A Concise Overview of the Austrian Legal System

I. Introduction

In Austria, legislation is traditionally regarded as the primary source of law due to the adherence to the civil law system. In this context, the most important piece of legislation is the Austrian Constitution of 1920 as amended 1929 ("Österreichische Bundesverfassung", "Bundes-Verfassungsgesetz", B-VG[1]). Nonetheless, legal acts of constitutional character can additionally be found outside the B-VG. These include important fields such as the protection of fundamental rights of citizens, provided for in a statutory law of 1867 („Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger": StGG[2]). Further, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is a constitutional provision of the same kind[3].
The directly elected Federal President is the official Head of the State (Article 19 para 1 B-VG). Pursuant to Article 1 B-VG, Austria is a democratic Republic. The functioning of the parliamentary representative democracy rests upon the bicameral Parliament consisting of the National Assembly ("Nationalrat") and the Federal Assembly ("Bundesrat"). Members of the latter are representatives of the nine constituent parts (member states) of Austria ("Länder") according to the federal principle expressed in Article 2 para 1 B-VG.
The organization of the Austrian State is further characterized by the separation of powers, i.e. the clear-cut differentiation between legislative, executive and judicial rights and duties.
With regards to the judicial branch, not only (domestic) constitutional provisions provide legal guidelines, but also Austria's accession to the European Union as of January 1, 1995 has had a significant impact on the work of the judges[4].
Yet, the following overview of the Austrian Courts shall focus on the respective operational principles as primarily defined by provisions of the Austrian Constitution.

II. The courts

The court system in Austria is characterized by a basic distinction between independent courts competent for all criminal and civil law matters on (pertaining to the "Ordinary" Court System) and a system of "Courts of public law jurisdiction". The latter notably comprises the Constitutional Court and the Administrative Court.

II.1 The "Ordinary" Court System

Pursuant to Article 82 para 1 of the Austrian Constitution, all courts are federal institutions ("Bundesgerichte"). In many other areas, the Constitution provides for a division of tasks between the Federal State and the "Länder". However, this organizing principle has not been applied to the court system[5].
The Constitution authorizes the legislature to elaborate further details of the organization of the courts. Article 83 para 1 B-VG explicitly specifies that the organization and jurisdiction of

[1] BGBl (Federal Law Gazette) No. 1/1930, as amended.
[2] RGBl No 142/1867, as amended.
[3] The ECHR was ratified by Austria in 1958 (BGBl No. 210/1958) and has the rank of constitutional law, as expressly enacted in 1964 (BGBl. No. 59/1964). Therefore, it is directly applicable and can be invoked before the Austrian Constitutional Court (see for further details *infra* II.2.1). Additionally, the impact of the ECHR has notably shaped criminal law and criminal and civil procedure as well as the system of administrative adjudication.
[4] For instance, since the accession, Austrian courts have filed a disproportionately high number of requests for preliminary rulings before the European Court of Justice (according to Article 234 Treaty of the European Union) in order to clarify issues in the context of conflict of norms between domestic and European law.
[5] The majority of other federal States has chosen a different approach: In Germany, for instance, both federal and "Länder" courts are established.

the courts may only be established by federal statute. Accordingly, the *Organisation of the Courts Act* ("Gerichtsorganisationsgesetz": GOG[6]) details the structure of court system. The jurisdiction of the courts in civil matters is regulated by the *Judicature Act* ("Jurisdiktionsnorm": JN[7]), and the relevant procedure by the *Code on Civil Procedure* ("Zivilprozeßordnung": ZPO[8]). In criminal law matters, both jurisdiction and procedure are regulated by the *Criminal Procedure Code* ("Strafprozeßordnung": StPO[9]).

II.1.2 Structure of the "Ordinary Courts"

Based on the Constitutional provisions and the aforementioned "ordinary" laws, notably the *Organisation of the Courts Act*, a system of lower level trial and appeals courts has been established. Accordingly, four different levels of courts can be distinguished:

II.1.2.1 District Courts ("Bezirksgerichte")

Both civil and criminal law matters are heard before 141 District Courts[10] ("Bezirksgerichte") as trial courts. A specialised District Court for commercial matters, competent to judge on disputes between merchants and other commercial participants, is situated in Vienna ("Bezirksgericht für Handelssachen").

The District Courts' competence for civil law cases is determined by both the subject matter and the value of the claim ("Streitwert"). Civil cases involving values of maximum EUR 10,000 are heard before the District Courts. Below EUR 2,000, means of appeal are restricted. Subject matters dealt with before the District Courts include property possession and rent matters, succession and most matters of non-contentious jurisdiction ("Außerstreitsachen"). Family law matters (such as paternity and alimony cases or divorce actions) are to be heard before the District Courts regardless of the value involved. All other civil law cases fall within the competence of higher courts.
As regards criminal law cases, the District Courts are competent to decide on cases involving less serious offences (misdemeanours: "Vergehen"). In principle, these are cases entailing either the imposition of a fine or a maximum of 12 months imprisonment.
District Courts are competent to assist in the preliminary inquiry or investigation regarding crimes ("Verbrechen") and serious misdemeanours.

There is no lay participation at the district court level. In both civil and criminal matters, single professional judges decide on the respective cases.

II.1.2.2 Regional Courts ("Landesgerichte")

Similar to the separation of duties on the District Court level, there are 20 „Landesgerichte"(Regional Courts)[11] competent to decide on both criminal and civil matters.

Regional Courts are trial courts in civil matters concerning sums exceeding EUR 10,000. Cases are usually heard by a single judge. Yet, panels of three judges decide on cases whose

[6] RGBl. No. 217/1896, as amended.
[7] RGBl. No. 111/1895, as amended.
[8] RGBl. No. 112/1895, as amended.
[9] BGBl (Federal Law Gazette) No. 631/1975, as amended.
[10] A complete list of District Courts as of February 18, 2005 is available at http://www.bmj.gv.at/_cms_upload/_docs/gerichte_und_behoerden2005.pdf
[11] See also at http://www.bmj.gv.at/_cms_upload/_docs/gerichte_und_behoerden2005.pdf.

amount in dispute is above EUR 50,000 and on specific (in practice very rare) request of one of the parties. In addition, the "Landesgerichte" decide on appeals regarding judgements of the District Courts.

Correspondingly, Regional Courts are courts of appeal for cases heard before the District Courts for criminal matters. In this respect, they are competent to decide on cases not falling within the competence of the District Courts as courts of first instance.
Materially, proceedings concerning criminal offences entailing a maximum sentence between one and five years are conducted by a single professional judge. More serious offences (i.e. those entailing a sentence of more than five years), are dealt with by a mixed court, consisting of two professional judges and two lay assessors. The latter decide on both the guilt and the sentence of the accused (so-called "Schöffengericht"[12]). Finally, a jury trial is competent to decide on most serious crimes (including for instance murder, armed robbery or political crimes, all of which entail sentences of minimum five years and maximum more than ten years of imprisonment[13]). The jury comprises eight lay jurors who solely decide whether the accused was indeed guilty of having committed the alleged crime. Three professional judges supervise the trial (so-called "Geschwornengericht"[14]).

As on the district court level, a specialised court for commercial matters involving companies, merchants or registered associations is established in Vienna. Outside Vienna, specialised commercial panels ("Handelssenate") within the courts of ordinary jurisdiction deal with commercial matters.
Further, there are specialised chambers for labour and social and welfare matters set up within the Regional Courts. Yet again, Vienna has a specialised "Labour and Welfare Court" ("Arbeits- und Sozialgericht").

