laws on Administrative Procedure, BGBl 1950/172, subject to review by the Administrative Court and Constitutional Court as provided for in the Austrian Federal Constitution. The Administrative Procedure Acts in BGBl 1950/172, however, in fact regulate only the *procedures* whereby administrative penalties may be imposed; the legal basis for these penalties are laid down in the provisions of offences scattered amongst the various administrative acts. The VfGH has found that it is only through reference to these substantive administrative acts that the reservation acquires any meaning at all. This interpretation has been accepted by the European Commission of Human Rights.⁸

The fact that the reservation was declared only with respect to Article 5 was no doubt due to the fact that “criminal charges” under Article 6 were at the time of accession understood as referring only to penal proceedings *in court*. This was soon perceived to be an error, therefore both the VfGH and the European Commission of Human Rights extended the reservation to encompass Article 6.⁹ The reservation was also extended to pecuniary penalties. In fact, the VfGH went even further; it applied the reservation to penal proceedings to which the Administrative Procedure Acts of 1950 cited in the reservation were not even to be applied. Specifically, the VfGH applied the reservation to financial penal law.¹⁰ Thus, in effect, every penalty imposed by an administrative authority and the pro-

⁵ See part III *infra*.

⁶ See part II *infra*.

⁷ For more on this see Öhlinger, ‘60 Jahre Verwaltungsverfahrensgesetze – Verwaltungsstrafrechtsreform: Sind die österreichischen Verwaltungsverfahrensgesetze noch zeitgemäß?’, *Verhandlungen des 9. Österreichischen Juristentages* (1985).

⁸ ECHR 15 December 1961, complaint No 1047/61, *YB* (1961) 356.

⁹ VfGH Slg 5021/1965, 6275/1970, 8234/1978, 9158/1981 etc.; European Commission of Human Rights, 3 March 1983, complaint No 8998/80, *EuGRZ* (1984) 74.

¹⁰ VfGH Slg 5021/1965.

cedure leading thereto was immune from the legal safeguards of Articles 5 and 6 of the Convention.

These broad interpretations have, however, been gradually cut back in recent years due to the impact of growing criticism. For instance, in 1984 the VfGH restricted the reservation to those areas of administrative penalty law to which the Administrative Procedure Acts of 1950 are to be applied.¹¹ Thus, the VfGH removed financial penal law from the scope of the reservation. Furthermore, in the *Apothekerkammer* decision of 14 October 1987,¹² the VfGH placed disciplinary punishments which are autonomously imposed by professional organizations within the scope of Articles 5 and 6.

The VfGH explicitly stated that in areas not covered by the reservation review by the VfGH was no longer sufficient. The validity of individual charges would have to be decided by a tribunal meeting the criteria of Article 6 in terms of both organizational structure and the procedures for pronouncing penalties. Thus, the VfGH insisted that the agency in charge of the decision be granted independence and impartiality in accordance with the criteria developed in the Strasbourg case law.¹³

In more recent decisions, the VfGH has further restricted the reservation to offences which were already part of the Austrian legal system at the time of accession to the ECHR.¹⁴ In the view of the VfGH, this does not exclude new provisions that fit within the system in force at the time of accession. But the reservation clearly no longer covers substantially new offences, even where the penalty is to be imposed by a procedure under the 1950 Administrative Procedure Acts. Nonetheless, in light of the European Court of Human Rights' case law pertaining to reservations,¹⁵ the Austrian reservation to Article 5 remains questionable even despite the restrictions recently introduced by the VfGH. Probably the reservation covers only the few offences actually defined in the 1950 Administrative Procedure Acts, which means that, in effect, it has lost all meaning in practice.

The necessity of administrative penal law reforms has, however, been beyond dispute in Austria for some time. In fact, a push for reform recently led to an amendment to the Federal Constitution Act due to come into force on 1 January 1991.

The reforms enacted by the constitutional legislature follow the case law of the European Court of Human Rights, specifically the ruling in the *Ringeisen* case¹⁶ which concerned Austria. In *Ringeisen*, the European Court of Human Rights held that a "tribunal", for the purposes of Article 6, may include authorities which, based on the criteria set forth in the Austrian Federal Constitution (Article 133), essentially constitute administrative rather than judicial bodies. Such collegial administrative bodies and their members must, however, be independent from the executive branch. Civil servants may only serve in such administrative organs if they are appointed for a period of at least 3 years and if they are not subject to any instructions from administrative bodies.

