HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:
THE RELATIONSHIP OF INTERNATIONAL, SUPRANATIONAL AND NATIONAL CATALOGUES IN THE 21st CENTURY

Austrian National Report

Ingrid Siess-Scherz

I. GENERAL PART – CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I.I. International catalogues of human rights (ECHR, UDHR and ICCPR)

1) In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?

The ECHR and its Additional Protocols 1 to 11, 13, 14 and 15 were elevated to the rank of constitutional law in Austria[1] and their provisions are referred to by the Constitutional Court (CC) in its case law as a directly applicable standard of review.[2]

The UDHR has not been incorporated into the Austrian system of law and therefore has no normative effect in national law, nor has it gained any importance in practice.

The ICCPR have also been transposed into national law[3] and ratified with a reservation of enforcement. It was decided not to raise the Covenant to constitutional rank, not least in order to avoid conflicts of law.[4] The Covenant therefore ranks as ordinary national law and is not directly applicable.[5]

2) What mechanism is used to invoke the international treaties in national court decision-making?

Given that the ECHR has for many decades been part of directly applicable constitutional law, all courts are familiar with this catalogue of human rights and take its provisions into account in their case law.

In accordance with the Constitution, the CC has the power to decide on complaints (inter alia) against decisions taken by administrative courts on grounds of violation of "constitutionally guaranteed rights". Only subjective rights enjoying the rank of constitutional law can be

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[1] While the CC had originally regarded the ECHR as ranking on the level of ordinary law (*VfSlg. 4049/1961*), the legislator in 1964 (retroactively) decided by way of a federal constitutional act to raise the ECHR to the level of constitutional law (Art. II of the Federal Constitutional Act of 4 March 1964, by which provisions of the 1929 Federal Constitutional Act on International Treaties were amended and extended; Federal Law Gazette 59/1964).

[2] *VfSlg. 4924/1965*; *Berka*, Verfassungsrecht, 7th edition (2018), point 1174; *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019) points 131, 681 with reference to *VfSlg. 5102/1965*: While the CC had first held that international treaties on the level of ordinary laws were not binding vis-à-vis the legislator and could only be qualified as a programme of the ordinary legislator, such programmes would become binding upon the ordinary legislator if they were elevated to constitutional rank or if such rank were retroactively established as given. This would mean that a claim could be derived from Article 6 paragraph 1 first sentence ECHR.

[3] Federal Law Gazette 591/1978.

[4] *Schäffer*, § 1. Die Entwicklung der Grundrechte, in: Merten/Papier (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 76.

[5] See also *VfSlg. 8900/1980, 14.050/1995*.

invoked.[6] By the same token, the powers of the CC are limited to a review of ordinary laws for their "unconstitutionality".

In Austria, the review of legal acts for their compliance with fundamental rights is not in the hands of a single court. Therefore, the Supreme Court also claims the right to ensure the respect of fundamental rights applicable in Austria within the framework of its power to review civil and criminal court decisions.[7] Finally, the Supreme Administrative Court, which reviews alleged violations of rights guaranteed under ordinary laws by administrative courts, also takes the provisions of the ECHR into account.

The International Convention on the Elimination of All Forms of Racial Discrimination is an important example of an international treaty ratified and raised to constitutional rank. The Convention was, however, ratified with a reservation of enforcement.[8] Applying the Convention as a guarantee of fundamental rights in constitutional practice was made possible through the adoption of a separate Federal Constitutional Act on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.[9] As the national guarantees of the right to equal treatment only refer to Austrian nationals, this constitutional act is the source of the prohibition of discrimination in Austria which non-Austrian nationals can invoke before the CC.[10]

Another issue to be taken into account is the interpretation of national law in conformity with international law.[11] The CC has recognised this principle[12] and stated – in accordance with the case law of the European Court of Human Rights (ECtHR) – that the substance of constitutional law must, as far as possible, be compatible with the ECHR.[13] Here, too, the ICCPR has not gained any importance in national practice.

3) Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.

Pursuant to Article 145 of the Constitution, the CC would pronounce on violations of international law "in accordance with the provisions of a special federal act". However, as no such act has ever been adopted, the CC does not have the power to decide on such violations.[14] Nevertheless, given that the ECHR is a component of constitutional law and, as such, a standard of review for the CC, it has never been necessary to extend the standard of review to other international human rights conventions and, thus, broaden the protection of rights before the CC.

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[6] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 677.

[7] Supreme Court, 1.8.2007, 13 Os 135/06m.

[8] Other international conventions covering fundamental rights also rank as constitutional law, but have been adopted with a reservation of enforcement and are therefore not directly applicable: Convention on the Political Rights of Women, Federal Law Gazette 1969/256; Convention on the Elimination of All Forms of Discrimination against Women, Federal Law Gazette 1982/443. Other conventions do not rank as constitutional law and are not directly applicable: e.g. the European Social Charter, Federal Law Gazette 1969/460; International Covenant on Economic, Social and Cultural Rights, Federal Law Gazette 1978/590; International Covenant on Civil and Political Rights, Federal Law Gazette 1978/591. Or they do not rank as constitutional law, but have been entered into without a reservation of enforcement: Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Federal Law Gazette 1987/492; see also *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), points 679ff; *Berka*, Verfassungsrecht, 7th edition (2018), points 1177f.

[9] Federal Law Gazette 390/1973.

[10] See *Berka*, Verfassungsrecht, 7th edition (2018), points 1631ff, 1711ff; *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), points 682, 757; *Grabenwarter*, § 2. Verfassungsrecht, Völkerrecht und Unionsrecht als Grundrechtsquellen, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 15. See below II.V.

[11] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 683.

[12] *VfSlg. 7478/1975*; *VfSlg. 16.404/2001* point 3.2.2.2 concerning the interpretation of a constitutional provision of the Vienna State Treaty in conformity with international law, in which the CC took guidance from the international practice of granting minority rights.

[13] *VfSlg. 15.027/1997* with reference to *VfSlg. 11.500/1987*.

[14] *VfSlg. 14.050/1995*; *Berka*, Verfassungsrecht, 7th edition (2018), point 1146.

I.II. Supranational catalogues of human rights (Charter of Fundamental Rights of the European Union [CFREU])

1) Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by "radiating" through the national catalogues (a substantive point of reference in other states)?

The CFREU was partially "constitutionalised" by the CC in 2012.[15] The CC regards the rights guaranteed by the CFREU as constitutionally guaranteed rights and, as such, as a standard of review for decisions taken by administrative courts and for ordinary laws, provided the following conditions are met: First, the point at issue must be within the scope of the CFREU;[16] moreover, the wording as well as the clarity and precision of the guarantee of rights enshrined in the CFREU must be similar to the rights guaranteed by the Austrian constitution.[17] Given that the CFREU rights are treated in the same way as national, constitutionally guaranteed rights and that the CC in general is not empowered to review constitutional provisions against the benchmark of constitutionally guaranteed rights, the CC can only review – and possibly repeal – provisions of ordinary law referring to the CFREU as a point of reference.[18]

If individual rights, such as Article 22 or Article 37 CFREU, have a completely different normative structure and are therefore more similar to "principles" in the meaning of the CFREU in terms of wording, clarity and precision than to constitutionally guaranteed rights, the CC holds that they do not constitute a standard of review before the CC.[19] This was the position taken by the CC regarding Articles 27 to 38 CFREU.[20] Article 47[21], Article 21[22] and Article 8[23] CFREU are examples of rights which the CC explicitly regards as constitutionally guaranteed rights.

2) Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?

On account of the constitutional basis in Austria, the case law of the Court of Justice of the European Union (CJEU) is taken into account by the Austrian courts, as required by European Union law.[24] Given that in Austria Union law is equivalent to national law, the case law of the CJEU is of particular importance for the courts in the interpretation and application of Union law. Despite the fact that the CC does not have the power to decide on violations of Union

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[15] *VfSlg. 19.632/2012, 19.955/2015*; CC, 10.10.2018, G 144/2018; see also *Grabenwarter*, § 2. Verfassungsrecht, Völkerrecht und Unionsrecht als Grundrechtsquellen, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), points 33f.

[16] *Holoubek*, Die Kooperation der Verfassungsgerichte in Europa – aktuelle Rahmenbedingungen und Perspektiven. Austrian National Report (XVIth Congress of the Conference of European Constitutional Courts 2014), 1ff, 8.

[17] *VfSlg. 19.632/2012*.

[18] CC, 10.10.2018, G 144/2018.

[19] *VfSlg. 19.632/2012*.

[20] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 684.

[21] *VfSlg. 19.632/2012*; *19.684/2012*; *VfSlg. 20.064/2016* with further references; see also CC, 26.11.2018, E 4221/2017; 24.11.2016, E 1079/2016. See also Question I.IV.1 below.

[22] *VfSlg. 19.865/2014*: Article 21 paragraph 1 CFREU is a guarantee which in its wording and degree of precision resembles constitutionally guaranteed rights of the Austrian Constitution and can therefore be invoked as such before the CC and constitutes a standard of review in judicial review proceedings; see also *VfSlg. 19.955/2015* on Article 21 paragraph 2 CFREU. See also Question I.IV.1 below.

[23] *VfSlg. 19.702/2012*. See also Question I.IV.1 below; *Holoubek*, Die Kooperation der Verfassungsgerichte in Europa – aktuelle Rahmenbedingungen und Perspektiven. Austrian Country Report (XVIth Congress of the Conference of European Constitutional Courts 2014), 4.

[24] *Holoubek*, Die Kooperation der Verfassungsgerichte in Europa – aktuelle Rahmenbedingungen und Perspektiven. Austrian National Report (XVIth Congress of the Conference of European Constitutional Courts 2014), 11.

law, it is obliged to apply Union law and, thus, to comply with the case law of the CJEU (in accordance with Union law). Frequent references to the case law of the CJEU, both by the CC[25] and by ordinary courts in general[26], can therefore be found. A uniform interpretation of the CFREU and other fundamental rights is envisaged, as the CFREU, as mentioned above, has been recognised as a standard of review by the CC. When Austrian courts have to apply Charter rights similar in content to national constitutionally guaranteed rights, they interpret them in the same way as the CJEU. Finally, Austrian courts refer to the CJEU for preliminary rulings (see question 3); by the beginning of 2019, out of 260 referrals by ordinary courts[27], ten concerned the CFREU[28].

3) Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is conditioned by making a request for preliminary ruling with the Court of Justice of the EU?

Charter rights meeting the prerequisites described above can be invoked as constitutionally guaranteed rights before the CC; they are referred to as a standard of review and, when applied, they have the same impact as the national constitutional catalogue of human rights. However, Charter rights are not explicitly reviewed if they do not afford a degree of protection going beyond national fundamental rights; in some cases, the question of the applicability of the CFREU is not even raised. If a Charter right and a national provision have the same scope, the CC will base its decision on the latter. It is only if there is no corresponding national provision that national courts exclusively refer to the CFREU. If an Austrian provision affords a higher level of protection than the corresponding Charter provision, the CC also refers to the national standard (see Article 53 CFREU).[29]

As regards referrals to the CJEU for preliminary rulings, the CC considers itself obliged to refer questions relating to the CFREU to the CJEU, as required by Article 267 paragraph 3 TFEU, provided the referral concerns a question of law that is relevant to the Court's decision. If this is not the case, for instance, "if a constitutionally guaranteed right, in particular a right guaranteed by the ECHR, has the same scope as a fundamental right guaranteed by the CFREU", there is no obligation to refer the case to the CJEU. In such cases the CC decides on the basis of the Austrian fundamental rights guarantee.[30]

On several occasions, the CC referred to the CJEU for preliminary rulings, including in fundamental rights issues, for instance, regarding data retention and Article 7 CFREU.[31] The

[25] See e.g. *VfSlg. 19.632/2012*; *VfSlg. 19.744/2013* (Data Protection Directive); *19.749/2013* (gambling law); *VfSlg. 19.750/2013* (ESM Treaty); *19.809/2013* (Fiscal Compact); *VfSlg. 19.865/2014*; *19.955/2015*. As regards the controversial question of the scope of the Charter in the meaning of Article 51 paragraph 1 CFREU, the CC applied the criteria of the CJEU; see *VfSlg. 19.865/2014* (with reference to CJEU, 26.2.2013, C-617/10, Åkerberg/Franson, points 19ff). See also *VfSlg. 20.000/2015*; *20.064/2016; 20.129/2016*.

[26] E.g. OGH, 20.6.2008, 1 Ob 52/08s; OGH, 28.10.2013, 8 Ob A68/13b; OGH, 16.12.2014, 10 Ob S44/14i, regarding Åkerberg; OGH, 6.5.2019, 4 Nc 11/19h; LG St. Pölten, 20.10.2000, 10 R 175/98g; OLG Wien, 1.10.2015, 34 R 101/15w; OLG Wien, 1.2.2018, 133 R 140/17m; OLG Wien, 1.3.2018, 133 R 10/18w and others. See also *Hofbauer/Binder*, The EU Charter of Fundamental Rights Seized by the National Judges – National Report Austria, in: Burgorgue-Larsen (ed.), La Charte des droits fondamentaux de l'Union européenne saisie par les juges en Europe. The Charter of Fundamental Rights as Apprehended by Judges in Europe (2017), 99, 120; *Holoubek*, Die Kooperation der Verfassungsgerichte in Europa – aktuelle Rahmenbedingungen und Perspektiven. Austrian National Report (XVIth Congress of the Conference of European Constitutional Courts 2014), 6-8.

[27] Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice, BMVRDJ-EU15116/0001-EU/2019, decree of 8 January 2019 on the status of referrals by Austrian ordinary courts as at 1 January 2019.

[28] Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice, BMVRDJ-EU15116/0001-EU/2019, decree of 8 January 2019 on the status of referrals by Austrian ordinary courts as at 1 January 2019.

[29] See above regarding section 1 Data Protection Act; see also *VfSlg. 19.673/2012*, *19.892/2014*.

[30] *VfSlg. 19.632/2012*.

[31] *VfSlg. 16.050/2000* and *19.702/2012* on data retention. For decisions on issues other than fundamental rights, see *VfSlg. 15.450/1999, 16.100/2001*.