II.1.2.3 Courts of Appeals ("Oberlandesgerichte")

In civil cases, the Courts of Appeals (situated in Graz, Linz, Innsbruck and Vienna) hear cases decided by the "Landesgerichte" as trial courts. The Courts of Appeals usually sit in panels ("Senate") composed of three judges. In commercial law matters and social and welfare cases, the structure of these panels is different, consisting of additional expert lay judges.

In criminal matters, the Courts of Appeals are usually the second and thus final courts of appeal. In this case, again, a panel ("Senat") of three judges is competent to decide on the matter. However, there are distinct situations when the appeal will be heard by the Supreme Court instead[15].

Further, the Vienna Court of Appeals is competent to decide on anti-trust matters, sitting as trial court for Austria (in this instance called "Kartellgericht", "Cartel Court"). Three member panels ("Senate") are composed of one professional judge and two "expert" lay judges nominated by the Austrian Federal Economic Chamber ("Wirtschaftskammer Österreich") and the Austrian Federal Chamber of Labour ("Arbeiterkammer Österreich").

[12] The participation of individuals at the "Schöffengericht" is stipulated by Article 91 para 3 B-VG.
[13] However, the maximum sentence is imprisonment for life since the constitution contains an absolute prohibition of the death penalty. It is the only provision of substantive criminal law contained in the Constitution (Article 85 B-VG).
[14] See Article 91 para 2 B-VG.
[15] Further details see *supra* IV (Appeals System).

II.1.2.4 The Austrian Supreme Court ("Oberster Gerichtshof": OGH)

Article 92 of the Constitution establishes the Supreme Court as the highest court in civil and criminal law matters. The Court's competence also includes matters of labour and social law, as opposed to the organization of courts in Germany, for instance, where two special Supreme Courts for these fields of law exist. The "Supreme Court Act"[16] provides further details of the organization of the Supreme Court:
The Court is composed of a President, two Vice-Presidents, 13 panel chairmen and 41 judges, usually sitting in panels of five. Ten panels are competent to deal with civil matters, five with criminal cases. In antitrust matters, a specialised panel deals with appeals against decisions of the "Cartel Court", comprising expert lay judges. Lay judges also participate in social and welfare cases decided by the Supreme Court.

Further, certain formal matters are decided by a three member panel. An enlarged panel ("Verstärkter Senat") of eleven judges deals with legal questions of fundamental importance, which deviate from the Court's established legal opinion in a specific field of law or that a legal issue of fundamental importance has not yet been answered in a uniform manner[17].

In civil cases, the Supreme Court's competence notably includes the decision on appeals against judgements of the Courts of Appeals.
In criminal matters, the Supreme Court is sitting in panels of five judges. The Supreme Court is notably competent to decide on appeals against verdicts adopted by courts consisting of lay jurors or by jury trials ("nullity appeals"). In this case, the Supreme Court is the second and final court to decide[18].

The *Legal Information System* ("Rechtsinformationssystem": RIS)[19] contains a database including full texts of the Supreme Court's decisions. It notably comprises a collection of civil case decisions since 1985, as well as criminal case decisions dating back to 1980. Prior to that, a complete overview of the Supreme Court's case law since 1950 (including further source indications) is available.

II.2 Courts of public law jurisdiction

Article 94 of the Constitution refers to the fundamental difference of civil law and public law jurisdiction and consequently states that "judicial and administrative powers shall be separate at all levels of proceedings"[20]. Accordingly, also a system of Courts of public law jurisdiction distinct from "Ordinary Courts" has been established.

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[16] "Bundesgesetz über den Obersten Gerichtshof" (OGHG) of June 19, 1968. BGBl (Federal Law Gazette) No. 328/1968, as amended.
[17] Since its inception in 1969, the enlarged panel has dealt with approximately 60 cases. See the latest report of the Court's activities of the year 2004, published on June 22, 2005, available online (in German) at http://www.ogh.gv.at/aktuelles/detail.php?nav=18&id=59&l_start=0&x_start=0.
[18] For further details regarding the appeals system in criminal and civil matters see *infra* IV.
[19] www.ris.bka.gv.at. The RIS contains a large number of other databases (such as a comprehensive collection of federal law, provincial laws, as well as a collection of the decisions of notably the Constitutional Court and the Administrative Court). Responsibility for the planning and coordination of the RIS lies with the Austrian Federal Chancellery ("Bundeskanzleramt"). Responsibility for the contents lies with the departments providing the specific data. While for some major legal documents English translations exist, the majority of the database's documents is currently just available in German.
[20] See the English translation of the Austrian Constitution from the Austrian Federal Chancellery ("Bundeskanzleramt") at www.ris.bka.gv.at/erv/erv_1930_1.pdf

The material scope of the Courts of public law jurisdiction is referred to in a number of provisions of the Constitution, one important example being Article 89 para 1 B-VG. It states that "the courts are not entitled to examine the validity of duly published statutes, regulations and treaties." This provision refers to one of the tasks assigned to the Austrian Constitutional Court ("Verfassungsgerichtshof: VfGH"), one of the two principal Courts of public law jurisdiction in Austria.
On the other hand, the Austrian Administrative Court ("Verwaltungsgerichtshof: VwGH") is competent to judge on legal conflicts between citizens and administrative authorities. In this context, it is noteworthy that such conflicts are neither adjudicated by ordinary courts (as it is the case in the US for instance) nor by special administrative courts including several levels of appeal (as in France or Germany), but are primarily addressed within the administrative hierarchy itself.

II.2.1 The Constitutional Court ("Verfassungsgerichtshof": VfGH)

Articles 137 to 148f of the Austrian Constitution specify both material and procedural aspects of the Austrian Constitutional Court. Further details on the structure of the Constitutional Court are notably provided for in the "Constitutional Court Act" of 1953[21].

The Constitutional Court consists of a President, a Vice-President, twelve further members and six substitute members. All members of the Court must hold law degrees and have at least ten years of professional experience[22].

Proceedings before the Constitutional Court are usually initiated by a written motion. In principle, complaints must be submitted by an attorney (so-called "absoluter Anwaltszwang"). The latter is subsequently served to the opponents with the purpose of allowing them to reply in writing. In practise, the decision of the Court is usually rendered without further oral argument, according to the Constitutional Court Act, this should be the exception to the rule, but has become the standard case. In principle, only the plenary (consisting of all members of the Court) is rightfully entitled to decide on a given case. In practise, a number of cases are decided by the so-called "Kleiner Senat" ("Small Senate/Panel") consisting of the President, the Vice-President and four Members. This panel will notably render a decision if it is unlikely on the outset that the complaint will be successful or the clarification of a controversial constitutional issue is not to be expected.

II.2.1.1 Powers of the Constitutional Court

The Constitutional Court's competences are comprehensively enumerated in the Constitution.
Among the most important tasks rank the constitutional review of statutes (Articles 139a and 140 B-VG: "Gesetzesprüfung").
The Court is entitled to examine the constitutionality of federal or *Land* statutes in two circumstances. Either, the court may investigate *ex officio* whether a statute is in conformity with a constitutional provision in case the statute is to be applied in a case before the court. Alternatively, an examination of the Court can be requested by certain institutions or persons. Appellate courts, Independent Administrative Review Tribunals, the Supreme Court or the Administrative Court may file a request if the contested statute is to be applied in the respective case in question ("Präjudizialität"). The Federal Government may contest the Land

[21] ("*Verfassungsgerichtshofgesetz*: VerfGG"). BGBl (Federal Law Gazette) No. 85/1953 as amended by BGBl (Federal Law Gazette) No. I 80/2005.
[22] For further details regarding the position of the judges of the Constitutional Court see *infra* III (Judiciary).

statutes, and a Land Government or one third of the members of the National Assembly ("Nationalrat") may challenge a federal statute.

