

JURISTRAS
State of the Art Report

**Strasbourg Court Jurisprudence and Human Rights in Austria:
An overview of Litigation, Implementation and Domestic Reform**

Ludwig Boltzmann Institute of Human Rights

Researchers:

Hannes Tretter, Barbara Liegl, Kerstin Buchinger, Astrid Steinkellner

Draft March 2007

Project report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society (contract no. FP6-028398)

TABLE OF CONTENTS

I.	Introduction	1
II.	Human Rights Litigation Patterns in Austria	1
A.	Domestic Reception of the Convention	1
B.	Strasbourg rights litigation	2
1.	Litigation on behalf of aliens	3
2.	Litigation on behalf of ethnic groups	5
3.	Litigation in connection with the Prohibition Statute	7
4.	Litigation on behalf of homosexuals	9
5.	Litigation on behalf of religious minorities.....	9
6.	Litigation by Austrian citizens expressing views that challenge state institutions ..	11
7.	Litigation on behalf of disabled persons	11
C.	Actors	11
D.	Strategic litigation	13
E.	Domestic Implementation	17
1.	Obligations due to the Convention.....	17
2.	Execution of judgments in Austria.....	18
III.	Literature review	21
A.	Global Considerations	21
B.	Literature on rights under Juristras scope	25
C.	Literature on the implementation of ECtHR rulings	27
IV.	Conclusions	28
V.	Bibliography.....	1
	Annex I: Short version of the state of the Article report intended for policy users	4
	Annex II: Mapping of Research Competences Reports	8
1.	Austrian Human Rights Institute.....	8
2.	European Training- and Research Centre for Human Rights and Democracy	8
3.	Section for International Law and International Relations, Department of European, International and Comparative Law, law faculty of the University of Vienna	9
4.	Other University Departments	10
5.	Austrian Society for European Law	11
6.	Austrian League for Human Rights	12
	Annex III: Tables of Cases.....	13

I. Introduction

After having regained its full sovereignty by the State Treaty of Vienna in 1955, Austria joined the Council of Europe on 16 April 1956 as its fifteenth Member State. Its membership in the Council of Europe was a great opportunity for Austria to actively participate in a process that would lead to a political unification-process within Europe. As Austria's perpetual neutrality had always been seen with an exclusive focus on military actions, it was never applied to the recognition and fight for human rights and the principles of a pluralistic democracy. By its efforts to actively contribute to and co-operate within the framework of the Council of Europe Austria was able to lay the foundation for its further European integration. Therefore, an active commitment in the Council of Europe has always been of high importance for Austria, with a special – still ongoing – emphasis on human rights.

Hence, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, the Convention) plays an important role within the Austrian legal system. The fact that Austria was the first State to incorporate the ECHR fully into its constitutional legal order created a high level of awareness within Austrian society concerning the Convention itself as well as its legal and practical implications. Consequently, a relatively large amount of applications was – and is still – lodged against Austria. Most of the applications so far have concerned Articles 5 and 6, some Articles 3, 8, 10 and 11 as well as Article 1 of the First Protocol. Only a few pertained to other provisions of the Convention.

Domestic courts and administrative authorities have so far ruled on nearly every right or freedom contained in the Convention. Naturally, the Constitutional Court plays a central role in this regard, having an impact on both, domestic legislation and jurisdiction. Thus, many areas of Austrian legislation over the years have been influenced by the Convention and the case law of the Strasbourg institutions. However, government and parliament remain reluctant to entirely observe and fulfil the obligations specified in the Convention.

II. Human Rights Litigation Patterns in Austria

A. Domestic Reception of the Convention

Before Austria ratified the Convention, fundamental rights and freedoms were only guaranteed by the Basic Law of 1867 on the General Rights of Nationals (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger 1867 – StGG 1867*, Basic Law 1867) which – being a law of the Austrian-Hungarian Monarchy – was incorporated into the constitutional legal order of the new democratic Republic of Austria in 1920. This law, which is still in force after various amendments, contains a core of civil and political rights, but is restricted, as its title implies, to Austrian nationals. When the Austrian Constitution came into force in 1920, the Basic Law 1867 as a minimum consensus with regard to fundamental rights and freedoms became part of it. Between 1933 and 1945, the constitutional system in Austria was suspended by the authoritarian regimes. In 1945, after the collapse of the Third Reich, the Austrian Constitution (and with it the Basic Law 1867) was put into force again.

After becoming a member of the Council of Europe, Austria signed the Convention on 13 December 1957 and ratified it – together with its first Additional Protocol of 1952 – on 3 September 1958. Concurrently, Austria accepted the competence of the European Commission of Human Rights (the Commission) and the European Court of Human Rights (ECtHR, the Court) to deal with individual complaints. After its ratification, the Convention was officially published in the Austrian Federal Law Gazette without any comment on its legal status. Only in 1964, an amendment to the Austrian Constitution clarified the status of

the ECHR as being fully equivalent to the original catalogue of fundamental rights, which can be traced back to the Basic Law 1867. Since then, the ECHR has had the rank of directly applicable federal constitutional law in Austria. As a result, all legislative, executive and judicial authorities are obliged to observe and implement the Convention within their sphere of action. Thus, the Austrian legislator has to respect the rights of the Convention when enacting a law and all courts and administrative authorities have to interpret the domestic legal provisions they apply in line with the Convention. Accordingly, any offences under the Convention can be reprovved within all judicial or administrative procedures as violations of constitutionally guaranteed rights. The Constitutional Court in particular has the task to ensure compliance with the rights stipulated in the Convention and the competence to review decisions of administrative authorities (by contrast, it is a matter of the Austrian Supreme Court, *Oberster Gerichtshof*, to review decisions of judicial authorities) as well as abolish domestic laws that infringe constitutional rights.

Both, the constitutional status of the Convention and the lack of modern domestic fundamental rights and freedoms are reflected by the great significance attributed to the rights of the Convention in Austria's case law. The initially reserved attitude which the Constitutional Court took vis-à-vis the Convention (caused by the parallelism of domestic fundamental rights and freedoms and the rights stipulated in the Convention) has changed over the years and the constantly increasing influence of the jurisdiction of the ECtHR has become more and more evident in the case law of the Constitutional Court. The Court refers to and takes into account the jurisdiction of the ECtHR in many of its judgments. Meanwhile, it has become common practice for the Constitutional Court to examine whether a right guaranteed by the domestic legal provisions or the Convention is more beneficial for the person affected.

Due to the aforementioned constitutional status of the ECHR in Austria, all civil and political rights of the Convention are part of Austrian constitutional law and, therefore, enjoy full constitutional protection. However, the constitutional status of the Convention does not mean that judgments of the ECtHR are directly applicable within domestic law or that decisions or laws infringing the Convention can be abolished solely on the basis of the ECtHR-judgments. In such cases, the Austrian legislator has to enact specific provisions.

B. Strasbourg rights litigation

100 decisions and judgments fall within the scope of core civil and political rights and/or directly involve or have consequences for marginalised groups. We included all judgments and decisions pertaining to Arts 8, 9, 10, 11 and 14 as well as those referring to other Arts when marginalised groups like aliens, members of ethnic or religious minorities, homosexuals or people with disabilities were affected. For a statistic overview of the cases see Annex III Table 1.

Most of the cases relate to aliens – defined as a legal concept – especially to residence prohibitions as a consequence of convictions in criminal proceedings and to the length of appeal proceedings in connection with the Aliens' Employment Act. Different strings of cases pertain to the broadly defined issue of ethnicity. Several cases were taken to Strasbourg alleging the prevention of a fair trial. The other cases do not cluster around similar issues; however there are two cases which had important consequences for third country nationals residing in Austria. One opened access to emergency assistance for third country nationals and the other one was the starting point for proceedings before the UN Human Rights Commission and for a similar case taken to the ECJ resulting in the abolition of a provision prohibiting third country nationals to stand as candidates in works' council elections. Another

group of cases that is dealt with in this sub-section are statements promoting racist agitation. Representatives of the Freedom Party, who were criticised for these statements by journalists, filed complaints of defamation of which the journalists were convicted by Austrian courts, whereas the ECtHR established violations of Article 10 of the Convention.

The third biggest groups of cases cluster around two issues. The first group of cases relates to the Prohibition Statute, which prohibits racist actions and incitements within the context of (neo-)Nazi ideology. Representatives of the Austrian Freedom Party and of right-wing extremist groups often take journalists to court, who are then convicted of defamation as they harshly criticise the statements, activities or offences relating to National Socialism. The second group of cases deals with the issue of homosexuality. Applicants were convicted of having violated section 209 of the Criminal Code, which prohibited sexual relationships between adult and adolescent males until 2002, and therefore challenged the compliance of section 209 of the Criminal Code with Article 8 in conjunction with Article 14 of the ECHR.

Few cases relate to the issue of religious minorities – which either pertained to sects or to views held by devout Roman Catholics. Only two cases were connected to disability and both concerned the Disabled Persons' Employment Act, which protects people that have been qualified as favoured disabled persons from dismissal. State institutions – such as the police, the judiciary and the army – were challenged by four Austrian citizens.

1. Litigation on behalf of aliens

Austria has always been a country of immigration¹, although it is not officially defined as such. Labour migration started in the late 1960s, and although subsequent Austrian governments and the trade unions had agreed on the so called “rotation principle”, indicating that migrants would only stay for one to two years, family reunification started in the 1970s. The 1980s and 1990s were characterised by a diversification of the countries of origin of migrants. The first migrants originated from Turkey and former Yugoslavia, later on migrants from various Eastern European countries, Africa and Asia started to come to Austria. In 2001, when the last census was conducted, about 9 per cent of the inhabitants were foreigners and 13 per cent were born in another country than Austria². Almost two thirds of the foreigners residing in Austria were migrants from the succession states of the former Republic of Yugoslavia and of Turkish origin³. 15 per cent were EU-citizens, 10 per cent had migrated from central and eastern European countries (esp. Poland, Rumania, Hungary, the Czech Republic and Slovakia) and another 10 per cent originated from non-European countries⁴. All third country nationals are subject to the Aliens' Act, Aliens' Police Act and the Aliens' Employment Act regulating access to the country, residence status and access to the labour market. Besides these “new” minorities, there are also “old” minorities living in Austria. At present, six groups enjoy the status of recognised autochthonous minorities: Croats, Slovenes, Hungarians, Czechs, Slovaks, and Roma. They are granted special rights with the declared aim of protecting these groups in their existence, their language, culture and traditions⁵.

Overall 18 cases were taken to the ECtHR on behalf of aliens, eleven of which were either declared inadmissible or struck out of the list as the matter had been resolved.

¹ For further information see: R. Bauböck/B. Perchinig, *Migrations- und Integrationspolitik*, in: H. Dachs (Ed.s), *Politik in Österreich – Das Handbuch*, Wien 2006, pp. 726-742

² Statistik Austria, *Volkszählung 2001: Hauptergebnisse I – Österreich*, Wien 2002, pp. 15, 17

³ R. Münz/P. Zuser/J. Kytir, *Grenzüberschreitende Wanderungen und ausländische Wohnbevölkerung: Struktur und Entwicklung*, in: H. Fassmann (Ed.s.), *Österreichischer Migrations- und Integrationsbericht*, Klagenfurt/Celovec 2003, p. 41

⁴ Ibid.

⁵ For further information see: G. Baumgartner/B. Perchinig, *Minderheitenpolitik*, in: H. Dachs (Ed.s), *Politik in Österreich – Das Handbuch*, Wien 2006, pp. 686-700

Thirteen cases clustered around the issuing of residence prohibitions. In four cases Austria was convicted of having violated Article 8. The discontinuation of residence in Austria of three applicants originating from Bosnia, former Yugoslavia and Turkey, who were convicted of criminal offences and therefore faced a residence prohibition, was seen by Austrian courts as preventing disorder and crime and protecting the rights of others (*Jakupovic v. Austria*, *Radovanovic v. Austria* and *Yildiz v. Austria*). This public interest – according to Austrian courts – allegedly outweighed the respect for the applicants’ right to private and family life. In *Moser*, the competent authorities had issued a residence ban for illegal employment of the applicant, who was a Serbian national, and transferred custody of her newly born son to the Youth Welfare Office. The ECtHR established a violation of Article 6, as the applicant was denied a public hearing, and Article 8, as the reasons relied on by the Austrian courts were “not sufficient to justify such a serious interference with the applicants’ family life”. Two cases of Turkish nationals were struck out of the list, as the matter was resolved and steps were taken to lift the residence prohibitions issued (*Gümüskaya v. Austria* and *Bulut v. Austria*). Seven cases taken to the ECtHR by two Turkish and Nigerian nationals and one Croatian, Slovak, and Macedonian national respectively were declared inadmissible as they were ill founded (*Öztürk v. Austria*, *Altuntas v. Austria*, *Onyegbule v. Austria*, *Adegbie v. Austria*, *B.S. v. Austria*, *Schober v. Austria* and *Fehrati v. Austria*). In *Özdemir*, the applicant, a Turkish national, faced a penal order because he had failed to comply with a residence prohibition, which he appealed. He complained under Article 6 about the length of the proceedings, the non-qualification of the Independent Administrative Panel as a “tribunal” and the lack of a hearing before the Administrative Court. The applicant reached an agreement with Austria and the case was struck out of the list.

Two of the cases involved administrative proceedings with regard to the Aliens’ Employment Act, which regulates access to the labour market of third country nationals and nationals of the new EU member states except for Cyprus and Malta. In *Jancikova*, four persons of Czech nationality working on a construction site were seized without a work permit. The applicant was invited by a letter, which did not reach her on time, to comment on the charge against her. She filed a request to reinstate first instance proceedings, a procedure lasting more than six and a half years. Austria was convicted of having violated Arts 6 and 13. In *Jurisic and Collegium Mehrerau*, the second applicant requested a work permit as a farm hand for the first applicant. As the maximum quota fixed for the employment of foreign workers in Vorarlberg had already been exceeded, the request was denied and appealed by the applicants. The first applicant was denied as party to the proceedings and the second applicant was refused an oral hearing. Austria was in both cases convicted of having violated Article 6.

Two cases involved asylum seekers. In *Ahmed*, the applicant, who had fled Somalia, had been granted refugee status within the meaning of the Geneva Convention but the forfeiture of the status was ordered on the ground that the applicant had been convicted of attempted robbery and sentenced to two and a half years’ imprisonment. The decision was upheld as the applicant constituted a danger to the community and although he asserted that the situation in Somalia had become worse since his departure in 1991. Austria was convicted of having violated Article 3 as the applicant could not return to Somalia without being exposed to the risk of treatment contrary to Article 3. In *Bilasi-Ashri*, the applicant had fled Egypt and asylum proceedings were still pending when the applicant turned to the ECtHR for alleged violation of Arts 3, 6, 8 and 13. The applicant was convicted in absentia of belonging to an illegal association threatening national order and security by means of violence and terror and of serious criminal offences in Egypt and was sentenced to fifteen years’ of imprisonment and hard labour. The Egyptian Ministry of Justice filed a request for extradition, which was

granted on certain conditions and the applicant was taken into detention with a view to his extradition. The case was struck out of the list, as the applicant had been released from detention immediately after the Egyptian authorities had indicated that they would not accept the conditions set out in the extradition order.

2. *Litigation on behalf of ethnic groups*

There are overall 10 cases that relate to the issue of ethnicity defined in a very broad sense taking into account issues of nationality and language. We subsumed cases that were taken to the ECtHR by people not having Austrian citizenship regardless of whether they invoked Article 14 or not. Within this sub-group cases do not really cluster around specific sets of issues. In all cases violations of the ECHR were established.

Four cases were filed by non-nationals complaining alleged violations of Article 6 of the ECHR. Austria was sentenced for not guaranteeing a public hearing and for the failure of pronouncing the judgments publicly to a Macedonian national (*Rushiti v. Austria*), for the failure of pronouncing the judgments publicly to a Hungarian citizen (*Szücs v. Austria*), for not guaranteeing the presence at a hearing at a third instance court to a British national (*Cooke v. Austria*) and for the submission of observations by the Attorney-General's Office to the Supreme Court without communication to a Turkish national's defence (*Bulut v. Austria*).

In *Herczegfalvy*, the applicant, a Hungarian citizen, was put in a psychiatric hospital for 5 years, and was allegedly deprived of writing materials from time to time, prevented from sending letters to the courts, and deprived of reading material, radio and television for disciplinary purposes. Violations were established under Arts 5, 8 and 10.

In *Can*, a friendly settlement could be reached with regard to the complaints of a Turkish citizen regarding Arts 5 and 6 of the ECHR – duration of detention and supervision of consultation with a lawyer. The Austrian government paid about €11.216 including costs and expenses incurred in the domestic proceedings compensation.

In reviewing the cases, we found one case relating to custody proceedings, which involved a Turkish couple (*Kaplan v. Austria*). The wife wanted to prevent her husband from taking their child to Turkey with him, after they had been divorced. When her husband had taken the child to Turkey, the court of first instance stated that the case had ceased to be within the scope of Austrian jurisdiction. The ECtHR established a violation of Article 8, as the court had not diligently dealt with the applicant's request to grant her custody of her son.