Court asked, among others, if the principle of a higher level of protection according to Article 53 CFREU requires that rights granting a level of protection going beyond Article 8 CFREU (specifically referring to section 1 of the Data Protection Act[32]) take precedence in the assessment of actions by the member states in the implementation of Union law or in the applicability of secondary law over the limitations resulting from the CFREU.[33]

In reaction to the Charter-based ruling in which the CC claimed a privileged role in the assessment of the CFREU[34], the Supreme Court referred to the CJEU, asking whether a violation of the CFREU by an Austrian law could not be corrected simply by not applying the law, or whether the courts first had to have the Austrian law reviewed by the CC.[35] However, the CJEU did not respond directly to the CC's interpretation in respect of the principle of equivalence. It held that a national provision according to which ordinary courts have to file an application with the CC to repeal the law if they are of the opinion that it violates Article 47 CFREU instead of merely abstain from applying the law, is against Union law, if this rule prevents the courts from exercising their right or meeting their obligation to refer questions to the CJEU – but not if they are free to do so at whatever stage of the proceedings they consider appropriate.[36]

I.III. National human rights catalogues

1) Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?

Unlike other constitutions, Austrian constitutional law is not laid down in a single law, but comprises several components: Besides the Constitution (*Bundes-Verfassungsgesetz*) as the constitutional document proper, there are a number of other federal constitutional acts. Moreover, individual provisions of a federal act can be adopted as constitutional provisions and are thus being elevated to the rank of a constitutional act.[37]

The fundamental rights, which the Constitution refers to as "constitutionally guaranteed rights", are not codified in a single, compact part of federal constitutional law, but spread out over numerous sources of law.[38]

For instance, the principle of equality (Article 7 of the Constitution) and the right to a lawful judge (Article 83 paragraph 2 of the Constitution) are enshrined in the Constitution. One of the most important sources of fundamental rights in Austria is the Basic Law of 1867 on the General Rights of Nationals[39]. The Vienna State Treaty of 1955 also contains provisions on fundamental rights, for instance on the protection of linguistic minorities (Articles 6 and 7).

[32] See text reproduced in the Annex.
[33] *VfSlg. 19.702/2012* (Referral 2.4.).
[34] *Hofbauer/Binder*, The EU Charter of Fundamental Rights Seized by the National Judges – National Report Austria, in: Burgorgue-Larsen (ed.), La Charte des droits fondamentaux de l'Union européenne saisie par les juges en Europe. The Charter of Fundamental Rights as Apprehended by Judges in Europe (2017), 99, 111; *Orator*, The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action? German Law Journal 2015, 1429, 1444.
[35] Supreme Court, 17.12.2012, 9 Ob 15/12i.
[36] CJEU, 11.9.2014, C-112/13, A vs. B et al., lit 32-46 with reference to CJEU, 22.6.2010, C-188/10 and C-189/10, Melki and Abdeli. See also *Orator*, The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action? German Law Journal 2015, 1429, 1441.
[37] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), points 6f.
[38] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 677.
[39] Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and the Laender represented in the Council of the Realm, Imperial Law Gazette 142/1867 as amended in Federal Law Gazette 684/1988.

Furthermore, the ECHR and the fundamental rights guaranteed therein are directly applicable and enjoy the rank of federal constitutional law.[40]

Fundamental rights are also guaranteed by a variety of constitutional provisions outside the aforementioned sources of law, e.g. in provincial acts (*Landesgesetze*) on minority schools, in section 1 of the Data Protection Act, or in the Federal Constitutional Act on the Rights of Children.[41]

2) What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?

Precursors of fundamental rights enshrined in the law can be found in Austria from the 18th century onwards.[42] The March Revolution of 1848 marked the beginning of efforts to develop a constitution for Austria in order to guarantee fundamental rights of the citizen vis-à-vis the monarch. Several constitutional drafts elaborated between 1848 and 1849 contained more or less comprehensive catalogues of fundamental rights, which were inspired by models from other European states (such as the Belgian constitution of 1831, the Prussian constitution of 1848 and the Frankfurt St. Paul's Church Constitution of 1849).[43] However, it took until 1861 before a general representative body was created through the adoption of a new basic law, which advanced the initiatives aimed to constitutionalise a body of fundamental rights. On 27 October 1962, the Act on the Protection of Personal Freedom and the Act on the Protection of the Rights of the Home were adopted.[44]

In December 1867, after its defeat in the war against Prussia and the Compromise with Hungary, Austria ("Cisleithania", i.e. the "Austrian" half of the Austro-Hungarian Dual Monarchy) was given a new constitution, including a catalogue of fundamental rights. Although the latter did not constitute a comprehensive system, it guaranteed the classic freedoms obtained in the historic struggle with the Monarchy,[45] such as the Basic Law on the General Rights of Nationals. It was complemented, inter alia, by a Basic Law on the Institution of an Imperial Court (*Reichsgericht*)[46] which could be seized with "complaints by citizens for violations of political rights guaranteed by the constitution" and was called upon to rule on fundamental rights violations. The catalogue of fundamental rights was inspired, on the one hand, by the March Constitution of 1849 unilaterally imposed by the Emperor, and the draft elaborated by the Constitutional Committee of the Reichstag in 1849, on the other hand, which contained the most comprehensive catalogue of fundamental rights so far (*Kremsierer Entwurf*). Guidance was also taken from the fundamental rights granted in the meantime by other European constitutions. The existence of a fundamental rights catalogue was taken to be a generally recognised element of a constitutional state.[47] After the collapse of the Habsburg Monarchy, the Basic Law on the General Rights of Nationals was incorporated in the provisional constitution. Other guarantees (such as the "Habsburg Act" concerning the

[40] *Berka*, Verfassungsrecht, 7th edition (2018), point 1167; *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), points 679ff.
[41] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), points 679ff; *Berka*, Verfassungsrecht, 7th edition (2018), point 1177.
[42] *Schäffer*, § 1. Die Entwicklung der Grundrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), points 3ff.
[43] *Berka*, Verfassungsrecht, 7th edition (2019), point 1166, on models see also *Schäffer*, § 1. Die Entwicklung der Grundrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), points 15ff.
[44] *Schäffer*, § 1. Die Entwicklung der Grundrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), points 28f.
[45] *Schäffer*, § 1. Die Entwicklung der Grundrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), points 31ff.
[46] Imperial Law Gazette 143/1867.
[47] *Schäffer*, § 1. Die Entwicklung der Grundrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 34.

expulsion and the take-over of the assets of the House of Habsburg-Lorraine,[48] the "Act on the Abolition of Nobility"[49], and the incorporation of certain provisions of the Treaty of Saint-Germain[50] regarding the protection of minorities and the principle of equality) served to secure the republican order. Additionally, the CC was established and endowed with the power to repeal decisions rendered by administrative authorities if these were found to violate fundamental rights.[51] The drafters of a constitution for the newly created Republic of Austria failed to agree on a (new) catalogue of fundamental rights.[52] For this reason, the body of fundamental rights of the Monarchy was taken over in Article 149 of the 1920 Constitution and declared constitutional law. After the suspension of the constitution between 1934 and 1945, it was re-enacted in 1945.[53] Subsequent additions to the body of fundamental rights through additional constitutional acts served to transpose international obligations[54] into national law and to modernise the constitution in view of the developments observed in society.[55]

3) What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?

There have been numerous changes and additions in the field of national fundamental rights. The Basic Law of 1867 was amended twice, with telecommunications secrecy added in 1974 (Article 10a) and the freedom of art added in 1982 (Article 17a). The Federal Constitutional Act on the Protection of Personal Liberty of 1988 replaced Article 8 of the Basic Law on the Rights of Nationals and an earlier version of the act on the protection of personal liberty. Further important additions and amendments in the field of fundamental rights followed from 1955 onwards through Austria's involvement in the international development of human rights protection, i.e. in 1955 through the Vienna State Treaty and, in particular, in 1958 through Austria's accession to the ECHR and its first Additional Protocol.[56] Moreover, new constitutional provisions guaranteeing fundamental rights were adopted.[57] Finally, following the country's accession to the EU, the body of fundamental rights was enlarged to include the fundamental rights enshrined in European Union law, in particular the CFREU.

In terms of procedure, any amendment to Austrian constitutional law requires a majority of two thirds in the National Council (consensus quorum), with at least half of the members being present (quorum of those present). Moreover, the act or provision to be adopted must be explicitly designated as a "constitutional act" or a "constitutional provision".

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[48] State Law Gazette 209/1919 as amended in Federal Law Gazette I 2/2008.
[49] State Law Gazette 211/1919 as amended in Federal Law Gazette I 2/2008.
[50] State Law Gazette 303/1920.
[51] *Schäffer*, § 1. Die Entwicklung der Grundrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 48.
[52] *Berka*, Verfassungsrecht, 7th edition (2018), point 1169; for an overview of the content and models of the constitutional drafts proposed, see *Schäffer*, § 1. Die Entwicklung der Grundrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), points 49ff.
[53] *Schäffer*, § 1. Die Entwicklung der Grundrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 61.
[54] See Federal Constitutional Act on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, details under Question I.I.2.
[55] See *Schäffer*, § 1. Die Entwicklung der Grundrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 64; see, e.g. the 2000 Data Protection Act, the 1988 Federal Constitutional Act on the Protection of Personal Freedom, or additions to the requirement of equal treatment of Article 7 of the Constitution, equal treatment of men and women, and equal treatment of persons with and without disabilities.
[56] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), points 679ff; *Berka*, Verfassungsrecht, 7th edition (2018), point 1172.
[57] See above Question I.III.1.; e.g. provincial acts on minority schools, Data Protection Act, Constitutional Act on the Rights of Children. For a chronological overview of the sources of fundamental rights in effect, see *Berka*, Verfassungsrecht, 7th edition (2018), point 1177.

I.IV. The mutual relationship between different catalogues of human rights

1) Can you give examples from the case law of your court related to the use of any of the international catalogues?

As mentioned above, the provisions of the ECHR serve as a regular and direct standard of review in proceedings before the CC. The frequency of references to fundamental rights guarantees of the ECHR even tends to increase. As evidenced by the CC's case law, the Court now tends to base itself on the fundamental rights guaranteed by the ECHR even in cases in which it used to apply the equivalent fundamental rights provision of national origin.[58] This also explains the numerous references to the ECHR in Part II.

As pointed out repeatedly, under certain conditions the CC also refers to the CFREU as a standard of review.[59]

Apart from Article 47 CFREU (for details see Question 2), Article 21 CFREU is another example of the application of CFREU guarantees by the CC[60]: For instance, the CC reviewed a restriction of access to higher education for EU citizens in Austria against the standard of Article 21 CFREU. It arrived at the conclusion that the rejection of an application filed by a German national for admission to diploma studies in human medicine, after a gender-specific evaluation of an aptitude test, for reasons of non-availability of a study place within the so-called "EU quota" did not constitute a violation of Article 21 CFREU. The Court concluded that the prohibition of discrimination on grounds of sex had not been violated either. In view of an actual risk to the public health system in Austria caused by a shortage of physicians in the near future, the provisions of the University Act and the Admissions Regulation applying a quota rule to the availability of study places does not constitute a violation of the prohibition of discrimination on grounds of nationality.[61]

Besides the European catalogues of fundamental rights, international human rights catalogues play a role in the case law of the CC in accordance with the aforementioned principles.[62] In the field of asylum law, for instance, the Court frequently takes the Geneva Refugee Convention[63] and the UN Convention against Torture into account.

2) Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?

As the Austrian constitutional order comprises a large number of sources of fundamental rights, it frequently happens that one and the same guarantee is enshrined in different legal provisions. However, in the Austrian system of (constitutional) law there is no national provision stating which catalogue of human rights is to be applied if, in a particular case, guarantees from different catalogues (e.g. from the ECHR and the originally national catalogues of fundamental rights or from these and the CFREU) are relevant.

In this context, it is worth noting the so-called "Charter ruling", in which the CC elaborates in detail on the relationship between Charter provisions and the ECHR and states its opinion on when to apply which source of law.[64]

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[58] Regarding the fundamental right to freedom of assembly, to which the CC has for some years applied Article 11 ECHR instead of Article 12 Basic Law of 1867 on the General Rights of Nationals, see *VfSlg. 19.818/2013, 19.962/2015, 19.994/2015, 20.057/2016; CC, 26.6.2018, E 4261/2017*.
[59] See *VfSlg. 19.632/2012*; see also Question I.II above.
[60] *VfSlg. 19.865/2014*.
[61] *VfSlg. 19.955/2015*.
[62] See Question I.I above
[63] See e.g. CC, 26.2.2019, E 4695/2018; CC, 1.12.2018, G 308/2018; *VfSlg. 13.314/1992*.
[64] See Questions I.II.1 and I.II.3 above.

In certain areas, Article 47 CFREU grants a higher level of protection than Article 6 ECHR, for instance, in asylum proceedings which are not within the scope of Article 6 ECHR.[65] A right to an oral hearing is therefore derived from Article 47 paragraph 3 CFREU even in cases in which Article 6 ECHR is not applicable.[66] Given the broader scope of the CFREU, the CC in these cases[67] resorts to Article 47 instead of Article 6 ECHR. Violations of Article 47 paragraph 2 are often found in practice.[68] A national provision corresponding to the Charter provision does not exist.[69]

As regards Articles 7 and 8 CFREU, the CC first held in 2012 that Article 8 CFREU does not afford a higher level of protection than the national fundamental right to data protection (constitutional provision of section 1 of the Data Protection Act). Moreover, the Court stated that a review against the standard of Article 7 CFREU (as well as Article 8 ECHR) would not have led to a different result than a review based on section 1 of the Data Protection Act and Article 8 CFREU.[70] In a case relating to the 2014 Data Retention Directive, the CC[71] again explicitly took Articles 7 and 8 CFREU into consideration as a standard of review. Ultimately, however, it reviewed the challenged provisions against the corresponding national provisions, i.e. section 1 of the Data Protection Act, and Article 8 ECHR. The Court emphasised that a stricter standard than that derived from Article 8 ECHR[72] had to be applied to the proportionality of an interference with section 1 of the Data Protection Act, and that the level of protection afforded by the CFREU remains intact even in cases in which the legislator has a margin of discretion in the implementation of Union law (see Article 53 CFREU).[73]

In a case concerning the freedom to engage in work, the CC only reviewed the respective national fundamental rights provision, i.e. Article 6 of the Basic Law on the Rights of Nationals, emphasising that an assessment on the basis of Articles 15 and 16 CFREU, which grant the same scope of protection, would have led to the same result. If the scope of the rights in question is the same, decisions are usually rendered on the basis of Austrian constitutional law.[74]

The CC frequently holds that, in principle, the guarantees of the CFREU serve as a standard of review in proceedings before the CC but do not have to be specifically referred to if the content of these guarantees does not go beyond the fundamental rights guaranteed by the national provisions.[75] In some cases, the CC, arguing along these lines, even refrains from establishing if the CFREU is applicable at all.[76]