Any individual may file a complaint before the Constitutional Court alleging a direct violation of his constitutional rights by a directly applicable statute. However, this presupposes that no court decisions or administrative rulings specifying such directly applicability were previously issued.
Further requirements for individual requests have notably been elaborated by the Court's case law: The individual must actually (and not just potentially) be affected by the contested measure. The degree of seriousness of the interference must be taken into account and any other way of granting the complainant's rights must have previously been estimated as unreasonable by either a court a another competent (administrative) authority.

The Court may repeal an entire statute or parts thereof. The statute (or its defective part) expires upon publication of the court's decision in the Federal Law. As a result, the respective legal provision in place prior to the unconstitutional statute will become effective again. However, the Court can expressly exclude this consequence (Article 139 para 6 B-VG).

Further, the Court is entitled to review secondary legislation of either the Federation ("Bund") or the *Länder* (Article 139 B-VG: "Verordnungsprüfung").
Regulations ("Verordnungen") of federal or *Land* authorities may be declared illegal at the request of certain institutions or persons. The latter can filed by a court or an Independent Administrative Review Panel, for instance, if these would have to apply the regulation in a specific case ("concrete review"). Also, the Federal Government may file a request concerning all regulations of Land authorities and vice versa. Municipalities ("Gemeinden") may contest regulations of superior bodies unlawfully restricting municipal enactments. In the latter cases, the review of the Constitutional Court is "abstract", i.e. no specific case triggers the Court's review mechanism.
Further, an individual citizen may file a claim whose rights are directly affected by the illegal regulation. The requirements pointed out in the context of individual complaints against statutes correspondingly apply[23].
In addition, the Austrian Ombudsman Board ("Volksanwaltschaft") may request the examination of federal or land regulations (Article 148e B-VG). Finally, the Constitutional Court itself may examine a regulation if it would have to apply it in a specific case.

As it is the case with statutes, the Court may appeal an entire regulation or parts thereof. The regulation expires upon publication of the Court's decision in the Federal Law Gazette of the respective *Land*.
The repeal of an illegal regulation by the Court has no retroactive effect. The regulation in question continues to be applied to all cases that have arisen prior to the Court's decision. The Court may, however, decide that the illegality of the regulation in question shall be extended to cases that had been initiated but not finally decided upon prior to the final judgement of the Court (Article 140 para 6 B-VG).

The review of statutes and secondary legislation provides for a large number of cases decided by the court, whereas the review of treaties, regulated in Article 140a B-VG ("Staatsvertragsprüfung"), does not occur on a frequent basis[24].

[23] These notably include: the direct applicability of the regulation; actual (i.e. not just potential) violation of the individual's subjective rights; no other possibility to ensure the individual's rights but by means of a decision by the Constitutional Court.

Further, pursuant to Article 144 B-VG, the Constitutional Court has the power to review the legality of individual acts issued by administrative authorities, provided that all other means of administrative appeal have been exhausted ("Sonderverwaltungsgerichtsbarkeit"). This task provides for more than half of the cases filed before the Court[25].
A respective complaint may be brought by an individual specifying that the individual act in question either violated one of his subjective rights protected by constitutional provisions ("verfassungsmäßig gewährleistetes Recht"), or that it was based on an unconstitutional statute, treaty or an illegal regulation and that his rights were thereby violated. In case the Constitutional Court finds that the complaint refers to a right not protected by a constitutional provision, it may transfer the case to the Administrative Court. This decision is subject to a respective prior request of the complainant.

In addition, the court has the power to review in selected fields, in which the actual number of decisions is not very elaborate:

The Constitutional Court is competent to decide on conflicts between organs of State (Article 138 para 1 B-VG: "Organstreitigkeiten" and "Kompetenzkonflikte"). The Court has the power to judge whether there might be a conflict between the Federation and the *Länder* in terms of their respective legislation (Article 138 para 2 B-VG: "Kompetenzfeststellung").
The Court determines the validity and extent of agreements between the Federation and the *Länder* or *Länder* inter se (Article 138a para 1 B-VG: "Vereinbarungsprüfungsgericht").
It has the power to review elections (Article 141 B-VG: "Wahlprüfung"). The Court hears actions against organs of the State for breach of official duties (Article 142 B-VG: Staatsgerichtshof") and may ultimately judge to remove them from office (impeachment).
In practice, the jurisdiction of the Court to decide on financial claims made against the Federation, the Länder or local authorities (Article 137 B-VG: "Kausalgerichtshof") is limited. Finally, breach of international law may be considered by the Court, acting as a sort of international law court (Article 145 B-VG). The actual scope of this provision is disputed and of limited practical relevance.

II.2.2 Administrative courts

Pursuant to Article 129 B-VG, the Independent Administrative Review Panels of the *Länder* ("Unabhängige Verwaltungssenate in den Ländern": UVS) and the Administrative Court (Verwaltungsgerichtshof: VwGH) competent to secure the legality of all acts of public administration.
Apart from these major administrative tribunals, a number of other administrative bodies, such as the Independent Federal Asylum Tribunal ("Unabhängiger Bundesasylsenat": UBAS) for instance, have been established in order to deal with administrative complaints in specialized areas of public law.

[24]For further details on the number of cases decided by the Austrian Constitutional Court see the latest report of the Court's activities as of May 5, 2005 at http://www.verfassungsgerichtshof.at/cms/vfgh-site/attachments/5/1/1/CH0011/CMS1123595629335/taetigkeit2004.pdf. This competence of the Constitutional Court is of particular importance in the context of the reception of pubic international law in Austria, it is dealt with *supra* V (The nature of the reception of public international law in the domestic courts of Austria).
[25] For more information see also the latest report of the Court's activities as of May 5, 2005 at http://www.verfassungsgerichtshof.at/cms/vfgh-site/attachments/5/1/1/CH0011/CMS1123595629335/taetigkeit2004.pdf.

II.2.2.1 The Administrative Court ("Verwaltungsgerichtshof": VwGH)

The most important aspects regarding competences and organization of the Administrative Court are dealt with in Articles 130 to 136 B-VG. Further details on the organization are notably provided for in the "Administrative Court Act" of 1985 ("*Verwaltungsgerichtshofgesetz*: VwGG")[26].

The Court consists of a President, a Vice-President and other Members, i.e. twelve "Presidents of Panels" and 49 Court Councillors ("Hofräte")[27]. In principle, panels ("Senate") of five members are competent to decide on the cases. Three member panels are notably competent to decide on certain formal issues, such as rejection of inadmissible complaints, and on simple legal issues, i.e. those that contain no specific legal problem, based on previous decisions of the court. A panel consisting of nine members is needed in case the court decides to if the judges decide to delineate from a thus far established line of reasoning in a specific legal situation. Equally, this panel decides on matters previously incoherently decided by different panels of the Court.

II.2.2.2.1 Powers of the Administrative Court

The Constitution designates the Administrative Court as one of the competent authorities to secure the legality of all acts of administration (Article 129 B-VG).
Accordingly, this court has the power of judicial review regarding complaints alleging the illegality of an individual ruling of an administrative authority (Article 131 B-VG: "Bescheidbeschwerde"), regarding instructions of administrative authority according to Article 81a para 4 B-VG and complaints alleging a failure to take a decision by administrative authorities (Article 132 B-VG: "Säumnisbeschwerde").
The Court is, however, not competent to decide on matters pertaining to the jurisdiction of the Constitutional Court.

Complaints against illegal administrative rulings may be brought by any party who, after exhaustion of all appellate stages, alleges a violation of his substantive rights.
The complaint may also be brought by a competent administrative agency in case of an *objective violation* of the law upon the issuance of a respective ruling ("Amtsbeschwerde").
A complaint for failure to take a decision may be filed after the elapse of minimum six months of inactivity on behalf of the competent administrative authority of final instance. As regards fiscal penal matters, a different rule applies: The contested decision expires in case the respective administrative appeal has not been decided upon within 15 months.

