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LEGISLATIVE OMISSION AS A PROBLEM OF CONSTITUTIONAL REVIEW

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The structure of this report follows the questionnaire prepared by the Constitutional Court of the Republic of Lithuania unless specific questions have appeared to be obsolete in the light of the Austrian concept of law.

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1.1. The legal gap as a precondition for the application of law by analogy

According to the general understanding of Austrian law, the term "legal gap" is a methodical instrument designed in order to satisfy needs for regulation which appear in practice when applying law. The need for regulation may merely be based on legal-political considerations; in this case we speak of a "non-genuine legal gap". It is the task of the legislator to fill it. A "genuine legal gap", also called "unintentional legal gap", occurs when an effective legal provision is incomplete. An example for such incompleteness is the following: according to an explicit constitutional provision the results of a non-binding referendum may be challenged before the Constitutional Court; the legislator, however, "forgot" to regulate the period of time during which such a challenge may be filed with the Constitutional Court.[1]

According to the Austrian doctrine, the existence of a genuine legal gap is based on the insufficiency of a legal provision, however, without suggesting its unconstitutionality. It is rather the task of the state organ applying the legal provision to fill the gap in line with the general principle provided in § 7 ABGB[2], i.e. by way of analogy. This means that provisions explicitly regulating similar facts have to be used in order to fill the gap. The applicability of this method - also called "analogy" or "analogous application of law" - quasi remedies the legal gap caused by the omission of the legislator. Therefore, this is clearly not a case of unconstitutionality.[3]

Any source of law - simple as well as constitutional law - may be incomplete in the above sense. The filling of a legal gap in constitutional law results in supplementing the constitutional legislator by an organ applying the constitution, which will ultimately, no

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[1] Cf. the legal situation in the judgement VfGH 27.9.2007 W I-1/06.

[2] *Allgemeines Bürgerliches Gesetzbuch* (Austrian Civil Code); § 7: "If a legal case can neither be decided on the basis of the wording nor on the basis of the natural meaning of a statute, similar, by statute definitely decided cases as well as the reasons of other closely related statutes have to be taken into consideration. If the legal case still remains doubtful, it has to be decided with respect to the diligently collected and deliberately considered circumstances on the basis of the natural fundamental principles of law." As regards the methodology of system-oriented and statute-oriented analogy in general, see *Bydlinski* in: Rummel, ABGB, 3rd edition, 2000, § 7 ABGB, para. 3 ff.

[3] In the cited judgement W I-1/06 the Constitutional Court assumed the necessity to set a time limit also for the challenge of a non-binding referendum - which had been left unregulated - by virtue of general considerations regarding legal certainty (system-oriented analogy), and has *in concreto* assumed the longest possible time limit explicitly provided by the legislator of the Constitutional Court Act, i.e. a term of six weeks (statute-oriented analogy).

doubt, be the Constitutional Court. To fill gaps in constitutional law in such a way will only then be legally admitted when the similarity of facts explicitly regulated by constitutional law compared with the non-regulated facts reaches such a high degree of intensity, that any other regulation by the constitutional legislator would appear as a conflict of values, or even would have to be regarded as not objectively justified. A famous example in this context is the application of the principle of legality in the Austrian constitution: Although Art. 18 (1) B-VG[4] only commits the administration to be strictly bound to the law[5], this provision is - by analogy - also applied to the judiciary.

1.2. The filling of a legal gap by way of interpretation in conformity with the constitution and by application of law in conformity with the constitution

If the simple legislator fails to enact a necessary regulation, the Constitutional Court frequently diagnoses the omission by way of interpretation in conformity with the constitution and remedies it simultaneously. The Court reinterprets *per analogiam* the initially - under the aspect of equality - incomplete, in the absence of a sufficiently explicit regulation unconstitutional statute by means of "interpretation in conformity with the constitution" (or better by "creation of law in conformity with the constitution"); thus, the Court fills the gap and remedies the unconstitutional incompleteness, which may have its reason in the equal protection clause, by way of analogy. The diagnosed "legal gap" is filled by repairing the legislative deficiency in a way that the failure of the legislator is corrected with the aid of analogy by applying a constitutional standard (mostly the equality principle); as a result the legislative omission appears quasi "corrected". If a legal gap is assumed for reasons inherent to the equality principle, the methodical basic principle of a "concept of law in accordance with the constitution" requires an interpretation of the legal situation in line with the equality principle, an interpretation that remedies the potential assumption of unconstitutionality of the legislative omission.[6]

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[4] *Bundes-Verfassungsgesetz (B-VG)*, Federal Constitution Act: „The entire sovereign administration may only be carried out on the basis of statutes."

[5] VfSlg. 12.185/1989; see also *Walter/Mayer/Kucsko-Stadlmayer*, Grundriss des österreichischen Bundesverfassungsrechts, 10th edition, 2007, para. 572; *Mayer*, Das österreichische Bundesverfassungsrecht – Kurzkommentar, 4th edition, 2007, p. 133.

[6] *Walter/Mayer/Kucsko-Stadlmayer*, op. cit.,para. 135

The judgement of the Constitutional Court VfSlg. 10.612/1985 shall serve as an example for a brief explanation of this abstractly described basic methodical idea: The Constitutional Court held that it would be unconstitutional - because contradicting the equality principle - to exclude the legally provided imposition of financial contributions for traffic development on meanwhile demolished buildings, but to collect such contributions for buildings that have not even been put up at all. The second mentioned case, which had not explicitly (and therefore in whole incompletely) been regulated by the legislator, has to be treated in the same way as the first mentioned case, in which the legislator had explicitly excluded the liability to pay the contribution. The Constitutional Court states expressly:

"An interpretation in conformity with the constitution on the basis of the equality principle of ... (the provision applied) ... requires the filling of this gap by way of analogy."[7]

Consequently, if it is possible to consider an - under the aspects of the equality principle - incomplete legal provision as a "legal gap" and to fill it by way of analogy, then any unconstitutionality in this respect is excluded *per se*.

