Die Österreichischen
Rechtsanwältinnen
und Rechtsanwälte

Österreichischer Rechtsanwaltskammertag

2024 Rule of Law Report

Position Paper

1. General comments

The Austrian Bar (ÖRAK) would like to point out that a large number of the EU Commission's legislative proposals during the survey period also affected core values of the rule of law, for example by jeopardizing the independence of bars and by cutting back on the fundamental judicial right to the protection and preservation of LPP/PS.

The ÖRAK calls on the Commission to pay more attention to rule of law aspects in its decision-making on new proposals. This is also a question of credibility vis-à-vis the Member States.

On national level there is an emerging trend that the unconstitutionality of some new laws seems to be accepted when making political decisions. Unconstitutional conditions are accepted and/or it is expected that the Constitutional Court's assessment will be made too late, so irreversible factual situations are created. Measures should be taken to ensure that concerns about fundamental rights and constitutional conformity are structurally considered during the legislative process.

2. Follow-up on the recommendations received in the 2023 Report regarding the justice system (if applicable).

The Constitutional Court ruled in its decision of 14.12.2023 that the seizure of mobile data in criminal proceedings without prior judicial authorization is unconstitutional. Some of the considerations cited are in line with the criticism from the Zerbes/Ghazanfari report at the time. The Commission's previous Rule of Law Report unilaterally took up criticism from the prosecution authorities that the now confirmed need for fundamental rights safeguards when securing data/data carriers appeared to counter the prosecution authorities' need for efficient investigations. The judgement of the Constitutional Court shows that the Commission's position was premature and unfortunately one sided.[1]

3. Appointment and selection of judges, prosecutors and court presidents (incl. judicial review)

Delayed replacement

The post of President of the Federal Administrative Court has been vacant for months, which alone is a prominent example of a structural problem. Filling such a responsible position is essential for a functioning judiciary.

The ÖRAK specifically calls for the position of President of the Federal Administrative Court to be filled without delay. In general, it is necessary to fill key positions in the judiciary in

[1] See footnote 107, Rule of law report 2023, country chapter Austria: "Another point that the WKStA referenced as potentially impacting their work relates to an ongoing public debate on the opportunity of reforming the seizure and evaluation of data for securing evidence, especially on corruption-related cases. The public debate started on the basis of a recent study by the Bar Association, with no concrete outcome so far on the legislative level. Prosecutors underlined the practical necessity in investigations to have access to digital data, especially in corruption-related cases, where very few witnesses and documents are available, and call for clear regulation allowing the seizure of relevant evidence. See Austrian Bar Association (2022), ÖRAK calls for far-reaching reforms in the safeguarding and evaluation of data and data carriers."

the broader sense in a timely manner. In addition, measures must be taken to avoid the impression that appointments are based on mere political considerations in order to increase confidence in the rule of law.

4. Quality of justice

Accessibility of courts (e.g. court/legal fees, legal aid, language)
Access to justice is not only defined by access to court, but also by access to legal advice, as the following examples show at very different levels:

On December 14, 2023, the Constitutional Court ruled that the independence of legal advice for asylum seekers and foreigners by the so-called Federal Support Agency (*Bundesbetreuungsagentur*) is not sufficiently guaranteed by law. The corresponding provisions in the BBU-G and the BFA-VG are repealed as unconstitutional. On the one hand, it is positive from the ÖRAK's point of view that the Constitutional Court has now made such a clear statement, but the question arises as to why the criticism of constitutionality that had already been expressed previously was not taken into account when the law was adopted (the ÖRAK had made a critical contribution to a previous consultation on the EU Rule of Law Report).

The same applies to further proceedings before the Constitutional Court regarding legal aid in administrative court proceedings. Currently, the right to legal aid is made dependent on whether fundamental rights under Art. 6 ECHR or Art. 47 Charter of Fundamental Rights are the subject of the proceedings (the scope of both articles is interpreted narrowly in these circumstances). § Section 8a VwGVG therefore excludes the granting of legal aid for all other proceedings. The Constitutional Court provisionally assumed that the provision is unconstitutional in a recent decision. Even outside the scope of application of these fundamental rights (according to the previous narrow interpretation), there could be proceedings in individual cases in which legal aid must be granted to ensure effective access to legal protection. This could be the case, for example, if proceedings are very complex or the personal circumstances of the person concerned require assistance. The next step is to review the law.

In practice, there can also be insurmountable obstacles with regard to the right to legal advice. For example, the responsible officers at the Federal Office for Immigration and Asylum increasingly assumes that *written* powers of attorney are necessary for lawyers to represent persons in need. Furthermore, the officers assume that they are allowed to decide whether or not a lawyer may be present when their client is questioned. This potentially excludes people already at an early stage from legal advice, meaning advice that would make them understand whether and how they can assert their rights through administrative channels or in court.

5. Resources of the judiciary (human/financial/material) as well as any efforts of the government or judiciary to address the relevant challenges

The ÖRAK repeatedly hears criticism from individual lawyers regarding personnel planning at individual courts and the lack of permanent posts for judges.
As in the past, the ÖRAK demands that courts be staffed in such a way that provision is made for medium or even long-term vacancies so that no de facto "interruption" of proceedings can occur for months on end.

6. Digitalisation (e.g. use of digital technology, particularly electronic communication tools, within the justice system and with court users, procedural rules, access to judgments online.

Service of electronic communication

It is an urgent concern of the ÖRAK to also connect the LVwGs and the BFG to the electronic filing system (ERV). The ERV has been established in Austria for years and functions perfectly to the satisfaction of all parties involved.

Another curiosity that leads to confusion in practice and referrals to the highest courts is the different triggering of time limits depending on the type of service (ERV or other digital service.)

A uniform and modernized regulation of the relevant delivery times for electronic deliveries is urgently needed in order to create the legal certainty necessary for a state governed by the rule of law.

Publication of last-instance decisions in the RIS databank
In addition to decisions by the Supreme Court, decisions by the higher regional courts, the regional courts and the district courts should also be available in the federal legal information system. However, research by the ÖRAK revealed that the option of anonymized publication is very rarely used.

It should be noted that courts already have unilateral access to such decisions and cite them in their decisions. This means that the parties cannot argue with the respective case law from the outset (and corresponding advice to clients is excluded), the decisions cannot be reviewed or cannot be reviewed promptly, as researching the decisions takes time and costs money, and ultimately this also prevents appeals from being lodged. Under certain circumstances, there is even a lack of equality of arms between the parties involved, as lawyers who have already been confronted with one or another of such unpublished decisions in similar cases have an advantage in their arguments.

7. Other institutional issues linked to checks and balances -The process for preparing and enacting law

Minimum standards for legislative procedures

In recent years, the quality of the legislative process has repeatedly been sobering. Legislative review procedures occasionally meet the minimum deadline of six weeks recommended by the Federal Chancellery (BKA), however, there are still significant underruns. For example, the review period for the 2nd Finance Organization Reform Act and the federal law amending the AMA Act was only one week. The federal law amending the Narcotic Substances Act was only given 11 days for review. The 55-page Minimum Taxation Act was only given 2.5 weeks for review.

The ÖRAK continues to call for the introduction of binding minimum standards for the legislative process:

- Sufficient review periods are necessary for a conscientious examination of draft legislation.

- Only after a verifiable and comprehensive review should government bills be submitted to the National Council by the Council of Ministers and laws ultimately passed by the National Council.
- In the case of serious changes to draft legislation, there should be a new review process.
- Furthermore, in a constitutional state, laws must be promulgated in good time.