II.2.2.2.2 Procedure

The "Administrative Court Act" specifies the procedural rules for the filing of complaints before the Administrative Court.
Complaints against rulings can be filed in writing within six months. They may (but do not necessarily have to) be submitted by an attorney (as opposed to the standard case before the Constitutional Court: "relativer Anwaltszwang"). Usually, no oral hearings take place. Yet, they will be undertaken upon request by one of the parties involved. A complaint does not automatically affect the enforcement of an individual ruling. Yet, the Court may decide to temporarily lift the enforcement.

[26] See BGBl (Federal Law Gazette) 10/1985, as amended.
[27] For further details of the position of the judges of the Administrative Court see *infra* III (Judiciary).

The Court will only decide on the merits in cases of failure to take a decision. In all other cases, if the Court finds a ruling to be illegal, it remands the case to the respective administrative authority. The latter is bound by the legal opinion of the Court upon implementation.
In case of non-compliance, the respective party may again file a complaint before the Administrative Court. Ultimately, if all further requirements are fulfilled, the party may bring a civil suit for damages against the State ("Amtshaftungsklage" or "Organhaftpflichtklage").
The collection of the decisions of the Court is embedded in the "Legal Information System"[28].

II.2.2.3 The Independent Administrative Review Tribunals of the "Länder" and other specialised tribunals of administrative law

In addition to the Administrative Court, the Independent Administrative Review Tribunals of the "Länder" are competent to secure the legality of all acts of administration (Article 129 B-VG). Technically, they are not "courts", but administrative bodies of the Länder, consisting of a Chairman, a Deputy Chairman, and the requisite number of other members[29].

They notably hear appeals regarding unlawful administrative orders ("Verwaltungsübertretungen", Article 129a para 1 subpara 1 B-VG). Their competence further includes the review of the acts of direct administrative power and compulsion ("Akte unmittelbarer behördlicher Befehls- und Zwangsgewalt", Article 129a para 1 subpara 1 B-VG).

Against decisions of the Independent Administrative Tribunals in these subject matters, an appeal may be brought before the Administrative Court, functioning as a court of second level of appeal. Additionally, in cases of violations of subjective rights protected by constitutional provisions, competence of the Constitutional Court may be given.

A limited number of specialised tribunals of administrative law has been established by the federal legislator. They share a common organizational structure compared to the Independent Administrative Review Tribunals. Two important cases in point are the Independent Federal Asylum Tribunal and the Independent Tax and Customs Panel.

Article 129c para 1 B-VG refers to the Independent Federal Asylum Tribunal ("Unabhängiger Bundesasylsenat": UBAS) as the administrative body competent for appeals in asylum cases. It has been established as of January 1, 1998, consisting of a Chairman, a Vice-Chairman and 37 members nominated for indefinite time. Consequently, the burden of work for the Administrative Court has substantially decreased since the Administrative Court may refuse to hear appeals from the Asylum Tribunal unless a fundamental question of law is concerned (i.e. deviating from the legal opinion of the Administrative Court in previous decisions of comparable legal settings, or such decisions do not exist for a specific legal problem or if the decisions of the court are not uniform in a given field)[30].

[28] See www.ris.bka.gv.at. Further details on the Legal Information System (RIS) see *supra* footnote 19. The respective decisions are subdivided into administrative and financial law. The annually published version is called "Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofs (Administrativrecht und Finanzrecht)"
[29] Additional aspects concerning the establishment of theses courts can be found *infra* III (Judiciary).
[30] A further example of tribunals referred to by the Constitution (Article 11 para 7 and 8 B-VG) and effectively set up by the federal legislator is the Independent Environmental Senate ("Unabhängiger Umweltsenat"). This body is competent to hear appeals regarding rulings dealing with environmental issues, such as the environmental impact of certain projects, for instance.

The Independent Tax and Customs Panel ("Unabhängiger Finanzsenat": UFS), is competent to decide on appeals against rulings in matters of taxes, customs duties and respective penalties. This body was established as of January 1, 2003 and enjoys a substantially increased independence compared to the previously existing review panels. It consists of a Chairman, Vice-Chairman and other 241 members who are appointed for life. The decisions of the Panel are subject to limited review by the Administrative Court according to the abovementioned criteria.

III. Judiciary

Some of the most important principles for the safeguard of fundamental (procedural) rights, such as the right to be heard and tried by a "lawful judge" (granted by Article 83 para 2 B-VG), profoundly depend on a powerful status of judges in the legal system.
Thus, Article 87 para 1 B-VG guarantees the independence of judges providing that they are only bound by law in the exercise of their duties and must not comply with administrative instructions, may they be general or specific in character. Further provisions substantiate the principle of judicial independence: Judges may not be removed from office or put into another position except for specific restricted cases provided for by law or based on a judicial decision (Article 88 para 2 B-VG). In addition, the allocation of duties (involving the distribution of cases) among judges has to be determined in advance and may only exceptionally be changed (Article 87 para 3 B-VG).

Pursuant to Article 86 B-VG, judges are appointed by the Federal President (who may delegate this power to the Minster of Justice) on proposal by the Federal Government (who may equally transfer this power to the Minister of Justice). A selection panel consisting of minimum three judges is competent to propose at least three candidates to the Minister of Justice for each vacant position. Interestingly, the Constitution does not specify the qualifications necessary to become a judge. However, these can be derived *argumentum e minori ad maius* from Article 87a para 1 B-VG referring to the requirement of a "special training", even for employees of the court who are not judges.

By comparison, the members of the Constitutional Court are appointed by the Federal President, who is bound by nominations of the Federal Government ("Bundesregierung"), as well as of the two chambers of the Parliament. Court members do not work full-time and are allowed to simultaneously continue other employments, the only exception being administrative officials who have to refrain from their activities in order to maintain their impartiality. Members of the Constitutional Court may retire at age 70 and therefore usually serve a relatively long term of office.

Members of the Administrative Court are equally appointed by the Federal President upon nomination by the Federal Government ("Bundesregierung"). Nominations of other members than the President or the Vice-President must be based on proposals containing three candidates per vacancy. These are submitted to the Federal Government by the Plenary Meeting of the Court. Similar to the requirements set up for the Constitutional Court, members of the Administrative Court must hold a law degree and have at least ten years of professional legal experience. Also, they shall retire at age 70 at the latest.

Both Members of the Constitutional Court and the Administrative Court enjoy judicial independence in the sense of Article 87 para 1 B-VG.

However, prior to 1991, substantiated doubts had been raised whether the Administrative Court was indeed an "independent and impartial tribunal" as required by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The structure of the administrative review system was found to be inconsistent with the respective obligations of Austria in this context. The mere possibility of subsequent administrative review of an administrative act by the Administrative Court did not suffice to qualify this court as an "independent and impartial tribunal" since the Administrative Court was bound by the determinations of facts of the lower administrative authorities. Yet, the latter were not independent because their officials are bound by instructions and orders of their superiors and are responsible to them in the exercise of their office (Article 20 B-VG).

Therefore, the Independent Administrative Review Tribunals of the "Länder" were established as of January 1, 1991. They are considered to be "tribunals" according to the understanding of this notion by the European Court of Human Rights. Panel members are appointed by the Land governments for at least six years. They are not judges, yet the length of their appointment guarantees their independence in the exercise of their "quasi-judicial functions". This is further supported by the constitutional provision of Article 129b para 2 B-VG according to which they are not bound by any instructions in the performance of their tasks.