1.3. Legislative omission caused by the non-observance of constitutional mandates

In exceptional and relatively rare cases (even though occurring to an increasing degree in constitutional practice) constitutional provisions referred to as "constitutional mandates"[8] may be found. These are either constitutional directives or orders to regulate a certain issue, both primarily addressed to the simple legislator, defining general political concerns and rather describing tasks and objectives ("provisions containing national policy objectives"). It may, however, also be the case that the constitutional mandate - as usually aiming at the supplementation of legal regulations - is in a way clear, that constitutional judiciary may guarantee its observance by the legislator by way of annulling the incomplete legal provisions because the constitutional mandate has not been observed.

For instance, the constitutional duty to explicitly identify the sovereign administrative tasks to be carried out by a municipality (*Gemeinde*) in its own sphere of autonomous self-government (Art. 118 (2) second sentence B-VG) may be mentioned as an example for a relatively precise

[7] More examples for judgements rendered on the same methodical basis (i.e. an interpretation in conformity with the constitution referring to the equality principle, based on the assumption of an incomplete statute) are for instance VfSlg. 10.720/1985, 13.486/1993, 13.786/1994, 13.822/1994, 15.197/1998.
[8] See *Öhlinger*, Verfassungsrecht, 7th edition, 2007, para. 90.

constitutional mandate. This constitutional mandate obliges the simple legislator to properly denominate an administrative task, characterized by certain abstract criteria ("exclusive and predominant interest of the local community" and suitability "to be carried out by the community within its territorial boundaries") as belonging to the municipalities' own sphere of competence. The consequence of the non-compliance with this constitutional mandate is that the respective statutes are unconstitutional. Thus, if the legislator regulates an administrative task to which the said constitutional criteria laid down in Art. 118 (2) B-VG apply, it is not only his duty to entrust the communities with this task, but he is also obliged to explicitly denominate this community task in the statutes regulating the relevant matter as to be carried out in the own sphere of autonomous self-government of the community. If the legislator fails to do so - insofar there exists a legislative omission - the statute regulating the administrative task is unconstitutional as such and would be annulled by the Constitutional Court in case of review.[9]

The constitutional situation is more complicated in the case of general constitutional mandates formulated as "provisions containing national policy objectives". It is the purpose of these programmatic constitutional provisions to navigate future official state action and state management into a certain direction or to determine it with regard to a certain objective. According to Austrian constitutional law this applies for the perpetual neutrality, for environmental protection or for the protection of ethnic minority groups.[10] The relevant question in this context is whether and when an already existing statute may turn unconstitutional because of the omission of the legislator to further pursue the national policy objective. It would be wrong to annul simple statutes (e.g. statutes regulating environmental compatibility enacted in pursuance of environmental protection) as unconstitutional because they do not (yet) realize the national objective "environmental protection" in a perfect manner. In fact, in this case the result would be an even more serious deficiency in the pursuance of the national objective!

As a consequence, legislative omission in connection with the pursuance of a national policy objective remains to a large extent without a sanction: Only legal provisions obviously contradicting the national policy objective may be stigmatized as being unconstitutional and

[9] VfSlg. 8155/1997, 9811/1983, 11.633/1988, 12.891/1991 and 13.568/1993; see also *Oberndorfer*, Allgemeine Bestimmungen des Gemeinderechts – 1. Teil, in: Klug/Oberndorfer/Wolny, Das österreichische Gemeinderecht, 2008, para. 66 f.

[10] For more constitutional provisions containing national policy objectives, see *Öhlinger*, op. cit., para. 91 ff.

may be annulled by the Constitutional Court in the case of review. The Constitutional Court is, however, not in a position to remedy legislative omission as such - namely the lack of further legal steps towards the realization of the national policy objective (like for instance "comprehensive environmental protection") - by way of annulling a statute.

2. The framework of the Constitutional Court's jurisdiction to review the unconstitutionality of legal gaps

2.1. The constitution in the national legal system

The theory on the "hierarchy of norms" ("*Stufenbau der Rechtsordnung*") - the leading principle of the Austrian constitutional concept - originates from legal theory.[11] The Austrian constitution, however, considers this theory as a precondition; it is also reflected in the jurisprudence law of the Austrian Constitutional Court.[12]

One of the essential conclusions of this theory is that each inferior "level" of the legal order represents a specification of the respective level above. In fact, it is not new that the rendering of judgements and administrative acts happens by specifying simple laws. New, however, is the conclusion of the mentioned theory that also simple legislation constitutes a specification, namely a specification of the constitutional system. It has been pointed out correctly that the role of simple legislation as a specification of the constitutional order entails the fact that the constitutional order may then be regarded as "*lex imperfecta*", when there is no possibility to sanction the simple legislator's deficient action. Such a sanction may especially be found in the power of a Constitutional Court to review the constitutionality of simple statutes. It is this power of a Constitutional Court which (ultimately) transforms the constitution into a "*lex perfecta*" with regard to legislature.[13]

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[11] *Merkl*, Das doppelte Rechtsantlitz, JBl 1917, 425 ff.; *Merkl*, Das Recht im Lichte seiner Anwendung, 1917, republished in: Die Wiener rechtstheoretische Schule, editors Klecatsky/Marcic/Schambeck, 1968, pp.1167 et seq.; see also *Merkl*, Prolegomina einer Theorie des rechtlichen Stufenbaus, 1931, ibid., 1311 ff.