The case *Karakurt v. Austria*, in which a Turkish citizen who was elected works' council representative in 1994, but was deprived of his mandate on the grounds of his Turkish nationality turned to the ECtHR invoking Article 11. The case was struck out of the list, as a works' council cannot be considered an "association" within the meaning of Article 11 para 1 and not being eligible to stand for election did not interfere with the applicant's right to freedom of association. After eight years of unsuccessful court proceedings, as several competent Austrian courts and the European Court of Human Rights dismissed the Turkish citizen's application, the UN Human Rights Committee finally took a decision in April 2002⁶. It adopted the view that stripping the man of his mandate was an offence to article 26 of the International Covenant on Civil and Political Rights, as "it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality". Austria therefore has to "ensure to all individuals within

⁶ UN Human Rights Committee, International Covenant on Civil and Political Rights, Seventy-fourth session, 18 March – 5 April 2002, CCPR/C/74/D/965/2000, <http://www.bka.gv.at/dokumente/karakurt.pdf>

its territory and subject to its jurisdiction the rights recognised in the Covenant, and to provide an effective and enforceable remedy”.

Two cases were taken to the ECtHR alleging violation of Article 14. A Turkish national was refused emergency assistance (*Notstandshilfe*) on the grounds of his nationality (*Gaygusuz v. Austria*). The ECtHR established a violation of Article 14 and Article 1 of Protocol No 1 in conjunction, as the refusal was exclusively based on the fact that he did not have Austrian nationality and it was not based on any “objective and reasonable justification”. In *Kamasinski*, the applicant, a US citizen, alleged insufficient interpretation in pre-trial proceedings, during proceedings and of the judgment. The ECtHR established no violation of Article 14 but of Article 6 as the applicant was refused leave to attend the appeal hearing before the Supreme Court.

Among the stream of the six cases challenging the monopoly of the Austrian Broadcasting Corporation was one applicant called *Arbeitsgemeinschaft offenes Radio (AGORA)*, which operated an authorised mobile radio station in Italy, who wanted to establish a radio station in southern Carinthia to broadcast non-commercial radio-programs in German and Slovene (*Informationsverein Lentia and others v. Austria*). The recognised autochthonous minority of Slovenes concentrates in Carinthia. AGORA applied for but was denied a license. The ECtHR established a violation of Article 10 like in two other cases – *Radio ABC v. Austria* and *Tele 1 Privatfernsehgesellschaft MBH v. Austria*.

Another set of cases that was not instigated by non-nationals but which has serious effects on members of ethnic minorities, clusters around xenophobic tendencies within the right-wing extremist Austrian Freedom Party (FPÖ)⁷. Criticism of statements and actions by the FPÖ as agitating racism resulted in convictions of journalists either for defamation or insult. Such judgments deter those that raise awareness for the issue of racism, publicly oppose such statements, try to make clear that racism is not a consensus in Austrian society or to protect members of minorities from constant racist abuse.

In 1983, Walter Grabher-Meyer, then Secretary of the FPÖ, suggested “that the family allowances for Austrian women should be increased by 50%, in order to prevent abortions, whilst those paid to immigrant women should be reduced to 50% of their current level”. The editor of the monthly *Forum* together with several other people filed criminal information against Grabher-Meyer, but the Vienna public prosecutor’s office decided not to prosecute him. The full text of the criminal information was published in the monthly and suspected the Secretary of the FPÖ of incitement to hatred, as the statement “offended human dignity and was directed against a group of persons defined by their membership of a people, ethnic group or State – by the fact that they do not have Austrian citizenship, immigrant mothers are inferior, worthless and less valuable and it is in the interest of the Austrian people that they have abortions”. The editor was convicted of defamation and took the case to the ECtHR invoking Article 10, a violation of which was established as well as a violation of Article 6 with regard to the impartiality of the court.

In 1991, a journalist working for the Austrian Broadcasting Corporation interviewed Jörg Haider, then party leader of the FPÖ, on the Viennese election campaign, in which the FPÖ gained 23 per cent of the votes and was runner-up to the social democrats. The journalist stated that the FPÖ had used “the question of foreigners as main argument” in the election campaign and has for the first time “since decades turned foreigners into some sort of non-

⁷ A. Pelinka, *Die FPÖ in der vergleichenden Parteienforschung: Zur typologischen Einordnung der Freiheitlichen Partei Österreichs*, in: *Österreichische Zeitschrift für Politikwissenschaft* 2002/3, pp. 281-290, pp. 281-290

persons”. He continued that in one Viennese park every park bench displayed smearings like “foreigners out” or swastikas. The ECtHR struck *Haider v. Austria* out of the list, as Haider’s application was manifestly ill founded, but it added that it was “in the interest of freedom of political debate that the interviewing journalist may also express critical and provocative points of view” and no violation of Article 10 could be established.

In 1992, the *TATblatt* published a leaflet stating “... let’s send them [FPÖ] small gifts in response to their racist agitation”. This statement referred to a petition for a referendum on the issue of immigration called “Austria first” initiated by the FPÖ. The editor of the *TATblatt*, the *Unabhängige Initiative Informationsvielfalt*, was convicted of having insulted Jörg Haider, then leader of the FPÖ. The ECtHR however established a breach of Article 10 and stated that the Austrian courts had overstepped the margin of appreciation afforded to Member States (*Unabhängige Initiative Informationsvielfalt v. Austria*).

3. Litigation in connection with the Prohibition Statute

The Constitutional Act prohibiting the National-Socialist German Workers’ Party (*Verbotsgesetz*, Prohibition Statute), which was enacted in order to comply with the international obligation resulting from Article 9 of the Treaty of Vienna forms the legal basis for sanctions against racist actions and incitements within the context of (neo-)Nazi ideology. The Prohibition Statute prohibits inter alia the foundation and maintenance of National-Socialist organisations as well as financial contributions, or any other form of support or co-operation with such organisations, persons to induce, encourage or lead actions prohibited under the Prohibition Statute by conduct in public or through the dissemination of printed material or figurative illustrations, the dissemination of the so-called *Auschwitzlüge* – i.e., anyone who denies, grossly trivialises, approves or seeks to justify the National-Socialist genocide or other National-Socialist crimes against humanity by making this opinion accessible to the public through printed material, broadcast or any other means.

There are twelve cases that relate to the issue of National Socialism and the Prohibition Statute. All but one was taken to the ECtHR alleging violation of Article 10 after journalists or publishers had been convicted of defamation.

Three cases were connected to the so called series of letter bombs in 1993, which were sent to politicians and other persons of the public sphere that allegedly supported members of ethnic minorities. There were two cases, which involved one and the same right-wing extremist, who had been suspected of being involved in the letter bomb attacks and was later on acquitted (*News Verlags GmbH & Co.KG v Austria* and *Österreichischer Rundfunk v. Austria*⁸). A weekly was prohibited to publish his picture without his consent in connection with criminal proceedings in general and the Austrian Broadcasting Corporation was prohibited to broadcast his picture in connection with the letter bomb proceedings by Austrian courts as the applicant’s legitimate interests had been grossly violated. In the first case a violation of Article 10 was established, the second case was declared inadmissible. Another case was declared inadmissible, in which a journalist had shared the allegations with the TV-film called “The Letter Bomber”. These allegations concerned the then Federal Minister of the Interior who had – according to the film – far too long preferred to have the search for the letter bomber continued in right wing circles (*Krone Verlag Gesellschaft M.B.H. and Gerhard Walter v. Austria*).

⁸ 57597/00.

There was one other case relating to right-wing extremists, in which the Austrian Broadcasting Corporation broadcasted a picture of a right-wing extremist, who had been convicted under the Prohibition Statute, on the occasion of another right-wing extremist's release from prison (*Österreichischer Rundfunk v. Austria*⁹). The Broadcasting Corporation was prohibited from publishing his picture accompanied by any text that he had been convicted under the Prohibition Statute or that he had been released on parole.

Three cases related to the FPÖ. In one case an FPÖ-politician was alleged of supporting National Socialist ideas through clandestine activities (*Scharsach and News Verlagsgesellschaft mbH v. Austria*), the other two cases involved Jörg Haider, then party leader of the FPÖ. In both cases a violation of Article 10 was established. In *Oberschlick (no. 2)*, a journalist stated that Haider was not a "Nazi" but an "idiot", when he glorified the role of the generation of soldiers who had taken part in WWII and in *Wirtschafts-Trend Zeitschriften-Verlags GmbH*, a book was criticised which pardoned Haider's belittlement of concentration camps as "punishment camps".

In *Lingens*, the social democrat Bruno Kreisky, then Federal Chancellor of Austria, was accused of "basest opportunism" and of being "immoral" and "undignified" when he described Simon Wiesenthal's Jewish Documentation Centre as "political mafia" applying "mafia methods" in reply to Wiesenthal's accusation of Friedrich Peter, then party leader of the FPÖ, of having served in the first SS infantry brigade during WWII. A violation of Article 10 was established.

Two further cases were declared inadmissible. In *Krone Verlag GmbH & CoKG and Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & CoKG*, the daily *Krone* accused another daily the *Salzburger Nachrichten* inter alia of having called murderers those that had died during combat in WWII and that it was an accomplice of liars namely those supporting the *Wehrmacht* exhibition, which critically assessed the crimes committed by the *Wehrmacht* between 1941 and 1944. In *Nachtmann*, the applicant had published an article in the *Aula*, a right-wing extremist paper, in which National Socialist genocide and crimes had been grossly denied and minimised.

In *Wabl*, no violation of Article 10 was established. Andreas Wabl, a member of the Greens, used the term "Nazi-journalism" for a journalist who had written an article stating that a policeman whom Wabl had scratched during a demonstration claimed that the politician should undergo an AIDS test. An injunction was imposed on him that prohibited him from repeating the statement on "Nazi-journalism". The ECtHR found that the Austrian Supreme Court was entitled to consider that the injunction issued was "necessary in a democratic society" for the protection of the reputation and the rights of others.

Another Green politician alleged violation of Article 11 when his gathering commemorating the Salzburg Jews killed during WWII was prohibited as it coincided with the gathering of Comradeship IV in memory of the SS soldiers killed during WWII. The ECtHR established a violation of Article 11 as the Austrian courts had failed to strike a fair balance between the applicant's interest in holding the intended assembly and expressing his protest against the meeting of Comradeship IV, while giving too much weight to the interest of those visiting the cemetery in being protected against some rather limited disturbances.

⁹ 35841/02.

4. Litigation on behalf of homosexuals

Ten cases were taken to the ECtHR on behalf of homosexuals, nine of which related to section 209 of the Criminal Code, which prohibited male persons who have attained the age of 19 from “fornicating” with a person of the same sex who has attained the age of 14 but not the age of 18 until 2002. Most of the applicants had either been convicted of having committed homosexual acts with an adolescent or had turned to the Constitutional Court that reviewed whether section 209 was compatible with the principle of equality under constitutional law and in particular with the prohibition on gender discrimination contained therein or directly to the ECtHR respectively. Two of the cases (*H.F. v. Austria* and *Zukrigl v. Austria*) were declared inadmissible, as they were ill-founded. In seven cases violation of Article 8 in conjunction with Article 14 was established (*Woditschka and Wilfling v. Austria*, *Ladner v. Austria*, *R.H. v. Austria*, *L. and V. v. Austria*, *S.L. v. Austria*, *H.G. and G.B. v. Austria*, *Wolfmeyer v. Austria*). Until 2002, the Constitutional Court stated that section 209 of the Criminal Code was meant to protect a young, maturing person from developing sexually in the wrong way and that homosexual influence endangered maturing males to a significantly greater extent than girls of the same age. In 2002, upon a request for review made by the Innsbruck Regional Court, the Constitutional Court found that section 209 of the Criminal Code was unconstitutional. In *Ladner*, a violation of Article 8 in conjunction with Article 14 was established, as a homosexual was prevented from succeeding to a tenancy that had been established by his partner before he died. The Rent Act provided that family members had a right to succeed to a tenancy but the Constitutional Court stated that in 1974 the legislator’s intent had not been to include persons of the same sex in the term family members.

Two further cases were not brought to the ECtHR on behalf of homosexuals but by newspapers that had reported on the issue of homosexuality. In *Krone Verlag GmbH & Co.KG (no. 2)*, the publisher was ordered to publish the sentence of the court and to pay compensations for publishing several articles on a case of parents who had abused their daughter and alleged that they had homo-bisexual inclinations. In *Kobenter and Standard Verlags GMBH*, the journalist and the publisher were convicted of defamation of a judge who had stated in a judgment that “in truth homosexuality includes also [...] the world [...] of animals” and described examples of same sex practices among different animals. The journalist wrote that the judge’s lending support to a homophobe’s venomous hate campaign cast doubt on his “intellectual and moral integrity”. In both cases a violation of Article 10 was established.

5. Litigation on behalf of religious minorities

The latest census showed a diverse picture of religious communities in Austria¹⁰. Almost four fifths of the residents said that they were Roman Catholics; the second largest group is the one without any denomination. Protestants (4.7%) and Muslims (4.2%) are almost on par with each other, at about four per cent. Only 0.1 per cent is of Jewish faith. Among resident aliens, the Islamic Faith Community is the largest group, amounting to one third of the respondents, followed by the Roman Catholic Church (23%) and the Orthodox Church (19%). Three per cent of the foreign resident population indicated to be of Jewish faith. Presently, thirteen religious groups hold the status of legally recognised religious communities: the Roman Catholic Church, the Lutheran Church (Augsburg and Helvetic Confessions), the Islamic Faith Community, the Old Catholic Church, the Jewish Faith Community, the Eastern Orthodox Church (Russian, Greek, Serbian, Romanian and Bulgarian), the Church of Jesus Christ of Latter-day Saints (Mormons), the New Apostolic Church, the Syrian Orthodox Church, the Armenian Apostolic Church, the Methodist Church of Austria, the Buddhist

¹⁰ Statistik Austria, *Volkszählung 2001: Hauptergebnisse I – Österreich*, Wien 2002, p. 20.

Community and the Coptic Orthodox Church. These religious communities are entitled to certain state subsidies and tax exemptions. Furthermore, they enjoy legal personality enabling them to engage in certain contractual obligations. Primary and secondary school students belonging to one of these communities receive religious instruction in Austrian schools as a compulsory subject, with the possibility to opt out. The religious communities are autonomous in deciding on curricula and teachers, whose salary is financed by the Austrian state.

Overall two cases were taken to the ECtHR relating to the issue of religious minorities and in both violations of the ECHR were established. They both relate to the issue of sects.

In *Hoffmann*, a member of Jehova's Witnesses took a custody case to the ECtHR. Her husband, who was of Roman Catholic faith, was granted parental rights over the two children of the divorced couple, who also were Roman Catholics. The Supreme Court overturned the judgments of the courts of lower instance and stated that the "two children do not belong to the faith of the Jehova's Witnesses" and that their education could no longer be continued in accordance with the provision that "during the existence of the marriage neither parent may decide without consent of the other that the child is to be brought up in a faith different from that shared by both parents at the time of the marriage or from that in which her or she has hitherto been brought up". The lower courts had failed to give due consideration to the "children's welfare". Although it would be preferable for young children to be taken care of by their mother, this only applies provided that all other things are equal. The ECtHR established a violation of Article 8 in conjunction with Article 14 and argued that "a distinction based essentially on a difference in religion alone is not acceptable".

The second case concerned the conviction of a politician, who stated during a political debate in the Vienna Municipal Council that the *Institut zur Förderung der Psychologischen Menschenkenntnis* was a "psycho-sect" showing "fascist tendencies" and a "totalitarian character". The politician was prohibited to repeat that statement by Austrian courts, whereas the ECtHR established a violation of Article 10 stating that "the Austrian courts overstepped their margin of appreciation and that the injunction granted against the applicant amounted to a disproportionate interference with her freedom of expression" (*Jerusalem v. Austria*).

One other case concerned the Roman Catholic Church, which requested a court of first instance to prevent the six showings of the film "Das Liebeskonzil" in the federal province of the Tyrol, which the court did by seizing the film. The judgments pointed out that a wholesale derision of religious feeling outweighed any interest the general public might have in information or the financial interests of persons wishing to show the film. In *Otto-Preminger-Institut v. Austria*, the ECtHR established that the seizure of the film was no violation of Article 10, as it could not be disregarded that the "Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner".

There was one more case that was indirectly related to the Roman Catholic Church. The association *Plattform Ärzte für das Leben*, who were campaigning against abortion and seeking to bring about reform of the Austrian legislation, on two occasions saw their rights to freedom of assembly and religious observation to be infringed as the police allegedly did not provide them with sufficient protection against counter-demonstrators. In one case they launched an appeal with the Constitutional Court, who declared the appeal inadmissible. The

ECtHR declared inadmissible the complaints under Arts 9, 10 and 11 and established no breach of Article 13 (*Plattform "Ärzte für das Leben" v. Austria*).

6. Litigation by Austrian citizens expressing views that challenge state institutions

Among the state institutions challenged by Austrian citizens was the police, the judiciary and the army.