"Independence" in the sense of Article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms is guaranteed by granting full jurisdiction on matters of facts and law to the tribunals after all means of administrative appeal have been exhausted.

All "quasi-judicial" bodies set up in the same way as the Independent Administrative Review Tribunals enjoy a sufficient degree of independence, notably because their members are not bound by any instructions in the performance of the tasks referred to them. Thus, their assessment as an "independent tribunal" as required by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is equally unproblematic.

IV. Appeals System

The *Criminal Procedure Code* ("Strafprozeßordnung": StPO[31]) provides for just one level of appeal in criminal cases[32].

Judgements of the District Court and of the single judge in Regional Court proceedings are open to an appeal against the legal assessment, the type and extent of the sentence and the establishment or assessment of evidence ("volle Berufung", "full appeal" or *de novo* appeal: Articles 464 et sequ. and 489 et sequ. *Criminal Procedure Code*). A trial restricted to the points advanced in the appeal will subsequently be carried out before the appellate court (either the Regional Court in cases appealed before the District Court or the Court of Appeals in Regional Court cases)[33].

[31] BGBl (Federal Law Gazette) No. 631/1975, as amended.

[32] This is expressed notably in Articles 295 para 3 and 479 *Criminal Procedure Code*, stating that no further remedies are available against decisions of courts of second instance. Most other procedural laws do not know such a restriction. See for instance the appeals system according to the Austrian civil procedure or German criminal procedure.

[33] Note that even if the appeal advances new facts and evidence, resulting in a different legal assessment on behalf of the appellate court, no further appeal is admissible (Article 479 *Criminal Procedure Code*).

As regards verdicts of the mixed courts ("Schöffengerichte") and jury courts ("Geschwornengericht") at the Regional Court level, either a material legal or serious procedural error can be appealed, provided they are listed in the *Criminal Procedure Code* ("Nichtigkeitsbeschwerde": "appeal for nullity" or "appeal for error": Article 281 para 1 Criminal Procedure Code)[34].
An "appeal for nullity" has suspensory effect. In absence of formal defects, a special hearing at the Supreme Court will take place. If the appeal is found to be justified, the judgement is reversed and the case is either remanded for re-trial (in all cases of procedural error) or decided on the merits by the Supreme Court (in all matters of substantive law).
Moreover, verdicts of the mixed and jury courts may also be appealed regarding the type or extent of the sentence (so-called "ordinary appeal" or "Strafberufung" pursuant to Article 283 *Criminal Procedure Code*). Again, the appeal has suspensory effect and is decided upon by the Court of Appeals in a procedure similar to that before the Supreme Court. If previously pointed out in the appeal, additional evidence may be presented. An "ordinary appeal" may be combined with an "appeal for nullity". In this case, both appeals are heard before the Supreme Court.

A number of "extraordinary remedies" complements the abovementioned system of appeals ("ordinary remedies"). Most importantly, in the case of an "ordinary resumption of proceedings" ("ordentliche Wiederaufnahme": Articles 352 et sequ. *Criminal Procedure Code*), a judgement that has not been appealed may later be contested in favour of the defendant. The proceedings may be resumed at the trial court, if the verdict was based on evidence or testimony later found to be false or incorrect, significant new evidence has become known or another person had been sentenced for the same crime before a different court, provided that there could only have been one perpetrator (Article 353 *Criminal Procedure Code*).

Further, the Supreme Court constantly deals with a number of so-called nullity appeals to uphold the integrity of the law ("Nichtigkeitsbeschwerde zur Wahrung des Gesetzes": Article 33 para 2 StPO) filed by the Procurator General[35]. This "extraordinary remedy" is aimed at protecting the legality and principle of due process without a prior appeal of the parties. The verdict can only be changed in favour of the defendant.
In case of an "extraordinary resumption of proceedings" ("außerordentliche Wiederaufnahme": Article 362 *Criminal Procedure Code*), the Supreme Court may correct a judgement *ex officio* in favour of the defendant if serious shortcomings regarding the determination of facts by the trail court or juror court have occurred. Since parties are likely to invoke an ordinary remedy in these cases, this provision is hardly ever applied[36].

[34] These include for instance cases of serious violations of procedural rules (i.e.: absence of a judge, defendant or his attorney during the entire trial, dubious assessment of evidence by the court etc) or cases of incorrect application of material law, such as the imposition of a sentence not provided for by the law. In jury trials, further reasons for appeal are admissible, such as the an inaccurate phrasing of questions submitted to the jury, incorrect legal instructions given to the jury by the court, or an incomplete, unclear or contradictory verdict rendered by the jury.
[35] The Procurator General ("Generalprokurator") is a party *sui generis* having the right to be heard and to bring motions. For instance, if the European Court of Human Rights has detected a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms by a decision of a criminal court, the Procurator General may file a request before the Supreme Court aiming at the abrogation of the decision (Article 363a *Criminal Procedure Code*).
[36] See the latest report of the Court's activities of the year 2004, published on June 22, 2005, available online (in German) at http://www.ogh.gv.at/aktuelles/detail.php?nav=18&id=59&l_start=0&x_start=0.

According to the *Code on Civil Procedure* ("Zivilprozeßordnung": ZPO[37]), the "standard" civil procedure is supposed to start before a single judge at a Regional Court level[38]. Its judgements may ultimately be appealed to the Supreme Court. Therefore, the "model" appeal proceeding in civil matters provides for two appeal courts.

First, an "ordinary" appeal ("Berufung")[39] may be filed to a Court of Appeal within four weeks after a written judgement has been served. This court, sitting in a three member panel, is equally competent to decide on appeals against judgments rendered by the three member panel of the Regional Court[40].
Alternatively, a judgement rendered by a District Court may be appealed to the Regional Court, who will also decide in a three member panel.
In all cases the appeal may challenge the establishment of facts and law[41]. It has suspensory effect, i.e. it adjourns the legal force and in most cases the enforceability of the judgement. The appellate court may amend, confirm or reverse the decision of the court of first instance. In the latter case, it usually remands the case to the trial court.

A second appeal ("Revision"[42]) against the decision of an appellate court may be brought before the Supreme Court if the value in dispute exceeds EUR 4,000[43].
Further, cases involving values above this threshold, but not exceeding EUR 20,000 can only be considered if the appeal has been declared admissible by the appellate court. This will notably the case if a clarification of issues regarding unity of the law, legal certainty or the development of the law can be expected (appeal regarding a point of fundamental importance: "Grundsatzrevision"[44]).
Appeals involving values exceeding EUR 20,000 cannot be blocked by the appellate court. The Supreme Court may amend, confirm or reverse the appealed judgement. Yet, the Supreme Court can in principle also refuse to decide on the case. This option has been introduced by the latest civil procedure reforms. It altered the court's position of a regular court of second appeal towards a more fundamental role intended to give principal guidance for the future assessment of important legal issues.

Two main "extraordinary remedies" ("außerordentliche Rechtsbehelfe") are in place to correct serious errors of judgements that have not been appealed.
If a case has been adjudicated by a judge that had been excluded from the trial or if one of the parties had not been duly represented during the proceedings, an action for annulment ("Nichtigkeitsklage") may be filed before the court that has rendered the defective decision (Article 529 of the *Code on Civil Procedure*).
Three types of motives for filing an action for the reopening of proceedings ("Wiederaufnahmsklage", Articles 530 and 531 *Code on Civil Procedure*) are admissible.

