NATIONAL LEGISLATION FOR THE IMPLEMENTATION OF (OR IN CONNECTION WITH) THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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The European Convention on Human Rights (ECHR) is an international instrument that was signed in the framework of the Council of Europe in 1950. When Austria acceded to the Convention 1958, it already had a national human rights tradition that went back to 1848, the year of the bourgeois revolution which then affected most of Western and Central Europe.

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The Austrian Diet which at the time had been transferred from revolution-stricken Vienna to the Moravian town of Kremsier (in Czech:

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[1] "Convention for the Protection of Human Rights and Fundamental Freedoms" of 4 November 1950.

[2] *See on this* CHARLES BREUNIG, *The Age of Revolution and Reaction, 1789 – 1850* (1977).

Kroměříž) elaborated a progressive set of fundamental rights which was to influence the further development of human rights in Austria after an neo-absolutist interlude between 1851 and 1859.[3] After the enactment of laws for the protection of personal freedom[4] and of the sanctity of the home[5] in 1862, the Basic Law of 1867 on the General Rights of Citizens contained a catalogue of fundamental rights and freedoms which is still in force in Austria, because the Austrian Constitution of 1920[6] for that part of Austria which was left after the dismemberment of the Austro-Hungarian monarchy,[7] did not contain a set of human rights and fundamental freedoms of its own. For this reason, Article 149, paragraph 1 of the Federal Constitutional Law incorporated the Basic Law and thus made it a – though not very systematic – part of the new Austrian Constitution.[8]

Nonetheless, the fact that the new Austrian Constitution introduced some essential changes into the Austrian legal system did also affect the traditional fundamental rights. Austria's Constitution of 1867 which remained in force until October 1918 had relied on the traditional concept, still known to some modern states, that the legislator – then the Emperor with the consent of both Houses of Parliament – can deal only with selected issues and that therefore the Executive has to take the necessary measures for the promotion of peace and security, freedom and welfare of the citizens in all areas where no enacted law existed. When legal doctrine spoke, at the time, of a reservation in favour of the law, the meaning was that the Executive was limited in its actions only in those areas where a law had already been enacted. In this time of wide executive discretion, the fundamental rights contained in the Basic Law of 1867 offered the citizens protection against encroachments of their freedoms by the Executive. This defensive function of the fundamental rights as against the Executive was considered to be of such importance that it blurred the view for their much more far-reaching potential, namely, to be also a bulwark against laws by which legislature intruded into areas which pertained to the ambit of fundamental rights and freedoms. The idea sometime

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[3] *Cf.* WILHELM BRAUNEDER, *Zum Wesen der Grundrechte des "Kremsierer Verfassungsentwurfs"*, Oesterreichische Juristenzeitung 1989, pp. 417 *et seqs.*

[4] "Gesetz zum Schutze der persoenlichen Freiheit" of 27 October 1862, RGBl. 1862/87.

[5] "Gesetz zum Schutz des Hausrechts" of 27 October 1862, RGBl. 1862/88.

[6] On the genesis of the Federal Constitutional Law ("Bundes-Verfassungsgesetz") *see* THEO OEHLINGER, *Verfassungsrecht*, 7th ed. (2007), pp. 43 *et seqs.*

[7] *Cf.* the famous remark by GEORGES CLEMENCEAU, then Prime Minister of France: "*Ce qui reste, c'est l'Autriche.*" ("*What remains is Austria*").

[8] *Cf.* OEHLINGER (*supra*, fn. 6), pp. 43 *et seqs.*

ventured that laws doing so were unconstitutional and should or could not be executed did not take roots in this period.[9]

The new Austrian Constitution of 1920 deprived the Executive of its function of operating in areas not regulated by a formal law and limited it to actions which could be based on such a law.[10] Thus, the administration ceased to be a threat to the liberties of the citizens; and it now became clear that the only remaining threat was that which emanated from acts of the legislator (now Parliament, in which the National Council had the decisive say while the Federal Council was limited to exercising a veto of a merely suspensive character). For this reason, laws trespassing on the field of fundamental rights became to be considered unconstitutional and could, for this reason, be declared null and void. Under these circumstances, the reservation in favour of the law, earlier conceived as a defence against encroachment by the Executive, were now considered a gateway for inroads of laws into the area of fundamental rights and freedoms wherever these freedoms relied, for their closer determination, on an act of legislature. And legislature – the republican as the former monarchical – was not all too reluctant to make use of these gateways.