In *Ribitsch*, the applicant was arrested for drug trafficking and the police searched his home, although they neither had a search nor an arrest warrant. According to the applicant, the officers questioning him had grossly insulted and then assaulted him repeatedly in order to wring a confession from him. Violation of Article 3 was established, as the injuries suffered by the applicant "showed that he had undergone ill-treatment which amounted to both inhuman and degrading treatment". In *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft MBH (no. 2)*, the weekly *profil* had disclosed the identity of an aliens' police officer, who had been involved in a deportation flight on which the deportee, Marcus Omofuma¹¹, had died. The Austrian courts stated that the police officer's legitimate private interests had been violated by disclosing his identity. This case was declared inadmissible.

In *Prager and Oberschlick*, the two applicants had written an article "attributing a despicable character or attitude" to Judge J., which could "expose him to contempt or denigrate him in the public eye" and were convicted of defamation. The ECtHR did not establish a violation of Article 10, as the "impugned interference" did not appear "to be disproportionate to the legitimate aim pursued" and "may be held to have been 'necessary in a democratic society'", as stated by the Austrian courts.

The *Vereinigung demokratischer Soldaten Österreichs* was prevented from distributing their magazine the *Igel* (which means hedgehog), containing articles of a critical nature on military life, in the barracks in the same way as two other military magazines. One of their members distributed the magazine without the authorisation of the commanding officer in specific barracks and was prohibited to do so. A violation of Article 10 was established as the articles did not "call into question the duty of obedience of the purpose of service in the armed forces". The magazine "could scarcely be seen as a serious threat to military discipline" and therefore the "measure in question was disproportionate to the aim pursued".

7. Litigation on behalf of disabled persons

Two cases were related to the lawfulness of dismissals with regard to the Disabled Persons' Employment Act, which regulates that people who have been qualified as favoured disabled persons can only be dismissed when the Disabled Persons' Board has authorised their dismissal. In *Wintersberger*, a friendly settlement was reached and the case was struck out of the list, in *Obermeier*, a violation of Article 6 was established. It was stated that the proceedings were "of some complexity" but that "a period of nine years without reaching a final decision exceeds a reasonable time".

C. Actors

In more than 90 per cent of the cases described above the litigants were represented by lawyers or law firms practising in Austria. In five cases, academics, namely professors of law, were involved, almost all of them in cases concerning Article 10 of the ECHR. Only in one

¹¹ For further information on this case see: RAXEN Focal Point for Austria, *Case Study Omofuma*, Vienna 2002, <http://www.univie.ac.at/bim/focalpoint/>.

case the law professor was not practising in Austria but in the US and represented a case, in which a violation of Article 6 was established.

NGOs do not seem to be very actively involved in cases taken to the ECtHR. We tried to conduct a survey among lawyers that have taken relevant cases to Strasbourg and asked them whether they had co-operated with NGOs; only two of the respondents answered this question in the affirmative. One stated that he asked amnesty international and the UNHCR for information and co-operated with organisations of Jehova's Witnesses and their legal departments. *Karakurt v Austria* indirectly involved an NGO then called *Verein zur Betreuung der AusländerInnen*, which was the employer of Mümatz Karakurt, who was deprived of his mandate in the works' council. In *Bilasi-Ashiri v. Austria*, it is mentioned that amnesty international issued a press release in which it expressed concern that the applicant was at risk of ill-treatment if extradited to Egypt and called for an "urgent action". The legal concept of intervener is not widely used and there is hardly any research done on this issue. Therefore, no pattern of support by NGOs can be traced; the cases in which NGOs were involved are listed below.

In *Lingens*, the International Press Institute (IPI), through Interights, asked for permission to submit written observations. It submitted a written statement comparing legislation and legal practice in CoE Member States and the US shedding light on whether legislation protects public figures against defamation in a different way than other people and differentiates between statements of fact and value judgments. The IPI concluded that in all eleven states covered public officials were afforded less protection against defamation and value judgments were distinguished from statements of fact. The existence of facts can and must be demonstrated, whereas the truth of value judgments is not susceptible of proof. As the judgment does not in detail refer to the statement by the IPI, it cannot be proven that the statement had an effect on the judgment¹².

In *Informationsverein Lentia and others*, one of the applicants was an NGO called *AGORA* which represented the critically thinking civil society in Carinthia aiming at establishing a multilingual radio program also functioning as a platform for minorities. They participated in exhausting the domestic remedies and paved the way for going to Strasbourg, as well as preparing the facts of the case and the line of argumentation.

One of the lawyers involved in litigation on behalf of homosexuals is Helmut Graupner, he is the president of the *Rechtskomitee Lambda*, which is an NGO founded in 1991 aiming at the abolition of all forms of discrimination on the grounds of homosexuality and transgender as well as promoting the consistent implementation of the basic and human right to a self-determined sexual and love-life. The website www.rklambda.at reports on judgments of the ECtHR concerning the discrimination on the ground of sexual orientation.

Another lawyer who regularly represents clients before the ECtHR is the co-founder of the NGO *SOS-Mitmensch* (www.sosmitmensch.at), which is a pressure group promoting the implementation of human rights especially in areas affecting marginalised groups in society aiming at equal treatment and equal opportunities for all.

¹² C. Außerhofer, *Möglichkeiten und Grenzen der Beteiligung Dritter an Individualbeschwerdeverfahren vor dem Europäischen Gerichtshof für Menschenrechte*, Wien 1998, pp. 34-35.

D. Strategic litigation

With regard to the identification of cases that were brought before the ECtHR in order to initiate certain concrete changes in the State's legal order and that may, therefore, be characterized as actions of 'strategic' litigation, two areas have to be examined in particular.

The first group of cases falls within the scope of Article 10 ECHR, more specifically under the issues of freedom of broadcasting and media diversity.

In 1978, *Informationsverein Lentia*, an association of co-proprietors and residents of a housing development, applied for an operating license under the Telecommunications Law (*Fernmeldegesetz*). As the Linz Regional Post and Telecommunications Head Office (*Post- und Telegraphendirektion*) did not reply within the six month time limit, *Lentia* turned to the National Head Office (*Generaldirektion für die Post- und Telegraphenverwaltung*) attached to the Federal Ministry of Transport, which rejected the application. In its view Article 1 para 2 of the Constitutional Law guaranteeing the independence of broadcasting (*Bundesgesetz über die Sicherung der Unabhängigkeit des Rundfunks*, 'Constitutional Broadcasting Law') had vested exclusive authority to regulate this activity in the federal legislature. This authority was only once exercised when enacting the Law on the Austrian Broadcasting Corporation (*Österreichischer Rundfunk – ORF*). Therefore, and due to the lacking of any further legal basis, no other person could apply for such a license. *Lentia* applied to the Constitutional Court and complained a breach of Article 10 ECHR. The Court, however, stated that the Constitutional Broadcasting Law had instituted a system ensuring objectivity and diversity of opinions, and would be ineffective if it were possible for everybody to obtain an authorisation. Therefore, the complaint was rejected and remitted to the Administrative Court, who dismissed the claim. Subsequently, *Informationsverein Lentia* (together with four other applicants) lodged an application with the Commission and the Court, maintaining that the impossibility of obtaining an operating license was an unjustified interference with its right to communicate information and infringed Article 10 of the Convention.

In reaction to the case of *Informationsverein Lentia and Others v. Austria*¹³ the Austrian Parliament in 1993 – even shortly before the judgment of the ECtHR, holding that there had been a violation of Article 10 ECHR, was delivered – abolished the broadcasting monopoly of the Austrian Broadcasting Corporation and passed the Private Radio Act (*Regionalradiogesetz*) allowing for private broadcasting licenses on a regional level. However, due to the fact that this act was quite restrictive and of indefinite character, the Austrian Constitutional Court abolished the norm relevant for private broadcasting licenses on the ground of insufficient legal determination shortly after. The thereupon amended act then granted broadcasting licenses to a much broader number of local and regional private radio enterprises. However, a legal basis for private television licenses was still lacking.

The Constitutional Broadcasting Law provided that broadcasting should be authorised by federal legislation. Federal legislation, however, until then had only been enacted for radio and television broadcasting by the ORF and for terrestrial broadcasting of regional radio programs. The so-called Broadcasting Ordinance (*Rundfunkverordnung*) e.g. at first solely contained a legal basis for passive broadcasting of radio and television programs. Only in 1995¹⁴ the Austrian Constitutional Court with effect from 1 August 1996 set aside certain essential passages of this ordinance, which were limiting cable distribution to the retransmission of programs produced by others (so-called "passive cable broadcasting"),

¹³ Cp. ECtHR judgment of 24 November 1993, Appl. No. 36/1992/381/455-459.

¹⁴ Cp. VfGH judgment of 27 September 1995, VfSlg 14.258, JBl 1996, 28 = MR 1995, 192 = RfR 1995, 17 = ZfVB 1996/1340.

stating that these passages were contrary to Article 10 ECHR. In its justification the Court explicitly referred to the ECtHR judgment of 24 November 1993 (*Informationsverein Lentia and Others v. Austria*). Consequently, the transmission of original programs via cable (so-called “active cable broadcasting”) became legal. However, still no legislation had been enacted for terrestrial broadcasting of television programs, apart from the legislation referring to the Austrian Broadcasting Corporation. As a result, other (private) broadcasters were not allowed to organise terrestrial television broadcasting, that is broadcasting via electromagnetic waves, broadcasting.

In 1993, the Austrian company *Tele 1 Privatfernsehgesellschaft mbH* applied to the Telecommunications Office for Vienna, Lower Austria and Burgenland for a license to set up and operate a television transmitter in the Vienna region, whereas in succession the request was dismissed by all relevant authorities. In this case, the Constitutional Court had stated that the unlawfulness of terrestrial broadcasting of television programs by private broadcasters originated from the legislator’s failure to enact the corresponding implementing legislation. Thus, the Court did not have the power to review the constitutionality of the broadcasting system in place. The company finally lodged an application with the ECtHR, alleging that the Austrian authorities’ decisions refusing it a license to set up and operate a television transmitter in the geographical area of Vienna violated its right to freedom of expression.

In its judgment¹⁵, the ECtHR revealed that the restrictions in question amounted to an “interference” with the applicant’s exercise of its freedom to impart information and ideas. Accordingly, the question arose whether the restriction was justified under Article 10. The Court further stated that although – according to Article 10 para 1 ECHR – States were permitted to regulate the way in which broadcasting is organised in their territories by such licensing systems, the compatibility of interferences, however, that might emerge out of such systems, had to be assessed in the light of the requirements set out in Article 10 para 2 of the Convention.

Already in its earlier judgments *Informationsverein Lentia and Others* and *Radio ABC*¹⁶, the Court held that, through the supervisory powers over the media it conferred on the authorities, the monopoly system in Austria adequately contributed to the quality and balance of programs and was, hence, in conformity with the third sentence of Article 10 para 1 ECHR. With regard to *Tele 1 Privatfernsehgesellschaft mbH v. Austria* the ECtHR stated that the asserted interference was “prescribed by law” (as the Constitutional Broadcasting Law – in conformity with Article 10 of the Convention – obliged the legislator to enact legislation relating to private terrestrial broadcasting and, thus, the inactivity of the legislator in this respect amounted to a *de facto* prohibition).

Moreover, and regarding the question of whether the asserted interference was “necessary in a democratic society”, the Court recalled that in assessing the need for an interference the States enjoy a margin of appreciation, but that margin goes hand in hand with European supervision, whose extent varies according to the circumstances. Thus, in this case the ECtHR pointed out that three different periods would need to be examined separately:

With regard to the first period (from the applicant’s first application to the Telecommunications office on 30 November 1993 to the taking of effect of the Constitutional Court’s judgment of 27 September 1995 on 1 August 1996) the Court found a breach of Article 10, as during the mentioned period no legal basis whereby a license to set up and operate a television transmitter could be granted to any station other than the ORF existed.

¹⁵ Cp. ECtHR judgment of 21 September 2000, Appl. No. 32240/96.

¹⁶ Cp. ECtHR judgment of 20 October 1997, Appl. No. 109/1996/728/925.

Regarding the second (from 1 August 1996 to the entry into force of the so-called Cable and Satellite Broadcasting Act on 1 July 1997) and third period (since 1 July 1997), the Court noted that following the Constitutional Court's judgment of 27 September 1997 (which took effect on 1 August 1996), private broadcasters were free to create and transmit their own programs via cable net without any further conditions being attached, while terrestrial television broadcasting was still reserved to the ORF. According to the opinion of the ECtHR, and due to the fact that almost all households receiving television in Vienna already had the possibility to be connected to the cable net, the impossibility to obtain a license for terrestrial broadcasting could no longer be regarded as being disproportionate to the aims pursued by the Constitutional Broadcasting Act.

With this judgment the ECtHR developed from the once most important source of pulse and inspiration with regard to the abolition of the Austrian broadcasting monopoly into a rather retarding instrument. However, the hope for legislative changes in Austria remained alive. Finally, the legislator in 2001 enacted the Private Radio Act (*Privatradiogesetz*),¹⁷ ensuring nationwide private radio broadcasting as well as the Private Television Act (*Privatfernsehgesetz*),¹⁸ regulating terrestrial private broadcasting and, thereby, effected the conclusive fall of the ORF monopoly.

Although the individual applicants in the cases mentioned above tried to bring their cases before the ECtHR in order to effect legislative changes in Austria, it is not possible to speak of 'strategic litigation' as such. The strategic elements contained rather amount to some kind of political strategy, but do not fall under the term 'strategic litigation'.

The second group of cases that have to be examined with regard to the issue of 'strategic' litigation in Austria are cases that fall under the scope of Article 8 and 14 ECHR. In recent years the European Court of Human Rights repeatedly convicted Austria on account of its long lasting practice of criminal prosecution of homo- and bisexual men on the basis of the then section 209¹⁹ of the Austrian Criminal Code (*Strafgesetzbuch*).²⁰ According to this section, male adults (after having attained the age of 19) were not allowed to have consensual homosexual contacts with adolescents (between 14 and 18 years old). Offences under section 209 were prosecuted on a regular basis. An average of sixty criminal proceedings was opened per year, out of which a third resulted in a conviction. Regarding the penalties applied, a term of imprisonment usually exceeding three months was imposed in 65 to 75 per cent of the cases.²¹

The practical application of different ages of consent for the protection of male and female adolescents against consensual (homo)sexual contacts with adults was tried to be justified by the Austrian legislator in the 1970s by the so-called *Prägungstheorie*, a theory stating that male adolescents were at a risk of being recruited into homosexuality (while female adolescents were not).²²

¹⁷ Privatradiogesetz, PrR-G, BGBl. I 2001/20.

¹⁸ Privatfernsehgesetz, PrTV-G, BGBl. I 2001/84.

¹⁹ Section 209 of the Criminal Code read as follows: "A male person who after attaining the age of 19 fornicates with a person of the same sex who has attained the age of 14 but not the age of 18 shall be sentenced to imprisonment for between six months and five years." It expired on 13 August 2002: cp. BGBl. I No. 134/2002.

²⁰ Cp. ECtHR judgments of *L. and V. v. Austria*, 9 January 2003, Appl. Nos. 39392/98, 39829/98; *S. L. v. Austria*, 9 January 2003, Appl. No. 45330/99; *Woditschka and Wilfling v. Austria*, 21 October 2004, Appl. Nos. 69756/01, 6306/02; *Ladner v. Austria*, 3 February 2005, Appl. No. 18297/03; *Wolfmeyer v. Austria*, 26 May 2005, Appl. No. 5263/03; *H. G. and G. B. v. Austria*, 2 June 2005, Appl. Nos. 11084/02, 15306/02; *R. H. v. Austria*, 19 January 2006, Appl. No. 7336/03.

²¹ Cp. ECtHR judgment of *L. and V. v. Austria*, 9 January 2003, Appl. Nos. 39392/98, 39829/98, § 20..

²² Cp. V. Murschetz, St. Ebensperger, *Aufhebung des § 209 StGB durch den VfGH*, in: JAP 2002/2003, 175.

In a judgment of 3 October 1989²³ the Constitutional Court found that section 209 of the Criminal Code was compatible with the principle of equality and in particular with the prohibition of gender discrimination.

In 1995 the Social Democratic Party, the Green Party and the Liberal Party brought motions in Parliament to repeal section 209, as science had meanwhile shown that sexual orientation was already established at the beginning of puberty. Moreover, such different ages of consent were not in line with European standards.²⁴ In 1996, the Austrian Parliament held a debate on the motion to repeal the section in question, but in the end section 209 remained in force. In 2001, the Innsbruck Regional Court requested to review the constitutionality of section 209, but the Constitutional Court dismissed the request by stating that *'the Regional Court had failed in giving detailed reasons for its contention that relevant scientific knowledge had changed to such an extent that the legislator was no longer entitled to set a different age-limit for consensual homosexual relations than for consensual heterosexual or lesbian relations'*.²⁵

Finally, on 21 June 2002, upon a further request for review made by the Innsbruck Regional Court, the Constitutional Court found that section 209 was unconstitutional. In its argumentation, the Regional Court had once again stated that the respective section violated Articles 8 and 14 ECHR and was incompatible with the principle of equality under constitutional law. For a falsification of the mentioned *Prägungstheorie*, the Regional Court referred to an expert opinion of 1995. Consequently, the Austrian Parliament on 10 July 2002 decided to repeal section 209 of the Criminal Code. However, the mere repeal of section 209 is, in itself, insufficient to rectify the harm inflicted by it.²⁶

Although the respective section was repealed even before the ECtHR pronounced its first judgment *L. and V. v. Austria*, a certain kind of litigation strategy can be identified with regard to this group of cases. Given the fact that only persons whose victim status was determined by a judgment of the ECtHR can successfully seek compensation and rehabilitation under the domestic legal system, Helmut Graupner, lawyer, president of the Austrian lesbian and gay rights organization *Rechtskomitee LAMBDA* (www.rklambda.at) and founder of the *Platform Against Section 209* (www.paragraph209.at) encouraged the applicants and represented them before the Court. As a result, Austria so far has had to pay more than € 350.000,- to date to ten persons who successfully applied to the ECtHR. However, the nationwide storage of convictions under section 209 in the Registry of Convictions (*Strafregister*) is still being upheld, as this practice was confirmed by the Constitutional Court in 2006.²⁷

In conclusion it should be pointed out that in both examples discussed before, namely the fall of the ORF monopoly and the compensation of victims under section 209 of the Criminal Code, Austrian litigants tried to bring cases before the Strasbourg organs in order to press the legislator in the pursuit of the specific goals mentioned. Although the legislative changes as such were enacted even *before* the European Court of Human Rights declared a violation of the respective Articles of the Convention, the Court nevertheless played an important role in the changing processes as such.