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[65] E.g. ECtHR, 5.10.2000, Maaouia vs. France, No. 39.652/98.
[66] *VfSlg. 19.632/2012*
[67] In contrast to cases of claims being raised under criminal or civil law in which Article 6 ECHR applies; see *VfSlg. 19.773/2013* (equivalence of Article 6 ECHR and Article 47 paragraph 2 CFREU regarding the right to a decision within a reasonable time); *VfSlg. 19.916/2014* ("It may therefore be left open if the respective proceedings concern an issue in which the authorities and the courts act in implementing Union law"); *VfSlg. 20.064/2016* (infringement of Article 1 of the Federal Constitutional Act on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination; reference to Article 47 paragraph 3 was therefore not required).
[68] *VfSlg. 19.632/2012*; CC, 11.6.2019, E 137/2019; CC, 9.10.2018, E 2449/2018; CC, 10.6.2016, E 2108/2015; CC, 23.2.2015, E 155/2014; CC, U 1175/12, 13.3.2013 et al.
[69] See *Kieber/Klaushofer*, The Austrian Constitutional Court Post Case-Law After the Landmark Decision on Charter of Fundamental Rights of the European Union, European Public Law 2017, 221 (228f); *Hofbauer/Binder*, The EU Charter of Fundamental Rights Seized by the National Judges – National Report Austria, in: Burgorgue-Larsen (ed.), La Charte des droits fondamentaux de l'Union européenne saisie par les juges en Europe. The Charter of Fundamental Rights as Apprehended by Judges in Europe (2017), 99, 114.
[70] *VfSlg. 19.673/2012.*
[71] In analogy to *VfSlg. 19.702/2012* and *VfSlg. 19.632/2012.*
[72] *VfSlg. 16.369/2001, 18.643/2008.*
[73] *VfSlg. 19.892/2014* (Data Retention).
[74] *VfSlg. 19.909/2014.*
[75] See e.g. on Article 7 CFREU *VfSlg. 19.673/2012*.
[76] See e.g. on Articles 15 and 16 CFREU *VfSlg. 19.749/2012.*

Furthermore, when confronted with a case concerning a fundamental right which is guaranteed by several catalogues of fundamental rights, all of them ranking as constitutional provisions, the CC pronounced specifically on individual fundamental rights to avoid conflictual situations by referring either to the level of protection or its limitations.[77] As regards the limitations to fundamental rights, the CC, in principle, ensures concordance between the guarantees of the ECHR and national fundamental rights.[78] In this context, the limitations in the field of freedom of conscience and belief deriving from the various catalogues of fundamental rights are worth noting.[79]

3) Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary.)

The Austrian legal order does not provide for a genuine procedure. However, in order to resolve conflicts of law involving at least one of the two European fundamental rights catalogues, the CC directly refers to the clauses of Article 53 ECHR and Article 53 CFREU regarding the minimum level of protection ("*Günstigkeitsklauseln*").

[77] See on the right to own property (*VfSlg. 12.227/1989*; ECHR and Basic Law of 1867 on the General Rights of Nationals); on the freedom of assembly (*VfSlg. 19.818/2013*, *19.962/2015*, *19.994/2015*, *20.057/2016*, CC, 26.6.2018, E 4261/2017; ECHR and Basic Law of 1867 on the General Rights of Nationals); on the freedom of religion (see Question II.IV below; ECHR and originally national fundamental rights guarantees); on extensions of protection regarding the principle of equality and the freedom to engage in work to EU citizens (*VfSlg. 19.077/2010*, *19.568/2011*; Basic Law of 1867 on the General Rights of Nationals and TFEU); on judicial guarantees (*VfSlg. 19.632/2012*; ECHR and CFREU).

[78] See Question I.IV.3 below.

[79] See Question II.IV.2 below.

II. SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

Preliminary remark:

As a matter of principle, the CC widely recognises the case law of the ECtHR.[80] The Court regularly refers to and explicitly cites the case law of the ECtHR and, in the majority of cases, follows its conclusions.[81] This is attributable to the fact that the ECHR ranks as constitutional law in Austria.[82] The CC has to interpret and apply the guarantees of the ECHR as a standard of review in the same wording as the ECtHR.[83] In some of its decisions, the CC performs what one could even call an exegesis of the Strasbourg case law,[84] taking the result and the line of reasoning of the ECtHR decisions into account.[85] In so doing, it emphasises the imperative of interpreting national law in conformity with the Convention and the case law of the ECtHR.[86] The CC follows the case law of the ECtHR in the large majority of cases, provided the underlying facts are comparable.[87] It is certainly true that, over the years, the ECHR has become the most important catalogue of fundamental rights in Austria.

In the following, the respective provisions of the ECHR will not be reproduced, nor will the restrictions of the respective fundamental rights be presented, unless they are of special interest. In view of the huge number of decisions dealing with the ECHR, only a few examples can be mentioned.

II.I. Right to life

1) What is the original wording of the provision protecting this right in your national catalogue?

Austrian constitutional law does not comprise a genuinely "national" provision enshrining the right to life. The constitutional protection of the right to life is therefore characterised, in particular, by its "internationalisation" and "Europeanisation". The right to life is referred to

[80] *Gamper*, Chapter 4 - Austria: Endorsing the Convention System, Endorsing the Constitution, in: Popelier/Lambrecht/Lemmens (eds.), Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level (2016), 75, 102; *Grabenwarter*, § 102. Der österreichische Verfassungsgerichtshof, in: von Bogdandy/Huber (eds.), Handbuch Ius Publicum Europaeum (2016), point 123; *Grabenwarter*, § 2. Verfassungsrecht, Völkerrecht und Unionsrecht als Grundrechtsquellen, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, VII/1, Österreich, 2nd edition (2014), point 48; see as an example CC, 28.6.2012, G 114/11, *VfSlg. 19.653/2012*.

[81] See *Gamper*, Chapter 4 - Austria: Endorsing the Convention System, Endorsing the Constitution, in: Popelier/Lambrecht/Lemmens (eds.), Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level (2016), 75, 90, 94ff; *Grabenwarter*, § 102 Der österreichische Verfassungsgerichtshof, in: von Bogdandy/Huber (eds.), Handbuch Ius Publicum Europaeum (2016), points 123f; *Weh*, Der Anwendungsbereich des Art. 6 EMRK / Das Ende des „cautious approach" und seine Auswirkungen in den Konventionsstaaten, EuGRZ 1988, 433, 437.

[82] See above under Question I.I.; Bundesverfassungsgesetz zur Abänderung und Ergänzung von Bestimmungen des Bundes-Verfassungsgesetzes in der Fassung von 1929 über Staatsverträge, 6.4.1964, Federal Law Gazette 59/1964, Art II No 7.

[83] CC, 14.10.1965, G 6/65, *VfSlg. 5102/1965*; see on the Charter of Fundamental Rights of the European Union as a standard of review of the Austrian CC *VfSlg. 19.632/2012*.

[84] See *Grabenwarter*, Zur Bedeutung der Entscheidungen des EGMR in der Praxis des VfGH, RZ 2007, 154, 158.

[85] See for example ECtHR, 24.11.1993, Informationsverein Lentia et al. vs. Austria, No. 13.914/88 and CC, 5.3.1996, B 2674/94, *VfSlg. 14.453/1996*; ECtHR, 24.7.2003, Karner vs. Austria, No. 40.016/98 and CC, 10.10.2005, G 87/05 et al., V 65/05 et al., B 47/05 et al., *VfSlg. 17.659-17.680/2005*; recently CC, 13.12.2016, G 494/2015, *VfSlg. 20.129/2016*; *Grabenwarter*, Zur Bedeutung der Entscheidungen des EGMR in der Praxis des VfGH, RZ 2007, 154, 158.

[86] CC, 12.12.1985, G 225/85 et al., *VfSlg. 10.737/1985*; CC, 30.11.2004, B 127/03, *VfSlg. 17.373/2004*; CC, 25.9.2010, G58/10 et al., *VfSlg. 19.166/2010*.

[87] *Grabenwarter*, Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes, JRP 2012, 298, 299.

in various sources of law. Explicit references can be found in two provisions of international law, i.e. Article 2 ECHR and Article 63 paragraph 1 of the Treaty of Saint-Germain[88].[89]

Pursuant to Article 63 paragraph 1 of the Treaty of Saint-Germain, Austria undertakes "to assure full and complete protection of life and liberty to all inhabitants of Austria without distinction of birth, nationality, language, race or religion." As implied by the wording and the systematic position in Section V of the Treaty, which regulates the protection of minorities, the provision is intended as a specific *prohibition of discrimination*, while the duty to protect the lives of all inhabitants of Austria remains of a general nature.[90]

In the 1970s, the CC pronounced a judgment in which it referred to both Article 63 paragraph 1 of the Treaty of Saint-Germain and Article 2 ECHR as a standard of review, thus implicitly stating that the latter provision does not supersede the former. More recent case law and legal doctrine is based primarily on Article 2 ECHR.

Finally, the abolition of death penalty is laid down in Article 85 of the Constitution ("Capital punishment is abolished.") and in the 6th and 13th Additional Protocols to the ECHR, while Article 2 ECHR does not yet rule out capital punishment.

2) Is it possible to restrict the right? If so, how and under what conditions?

Article 63 paragraph 1 of the Treaty of Saint-Germain does not contain an explicit constitutional requirement of the specific enactment of a statute but imposes an absolute prohibition of discrimination: On account of the linkage of forbidden grounds of differentiation with concrete objects of protection and the guarantee of "full and complete" protection, differentiation on the basis of the aforementioned grounds – as well as other criteria, such as sex – is not allowed.[91]

On the basis of Article 85 of the Constitution in conjunction with Article 2 ECHR as well as the 6th and 13th Additional Protocols to the ECHR, Austria guarantees the absolute and unrestrictable right of every human being not to be sentenced to death or executed. This also comprises the prohibition of extradition or deportation of aliens if they are exposed to a threat of capital punishment in the receiving state.[92]

3) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The CC regularly deals with the issue of the right to life. Article 2 EHRC is invoked especially in connection with complaints relating to asylum law and the lawfulness of deportations.[93] Moreover, the CC considered Article 2 ECHR in cases of people losing their

[88] State Law Gazette 303/1920 as amended in Federal Law Gazette III 179/2002.
[89] *Kneihs*, § 9. Schutz von Leib und Leben, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 1; *Kopetzki*, Der Abbruch der künstlichen Ernährung beim Wachkomapatienten, in: *Kröll/Schaupp* (eds.), Eluana Englaro – Wachkoma und Behandlungsabbruch (2010), 77.
[90] *Kneihs*, § 9. Schutz von Leib und Leben, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 3 with further references.
[91] *Kneihs*, § 9. Schutz von Leib und Leben, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 4.
[92] *VfSlg. 13.981/1994*, *13.995/1994*, see also *Berka*, Verfassungsrecht, 7th edition (2018), point 1336.
[93] See e.g. *VfSlg. 18.436/2008; VfSlg. 19.140/2010; 19.215/2010* (repeal of the factual protection against deportation); *19.274/2010* (review for refoulement not based on current facts is arbitrary); *19.752/2013*.

lives in police detention[94] or through the use of firearms by the police[95], as well as in the context of questions arising over legally permitted termination of pregnancy.[96]

Nevertheless, the protection of unborn life remains a controversial issue. While the ECHR leaves the question open or to the member states' discretion,[97] the CC in the 1970s took the position that Article 2 ECHR does not refer to unborn life and therefore does not conflict with the so-called "three months rule", i.e. the impunity of abortion within the first three months of pregnancy pursuant to section 97 paragraph 1 point 1 of the Code of Criminal Law. According to the Court's case law, all human beings are subjects of fundamental rights from birth to death. In terms of constitutional law, the protection of embryos is of no specific importance.[98] In its decision on the "three months rule", the CC held that there is no reason to assume that the term "inhabitant" in Article 63 paragraph 1 of the Treaty of Saint-Germain was meant to refer not only to human beings already born. The Court further stressed that the term is also used in Article 63 paragraph 2, where it refers, without any doubt, only to human being already born.[99]

The CC derives the absolute right of every human being not to be sentenced to death or executed from Article 85 of the Constitution in conjunction with Article 2 ECHR and the 6th and 13th Additional Protocols to the ECHR. This includes a prohibition of refoulement and forbids extraditions and deportations if a person is exposed to a threat of capital punishment in the receiving state.[100] If a court fails to seriously consider an appeal stating that the person concerned is exposed to the risk of capital punishment in the receiving state, it commits a serious procedural error and the judgment violates Article 2 ECHR. This also applies if the judgment is derived from a legal basis or an interpretation of the law in conflict with Article 2 ECHR.[101]

The right to life not only forbids killing by law enforcement authorities – be it within the framework of police actions, through neglect of a person under state supervision, or through euthanasia practiced by the state – and obliges the legislator to impose sanctions but also includes positive obligations. On the one hand, violations of the right to life can occur through intentional or unintentional killing by law enforcement authorities.[102] On the other hand, according to the case law of the CC based on the case law of the ECHR[103], the right to life can also be interfered with through omission – for instance, if under certain circumstances a person at risk of being killed by a third party is not sufficiently protected by the police[104] or if a detainee dies for lack of medical care.[105]

A "right to die" cannot be derived from Article 2 ECHR. Therefore, according to the case law of the CC, no one can claim impunity for having assisted another person to die.[106] Through

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[94] *VfSlg. 16.638/2002*.
[95] *VfSlg. 15.046/1997, 17.046/2003, 17.257/2004*.
[96] *VfSlg. 7400/1974*.
[97] ECtHR, 10.4.2007, Evans vs. United Kingdom, No. 6339/05; ECtHR, 16.12.2010 (GC), A, B and C vs. Ireland, No. 25.579/05.
[98] *VfSlg. 7400/1974*.
[99] *VfSlg. 7400/1974*.
[100] See e.g. *VfSlg. 13.981/1994, 13.995/1994*.
[101] *VfSlg. 13.981/1994; VfGH, 25.6.2014, U 433/2013*.
[102] *VfSlg. 15.046/1997, 17.046/2003, 17.257/2004*.
[103] ECtHR, 28.10.1998 (GC), Osman vs. United Kingdom, No. 23.452/94, point 115; ECtHR, 14.9.2010, Dink vs. Turkey, No. 2668/07 et al., point 64.
[104] *VfSlg. 19.708/2012* (failure by police to protect a refugee in life-threatening situation).
[105] *VfSlg. 16.638/2002*.
[106] *VfSlg. 20.057/2016* (prohibition of an association for assisted dying). See also *Berka*, Verfassungsrecht, 7th edition (2018), point 1345. See also ECtHR, 29.4.2002, Pretty vs. United Kingdom, No. 2346/02 (It is primarily up to the state to assess the risk of abuse in the event of a relaxation of the prohibition of assisted suicide or the admission of exemptions).

the prohibition enacted in section 78 in the Code of Criminal Law (assisted suicide), the legislator neither exceeded its margin of discretion[107], nor did it violate another fundamental right (e.g. the right to respect for private life).[108]

4) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

As already pointed out, the CC takes guidance from the case law of the ECtHR, including in questions relating to the right of life. The CC's decisions on the right to life therefore do not differ significantly from those of the international courts. In numerous decisions, the CC refers, in particular, to the case law of the ECtHR and follows its rulings.