To give an example: According to Article 5 of the Basic Law of 1867, property was inviolable, and expropriation was permitted only in those cases and under those conditions as provided by a law.[11] The provision did not say anything about compensation. Probably, § 365 of the Code of Private Law[12] was considered sufficient protection at the time because it was a general provision applicable to expropriation as such and set two conditions for such expropriation: justified public interest and equitable compensation.[13] Later, however, § 365 was regarded only one of several possible approaches to the question of compensation, and other approaches in other laws adopted for particular cases of expropriation which did nor provide for equitable compensation were also considered covered by the reservation on favour of the law contained in Article 5 of the Basic Law of 1867. This had the consequence that the guarantee of property given there was an empty shell.

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[9] *Cf. ibid*., p. 307 *et seq.*

[10] The so-called "Legality Principle"; cf. Article 18 Federal Constitutional Law.

[11] "Artikel 5. Das Eigentum ist unverletzlich. Eine Enteignung gegen den Willen des Eigentümers kann nur in den Fällen und in der Art eintreten, welche das Gesetz bestimmt."

[12] Allgemeines Buergerliches Gesetzbuch of 1811.

[13] § 365 ABGB: "Wenn es das allgemeine Beste erheischt, muss ein Mitglied des Staates gegen angemessene Schadloshaltung selbst das vollstaendige Eigentum einer Sache abtreten."

When Austria acceded to the European Convention on Human Rights, the Convention was not the first acquaintance made by the Austrian legal order with international rules for the protection of human rights. Already the State Treaty of St. Germain of 1920[14] contained related provisions, although these were directed to the protection of minorities.[15] The same applies to the State Treaty of Vienna of 1955[16] certain provisions of which extended and enlarged the protection of minorities.[17] Both cases offered examples for fundamental rights being transformed from international (treaty) law into national (constitutional) law, a procedure that was thus not unknown to Austrian constitutional law either in practice or in theory.

Yet, accession to the European Convention on Human Rights in 1958 was designed to incorporate not just one or the other additional right into the Austrian constitution but a comprehensive bill of rights as a whole.[18] This bill of rights was to have an almost revolutionary impact on the Austrian legal system, not just because it introduced certain new fundamental rights (as the right to education[19]) and new guarantees in the context of traditional rights (as the guarantees related to law enforcement through criminal and civil procedures provided for by Articles 5 and 6 of the Convention) but also and especially because all fundamental rights embodied in the Basic Law of 1867 had to be interpreted in the light of the corresponding provisions of the European Convention.

For this reason, direct application of the Convention in Austria met with opposition. Parts of the judiciary as well as of doctrine regarded the Convention an unwelcome interference with the Austrian human rights practice as it had grown (allegedly organically) in the course of almost a century and which constituted, as was contended, an adequate balance between the interests of the individual and the interests of society at large. Therefore, much was done to keep the influence of the Convention in Austria as small as possible.

In this connection, the Constitutional Court took the lead. In doing so it availed itself of some allegedly existing lack of clarity in the Austrian Constitution, a lack of clarity, however, that so far had bothered neither doctrine nor practice.

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[14] St. Germain State Treaty of 10 September 1919; StGBl. 1920/303.

[15] Articles 62 and 69 of the St. Germain State Treaty.

[16] Vienna State Treaty of 15 May 1955; BGBl. 1955/152.

[17] Articles 7 and 8 of the Vienna State Treaty.

[18] *Cf.* OEHLINGER (*supra*, fn. 6), p. 85.

[19] *Cf.* Article 2 (First) Additional Protocol of 20 March 1952.