[12] According to this jurisprudence, the essence of the rule of law principle culminates in the assumption that all acts of state organs must be based on statutes and, indirectly, ultimately on the constitution. Furthermore, a system of institutions guaranteeing legal protection must safeguard that only these legal acts may appear permanently secured with regard to their legal existence, which have been created in conformity with the corresponding acts on the superior level. See e.g.VfSlg. 11.196/1986.

[13] *Korinek*, Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen, VVdStRL 39, 1981, p. 36.

The power of the Constitutional Court to review statutes does, of course, not mean that the Constitutional Court has to take up every possibly imaginable deficiency of the legislature. An act of simple legislation may be criticised in many respects, it may in particular be regarded as unjust, incomplete and unfair. As will be demonstrated below, legislative omission may definitely constitute a constitutional deficiency of a statute which the Constitutional Court may take up. On the other hand, there may just as well be a deficiency criticisable under legal-political or general political aspects, not entailing an unconstitutionality to be dealt with by the Constitutional Court. Drawing up the limits between these two phenomena is always an extremely sensitive and often debatable problem. Generally, it is important to note that according to the Austrian constitutional system, legislative omission *per se* does not necessarily result in the unconstitutionality of the statute considered as incomplete; however, constellations are possible where unconstitutionality occurs indeed. Such a constellation arises in particular when the incompleteness is caused by the violation of a constitutional mandate or by the violation of a fundamental right.

Provisions in positive law according to which certain deficiencies do not inhibit the origination of a legal act as such are called "margin of tolerance" ("*Fehlerkalkül*"). *Kelsen* and *Merkl* have developed this theory. As already indicated, the "margin of tolerance" has to be determined by the legal order itself; the respective provisions contain information on whether a deficiency is insignificant or whether it may lead to the annulment of the legal act.[14] Therefore, the "margin of tolerance" comprises all possible consequences of deficiencies described in the context of the mentioned "hierarchy of norms", with the exception of absolute nullity. As a rule, it is impossible to regulate absolute nullity in positive law. In exceptional cases, however, there may be such regulations: Art. 67 (2) B-VG, for instance, determines that all acts carried out by the Federal President require the counter-signature of the Federal Chancellor or of the competent Federal Minister in order to gain validity.

The Austrian Constitution defines the "margin of tolerance" with regard to statutes and administrative rulings in the following manner: unconstitutional statutes and illegal administrative rulings remain in force as long as they have not been annulled by the Constitutional Court. Absolute nullity may, however, occur in the case of general norms as well; so, for instance, if a statute has not been duly published. Also the ordinary courts, which

[14] *Antoniolli/Koja*, Allgemeines Verwaltungsrecht, 3rd edition, 1996, pp. 561, 562.

do not have the competence to review the content of a statute, are obliged to verify the due publication of statutes.[15]

2.2. Legal acts subject to constitutional review

The power of the Austrian Constitutional Court to review general legal acts with regard to their legality includes the following types of legal norms: The review of the constitutionality of formal federal or *Land* statutes according to Art. 140 B-VG is the core task of the Constitutional Court (also from the point of view relating to national policy). However, it is also the task of the Constitutional to review the legality of general norms created by a federal or a *Land* administrative authority, i.e. administrative rulings, primarily with regard to their conformity with simple laws, but also with the constitution (Art. 139 B-VG). Only little practical significance enjoys the power of the Constitutional Court to review the legality of international treaties pursuant to Art. 140a B-VG. For the sake of completeness, it should also be mentioned that according to Art. 138a B-VG the Constitutional Court may determine whether an agreement between the Federation and the *Länder* or between several *Länder* among each other exists, and may examine whether the obligations resulting from such an agreement have been fulfilled. The review of a non-existing legal norm is, however, not mentioned among the possible objects of constitutional review.

2.3. The Constitutional Court as a negative legislator

The scope of the decision-making power a Constitutional Court disposes of on the basis of the respective national constitutional system is of great significance for the sanctioning of unconstitutional legislative omission.

The decision-making power of the Austrian Constitutional Court is confined to the annulment of norms recognized as unconstitutional when reviewing statutes according to Art. 140 B-VG and also when reviewing administrative rulings according to Art. 139 B-VG. The Constitutional Court is not entitled to create norms, neither formal statutes enacted by Parliament nor administrative rulings enacted by an administrative authority. The Constitutional Court may not even then act as a legislator "when the enactment of certain

[15] Art. 89 (1) B-VG: "Save as otherwise provided by this Article, the courts are not entitled to examine the validity of duly published ... laws."

regulations would be constitutionally necessary".[16] Consequently, it is refused to the Constitutional Court to supplement missing regulations by its judgements.[17] In legal literature[18] the Constitutional Court is, therefore, commonly being described as a - merely - negative legislator who lacks any power to create positive norms. This basic idea characterizes the scope of constitutional review in Austria and reveals herewith, in all possible clearness, the role of the Constitutional Court in relation to the ("formal") parliamentarian legislator. From this basic idea follows that the consequence of dealing with unconstitutional legislative omission can only be the annulment of existing statutes connected with the omission (or only parts thereof or possibly only a few words or a single word).