As regards the protection of unborn life, this question is of no special importance in terms of constitutional law, as pointed out by the CC. As mentioned above, the ECtHR leaves the question open or to the member states' discretion.[109] The situation is similar with regard to assisted dying or assisted suicide: While the ECtHR leaves the matter to the member states' discretion, the CC holds that, from the viewpoint of constitutional law, assisting a person to die can be punished, as there is no right to die.[110]

II.II. Freedom of expression

1) What is the original wording of the provision protecting this right in your national catalogue?

The oldest constitutional guarantee of the freedom of expression in the Austrian Constitution dates from 1867 and is contained in Article 13 of the Basic Law on the Rights of Nationals (reproduced in the Annex). When the Republic of Austria was established as a constitutional state, the Provisional National Assembly introduced an absolute prohibition of pre-publication censorship in 1918 (original text reproduced in the Annex). From today's perspective, Article 10 ECHR is the most important source of law guaranteeing the freedom of expression – both generally speaking and for the case law of the CC.

2) Is it possible to restrict the right? If so, how and under what conditions?

The freedom of expression is not unlimited. Constitutional law allows restrictions to be imposed under certain conditions. The restrictions of this fundamental right are derived from a combined assessment of Article 13 of the Basic Law on the Rights of Nationals and Article 10 ECHR as well as the Resolution adopted by the Provisional National Assembly in 1918.[111] Any interference with the freedom of expression can only be justified if it meets the constitutional requirement of the specific enactment of a statute of Article 13 of the Basic Law on the Rights of Nationals[112] and the requirements of Article 10, paragraph 2 ECHR as well as the absolute restrictions of interference contained in the Resolution of the Provisional National Assembly and Article 13 of the Basic Law on the Rights of Nationals[113]. This means

[107] So-called "*rechtspolitischer Gestaltungsspielraum des Gesetzgebers*".
[108] *VfSlg. 20.057/2016*.
[109] ECtHR, 10.4.2007, Evans vs. United Kingdom, No. 6339/05; ECtHR 16.12.2010 (GC), A, B and C, No. 25.579/05; *VfSlg. 7400/1974.*
[110] *VfSlg. 20.057/2016*; ECtHR, 29.4.2002, Pretty vs. United Kingdom, No. 2346/02.
[111] Resolution adopted by the Provisional National Assembly on 30 October 1918, State Law Gazette 3/1918 as amended in Federal Law Gazette 1/1920.
[112] See also *VfSlg. 1332/1930* (In the past, the CC used to interpret this reservation of interference formally: The legislator was thus in a position to restrict the freedom of expression through any law).
[113] Guided by the case law of the ECtHR, the vision of practical and effective protection of fundamental rights as well as an increasing number of references to Article 10 ECHR – instead of or at least in addition to Article 13 of the Basic Law of 1867 on the General Rights of Nationals – the CC now upholds the applicability of a substantive reservation of interference.

that any interference must be prescribed by law, it must not violate an absolute prohibition of interference, it must pursue one of the legitimate aims set out in Article 10 paragraph 2 ECHR, and it must be necessary "in a democratic society" for the achievement of the aim or aims in question.[114] Moreover, an absolute prohibition of pre-publication censorship of all forms of communication applies pursuant to Article 13 of the Basic Law on the Rights of Nationals and points 1 and 2 of the Resolution of the Provisional National Assembly,[115] which is strictly interpreted by the CC.[116] According to these provisions all preventive forms of censorship by the state prior to a medium's publication are absolutely forbidden,[117] regardless of their objective[118]. Moreover, Article 13 of the Basic Law on the Rights of Nationals contains a prohibition of a licensing system; it also states that administrative postal vetoes do not apply to inland publication. For reasons of Article 53 ECHR, the fact that Article 10 ECHR does not absolutely forbid preventive measures (censorship) but only subjects them to a strict requirement of justification[119] must not lead to a dilution of the prohibition of censorship in the Austrian constitutional order;[120] regardless of Article 10 ECHR, the ban on censorship is absolute.

As the CC's more recent case law shows, Article 10 ECHR has largely replaced the guarantee of Article 13 of the Basic Law on the Rights of Nationals and therefore the requirements of Article 10 paragraph 2 ECHR are applied; what remains of importance, though, are the absolute prohibitions of Article 13 of the Basic Law on the Rights of Nationals and points 1 and 2 of the Resolution of the Provisional National Assembly (mainly the prohibition of censorship).[121] In particular, any interference with the freedom of expression must be proportionate to the legitimate aim pursued.[122] The effective guarantee of the freedom of expression requires that any law restricting that freedom be interpreted in light of the fundamental right, i.e. in conformity with constitutional law. Public authorities and the courts are therefore obliged to strike a fair balance between the rights involved, taking into account the special importance and function of the freedom of expression in a democratic society[123] and the specific circumstances prevailing in a given situation.[124]

3) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The CC's case law on the interpretation and application of the fundamental right of freedom of expression should be seen against the background of the national system of legal protection. According to the Austrian constitutional order, constitutional jurisdiction, ordinary jurisdiction and administrative jurisdiction are equal in rank. As a matter of principle, decisions by civil and criminal courts cannot be challenged before the CC. Court decisions are reviewed for their compatibility with guarantees of fundamental rights exclusively by the

[114] *VfSlg. 11.996/1989, 13.694/1994.*
[115] *VfSlg. 32/1919.*
[116] *VfSlg. 2362/1952.*
[117] *VfSlg. 6615/1971,* see also *VfSlg. 1829/1949.*
[118] *VfSlg. 8461/1978, 12.394/1990.*
[119] ECtHR, 18.12.2012, Yildirim vs. Turkey, No. 3111/10.
[120] *Holoubek*, § 15. Kommunikationsfreiheit, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 1.
[121] See *Holoubek*, § 15. Kommunikationsfreiheit, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 25 footnote 76; on reservations regarding freedoms of communication and their development in Austrian fundamental rights protection see *Grabenwarter*, Verhältnismäßig einheitlich: Die Gesetzesvorbehalte des StGG 1867 im Wandel, JBl 2018, 417, 420f.
[122] *VfSlg. 11.996/1989, 13.035/1992, 13.122/1992*; see *Berka*, Verfassungsrecht, 7th edition (2018), point 1465.
[123] *VfSlg. 11.996/1989*.
[124] *VfSlg. 10.700/1985*; see also *VfSlg. 13.612/1993, 19.742/2013*.

ordinary courts within the framework of and by means of civil and/or criminal proceedings.[125] The Austrian constitutional order does not provide for complaints to be filed before the Constitutional Court against judgments rendered by ordinary courts („*Urteilsverfassungsbeschwerde*"). Litigation between private parties for defamation or insult in accordance with the provisions of civil law or sentences for defamation by criminal courts, i.e. issues concerning the relationship between personal rights and the right to free expression of opinion, are decided by the ordinary courts, which apply and interpret the fundamental right within this framework and by the means available to them. The extensive case law of the ECtHR on this issue is therefore referred to and largely taken into account by the ordinary courts and, in particular, by the Supreme Court as the highest judicial body called upon to weigh the interests at stake in the individual case. The CC is seized with questions relating to the protection of personal rights only in those special situations in which the Austrian (constitutional) legislator assigns the enforcement of provisions in connection with the protection of personal rights to administrative authorities[126] or the constitutionality of a law is to be reviewed in this context.[127]

Despite this specific feature of the Austrian Constitution and the resulting lower number of rulings on the fundamental right of freedom of expression, as compared to other constitutional courts, the CC regularly deals with this guarantee.

In the CC's opinion, the freedom of expression, press[128] as well as broadcasting[129] and the freedom of information[130] are guaranteed. In conformity with the case law of the ECtHR, the CC attributes a public duty of particular importance to the press, which must always be taken into account when restrictions are imposed by government measures.[131] According to the case law of the CC, the freedom of expression guarantees the expression of value judgments and statements of facts.[132] This includes disagreeable statements that offend, shock or disturb the the State or any sector of the population.[133] The CC also includes commercial advertising[134] and begging[135] in the scope of protection afforded by the freedom of expression. Any form of dissemination is guaranteed.[136]

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[125] *Grabenwarter*, § 102 Der österreichische Verfassungsgerichtshof, in: von Bogdandy/Huber (eds.), Handbuch Ius Publicum Europaeum (2016), point 104.

[126] E.g. in codes of professional conduct for lawyers (*VfSlg. 17.565/2004; VfGH, 27.2.2012*, B 1103/11) or physicians (*VfSlg. 13.554/1993, 18.763/2009*) and in broadcasting supervision by administrative authorities (*VfSlg. 15.426/2004*). Applicability of the 1947 National Socialism Prohibition Act (State Law Gazette 13/1945 as amended in Federal Law Gazette 148/1992), which contains a prohibition of acts in the spirit of National Socialism and restrictions of the freedom of expression in the form of a constitutional provision, thus ranking on the same level as the guarantee of freedom of expression, is also decided by ordinary courts. The CC holds that the provisions of the National Socialism Prohibition Act do not constitute an overall amendment to the Austrian Constitution, neither with a view to the principles of democracy nor in terms of the constitutional core of the freedom of expression (*VfSlg. 10.705/1985*), although the constitutional rank of the provisions means that they are not to be reviewed against the principle of proportionality according to Article 10 paragraph 2 ECHR, as the constitutional legislator has already decided on their justification by granting them constitutional rank (*Grabenwarter*, "Hate Speech" – verfassungsrechtliche und völkerrechtliche Aspekte, in: Klob/Grafl/Reindl-Krauskopf (eds.), Meinungsfreiheit und Strafrecht – Das wird man wohl noch sagen dürfen! (2018), 67, 74ff.

[127] These are rare instances, as issues relating to the protection of personal rights usually concern individual cases (and errors in application) and the legal basis for sanctions usually does not give rise to constitutional controversies.

[128] See *VfSlg. 6615/1971, 9662/1983, 11.297/1987, 13.577/1993, 13.725/1994*.

[129] *VfSlg. 9909/1983, 10.948/1986*.

[130] *VfSlg. 11.297/1987, 13.577/1993, 12.104/1989, 15.575/1999*.

[131] *VfSlg. 13.577/1993, 13.725/1994*; on ECtHR case law, see e.g. ECtHR, 26.11.1991, Observer and Guardian vs. United Kingdom, No. 13.585/88; ECtHR, 8.7.1986, Lingens vs. Austria, No. 9815/82, point 44.

[132] Consistent CC case law since *VfSlg. 10.393/1985, 12.886/1991, 13.554/1993, 17.820/2006*.

[133] *VfSlg. 10.700/1985, 12.086/1989, 13.694/1994, 15.068/1998, 18.893/2009*.

[134] *VfSlg. 10.948/1986, 19.091/2010, 19.662/2012*.

[135] *VfSlg. 19.662/2012*.

[136] *VfSlg. 1207/1929* (wearing of a uniform), *10.948/1986, 11.651/1988* (flyers), *12.501/1990, 13.127/1992* (posters), *15.533/1999*; CC, 18.6.2019, E 5004/2018 (banners).

In determining if the freedom of expression has been violated, the decisive factor is proportionality of an interference, which is to be established by weighing the conflicting interests against one another. In considering the fundamental right of freedom of expression, the CC holds that the assessment of a challenged statement needs to view its meaning in context and take potential polemics and exaggerations into account.[137] According to the CC, a statement must not be presented as unconstitutional merely through its interpretation.[138] Consequently, the CC consistently regards absolute advertising bans as disproportionate,[139] without necessarily qualifying all other advertising restrictions as such.[140] It considers restrictions of this type to be more widely acceptable in rules of professional conduct than in other areas,[141] although, here too, a prohibition of factual information was ruled to be disproportionate.[142] The prohibition of intrusive advertising messages (unsolicited phone calls) is not in violation of Article 10 ECHR.[143] Restrictions on dissemination, such as limitations of the freedom to put up posters in the public space for advertising purposes, may be proportionate and therefore justified in individual cases for reasons of aesthetics, nature conservation and environmental protection, if public interest prevails.[144] As regards the prohibition of begging, the CC differentiates between aggressive begging and silent begging;[145] it regularly rules that a ban on the latter is disproportionate if begging does not impair the use of public space in a way deemed to be a public nuisance.[146] Measures serving to ensure the functioning of publishing competition are justified in light of Article 10 paragraph 2 ECHR, even if they result in lasting restrictions for individual media enterprises.[147]

For a statement to be qualified as a punishable disciplinary offence, the CC demands that the superior importance of the freedom of expression be taken into account.[148] This also applies to criticism directed against public authorities and the judicial system.[149] Factual criticism, even if worded in exaggerated terms, is protected,[150] whereas constitutional law allows offensive and disparaging statements to be sanctioned.[151] Restrictions imposed on statements by civil servants are allowed by constitutional law if such statements undermine the general public's trust in the performance of civil service tasks.[152]

If, regardless of the distribution of powers within the Austrian judiciary described above, the CC has to pronounce on a conflict between personal rights and the freedom of expression, criticism of politicians is, in principle, more widely allowed than criticism of private individuals.[153] However, in the CC's case law there are numerous examples of a stronger emphasis on the protection of personal rights than the freedom of expression, for instance in connection with the presumption of innocence in media reporting.[154] As regards the freedom of information, the CC has held so far that an obligation of the state to guarantee access to

[137] *VfSlg. 11.996/2009, 18.893/2009*; see also CC, 18.6.2019, E 5004/2018.
[138] *VfSlg. 13.694/1994*.
[139] *VfSlg. 15.291/1998, 18.652/2008, 19.159/2010*.
[140] *VfSlg. 13.635/1993, 15.481/1999, 18.559/2008, 16.296/2001*.
[141] *VfSlg. 12.467/1990, 12.886, 12.942/1991* (lawyers), *13.554/1993* (physicians), *16.296/2001, 18.763/2009, 18.290/2007*.
[142] *VfSlg. 13.128/1992, 13.554/1993, 13.675/1994, 20.095/2016*; CC, 11.12.2018, V 19/2018.
[143] *VfSlg. 16.688/2002*.
[144] *VfSlg. 6999/1973, 8019/1977, 9591/1982, 11.733/1988, 16.330/2001, 17.943/2006, 18.652/2008, 19.676/2012*.
[145] *VfSlg. 19.662/2012*.
[146] *VfSlg. 20.157/2017, 20.184/2017*.
[147] *VfSlg. 13.725/1994*.
[148] *VfSlg. 11.996/1989, 13.612/1993, 14.037/1995, 17.852/2006*.
[149] *VfSlg. 16.267/2001, 18.327/2007*.
[150] *VfSlg. 13.122/1992, 13.694/1994, 14.006/1995, 19.459/2011*.
[151] *VfSlg. 15.905/2000, 16.792/2003, 18.001/2006, 19.459/2011*.
[152] *VfSlg. 13.978/1994*; see also *VfSlg. 14.316/1995, 18.405/2008*.
[153] *VfSlg. 12.086/1989*.
[154] *VfSlg. 14.260/1995*.