The Austrian Constitution required (and requires) that laws or provisions in laws which were to be given constitutional rank had to be adopted by a majority of two-thirds of the members of the National Council[20] and had to be published in the Federal Official Journal[21] with a reference to its constitutional character. As regards international treaties or provisions in international treaties that were to be given constitutional rank within the Austrian legal system the Austrian Constitution also required adoption by a two-thirds majority in Parliament but did not expressly provide for a special reference to their constitutional character on the occasion of their publication in the Federal Official Journal. The Constitution could therefore be interpreted, in this context, in two ways. One way was application of the *argumentum e contrario* which ruled out the need for a special reference to the constitutional character at the time of publication because this was not expressly called for by the Constitution with regard to international treaties, in contrast to Austrian laws. The other way was the application of analogy, by the argument that the same reason which required laws of constitutional rank to be referred to as such – namely legal certainty – called also for such a reference in connection with international treaties which were to be given constitutional character.

While both interpretations had good arguments on their side, Austrian Constitutional practice had so far gone the first way and had refrained from expressly referring, on the occasion of their publication in the Federal Official Journal, to international treaties that were to have constitutional rank as "treaties amending or supplementing the Constitution". One would have thought, therefore, that it was sufficient for direct application of the European Convention as Austrian constitutional law that it had been adopted by an at least two-third majority in Parliament[22] with the intention to create constitutional law.[23]

However, the uneasiness with which the European Convention was received in parts of constitutional doctrine and practice started a new discussion on the issue of requirement of reference to constitutional character with regard to international treaties. An article appeared in one of the most prominent Austrian Legal Journals which contended that the reference requirement applied also the international treaties and that no international treaty could attain constitutional rank without having been published without

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[20] *See* Article 44, paragraph 1 Federal Constitutional Law.

[21] Bundesgesetzblatt (BGBl.).

[22] In fact, the European Convention on Human Rights was approved unanimously.

[23] Of course, the mere fact that a law is adopted by a two-thirds majority does not give it constitutional character if Parliament does not intend to enact a law of constitutional rank.

such a reference.[24] This article prepared the way for a decision of the Austrian Constitutional Court in 1961 that the European Convention, failing the reference to its constitutional character on its publication,[25] did not have the rank of a constitutional law but was to be regarded only a "simple" law which could not directly be applied in the face of existing constitutional law.[26] By this decision, the Constitutional Court justified disregard of the Convention in its own jurisprudence and succeeded in deferring application of the Convention for several years. Since opinions were divided on this issue, the Constitutional Court met with some harsh criticism in doctrine, accusing him of giving preference to formal considerations rather than to the full realisation of the human rights and fundamental freedoms contained in the Convention.[27]

It took a new effort by legislature to secure constitutional character to the European Convention. This was done by a special constitutional law of 1964 which did not only retroactively establish the constitutional rank of the Convention but also contained a lengthy list of other, previously adopted international treaties which as a whole, or provisions of which, had been adopted by Parliament with the necessary two-thirds majority but had equally not been referred to as amending or supplementing the constitution on their publication.[28]

This unequivocal commitment of Parliament to the European Convention of Human Rights gave an additional impetus to the Constitutional Court to turn to an interpretation of the Convention more receptive of human rights. Earlier, the Court had tended to declare certain provisions of the Convention embodying fundamental rights, apart from denying them (as the Convention as a whole) constitutional rank, to be not suited for direct application under the strict requirements, set up by Austrian law, for direct application of rules in favour of individuals.[29] If this standard was not met, the individual could not avail itself of such a right even if it was clear that grant of this right had been intended. These requirements included a clear indication of

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[24] *Cf.* GUENTER WINKLER, *Der Verfassungsrang von Staatsverträgen*, 10 OeZoeR, 1959/60, pp. 514 *et seqs.*

[25] The European Convention on Human Rights had been published in BGBl. (Austrian Federal Official Journal) 1958/210.