11 VfGH Slg 10291/1984.

12 VfGH Slg 11506/1987 – *Apothekerkammergesetz*.

13 See esp. the *Ringeisen* case.

14 Austria acceded to the ECHR on 3 September 1958. For the recent decisions restricting the reservations see VfGH 16 June 1987, G 141-142/86; 27 November 1987, B 1231/86; 27 November 1987, B 1233/86; 1 October 1988, G 164-166/88.

15 See the *Belilos* case, *EuGRZ* (1989) 21.

16 See *supra* note 13.

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With this as a starting point, an amendment to the Federal Constitution Act of 20 November 1988¹⁷ created a new type of authority: independent administrative senates. These senates are to rule on administrative offences, though only once the administrative stages of appeal have been exhausted. The members of these senates, who are required to have legal training, are to be appointed by the Länder governments for at least six years and it is assumed that they will be recruited largely, if not exclusively, from the civil service of the Länder and the federal government. Therefore work in these senates will probably constitute a stage in the career of an administrative officer. Critics are thus doubtful as to whether these senates will actually be independent.

The principle innovation of the November 1988 amendment is that a procedure before an independent administrative senate has been interposed between the decision of the highest administrative instance and the VwGH. The administrative senates will not decide cases in the first instance, but only after the district administrative authority and the office of the Land government have heard the case.¹⁸ At the same time, however, their decisions will not be final. Further appeal to the VwGH against the decision of the administrative senate will still be possible. The administrative senate's power of review will not, however, be confined to questions of law as is that of the VwGH. But it is doubtful, at least in individual cases, whether the taking of evidence can reasonably be carried out after more than a year; consideration of this issue suggests a potential flaw in the new pattern.

As previously noted the new arrangements will enter into force on 1 January 1991. The Austrian reservation regarding Article 5 is expected to be withdrawn on that date.

III.

Having an even greater impact on the Austrian legal system is the part of Article 6 of the Convention which entitles an individual to have his claims regarding *civil rights and obligations* decided by an independent and impartial tribunal. Problems have arisen with respect to this part of Article 6 due to the European Court of Human Rights' extremely extensive interpretation of the civil law concept embodied in the ECHR.

The Austrian legal system is – in the tradition of continental European law – characterized by the distinction between private law and public law; the separation between judicial and administrative authorities and the division of competences among courts and administrative bodies is based on this distinction. Interpreted in the context of this legal tradition, Article 6 was initially understood as a guarantee that courts would decide all matters of civil and penal law; the public-law area (administrative law area) was thought to be completely unaffected.

For quite a long time, the European Court of Human Rights' broad interpretation of the civil rights concept, which first emerged in the *Ringeisen* decision, had no impact on the Austrian system. As a rule, any decision of an administrative authority affecting individual rights was ultimately subject to review by the VwGH. The VwGH considered it "beyond any doubt that Austria (despite its accession to the ECHR) wished to retain its

¹⁷ BGBI 1988/685.

¹⁸ It may be provided by statute that in particular cases the decision of a district administrative authority may be directly challenged before one of the senates.

established and approved system of administration under comprehensive VfGH review without any major changes."¹⁹

However, when the VfGH finally ruled that in penal cases the restrictive competence of the VfGH to decide legal issues on appeal did not satisfy the requirements of Article 6, but that a tribunal instead ought to decide such cases – as definitively adjudicated in the previously discussed *Apothekerkammer* decision of 14 October 1987²⁰ – the issue presented itself in quite new terms for the area of civil rights as well. In another decision handed down the same day,²¹ the VfGH discussed this problem.

Taking the European Court of Human Rights' judgments in the *König*,²² *Sporrong and Lönnroth*²³ and *Bentham*²⁴ cases as a basis, the VfGH concluded that according to the European Court of Human Rights' case law all decision-making powers of administrative authorities had to be transferred to tribunals within the meaning of Article 6. The Court noted, however, that this would compel Austria to restructure radically its legal structure and took the view that Austria could neither have intended to accept such consequences when it acceded to the ECHR nor have foreseen that the European Court of Human Rights would develop such a broad interpretation of civil rights. In the view of the VfGH, the European Court of Human Rights' extensive interpretation of the civil rights concept in the Convention is a case of manifest judicial extension of law for which there may be sound reasons, but which imposes obligations on states which they neither intended nor agreed to accept.²⁵ Some Austrian legal scholars even characterize the European Court of Human Rights' decisions in this area as having "tendencies to turn into revolution."²⁶ The rulings are said to have "nothing to do with the application of law provided for in the interpretation rules appropriate to the special nature of the law of international agreements codified in the Vienna Convention on the Law of Treaties."²⁷

