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THE RULE OF LAW AND ADMINISTRATIVE JURISDICTION IN AUSTRIA

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The article focuses on practical aspects of the rule of law with regard to remedies against administrative decisions. Explores the problems of the system of judicial protection against administrative orders.

Keywords: administrative court procedure in Austria, administrative orders, judicial protection.

A. Introduction

Administrative Procedures are forming the relationship between the state and its citizens. In the meantime many European countries have established legal codifications of administrative procedural rules in order to enhance the uniformity and foreseeability of the actions of the state administration on the way to render an administrative decision.[1]

In Austria the General Administrative Procedure Act[2] entered into force in 1925 and was the first Administrative Procedure Act worldwide. This piece of legislation with the purpose of simplifying and improving the Austrian administration in favour of the Rule of Law gained[3] international recognition as a pioneering work and was a model for many Procedure Acts in many other countries.[4]

It is not necessary to explain that a legal codification of administrative procedure encourages that the state complies with the requirements of the principle of the Rule of Law.[5] The Rule of Law[6] as the *imperium legum* or more literally "the empire of laws and not of men"[7] is starting point for almost every fundamental analysis of administrative procedures and administrative jurisdiction. The Rule

1 For example Poland and Czechoslovakia introduced an Administrative Procedure Act in 1928 and Yugoslavia in 1930. In Switzerland the Law of Administrative Procedure was established in 1968, in the Federal Republic of Germany the Administrative Procedure Act (VwVfG) [...]in 1976, in Finland an Adminstrative Procedure Act in 1982, in Denmark in 1984, in Italy in 1990 and in the Netherlands in 1992; see for details *Hermann Pünder* in *Hans-Uwe Erichson/Dirk Ehlers* (eds.), Allgemeines Verwaltungsrecht, 13th Edition (2006), p. 390 et seq.

2 Österreichisches Bundesgesetz über das allgemeine Verwaltungsverfahren (AVG), Federal Law Gazette No. 172/1925.

3 See *Wolfgang Fasching/Walter Schwartz*, Verwaltungsverfahrensrecht, 4th Edition (2009), p. 26; *Johannes Hengstschläger*, Verwaltungsverfahrensrecht, 4th Edition (2009), p. 44; *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan L. Frank*, Österreichisches Staatsrecht IV (2010), Rz 62.001.

4 Especially the legislation in those countries which had formerly been united with Austria based on the Austrian model; see *Michael Stolleis*, A History of Public Law in Germany, 1914-1945 (2004), p. 241; *Heinz Schäffer,* Administrative Procedure in Austria, in European Review of Public Law, vol. 17 (2005), No. 2, p. 871. The high legislative quality of the Austrian General Administrative Procedure Act is demonstrated by the fact that the legislative text remained for the most part unchanged until now and was just subject to insignificant amendments.

5 For the Russian legal science see for example *Jurij Nikolaevič Starilov*, Verwaltungsjustiz in Russland. Probleme der modernen Theorie und Entwicklungsperspektiven, in Osteuroparecht, Heft 3-4 (1998), p. 217.; see further more for example *Heinz Ahrens* in *Fritz Morstein Marx* (ed.), Verwaltung (1965), p. 251 („A legally regulated procedure is a guarantor of the Rule of Law"); *Christian Quabeck*, Dienende Funktion des Verwaltungsverfahrens und Prozeduralisierung (2010), p. 256.

6 The books about the Rule of Law could certainly fill whole libraries: See for example *Mauro Cappelletti* (ed.), Access to Justice and the Welfare State (1981); *Pietro Costa/Danilo Zolo* (eds.), The Rule of Law. History, Theory and Criticism (2007); *Ferdinand Feldbrugge* (ed.), Russia, Europe and The Rule of Law (2007); *Matthew H. Kramer*, Objectivity and the Rule of Law (2007); *Rudolf Machacek*, Austrian Contributions to the Rule of Law (1994).