²³ Cp. VfSlg 12.182/1989.

²⁴ Cp. CoE PA Rec. 924 (1981) of 1 October 1981 on discrimination against homosexuals, which had advocated equal ages of consent for heterosexual and homosexual relations.

²⁵ Cp. *L. and V. v. Austria*, 9 January 2003, Appl. Nos. 39392/98, 39829/98, § 26.

²⁶ Cp. M. Nowak, A. Lubich, *Report on the Situation of Fundamental Rights in Austria in 2004*, E.U. Network of Independent Experts on Fundamental Rights, p. 61.

²⁷ Cp. VfGH judgment of 4 October 2006, B 742/06.

E. Domestic Implementation

1. Obligations due to the Convention

The obligations of a respondent state arising from the finding of a breach of the Convention follow the scheme of international state responsibility:

a) Cessation:

The state has to cease the wrongful act, which presupposes an ongoing violation; the state must not claim that its domestic law does not permit the required measures to be taken.

b) General Measures:

The state has to provide appropriate guarantees to prevent new violations similar to that/those found. As regards the means of performance of this obligation, the respondent state has a certain “freedom of choice”, though limited by the relevant rules of state responsibility. This freedom does not mean that the state can suspend the application of the Convention until the appropriate reforms have been finalised.²⁸

These general measures need not stringently be understood as legislative provisions but can also occur in forms of a change of jurisdiction according to the Strasbourg findings. As regards the latter, at least a circular letter is addressed to the executive and judicial authorities bringing them to attention the respective judgment and reminding them in general of complying with the Convention within their sphere of action.²⁹

c) Individual Measures:

The state has to provide full reparation for all consequences of the infringement of the Convention within the possibilities of the applicable domestic law (*restitutio in integrum*, i.e. reinstating the applicant in the position in which he/she would have been without the violation).

Irrespective of the payment of just compensation, the possibilities to allow for compliance with ECtHR judgments in individual cases in Austria are the following³⁰:

- **Plea of nullity for the preservation of law** (*Nichtigkeitbeschwerde zur Wahrung des Gesetzes*) under section 33 of the Code of Criminal Procedure³¹
- **Re-opening of proceedings** under sections 363a – 363c Code of Criminal Procedure
- **Mitigation of a sentence *ex post*** (*nachträgliche Strafverminderung*) according to section 410 Code of Criminal Procedure
- **Remission of a sentence (act of grace)** by the Federal President of Austria
- **Amendment of an administrative authority’s decision** (if in conflict with the Convention) under section 52a Administrative Penal Code (*Verwaltungsstrafgesetz*)³² and section 68 Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*)³³

²⁸ Cp. W. Okressek, *Die Umsetzung der EGMR-Urteile und ihre Überwachung*, in: EuGRZ 2003, p. 170 et seq.

²⁹ Cp. Okressek, p. 171.

³⁰ Cp. Okressek, p. 171.

³¹ Federal Law Gazette No. 631/1975 (*Strafprozessordnung 1975, BGBl.Nr. 631/1975*).

³² Federal Law Gazette No. 52/1991 (*BGBl.Nr. 52/1991*).

³³ Federal Law Gazette No. 51/1991 (*BGBl.Nr. 51/1991*).

2. Execution of judgments in Austria

a) Procedure

The Austrian Foreign Ministry functions as the “letterbox” of the Federal Republic of Austria and it is the duty of the “Bureau of International Law” (*Völkerrechtsbüro*), a department of the Foreign Ministry, to distribute the judgments among all other public authorities concerned (i.e. the Federal Ministry of Justice, the Ministry of Interior Affairs, Ministry of Economics etc.).

The most decisive role, in any case, is played by the Constitutional Service (*Verfassungsdienst*), a division of the Austrian Federal Chancellery (*Bundeskanzleramt*). If a case against Austria is brought before the ECtHR, the Constitutional Service of the Federal Chancellery together with the Federal ministries concerned prepare the statement of the Government of Austria. The ambassador of the Foreign Ministry or the senior councillor of the Constitutional Service act as representatives in proceedings before the Court.

As regards implementation procedures, the Constitutional Service collaborates with the Federal ministries in charge and with the Constitutional Court (in case domestic law is in conflict with the Convention). It offers consultancy to the division managers in the ministries concerned, gives comments on new legislative texts and supervises the payment of the compensation awarded by the Court. Last but not least, it is integrated in the reporting process to the Committee of Ministers on the implementation measures, which have been undertaken in response to a Strasbourg conviction both on an individual and a general level.

b) Just satisfaction

Regarding the Austrian cases before the ECtHR it has to be stated first and foremost that pecuniary satisfaction under Article 41 of the Convention has always been paid entirely and promptly.³⁴ The national institution which is responsible for the wrongful act is in charge of paying the compensation sum in the respective case.

c) Legislative Changes following ECtHR judgments

The Austrian legislator has continuously been influenced by the ECHR itself and by the case law of the Strasbourg organs, both in reaction to Court findings against Austria and resulting from decisions which, though addressing other countries, raised objections under the ECHR against domestic laws. So, as far as legislative changes are required to avoid similar condemnations in the future, the Austrian lawmaker has demonstrated in many cases to be prepared to follow the opinions of the ECtHR by amendments or enactment of new laws.³⁵

d) Change of “legal practice”

In cases, in which the domestic legal provisions comply with the ECHR and it is a matter of application or interpretation due to Austrian judicial or administrative bodies not to infringe the rights guaranteed by the Convention, generally speaking, a lack of willingness to improve the legal practice can be identified. This fact can best be illustrated by the latest convictions of Austria referring to Article 10 of the Convention.³⁶ The Austrian legislator has repeatedly

³⁴ Cp. H. Tretter, *The implementation of judgments of the European Court of Human Rights in Austria*, in: T. Barkhuysen et.al. (Ed.s), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order*, The Hague/Boston/London 1999, p. 171.

³⁵ Cp. *ibid.* pp. 170 et seq. See for ex. further down, section on Criminal law (new procedure for re-opening of cases under section 363a Code of Criminal Procedure).

³⁶ Judgments of 2nd November 2006 in the Cases of *Kobenter and Standard Verlags GmbH v. Austria* (appl. No. 60899/00), *Standard Verlags GmbH v. Austria* (appl. No. 13071/03) and *Standard Verlags GmbH and Krawagna-Pfeifer v. Austria* (appl. No. 19710/02).

referred to the ECHR in domestic legal provisions or the respective parliamentary explanatory reports, in some instances even by literally quoting Convention rights, to guarantee that Austrian authorities are also obliged to use the provisions of the Convention as a basis for their decisions. Of course, not much is to be gained in terms of normative function from the repetition of ECHR provisions in ordinary law because authorities are obliged to interpret domestic provisions in conformity with the ECHR anyway. Thus, it would be more useful to focus in more detail on the Convention provisions instead of just quoting Convention rights in national ordinary law.³⁷ Simply spoken, there is a discrepancy between official references to the Convention on the one hand and actual willingness to conform national judicial and legal interpretations with the ECHR on the other.

In this context, one has to consider that the Austrian judiciary training system does not provide for a pertinent human rights education of the republic's prospective judges. A candidate for judicial appointment must graduate from law school and complete a nine-month clerkship in three different types of courts. Up to this point, the requirements for future judges and attorneys are equal. The former must then pass an examination in order to be proposed for appointment as judicial trainee which is followed by an additional training period in different courts, the prosecutor's office, a law firm and a penal institution. After a total traineeship of four years the Judges' examination may be taken. No respective human rights teaching is provided for throughout this whole educational period. Only for designated judges there are advanced training courses, mostly on particular human rights provisions (e.g. freedom of the media linked to the Austrian convictions in Strasbourg), which are on an optional basis, though. Therefore, Austrian judges often lack some understanding when it comes to substantial questions of human rights matters. Especially amongst the "senior generation" of Austrian judiciary it seems to be widely agreed upon the fact that its practice is consistent with fundamental rights in any way. Only younger generations of judges set the stage for a human rights approach in domestic judicial practice.

Besides the structural shortcomings within the educational system of judges, human rights are lacking consideration by the judicial sector as such – in contrast to the administrative sector. That is to say, because the Constitutional Court in his function as "supreme court for human rights" is only competent for reviewing decisions of administrative authorities and legislative acts. As explained in the beginning, it does not have the competence to review decisions of judicial authorities, this is a matter of the Supreme Court only. Currently, this fact is being discussed extensively in Austria and there are already concrete suggestions on a – hopefully soon coming – reform of the Austrian constitutional system including constitutional jurisdiction.

e) Re-opening of cases at the domestic level

With regard to the obligations of a state to afford just satisfaction to the successful applicants problems may arise, when internal decisions have become final. In certain cases overturning domestic decisions seems to be the only effective remedy for the injured party to be fully redressed. This fact led the Committee of Ministers to adopt a recommendation to the Member States in the year 2000.³⁸ Though, the Convention does neither include an obligation to renew a lawsuit, nor is such a requirement inherent to the above mentioned recommendation.

³⁷ Cp. H. Tretter, *Austria*, in: R. Blackburn (Ed.), *Fundamental Rights in Europe. The European Convention on Human Rights and its Member States, 1950-2000*, pp. 107 et seq.

³⁸ Committee of Ministers Recommendation No. R(2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights of 19th January 2000.

A general provision assuring the possibility to overturn domestic decisions in cases Strasbourg has found an infringement of Convention rights does not exist in Austria. Only as far as criminal law is concerned, several states (amongst others Austria, Luxembourg, Switzerland, Norway etc.) have provided special legal provisions for revision.

In Austria the options providing for a reopening of the domestic case are the following:

(1) *Criminal Law*

Particularly in reaction to some leading cases of Strasbourg's case law (cases *Lingens*³⁹, *Oberschlick I*⁴⁰ and *Kremzow*⁴¹) an amendment of the Austrian Code of Criminal Procedure (*Strafprozessordnung*) was passed in 1996. The instrument of reopening proceedings on the basis of a plea of nullity for the preservation of law turned out to be insufficient to ensure the implementation of ECtHR judgments since it only offered the possibility to make such a motion to the Procurator General and not to the successful applicant. This is best illustrated by the cases *Lingens* and *Oberschlick I* which came out to be exemplary in respect of Austria and the guarantee of Article 10 of the Convention (journalistic freedom of expression).

The newly inserted article 363a provides the opportunity to submit a motion to the Austrian Supreme Court (*Oberster Gerichtshof*) to reopen proceedings if the ECtHR has found in a final judgment a violation of Convention rights by a decision or order of a national criminal court. Precondition for such an application is further the – at least abstract – prospect that without infringement of the Convention the national court would have come to a more favourable decision for the person concerned (“pro libertate-principle”). This right to petition is not subject to a time-limit and is granted to the person convicted or affected by the national order and the Procurator General (for reasons of his/her special position, taking precedence over the plea of nullity for the preservation of law).

(2) *Administrative Law*

Compared to this, there is – so far – a lack of legal protection in Austrian administrative law, because the legislator has not provided any comparable instruments for reopening proceedings like in the criminal procedure law. Even though there is an article (article 69) for a revision of proceedings in the Austrian Administrative Procedure Act, no reasons for a renewal are applicable to the finding of a breach of the ECHR. Further it is stated that in case of changing jurisdiction a reopening cannot take place. This deficiency within the administrative law can be well demonstrated in the *Gaygusuz*⁴² case.

Against the background of a recent judgment of the ECtHR in the case *Jancikova*⁴³ v. Austria from April 2005, the Austrian legislator released a draft on an amendment concerning the Administrative Procedure Act in March 2006⁴⁴. On the basis of the consideration that there is no essential difference between criminal law and the administrative criminal law, which would justify or even require the existing differentiation, the regulations of the Administrative Penal Code shall as far as possible be brought in line with those of the general Criminal Code.

With the suggested new article of the Administrative Penal Code – following the model of article 363a of the Code of Criminal Procedure – the possibility of a renewal of administrative criminal proceedings shall be created; accordingly, for those cases where the ECtHR has

³⁹ *Lingens v. Austria*, application No. 9815/82, judgment of 8th July 1986.

⁴⁰ *Oberschlick I v. Austria*, application No. 11662/85, judgment of 23rd May 1991.

⁴¹ *Kremzow v. Austria*, application No. 12350/86, judgment of 21st September 1993.

⁴² *Gaygusuz v. Austria*, application No. 17371/90, judgment of 16th September 1996.

⁴³ *Jancikova v. Austria*, application No. 56483/00, judgment of 7th April.

⁴⁴ See Austrian Federal Chancellery, http://www.bundeskanzleramt.at/Docs/2006/3/8/VfZr2006_V.pdf [08.03.2007].

determined an injury of the Convention by a decision of an administrative authority and if it can be assumed that this breach could have had an unfavourable influence on the decision for the person concerned, a reopening of the domestic case shall be possible.

Moreover, another new article Administrative Penal Code shall provide means for the extension of legal protection against the failure to decide in administrative criminal proceedings, which is at present restricted to certain legal matters (i.e. matters of private accusation and fiscal law). Furthermore, the gap in legal protection against default shall be bridged by implementing a time limit of one year for the high courts – Administrative Court (*Verwaltungsgerichtshof*) and Constitutional Court – to decide on a matter in the particular cases. In this regard, the concerned party shall be granted the option to file an application with the President of the Austrian Administrative Court or the President of the Constitutional Court, depending on which court is in delay with its decision, for determining a date (*Fristsetzungsantrag*).

(3) Civil Law

Similar to the Austrian administrative law, domestic civil law – at the moment – does not include any equivalent legal provisions providing for a reopening of the domestic case like those in the Code of Criminal Procedure.

As mentioned, referring to the administrative procedure law, a general provision for the reopening of proceedings exists within the Code of Civil Procedure⁴⁵. But again, an ECtHR conviction does not constitute legal grounds for renewal. Furthermore, a reopening cannot take place in case of changing jurisdiction. In these terms, there is no right for the applicant to file a petition for reopening his individual case on the domestic level based on the finding of the ECHR. Merely, where a criminal conviction, which was the basis for a civil law judgment, has been quashed a motion to reopen civil law proceedings can be initiated.

Due to the “principle of legal certainty” the reopening of proceedings in private law matters raises problems since the *bona fide* confidence of third parties may not be disregarded. In those cases the provisions of state liability could be applied alternatively.

III. Literature review

A. Global Considerations

First of all, when speaking of a literature review in the Austrian case it has to be pointed out that, just as in the German case, a lot of writing by Austrian academics or practitioners has been published in Germany and the other way round (e.g. student book on the ECHR by C. Grabenwarter, *Europäische Menschenrechtskonvention*, 2.Ed., München/Wien 2005). There is also a lot of material in German by Non-Austrian scholars (German or Swiss scholars), which is not considered in this report as far as there are no linkages to the human rights situation in our country.

Since the European Convention on Human Rights entered into force, legal science has dealt intensively with the Convention and related case law. Academic literature regarding the ECHR mostly reacted to judgements of the ECtHR and the Austrian Constitutional Court, only in few cases academics actively initiated a debate or influenced legislation and case-law.

⁴⁵ Section 530 Code of Civil Procedure, Gazette of the Austrian-Hungarian Monarchy No. 113/1895 (*Zivilprozessordnung*, *RGBl. Nr. 113/1895*).

It is not possible to give an exhaustive account of the entire Austrian literature pertaining to the Austrian case. In the run-up to an outline of Austria's "academic landscape" referring to the national implementation of Court rulings, a few Austrian scholars' work on the subject of fundamental rights in general terms seems worth mentioning:

First and foremost, we would like to introduce Felix Ermacora⁴⁶ who was undoubtedly one of Austria's major scholars in human rights law and founder and first Director of the Ludwig Boltzmann Institute of Human Rights back in 1992⁴⁷. His main work comprises books such as the handbook *Handbuch der Grundfreiheiten und der Menschenrechte*⁴⁸, a commentary on the Austrian basic rights regulation which, at the time of its publication in 1963, was the very first attempt to give an all-embracing overview on the whole legal dimension of human rights and fundamental freedoms in Austria; accordingly, when human rights had evolved to an independent branch of legal science later on, a respective student book⁴⁹ was published. Further there is a three volume compilation titled 'Human Rights in a Changing World'⁵⁰ which is devoted to the historic development of human rights (Vol. I) and the theory and reality of the realisation of human rights in the Middle East (Vol. II) and in America (Vol. III). Ermacora also wrote benchmark works on political science, the state system and constitutional matters (e.g. Austria's perpetual neutrality)⁵¹, on minority rights⁵² or compulsory military service⁵³. All in all he had some 500 scientific papers on human rights and public law issues published.