[37] RGBl. No. 112/1895, as amended.
[38] However, in terms of the numbers of annual cases brought before the respective courts of first instance, both the District Courts and the Regional Courts composed of one judge courts are equally important.
[39] Articles 461 et sequ. *Code on Civil Procedure*.
[40] A three member panel is competent to decide cases of a value exceeding EUR 50,000 or upon request by one of the parties (see at II.1.2.2).
[41] Notably Articles 477 et sequ. *Code on Civil Procedure* specify the grounds for appeal ("Nichtigkeitsgründe"). They have to be considered ex officio at every stage of the proceedings regardless of their influence on the judgement and include *inter alia* serious procedural errors (such as lacking jurisdiction of the court) and substantive errors (such as the incorrect application of the law). In cases amounting to less than EUR 2,000.-, appeals can be filed only for nullity and an incorrect application of the law (Article 501 para 1 *Code on Civil Procedure*: "Bagatellberufung").
[42] Articles 502 et sequ. *Code on Civil Procedure*.
[43] See Article 500 para 2 subpara 1 *Code on Civil Procedure*.
[44] See Article 502 para 1 *Code on Civil Procedure*.

These include criminal actions (such as the submission of forged documents); the consideration of prejudicial or identical judgements or the existence of non-accessible evidence at the time of the trial at first instance (*nova reperta*), all of which could have led to a decision to the advantage of the applicant. The action must be filed within four weeks after such motives have become known before the court that has rendered the defective decision.

In addition, court orders ("Beschlüsse"[45]) can be contested by filing a complaint ("Rekurs"). A second complaint ("Revisionsrekurs") can be brought against an order of an appellate court. In general, the filing of a complaint does not suspend the enforceability of the judgement.

In principle, material administrative law specifies the competent authority that can be addressed to seek relief against a specific administrative ruling. Due to the large number of administrative authorities in various sectors of administrative law, there exists also a multitude of administrative appeal bodies. Ultimately, after the exhaustion of all remedies, the illegality of an individual ruling of an administrative authority can be contested before the Administrative Court (Article 131 B-VG: "Bescheidbeschwerde"[46]), or even before the Constitutional Court if a subjective right protected by the constitution is concerned [47].

The 1991 *General Administrative Procedure Act* ("Allgemeines Verwaltungsverfahrensgesetz: AVG")[48], however, contains two provisions of "extraordinary remedies" that are applicable to all administrative proceedings.
Within three years after the issuance of an individual ruling, a resumption of proceedings may be requested (Article 69 para 1 *General Administrative Procedure Act*: "Wiederaufnahme") either if the ruling had been based on certain unlawful acts attributable to a party (such as the submission of a forged certificate), or if new facts or evidence come up that a party had not been able to present during the proceeding. A resumption of proceeding is admissible if, in the light of these elements, the competent authority had fundamentally altered its legal assessment prior to the issuance of the ruling.

A "reinstatement to the previous condition" ("Wiedereinsetzung in den vorigen Stand": Article 71 *General Administrative Procedure Act*) can be demanded if an unpredictable and unavoidable event has prevented a party to respect a deadline or attend an oral hearing. The request must be filed within two weeks after notice that the unpredictable and unavoidable event has ceased to exist. Accordingly, the proceeding will be reopened at the stage before the occurrence of the event.

Further, pursuant to Article 68 of the *General Administrative Procedure Act*, a general *ex officio* modification of rulings issued by a respective administrative appeal authority (including the Independent Administrative Panel) may be undertaken, notably in case of *ordre public* violations[49] or if serious errors have occurred, for instance if the ruling had been issued by an authority not having jurisdiction or an improperly composed panel or if the error is

[45] This type of judicial decision is rendered in various fields. These include for instance trespass orders ("Besitzstörungsendbeschlüsse"), summary notices to pay ("Zahlungsbefehle") or orders to pay bills of exchange ("Wechselzahlungsaufträge"). In the procedural field, orders are for instance issued for a dismissal of an action ("Klagszurückweisung").
[46] See *supra* II.2.2.2.1 (Powers of the Administrative Court).
[47] See *supra* II.2.2.1.1 (Powers of the Constitutional Court).
[48] BGBl (Federal Law Gazette) No. 51/1991, as amended.
[49] Article 68 para 3 of the *General Administrative Procedure Act* specifies that threats to life or health of people or serious damages to the economy need to be taken into account.

expressly sanctioned with nullity by a provision of law[50]. The *ex officio* modification of a ruling can be initiated within three years.

V. The nature of the reception of public international law in the domestic courts of Austria

While some sources of international law, such as treaties and "*generally accepted norms of international law*" are explicitly addressed by the Austrian Constitution, others, such as unilateral acts or legally binding decisions of International Organizations are not referred to.
Most of the constitutional provisions govern issues relating to the respective source's implementation into the Austrian legal order. One of the courts' most important tasks is to clarify questions arising in this context[51] and give authoritative guidance regarding the analogous treatment of sources not explicitly referred to in the Constitution.

Typically, the difficulty of determining a specific source's rank within the system of domestic legal norms arises upon implementation[52].
In this context, Austrian doctrine has advanced a system to identify the rank of a legal norm and accordingly determine its position among other legal acts ("hierarchy of norms": "Stufenbau der Rechtsordnung")[53].
Other related issues, such as the solution of conflict of norms between international and domestic law, equally depend on this assessment. Only if conflicting norms have the same rank, the "*lex posterior derogat legi priori* and *lex specialis derogat legi generali"*-rules apply. Therefore, the provision later enacted (*lex posterior*) will prevail over the previous piece of legislation, just as the more specific regulation will prevail over the more general norm.

V.1 Treaties

Constitutional provisions relating to treaties exclusively use the term "Staatsvertrag" (State treaty)[54]. Absent a definition in the Constitution, other sources help to clarify the content of this expression.

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[50] See Article 68 para 4 of the *General Administrative Procedure Act*. An official English translation by the Austrian Federal Chancellery is available at http://www.ris.bka.gv.at/erv/erv_1991_51.pdf.
[51] See notably the competence of the Constitutional Court to assess the conformity of treaties with constitutional requirements (Article 140a B-VG: "Staatsvertragsprüfung"). See *infra* V.1.1 (Role of the Courts).
[52] Other legal systems, such as countries of common law tradition, are not familiar with this formalistic assessment, the United Kingdom being a typical example.
[53] The law scholars *Hans Kelsen* and *Adolf Merkl* have developed this approach. Constitutional law ("Verfassungsrecht") is placed on top of this hierarchy, since it determines further requirements regarding the enactment of acts of "ordinary" legislation (statutory law: "einfaches Gesetzesrecht"). At the rank below, there are administrative regulations ("Verordnungen") having a general scope and specifying details of statutes. Regulations and are applied to individual cases by administrative rulings ("Bescheide"). Court judgements have the same rank as rulings since they equally deal with a specific individualised situation. Important questions in the domestic context are linked to the rank of a legal norm. In the present context, for instance, the competence of a court for judicial review depends on the rank of the legal act in question, as well as further respective requirements.
[54] For instance Articles 10 para 1 subpara 2, 10 para 3, 16, 49, 50, 65-66, 89 and 140a B-VG as cited in G Hafner and F Cede in D Hollis *et ali* (eds.), *National Treaty Law and Practise* (Leiden/Boston, 2005), 61. The basic distinction between "State treaties" concluded by the Federal State ("Staatsverträge des Bundes") and those concluded by the "Länder" ("Staatsverträge der Länder") is one of the few constitutional categorizations provided for in this context. Pursuant to a 1988 amendment to the Constitution, the "Länder" have the right to conclude treaties with neighbouring States regarding matters falling within their exclusive competence as provided for in Article 16 B-VG.