[26] *VfSlg.* (Collection of decisions by the Constitutional Court) 4049/1961.

[27] *Cf.* FELIX ERMACORA, *Die Menschenrechte und der Formalismus*, 84 Juristische Blaetter 1962, pp. 118 *et seqs*.; RENÉ MARCIC**,** *Die Menschenrechte und der Formalismus***.** *Eine Antwort und ihre eigenstaendige Entfaltung*, 84 Juristische Blaetter 1962, pp. 303 *et seqs.*

[28] Constitutional Law of 4 March 1964, BGBl. 1964/59.

[29] *Cf. VfSgl*. 3767/1960 and 4122/1961.

the authority called upon to apply the provision in question. Understandably, provisions in international treaties would rarely fulfil this condition.

After the European Convention had anew been vested with constitutional character, the Constitutional Court gradually adopted a more positive approach to it;[30] but it still took some time until it was given full effect. Thus, in 1965 the Court upheld a provision of Austrian law which seemed to be incompatible with the European Convention with the argument that it was not possible to adopt an understanding of the Convention leading to a conclusion which would have as its consequence a fundamental change in a particular area of the Austrian legal order.[31]

Corresponding to the reluctance to recognise the constitutional nature of the Convention and to give it direct application, there was also slowness in implementing it, where necessary, in the domestic legal system. This was especially, though not exclusively, true for certain guarantees contained in Articles 5 and 6 of the Convention which clearly enhanced the rule of law in proceedings brought by, or instigated against, individuals.

Article 5 is concerned with "[e]*veryone's* […] *right to liberty and security of person*" and provides that "[n]*o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.*"[32] The Article then gives detailed requirements for the existence of one of "*the following cases*".

Article 6, in its turn, deals with everyone's entitlement, "*in the determination of his civil rights and obligations or of any criminal charge against him,* […] *to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"[33] Here again, elaborate provisions set out the conditions for fair proceedings.[34]

Evidently, certain Austrian laws including the Code of Criminal Procedure did not fully live up to the standards set by Articles 5 and 6. Yet, reluctance to alter them was great because the Austrian provisions concerned were considered important for an efficient administration of justice. It took quite a number of cases before the European Commission of Human Rights and the European Court of Human Rights in order in order to make Austria reconsider some of the most controversial legal provisions in this context. The

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[30] The Court recognised the Convention's constitutional character by a decision of 1965, *VfSlg* 4924/1965, and, in the same year, also its direct applicability; *cf. VfSlg* 5102/1965.

[31] *Cf. VfSlg* 5102/1965.

[32] Article 5, no. 1, paragraphs 1 and 2 ECHR.

[33] Article 6, no. 1, first sentence,

[34] Article 6, nos. 1-3.

situation was aggravated by the fact that it took until the nineteen eighties that the Austrian Constitutional Court began to take the practice of the Commission and the Court in Strasbourg into consideration; and the other supreme courts, the Administrative Court and the Supreme Court in civil and criminal matters then followed suit, albeit with a certain lag of time.[35]

The effect of the safeguards contained in Article 6 of the European Convention on Human Rights is hampered in Austria also by a reservation made, on accession to the Convention, to Article 6 in favour of the administration of criminal justice on lower levels by administrative authorities and not by courts. Austria regarded its own system as more expeditiv and not contrary to the meaning, even if to the letter, of the Convention requiring a decision by a court, because final appeal lay anyway to a court, namely the Administrative Court. However, this construction had another blemish, because procedure before that Court is regulated in such a manner that the Court cannot, apart from exceptional circumstances, render final judgment itself; its decisions are merely cassatory in nature, and the case is sent back to the administrative authority for a decision not in contrast with the Court's ruling. Therefore, the final decision rests with the administrative authority, a fact which is in clear conflict with the general practice and doctrine concerning Article 6 ECHR. (The same issue creates difficulties also in relation to Community law, which are not limited to the administration of criminal justice; but both the European Court of Human Rights and the European Court of Justice have so far refrained from unambiguously ordering this holy cow of the Austrian legal order to be slaughtered.)