With reference to the European Convention on Human Rights there are, amongst numerous others, two books which have systematically examined the ECHR and highlighted its influence on the legal system of Austria: the Handbook *Die Europäische Menschenrechtskonvention in der Rechtsprechung der österreichischen Höchstgerichte*⁵⁴ by Felix Ermacora, Manfred Nowak and Hannes Tretter, published in 1983, and the three-volume edition of *Grund- und Menschenrechte in Österreich*⁵⁵ which contains contributions by different Austrian academics referring to various branches of fundamental rights. Volume 2 of the collection is dedicated to the 40 years anniversary of the ECHR and comprises numerous articles dealing with rights under the JURISTRAS scope. We will only illustrate some of them here, such as F. Sturm, *Minderheiten- und Volksgruppenschutz*, M. Holoubek/H. Neisser, *Die Freiheit der Kunst*, P. Perntaler/U. Rath-Kathrein, *Der grundrechtliche Schutz von Ehe und Familie*, H. Hofer-Zeni, *Die Versammlungsfreiheit*, W. Berka, *Die Kommunikationsfreiheit sowie die Informationsfreiheit, Freiheit der Meinungsäußerung, Pressefreiheit und Zensurverbot*, B. Binder, *Die Rundfunkfreiheit*, H.R. Klecatsky, *Die Glaubens- und Gewissensfreiheit und die Rechtsstellung gesetzlich anerkannter Kirchen- und Religionsgesellschaften*.⁵⁶ Volume 3 contains some pertinent

⁴⁶ Expert in International Law, politician and professor of law at the Universities of Innsbruck and Vienna, member of the European as well as the United Nations' Human Rights Commission, UN Special Rapporteur for Afghanistan, laureate of several human rights awards, (1923 – 1995).

⁴⁷ Together with Hannes Tretter and Manfred Nowak.

⁴⁸ F. Ermacora, *Handbuch der Grundfreiheiten und der Menschenrechte*, Wien 1963.

⁴⁹ F. Ermacora, *Grundriß der Menschenrechte in Österreich*, Wien 1988.

⁵⁰ F. Ermacora, *Menschenrechte in der sich wandelnden Welt*, 3 vols., Wien 1974-94.

⁵¹ Amongst others F. Ermacora, *Allgemeine Staatslehre*, 2 vols., Wien 1970/1980; idem, *Österreichische Verfassungslehre*, 2 vols., Wien 1970/1980; idem, *Die Entstehung der Bundesverfassung 1920*, 5 vols., Wien 1986-93; idem, *20 Jahre österreichische Neutralität*, Frankfurt a. Main 1975.

⁵² E.g. on post-World War II issue regarding South Tyrol. See F. Ermacora, *Südtirol. Die verhinderte Selbstbestimmung*, Wien 1991.

⁵³ E.g. F. Ermacora, *Österreichisches Wehrrecht*, Wien 1958 (2.Ed 1978).

⁵⁴ F. Ermacora/M. Nowak/H. Tretter (Ed.s), *Die Europäische Menschenrechtskonvention in der Rechtsprechung der österreichischen Höchstgerichte*, Wien 1983.

⁵⁵ R. Machacek/W. Pahr/G. Stadler (Ed.s), *Grund- und Menschenrechte in Österreich*, Kehl a. Rhein 1991/1992/1997.

⁵⁶ R. Machacek/W. Pahr/G. Stadler (Ed.s), *Grund- und Menschenrechte in Österreich, Band 2: 40 Jahre EMRK, Wesen und Werte*, Kehl a. Rhein 1992.

contributions as well, amongst others M Nowak/G. Strojcek, *Das Wahl- und Stimmrecht*, H. Tichy, *Die Vereinigungsfreiheit*, P. Fenzl, *Behindertenrechte*, W. Okressek, *Die EMRK und ihre Auswirkungen auf das österreichische Strafverfahrensrecht*, S. Bernegger, *Der allgemeine Gleichheitsgrundsatz und das Diskriminierungsverbot gemäß Art. 14 EMRK*, A. Sporrer, *Die Gleichheit von Männern und Frauen in Österreich*.⁵⁷

Respectively, various contributions, articles and essays published in collective volumes or legal journals as well as documentation of seminars and congresses exist in terms of the relationship between the ECHR and Austrian, such as M. Nowak (Ed.), *Europarat und Menschenrechte (Dokumentation eines Seminars im Schloß Laudon gemeinsam mit dem Ludwig-Boltzmann-Institut für Menschenrechte vom 4. - 6. Oktober 1993 anlässlich des Gipfeltreffens des Europarates in Wien vom 8. - 9. Oktober 1993)*, Wien 1993; H. Tretter, *Austria*, in: R. Blackburn (Ed.), *Fundamental Rights in Europe. The European Convention on Human Rights and its Member States, 1950-2000*, Oxford 2001, pp.103-165; C. Grabenwarter, *Die EMRK aus österreichischer Sicht*, in: D. Thürer, *EMRK: Neuere Entwicklungen*, Zürich/Basel/Genf 2005, pp. 79-120; W. Karl, *Menschenrechte in Europa: Die Europäische Menschenrechtskonvention, ihr Verfahren und ihr Einfluss auf das österreichische Recht*, in: W. Schuhmacher (Ed.), *Perspektiven des europäischen Rechts*, Wien 1994, 281; C. Mahler/N. Weiß, *Europäische Menschenrechtskonvention und nationales Recht: Deutschland – eine Spurensuche / Österreich – ein Königsweg?*, in: C. Mahler (Ed.), *Menschenrechtsschutz im Spiegel von Wissenschaft und Praxis*, Berlin 2004, pp. 148 et seqq. The list shall not be regarded as being exhaustive; it's no more than a random illustration of existing literature on the Austrian case.

There is also a lot of scholarly material on the relationship between the ECtHR and the human rights protection system of the European Union and likewise the paragraph above, we are going to mention literature in this regard only in a very exemplary way. Amongst others, Christoph Grabenwarter has done a great assortment of articles on this topic, such as *Grundrechtsschutz in der Rechtsprechung des EuGH und des EGMR*⁵⁸. Additionally, Grabenwarter has written a considerable number of contributions on the European Charter of Human Rights and on the topic of a constitution for the European Union⁵⁹. So have Hannes Tretter⁶⁰, Walter Berka⁶¹ and a lot of other well-known Austrian academics.

Turning back to the academic work on fundamental rights and freedoms in general, 35 years after the first attempt to sum up the Austrian human rights case, Walter Berka⁶² pursued and developed the work of Felix Ermacora which came out to be published under the title *Die Grundrechte. Grundfreiheiten und Menschenrechte in Österreich*⁶³. This work aims at giving a collective review of the basic rights as codified in and guaranteed by the Austrian

⁵⁷ R. Machacek/W. Pahr/G. Stadler (Ed.s), *Grund- und Menschenrechte in Österreich, Band 3: 50 Jahre Allgemeine Erklärung der Menschenrechte, Wesen und Werte*, Kehl a. Rhein 1997.

⁵⁸ C. Grabenwarter, *Grundrechtsschutz in der Rechtsprechung des EuGH und des EGMR*, in: Stern/Tettinger (Ed.s), *Die Europäische Grundrechte-Charta im wertenden Verfassungsvergleich*, Vol. 1, 2005, pp. 81-97.

⁵⁹ E.g. C. Grabenwarter, *Verfasstes Europa - gefasst worauf? Versuch einer politischen Bewertung der Europäischen Verfassung*, in: Khol et al. (Ed.s), *Österreichisches Jahrbuch für Politik 2004*, 2005, pp. 493-502; idem, *Die Grundrechte im Verfassungsvertrag der Europäischen Union*, in: Hammer/Stelzer/ Weichselbaum (Ed.s), *Demokratie und sozialer Rechtsstaat in Europa. FS Theo Öhlinger*, 2004, pp. 469-485.

⁶⁰ H. Tretter, *Die Charta der Grundrechte der Europäischen Union – vergebene Chance oder Hoffnung ?*, in: *Die Union* 1/2001, pp. 44-59; idem, *EMRK und Europäische Grundrechts-Charta*, in: Grew/Gusy (Ed.s), *Menschenrechte in der Bewährung*, 2005, S. 55-80

⁶¹ E.g. W. Berka, *Grundrechtsschutz durch EuGH und EGMR – Konkurrenz oder Kooperation?*, in: *ÖJZ* 61(2006), 22, pp.876-887.

⁶² Jurist and political scientist, professor of public law at the Universities of Linz and Salzburg, member of the Austrian Academy of Science and the Science Council, member of the Austrian Jurists' Commission.

⁶³ W. Berka, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Österreich*, Wien 1999.

Constitution (the survey comprises both national human rights law and international human rights obligations with constitutional status) as well as their integration into the European legal order. Berka's work additionally highlights the fact that Article 10 ECHR is one of the most frequently infringed Articles of the ECHR in the Austrian case, especially as regards defamation accusations as well as in relation to the former monopoly position of the Austrian Broadcasting Corporation (*ORF*). He wrote books on the relationship between freedom of the media and the responsibility of the latter within the system of basic rights⁶⁴, on the broadcasting monopoly⁶⁵ and made numerous contributions to collective volumes, scientific journals and legal commentaries⁶⁶ on his main research areas (basic and human rights, law of the media) as well as on artistic freedom⁶⁷. Moreover, he had several student books on public law, constitutional law and basic and human rights law published.

When listing Austria's major human rights scholars one must not leave Manfred Nowak⁶⁸ out of consideration. Nowak holds a university chair for International Human Rights Law at the University of Vienna since 2007, since 2004 he functions as United Nation's Special Rapporteur on Torture after having had a number of other duties and responsibilities within the system of human rights protection of the UN. He is author of more than 400 publications in the fields of constitutional, administrative and international law, human rights as well as development studies and editor of periodicals and scientific series⁶⁹. His basic work comprises books and commentaries on civil and political rights⁷⁰, an overall review on the international human rights regime titled *Einführung in das Internationale Menschenrechtssystem*⁷¹, and contributions on European aspects of human rights protection⁷². Presently, Nowak is working on an article by article Commentary on the UN Convention against Torture to be published by Oxford University Press in 2008.

In 1999, Hannes Tretter⁷³ wrote a short brochure with the title "*Die Grundrechte in Österreich*", aimed at informing parliamentarians for their daily work about the system of

⁶⁴ Such as W. Berka, *Medienfreiheit und Persönlichkeitsschutz. Die Freiheit der Medien und ihre Verantwortung im System der Grundrechte*, Wien/New York 1982; idem, *Das Recht der Massenmedien. Ein Lehr- und Handbuch für Studium und Praxis*, Wien/Köln/Graz 1989; idem, *Redaktionsgeheimnis und Pressefreiheit. Aktuelle Probleme des Schutzes journalistischer Quellen im österreichischen Recht*, Wien 2001.

⁶⁵ Amongst others W. Berka, *Rundfunkmonopol auf dem Prüfstand. Die Freiheit und öffentliche Verantwortung des Rundfunks in Österreich*, Wien 1988.

⁶⁶ Most recently Berka/Höhne/Noll/Polley, *Mediengesetz. Praxiskommentar (2. Ed)*, Wien 2005

⁶⁷ W. Berka, *Die Freiheit der Kunst und ihre Grenzen im System der Grundrechte*, JBl 1983, pp. 281 et seqq.; idem, *Kunst im Konflikt mit dem Recht*, in: M. Nowak et al. (Ed.s), *Fortschritt im Bewußtsein der Grund- und Menschenrechte. Festschrift für Felix Ermacora*, Wien 1988.

⁶⁸ Professor for International Protection of Human Rights at the Faculty of Law of Vienna University and Co-Director of the Ludwig Boltzmann Institute of Human Rights, U.N. Special Rapporteur on Torture and other cruel, inhuman or degrading Treatment, head of one of the Independent Human Rights Commissions at the Austrian Ministry of the Interior, chairperson of and national director representing the University of Vienna at the European Masters Degree Programme in Human Rights and Democratisation (Venice), member of the International Commission of Jurists, former member of the EU Network of Independent Experts on Fundamental Rights, former UN Expert on Disappearances and Consultant to the UN High Commissioner for Human Rights, former judge at the Human Rights Chamber for Bosnia-Herzegovina, member of several NGOs, 1994 laureate of the UNESCO Prize for the Teaching of Human Rights.

⁶⁹ E.g. Netherlands Quarterly of Human Rights, Austrian Review of International and European Law, BIM Human Rights Study Series.

⁷⁰ Such as M. Nowak, *Politische Grundrechte*, Wien 1988; idem, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Kehl/Straßburg/Arlington 1993 (2. Ed. 2005).

⁷¹ M. Nowak, *Introduction to the international human rights regime*, Leiden/Boston 2003 (German Ed. Wien 2002).

⁷² Amongst others M. Nowak et al., *Perspectives of an All-European System of Human Rights Protection*, Kehl/Strasbourg/Arlington 1991; idem et al., *Monitoring Human Rights in Europe*, Dordrecht 1993; idem (Ed.), *Europarat und Menschenrechte*, Wien 1994.

⁷³ Professor for Fundamental and Human Rights at the Faculty of Law of Vienna University, Co-Director of the Ludwig Boltzmann Institute of Human Rights, Director of the Austrian RAXEN Focal Point to EUMC/FRA, former head of one of the Independent Human Rights Commissions at the Austrian Ministry of the Interior, legal adviser/representative in several cases brought before the European Commission and the European Court of Human Rights.

fundamental rights in Austria. The brochure now serves in an amended version (2007) for the teaching of fundamental rights on University level.

There are two commentaries on Austrian federal constitutional law which should be mentioned here as well, namely one published by Karl Korinek⁷⁴ together with Michael Holoubek (professor of law at the University of Vienna) and another one by Heinz Peter Rill (professor of law at the Vienna University of Economics and Business Administration) together with Heinz Schäffer (professor of law at the University of Salzburg).⁷⁵ The annotations of Article 3 and 4 ECHR are done respectively in preparation by Hannes Tretter.

B. Literature on rights under Juristras scope

The principle of equality and prohibition of discrimination obliges legislative and executive authorities (in the broader sense) to handle comparable matters equally, whilst objectively different matters are to be dealt with in a different way, or in other words: unequal circumstances must not be dealt with alike without having factual reasons of justification. Resulting from this, the Austrian Constitutional Court has developed a legal principle which states that normative unequal treatment needs a substantial, objective vindication. Scholarly literature has had and still has a remarkable stake in the development and definition of this dogmatic figure.⁷⁶

According to Constitutional Court jurisprudence, also gender-related unequal treatment – albeit explicitly forbidden through Art. 7 para. 1 of the Austrian Federal Constitutional Law – is justifiable as long as there exist objective reasons for the differentiation. Following ECtHR jurisprudence, exceedingly crucial factors are required to justify different treatment in such cases; according to the European Court of Justice, women must not reap a privileged treatment in any event. In 1998 a new paragraph 2 was added to Art. 7 Federal Constitutional Law providing the possibility for the Austrian legislator to enact provisions which serve to generate a *de facto* equal position for women compared to men, since pure legal equality turned out to bring new problems of gender-discrimination. Legislation based on this paragraph is binding state organs as well as individuals, e.g. employers. Literature has dealt intensively with this topic, in particular with a new constitutional act on retirement in 1992 which provided for the gradual harmonisation of the pension age of men and women in Austria.⁷⁷ This was based upon a Constitutional Court judgement, saying that the privilege of women reaching retirement age much earlier than men lacks an objective justification and therefore is to be considered unconstitutional.

In terms of antidiscrimination, Austrian scholars have commented especially on the prohibition of discrimination on grounds of ethnicity and race.⁷⁸ The respective constitutional provisions do not hinder to grant certain rights and privileges to Austrian nationals only.

⁷⁴ President of the Austrian Constitutional Court since 2003, noted for over 200 publications on questions pertaining to constitutional law (especially fundamental rights protection by the Constitutional Court, e.g. K. Korinek, *Grundrechte und Verfassungsgerichtsbarkeit*, Wien/New York 2000), on broadcasting-, telecommunications- and administrative law.

⁷⁵ Korinek/Holoubek (Ed.s), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar*, Wien 1999 (7. Ed. 2005); Rill/Schäffer (Ed.s), *Kommentar zum Bundesverfassungsrecht*, Wien 2006.