The annulment of only parts of a statute (in the extreme case of only a few words) in order to restore a legal situation in accordance with the constitution gives the Constitutional Court the possibility to supplement the content of incomplete - and therefore unconstitutional - legal provisions by annulling the restrictive legal consequences, thus, e.g. eliminating the original restriction of a statute's personal scope. For instance, in its "Islam Act" judgement[19] the Constitutional Court has widened the personal scope of the Islam Act (originally valid for the Hanafi rite only) for a larger group of addressees (i.e. for all Muslims) by annulling an unconstitutional restriction of the personal scope of the said Act[20] for contradiction with the freedom of church laid down in Art. 15 StGG.[21] As a consequence, the Islam as a whole became a legally recognized religious community in Austria. Such a practice possibly disregards or even violates the constitutional prohibition to replace a positive legislative act by a judge-made decision. By applying such an "imaginative" technique[22] when annulling only parts of legal provisions, the content of legal norms is modified in a way, that the remaining part is no longer in accordance with the intention of the legislator. This

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[16] *Rohregger* in: Korinek/Holoubek, Österreichisches Bundesverfassungsrecht II/2, Art. 140 B-VG para. 14.
[17] *Öhlinger*, op. cit., para. 1007.
[18] *Kelsen*, Wesen und Entwicklung der Staatsgerichtsbarkeit, VVdStRL 5, 1929, p. 30 (p. 56); republished in *Koja* (editor), Hans Kelsen oder Die Reinheit der Rechtslehre, 1988, p. 113 (p. 133); *Oberndorfer*, Die Verfassungsrechtsprechung im Rahmen staatlicher Funktionen, EuGRZ 1988, pp. 193 et seq.; for more citations see *Rohregger*, op. cit., n. 41.
[19] VfSlg. 11.574/1987. Severly critizised by *Schima*, Das Islamgesetz und die Grenzen der Verfassungsgerichtsbarkeit, ÖJZ 1989, p. 545.
[20] *Staatsgrundgesetz vom 21.12.1867 über die allgemeinen Rechte der Staatsbürger - StGG* (Basic Law of December 21, 1867 on the General Rights of Citizens).
[21] The consequences of annulling the legal limitation of the recognition to the Hanafi rite only were not just the extended personal scope of the Act (from now on valid for all Muslims), but also the legistically unsatisfying situation that the title of the Act - which had not been corrected by the Constitutional Court - is now in contradiction with the contents of the Act.
[22] *Rohregger*; op.cit., speaks of "creative techniques of annulment".

consideration motivated the Constitutional Court[23] to annul an entire provision of social security law (more precise: health insurance law) which discriminated house-keeping partners of the same gender by excluding them from dependent coverage, and not only the particular part of the provision that concerned the legal limitation to partners of different gender.

The confinement of the Constitutional Court to the role of a negative legislator is very reasonable from the democratic point of view. It is the people and its representatives in parliament who shall determine what is legal, and not a court which lacks any direct democratic legitimisation.

This conclusion is of great importance with respect to the sanctioning of unconstitutional legislative omissions as well. It is the task of the formal legislator, vested with the corresponding democratic mandate, to correct legislative omission - no matter whether it concerns an unconstitutionality of norms or a mere legal shortcoming.

After the annulment of a statute by the Constitutional Court, for the legislator a need for regulation may arise in many cases. What the parliamentarian legislator is expected to do is to "repair" the statute. Thereby, the legislator will advisably be oriented towards the formal decision and the reasons of the annulling judgement. Usually, the legislator has considerable discretion as regards the content of the repair.

In its former jurisprudence, the Constitutional Court was quite reluctant to give certain guidelines for future statutes replacing the annulled ones. The Court's role perception had been marked by a great deal of restraint.[24] An essential change in the interpretation of the constitution occurred under the influence of the jurisprudence of the European Court of Human Rights, but also due to a generally growing fundamental rights-oriented, value-oriented approach of European constitutional systems. Since the end of last century's seventies, also in Austria, a constitutional review style has been developed which is oriented towards substantive law principles and conceptions of values.[25]

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[23] VfSlg. 17.659/2005.
[24] Cf. *Oberndorfer*, EuGRZ 1988, pp. 198 - 199.
[25] For Austria, the judgement of the Constitutional Court VfSlg. 10.179/1984 is regarded as the first step into this direction.

This jurisprudence on fundamental rights, based on substantive conceptions of values, is further supported by the fact that the Constitutional Court makes relatively intense use of the so-called fundamental principles of the Austrian constitutional system (democratic principle, rule of law principle, and federal principles). By way of interpreting constitutional law in conformity with these fundamental principles of the constitution, these basic legal principles pervade the entire legal system, especially the constitutional norms. As a consequence, e.g. the rule of law and the democratic equality principle develop more and more to a structure that shapes legal norms also in the case of (unconstitutional) omission, i.e. in the case of "silence" of the legislator.

The principle of the rule of law as well as the respective necessary legal regulations based on the equality principle (which is the basis for a democratic political system) reflect the image of a jurisprudence that is justice-oriented and that follows the general principles of law. Frequently, these two constitutional core principles serve as an impulse for the legislator to act and to fill many a gap in the positive legal system: The Constitutional Court[26] has, for instance, concluded from the rule of law principle that it is necessary to grant provisional legal protection in procedural law also for those proceedings, where the said provisional legal protection is not or only insufficiently provided for by law; it is, therefore, necessary not to charge only one party of the proceedings with the burden of its application for legal protection and with the corresponding proceedings.

Generally, the attempt to implement and to develop these core principles in constitutional case law leads almost inevitably to the fact that legislative omission has become an important problem for a democratic, constitutional system based on the rule of law, a problem for which the Constitutional Court is prepared to find a solution within the scope of its decision-making power.

In summary, the following has to be emphasized: The Constitutional Court has no explicit power to decide upon constitutional questions in connection with legal gaps; however, such a jurisdiction may arise when the Constitutional Court exercises its (explicitly provided) competences.[27] The result reflects an extremely differentiate image.[28]

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[26] Cf. VfSlg. 11.196/1986, 12.683/1991, 13.003/1992, 13.305/1992.
[27] In this sense VfSlg. 7407/1974; see also VfGH 14.6.2007, G 213/06.
[28] Cf. Chapter 3. below.