7 See *Mortimer Sellers*, What Is the Rule of Law and Why Is It So Important?, in *Silkenat/Hickey/Barenboim* (eds.), The Legal Doctrines of The Rule of Law and Legal State (2014), p. 4.

of Law principle is commonly understood as a synonym for the *legal state*, although it differs in its content in certain details.[8]

In the following I want to start with some significant aspects usually qualified as basic elements of the Rule of Law as well as key elements of the legal state concept. Afterwards I want to focus on the system of legal protection in administrative matters and its efficency and effectivity which are in the understanding of the Austrian Constitutional Court also guaranteed by the Rule of Law and even by the European Convention on Human Rights. I want to concentrate on the practical consequences of the Rule of Law in regard of remedies against administrative decisions. What impedes the functioning of the Rule of Law in this area? What are the gaps and obstacles concerning the system of judicial protection against administrative orders?

B. The Primacy and the Supremacy of the Law

The Rule of Law or rather some of its elements are more or less explicitly embedded in the Constitutions of almost all modern democracies.[9] The so-called *Supremacy* of the law which is one of the core elements of the Rule of Law and characteristical for every modern law-based state is, for example, guaranteed by Art. 15 Par. 2 of the Constitution of the Russian Federation (*"The bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution of the Russian Federation and laws."*) as well as by Art. 20 III of the German Constitution (*"The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."*).[10] Also Art. 18 of the Austrian Constitution ensures the same principle: *"The entire public administration can be exercised only on the basis of the laws."* These cited phrases express in the end that the state has to act in accordance with the law.

In the Austrian doctrine it is common sense that Art. 18 of the Austrian Constitution establishes – as a first pillar – the supremacy of the law in the way that all

8 *Gadis A. Gadzhiev*, The Russian Judicial Doctrine of the Rule of Law: Twenty Years After, in *Silkenat/Hickey/Barenboim* (eds.), The Legal Doctrines of The Rule of Law and Legal State (2014), p. 209. Russian scholars qualify as main elements of the Rule of Law inter alia the existence of human rights, the separation of powers and democracy as the rule by the people; see *Ilja Skrylnikow*, Legal State: the Rule of Law in Russia, http://wikis.fu-berlin.de/display/SBprojectrol/Russia (download on Feb. 2nd, 2015). There are schollars adding more than 140 sub-principles to the Rule of Law (see *Katharina Sobota*, Das Prinzip Rechtsstaat [1997], 471 et seq.).

9 In Austria the Rule of Law is even interpreted as a super-constitutional law ranking higher than the "ordinary" constitutional law; see for example *Theo Öhlinger/Harald Eberhard*, Verfassungsrecht 10th edition (2014), Rz 74.

10 See for example *Ernst Forsthoff*, Lehrbuch des allgemeinen Verwaltungsrechts I (1973), p. 81; *Georg Ress* in *Heinz-Christoph Link/Georg Ress/Jörn Ipsen/Dietrich Murswiek/Bernhard Schlink* (eds.), Staatszwecke im Verfassungsdienst - nach 40 Jahren Grundgesetz, VVDStRL 48 (1990), p. 84.

administrative and judicial acts have to comply with the law.[11] As a second pillar the entire administration (and the courts as well) may only take action on the basis of an explicit legal authorization (Primacy of the law).[12]

In the last decades Art. 18 of the Austrian Constitution was the starting point for the Austrian Constitutional Court to derive various obligations for the legislation and the administration. For example the Constitutional Court considers since 1923 that the concept of the Rule of Law established in Art. 18 of the Austrian Constitution requires that legal provisions have to be "sufficiently clear and detailed" otherwise these provisions infringe the Constitution.[13] Legal provisions which can be understood only by using "subtle constitutional knowledge, qualified legal qualifications and experience and downright archival diligence", do not meet the requirements of the Rule of Law.[14] This jurisdiction has to be seen in the light that the "normal" citizen should be able to foresee the acts of the administration which is not possible when the sense of the law is hardly to understand and can't be recognized even by the use of all methods of judicial interpretation.[15] Therefore a legal provision breaches the constitution when its content and its entry into force is formulated in a way that only those persons are able to benefit from the advantages granted by this provision, who knew the content of the provision before the entry into force.[16]