⁷⁶ Bernegger, *Der (allgemeine) Gleichheitsgrundsatz (Art 7 B-VG, Art 2 StGG) und das Diskriminierungsverbot gemäß Art 14 EMRK*, in: Machacek/Pahr/Stadler, *Grund- und Menschenrechte in Österreich*, Vol. 3, 709 pp; Berka, *Art 7 B-VG*, in: Rill/Schäffer, *Kommentar zum Bundesverfassungsrecht*, Wien 2006; Holoubek, *Die Sachlichkeitsprüfung des allgemeinen Gleichheitsgrundsatzes*, ÖZW 1991, 72 pp; Korinek, *Gedanken zur Bindung des Gesetzgebers an den Gleichheitssatz nach der Judikatur des Verfassungsgerichtshofes*, FS Melichar, 1983, 39 pp; Somek, *Rationalität und Diskriminierung*, 2001.

⁷⁷ Sporrer, *Die Gleichheit von Frauen und Männern in Österreich*, in: Machacek/Pahr/Stadler, *Grund- und Menschenrechte in Österreich*, Vol. 3, 901 pp; Rosenkranz, *Das Bundes-Gleichbehandlungsgesetz*, 1997.

⁷⁸ Marschik, *Die UN-Rassendiskriminierungskonvention im österreichischen Recht*, 1999; Heidinger/Frank-Thomasser/Schmid, *Antidiskriminierung – Rechtliche Gleichbehandlung in Österreich und in der EU*, 2004; Rebhahn (Ed.), *Gleichbehandlungsgesetz – Kommentar*, 2005.

Legislative and executive authorities are only obliged to equally treat foreigners and stateless people among one another, hence, the Constitutional Court concludes that Austrian citizens must not face an inferior position than aliens or stateless persons.⁷⁹

The right to private life, has evoked a great many academic work as well. It is regarded as some kind of “catchall element” in terms of human rights and the far-ranging protected areas of life are determined on a case-by-case basis only. According to hitherto existing literature and case law, the fundamental right guaranteed by Art. 8 ECHR covers the right to free self-determination and protects the entire sphere of privacy, therefore it appears accordingly multifaceted.⁸⁰ As personal privacy comprises interpersonal relations and the right to freely choose a form of sexual orientation, section 209 of the Austrian Criminal Code has been dealt with intensively as well.⁸¹

The second element of Art. 8 of the Convention, the right to family life, has especially caused problems in terms of aliens law. Authorities are obliged to conduct a due consideration of interests in the cases of aliens who shall be deported because of lacking a residence permit whilst their families are allowed to stay in Austria. In particular since a whole new aliens law package has come into effect in the beginning of 2006, many critics have spoken out on these issue, precisely because the number of “illegal aliens” in Austria has increased tremendously by reason of the new legislation. Not seldom the right to family life is at serious risk because of not applying the provisions with due regard to respectively weighing the interests.⁸²

Besides the right to equal treatment and non-discrimination, members of ethnic minority groups (*Volksgruppen*) who have Austrian citizenship are granted special privileging rights so that they can enjoy equal chances alike the majority population (e.g. in the school system, linguistic usage etc.). The Law on Ethnic Minorities (*Volksgruppengesetz*)⁸³ introduced in 1976, regulates the matters of ethnic groups in social life. It comprises that the commitment to a respective minority must be free, that means national authorities must not ask for the affiliation to a minority group, even not in the course of a population census. The Slovenian and Croatian minority in the three Austrian federal states Carinthia, Styria and Burgenland are granted particular constitutionally guaranteed rights on the basis of the state treaty of Vienna 1955. I.e. the right to elementary education being conducted in their original languages, the use of their minority languages besides German in official matters (*Amtssprache*) and the right to have bilingual topographic signs, mainly road and direction signs, placed in certain regions. Of course, there is a lot of literature on the topic of national minorities as such⁸⁴ but actually interesting is the current dispute over a judgement of the Constitutional Court,

⁷⁹ Korinek, *Der gleichheitsrechtliche Gehalt des BVG gegen rassistische Diskriminierung*, FS Rill, 1995, 183 pp.

⁸⁰ Berka, *Medienfreiheit und Persönlichkeitsschutz*, 1982; Lukasser, *Europäische Menschenrechtskonvention und individueller Lebensstil*, ÖJZ 1994, 569 pp; Wiederin, *Privatsphäre und Überwachungsstaat*, 2003; Wiederin, *Artikel 8 EMRK*, in: Korinek/Holoubek (Ed.s), *Österreichisches Bundesverfassungsrecht - Textsammlung und Kommentar*, Wien 1999 (7. ed. 2005).

⁸¹ In particular Graupner, *Sexualität, Jugendschutz und Menschenrechte – Über das Recht von Kindern und Jugendlichen auf sexuelle Selbstbestimmung*, 2 Volumes, 1997.

⁸² Pernthaler/Rath-Kathrein, *Der grundrechtliche Schutz von Ehe und Familie*, in: Machacek/Pahr/Stadler, *Grund- und Menschenrechte in Österreich*, Vol. 2, 245 pp; Weichselbaum, *Die Regelung des Familiennachzugs in Österreich im Lichte der Vorgaben der Europäischen Menschenrechtskonvention*, ZAR 2003, 359 pp; Wiederin, *Aufenthaltsbeendende Maßnahmen im Fremdenpolizeirecht*, 1993; Gutknecht, *Grundrechtsschutz für Ehe und Familie*, 1988.

⁸³ Federal Law Gazette No. 396/1976 (BGBl. Nr. 396/1976).

⁸⁴ Holzinger, *Die Rechte der Volksgruppen in der Rechtsprechung des Verfassungsgerichtshofes*, in: FS Adamovich, 2002, 193 pp; Kolonovits, *Minderheitenschulrecht im Burgenland*, 1995; Kolonovits, *Sprachenrecht in Österreich*, 1999; Öhlinger, *Der Verfassungsschutz ethnischer Gruppen in Österreich*, FS Kojas, 1998, 371 pp; Sturm, *Der Minderheiten- und Volksgruppenschutz*, in: Machacek/Pahr/Stadler, *Grund- und Menschenrechte in Österreich*, Vol. 2, 77 pp; Tretter, *Zur Transformation des Europäischen Rahmenübereinkommens zum Schutz nationaler Minderheiten in das österreichische Recht*, in: Österreichisches Volksgruppenzentrum (Ed.), *Volksgruppenreport 1997*, 214 pp.; Tretter, *Der Artikel 8 EMRK als Grundlage eines individuellen Rechts auf zweisprachige Ortstafeln ?*, in: Kärntner Jahrbuch für Politik 2005, 265 pp.

posting an obligation to set up a lot of new bilingually lettered topographic signs in Carinthia which is systematically ignored and sidestepped by the Carinthian governor in a really alarming way as regards the rule of law.

Literature on the freedom of information and speech, particularly as regards freedom of the media, is large and varied.⁸⁵ Art. 10 ECHR admits countries to provide a licensing procedure for broadcasting service, but this does not mean that reservations can be based upon the content of the communicated opinions (prohibition of censorship). In course of the Austrian “radio-cases” and the struggle to overthrow the monopoly of the public broadcasting agency (ORF) the Strasbourg Court has underscored the fundamental importance of the freedom of opinion in a democratic society. Finally, ORF monopoly was not upheld, the legislator in 2001 enacted the Private Radio Act and the Private Television Act opening the market also to private broadcasting corporations and radio stations.⁸⁶

In regard of print media, Austria has faced several convictions, some of them even in recent past, too. The principle of proportionality is to be applied on a case-by-case basis. Following ECtHR jurisprudence, the limitation of criticism referring to politicians or other persons of public interest does not reach as far as with private persons’ lives because a public political debate belongs to the core areas of the concept of a democratic society. In the Austrian case there is a special, historically justified restriction of Art. 10 ECHR, namely the so called “Verbotsgesetz” (Prohibition Statute). According to this, it is forbidden to publicly or via the media take up a position approving, trivializing or seeking to justify the ideas of National Socialism, genocide and other forms of national socialist crimes. This is quite a controversial issue in the current public discussion.

C. Literature on the implementation of ECtHR rulings

Unlike the big volume of academic writing on the Convention itself as well as literature pertaining to particular human rights issues, exemplary illustrated above, literature on the effect of ECtHR judgments in Austria is not very prevalent. This could be traced back to the fact that the Convention ranks equal to the Austrian Federal Constitution. Therefore, the question dealt with extensively in the German case, where the ECHR is only considered a part of the federal domestic legal system and not on equal terms with the Constitution, has not arisen in Austria. Mainly, the matter with Austria is on *how* implementation of Strasbourg rulings is taking place and to what extent ECtHR judgments have an effect on the national legal system.

A quite detailed illustration is given by the study of D. Leeb, titled *Die innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im entschiedenen Fall*⁸⁷, published in 2001, which pertains explicitly to the cases, in which Austria was found guilty of a violation of Convention principles. The book focuses on the questions to what extent and by which means the persons affected by the violation may remediate their personal gravamen, i.e. the basic gist of every claim (cause of action), within the national legal system. Based on previous Strasbourg case law pertaining to the Austrian

⁸⁵ *Inter alia*: Berka, *Medienfreiheit und Persönlichkeitsschutz*, 1982; Berka, *Die Kommunikationsfreiheit in Österreich*, in: Machacek/Pahr/Stadler, *Grund- und Menschenrechte in Österreich*, Vol. 2, 393 pp; Holoubek, *Medienfreiheit in der Europäischen Menschenrechtskonvention*, AfP 2003, 193 pp; Österreichische Juristenkommission (Ed.), *Caroline und die Folgen: Medienfreiheit am Wendepunkt ?*, 2005.

⁸⁶ Wittmann, *Rundfunkfreiheit*, 1981; Berka, *Rundfunkmonopol auf dem Prüfstand*, 1988; Holoubek, *Rundfunkfreiheit und Rundfunkmonopol*, 1990; Tretter, *Wie Österreich in Straßburg wegen des ORF-Monopols verurteilt wurde*, JAP 1994, 141 pp, 194 pp; Tretter, *Jüngste Entwicklungen im österreichischen Rundfunkrecht*, EuGRZ 1996, 77 pp.

⁸⁷ Leeb, *Die innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im entschiedenen Fall*, 2001.

case, the author systematically analyses the options and prospects which the national constitutional law, the codes of procedure of the high courts, administrative procedure law, administrative penal law and the Austrian code of criminal procedure offer for re-examining and altering domestic legislation, court judgments or administrative decisions. Additionally, the legal foundations for the elimination of the negative consequences resulting from a Convention breach as well as for pecuniary satisfaction are demonstrated in detail.

Besides, there are of course several other publications dealing with the implementation of ECtHR rulings, such as the contributions by Hannes Tretter, *The implementation of judgments of the European Court of Human Rights in Austria*⁸⁸, published in 1999, and by Wolf Okresek, *Die Auswirkungen der Judikatur der Straßburger Menschenrechtsorgane auf die österreichische Rechtsordnung*⁸⁹ from 1993. Beyond this, the latter who was head of the Constitutional Service (*Verfassungsdienst*) through 2005, has written several articles on this topic, published in different academic law journals.⁹⁰ Though, Austrian scholars have rather neglected to address the question of implementation.

In a broader perception of the question of implementation we should also mention the academic series of the Austrian Human Rights Institute (*Österreichisches Institut für Menschenrechte*). The institute, located in Salzburg, is the main Austrian research institution in terms of the ECHR. The latest two volumes of the academic series deal with the impact of the jurisdiction of international courts and tribunals on the national level in a comparative approach embracing Austria and its neighbouring countries.⁹¹ In addition, the institute periodically publishes a human rights newsletter which is intended to give information on recent human rights judicature (decisions by the Strasbourg Court, the ECJ, the Austrian high courts and the UN human rights commission) and further contains book reviews as well as scientific contributions in the field of fundamental rights.

IV. Conclusions

The ECHR is fully incorporated into Austria's constitutional legal order, which created a high level of awareness within Austrian society concerning the Convention itself as well as its legal and practical implications. Consequently, a relatively large amount of applications was – and is still – lodged against Austria. Most of the applications so far have concerned Articles 5 and 6 as well as Art 10, some Articles 3, 8, and 11 as well as Article 1 of the First Protocol. Both, the constitutional status of the Convention and the lack of modern domestic fundamental rights and freedoms are reflected by the great significance attributed to the rights of the Convention in Austria's case law. Accordingly, since about 30 years the Austrian Constitutional Court – with some exemptions – has developed its jurisdiction closely along the lines of the ECHR in the understanding of the ECtHR. Insofar, the jurisdiction of the Constitutional Court regarding public law can be described as generally in line with the

⁸⁸ H. Tretter, *The implementation of judgments of the European Court of Human Rights in Austria*, in: T. Barkhuysen et.al. (Ed.s), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order*, The Hague/Boston/London 1999, pp 167-182.

⁸⁹ W. Okresek, *Die Auswirkungen der Judikatur der Straßburger Menschenrechtsorgane auf die österreichische Rechtsordnung*, in: H. Neisser (Ed.), *Menschenrechte als politischer Auftrag*, Wien 1993.

⁹⁰ E.g. W. Okresek, *Der Einfluss der EMRK und der Judikatur der Straßburger Konventionsorgane auf die österreichische Rechtsordnung*, in: Österreichisches Institut für Menschenrechte, Newsletter 1997/3a, Sonderheft zum Festakt 10 Jahre österreichisches Institut für Menschenrechte, pp. 144 et seqq.; idem, *Die EMRK und ihre Auswirkungen auf das österreichische Strafverfahren*, in: *EuGRZ* 1987, pp. 497 et seqq.

⁹¹ See F. Matscher, *Erweitertes Grundrechtsverständnis. Internationale Rechtsprechung und nationale Entwicklungen ; EGMR, EuGH, Österreich, Deutschland, Schweiz. (Enquête veranstaltet vom Österreichischen Institut für Menschenrechte in Salzburg in Zusammenarbeit mit der Österreichischen Volksanwaltschaft am 18. und 19. April 2002 in Wien)*, Kehl a. Rhein 2003; W. Karl (Ed.), *Internationale Gerichtshöfe und nationale Rechtsordnung. Internationales Symposium am Österreichischen Institut für Menschenrechte am 28. und 29. Nov. 2003 in Salzburg zu Ehren von em.o.Univ.-Prof. Dr. Dr.h.c. Franz Matscher*, Kehl a. Rhein 2005.

ECHR (with some exemptions regarding the administrative penal law based on Art 5 and 6 ECHR). In contrast, the jurisdiction of penal and civil courts as well as of the Supreme Court in civil and penal matters seems to be in particular susceptible to violations of certain rights of the Convention (like Art 5, 6, 8, and 10 ECHR).

About 100 decisions and judgments fall within the scope of core civil and political rights and/or directly involve or have consequences for marginalised groups, which include aliens, members of ethnic or religious minorities, homosexuals and people with disabilities. Most of these cases relate to aliens – defined as a legal concept – especially to residence prohibitions as a consequence of convictions in criminal proceedings. Despite this fact, no changes in legal provisions regarding aliens can be traced to judgments by the ECtHR. Different strings of cases pertain to the broadly defined issue of ethnicity – some of them alleging the prevention of a fair trial and two cases having important consequences for third country nationals residing in Austria. One opened access to emergency assistance for third country nationals and the other one was the starting point for the abolition of a provision prohibiting third country nationals to stand as candidates in works' council elections. Among the state institutions challenged were the judiciary, the army and the police.

Another group of cases relates to statements promoting racist agitation and the Prohibition Statute, which prohibits racist actions and incitements within the context of (neo-)Nazi ideology, which indirectly affect aliens and members of ethnic minorities as such statements influence public opinion and allegedly legitimise racist and ethnic discrimination. An issue constantly arising – due to a lack of observance by courts – is the violation of Article 10, which very often relates to statements criticising racist agitations or opinions promoting National Socialism.

Discrimination of homosexuals by penal law respectively civil law in conjunction with their right to private and family life according to Article 8 ECHR is another string of cases taken to the ECtHR. Few cases related to the issue of religious minorities – which either pertained to sects or to views held by devout Roman Catholics. So far there have not been any cases taken to Strasbourg by Muslims, which might relate to the fact that Islam is one of the religious denominations holding the status of a legally recognised religious community guaranteeing equal rights to Muslims and Catholics. Nevertheless, there are of course incidents, where Muslim women are discriminated against because of wearing a headscarf.

Although there are quite a number of NGOs and other associations focusing on representing and supporting marginalised groups, very few of them seem to be actively involved in cases taken to the ECtHR. Exceptions are amnesty international, Interrights, the UNHCR, Jehova's and Witnesses. The legal concept of intervener is not widely used in Austria. Some of the lawyers representing applicants are founders or representatives of NGOs like the *Rechtskomitee Lambda*, *Platform Against Section 209* and *SOS-Mitmensch*.

There are two sets of cases which were analysed under the perspective of strategic litigation. One set of cases relates to the repeal of section 209 of the Criminal Code and the other to the abolition of the Austrian Broadcasting Corporation's monopoly position.. Although legislative changes cannot solely be attributed to the judgments pronounced by the ECtHR, it played an important role in bringing about changes in the Austrian media policy. Globalisation and consumer interests demanded a liberalised media policy. In contrast to these changes, judgments by the ECtHR relating to the issuing of residence prohibitions against aliens have not resulted in amended legislation. First of all, the government very often offers solutions on a case by case basis, which does not bring about as much public attention as

amending aliens' legislation. Changing aliens' legislation aiming to the improvement of the legal security of aliens results in public discussions fuelled by right wing and conservative parties calling for stopping migration for reasons of public and social security.