information or to provide such information itself cannot be derived from Article 10 ECHR,[155] but that the guarantee of this fundamental right forbids the state to prevent persons from obtaining information.[156] Rules aimed to monitor and check the extent of media concentration can be interpreted as examples of measures serving the fulfilment of positive obligations deriving from Article 10 ECHR.[157]

The fundamental right to freedom of expression can also play a role within the framework of parliamentary committees of enquiry. Pursuant to Article 138b paragraph 1 point 7 of the Constitution, a person questioned by members of the committee of enquiry can invoke a violation of personal rights before the CC. In that case, a balance has to be struck between the protection afforded by Article 10 and Article 8 ECHR against the background of the investigative function of the committee of enquiry and the subject matter to be investigated in a specific case.[158]

In connection with the freedom of broadcasting it should be emphasised that the CC, on the basis of specific provisions of the Austrian Constitution, holds that individual and institutional guarantees as well as public-service and private broadcasting exist side by side. According to a constitutional provision, broadcasting is declared to be a public duty and subject to a legal licensing system.[159] Against this background and in view of the provision of Article 10 paragraph 1 third sentence ECHR, the CC holds that broadcasting is only permitted on the basis of a provision of federal law.[160] A licensing procedure is also permissible for private broadcasters, provided it is decided on the basis of factual, non-arbitrary and non-discriminatory criteria. The approval criteria can be of a technical nature, but the quality and balance of the programme may also be taken into consideration.[161] Advertising restrictions for public-service broadcasters provided for by the legislator in the rules governing broadcasting can be justified if they serve to ensure the viability of private broadcasters.[162]

Public-service broadcasters can also invoke the guarantee of freedom of expression.[163] In this context, for instance, the CC decided that a rule forbidding a public-service broadcaster to set up links to and cooperate with social networks, except in connection with its own current online news reporting, is unconstitutional, as it constitutes a disproportionate interference with the freedom of expression in public-service broadcasting.[164] The fact that the public-service broadcaster was forbidden to provide permanent fora within the framework of certain online offers was also pronounced by the CC to violate the freedom of expression in public-service broadcasting.[165] At the same time, the fact that the public-service broadcaster was not allowed to provide its (own) social network was ruled to be justified with a view to the objective of protection of private competitors in the broadcasting market.[166] According to the CC, the restriction of exclusive rights of private broadcasters through the Austrian Broadcasting

[155] *VfSlg. 11.297/1987, 12.104/1989, 19.571/2011*.
[156] *VfSlg. 13.577/1993*.
[157] *Grabenwarter/Holoubek*, Verfassungsrecht. Allgemeines Verwaltungsrecht, 3rd edition (2016), point 543; *Holoubek*, § 15. Kommunikationsfreiheit, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), points 58ff; see *VfSlg. 13.725/1994*.
[158] *VfSlg. 20.015/2015*; CC, 8.10.2015, UA 8/2015.
[159] Federal Constitutional Act of 10 July 1947 on Guaranteeing the Independence of Broadcasting, Federal Law Gazette 396/1974.
[160] *VfSlg. 13.681/1992*.
[161] *VfSlg. 16.143/2001, 16.911/2003*.
[162] *VfSlg. 16.911/2003, 17.006/2003, 18.017/2006*.
[163] *VfSlg. 19.768/2013, 19.854/2014*.
[164] *VfSlg. 19.768/2013*.
[165] *VfSlg. 19.854/2014*.
[166] *VfSlg. 19.768/2013*.

Corporation's (ORF) right to broadcast short news programmes is in conformity with the Constitution if there is a general public interest in such programmes.[167]

4) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

As mentioned above and in accordance with the principles described, the CC takes guidance from the jurisprudence of the ECtHR, especially in the field of freedom of expression, its case law being characterised by a large degree of loyalty to the rulings of the Strasbourg court.[168]

II.III. Right to privacy/right to respect for private life/right to family life

1) What is the original wording of the provision protecting this right in your national catalogue?

Austrian constitutional law protects a person's privacy only from certain acts of interference (inviolability of the home, postal and telecommunications secrecy)[169]; the relevant legal provisions are reproduced in the Annex. From today's perspective, Article 8 ECHR is the most important source of law in respect of the protection of private and family life; the Court's case law in this field is the most extensive (see Question 3).

The fundamental right to data protection is enshrined in section 1 of the Data Protection Act (reproduced in the Annex) and provides for secrecy of personal data as far as such protection is justified. This fundamental right aims to protect a person's privacy, especially with a view to the potential danger resulting from the possibilities of electronic data processing.[170]

2) Is it possible to restrict the right? If so, how and under what conditions?

In general, any interference with a person's private and family life has to meet the requirements of Article 8 paragraph 2 ECHR. If a case qualifies for protection under Article 8 and one of the aforementioned (more specific) national fundamental rights, the restrictions of both guarantees are to be applied cumulatively. The Act on the Protection of the Home[171] only refers to house searches and is regarded as *lex specialis* to Article 8 ECHR.[172] Pursuant to section 1 of the Act on the Protection of the Home, house searches are constitutional only if they meet the conditions outlined in that act. As a matter of principle, a reasoned court order is required (*Richtervorbehalt*). However, there are exceptions, for instance in the case of house searches for the enforcement of criminal law, in the event of imminent danger, and for the purpose of police surveillance.[173] A breach of postal secrecy pursuant to Article 10 of the Basic Law on the Rights of Nationals, i.e. the seizure and opening of letters, is allowed only in the event of a lawful arrest or house search, in the event of war, or on the basis of a court order based on existing legislation. The mere opening of letters can also be provided for by law in other cases, with conditions deriving exclusively from Article 8 paragraph 2 ECHR.[174] Interferences with telecommunications secrecy pursuant to Article 10a of the Basic Law on

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[167] *VfSlg. 18.018/2006*.
[168] See, in general, *Gamper*, Chapter 4 - Austria: Endorsing the Convention System, Endorsing the Constitution, in: Popelier/Lambrecht/Lemmens (eds.), Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level (2016), 75, 102; *Grabenwarter*, § 102 Der österreichische Verfassungsgerichtshof, in: von Bogdandy/Huber (eds.), Handbuch Ius Publicum Europaeum (2016), point 123.
[169] *Berka*, Verfassungsrecht, 7th edition (2018), point 1390.
[170] *Berka*, Verfassungsrecht, 7th edition (2018), point 1390.
[171] Act on the Protection of the Home of 27 October 1862.
[172] *Berka*, Verfassungsrecht, 7th edition (2018), point 1421; *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 864.
[173] See section 2f Act on the Protection of the Home; see also *Berka*, Verfassungsrecht, 7th edition (2018), points 1416ff.
[174] *Berka*, Verfassungsrecht, 7th edition (2018), points 425ff.

the Rights of Nationals, which protects the secrecy of communication disseminated via telecommunication networks, also require a court order in accordance with the law.[175]

3) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The CC regularly deals with the right to respect for private and family life. Given the broad scope of Article 8 ECHR, the CC's case law on this provision is extensive.

As a person's identity and/or name is protected as a component of private life, denying the request for a change of name may, according to the CC's case law, be in violation of Article 8 ECHR.[176] The deletion of the particle "von" in a name as indicator of nobility was recently ruled by the CC to be proportionate, as it creates the impression of a noble descent and the related privileges of birth and/or class.[177] Denying the request for a correction of the birth register by a transsexual person not having undergone sex reassignment surgery may constitute an interference.[178] Most recently, the CC recognised the right of persons with variations in sex characteristics other than male or female to have an individual gender identity ("third gender") or no gender entered in the civil register, which in turn entails the right not to declare one's gender.[179] Medically assisted procreation is also guaranteed by Article 8 ECHR.

In an earlier decision, a general prohibition of egg and sperm donation was ruled to be admissible, as national legislators have a wider margin of appreciation according to the case law of the ECtHR, in particular if "complex scientific, ethical and societal problems" are addressed and the question concerns new medical procedures with ethical and moral implications on which the member states have not yet arrived at a uniform consensus.[180] However, the CC later declared the prohibition of medically assisted procreation by means of sperm donation for women in same-sex partnerships to be unconstitutional; it ruled that the prohibition constituted a disproportionate interference with their rights regarding the wish for children and its fulfilment by means of the methods of reproductive medicine (Article 14 in conjunction with Article 8 ECHR).[181]

As regards the collection of personal data for the purposes of criminal investigations (DNA data), the CC held this to be unconstitutional in the case of minor offenses; moreover, the person concerned has a right to deletion of the data as soon as their storage is no longer necessary.[182] In accordance with ECtHR's case law, the CC emphasised that surveillance measures may be allowed even without a court order;[183] this also applies to the collection of technical communication data that do not permit any conclusions regarding the content of the

[175] *Berka*, Verfassungsrecht, 7th edition (2018), point 1428. Additionally, the restrictions of Article 8 paragraph 2 ECHR have to be considered. As the protection afforded by Article 8 ECHR goes beyond Article 10a Basic Law of 1867 on the General Rights of Nationals (also in relation to its Article 10), there are circumstances in which the restrictions of Article 8 ECHR apply exclusively.
[176] *VfSlg. 20.100/2016*.
[177] *VfSlg. 20.234/2018*.
[178] *VfSlg. 18.929/2009* from the viewpoint of arbitrariness.
[179] *VfSlg. 20.258/2018* (and *VfSlg. 20.266/2018*; underlying case).
[180] *VfSlg. 15.632/1999*; ECtHR 23.4.1997, X, Y and Z vs. United Kingdom, No. 75/1995/581/667.
[181] *VfSlg. 19.824/2013*; ECtHR 3.11.2011, S H et al. vs. Austria, No. 57.813/00, point 82, points 94ff (international trend towards admissibility of egg and sperm donation; thorough examination of arguments in favour of a particular legal provision). In 2012 the ECtHR ruled that a general prohibition of pre-implantation diagnostics is going too far, see ECtHR, 28.8.2012, Costa and Pavan vs. Italy, No. 54.270/10.
[182] *VfSlg. 18.963/2009, 19.659/2012, 19.738/2013* (no sufficient differentiation between different types of offences).
[183] ECtHR 10.2.2009, Iordachi vs. Moldova, No. 25.198/02.

communication.[184] At the same time, the protection of privacy can be invoked to justify the legitimate denial of access to files.[185] Depending on the type of measures to be taken in the individual case, mobile phone tracking, access to private computers and other surveillance measures representing intensive interferences with fundamental rights may be justified, for instance in combatting organised crime and terrorism.[186]

Protected family life**,** as ruled by the CC, basically includes the relations between spouses and their children,[187] extramarital family ties, with family life between a child and both parents deemed to continue even after relations between the parents have been terminated[188], relations among close relatives, especially between grandparents and grandchildren,[189] same-sex partnerships,[190] fathers of illegitimate children,[191] etc. The CC holds that the legislator enjoys a wide "margin of discretion"[192] in regulating conflicting interests in family law.[193] As the case law shows, this area is often characterised by highly conflictual situations, the special need for protection of minors involved, and complex scientific considerations in the field of child psychology.[194]

The case law of the CC in the field of private and family law reflects the changes in society. This is evident, in particular, in decisions regarding illegitimate children (and their fathers), extramarital partnerships, same-sex partners, and reproductive medicine. Over the years, provisions applying to same-sex partnerships, which may, in certain instances, be protected under Article 12 ECHR, have been repealed by the CC, such as the prohibition of adoption of children by registered partners or by the partners in registered partnerships (stepchild adoption).[195] In the latter decision, the CC emphasised that the unequal treatment of registered partners compared to their same-sex or different-sex partners in step-child adoption was not justified. Moreover, the CC repealed provisions to the effect that a registered partnership can only be entered into on the official premises of a district administrative authority[196] and that co-insurance in health insurance is only possible in heterosexual partnerships, emphasising that differentiation on grounds of sexual orientation in a legal provision is not allowed, except for serious reasons.[197] A provision regarding the change of name upon entry into a registered partnership was also ruled to be unconstitutional.[198] The CC furthermore ruled that after the separation of a same-sex couple, one partner is allowed to adopt the other partner's child, as is the case in heterosexual partnerships.[199]

As regards marriage, the CC held for a long time that same-sex partnerships are afforded protection under Article 8 ECHR, but that neither the ECHR (Articles 8, 12 or 14) nor the principle of equality demand that marriage be allowed.[200] After the ECtHR had put an end to

[184] *VfSlg. 20.213/2017* (protection against crimes against the state).
[185] *VfSlg. 19.996/2015*.
[186] *VfSlg. 17.102/2004, 19.892/2014* (Data retention is unconstitutional on account of the non-specificity of the interference, the range and type of data; information communicated not only for the investigation of severe criminal offences).
[187] *VfSlg. 12.103/1989* with further references, 14.301/1995, *VfSlg. 20.018/2015*.
[188] ECtHR 3.12.2009, Zaunegger vs. Germany, No. 22.028/04, points 37f with further references; *VfSlg. 19.653/2012* with further references, 20.018/2015.
[189] *VfSlg. 13.629/1993* with further references.
[190] *VfSlg. 17.098/2003*.
[191] *VfSlg. 19.653/2012*.
[192] So called "rechtspolitischer Gestaltungsspielraum des Gesetzgebers".
[193] *VfSlg. 12.103/1989, 14.301/1995*.
[194] *VfSlg. 20.018/2015*.
[195] *VfSlg. 19.942/2014* (infringement of Articles 8 and 14 ECHR).
[196] *VfSlg. 19.758/2013*.
[197] *VfSlg. 17.659/2005*.
[198] *VfSlg. 19.623/2012* (violation of the principle of equality).
[199] CC, 3.10.2018, G 69/2018.
[200] *VfSlg. 17.098/2003*, see also *VfSlg. 19.758/2013*, after ECtHR, 24.6.2010, Schalk and Kopf, No. 30.141/04.

the exclusion of same-sex partnerships from family life[201], the CC followed suit.[202] Referring to the case law of the ECtHR,[203] it emphasised that same-sex partnerships are not only covered by the notion of private life but also enjoy the protection of the right for family life, provided the partners share the same household. A differentiation in law between marriage and a registered partnership is possible, but in light of Article 14 in conjunction with Article 8 ECHR can only be justified for particularly serious reasons. Therefore, a reasonable relation between the institution of marriage and its legal consequences is required.[204] In 2012, the CC still had no constitutional concerns regarding provisions reserving access to marriage for heterosexual couples, as it stated at that time that it was within the legislator's margin of discretion to provide for different institutional frameworks for heterosexual couples contracting marriage and for same-sex couples concluding a registered partnership and, thus, limit access to marriage to heterosexual couples. The legislator is not obliged to provide the same legal consequences for the legal forms of partnership for same-sex couples on the one hand and for different-sex couples on the other hand.[205] Finally, however, the Court decided in 2017 that allowing same-sex marriage is within the legislator's discretion under Article 12 ECHR, but that the principle of equality forbids a differentiation in law between marriage as a heterosexual relationship and a registered partnership as a same-sex relationship. Thus, marriage became accessible to same-sex couples.[206]

Article 8 ECHR is of particular importance in asylum and aliens law, as measures terminating or preventing a person's stay in the country may constitute an interference with private and family life.