The definition of Article 2 of the Vienna Convention on the Law of Treaties ("VCLT")[55] is of particular relevance since this legal document has been incorporated into the Austrian domestic legal order[56] and is accordingly applied by Austrian authorities. The VCLT understanding is equally relevant for treaties concluded with international organizations or other subjects of international law.
In addition, the Office of the Legal Adviser of the Federal Ministry for Foreign Affairs has defined a "State treaty" to be "an international instrument by means of which the parties intend to create rights and obligations under international law"[57].
Therefore, both multilateral and bilateral treaties, concluded with States or international organizations, are covered by this term.
In practise, it might at times be difficult to precisely qualify a specific treaty concluded by Austria. Therefore, the authority involved in the conclusion of a specific treaty is also competent to decide on the appropriate category to be employed[58].

The character of a treaty is decisive for the procedure upon its implementation.
Treaties of political nature ("political State treaties") and treaties modifying or complementing existing laws require prior parliamentary approval (Article 50 B-VG[59]). Austrian scholarly writing has defined treaties of political nature to be those affecting the political status of Austrian in international affairs[60]. A "modifying treaty" relates to a subject matter that, if addressed in the domestic context, would result in the promulgation of an entirely new piece of domestic legislation. By the same standard, a treaty "complementing existing laws" would be enacted by an amendment of domestic law already in force.

In case a treaty subject matter has a constitutional dimension[61], the respective treaty (or single treaty provision) is to be implemented according to the domestic provisions for the enactment of constitutional law (Article 50 para 3 B-VG). Article 9 para 2 B-VG is an exception to this rule: it permits the incorporation of treaties that confer single sovereign rights to International Organizations and their bodies in the form of ordinary laws[62]. Yet again, parliamentary approval is required.

Further steps of implementation depend on whether the treaty in question has a self-executing character[63]. If so, it will be ratified by the Federal President after parliamentary approval by

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[55] According to this provision, a treaty is "*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*". Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 8 ILM 679 and 63 Am. J. Int'l L. 875 (1969).
[56] See BGBl (Federal Law Gazette) No. 40/1980.
[57] See for further details G Hafner and F Cede in D Hollis *et ali* (eds.), *National Treaty Law and Practise* (Leiden/Boston, 2005), 61.
[58] In doing so, there exists a wide range of possibilities. An international agreement could in principle even take the form of a Contract under Domestic (Private) Law since the Federal Republic of Austria is entitled to enter into such contracts according to Article 17 B-VG.
[59] This is a provisions dealing with the *conclusion* of a treaty, but is equally relevant for matters regarding treaty implementation.
[60] Yet, a concise assessment is rather difficult to provide given the vagueness of this term. See G Hafner and F Cede in D Hollis *et ali* (eds.), *National Treaty Law and Practise* (Leiden/Boston, 2005), 64.
[61] This, again, is to be discerned by referring to the domestic context and by asking if such a treaty, would it be subject matter of sole domestic legislation, would have to be enacted as a constitutional law.
[62] A case in point would be a treaty establishing an International Organization that has the competence to enact decisions binding upon Austria. This does not alter the constitutional nature of the right to legally bind a State from a domestic perspective. This provision, introduced by a 1981 amendment of the Austrian Constitution, intended to smooth the implementation of a large number of such provisions.
[63] Treaties of self-executing character are sufficiently precise to allow for direct application in the domestic context. In this case, both the content of the treaty provisions and the parties concerned are discernable to the

the National Assembly ("Nationalrat"). Subsequently, these treaties will become effective and applicable upon publication in the Federal Law Gazette[64] ("generelle Transformation": general transformation into domestic law).

By contrast, treaties of "non-self-executing" nature require additional legislative action. The National Assembly ("Nationalrat") will not only approve the specific treaty, but also determine the form of domestic legislation needed to achieve effectiveness and applicability in the domestic context. It may notably specify that the enactment of specific statutes or regulations is required (Article 50 para 2 BVG: "spezielle Transformation": specific transformation into domestic law)[65].

The Federal President is competent to conclude treaties that need no parliament participation. He may transfer this responsibility to the Federal Government or to individual Federal Ministers[66]. In this case, the respective authorization also encompasses the right to issue regulations implementing the treaty as domestic law.

The implementation procedure determines the rank of a specific treaty within the Austrian legal order. If parliamentary approval according to Article 50 B-VG has taken place, a treaty will at least have the rank of an ordinary law. If, in addition, the procedural requirements for the enactment of constitutional laws have been met (notably, if the treaties were designated as "amending the constitution" upon publication in the Federal Law Gazette), they will have the rank of constitutional laws. In all other cases, treaties have the rank of regulations.

V.1.1 Role of the Courts

Pursuant to Article 140a B-VG, the Constitutional Court is entitled to review treaties. Depending on the rank of the treaty, the Court applies the rules on the constitutional review of statutes (Article 139a and 140 B-VG) or on the review of secondary legislation (Article 139 B-VG)[67], respectively. Therefore, upon request of a court or an administrative body, the Constitutional Court will decide whether treaties referred to in Article 50 B-VG[68] are in conformity with constitutional law and whether all other treaties are in conformity with ordinary laws. It can further determine whether the disputed part of the treaty or the treaty as a whole may be applied by the Austrian authorities.

Further, an individual may file a complaint before the Constitutional Court if the application of a treaty violates a subjective right protected by a constitutional provision[69].
In case an individual has suffered damage resulting the non-compliance of treaty provisions by the competent domestic organ, it may invoke the respective provisions of the "Act on

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extent that the domestic authorities competent for application are indeed able to put the treaty into operation without further explanatory domestic legal acts.

[64] The Federal Law Gazette is the official Austrian instrument for the publication of legislative acts. As a general rule, all treaties, including their German translation and any reservation and declaration related thereto, must be published in the Federal Law Gazette. Treaties are reproduced in part III of the Federal Law Gazette and will in principle become effective on the day following its publication, unless a different date is explicitly mentioned.

[65] If necessary, the respective competent Federal Ministry as pointed out in the "Act of the Federal Ministries" ("Bundesministeriengesetz", BGBl (Federal Law Gazette) No. 76/1986, as amended) is responsible to take further steps upon implementation.

[66] See Article 66 para 2 B-VG.

[67] See *supra* II.2.1.1 (Powers of the Constitutional Court).

[68] These are treaties of political nature and treaties modifying or complementing existing laws.

[69] See *supra* II.2.1.1 (Powers of the Constitutional Court).

State's Liability for its Organs" ("Amtshaftungsgesetz")[70] and file a suit before a trial court competent for civil matters[71].
Treaties of self-executing character are directly binding upon individual authorities. They can be invoked before Austrian Courts and are subject to the relevant appeals procedure, either legislative or administrative. Therefore, possibilities of judicial review do not differ from those regarding "regular" domestic acts.

V.2 "Generally accepted norms of international law "

Pursuant to Article 9 para 1 B-VG, "generally accepted norms of international law" are to be considered integral part of Austrian federal law. This notion comprises both customary international law and principles of international law.

The prevailing scholarly opinion in Austria[72] therewith includes not just universal customary international law, but also particular/regional customary international law. The term "generally" is interpreted to be referring to the objective element of "State practice". Differently stated, there has to be "general" acceptance among all actors that the act in question is attributable to a State, regardless whether its effects are universal or particular/regional in nature. The ordinary meaning of the term "accepted" on the other hand is understood to be indicative of the *opinio iuris* criterion, i.e. the subjective element according to which a certain practise is perceived as law[73].

Both customary international law and principles of international law will in most cases lack sufficient exactitude to be qualified as rules having "self-executing character". Rather, they will need further specifying legislative acts of Austrian authorities upon incorporation into domestic law ("specific transformation"). For this reason, Article 9 para 1 B-VG is repeatedly interpreted as a rule of mere programmatic character. However, customary international law and principles of international law, respectively, shall be incorporated into to domestic legal order according to their latest interpretation in the overall framework of international law ("dynamic incorporation").