It is not a matter that falls within the scope of jurisdiction of the Constitutional Court, if the legislator leaves - which might be considered as inequitable - certain fields of law unregulated, unless there is an explicit constitutional mandate to enact certain legal regulations.[29]

Special problems may arise in connection with the implementation of community law, and also in the context of the implementation of international treaties by the *Länder*.[30]

As referred to above, none of the initially mentioned powers authorises the Constitutional Court to turn - explicitly and directly - illegally missing general norms (legal provisions or administrative rulings) into the subject matter of its judgement. The Constitutional Court is neither authorized to substitute legislative action (in a substantive sense) of the state organ called to enact a norm (i.e. the formal legislator - the Parliament, or in the case of administrative decisions, the administrative - including the government - authorities), nor may the Court correct the illegally missing regulation by way of its own judgement, and become - in that sense - legislator itself.

In the case of legislative omission with respect to a general norm, the Austrian constitutional system does not only lack an explicit basis for the Constitutional Court's decision-making authority. At first, the Constitutional Court is virtually refused to turn the non-existence of a certain general norm - be it a statute or an administrative regulation - into the subject-matter of its judgement. The principal incompetence of the judiciary to decide on the non-existence of a certain statutory or regulatory provision derives, on the one hand, from the description by the constitution of the subject to be reviewed, which refers to statutes and regulations in force as well as statutes and regulations that have been in force in the past (and still have a scope of application). On the other hand it results from the legal structure of the Constitutional Court's decision-making authority, by virtue of which the Constitutional Court is only authorized to annul a formal statute considered unconstitutional or an illegal administrative regulation (in exceptional cases the Court may also declare a norm unconstitutional that is not in force any longer).

[29] VfSlg. 16.389/2001.
[30] See Chapter 2.4. below.

2.4. Lacking (omitted) legal provisions as the reason for the unconstitutionality of a statute on grounds lying in the equality principle

Especially under the aspect of the equality principle, i.e. the fundamental right to equal treatment before the law, an important process of rethinking may be observed in the jurisprudence of the Constitutional Court. Whereas, in its older rulings, the Constitutional Court has assumed that the equality principle does not oblige the legislator to positive action, and that an omission of the legislator cannot be challenged with reference to this fundamental right[31], the Constitutional Court has partly changed its view since mid of last century's seventies. Beginning with the judgements VfSlg. 7947/1976 and 8017/1977, the understanding wins increasing recognition that an illegal inequality may be caused by the - partial - omission of a legal provision. This means that the lack of a certain legal provision (caused by the inactivity of the legislator) may entail the unconstitutionality of another legal provision that has, in fact, been enacted by the legislator. The subject of review is and remains, as a matter of fact, the statute actually enacted by the formal legislator. However, this statute may possibly be unconstitutional because of the lack of a certain legislative activity; the Constitutional Court may then identify the unconstitutionality and, consequently, annul the statute that has only been "incompletely enacted" by the legislator.

It is thinkable and occurs from time to time, that the legislator grants preferential treatment by law to a certain group of persons, refuses, however, these privileges to other such groups. In such a case, the equality principle may be violated which may lead to the annulment of legal provisions for unconstitutionality.[32]

If the enactment of an administrative ruling is required by law in order to effectuate the coming into force of a statute, the fact that the administrative ruling is not enacted, might entail the unconstitutionality of the legal provision.[33]

The Constitutional Court has justified the necessity to review the inequality of a statute caused by the partial omission of a legal regulation and to annul the then unconstitutional "part" of the regulation, because otherwise it would depend on legislative coincidence

[31] VfSlg. 3160/1957, 5854/1968, 7407/1974; see also *Berka*, Die Grundrechte, 1999, para. 914, with reference to further judgements.
[32] E.g.VfSlg. 15.054/1997, 17.306/2004.
[33] Cf. VfSlg. 17.604/2005.

whether the Constitutional Court is enabled to review the constitutionality of a legal provision. As a matter of fact, the legislator may express one and the same content of a legal regulation in different legal-technical manners. Thus, the legislator may enact - positively or negatively formulated - side by side different regulations for all scopes of application of a legal norm (e.g. regarding the subject matter, the personal scope or the temporal scope), the legislator may also stipulate exceptions from a general rule, or explicitly regulate only one scope of application and herewith implicitly intend a contrary regulation for other similar scopes.[34]

Consequently, the mentioned jurisprudence of the Constitutional Court based on to the equality principle confines the sovereignty of the legislator not just insignificantly. The legislator is no longer free to grant privileges. A statute is not only then considered unconstitutional and subject to annulment, if it *expressis verbis* discriminates a group of persons or several persons in an undue and unreasonable manner. It is also the privileging norm that may be annulled, if and because the legislator has failed to grant the privilege in question to a larger group of persons, which - for objective reasons - should also enjoy it, if and because the legislator is otherwise not in a position to avoid discriminations with regard to the equality principle.

2.5. Special problems

2.5.1. The national legislator is obliged to implement community law as specifically regulated.[35] If he fails to do so, government liability may result. The Constitutional Court has considered itself competent to adjudicate on legal claims based on government liability within the scope of its special power to decide on claims against regional authorities based on civil law (Art. 137 B-VG).[36]

2.5.2. The Austrian constitution determines that the *Länder* are obliged to take the necessary measures for the implementation of international treaties within their scope of competence (Art. 16 (4) B-VG). If a *Land* fails to do so, the competence to take such implementation measures (especially to enact the necessary statutes) devolves to the Federation. Also in this

[34] VfSlg. 8017/1977
[35] Cf. *Öhlinger/Potacs*, Gemeinschaftsrecht und staatliches Recht, 3rd edition, 2006, pp.108 et seq.
[36] VfSlg. 17.002/2003, 17.576/2005.

context, there may be a jurisdiction of the Constitutional Court to review statutes; until now, however, such a case has not yet occurred.