Taking the case law of the ECtHR[207] as an example, the CC elaborated a set of criteria which must be taken into account by the authorities deciding on an alien's "right to stay" (*Bleiberecht*) in the country, such as the length of the person's prior residence in the country, the existence (and intensity) of family life in Austria,[208] (e.g. the partner's pregnancy[209]), the degree of integration,[210] any criminal offenses, on the one hand, and ties to the country of origin[211] and the requirements of public order,[212] on the other hand.

The welfare of the child is to be taken into account, for instance when deciding on the right of residence of a mother whose child is an Austrian national;[213] another factor to be taken into account is the minority of the complainant in asylum proceedings.[214] As regards the length of prior residence, a right to stay may arise after five years, e.g. in the case of intensive family relations in Austria;[215] at the same time, however, deportation may still be admissible after a much longer period of residence (repeated marriages during a nine-year period of

[201] ECtHR, 24.6.2010, Schalk and Kopf, No. 30.141/04, point 94.
[202] *VfSlg. 19.623/2012* (no factual justification for discrimination of registered partnership compared to marriage).
[203] ECtHR, 24.6.2010, Schalk and Kopf, No. 30.141/04, point 94; ECtHR, 22.7.2010, PB and JS vs. Austria, No. 18.984/02, point 30.
[204] *VfSlg. 19.623/2012*; see also *VfSlg. 19.492/2011* (no discrimination of heterosexual couples through registered partnership being reserved for same-sex couples); *VfSlg. 19.758/2013*.
[205] *VfSlg. 19.682/2012* (with reference to *VfSlg. 17.098/2003, 19.492/2011*; ECtHR 24.6.2010, Schalk and Kopf vs. Austria, No. 30.141/04, points 108f).
[206] *VfSlg. 20.225/2017* with further references.
[207] See, in particular, references in *VfSlg. 18.223/2007, 18.224/2007* (e.g. ECtHR 31.1.2006, Rodrigues da Silva and Hoogkamer vs. Netherlands, No. 50.435/99; ECtHR, 16.9.2004, Ghiban vs. Germany, No. 11.103/03; ECtHR, 2.8.2001, Boultif vs. Switzerland, No. 54.273/00 etc.).
[208] *VfSlg. 18.223/2007* (including intensive family relations in Austria).
[209] *VfSlg. 18.393/2008, 19.776/2013*; CC, 22.9.2017, E 2670/2017; CC, 27.2.2018, E 3775/2017.
[210] *VfSlg. 19.203/2010*; CC, 20.2.2014, U 2496/2013.
[211] On absence of ties to country of origin, see CC, 10.12.2014, E 10/2014 with further references.
[212] *VfSlg. 18.223/2007*.
[213] CC, 11.6.2018, E 343/2018.
[214] CC, 12.9.2013, U 1963/2012.
[215] *VfSlg. 18.223/2007*.

residence[216]). According to the CC, a longer unlawful stay must not be held exclusively against the alien, especially if the authority itself is accountable for the length of the proceedings and the resultant long stay.[217]

The legislator has the right to specify the prerequisites for family reunification. Depending on the circumstances of the case, a right of residence or a right to family reunification can be derived from Article 8 ECHR according to the CC's and the ECtHR's case law, even if, in principle, the state is not obliged to grant such rights.[218]

4) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Basically, the case law of the CC follows that of the ECtHR. In general, the CC's case law on the respect for private and family life does not differ significantly from that of other international courts, which is confirmed by the numerous references to ECtHR rulings.

There are, however, minor differences in certain areas. While the ECtHR frequently resolves issues relating to a person's entry into a country by referring to the state's positive obligations,[219] the CC, as mentioned above, assesses the proportionality of the decision taken and qualifies the termination or denial of residence as interference with a fundamental right if it prevents or significantly impairs the individual's family life. Moreover, the CC pays less attention to the situation in the individual's home country than the ECtHR, such as the existence of other ties.[220]

II.IV. Freedom of religion

1) What is the original wording of the provision protecting this right in your national catalogue?

In addition to Art. 9 ECHR, Article 14 of the Basic Law on the Rights of Nationals contains a national guarantee of the freedom of belief and conscience dating from 1867. Article 63 paragraph 2 of the Treaty of Saint-Germain also contains a constitutional guarantee of the free exercise of any belief, religion or creed (texts reproduced in the Annex).

Special constitutional provisions on the right to conscientious objection to military service, which will not be elaborated on in this context, are contained in Article 9a paragraph 4 of the Constitution as well as section 1 of the Alternative Civil Service Act (*Zivildienstgesetz*). The fundamental right to conscientious objection has been specified through special constitutional provisions in the Alternative Civil Service Act.[221]

Article 15 of the Basic Law on the Rights of Nationals, which will not be discussed in detail either, guarantees a special status for legally recognised churches and religious communities. This constitutional provision grants recognised religious communities the right to autonomously regulate and administer their internal affairs. This autonomy must not be

[216] *VfSlg. 18.224/2007*.
[217] E.g. *VfSlg. 18.417/2008* (no criminal record, starting a family).
[218] VfSlg. 17.013/2003 (rigid quota rule for family reunification is disproportionate), 17.734/2005 (father of children living in Austria).
[219] See ECtHR, 1.12.2005, Tuquabo-Tekle et al. vs. Netherlands, No. 60.665/00, point 43; ECtHR, 31.1.2006, Rodrigues da Silva and Hoogkamer vs. Netherlands, No. 50.435/99, point 38.
[220] See e.g. ECtHR, 18.2.1991, Moustaquim vs. Belgium, No. 12.313/86; see also ECtHR, 26.3.1992, Beldjoudi vs. France, No. 12.083/86 (on command of the language in the country of origin).
[221] See *VfSlg. 16.389/2001* (The fundamental right to conscientious objections must not be undermined through highly unfavourable conditions).

interfered with. It is associated with certain privileges and, in particular, with the status of a legal person under public law.[222]

2) Is it possible to restrict the right? If so, how and under what conditions?

Any interference by the state with the fundamental right to freedom of religion has to meet all the requirements of Article 14 of the Basic Law on the Rights of Nationals, Article 63 of the Treaty of Saint-Germain and Article 9 ECHR.[223] According to the CC's case law, the three aforementioned constitutional provisions are to be regarded as one, given that Article 14 of the Basic Law on the Right of Nationals is complemented by Article 63 paragraph 2 of the Treaty of Saint-Germain, and the restrictions mentioned in the latter are further specified in Article 9 paragraph 2 ECHR.[224]

The CC has stated that, with a view to Article 53 ECHR (*Günstigkeitsprinzip*), an interference is to be assessed in light of Article 63 paragraph 2 of the Treaty of Saint-Germain (*Schrankenvorbehalt*), but added that the latter has been specified by Article 9 ECHR.[225] However, recourse to the *Günstigkeitsprinzip* is not possible if an alleged right derived from the negative freedom of religion conflicts with other rights derived from the freedom of religion, as a wider scope of fundamental rights protection pursuant to the Treaty of Saint-Germain could diminish the protection of conflicting human rights in violation of the Convention.

According to the case law of the CC, a harmonising interpretation of Article 9 paragraph 2 ECHR and Article 63 paragraph 2 of the Treaty of Saint-German implies that Article 9 paragraph 2 ECHR specifies the latter and that the aim of "public order" in Article 63 paragraph 2 Treaty of Saint-Germain is not limited to dangers to public security.[226] The pursuit of the other legitimate aims mentioned in Article 9 paragraph 2 ECHR, in particular the aim of protection of the rights and freedoms of others, can be deemed to be included in the aims according to Article 63 paragraph 2 of the Treaty of Saint-Germain and therefore justify an interference with the right to freedom of religion.[227]

Article 14 paragraph 2 of the Basic Law on the Rights of Nationals, prescribing that duties incumbent on nationals may not be prejudiced by religious beliefs, equally applies to the freedom of religion and conscience.[228]

3) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Given the various provisions guaranteeing this fundamental freedom, the scope of protection afforded is interpreted in different ways. According to the case law of the CC, only physical persons can be guaranteed the freedom of conscience and creed in the meaning of Article 14 of the Basic Law on the Rights of Nationals.[229] Article 14 of the Basic Law on the Rights of Nationals thus guarantees the "individual freedom of religion".[230] Article 15 of the Basic Law

[222] *Berka*, Verfassungsrecht, 7th edition (2018), points 1443ff.
[223] *VfSlg. 10.547/1985, 13.513/1993, 15.592/1999, 19.349/2011*.
[224] *VfSlg. 15.394/1998, 19.349/2011.*
[225] *VfSlg. 15.394/1998*.
[226] *Müller*, Über Grenzen der Religionsfreiheit am Beispiel des Schächtens, in: FS Adamovich, (2002), 503, 519f; see *Berka*, Verfassungsrecht, 7th edition (2018), point 1434.
[227] See also *Kalb/Potz/Schinkele*, Religionsrecht (2003), 85.
[228] See *VfSlg. 15.680/1999*.
[229] *VfSlg. 13.513/1993*.
[230] *VfSlg. 13.513/1993*.

on the Rights of Nationals additionally guarantees the "corporative" freedom of religion, which can be invoked by churches and religious communities. Both individuals and churches and religious communities can invoke Article 9 ECHR.[231]

According to the case law of the CC, Article 14 of the Basic Law on the Rights of Nationals and Article 9 ECHR equally protect the free choice and free exercise of a religion; the essence of this freedom consists in the absence of state coercion in religious matters.[232] Every human being is to enjoy full and unrestricted freedom in matters of religion.[233]

The freedom of religion comprises the freedom of the individual to practice his or her religion alone or in community with others in public or in private, through religious service, religious instruction, prayers and the observance of religious rites. The scope of protection covers the choice of belief as well as the right to convert to another religion or the decision to leave one's religious community. These individual freedoms do not depend on the respective community having the status of a legally recognised Church or religious community.[234]

Pursuant to Article 63 paragraph 2 of the Treaty of Saint-Germain, all inhabitants of Austria have the right, in principle, to freely exercise any creed, religion or belief.[235] Art 14 of the Basic Law on the Rights of Nationals only refers to religious matters;[236] it does not guarantee a general "freedom of ideology".[237] In contrast, Article 9 ECHR also refers to the freedom of thought.

According to the case law of the CC, the freedom to exercise a religion does not depend on whether the individual concerned formally belongs to a religious community.[238] The exercise of a religion is not necessarily based on compulsory religious rules and commandments.[239] It must, however, be an actual, collectively developed exercise of a certain belief, creed or ideology.[240]

In the CC's opinion, the guarantee of the freedom of religion as a fundamental right includes, in particular, the negative freedom of religion, i.e. the right not to adhere to any religion and not to be under coercion by the state to participate in religious practices or to be exposed to religious instruction.[241] Hence, the CC declared the obligation to enter one's religious creed in the residential registration form to be unconstitutional.[242]

According to the CC, only those actions may be forbidden in the interest of public order that substantially disturb people's life in the community of the state.[243] In other words: A ban of certain religious rites cannot be justified, unless they seriously endanger public order.[244]

The CC held that a ban of the ritual slaughtering of animals, imposed on Jews and Muslims by law for reasons of animal welfare, constitutes a violation of the freedom of religion; such ban is not necessary in a democratic society and therefore not justified.[245]

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[231] *VfSlg. 17.021/2003, 19.240/2010.*
[232] *VfSlg. 10.547/1985*.
[233] *VfSlg. 10.547/1985, 13.513/1993, 19.813/2013.*
[234] *VfSlg. 10.915/1986*.
[235] *VfSlg. 19.349/2011*.
[236] *VfSlg. 11.105/1986.*
[237] *VfSlg. 10.674/1985*.
[238] *VfSlg. 15.592/1999.*
[239] *VfSlg. 15.394/1998.*
[240] *VfSlg. 15.394/1998*.
[241] *VfSlg. 802/1927*.
[242] *VfSlg. 15.541/1999*.
[243] *VfSlg. 15.394/1998*.
[244] See *VfSlg. 15.592/1999*.