Austria has ratified all Additional Protocols to the Convention, of which the First, Fourth, Sixth and Seventh contain rules substantively pertaining to the protection of human rights.[36] Equally, Austria has submitted, right from the time of her accession, to the jurisdiction of the European Court of Human Rights and to the remedy of individual application (Article 34 ECHR).[37] Finally, Austria has also ratified the Eleventh Additional Protocol concerning the comprehensive and compulsory jurisdiction of the European Court of Human Rights to decide on applications by individuals and States.[38]

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[35] *Cf.* WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), no. 68.

[36] *Cf.* ROBERT WALTER/HEINZ MAYER/GABRIELEKUCSKO-STADLMAYER, *Bundesverfassungsrecht*, 6th ed. (2007), p. 636.

[37] *See on this* OEHLINGER (*supra*, fn. 6), p. 86.

[38] *Cf.* BGBl. III 1998/30.

The progressive development of the jurisprudence of the Austrian Constitutional Court since the nineteen eighties brought about some substantial innovations. The most important one was the change in the approach to fundamental rights from a formal to a substantive one. Earlier, provisions containing such rights were interpreted by strictly following their wording and relying on their meaning in the historical context in which they were adopted. This led to what was called a petrification of fundamental rights. Moreover, reservation in favour of the law contained in certain provisions were considered a *carte blanche* for legislature, save the essence of the right in question which was to be preserved; and considerations of legal policy going beyond the wording of the provision or even involving considerations of natural justice were strictly ruled out. There were but a few exceptions to this restrictive approach; thus, in rare cases (sanctity of the home, legitimate or lawful judge) historical interpretation was substituted by teleological interpretation and expropriation was restricted to cases concerning the public weal.[39]

Now, the formal approach was abandoned in favour of a new approach characterised by a value-based substantive or material understanding of fundamental rights. In order to make the protection of fundamental rights more effective, the Constitutional Court plunged into judicial activism based on teleological interpretation and on those considerations of legal policy which it had formerly rejected. One of the more striking innovations was the adoption of the principle of proportionality in the context of reservations in favour of the law. Proportionality went beyond the protection of fundamental rights against inroads into their essence; it excluded any legal measure that was not the smallest possible interference with the exercise of those rights justified by the interference's objective.[40]

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[39] *Cf.* WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), no. 116; HANS-ULRICH EVERS, *Zur Stellung der oesterreichischen Verfassungsgerichtsbarkeit im Gefuege der Staatsfunktionen*, 19 DVBl. 1989, pp. 779 *et seqs.*; and THEO OEHLINGER, Das Grundrechtsverstaendnis in Oesterreich – Entwicklungen bis 1982, in RUDOLF MACHACEK/WILLIBALD PAHR/GERHARD STADLER (eds.), *70 Jahre Republik. Grund- und Menschenrechte in Oesterreich* (1991), pp. 29 *et seqs.*

[40] *Cf.* WALTER BERKA, *Der Freiheitsbegriff des „materiellen Grundrechtsverständnisses"*, in JOHANNES HENGSTSCHLAEGER/HERIBERT FRANZ KOECK/KLAUS STERN/ANTONIO TRUYOL Y SERRA (eds.), *Fuer Staat und Recht, Festschrift fuer Herbert Schambeck* (1994), pp. 339 *et seqs.*

It has been pointed out[41] that the new understanding of fundamental rights has had an impact not only on constitutional and administrative law but also on private and criminal law. Since the Constitutional Court has no competence to review decisions of the courts of civil or criminal procedure, it fell to these courts to provide the legal protection with regard to fundamental rights and freedoms. Consequently, appeal to the European Court of Human Rights lies directly from the decision of the Court of last resort in matters of private or criminal law.[42]

Apart from the fact that the European Convention on Human Rights extended some of the rights contained in the Austrian bill of rights and originally designed only for Austrian citizens to everyone (regardless of his or her citizenship),[43] the Convention's reception into the Austrian legal system was pivotal for the change of jurisprudence in the field of human rights; and it might be said that without the Convention transition from the traditional to the modern understanding of fundamental rights would have been much more difficult if not impossible.