2.5.3. Art. 23d (4) B-VG contains a provision corresponding to Art. 16 (4) B-VG (see Chapter 2.5.2. above), referring to measures to be taken by the *Länder* necessary with regard to the implementation of legal acts within the framework of European integration. In case of omission - which has to be declared by the European Court of Justice[37] - the respective competence devolves to the Federation.

3. Legislative omission as the reason for the annulment of effective statutes and administrative regulations by the Constitutional Court

3.1. The principal impossibility to review legislative omission

If in the following individual cases or groups of cases are being described, where legislative omission has been the reason for the annulment of effective statutes and administrative rulings by the Constitutional Court, it has to be noted that always very specific constellations are at issue. Every single case constitutes an exception from the principle of the impossibility to review legislative omission as such.

The said principle is very well depicted in a case in which the granting of a license to operate a (regional) private television station had been refused.[38] The Constitutional Court had (in accordance with the judgement of the European Court of Human Rights [ECHR] in the case *Informationsverein Lentia and others v. Austria*[39]) qualified the prohibition for private broadcasting enterprises to operate terrestrial television stations as a disproportional interference with the right to freedom expression and information guaranteed by Art. 10 of the European Convention on Human Rights; consequently, the unconstitutionality of the repeated refusal of the license to operate a private regional television station could not be doubted. Nevertheless, the Constitutional Court had to dismiss the complaint for lack of any legal basis for the desired license. The Constitutional Court pointed out that the prohibition to operate terrestrial television (for other broadcasting enterprises than the state-run Austrian

[37] So e.g. in case of the implementation of the Natura 2000-Directive 92/43/EWG (ECHR 10.5.2007, Rs C-508/04).
[38] VfSlg. 14.453/1996.
[39] ECHR 24.11.1993, ÖJZ 1994, p. 32.

Broadcasting Corporation *[Österreichischer Rundfunk - ORF]*) had its reason in the "inactivity of the legislator". Such inactivity could - as was the case in the "*Cable-TV*-case"[40] - indeed be reviewed "with regard to its constitutionality if it consisted in a mere partial inactivity", i.e. if there existed at least a legal norm as "a point of reference for the consequences entailed by the legislative inactivity in question". The complaint, however, had to be dismissed since the case in question could not fulfil this condition: "Total inactivity of the legislator" may not be taken up by the Constitutional Court; the Court is not authorized to commit the legislator to implement an act of legislation".

3.1.1. Partial unconstitutionality of general norms because of legislative omission

Contrary to the said basic principle, more or less established groups of cases exist where the Constitutional Court occasionally takes the omission of legal acts as an opportunity to annul a pertinent, effective legal norm for reasons of unconstitutionality. This is the case in the judgement VfSlg. 10.705/1985 that concerns the candidateship to the Student Body election of a party contradicting the National-Socialist Prohibition Act 1947[41]. Although the Students Body Act lacks any provision forbidding such a group to lead an election campaign, the Constitutional Court has explicitly pronounced that also a "non-regulation" may - in the context of legal regulations in force - constitute an implicit normative regulation.

The Court refers to its legal opinion laid down in the judgement VfSlg. 8017/1977, where it held that a legal provision that does not explicitly contain necessary regulations of a certain subject matter (in this judgement concerning the allowance for the time spent in custody) may express simultaneously that the aspects that have been left unregulated must not be taken into consideration. "In this respect, a 'non-regulation' constitutes, in fact, an only implicitly enacted, but still normative regulation." The Constitutional Court confirms this view also in subsequent judgements (cf. e.g. VfSlg. 8533/1979, 8806/1980, 10.384/1985).

Relatively often a legal situation occurs where the inequality of a statute results from a legal gap. The judgement VfSlg. 17.659/2005 concerning social security law is of special interest in this context; the relevant provisions provided a social security law regulation regarding dependent coverage in favour of the house-keeping partner, however, excluded at the same time partners of the same gender from such dependent coverage in a discriminating manner.

[40] VfSlg. 14.258/1996.
[41] *Verbotsgesetz 1947*, StGBl. 13/1945 as amended by BGBl. 148/1992.

The exclusion of male persons from receiving a part time financial aid in the amount of half of the benefits received during maternity leave for the period of time in which they interrupt their own professional life as a self-employed person in order to look after their child, lead to an extension of the claim for benefits. The Constitutional Court annulled the words "female" and "the mother" in the respective provisions and extended thereby the claim for benefits also to fathers.[42]

Claims for benefits that have to be granted by virtue of the equality principle in the case of legislative omission are called "derivative claims".[43] Such derivative claims may not only be granted on the basis of the equality principle, but also on the basis of other fundamental rights, with the effect that they entail the unconstitutionality of a legal regulation that neglects such claims. To an increasing extent, such claims for protection and for the granting of benefits derive from different fundamental rights, which were originally intended as defensive rights protecting individuals against state intervention, but have now turned into obligations of the state to take affirmative action. Of course, in the first place it is the simple legislator who is authorized and called to guarantee the right to such affirmative state action. In case the simple legislator fails to substantiate the obligation of the state guaranteed by fundamental rights, it is the Constitutional Court that seeks to derive such duties from the fundamental right.[44] In the area of political rights, the right to secret suffrage offers examples for direct rights to affirmative state action derived from fundamental rights in order to compensate legislative omission. The right to secret suffrage obliges the legislator to guarantee the secrecy of a ballot by means of adequate measures.[45] A direct administrative duty to protect is derived from the right of assembly.[46] Accordingly, it is not allowed to prohibit an assembly for the reason that other groups are announcing counter-demonstrations; the administrative authority has rather the obligation to impede the counter-demonstration to such an extent that the originally announced assembly may take place.[47]