According to the case law of the CC, denying prisoners the pastoral care of their choice or attendance of a religious service, notwithstanding the fact that they have credibly demonstrated their affiliation with the respective religious creed, is also against the Constitution.[246] If a prisoner is denied the use of religious objects for their intended use, his/her right to freedom of religion and conscience is violated.[247]

The CC, in conformity with the case law of the ECtHR[248], holds that the obligatory presence of a crucifix in classrooms where the majority of pupils are Christians does not constitute religious coercion which would be unconstitutional.[249] It also holds that a "minute of silence" broadcast by a public-service broadcaster on Good Friday does not violate the negative freedom of religion.[250]

The fundamental right to freedom of religion also obligates the state to protect the lawful exercise of a religion from disturbances by private individuals.[251] However, the CC holds that the legislator enjoys a wide margin of discretion in deciding if and how the state exempts religiously motivated activities from its legal order.[252]

4) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The case law of the ECtHR is frequently referred to, extensively cited and taken into account.[253] In particular, the CC engaged in dialogue with the ECtHR regarding the freedom of religion:

In 2009, the Second Chamber of the ECtHR decided that the presence of a crucifix on the premises of a state-run school constituted a violation of the right of parents and children on the basis of Article 2 of the 1st Additional Protocol to the ECHR in conjunction with Article 9 ECHR.[254] A few days before the Grand Chamber of the ECtHR, to which the case had been referred, rendered its judgment, the CC pronounced its decision on the presence of crucifixes in public kindergartens. In its judgment, the CC held that the mere sight of a crucifix cannot be interpreted to create an obligation to honour the cross or to perform religious acts, nor is there any indication of children thus being exposed to any constraint in terms of identification or belief. According to the CC, the right to adhere to any religion or none at all and even to reject the religious belief represented by a religious symbol is not affected by the presence of crucifixes in kindergartens.[255] Contrary to the decision by the Second Chamber of the ECtHR, the CC did not recognise any interference with the freedom of religion and stated that, even if an interference were assumed, it would be justified on account of the low intensity of interference and substantial opposing interests (protection of the rights and freedoms of Christian kindergarten children and their parents who wish their children to be educated under the religious symbol of the cross).[256] Nine days later, the Grand Chamber of the ECtHR rendered a judgment which was largely in line with the decision of the CC, both in its reasoning and its outcome, and did not recognise a violation of the ECHR through the

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[245] *VfSlg. 15.394/1998*.
[246] *VfSlg. 15.592/1999*.
[247] *VfSlg. 10.547/1985*.
[248] ECtHR (GC) 18.3.2011, Lautsi vs. Italy, No. 30.814/06.
[249] *VfSlg. 19.349/2011*.
[250] *VfSlg. 19.915/2014*.
[251] *VfSlg. 16.054/2000*.
[252] *VfSlg. 17.021/2003*.
[253] For details see Question II. above, Preliminary remark.
[254] ECtHR 3.11.2009, Lautsi vs. Italy No 30.814/06 (non-final decision by the Second Chamber).
[255] CC, 9.3.2011, G 287/09, *VfSlg. 19.349/2011*, point 73.
[256] CC, 9.3.2011, G 287/09, *VfSlg. 19.349/2011*, points 73ff.

presence of crosses in state-run schools.[257] As the decision by the Second Chamber had not been final, a contradiction had – formally speaking – never existed. Nevertheless, it was the CC's deliberate decision to dissent from the Second Chamber's non-final decision.[258] Reading the two decisions by the courts in parallel, one becomes aware of the fact that the CC rendered its decision in reply to the Second Chamber's ruling.

Exceptionally, minor divergences can be found in other cases. As described above, the CC ruled that the ban of ritual slaughtering is not proportionate but violates the fundamental right to freedom of religion. Not so the ECtHR, which held that the prohibition of ritual slaughtering may, under certain circumstances, meet the prerequisites of Article 9 paragraph 2 ECHR and be in conformity with the Convention.[259]

Another case concerns the question of exemption from military service. According to the case law of the ECtHR, punishing a religiously motivated conscientious objector is an inadmissible interference with Article 9 ECHR.[260] The CC repeatedly dissented from that position, holding that the freedom of conscience does not comprise the right to exemption from military service.[261]

II.V. Prohibition of discrimination

1) What is the original wording of the provision protecting this right in your national catalogue?

The Austrian Constitution comprises several relevant sources, the focus of the constitutional provisions being less on the ban on discrimination but rather on the obligation of equal treatment[262] (legal texts reproduced in the Annex). The primary source is Article 7 paragraph 1 of the Austrian Constitution ("All nationals are equal before the law"), which is supplemented by the requirement of equal treatment of persons with and without disabilities and the equality of men and women. Article 2 of the Basic Law on the Rights of Nationals reads: "All nationals are equal before the law". It is interesting to note that equality was first to be ensured through measures intended to restrict the privileges of nobility and descent.[263]

Besides Article 14 ECHR and Articles 20 and 21 CFREU, there are other constitutional provisions prohibiting discrimination, which have not received special attention in the CC's case law (see Article 14 of the Basic Law on the Rights of Nationals, Point 3 of the Resolution of the Provisional National Assembly of 1918, Article 63 of the Treaty of Saint-Germain, Article 14 paragraph 6 of the Austrian Constitution).[264] Additionally, specific provisions apply to minorities living in Austria („Volksgruppen"), which prohibit discrimination or rather explicitly stipulate special rights for these minorities. Such provisions can be found in Articles 66 to 68 of the Treaty of Saint-Germain, in Article 7 of the Vienna

[257] ECtHR (GC), 18.3.2011, Lautsi vs. Italy, No. 30.814/06.
[258] *Grabenwarter*, Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes, JRP 2012, 298, 300.
[259] ECtHR, 27.6.2000, Cha'are Shalom Ve Tsedek vs. France, No. 27.417/95.
[260] ECtHR, 7.7.2011, Batayan vs. Armenia, No. 23.459/03.
[261] *VfSlg. 8033/1977, 11.253/1987*.
[262] On the meaning of "equality", see, *Pöschl*, § 14. Gleichheitsrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), points 10ff.
[263] See the Act on the Abolition of Nobility (abolition of nobility and prohibition of titles and privileges) and the Habsburg Act (dethroned the Imperial House of Habsburg-Lorraine, exiled its members unless they agreed to waive their imperial rights, and confiscated the court's assets).
[264] *Pöschl*, § 14. Gleichheitsrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 98.

State Treaty and in individual constitutional provisions of the Austrian Ethnic Groups Act of 1976.[265]

As Article 7 of the Constitution and Article 2 of the Basic Law on the Rights of Nationals exclusively apply to nationals, the Federal Constitutional Act on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination obtained special importance. Its first paragraph reads: "Any form of racial discrimination is […] forbidden. Legislation and enforcement shall refrain from any discrimination for the sole reason of race, colour of skin, descent or national or ethnic origin." The obligation of "equal treatment of non-nationals among themselves" [266] prescribed by the constitutional act is equivalent to Article 7 of the Constitution.

2) Is it possible to restrict the right? If so, how and under what conditions?

Given the structure of the fundamental right as a general principle of equality, none of the constitutional provisions in effect explicitly allow a restriction of this fundamental right. However, some fundamental guidelines can be derived from the case law of the CC with regard to the legislator's obligations. The CC derives from the notion of equality not only a principle of equal treatment (*Gleichbehandlungsgebot*) but also an obligation of differentiation (*Differenzierungsgebot*). Accordingly, what is equal is to be treated equally, unless substantial differences of facts justify a departure from this principle.[267] The CC holds that any differentiation must be "justified".[268] The legislator is obligated to take significant differences of facts into account by differentiating accordingly, i.e. by treating "unequally what is unequal".[269] From the principle of equality the CC also derives a "general principle of objectivity" (*allgemeines Sachlichkeitsgebot*), according to which the legislator is not allowed to adopt provisions that cannot be objectively justified.[270] In its assessment, the legislator enjoys a margin of discretion[271], the scope of which depends of the subject matter to be regulated.[272] Within this margin of discretion, the legislator is free to pursue its political aims in the manner it regards as most appropriate.[273] Moreover, the CC derives a principle of legitimate expectations from the principle of equality, according to which retroactive enactment is subject to strict requirements and, in addition, restrictions of "acquired rights" are unconstitutional if the legislator profoundly and suddenly interferes with rights in whose

[265] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), points 978ff; see constitutional provisions in sections 12 and 13 of the Ethnic Groups Act, Federal Law Gazette 376/1976 as amended in Federal Law Gazette I 84/2013, regarding the use of bilingual topographical signs as well as the use of the Croatian, Slovenian and Hungarian languages as official languages in Austria.

[266] *Pöschl*, § 14. Gleichheitsrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 22.

[267] See the summary in *Pöschl*, § 14. Gleichheitsrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), points 31ff.

[268] See *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 761 and points 773ff; *Berka*, Verfassungsrecht, 7th edition (2018), points 1644ff and points 1664ff; see e.g. on health insurance and pension benefits *VfSlg. 13.829/1994*; on employment law *VfSlg. 14.867/1997*; on minimum income *VfSlg. 20.244/2018*; on differences in codes of procedure *VfSlg. 20.249/2018, 20.264/2018*; CC, 10.10.2018, G 49/2017 et al.

[269] *VfSlg. 12.641/1991*.

[270] See e.g. *VfSlg. 11.369/1987* and additional examples in *Pöschl*, § 14. Gleichheitsrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), points 36ff; critical comments on this development of case law *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 767.

[271] *VfSlg. 12.416/1990*.

[272] The legislator enjoys a broad margin of discretion in matters such as state aid (*VfSlg. 19.411/2011* with further references) or social welfare (CC, 3.10.2018, G 189/2018, pensions for victims of abuse in institutionalised care; *VfSlg. 18.885/2009*, compensatory allowances for minimum income earners; *VfSlg. 20.244/2018* and CC, 1.12.2018, G 308/2018, both on minimum income support). Conversely, the unequal treatment of legitimate and illegitimate children is generally inadmissible, except for substantial reasons (*VfSlg. 19.704/2012* with reference to ECtHR case law on Article 14 in conjunction with Article 8 ECHR).

[273] *VfSlg. 7864/1976*.

existence the persons concerned could have legitimately trusted.[274] Within the scope of its power to pronounce on complaints against decisions by administrative courts, the CC holds that an administrative court decision violates the principle of equality if the authority's decision is deemed to be of an arbitrary nature. Arbitrariness is defined to include severe procedural errors, for instance decisions without reasoning or without comprehensible reasoning.[275]

3) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

On account of the broad scope of the principle of equality, having been extended to be understood as a general principle of objectivity, the case law of the CC on Article 7 of the Constitution and, where non-Austrian nationals are concerned, the Federal Constitutional Act on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination is extensive.[276] In the CC's case law, the general principle of equality takes precedence over specific bans on discrimination targeted at particularly objectionable grounds.[277] However, there are cases in which the CC also refers to Article 14 ECHR if, on account of interference with a fundamental right protected by the ECHR, it recognises a particular need for justification or if the ECtHR has already given some guidance in its case law.[278]

As regards the importance of the principle of equality as a ban on discrimination, the following decisions by the CC can be mentioned as examples:

A case from 2003 concerned a decision by an independent administrative panel (*Unabhängiger Verwaltungssenat*) by which the performance of a body X-ray of an Austrian national of African origin and the search of her luggage was ruled to be lawful. The CC repealed the decision, stating in its reasoning that the authority had failed to consider the claimant's plea that these actions were due exclusively to the colour of her skin and her (assumed) origin.[279]

As regards the prohibition of discrimination of persons with disabilities pursuant to Article 7 paragraph 1 third sentence of the Constitution, the CC pronounced that this prohibition applies not only to nationals but to anybody.[280] In so doing, it repealed a provision of the Austrian Citizenship Act according to which the granting of citizenship depended on the applicant's ability to independently earn a living. The Court argued that by including an explicit prohibition of discrimination of persons with disabilities, the constitutional legislator emphasised that provisions to the disadvantage of persons with disabilities require special justification. In the Court's opinion, the legal provision according to which persons with and without disabilities are to be treated equally violates Article 7 paragraph 1 third sentence of the Constitution, because individuals whose disability makes it difficult or impossible for them to access the labour market are unable to meet the requirement of independently earning

[274] *Berka*, Verfassungsrecht, 7th edition (2018), points 786ff; see e.g. *VfSlg. 11.309/1987, 16.764/2002* on pension law.
[275] See *Berka*, Verfassungsrecht, 7th edition (2018), points 791ff and the examples mentioned there; most recently *VfSlg. 20.109/2016, 20.185/2017*; CC, 11.12.2018, E 3717/2018; 14.6.2019, E 1610/2019.
[276] See e.g. *VfSlg. 13.836/1994, 17.026/2003*; most recently *VfSlg. 20.177/2017, 20.208/2017, 20.215/2017, 20.228/2017, 20.229/2017, 20.267/2018*.
[277] *Pöschl*, § 14. Gleichheitsrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 98.
[278] See examples in *Pöschl*, § 14. Gleichheitsrechte, in: Merten/Papier/Kucsko-Stadlmayer (eds.), Handbuch der Grundrechte, 2nd edition (2014), point 98: *VfSlg. 14.863/1997, 15.129/1998*.
[279] *VfSlg. 17.017/2003*. The authority acted "arbitrarily" by not dealing with the complainant's plea.
[280] *VfSlg. 19.732/2013*.

a living and are thus disadvantaged and discriminated against. Moreover, the CC found a violation of the general principle of objectivity, as the law did not allow for the fact that exceptional situations may result in emergencies without any fault of the individual concerned.

As regards the unequal treatment of nationals and non-nationals or different groups of immigrants, the CC pronounced that privileged treatment of EEA citizens and certain third-country nationals (who are relatives of EEA citizens) compared to citizens of other states does not violate the Federal Constitutional Act on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.[281] The CC also held that disadvantaging Austrian nationals compared to non-nationals is against the principle of equality. Such "discrimination against the country's own nationals" (*Inländerdiskriminierung*) is to be rejected in all cases in which the application of EU law (or CJEU case law) to situations within the scope of Union law results in the inapplicability of strict provisions of national law, while according to Union law they can still be applied to purely domestic situations. In such cases, the CC decided to repeal provisions that are to the disadvantage of Austrian nationals[282].

In 1990, the CC repealed a part of a sentence in the Social Security Act which provided for different retirement ages for men and women and, at the same time, offered guidance for the legislator for a wording in conformity with the law: The Court emphasised that it was indeed within the legislator's margin of discretion to take differences with regard to the burdens of working life for certain persons and groups of persons into account. Nevertheless, in the case concerned the challenged provisions – differentiating merely on the basis of sex – were not justified, because the different extent of the burden on women and the actual physical workload were not reflected in the provision, which privileged those women whose role model did not differ from that of men. The Court held that the principle of equality does not oblige the legislator to set the same retirement age for men and women immediately and systematically (on the contrary, this would even be unconstitutional in the case of persons approaching retirement age, as it would undermine their legitimate expectations). However, different retirement ages for individuals approaching retirement can only be maintained if, at the same time, provisions are introduced to the effect of a gradual reduction of the purely gender-specific differentiation.[283] In response to this decision, the constitutional legislator adopted the Federal Constitutional Act on Different Age Limits for Men and Women Covered by Social Insurance[284], according to which legal provisions providing for different age limits for men and women covered by statutory social insurance are allowed and a progressive increase of the age limits for women covered by social insurance up to 2033 is prescribed. By adopting a constitutional act, a further examination by the CC was precluded.