It was helpful, in this connection, that the reservations in favour of the law contained in the Convention itself are formulated in such detail as not to leave much freeway to national legislation,[44] and that the formulations used there could be regarded examples of what could be considered a correct

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[41] By WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), no. 117.

[42] However, WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), no. 108, points to the fact that courts of civil and criminal law are not always conscious of the impact of fundamental rights on their work; for this reason, it was suggested to provide for an application to the Constitutional Court against the decisions of courts of last resort in civil and criminal matters. With reference to MANFRED STELZER, *Stand und Perspektiven des Grundrechtsschutzes*, in: OESTERREICHISCHE PARLAMENTARISCHE GESELLSCHAFT (ed.), *75 Jahre Bundesverfassung* (1995), pp. 583 *et seqs.;* reprint in World Constitutional Law Review 2001, pp. 209 *et seqs.*

[43] As, e.g., the rights to peaceful assembly and to association.

[44] Thus, the exercise of "[e]*veryone*['s right] *to freedom of expression*[, including] *freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*", contained in Article 10, paragraph 1 ECHR, "*may be subject*" only "*to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*." *Cf.* also Article 9 (freedom of thought, conscience and religion), Article 11 (freedom of peaceful assembly and to freedom of association) and Article 12 (right to marry and to found a family).

application of the principle of proportionality.[45] Moreover, certain limitations of the various rights protected by the Convention which were regarded as necessary were expressly laid down in the related provisions,[46] with the consequence that additional (so-to-say inherent) limitations were ruled out according to the maxim *inclusio unius est exclusion alterius* (where exceptions are mentioned, exceptions not mentioned must be regarded as not admissible). Methods of interpretation applied by the European Court of Human Rights, especially the principle that fundamental rights and freedoms are to be construed in the present-day social and legal context and the principle that these rights and freedoms should be given their full effect had also an important influence on the Austrian human rights practice. The former principle is derived from the rules of interpretation traditional in international law and codified in the Vienna Convention on the Law of Treaties of 1969,[47] the latter principle reminds of the doctrine of the *effet utile* applied by the European Court of Justice which is geared to positive object and purpose of a rule which should not remain unrealised.[48]

Even where there remained some free space for the application of the traditional fundamental rights contained in the Austrian legal order since 1867,[49] the new methods developed by the European Court of Human Rights

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[45] *Cf. supra*, at fn. 40.

[46] *Cf.* the limitations contained in Article 2 (right to life), Article 4 (prohibition of slavery and servitude), Article 5 (right to liberty and security of person) and Article 8 (respect for private and family life).

[47] *Cf.* Article 31 VCLT (General rule of interpretation): "*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.* […]"

[48] *See on this* MARGIT MARIA HINTERSTEININGER, *Zur Interpretation des Gemeinschaftsrechts*, 53 Austrian Journal of Public and international Law 1998, pp. 217 *et seqs.*

[49] This is the case with those Austrian fundamental rights which have no counterpart in the European Convention, like the right to sojourn in a state party to the Convention and the right freely to acquire real estate or to exercise a gainful occupation (all contained in Article 6 of the Basic Law of 1867). There is a tendency in Austrian jurisprudence to also extend the right to

spilled over into the area of the traditional fundamental rights just mentioned and brought their interpretation in line with the spirit of the Convention. It may therefore be said that traditional fundamental rights contained in the Austrian Constitution and fundamental rights contained in the European Convention now form an almost harmonious body of law which will steadily be, and in fact already is, supplemented, at least where the application of Community law by Austrian administrative authorities and courts is concerned, by the European Union's Charter of Fundamental rights[50] as interpreted by the European Court of Justice, either as such or as the expression of the common human rights tradition of the Member States.[51] In this connection, it seems desirable that the European Community or European Union, respectively, accede to the European Convention on Human Rights,[52] lest from the jurisprudence of the European Court of Justice there develops a human rights case law not fully congruous with that of the Strasbourg court.[53]