Moreover, in its *Miltner* decision the VfGH raised the question of whether "the transfer of constitutional law-making to an international organ would not constitute a *total revision of the Federal Constitution* within the meaning of Article 44(3) of the Federal Constitution Act which requires a plebiscite of the whole federal population." The VfGH thus raised the possibility that the Austrian accession to the ECHR was unconstitutional, a situation which could be rectified only through a plebiscite.

This question, which in fact is a major critique of the case law of the European Court of Human Rights, is no doubt intended to remind the Court of the possible repercussions of a future Strasbourg decision rejecting the solution developed by the VfGH, specifically a *twofold concept of civil rights*: civil rights in the narrower and broader sense. Civil rights in the narrower sense would be decisions on "rights and obligations of citizens

¹⁹ See the VfGH decision of 14 October 1987, B 267/86 = *EuGRZ* 1988, 166.

²⁰ VfGH Slg 11506/1987.

²¹ VfGH Slg 11500/1987 *Miltner* case.

²² Series A, 27, para. 85.

²³ Serie A, 52, para. 56.

²⁴ Series A, 97, para. 30.

²⁵ The VfGH based itself in this connection on the separate opinion of the Austrian judge at the European Court of Human Rights, *Franz Matscher*, in the *König* case, *EuGRZ* (1978) 422.

²⁶ H. P. Rill, 'Die Artikel 5 und 6 der Europäischen Menschenrechtskonvention, die Praxis der Straßburger Organe und des Verfassungsgerichtshofes und das österreichische Verfassungssystem', in *Beiträge zum Verfassungs- und Wirtschaftsrecht, Festschrift für Günther Winkler* (1989) 13.

²⁷ Rill, *supra* note 26, at 26; similarly H. Mayer, 'Zivilrechtsbegriff und Gerichtszuständigkeit', *Zeitschrift für Verwaltung* (1988) 473.

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among themselves.” According to the VfGH, such decisions, without exception, ought to be taken by a tribunal. In contrast, for decisions affecting the private legal sphere only in a broader sense – for example in the case at issue whereby an administrative body was asked to judge an individual’s objection to the issuance of a building permit granted to his neighbour – review by a court, in other words review by the VwGH, would suffice. The VfGH recently reiterated this twofold concept of civil rights in a case involving the termination of a permit to run a pharmacy;²⁸ in that case, however, the inapplicability of Article 6 was, according to the European Court of Human Rights’ case law,²⁹ beyond any doubt.

In recent decisions the VfGH has found that the competence of administrative authorities to decide on compensation for damages resulting from hunting,³⁰ to determine the amount of indemnity for expropriation³¹ and to decide on claims arising from agreements between social insurance institutions and doctors³² violates Article 6. Statutory provisions furnishing administrative authorities with the competence to adjudicate these types of disputes have therefore been struck down on constitutional grounds. The VfGH has thus indicated that in the “narrower field of civil rights” it is quite prepared to follow the case law of the European Court of Human Rights.

The European Court’s extensive interpretation of the civil rights concept embodied in Article 6 has become a problem for many continental European countries and it may be the case that the Austrian VfGH has over-dramatized the issue. But the VfGH’s decisions must be understood as arising from the national court’s concern about its ability to reconcile the European Court of Human Rights’ interpretation of the ECHR with the domestic legal system. The VfGH found itself coming up against a limit that it did not feel able, in its *self-perception as a court*, to go beyond, and was thus forced to issue a warning.

The ECHR continues to be dependent on voluntary acceptance by member states. Today the ECHR is a living component of the Austrian Federal Constitution which has had a significant impact on the Austrian legal system. For this very reason, the VfGH’s warning ought not to be ignored in Strasbourg.

28 13 December 1988, B 1450/88.

29 See e.g., the *König* case.

30 10 March 1988, G 211, 212/87; 28 September 1988, G 69/88.

31 24 June 1988, G 1/88; 25 June 1988, G 65/88.

32 14 June 1988, G 48/87, V 14/87.