The existence of a right to affirmative state action derived from constitutional law in spite of the absence of a specifying regulation on the sub-constitutional level became very obvious in a case, in which the assessment of an "adequate" financial contribution to the costs of living

[42] VfSlg. 15.054/1997.
[43] See *Berka*, op. cit., para. 915.
[44] For general aspects, cf. *Holoubek*, Grundrechtliche Gewährleistungspflichten, 1997.
[45] VfSlg. 10.412/1985.
[46] Cf. also VfSlg. 6850/1972, 8609/1979.
[47] See also VfSlg. 12.509/1990.

for persons doing alternative service (instead of compulsory military service) played an important role. The constitutionally guaranteed right to carry out alternative service (Art. 9a (3) B-VG) safeguards also the committed citizen's subsistence for the duration of this service.[48] It is, in fact, principally the task of the legislator to regulate - in line with the constitutional guidelines - dimension and form of the subsistence of persons carrying out alternative service. However, if the legislator fails to create a legal basis securing an existentially necessary basic subsistence for persons doing alternative service, then the respective obligation of the state derives directly from the constitution.[49] The series of Constitutional Court judgements on the constitutional guarantee of an adequate subsistence for people carrying out alternative service (which has, in the first place, to be specified by the simple legislator, but may, however, also be directly derived from the constitution when the respective legal provisions have not been enacted) could well serve as a model for a comprehensive embodiment of social fundamental rights into the Austrian catalogue of fundamental rights, as it is presently being discussed.[50]

3.1.2. The omission of transitional provisions contradicting the equality principle

The equality principle requires the enactment of transitional provisions when the legal situation of the addressee of the statute is amended to the worse. If the legislator fails to enact such transitional provisions, the amended provision is unconstitutional. Although it lies principally within the legislator's legal-political scope of action to alter the legal position of persons concerned to the worse, the legislator violates the equality principle when intervening in vested legal positions in a sudden and intense manner. This is especially the case in pension law.[51] The intensity of an encroachment is especially then considered as disproportional and therefore in disagreement with the equality principle, when the legislator fails to soften the legal amendment by way of corresponding transitional provisions.

When annulling provisions regulating the different pension age of men and women for contradiction with the equality principle, the Court held at the same time in its judgement VfSlg. 12.568/1990 that the equality principle requires the creation of transitional provisions,

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[48] VfSlg. 16.389/2001.
[49] In the judgement VfSlg. 17.685/2005, the Constitutional Court explains the legal term "adequate" subsistence in detail from the constitutional point of view, after having derived a sufficient determinateness for the resulting state duty from the obligation to grant "adequate" subsistence.
[50] Cf. Chapter 4. below.
[51] VfSlg. 11.288/1987, 11.665/1988, 12.568/1990.

thus effectuating a step-by-step reduction of the merely gender-specific distinction. In a case concerning pension reductions for notaries the Constitutional Court[52] pronounced that - under the aspect of the equality principle - such reductions are the more significant, the closer to pension age the person concerned is. If the legislator had wished to enact a regulation in line with the equality principle, he would have had to provide transitional periods corresponding to the increasing intensity of the intervention (thereby considering the age of the persons concerned).[53]

3.1.3. Legal consequences of illegally omitted administrative rulings

In the same way as the Constitutional Court has no power to directly review legislative omission with regard to its constitutionality (the Court is only entitled to examine existing legal provisions in consequence of their context with a non-enacted legal norm), also illegally omitted administrative ruling may entail different legal consequences, depending on the effects intended by the legislator. If the legislator stipulates that the effects of a statute shall depend on the enactment of an administrative ruling, then unconstitutionality may not only be attributed to the - for whatever reason defaulting - administrative authority obliged to enact the ruling, but also to the statute itself that has provoked this situation.[54] Thus, a legal provision whose entry into force depends on the enactment of an administrative ruling may become unconstitutional. In that sense, the Constitutional Court held in its judgement VfSlg.11.632/1988[55] that a legal situation that is constitutionally tolerable as a transitory regulation only, may become unconstitutional when the maximum permissible transitory term has expired. "It is not the omission by the administrative authority obliged to enact the regulation that makes the statute questionable with regard to the constitution, but it is the excessive continuance - caused by whatever reason - of the effects of a legal situation tolerable for a transitory period of time only."[56]

The inactivity of the competent administrative authority in connection with the so-called "dispute on topographic road signs" ("*Ortstafelstreit*") in Carinthia caused special problems

[52] VfSlg. 17.254/2004.
[53] VfSlg. 17.254/2004.
[54] VfSlg. 11.632/1988, 13.177/1992, 13.890/1994.
[55] "*Süßstofferkenntnis*", VfSlg. 11.632/1988.
[56] The same basic idea may be found in the judgement VfSlg. 17.604/2005, according to which the illegal inactivity of the administrative authority called to enact an administrative ruling, causes - after an appropriate period of time - the unconstitutionality of the legal provisions hindering the granting of a construction permit (in the present case, the administrative authority has - for whatever reason - failed to enact a general and supplementing legally binding land-use plan).