In one of the first judgements of this kind the Constitutional Court ruled out that a legal provision violates the Constitution when the assessment of a provision "demands a certain diligence in archive research or a faible for solving puzzles".[17]

C. System of legal protection

Another important aspect accompanying the Supremacy of the Law is the judicial control of administrative decisions: The functioning of the executive power in compliance with the law can only be guaranteed by a *judicial control*. This is a

11 In Austrian literature this principle is also named "principle of legality"; see for example *Christoph Grabenwarter/Michael Holoubek*, Verfassungsrecht - Allgemeines Verwaltungsrecht (2009), p. 304 et seq.; *Robert Walter/Heinz Mayer/Gabriele Kucsko-Stadlmayer*, Grundriss des österreichischen Bundesverfassungsrechts (2007), 10th edition, p. 82; *Arno Kahl/Karl Weber*, Allgemeines Verwaltungsrecht 2nd edition (2008), p. 101 et seq.

12 *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan L. Frank*, Österreichisches Staatsrecht II, 2nd edition (2013), Rz 27.041.

13 VfSlg. (Official Compilation of the Constitutional Court's rulings and decisions) 176/1923.

14 VfSlg. 3130/1956.

15 See for example *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan L. Frank*, Österreichisches Staatsrecht I, 2nd edition (2011), Rz 14.014.

16 VfSlg. 13.329/1993.

17 VfSlg. 12.420/1990; see also VfSlg. 13.740/1994, 16.381/2001, 17173/2004. This jurisdiction is humorously called the "brain-teaser jurisdiction".

requirement of a legal state although it is not self-evident that decisions of a state body can be subject of an appeal by a "normal" citizen. But the Rule of law has only an effect when there is a certain control which ensures the compliance with the law. In the meanwhile this is also a principle in many constitutions.

In Austria the Constitutional Court derived from the Rule of Law that there has to be "a system of institutions for legal protection to ensure that all acts of state bodies comply with the law". It also has to be considered that it is not just a question of the conformity of acts with the law, but the rights or even human rights of individuals which have to be guaranteed. One can say: For every right there must be a remedy![18] Therefore the legislator is - from the perspective of the Constitutional Court - obliged by the constitution to assure that in case of legal prescriptions providing (significant) interferences in a person's right by actions of the administration there must be granted an administrative order which may be challenged before the courts by the affected person.

This notion finds a parallel in Art. 13 of the European Convention on Human Rights which requires that "everyone whose rights and freedoms" are violated shall have a remedy before a national authority. Art. 13 of the Convention does not demand, however, a judicial protection and is further more limited to the rights and freedoms as set forth in this Convention whereas the jurisdiction of the Austrian Constitutional Court does not distinguish on the basis of the legal framework the effected rights are derived.[19]

Although the necessity of a comprehensive system of judicial protection is evident, if you take a closer look the legal system is not perfect: You will find everywhere "gaps" in the system:

An illustrating example for the jurisdiction of the Austrian Constitutional Court in this regard may be the judgement concerning the Austrian Act on extradition and judicial assistance which was the legal background of the extradition of an American citizen who was sentenced in absentia by an American District Court to 845 years' imprisonment for committing an insurance fraud with a damage of $ 350 Million.[20] Mr. Weiss fled before the pronouncement of the judgement.

18 Gadis A. Gadzhiev, The Russian Judicial Doctrine of the Rule of Law: Twenty Years After, in *Silkenat/Hickey/Barenboim* (Editors), The Legal Doctrines of The Rule of Law and Legal State (2014), p. 209 (211).