V.2.1 Role of the Courts

The abovementioned dynamic understanding has been referred to in one of the few respective cases decided by the Austrian Supreme Court. According to the Court's view, no uniform practise existed in the international context that would allow the exemption of all acts of a State from a foreign jurisdiction. It consequently dismissed the respective party's interpretation of absolute immunity ("*Hoffmann gegen Dralle*"- case)[74].
Accordingly, since the most recent understanding of "generally accepted norms of international law" is relevant, these will always be rules of *lex posterior* character according to the rule *lex posterior derogat legi priori* rule and therefore prevail over previously enacted (domestic) law.

[70] BGBl (Federal Law Gazette) No. 20/1949 as amended.
[71] See supra II („Ordinary Courts").
[72] See for example Bruno Simma in H Neuhold, W Hummer and C. Schreuer (eds), Österreichisches *Handbuch des Völkerrechts* (4th edn, Vienna 2004) at 44.
[73] For further details regarding this interpretation see also H Neuhold ,W Hummer and C. Schreuer (eds), Österreichisches *Handbuch des Völkerrechts* (4th edn, Vienna 2004) at 44.
[74] See collection of Austrian Supreme Court case-collection (OGH- SZ 23/143). The judgement was rendered on May 10, 1950.

Diverging opinions exist regarding the rank of "generally accepted norms of international law" in the domestic legal order since Article 9 para 1 B-VG remains silent on this question. The Constitutional Court places them on the same level as ordinary laws[75] while others try to infer the respective rank by comparison with domestic provisions covering similar subjects[76].

V.3 Unilateral Acts

In absence of respective (constitutional) provisions, the exact form incorporation of unilateral acts into the Austrian legal order remains unclear. The multitude of different types of unilateral acts additionally complicates this task.
In terms of their methodological classification in the Austrian context, unilateral acts are regarded as a distinct source of international law. This is based on the postulation that the validity of unilateral acts is linked to their customary nature[77]. If customary international law is regarded to be part of Austrian federal law according to Article 9 para 1 B-VG, this must also hold for unilateral acts having a customary nature.
Further, since the enactment of an international unilateral act is an issue of foreign matters, it falls under the respective general competence of the Federal President according to Article 65 para 1 B-VG. In this context, Article 67 para 1 B-VG additionally specifies that all official acts of the president are subject to a previous proposal of the Austrian Government or the competent Federal Minister.
In principle, the incorporation of unilateral acts into the Austrian legal order depends in the content of the unilateral act in question. For instance, if they refer to a treaty provision, they need to be incorporated according to the respective rules on treaty implementation.
In general, they will become part of the Austrian legal order upon publication in the Federal Law Gazette.
If no further domestic legal provision is enacted, the respective rank of the unilateral act within the Austrian legal order can be inferred by comparing its content with domestic provisions covering similar matters.

V.3.1 Role of the Courts

The possibility of judicial review depends on the specific form of the unilateral act in question. For instance, a unilateral act might be linked to a treaty provision. In this case, it falls under the Constitutional Court's competence according to 140 a B-VG[78] to assess the legality of such a unilateral act as a prejudicial question for the legal evaluation of the respective treaty.
Further, unilateral acts that explicitly address individuals may be appealed to the Constitutional Court if a matter of a subjective right protected by a constitutional provision is affected (Article 144 B-VG, "verfassungsmäßig gewährleistetes Recht")[79]. In all other cases, the legality of a unilateral act of individual content may be addressed before the Administrative Court, if the requirements for filing a complaint against illegal administrative rulings pursuant to Article 131 B-VG are met[80].

[75] See for instance the "Kraftwerk Ybbs-Persenbeug"- case of June 24, 1954, contained in the collection of judgements of the Austrian Constitutional Court (Slg. 2680).
[76] See for instance F Ermacora and W Hummer in H Neuhold, W Hummer and C. Schreuer (eds), Österreichisches *Handbuch des Völkerrechts* (4th edn, Vienna 2004) at 44.
[77] However, the precise reason for the legal validity of unilateral acts is a heavily disputed topic. See for further details in the Austrian context H Neuhold, W Hummer and C. Schreuer (eds), Österreichisches *Handbuch des Völkerrechts* (4th edn, Vienna 2004) at 93.
[78] See supra V.1.1 on the respective competence of the Constitutional Court to review treaties (Art 140a B-VG).
[79] See *supra* II.2.1.1 (Powers of the Constitutional Court).
[80] See *supra* II.2.2.2.1 (Powers of the Administrative Court).

V.4 Legally Binding Decisions of International Organizations

The Constitution does not regulate the incorporation of legally binding decisions of International Organizations. These are regarded to be legal acts *sui generis.*
In general, the incorporation of decisions of International Organizations solely in the form of a publication in the Federal Law Gazette will be admissible if the respective decision is sufficiently precise to enable the domestic authorities to achieve the goals provided for without further explanatory domestic legal acts.
In all other cases, additional specifying pieces of domestic legislation have to be enacted. These can either take the form of a regulation or a law modifying existing domestic pieces of legislation ("spezielle Transformation": specific transformation into domestic law).

V.4.1 Further Aspects

Considering various different forms of decisions of international bodies, general statements regarding the incorporation of decisions of international bodies are particularly difficult to provide.
Yet, referring to the abovementioned general rule, some scholars disagree with the Constitutional Court who pointed out that acts of International Organizations form part of the Austrian legal order already at the time of their publication the Federal Law Gazette and therefore do not need additional domestic legislative action[81]. According to the Austrian terminology, respective publication of acts of International Organizations has therefore constitutive and not just declaratory effects ("konstitutive" vs "deklaratorische" Wirkung).
The Constitution does not provide rules to determine the rank of decisions of International Organizations. Yet again, the respective content will be decisive for its position within the Austrian legal order.

VI. Concluding remarks

Several parameters define the general reception of international law within the Austrian legal system. The incorporation of sources of international law is facilitated if explicit legal provisions exist, as it is the case of treaties and "generally accepted norms of international law".
Depending on the content of a given treaty, different implementation procedures apply that might ultimately even necessitate the enactment of further explicit domestic legal acts of constitutional rank. In this context, the Austrian Constitutional Court has the explicit competence to review the legality of treaties (including the assessment of the conformity with constitutional provisions) pursuant to Article 140a B-VG.
Equally, the impact of the Austrian courts has helped to define the general obligation to include "generally accepted norms of international law" (including customary international law and general principles of international law) into the domestic legal order by means of a "dynamic understanding" of these terms according to their most recent meaning in the international context.
The reference to general principles is helpful in the assessment of sources not mentioned in the Constitution, such as unilateral acts or legally binding decisions of international Organizations. The possibility of judicial review of these sources depends on the actual form that these sources might take.

[81] Further on this viewpoint sees Griller in: H Neuhold, W Hummer and C. Schreuer (eds), Österreichisches *Handbuch des Völkerrechts* (4th edn, Vienna 2004) at 119. For a more balanced view disconnected from strictly formal considerations, see for instance the fundamental work C Schreuer, *Die Behandlung internationaler Organakte durch staatliche Gerichte* (Duncker and Humblot 1977) 340.

Accordingly, the Constitutional Court is competent if an individual's subjective right protected by a constitutional provision is affected or a specific source has not been incorporated in conformity with respective domestic constitutional rules.
Further, the Administrative Court can be addressed if upon domestic implementation an illegal individual ruling has been issued by an administrative body.
Apart from these competences of these "courts of public law jurisdiction", a separate system of "Ordinary Courts" for criminal and civil law matters has been established. On top of this hierarchy, the Austrian Supreme Court has repeatedly dealt with civil cases having an international law dimension. A number of respective judgements has accordingly helped to specify the perception of international law in this field.