indeed. Art. 7 sub-para. 3 second sentence of the State Treaty for the Re-establishment of an Independent and Democratic Austria (State Treaty of Vienna) - which is in the rank of the constitution - stipulates among others, that in administrative and judicial districts, where there is Slovene or mixed population, topographical terminology and inscriptions shall be in Slovene language as well as in German. The Constitutional Court[57] has defined an area with mixed population as an area where the percentage of the minority in a locality exceeds 10 % during a longer period of time. If this is the case, an administrative district with mixed population may be assumed according to Art. 7 sub-para. 3 second sentence of the State Treaty of Vienna. § 2 (2) sub-para. 1 of the Ethnic Groups Act (*Volksgruppengesetz*) had provided that bilingual topographical road signs should only be put up in territorial areas where "a relatively significant number (one quarter)" of the Austrian citizens resident there belonged to the ethnic group;[58] the Constitutional Court annulled this provision as unconstitutional, because it contradicted the mentioned provision of the State Treaty of Vienna. The Constitutional Court held in the following that Art. 7 sub-para. 3 second sentence of the State Treaty of Vienna directly - without a statute as intermediary, i.e. in the case of legislative omission - obliges the administrative authorities to implement the respective bilingual topographical road signs in areas where a share of the population of more then 10 % speaks Slovene. The omission of this obligation by the competent administrative authority entailed the illegality of many administrative rulings implementing topographical road signs (in German language only).[59]

3.2. Procedural law problems caused by legislative omission before the Constitutional Court

In the Austrian constitution, abstract as well as concrete norm review may be found. Norms in this sense are simple statutes, international treaties and administrative rulings; if the alleged violation of fundamental principles of the constitution (democratic principle, rule of law principle, federal principle and liberal principle) is at issue, also "simple" constitutional laws must be in accordance with these principles.[60]

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[57] VfSlg. 15.970/2000; this judgement concerned the recognition of the Slovene Language as an official language.
[58] Cf. VfSlg. 16.404/2001.
[59] Cf. e.g.VfSlg. 16.404/2001; VfGH 26.6.2006 V 20/06 et al., VfGH 3.12.2006 V 51/06.
[60] In the case of conflict, they may even be annulled by the Constitutional Court: VfSlg. 16.327/2001.

Abstract norm review is not linked to a specific case. Applications for abstract norm review may be filed by the federal government with respect to *Land* statutes, by the governments of the *Länder* with respect to federal statutes as well as by one third of the members of the *Nationalrat* (deputy chamber of parliament) and of the *Bundesrat* (federal chamber of parliament) with respect to federal statutes, and - if the constitution of a *Land* provides for - also by one third of the members of a *Landtag* with regard to statutes of the respective *Land*.

Concrete norm review takes place upon application of the Supreme Court and the Administrative Court, of a court of second instance as well as of an Independent Administrative Panel or the Federal Procurement Authority, always on the condition that the institution filing the application had to apply the statute or the provision in question in a specific case.

In the case of abstract as well as in the case of concrete norm review, legislative omission - even if unconstitutional - is principally excluded as a procedurally admissible argument. In this regard, the application would have to be rejected. When however, as repeatedly mentioned above, the constitutionality of an existing regulation depends on the condition, that no related unconstitutional omission has occurred, then also the omission may indirectly be made a procedural topic and even the subject matter in dispute *per se*.

Very important and – as comparative law shows, not at all self-evident - is the obligation of the Constitutional Court to open norm review proceedings *ex officio* with regard to a statute or a legal provision, if and when the Court itself has to apply the statute or the legal provision in other proceedings pending before it. This may occur in the course of all types of proceedings to which the constitution empowers the Constitutional Court, with the exception of norm review proceedings regarding statutes. A special role, however, plays the *ex officio*-review in the case of complaints filed by individual persons, challenging a last instance decision by an administrative authority (Art. 144 B-VG). Such a complaint may allege the unconstitutionality of the statute applied, and that this unconstitutionality originates from the omission of a supplementary regulation.[61]

It is very important to emphasize that also in case of *ex officio*-reviews there must be an initiative "from outside". Unless proceedings subject to the jurisdiction of the Court are

[61] E.g. regarding necessary transitory regulations, see Chapter 3.1. above.

pending, the Constitutional Court is not authorized to review on its own initiative the constitutionality of statutes, not to mention of legislative omission.

In summary, it has to be noted that - in the absence of an explicit jurisdiction of the Constitutional Court to sanction legislative omission - there is, at best, an indirect possibility to object the omission of a regulation in the course of the proceedings and to use it as an argument for the unconstitutionality of an existing, effective legal norm.

4. Review and evaluation of legislative omission in view of legal-political and constitutional-political aspects

Although the Constitutional Court only has the power to annul or not to annul legal provisions (according to the present constitutional situation, the Court does not have the jurisdiction to determine the existence of a legal gap in a declaratory judgement), certain legal-political and constitutional-political trends tend towards a comprehensive jurisdiction of the Constitutional Court that also comprises the review of legislative omission.

This complex of problems is, above all, in a special way connected with the current discussion on the creation of "social" fundamental rights (which - according to the present constitutional situation - do not exist in the rank of the constitution). When creating social fundamental rights, in most cases it will be inevitable to charge the simple legislator with the mandate to implement certain programmatic constitutional provisions. If this happens, the creation of a jurisdiction of the Constitutional Court will doubtlessly have to be envisaged, enabling the Court to declare, whether at all, and if yes, in the form of which complex of regulations the simple legislator has not implemented a programmatic constitutional provision. It may be expected that, in the course of next year, a corresponding constitutional regulation will be submitted to Parliament by the Federal Government in the form of a government bill. The so-called "Austrian Convention" – established 2003 with the aim to prepare a global redesign of Austrian constitutional law – has elaborated precise propositions for the design of such a jurisdiction of the Constitutional Court.