19 The Austrian Constitutional Court abolished in the beginning of the 1990's a paragraph in the Austrian Calibration Law which provided that the calibration authority does not issue an order when the measuring device does not comply with the law (VfSlg. 13.223/1992). The applicant of the concrete proceeding was a taxi driver who applied for the permission of his taximeter.

20 It was believed to be the largest insurance failure in history at the time: See Extradited fugitive asks for bond hearing, Herald Tribune, 11.6.2002.

Surprisingly he appeared after a while in Austria, and the authorities of the United States of America requested his extradition.[21] After an extradition proceeding in which an Austrian court approved the extradition, the extradition of Mr. Weiss to the United States could immediately be carried out because the Austrian Act on extradition only provided a remedy for the public prosecutor (to ensure a lawful decision) but not for the person affected by the extradition request. Mr. Weiss tried to prevent his immediate extradition desperately and unsuccessfully with several complaints with many institutions in Austria, which did not have any effect for the extradition matter, even a complaint with the Constitutional Court which indeed abolished the legal provision of the Austrian Act on extradition which excluded a remedy for the person to be extradited because it violated the constitutional principle of the Rule of Law.[22] The consequence of this judgement was a comprehensive amendment to the Austrian Act on extradition establishing new stages of appeal[23], but Mr. Weiss who was at this time after his immediate deportation already in prison in the United States could not benefit from proceedings he initiated in Austria. His stay in prison in the United States remained unchanged.

Another example of the jurisdiction in this context was the legal protection in the framework of the public procurement law: In the 1990's in Austria a private tenderer who took part in a proceeding for the purchase by a public sector body had no possibility to file a remedy against the decision when a competitor' s offer was chosen for the contract even when this decision was not consistent with significant legal provisions. This restriction concerned all public purchases up to a certain amount of the contract value which was defined by the EU thresholds. In other words only purchases of a very high contract value covered by EU directives could be subject of a judicial review.[24] The Austrian Constitutional Court abolished this restriction with reference to the Rule of Law and pointed out that a minor value of a contract may justify legal restrictions in favour of procedural simplifications or the loss of time-consuming and elaborate appeals procedures but not the total abandonment of any legal protection.[25]

21 See Fugitive Arrested in Austria After a Year on the Run, New York Times, 26.10.2000.

22 VfSlg. 16.772/2003. The United Nations Human Rights Committee seised by the American citizen retradicted to the United States stated a violation of Art. 2 and Art. 14 of the second UN Covenant on Human Rights (HRC 8.5.2003, No. 1086/2002).

23 See the amendment in Federal Law Gazette No. 15/2004.

24 Reason for this restriction was the fact that in Austria a judicial control concerning the award of contracts was not implemented before entering the European Union and only the obligations of the European law forced the Austrian legislation to establish a public procurement review at least for contracts exceeding the EU thresholds.

25 VfSlg. 15.106/1998, 15.204/1998, 16.027/2000. For further details and references see for example

Even in the more recent past the Austrian legislation contained certain "gaps" in the system of judicial review: For example the Austrian Financial Market Authority was allowed to inform the public by publication on the Internet or in any other newspaper with nationwide circulation, that a particular person is not entitled to carry out certain investment services to prevent possible disadvantages for private investors. This warning notice was not the result of a comprehensive administrative procedure and even not content of an administrative decision which could have been subject of a remedy or file or whatever. In case of a wrong or unlawful warning by the Financial Market Authority the person falsely accused in public to carry out services illegally had no instrument to activate a judicial review to quash this warning notice (and especially to restore confidence). The Austrian Constitutional Court abolished also the legal provision authorising the Financial Market Authority to this warning notice and ruled out that the massive interference in the integrity of such a person in the light of an irrevocable loss of reputation at the market of financial services requires a certain kind of judicial protection to revise such a warning notice and to recover the reputation of that person.[26]