Membership in the European Union, to which Austria acceded in 1994, with effect of 1 January 1995, has again considerably enlarged the number of persons which are entitled to equal treatment and therefore also to the enjoyment of fundamental rights and freedom on equal footing with Austrian citizens. The prohibition of discrimination on grounds of nationality is not restricted to the freedoms of the internal market but extends to all legal areas of Union or Community law, with only those exceptions as are contained in this law itself.[54]

Another important aspect of the European Convention on Human Rights is the broader understanding given to their effect as compared to the original understanding of fundamental rights in Austrian law. In Austria, fundamental rights in the traditional meaning, i.e., fundamental freedoms,

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equal treatment to non-citizens. *Cf.* WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), no. 147. The same ist true for political rights, especially the right to vote.

[50] O.J. 2000, C 364, pp. 1 *et seqs.*

[51] *Cf.* Article 6, paragraph 2 EU.

[52] *Cf.* Article 6, paragraph 2 EU consolidated version according to the Treaty of Lisbon (O.J. 2008, C 115, pp. 13 *et seqs.*): "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*"

[53] *Cf.*, e.g., ECJ, Joined cases 46/87 and 277/88, *Hoechst v. Commission*, E.C. Reports 1989, pp. 2859 *et seqs.*

[54] Thus, the right to vote pertaining to all citizens of the Union in all Member States is restricted to communal and Europe-wide elections and does not comprise the right to vote in national or regional elections. *Cf.* Article 19 EC.

were for a long time considered to be "defensive rights", i.e., rights which protect against encroachment by the state.[55] For this reason, a third-party effect or horizontal effect of fundamental rights, i.e., an effect on other private individuals, seemed to be excluded.[56]

In contrast, the fundamental rights and freedoms of the European Convention have never been construed in the traditional way as mere defensive rights against interference by the State and have rather been understood to protect also against encroachment by other private individuals.[57] While fundamental rights in the traditional meaning obliged the State to refrain from interfering with them, it is the characteristic of the rights contained in the European Convention that they oblige the State to protect them against interference from others.[58] This concept of fundamental rights as defensive rights *erga omnes* had an impact on the fundamental right thinking in Austria and contributed to the reception of the third-party or horizontal effect with regard to the traditional fundamental rights.

In this context, the discussion distinguishes between direct and indirect horizontal effect. Doctrine and practice have a greater sympathy for the latter. This means that the horizontal effect should be implemented by law and not derived only from the fundamental right itself. The main argument in favour of this approach is that otherwise legislature would be unduly substituted by acts of the judiciary. However, the sympathy of doctrine and practice for the mere indirect horizontal effect of fundamental rights is no more than a preference for a certain legal policy; if there does not exist a law of implementation,

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[55] *Cf.* WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), no. 87, also no. 93.

[56] *Cf.* WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), nos. 222 *et seqs.* Of course, the situation is different where the intention of the constitutional legislator to cloth a right with horizontal effect is clear. *Cf.* the fundamental right to the protection of one's data in Article 6, paragraph 1 Data Protection Law (*Datenschutzgesetz*) which provides for enforcement of that protection against private individuals by the courts of civil law.

[57] *Cf.* WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), no. 228, with reference to ANDREW CLAPHAM, *The "Drittwirkung" of the Convention*, in RONALD ST. J. MACDONALD/FRANZ MATSCHER/HERBERT PETZOLD (eds.), *The European System for the Protection of Human Rights* (1993), pp. 163 *et seqs.*