V. Bibliography

- C. Außerhofer, *Möglichkeiten und Grenzen der Beteiligung Dritter an Individualbeschwerdeverfahren vor dem Europäischen Gerichtshof für Menschenrechte*, Wien 1998
- R. Bauböck/B. Perchinig, *Migrations- und Integrationspolitik*, in: H. Dachs (Ed.s), *Politik in Österreich – Das Handbuch*, Wien 2006, pp. 726-742
- G. Baumgartner/B. Perchinig, *Minderheitenpolitik*, in: H. Dachs (Ed.s), *Politik in Österreich – Das Handbuch*, Wien 2006, pp. 686-700
- W. Berka, *Grundrechtsschutz durch EuGH und EGMR – Konkurrenz oder Kooperation?*, in: ÖJZ 61(2006), 22, pp.876-887
- W. Berka, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Österreich*, Wien 1999
- W. Berka, *Medienfreiheit und Persönlichkeitsschutz. Die Freiheit der Medien und ihre Verantwortung im System der Grundrechte*, Wien/New York 1982
- W. Berka, *Das Recht der Massenmedien. Ein Lehr- und Handbuch für Studium und Praxis*, Wien/Köln/Graz 1989
- W. Berka, *Redaktionsgeheimnis und Pressefreiheit. Aktuelle Probleme des Schutzes journalistischer Quellen im österreichischen Recht*, Wien 2001
- W. Berka, *Rundfunkmonopol auf dem Prüfstand. Die Freiheit und öffentliche Verantwortung des Rundfunks in Österreich*, Wien 1988
- Berka/Höhne/Noll/Polley, *Mediengesetz. Praxiskommentar (2. Ed)*, Wien 2005
- W. Berka, *Die Freiheit der Kunst und ihre Grenzen im System der Grundrechte*, JBl 1983, pp. 281 et seqq.
- W. Berka, *Kunst im Konflikt mit dem Recht*, in: M. Nowak et.al. (Ed.s), *Fortschritt im Bewußtsein der Grund- und Menschenrechte. Festschrift für Felix Ermacora*, Wien 1988
- F. Ermacora, *Handbuch der Grundfreiheiten und der Menschenrechte*, Wien 1963
- F. Ermacora, *Grundriß der Menschenrechte in Österreich*, Wien 1988
- F. Ermacora, *Menschenrechte in der sich wandelnden Welt*, 3 vols., Wien 1974-94
- F. Ermacora, *Allgemeine Staatslehre*, 2 vols., Wien 1970/1980
- F. Ermacora, *Österreichische Verfassungslehre*, 2 vols., Wien 1970/1980
- F. Ermacora, *Die Entstehung der Bundesverfassung 1920*, 5 vols., Wien 1986-93
- F. Ermacora, *20 Jahre österreichische Neutralität*, Frankfurt a. Main 1975
- F. Ermacora, *Südtirol. Die verhinderte Selbstbestimmung*, Wien 1991
- F. Ermacora, *Österreichisches Wehrrecht*, Wien 1958 (2.Ed 1978)
- F. Ermacora/M. Nowak/H. Tretter (Ed.s), *Die Europäische Menschenrechtskonvention in der Rechtsprechung der österreichischen Höchstgerichte*, Wien 1983
- C. Grabenwarter, *Die EMRK aus österreichischer Sicht*, in: D. Thürer, *EMRK: Neuere Entwicklungen*, Zürich/Basel/Genf 2005, pp. 79-120
- C. Grabenwarter, *Grundrechtsschutz in der Rechtsprechung des EuGH und des EGMR*, in: Stern/Tettinger (Ed.s), *Die Europäische Grundrechte-Charta im wertenden Verfassungsvergleich*, Vol. 1, 2005, pp. 81-97
- C. Grabenwarter, *Verfasstes Europa - gefasst worauf? Versuch einer politischen Bewertung der Europäischen Verfassung*, in: Khol et al. (Ed.s), *Österreichisches Jahrbuch für Politik 2004*, 2005, pp. 493-502
- C. Grabenwarter, *Die Grundrechte im Verfassungsvertrag der Europäischen Union*, in: Hammer/Stelzer/ Weichselbaum (Ed.s), *Demokratie und sozialer Rechtsstaat in Europa. FS Theo Öhlinger*, 2004, pp. 469-485
- W. Karl, *Menschenrechte in Europa: Die Europäische Menschenrechtskonvention, ihr Verfahren und ihr Einfluss auf das österreichische Recht*, in: W. Schuhmacher (Ed.), *Perspektiven des europäischen Rechts*, Wien 1994, pp. 281 et seqq.

- W. Karl (Ed.), *Internationale Gerichtshöfe und nationale Rechtsordnung. Internationales Symposium am Österreichischen Institut für Menschenrechte am 28. und 29. Nov. 2003 in Salzburg zu Ehren von em.o.Univ.-Prof. DDr. Dr.h.c. Franz Matscher*, Kehl a. Rhein 2005
- K. Korinek, *Grundrechte und Verfassungsgerichtsbarkeit*, Wien/New York 2000)
- Korinek/Holoubek (Ed.s), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar*, Wien 1999 (7. Ed. 2005)
- D. Leeb, *Die innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im entschiedenen Fall*, Linz 2001
- R. Machacek/W. Pahr/G. Stadler (Ed.s), *Grund- und Menschenrechte in Österreich*, Kehl a. Rhein, 3 Bände 1991/1992/1997
- C. Mahler/N. Weiß, *Europäische Menschenrechtskonvention und nationales Recht: Deutschland – eine Spurensuche / Österreich – ein Königsweg?*, in: C. Mahler (Ed), *Menschenrechtsschutz im Spiegel von Wissenschaft und Praxis*, Berlin 2004, pp. 148 et seqq.
- F. Matscher, *Erweitertes Grundrechtsverständnis. Internationale Rechtsprechung und nationale Entwicklungen; EGMR, EuGH, Österreich, Deutschland, Schweiz*. (Enquête veranstaltet vom Österreichischen Institut für Menschenrechte in Salzburg in Zusammenarbeit mit der Österreichischen Volksanwaltschaft am 18. und 19. April 2002 in Wien), Kehl a. Rhein 2003
- R. Münz/P. Zuser/J. Kytir, *Grenzüberschreitende Wanderungen und ausländische Wohnbevölkerung: Struktur und Entwicklung*, in: H. Fassmann (Ed.s.), *Österreichischer Migrations- und Integrationsbericht*, Klagenfurt/Celovec 2003
- V. Murschetz, St. Ebensperger, *Aufhebung des § 209 StGB durch den VfGH*, in: JAP 2002/2003, pp. 175 et seqq.
- M. Nowak, *Politische Grundrechte*, Wien 1988
- M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Kehl/Straßburg/Arlington 1993 (2. Ed. 2005)
- M. Nowak, *Introduction to the international human rights regime*, Leiden/Boston 2003 (German Ed. Wien 2002)
- M. Nowak et al., *Perspectives of an All-European System of Human Rights Protection*, Kehl/Strasbourg/Arlington 1991
- M. Nowak et. al., *Monitoring Human Rights in Europe*, Dordrecht 1993
- M. Nowak (Ed.), *Europarat und Menschenrechte*, Wien 1994
- M. Nowak (Ed.), *Europarat und Menschenrechte (Dokumentation eines Seminars im Schloß Laudon gemeinsam mit dem Ludwig-Boltzmann-Institut für Menschenrechte vom 4. - 6. Oktober 1993 anlässlich des Gipfeltreffens des Europarates in Wien vom 8. - 9. Oktober 1993)*, Wien 1993
- M. Nowak, A. Lubich, *Report on the Situation of Fundamental Rights in Austria in 2004*, E.U. Network of Independent Experts on Fundamental Rights
- W. Okresek, *Die Umsetzung der EGMR-Urteile und ihre Überwachung*, in: EuGRZ 2003, pp. 170 et seqq.
- W. Okresek, *Die Auswirkungen der Judikatur der Straßburger Menschenrechtsorgane auf die österreichische Rechtsordnung*, in: H. Neisser (Ed.), *Menschenrechte als politischer Auftrag*, Wien 1993
- W. Okresek, *Der Einfluss der EMRK und der Judikatur der Straßburger Konventionsorgane auf die österreichische Rechtsordnung*, in: Österreichisches Institut für Menschenrechte, Newsletter 1997/3a, Sonderheft zum Festakt 10 Jahre österreichisches Institut für Menschenrechte, pp. 144 et seqq.
- W. Okresek, *Die EMRK und ihre Auswirkungen auf das österreichische Strafverfahren*, in: EuGRZ 1987, pp. 497 et seqq.

- Pelinka, *Die FPÖ in der vergleichenden Parteienforschung: Zur typologischen Einordnung der Freiheitlichen Partei Österreichs*, in: *Österreichische Zeitschrift für Politikwissenschaft* 2002/3, pp. 281-290
- RAXEN Focal Point for Austria, *Case Study Omofuma*, Vienna 2002, <http://www.univie.ac.at/bim/focalpoint/>
- Rill/Schäffer (Ed.s), *Kommentar zum Bundesverfassungsrecht*, Wien 2001 (Stand 30.06.2006)
- Statistik Austria, *Volkszählung 2001: Hauptergebnisse I – Österreich*, Wien 2002, pp. 15 et seqq.
- H. Tretter, *Die Grundrechte in Österreich*, 1999 (version 2007: www.univie.ac.at/bim)
- H. Tretter, *The implementation of judgments of the European Court of Human Rights in Austria*, in: T. Barkhuysen et.al. (Ed.s), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order*, The Hague/Boston/London 1999, pp. 167 et seqq.
- H. Tretter, *Austria*, in: R. Blackburn (Ed.), *Fundamental Rights in Europe. The European Convention on Human Rights and its Member States, 1950-2000*, 2001, pp. 103 et seqq.
- H. Tretter, *Die Charta der Grundrechte der Europäischen Union – vergebene Chance oder Hoffnung ?*, in: *Die Union* 1/2001, pp. 44-59
- H. Tretter, *EMRK und Europäische Grundrechts-Charta*, in: Grewe/Gusy (Ed.s), *Menschenrechte in der Bewährung*, 2005, pp. 55-80

Annex I: Short version of the state of the Article report intended for policy users

1. The fact that Austria incorporated the ECHR fully into its constitutional legal order created a high level of awareness within Austrian society concerning the Convention itself as well as its legal and practical implications. Consequently, a relatively large amount of applications was – and is still – lodged against Austria. Most of the applications so far have concerned Articles 5 6 and 10, some Articles 3, 8, and 11 as well as Article 1 of the First Protocol. Only a few pertained to other provisions of the Convention.

Domestic courts and administrative authorities have so far ruled on nearly every right or freedom contained in the Convention. Naturally, the Constitutional Court plays a central role in this regard, having an impact on both, domestic legislation and jurisdiction.

Thus, many areas of Austrian legislation and legal practice over the years have been influenced by the Convention and the case law of the Strasbourg institutions. However, government and parliament remain often reluctant to entirely observe and comprehensively fulfil the obligations specified in the Convention.

2. Since 1964, the ECHR has had the rank of directly applicable federal constitutional law in Austria and became increasingly the core of the Austrian human rights catalogue. As a result, all legislative, executive and judicial authorities are obliged to observe and implement the Convention within their sphere of action. Thus, the Austrian legislator has to respect the rights of the Convention when enacting a law and all courts and administrative authorities have to interpret the domestic legal provisions they apply in line with the Convention. Accordingly, any offences under the Convention can be reprovved within all judicial or administrative procedures as violations of constitutionally guaranteed rights. The Constitutional Court in particular has the task to ensure compliance with the rights stipulated in the Convention and the competence to review decisions of administrative authorities (by contrast, it is a matter of the Austrian Supreme Court, *Oberster Gerichtshof*, to review decisions of judicial authorities) as well as abolish domestic laws that infringe constitutional rights.

Both, the constitutional status of the Convention and the lack of modern domestic fundamental rights and freedoms are reflected by the great significance attributed to the rights of the Convention in Austria's case law. The initially reserved attitude which the Constitutional Court took vis-à-vis the Convention (caused by the parallelism of domestic fundamental rights and freedoms and the rights stipulated in the Convention) has changed over the years and the constantly increasing influence of the jurisdiction of the ECtHR has become more and more evident in the case law of the Constitutional Court. The Court refers to and takes into account the jurisdiction of the ECtHR in many of its judgments. Meanwhile, it has become common practice for the Constitutional Court to examine whether a right guaranteed by the domestic legal provisions or the Convention is more beneficial for the person affected.

A significant lack of effectiveness in human rights protection within civil and penal law is connected with the fact that judgments of the Supreme Court (responsible in last instance for civil and penal legal matters) are not under the fundamental rights' control of the Constitutional Court (like it is, for example, in Germany). Based on its legal tradition and general self-understanding the Supreme Court is not strongly enough committed to fundamental and human rights as it would be necessary to provide efficient and

comprehensive legal protection. Therefore, most of the Austrian cases brought before the ECtHR concern civil and penal legal matters.

However, the constitutional status of the Convention does not mean that judgments of the ECtHR are directly applicable within domestic law, or that decisions or laws infringing the Convention can be abolished solely on the basis of the ECtHR-judgments. In such cases, the Austrian legislator has to enact specific provisions (see later on).

3. 100 decisions and judgments fall within the scope of core civil and political rights and/or directly involve or have consequences for marginalised groups. Most of the cases relate to aliens, especially to residence prohibitions as a consequence of convictions in criminal proceedings and to the length of appeal proceedings in connection with the Aliens' Employment Act. Different strings of cases pertain to the broadly defined issue of ethnicity. The third biggest groups of cases cluster around two issues. The first group of cases relates to the Prohibition Statute, which prohibits racist actions and incitements within the context of (Neo-)Nazi ideology. The second group of cases deals with the issue of homosexuality. Applicants were convicted of having violated a provision of the Criminal Code, which prohibited sexual relationships between adult and adolescent males until 2002, and therefore challenged the compliance of this provision with the right to respect of private life in conjunction with the prohibition of discrimination. Few cases related to the issue of religious minorities which either pertained to sects or to views held by devout Roman Catholics.

4. In more than 90 per cent of the cases described above the litigants were represented by lawyers or law firms practising in Austria. In few cases, academics, namely professors of law, were involved, almost all of them in cases concerning Article 10 of the ECHR. NGOs do not seem to be very actively involved in cases taken to the ECtHR, only in few cases NGOs took part in the procedures.

With regard to the identification of cases that were brought before the ECtHR in order to initiate certain concrete changes in the State's legal order ('strategic' litigation), two areas have to be examined in particular: The first group of cases falls within the scope of Article 10 ECHR (freedom of opinion), more specifically under the issues of freedom of broadcasting and media diversity (combating the monopoly of the Austrian Broadcasting Corporation – ORF). The second group of cases that have to be examined with regard to the issue of 'strategic' litigation in Austria are cases that fall under the scope of Article 8 and 14 ECHR (right to respect for private and family life respectively prohibition of discrimination) with regard to a long lasting practice of criminal prosecution of homo- and bisexual men. It should be pointed out that regarding both groups, Austrian litigants tried to bring cases before the Strasbourg organs in order to press the legislator in the pursuit of the specific goals mentioned. Although the legislative changes as such were enacted even *before* the ECtHR declared a violation of the respective Articles of the Convention, the Court nevertheless played an important role in the changing processes as such, since the legislative changes were set into force *because* of the impending and expected conviction of the Republic of Austria.

5. The obligations of a respondent state arising from the finding of a breach of the Convention, following the scheme of international state responsibility, are the State

- has to cease the wrongful act, which presupposes an ongoing violation;
- has to provide appropriate guarantees by general measures to prevent new violations similar to that/those found; as regards the means of performance of this obligation, the respondent state has a certain "freedom of choice", though limited by the relevant rules of state responsibility; these general measures need not stringently be understood as

legislative provisions but can also occur in forms of a change of jurisdiction according to the Strasbourg findings.

- has to provide by individual measures full reparation for all consequences of the infringement of the Convention within the possibilities of the applicable domestic law (*restitutio in integrum*, i.e. reinstating the applicant in the position in which he/she would have been without the violation).

Not in any perspective and not in any case, Austria was and is providing appropriate implementation of ECtHR's judgements. A general provision assuring the possibility to overturn domestic decisions in cases Strasbourg has found an infringement of Convention rights does not exist in Austria. Irrespective of the payment of just compensation (which has always been paid entirely and promptly by the Republic) in cases of a conviction of Austria because of a violation of the ECHR, the possibilities to allow for compliance with ECtHR judgments in individual cases in Austria are only the following:

- plea of nullity for the preservation of law under the Criminal Procedure Code,
- re-opening of proceedings under the Criminal Procedure Code,
- mitigation of a sentence *ex post* according to the Criminal Procedure Code,
- remission of a sentence (act of grace) by the Federal President of Austria,
- amendment of an administrative authority's decision under the Administrative Penal Code and the Administrative Procedure Act.

What is still missing in particular, are corresponding provisions on re-opening of procedures in the Administrative Penal Code and the Administrative Procedure Act as well as in the Civil Procedure Act. Since regarding the administrative penal law a provision on re-opening procedures similar to penal law is planned, due to the "principle of legal certainty" the reopening of proceedings in private law matters raises problems when internal decisions have become final since the *bona fide* confidence of third parties may not be disregarded. In those cases the provisions of state liability and fair compensation could be applied alternatively.