A similar deficit of judicial control was to find in the Austrian Alien's legislation concerning the immigration restrictions for family reunification: To receive a settlement permit the family member of a foreigner already settled down in Austria had to apply for a "quota place" which was determined by the Government every year only in a small number with the result that many applications were added on a waiting list without any administrative order. As a consequence applicants had to wait for many years without any information about their position in the waiting list and when their request would be the next in the line. The Constitutional Court criticised that there was no exact regulation of the waiting list and the applicants did not have any right to lodge a complaint against the default.[27]

An important issue in this context is the constitutional jurisdiction in regard to the occupation of major or higher positions in public office, for example for headmasters of schools: The Constitutional Court ruled out that no applicant has a legal right to a special workplace but a candidate who was selected onto the shortlist of the nomination proposal is allowed to lodge a complaint against the decision in favour of the successful candidate.[28] Of course the appointing authority has wide

Peter Chvosta, Die verfassungsgerichtliche Judikatur in Vergabesachen, in *Gunther Gruber/Thomas Gruber/Michael Sachs* (eds.), Jahrbuch Vergaberecht 2008 (2008), p. 95.

26 VfSlg. 18.747/2009.

27 VfSlg. 17.013/2003.

28 VfSlg. 9923/1984, 12.102/1989, 12.476/1990, 18.095/2007, 19.670/2012.

discretion when selecting the most appropriate applicant, but that discretion must always be exercised according to the general principle of objectivity. A selection on the basis of a party membership card system or a decision without coherent and comprehensible reasons will be quashed by the Administrative Courts.

D. The efficiency of legal protection

Jurij Nikolaevič Starilov wrote in an essay published a few years ago, the most important feature of a modern legal state would be an administrative court proceeding which is designed to ensure the rights of the citizens and legal entities.[29] I agree with that and want to underline that it is not only the existence of a procedure but the configuration of the proceeding, the quality and capability to achieve the objectives which only can be the safeguarding of the rights of individuals and the compliance of state acts. It is a political question how easy shall be made the access to the court or to the appellation body, if a citizen shall be able to lodge a complaint without the support of a lawyer or not, if a complainant has to pay fees for his remedy or not.

But in the end it is also a question how effective is the system of legal protection: In Austria the Constitutional Court ruled out that the Rule of Law does not only demand a system of judicial control, the system of legal protection has also to be *effective* and the legislation has to comply with that.[30] A regulation for remedies which does not guarantee a certain minimum of *de facto efficiency* for a complainant does not comply with the Rule of Law.

This notion is in some extent not only very similar to Art. 13 of the European Human Rights Convention which demands an *effective* remedy. Also Art. 6 of the Human Rights Convention which protects the right to a fair trial in criminal law cases and cases to determine civil rights. The European Court of Human Rights ruled out that the right of access to a court guaranteed by Art. 6 shall not be "*theoretical* or *illusory*" but "practical and effective".[31] Also the European Union law contains the principle of *effective judicial protection* which requires that the Member States of the European Union establish a system of legal remedies and procedures

29 *Jurij Nikolaevič Starilov*, Verwaltungsjustiz in Russland. Probleme der modernen Theorie und Entwicklungsperspektiven, in Osteuroparecht, Heft 3-4 (1998), p. 217.

30 See comprehensively Martin Hiesel, Die Rechtsstaatsjudikatur des Verfassungsgerichtshofes, ÖJZ 1999, p. 522; Martin Hiesel, Die Entfaltung der Rechtsstaatsjudikatur des Verfassungsgerichtshofes, ÖJZ 2009/12.