[58] *Cf.* MICHAEL HOLOUBEK, *Grundrechtliche Gewaehrleistungspflichten. Ein Beitrag zur allgemeinen Grundrechtsdogmatik* (1997), at 45 *et seqs.*; also FRANZ MATSCHER, *Menschenrechte in Europa: Gedanken zur Weiterentwicklung des Grundrechtsschutzes in Europa*, in WOLFGANG SCHUMACHER (ed.), *Perspektiven des Europaeischen Rechts* (1994), pp. 305 *et seqs.,* at pp. 321 *et seqs.*

direct horizontal effect is not ruled out.[59] This seems to be the correct approach, because the interest – not only of the individual concerned but also of public at large – in the realisation of fundamental rights seems to be preponderant as compared to the mere technical interest of how the horizontal effect of fundamental rights should be implemented best.[60]

Since fundamental rights are constitutionally guaranteed rights and take precedence over obligations contained in "simple" laws – the Austrian legal order distinguishes between laws of constitutional rank and other laws which do not enjoy constitutional rank and are therefore called "simple" laws[61] –, a person can invoke his or her fundamental rights as a ground of justification or excuse for not complying with certain obligations deriving from private law.[62]

There are more examples to illustrate the impact of the European Convention on Human Rights on Austrian fundamental rights thinking. One of them should be mentioned in concluding this short survey. It pertains to the field of legal protection.

If a person registers a complaint with the European Court of Human Rights against an alleged violation of one of his or her rights guaranteed under the Convention by one of the States party to the Convention, the Court will decide by a judgment whether a violation has occurred. If this is the case, the Court will grant just reparation.

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[59] *Cf.* WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), no. 229; *cf. also* MANFRED NOVAK, *Zur Drittwirkung der Grundrechte*, in 11 Europaeische Grundrechte-Zeitung 1984, pp. 133 *et seqs*.; STEFAN GRILLER, *Der Schutz der Grundrechte vor Verletzung durch Private*, in 114 Juristische Blaetter 1992, pp. 205 *et seqs.* and pp. 289 *et seqs.*

[60] This seems to be a valid view, even if decisions by certain courts of civil law have not lived up to that degree of rationality that would be desirable in handling constitutional questions of such importance. *Cf.* WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), no. 229.

[61] *Cf.* Austrian Federal Constitutional Law (Bundes-Verfassungsgesetz [B-VG]), Article 44.

[62] Thus, while according to the Austrian law of reparation for damages the injured person has a duty to minimise the negative consequences of an injury and thereby keep the damage as small as possible, this principle is outweighed by the right of a conscientious objector against a particular medical treatment (e.g., refusal of a Jehovah's witness to permit blood transfusion). Here, freedom of religion and conscience takes precedence over the obligation to minimise damages. *Cf.* WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), no. 233; with reference to STEFAN KORINEK/ANDREAS VONKILCH, *Gewissen contra Schadensminderungspflicht*, in 119 Juristische Blaetter 1997, pp. 756 *et seqs.*

The Member States are bound to execute the judgment of the Court with all means at their disposal, including the adaptation of the Austrian legal order.[63] An example for the implementation of this obligation is Section 363a of the Code of Criminal Procedure (*Strafprozessordnung*). It provides that proceedings against a person have to start anew in all cases where the Court has found that the accused has been violated in one of the rights contained in the Convention or one of its Additional Protocols by a decision of a court of criminal jurisdiction.[64]

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[63] *Cf.* GEORG RESS, *The Effects of Judgments and Decisions in Domestic Law*, in: RONALD ST. J. MACDONALD/FRANZ MATSCHER/HERBERT PETZOLD (eds.), *The European System for the Protection of Human Rights* (1993), pp. 801 *et seqs.;* JOERG POLAKIEWICZ, *Die Verpflichtungen der Staaten aus den Urteilen des Europaeischen Gerichtshofs für Menschenrechte* (1993).

[64] *Cf.* WALTER BERKA, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Oesterreich* (1999), nos. 328 *et seq.;* with reference to WOLFRAM KARL, *Menschenrechte in Europa: Die Europaeische Menschenrechtskonvention, ihr Verfahren und ihr Einfluss auf das oesterreichische Recht*, in WOLFGANG SCHUMACHER (ed.), *Perspektiven des Europaeischen Rechts* (1994), pp. 281 *et seqs.,* at pp. 296 *et seqs.*