6. As mentioned above, the Austrian legislator has continuously been influenced by the ECHR itself and by the case law of the Strasbourg organs, both in reaction to Court findings against Austria and resulting from decisions which, though addressing other countries, raised objections under the ECHR against domestic laws. So, as far as legislative changes are required to avoid similar condemnations in the future, the Austrian lawmaker has demonstrated in many cases to be prepared to follow the opinions of the ECtHR by amendments or enactment of new laws.

In cases, in which the domestic legal provisions comply with the ECHR and it is a matter of application or interpretation due to Austrian judicial or administrative bodies not to infringe the rights guaranteed by the Convention, generally speaking, a lack of willingness to improve the legal practice can be identified. This fact can best be illustrated by the latest convictions of Austria referring to Article 10 of the Convention. The Austrian legislator has repeatedly referred to the ECHR in domestic legal provisions or the respective parliamentary explanatory reports, in some instances even by literally quoting Convention rights, to guarantee that Austrian authorities are also obliged to use the provisions of the Convention as a basis for their decisions. Of course, not much is to be gained in terms of normative function from the repetition of ECHR provisions in ordinary law because authorities are obliged to interpret domestic provisions in conformity with the ECHR anyway. Thus, it would be more useful to focus in more detail on the Convention provisions instead of just quoting Convention rights in national ordinary law. Simply spoken, there is a discrepancy between official references to the Convention on the one hand and actual willingness to conform national judicial and legal

interpretations with the ECHR on the other. In this context, it has to be considered that the Austrian judiciary training system does not provide for a pertinent respectively obligatory fundamental and human rights education of the republic's prospective judges (but there are currently plans to change this). Therefore, Austrian judges often lack some understanding when it comes to substantial questions of human rights matters. Especially amongst the "senior generation" of Austrian judiciary it seems to be widely agreed upon the fact that its practice is consistent with fundamental rights in any way. Only younger generations of judges set the stage for a human rights approach in domestic judicial practice.

Besides the structural shortcomings within the educational system of judges, human rights are lacking consideration by the judicial sector as such – in contrast to the administrative sector. That is to say, because the Constitutional Court in his function as "supreme court for human rights" is only competent for reviewing decisions of administrative authorities and legislative acts. As explained in the beginning, it does not have the competence to review decisions of judicial authorities, this is a matter of the Supreme Court only. Political action and constitutional amendment would be needed to cope with this shortcoming.

Annex II: Mapping of Research Competences Reports

1. Austrian Human Rights Institute

Österreichisches Institut für Menschenrechte, Internationales Forschungszentrum

Contact information: Edmundsburg, Mönchsberg 2

5020 Salzburg, Austria

Tel.: +43 662 84 31 58 – 11

E-mail: office@menschenrechte.ac.at

Website: <http://www.menschenrechte.ac.at>

Director: Prof. Dr. Wolfram Karl, LL.M.

Leading experts: Prof. Wolfram Karl, LL.M. (director, Professor and head of the Institute of International Law at the University of Salzburg)
Philip Czech (editor of the Newsletter, advisor in cases and for questions relating to human rights)
Dr. Eduard Christian Schöpfer (editor of the “National Report” for the Council of Europe, legal advisor)

The Austrian Human Rights Institute was founded in 1987. Its seat is in Salzburg. Its legal form is that of a “public service association” with the Republic of Austria, the Province of Salzburg and the Catholic University Foundation in Salzburg as members. It understands itself as a centre of competence in the field of national and international fundamental rights protection. A focus, anyway, is set on the protection of human rights by means of the instruments of the Council of Europe, above all the ECHR. Due to the scientific orientation of the institute its activities are addressed primarily to legal practitioners. Besides, it devotes a large part of its work to public relations work and human rights education.

Its main tasks are as follows: publication of a periodical law journal (*Newsletter Menschenrechte*) on latest judgments of international human rights instances and Austrian high courts in German language; National Reporter of the CoE (report being published in the ECHR-Yearbook); contact for the federal, provincial and municipal authorities in Austria; legal advice to individuals, lawyers, complainants, courts and other public authorities on relevant issues; symposia on significant human rights topics and publication in scientific book series "Publications of the Austrian Human Rights Institute" (*Schriftenreihe des Österreichischen Instituts für Menschenrechte*); advanced training events, workshops and human rights education in schools; annual major lectures on Human Rights for the broad public with the support of the Hermann and Marianne Straniak-Foundation.

2. European Training- and Research Centre for Human Rights and Democracy

ETC Graz

Contact information: Schubertstrasse 29

8010 Graz, Austria

Tel.: +43 316 322 888 1

E-Mail: office@etc-graz.at

Website: www.etc-graz.at

Director: Prof. Wolfgang Benedek

Leading experts: Professor Wolfgang Benedek (Director, Professor at Institute of International Law and International Relations at the University of Graz, Member of the Advisory Council on Human Rights of the Minister of the Interior, Chairman of World University Service Austria), Professor Renate Kicker (Co-Director, Professor at Institute of International Law and International Relations University of Graz, Member of the European Committee on the Prevention of Torture)
Barbara Schmiedl (head of the training section);

The ETC has been set up as a non-profit association in October 1999. Its main aim is to conduct research and training programs in the fields of human rights, democracy and the rule of law in close co-operation with the Karl-Franzens-University of Graz. It serves the University as a competence centre for human rights and democracy and supervises the participation of the University of Graz in the European Master Programs in Human Rights and Democratisation in Venice and Sarajevo. Special emphasis is put on training programs for specific target groups such as the educational sector, the judiciary, the administration, the police, the military and members of national and international organisations and institutions in Austria and abroad.

Simultaneously, basic research is conducted (with assistance or on behalf of European institutions, Austrian ministries and other initiators) with a particular research focus on South Eastern Europe. The institute composes publications, studies, curricula and manuals focused on human rights education, human security, discrimination, migration, terrorism as well as human rights at the local level, human rights and democracy in South-Eastern Europe and the culture of human rights. An interdisciplinary approach is followed, being supported by an international Advisory Board.

It participates in international networks and cooperates in international projects in the field of human rights and democracy. It is the European partner of the Peoples Movement for Human Rights Education (PDHRE), assists the work of the Austrian Advisory Council on Human Rights at the Ministry of the Interior and it commissions and works with the Ministry of Foreign Affairs and Education in the field of human rights education and human security as well.

***3. Section for International Law and International Relations,
Department of European, International and Comparative Law, law
faculty of the University of Vienna***

**Abteilung für Völkerrecht und Internationale Beziehungen, Institut für Europarecht,
Internationales Recht und Rechtsvergleichung, Universität Wien**

Contact information: Schottenbastei 10-16/2/5

1010 Vienna, Austria

Tel.: +43 1 4277 35301

E-mail: int-law@univie.ac.at

Website: <http://intl.law.univie.ac.at/>

Head of Department: Prof. Gerhard Hafner

Head of the Section: Prof. August Reinisch LL.M.

Leading experts: Professors Dr. Gerhard Hafner, Dr. Hanspeter Neuhold, Dr. Christoph Schreuer, Dr. August Reinisch LL.M. (Program Director LL.M. program International Legal Studies), Dr. Manfred Nowak, Dr. Bea Verschraegen, Dr. Peter Fischer, ret., Dr. Karl Zemanek, ret., Dr. Ursula Kriebaum

The Section for International Law and International Relations which forms part of the Department of European, International and Comparative Law, is one of Europe's leading institutions dealing with core problems of international law and its teaching. The department members' areas of research encompass the main aspects of international law and international relations. Particular emphasis is given to the following fields: law and politics of international security, state responsibility, international investment law, protection of human rights, international organizations, international and European environmental law, international procedural law and legal informatics.

The department members have wide-ranging teaching assignments, both at the Vienna's law school (lectures, courses and seminars, participation at Philip C. Jessup International Law Moot Court Competition, LL.M. in International Legal Studies [postgraduate course of the University of Vienna], Master of Advanced International Studies [M.A.I.S, postgraduate course of the University of Vienna and the Diplomatic Academy Vienna], Master of European Studies [M.E.S., postgraduate course „European Studies“], European Master's Degree in Human Rights and Democratization [postgraduate international course, in collaboration with 15 universities], Summer School of the University of Vienna in Strobl) and external ones (Diplomatic Academy Vienna, EURAS- and EURO-JUS-Program at Danube University Krems, Vienna Course for Military Legal Advisers from Central and Eastern Europe for the Austrian Armed Forces and International Committee of the Red Cross).

Further activities comprise a student exchange program (ERASMUS/SOKRATES), editorship of the Austrian Review of International and European Law (ARIEL, i.e. editorial supervision of the only English scientific periodical on international law in Austria and annual assessment of the Austrian practice of international law, appearing at Martinus Nijhoff/Brill in Leiden, Netherlands), consultancy and membership of Austrian delegations, round table meetings with representatives of the International Law Office of the Austrian Federal Ministry for Foreign Affairs, participation in several expert committees in the Austrian branch of the International Law Association (ILA), networking within the European Society of International Law (ESIL) and the German Society of International Law (Deutsche Gesellschaft für Völkerrecht, DGVR).

4. Other University Departments

a) University of Salzburg, Department of Public Law

Contact information: Churfürststr. 1
5020 Salzburg, Austria
Email: int-law@sbg.ac.at

Leading experts: Prof. Walter Berka
Prof. Reinhold Klaushofer

b) University of Vienna, Department of Constitutional and Administrative Law

Contact information: JURIDICUM
Schottenbastei 10 - 16
1010 Vienna, Austria

Leading experts: Prof. Bernd-Christian Funk
Prof. Dieter Kolonovits
Prof. Heinz Mayer

Prof. Theo Öhlinger
Prof. Manfred Stelzer
Prof. Rudolf Thienel
Prof. Hannes Tretter

c) University of Graz, Department for Public International Law

Contact information: Institute for International Law and International Relations
Universitätsstraße 15/A4
8010 Graz, Austria

Leading experts: Prof. Wolfgang Benedek
Prof. Renate Kicker

d) University of Graz, Department of Public Law and Political Science

Contact information: Universitätsstraße 15/K3
8010 Graz
Email: josef.marko@uni-graz.at

Leading expert: Prof. Joseph Marko (expert for minority rights)

e) University of Innsbruck, Department of European Law and Public International Law

Contact information: Innrain 52, Christoph-Probst-Platz
6020 Innsbruck, Austria
Email: europarecht@uibk.ac.at

Leading experts: Prof. Waldemar Hummer

5. Austrian Society for European Law

Österreichische Gesellschaft für Europarecht (ÖGER)

Contact information: Danube University Krems
Centre for European Union Law, Business Law and Technology Law
Dr. Karl Dorrek-Straße 30
3500 Krems, Austria
Website: <http://www.donau-uni.ac.at/de/departement/euro/recht/oeger/01597/index.php>

Honorary Presidents (*Ehrenpräsidenten*): Professors Dr. Peter Fischer, Dr. Manfred Straube
Directorate (*Vorstand*): Professors Dr. Heribert Franz Köck (chairman), Dr. Josef Aicher (vice-chairman), DDDr. Waldemar Hummer (vice-chairman), Dr. Willibald Posch (vice-chairman), Dr. Wolfgang Schuhmacher (vice-chairman), Dr. Siegfried Fina (secretary general), Dr. Gerhard Hafner (treasurer), Dr. Margit Maria Karollus;

Presiding Council (*Präsidialrat*): Dr. Josef Azizi, Dr. Franz Cede, Prof. DDr. Thomas Eilmansberger, Prof. Dr. Stefan Griller, Dr. Hanspeter Hanreich, Prof. Dr. Karl Hempel, Prof. Dr. Hans Hoyer, Prof. Dr. Hubert Isak, Dr. Peter Jann, Prof. Dr. Hans-Georg Koppensteiner, Prof. Dr. Karl Korinek, Dr. Alfred Längle, Prof. Dr. Alina Lengauer, Prof. Dr. Gerhard Loibl, Prof. Dr. Theo Öhlinger, Prof. DDr. Michael Potacs, Prof. Dr. Reinhard Rack, MEP, Prof. Dr. Bernhard Raschauer, Prof. Dr. Manfred Rotter, Prof. Dr. Kirsten Schmalenbach, Prof. Dr. Werner Schroeder, Dr. Gerhard Stadler, Prof. Dr. Sigmar Stadlmeier, Dr. Christine Stix-Hackl, Prof. Dr. Franz Zehetner, Prof. Dr. Karl Zemanek;

Leading experts: numerous professors of the Austrian Universities' law faculties and other experts in European Law (see above)

The Austrian Society for European Law was founded in 1988, with the ambition to intensify scientific discussion and research engagement in European Law, especially in view of Austria's legal relation to the European Community. By the end of 1997 the society was profoundly restructured and integrated within the Centre for European Union Law, Business Law and Technology Law of the Danube University Krems. A main task of the association is the academic support and promotion of European Law in research, teachings and in practice. ÖGER is member of F.I.D.E. (La Fédération Internationale Pour le Droit Européen), an international forum for the exchange of experience and knowledge on European Law amongst judges, lawyers and jurists, coming from the academic domain.

In 1999 the society has begun to annually award the "Jean Monnet Wissenschaftspreis für Europarecht" to students doing excellent doctoral theses on current questions of interest in European Law. Besides scientific quality the jury especially focuses on the promotion of young researchers in the field of European Law.

6. Austrian League for Human Rights

Österreichische Liga für Menschenrechte

Contact information: Hermannsgasse 9
1070 Wien, Austria
Tel.: +43 1 523 63 17
E-Mail: office@liga.or.at
Website: <http://www.liga.or.at>

Honorary Presidents: Dr. Johann Müller († 2006), Prof. Alfred Ströer

Directorate: Ferdinand Lacina (president), Prof. Dr. Heinrich Neisser (vice-president), Mga. Terezija Stoisits (vice-president), Dr. Elisabeth Ebner (secretary general), Dr. Konrad Pleterski, Dr. Eva Maria Barki, Dr. Dietmar Dragric, Marko Gabriel, Dr. Karl Garnitschnig, DI Klaus W. Gartler, Dr. Barbara Helige, Dr. Michael Kerbler, Dr. Volker Kier, Max Koch, Dr. Klaus Perko, Prof. Dr. Hannes Tretter, Dr. Franz Zwitter;

Relevant persons: see above

The Austrian League for Human Rights was established in 1926 as one of the 105 member organizations of the "Fédération International des Ligues des Droits des Hommes" (FIDH). Since its inception, the Austrian League for Human Rights has been dedicated to combating all forms of discrimination and directed its efforts in particular against manifestations of anti-Semitism, xenophobia, and racism as well as discrimination based on sexual orientation, handicapped status, or religion. It focuses its efforts in particular on human rights in Austria and the European Union.

The Austrian League for Human Rights devotes its activities to the following fields: identification and analysis of tendencies that impact on human rights (the association works closely together with research institutions and organizes podium discussions and symposia), information and awareness building on issues relevant to human rights (publication of the quarterly magazine "LIGA"; participation in discourse on contemporary issues by organizing press conferences and press mailings), the implementation of human rights standards in Austria and the European Union with proactive lobbying in collaboration with other NGOs in Austria and the EU. Although the focal point of activities of the Austrian League for Human Rights is not in the operational realm, it also provides counselling and support in legal and social affairs.

Annex III: Tables of Cases

Table 1: Violations, settlements, inadmissibility and non-violations according to articles of the ECHR and actors

	Article 3				Article 5				Article 6				Article 8				Article 10				Article 11				Article 13				Article 14				Total							
	VL	SO	DI	NV	VL	SO	DI	NV	VL	SO	DI	NV	VL	SO	DI	NV	VL	SO	DI	NV	VL	SO	DI	NV	VL	SO	DI	NV	VL	SO	DI	NV	VL	SO	DI	NV	Σ			
Aliens	1	1	1					2 (1)	1				4	2	6																			7 (2)	4	7	--	18 (2)		
National Socialism																6		4		1			1												7	--	4	1	12	
Sexual orientation													8		2		2																		10 (8)	--	2	--	12 (8)	
Ethnicity					1	1			4 (1)				2									1						1						8 (2)	1	1	--	10 (2)		
ORF monopoly																3	2	1																	3	2	1	--	6	
Religion													1				1						12				1								2 (1)	--	--	2	4 (1)	
Challenging state institutions	1																1		1				1												2 (1)	--	1	1	4 (1)	
Racist agitation																2		1																	2 (1)	--	1	--	3 (1)	
Disability									1	1																									1	1	--	--	2	
Equal treatment															1											1										1	--	--	1 (1)	2 (1)
Others							1		3				3			9	2	3								1	1			1				16	3	4	4	27		
Total	2	1	--	--	1	1	1	--	10 (3)	2	--	--	18	2	8	1	24 (1)	4	1	--	1	--	1	6	--	--	--	1	3 (9)	1	--	1 (1)	59 (15)	11	21	9 (1)	100 (16)			

VL = violation of respective Article; SO = struck out of list; DI = declared inadmissible, NV = no violation

Numbers in brackets show judgments, by which violations of more than one article were established or by which violations of more than one article were not established