31 Judgement of 26.2.2002, Del Sol v. France, 46800/99; judgement of 13.2.2003, Bertuzzi v. France, 36378/97; judgement of 13.7.1995, Tolstoy Miloslavsky v. the United Kingdom, Series A no. 316-B; judgement of 9.10. 1979, Airey v. Ireland, 6289/73; judgement of 22.3.2007, Staroszczyk v. Poland, 59519/00.

safeguarding the rights derived from Union law.[32] According to the Court of Justice of the European Union the procedural rules governing actions for safeguarding an individual's rights under Union law must not render practically impossible or excessively difficult the exercise of rights conferred by Union law. If a person was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Union law, would not be sufficient to secure for it such effective judicial protection.[33] The "right to an effective judicial protection" can also be qualified as an essential element of the Rule of Law within the European Union.[34]

One of the most significant aspects of the effectivity of legal protection in the context of the Austrian Constitutional jurisdiction is the suspensive effect of a remedy. An appeal against the administrative decision which imposes the demolition of a house because of various violations of the Construction Ordinance will not be effective without the suspensive effect of the remedy because the applicant won't be satisfied by the successful appeal after the demolition is already realized. The Constitutional Court ruled out that a regulation generally straining the citizen with the negative consequences of a potentially unlawful decision by administrative authorities violates the Rule of Law principle. The general exclusion of a suspensive effect for remedies will be acceptable only when the immediate enforcement of a decision does not have irrevocable impacts, for example when the decision causes only financial consequences which can be reversed, or (vice versa) when the suspensive effect leads to circumstances which make the final decision about the remedy pointless.[35]

The Asylum Law was very often subject to amended legislations with the goal to avoid proceedings of long durations.[36] One attempt was to reduce the time

32 See the settled case law of the jurisdiction of the Court of Justice of the European Union, for example Judgement of 15.05.1986, Johnston, 222/84; Judgement of 20.03.1997, Rheinland Pfalz v. Alcan, C-24/95; Judgement of 27.11.2001, Commission v. Austria, *C-424/99;* Judgement of 25.7.2002, Unión de Pequeños Agricultores v. Council, C-50/00*;* Judgement of 19.06.2003, Eribrand, C-467/01; Judgement of 28.07.2011, Diouf, C-69/10.

33 Judgement of 13.03.2007, Unibet, C-432/05.

34 See for example *Koen Lenaerts*, Effective judicial protection in the EU, p. 1 (http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf.), with regard to Art. 47 of the Charter of Fundamental Rights of the European Union.

35 See for example *Johannes Hengstschläger/David Leeb*, Kommentar zum Allgemeinen Verwaltungsverfahrensgesetz III (2007), § 64 Rz 31 et. seq.

36 According to the Geneva Convention for Refugees an asylum seeker usually may not be deported to his home country as long as the decision regarding his asylum application has not been made, i.e. asylum seekers are granted ex lege protection from deportation for the whole asylum procedure (at least in the first instance).

limit for lodging a complaint with the result that asylum seekers had only two days time to analyse a negative decision and to lodge the appeal containing all necessary reasons for appeal. The Constitutional Court did not accept the argument of the Government defending the legal provision with the reference to the simplicity of the subject of the administrative procedure and the low probability of wrong decisions. In order to achieve a de facto efficient legal protection system for lodging a complaint should usually take at least one week as the Constitutional Court pointed out.[37] Also a legal provision which bans the presentation of new facts and evidence by the complainant against a decision of the determining authority can violate the maxim of an effective remedy when the administrative procedure at first instance is formed as a summary trial where the complainant didn't have enough time and opportunity to present his facts and evidence. In this sense the Austrian Constitutional Court abolished a specific legal provision which prohibited any new fact or evidence against an asylum decision by the asylum seeker although the asylum procedure did not allow an extensive examination of the presented reasons for asylum.[38]

The procedural costs can also affect the efficiency of the legal protection in a massive form: The Austrian public procurement code provided that complainants had to pay procedural fees in case of a remedy against a decision of a public purchaser. The fee was formed as a very high flat-rate fee but the tenderer had to pay not only once for his complaint but also for further applications in the same procedure, in particular for an interim injunction which often had to be extended with a special application again increasing the fees. In total the sum of the fees for one procedure could exceed the financial interest of the applicant in the concrete public contract which is usually his potential profit in the contract. The flat-rate fee had the effect of an artificial obstacle to effective access to justice.[39] Also the European Court of Human Rights emphasised in his jurisdiction regarding Art. 6 of the European Human Rights Convention that legal restrictions placed on access to a court, especially in form of the requirement to pay fees, will not be compatible with Art. 6 "unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved".[40] For example in the case Kreuz v. Poland a Polish applicant suing a Municipality for damages had to pay procedure fees which were equal to an average

37 VfSlg. 15.218/1998.
38 VfSlg. 17.340/2004.
39 VfSlg. 17.783 - 17.970/2006, 18.034/2006, 18.248/2006.
40 See for example Judgement of 10.07.1998, Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom, Reports 1998-IV, p. 1660.

annual salary in Poland. Bearing in mind that the applicant could not pay the fee and had to desist from his claim the European Court of Human Rights concluded that excessive court fees impaired the very essence of the right to access to a court and were a breach of Art. 6 of the Convention.[41]

A long duration of proceedings can also interfere the efficiency of legal protection. This aspect can be seen in the light of Art. 6 of the European Human Rights Convention which guarantees the right to a hearing *within a reasonable* time and in the light of the Rule of Law as well. For example in Austria a legal provision in the Tax Code extended the usual period within the state authorities are obliged to decide on requests from 6 months up to 24 months. There was no significant reason for such a long period of time within the applicant had to wait for a decision and was not allowed to submit a request for the transfer of competence to the higher authority. The Austrian Constitutional Court considered that such a general extension violates the Rule of Law and the maxim of an effective system of legal protection.[42]

The efficiency of legal protection was even one of the reasons for the legislator in Austria to reform the whole Austrian system of judicial protection in administrative matters: The "one-stage-system" with a limited review by only one Administrative Court after various stages of appeal within the administration existed since 1875 and was for a long time sufficient to guarantee the legal acting by the administrative bodies. After more than 100 years of practice this system could not manage the challenges of the presence anymore and the Supreme Administrative Court was permanently congested with thousands of pending complaints with the result that proceedings took many years until the final decision by the Supreme Administrative Court was delivered.[43] In 2012 the Austrian legislator decided to eliminate the stages of appeal within the administration and to establish a two-stage system of administrative jurisdiction with 11 Administrative Courts as first instance and the Supreme Administrative Court as second instance only deciding when the ruling depends on solving a legal issue which is of fundamental importance. The main effect should that the citizens can lodge a complaint against an administrative decision with a court immediately after its issue and is not forced anymore to have a "long march through the stages of appeal" before he is allowed to defend his rights

41 Judgement of 19.06.2001, Kreuz v. Poland, 28249/95.

42 VfSlg. 16.751/2002.

43 The average duration for the proceedings rose since the 1990's till 2011 up to 23 months (see Activity Report of the Supreme Administrative Court 2011, p. 9). The Republic of Austria was also condemned by the European Court of Human Rights several times solely because of the long duration of the proceedings in administrative matters as a violation of Art. 6 of the European Human Rights Convention (when the proceedings affected civil rights or criminal law cases in the sense of Art. 6).

before a court.[44] The fact that the Administrative Courts decide mostly within six months shall ensure that a final judgement in a concrete administrative matter can be granted within a short period of time. After one and a half year it can be said that this objective of the reform could be achieved.[45]

E. Conclusion:

These examples and aspects should demonstrate that the Rule of Law and the judicial protection can face various obstacles impairing the functioning of the system of judicial control in administrative matters. In my opinion it is obvious that the Rule of Law concept is an ideal which will never be achieved completely! It is a goal you can only come closer to step by step. I hope this conference contributes to taking the next step in our countries!

44 For more details see for example *Peter Chvosta*, Aktuelle Reform der Verwaltungsgerichtsbarkeit in Österreich, Deutsche Gesellschaft für Internationale Zusammenarbeit (Ed.), Jahrbuch des öffentlichen Rechts 2014, p. 186.

45 See Verwaltungsgerichtshof hat Entscheidungsdauer halbiert, Salzburger Nachrichten, 15.2.2015.

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