Moreover, measures intended to balance a proven structural inequality between women and men (in this particular case: a quota rule requiring that candidacies proposed for election to collegiate bodies of universities include 40% women) were qualified by the CC as justified in view of the proven under-representation of women in executive bodies.[285] The CC did not object to a gender-specific evaluation of an aptitude test for admission to studies of human medicine either, as the regulator, by adopting this provision, reacted to an empirically demonstrated difference in the test results of men and women, and had already begun to design a new admission test. As stated by the Court, a gender-specific evaluation of the

[281] *VfSlg. 13.836/1994*.
[282] *VfSlg. 14.963/1997, 18.027/2006, 18.226/2007, 18.656/2008*.
[283] *VfSlg. 12.568/1990*, the same applies to social security for the self-employed *VfSlg. 13.795/1994*.
[284] Federal Law Gazette 832/1992.
[285] *VfSlg. 19.866/2014*.

candidates' individual aptitude and skills was being prescribed for a limited transition period, given that empirical proof showed that other accompanying measures would not have resulted in the elimination of the observed gender differences. The Court therefore ruled this provision to be a proportionate measure intended to prevent any (further) structural discrimination of women.[286]

In a similar case, the Court rejected the complaint filed by a male German national (whose application for admission to studies of human medicine was also subject to a 20% quota for Union citizens) and, at the same time, performed an in-depth analysis of the case law of the CJEU. The CC arrived at the conclusion that both the gender-specific evaluation of the test in light of Article 23 paragraph 2 CFREU and the quota for Union citizens in light of Article 21 paragraph 2 CFREU are justified. In the Court's opinion, the Federal Minister had demonstrated that the Austrian public health system was at risk of suffering from a shortage of physicians exercising their profession in Austria in the near future. The provision was therefore held to be suitable, necessary and appropriate to achieve the legitimate aim of ensuring high-quality, well-balanced and generally accessible health care in Austria. Thus, the complainant's constitutionally guaranteed right under Article 21 paragraph CFREU was not violated on account of his nationality.[287]

In its case law, the CC has also acknowledged the linguistic privileges granted by the Constitution to the Slovenian and Croatian ethnic groups and contributed to their realisation – for instance, with regard to the right to primary school education in the language of the ethnic group concerned[288], the right to use minority languages as official languages[289] and the obligation to install bilingual place-name signs in certain areas[290].

4) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

As shown by the reply to the above question, the CC largely follows the positions taken by the ECtHR in its case law regarding the principle of equal treatment. In the field of Union law, there fewer cases that have an immediate impact on the case law of the CC, nevertheless the case law of the CJEU has had a noticeable impact; for instance, in cases where adaptations to Union law made by the legislator resulted in discrimination against Austrian nationals, the CC reacted by applying the general principle of equality. At the same time, the CC in its case law referred to Articles 20 to 23 CFREU as constitutionally guaranteed rights[291] (see Question I.II above).

II.VI. Right to liberty

1) What is the original wording of the provision protecting this right in your national catalogue?

Besides Article 5 ECHR, Article 1 of the 4th Additional Protocol to the ECHR and Article 6 CFREU, which are referred to as a standard of constitutional review, the right to liberty is enshrined in the Federal Constitutional Act on the Protection of Personal Liberty[292], which replaced the Act on the Protection of Personal Liberty of 1862 and Article 8 of the Basic Law on the General Rights of Nationals in order to ensure conformity with Article 5 ECHR and

[286] *VfSlg. 19.899/2014*.
[287] *VfSlg. 19.955/2015*.
[288] *VfSlg 12.245/1989, 15.759/2000.*
[289] *VfSlg 15.970/2000, 19.693/2012.*
[290] *VfSlg 16.404/2001, 17.895/2006, 18.044/2006, 19.128/2010.*
[291] See, in principle, *VfSlg. 19.632/2012*.
[292] Federal Law Gazette 684/1988 as amended in Federal Law Gazette I 2/2008.

allow the withdrawal of the Austrian reservation regarding Article 5 ECHR[293] (texts reproduced in the Annex). As intended by the legislator, the act summarises the substance of Article 8 of the Basic Law on the General Rights of Nationals, the Act on the Protection of Personal Liberty, Article 63 paragraph 1 of the Treaty of Saint-Germain (indirectly), Article 6 of the Vienna State Treaty and, above all, Article 5 ECHR and Articles 9 and 14 of the International Covenant on Civil and Political Rights.[294] The Personal Liberty Act first postulates the right to liberty ("Everyone has the right to liberty and security") but also includes detailed provisions on the prerequisites for and the procedural guarantees in case of deprivation of liberty and includes an exhaustive list of reasons for the deprivation of liberty. Moreover, it contains provisions on jurisdiction and procedures.[295]

2) Is it possible to restrict the right? If so, how and under what conditions?

Restrictions of personal liberty must be provided for by law (Article 1 paragraphs 2 and 3 of the Personal Liberty Act). Within the framework of this constitutional requirement of specific enactment, the legislator has to clearly determine the reasons for the deprivation of liberty and the procedure to be applied. Deprivation of liberty is allowed only if it is necessary for the purpose of the measure. Article 2 of the Personal Liberty Act contains an exhaustive list of reasons allowed as a basis for the deprivation of liberty.[296]

3) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

First of all, it is important to note that the CC is not endowed with the power to review decisions taken by the ordinary courts, i.e. in civil and criminal matters. Measures of deprivation of freedom (e.g. penal and pre-trial detention, institutionalisation for reasons of illness or institutionalisation of minors) therefore cannot be subject to constitutional review. The power of the CC is limited to examine the constitutionality of legal provisions (Articles 139 and 140 of the Constitution). In judicial practice, however, the right to personal liberty features prominently on a regular basis, because the CC decides on complaints filed against decisions by administrative courts concerning measures of deprivation of liberty taken by administrative authorities. This especially includes proceedings in which imprisonment (as an alternative to payment of a fine) or detention prior to deportation is imposed by decree and in proceedings dealing with complaints against arrest and detention (exercised directly by administrative bodies, e.g. coercion without any decree).

In agreement with the case law of the ECtHR, the CC applies a narrow definition of the right to personal liberty[297], interpreting it merely as a restriction of the individual's physical freedom of movement[298] through arrest or detention. In its consistent interpretation of Article 8 of the Basic Law on the Rights of Nationals, the Personal Liberty Act and Article 5 ECHR, the CC states that the definition of "arrest" is met only when a law enforcement officer in the exercise of his/her official duties, through the use of physical force or a threat of the use of force, prevents a person from exercising his/her personal mobility or restricts such

[293] *Berka*, Verfassungsrecht, 7th edition (2018), point 1356; *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 834, see explanations on RV 134 BlgNR 17. GP, 3f.
[294] Explanations on RV 134 BlgNR 17. GP, 4.
[295] *Berka*, Verfassungsrecht, 7th edition (2018), point 1357.
[296] *Berka*, Verfassungsrecht, 7th edition (2018), point 1361; *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 839.
[297] *Berka*, Verfassungsrecht, 7th edition (2018), point 1358; *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 835.
[298] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 835.

mobility to certain premises or areas, which are confined on all sides and must not be left.[299] Moreover, the deprivation of liberty is deemed to interfere with the fundamental right only if the will of the authority is primarily directed at such restriction of freedom but not if another measure requires that the person concerned remain in the custody of the authority or its representatives, i.e. if this restriction of freedom is (merely) the secondary consequence of an impairment of mobility or an obligation of mandatory presence.[300]

As prescribed by the Austrian Code of Criminal Procedure, arresting a person without court order is allowed only in case of imminent danger. According to the case law of the CC, this criterion is to be strictly interpreted and applies only if contacting the judge (on stand-by duty) by telephone or radio is not possible.[301] The CC applies an equally strict interpretation to the criterion of a risk of absconding to assess the constitutionality of arrest because of an administrative offence[302] (or detention prior to deportation) as well as the criterion of proportionality. The CC's case law is particularly extensive regarding detention prior to deportation. Deprivation of liberty must always be the measure of last resort.[303] The necessity and proportionality of detention (Article 1 paragraph 3 of the Personal Liberty Act) has to be assessed and motivated on a case by case basis.[304] The CC recognises that preference is to be given to the use of lesser means than detention prior to deportation and that such interpretation is constitutionally required.[305] The violation of the rights of a detainee to be informed makes detention unlawful[306], but it does not change the fact that, in case of doubt, the individual may have to remain in detention, because the administrative court's decision in proceedings to review the detention order may, at the same time, constitute a legal basis for further detention. The right to obtain a decision in proceedings to review a detention order continues to exist even if detention has already ended at the time of the decision (see Article 6 paragraph 1, second sentence, of the Personal Liberty Act).[307] The administrative court has to independently verify the lawfulness of detention in every respect and address any unlawfulness.[308] Pursuant to Article 6 paragraph 1 of the Personal Liberty Act, the decision on the lawfulness of deprivation of liberty must be issued within a week, regardless of any difficulties that may be encountered within the organization of the authority.[309]

In the field of criminal law, the CC in its case law referred to Article 5 paragraph 5 ECHR and Article 3 of the 7th Additional Protocol to the ECHR as well as Article 7 of the Personal Liberty Act, for instance in connection with the determination of upper and lower limits of indemnification for detention, and pronounced that none of these provisions justified a claim to indemnification for detention that originally was lawful but was later found to be unjustified.[310]

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[299] *VfSlg. 13.063/1992* with further references.
[300] *VfSlg. 15.372/1998*; see examples mentioned by the CC in *VfSlg. 5280/1966* on the establishment of identity through inspection of ID documents, *VfSlg. 5570/1967* on the performance of a breathalyser test *VfSlg. 7298/1974* and *VfSlg. 12.792/1991* on a body search, *VfSlg. 8327/1978* on a one-hour inspection of a motor vehicle, *VfSlg. 12.017/1989* on a customs procedure lasting several hours; for critical comments on the criterion of "intentionality" (*Intentionalität*) see *Berka*, Verfassungsrecht, 7th edition (2018), point 1359.
[301] *VfSlg. 11.491/1987, 13.155/1992*.
[302] *VfSlg. 13.108/1992*.
[303] *Berka*, Verfassungsrecht, 7th edition (2018), point 1361; *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 839.
[304] *VfSlg. 14.981/1997, 17.288/2004, 19.675/2012*.
[305] *VfSlg. 19.675/2012*.
[306] *VfSlg. 13.914/1994*.
[307] *VfSlg. 13.698/1994*.
[308] *VfSlg. 13.039/1992, 13.806/1994, 19.970/2015*.
[309] *VfSlg. 13.893/1994, 18.081/2007, 19.968/2015*.
[310] *VfSlg. 20.072/2016*.

4) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The Personal Liberty Act is inspired by the decision of the Austrian legislator to go beyond the standard of guarantees of Article 5 ECHR.[311] Article 8 paragraph 3 of the Personal Liberty Act prescribes that the ECHR remain "untouched" so that in the event of a conflict Article 5 ECHR takes precedence over the Personal Liberty Act.[312] Occasional deviations from the international standard can be observed in two directions: Doubts have been expressed in the legal doctrine as to whether the imposition of detention by administrative authorities (up to a maximum of six weeks per offence, up to three months in financial criminal law; see Article 3 paragraph 3 of the Personal Liberty Act) is compatible with Article 5 paragraph 1 litera a ECHR.[313] As regards the deprivation of liberty of a minor for the purpose of necessary educational measures (Article 2 paragraph 1 point 6 of the Personal Liberty Act), the powers of intervention allowed by the Austrian legislator could go beyond what the ECtHR allows in its case law.[314] Conversely, the requirements to be met by proceedings to review a detention order (Article 6 of the Personal Liberty Act) are less strict than those imposed by Article 5 ECHR.[315]

[311] *Kopetzki*, PersFrG. Vorbemerkungen, in: Korinek/Holoubek et al. (eds.), Österreichisches Bundesverfassungsrecht. Kommentar (2002), point 8.
[312] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 834.
[313] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 849; dissenting opinion in *Berka*, Verfassungsrecht, 7th edition (2018), point 1364.
[314] *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 846.
[315] *Kopetzki*, PersFrG. Vorbemerkungen, in: Korinek/Holoubek et al. (eds.), Österreichisches Bundesverfassungsrecht. Kommentar (2002), point 8; *Öhlinger/Eberhard*, Verfassungsrecht, 12th edition (2019), point 846; see *VfSlg. 13.893/1994* on the decision to be taken within one week.

Annex:

Art 9 of the Basic Law of 1867 on the General Rights of Nationals (rights of the home) reads:

Art. 9. (1) The rights of the home are inviolable.

(2) The existent law of 27th October 1862 (RGBl. No. 88) on the protection of the rights of the home is hereby declared a component of this Basic Law.

Art 10 Basic Law of 1867 on the General Rights of Nationals (privacy of letters) reads:

Art. 10. The privacy of letters may not be infringed and the seizure of letters may, except in case of a legal detention or domiciliary visit, take place only in times of war or by reason of a judicial warrant in conformity with existent laws.

Art 10a Basic Law of 1867 on the General Rights of Nationals (telecommunications secrecy) reads:

Art. 10a. (1) Telecommunications secrecy may not be infringed.

(2) Exceptions to the provisions of the foregoing paragraph are admissible only by reason of a judicial warrant in conformity with existent laws.

Art 13 Basic Law of 1867 on the General Rights of Nationals reads:

Art. 13. (1) Everyone has the right within the limits of the law freely to express his opinion by word of mouth and in writing, print, or pictorial representation.

(2) The Press may be neither subjected to censorship nor restricted by the licensing System.

Administrative postal distribution vetoes do not apply to inland publication.

Art 14 Basic Law of 1867 on the General Rights of Nationals reads:

Art. 14. (1) Everyone is guaranteed complete freedom of belief and conscience.

(2) The enjoyment of civil and political rights is independent of religious belief. Nevertheless duties incumbent on nationals may not be prejudiced by religious beliefs.

(3) No one can be forced to observe a ritual act or to participate in an ecclesiastical ceremony in so far as he is not subordinate to another who is by law invested with such authority.

Art 7 of the Austrian Constitution reads:

Article 7. (1) All nationals are equal before the law. Privileges based upon birth, sex, estate, class or religion are excluded. No one shall be discriminated against because of his disability.

The Republic (Federation, provinces and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of everyday life.

(2) The Federation, provinces and municipalities subscribe to the de-facto equality of men and women. Measures to promote factual equality of women and men, in particular by eliminating actually existing inequalities, are admissible.

(3) Official designations can be applied in such a way as to indicate the sex of the officer holder. The same holds good for titles, academic degrees and descriptions of occupations.

(4) Public employees, including members of the federal army, are guaranteed the unrestricted exercise of their political rights.

Art 14 paragraph 6 of the Austrian Constitution reads:

(6) Schools are institutions in which pupils shall be educated together according to a comprehensive fixed curriculum and in which, in connection with the imparting of knowledge and skills, a comprehensive educational goal is strived for. Public schools are those schools which are established and maintained by authorities so required by law. The Federation is the authority so required by law in so far as legislation and execution in matters pertaining to the establishment, maintenance and dissolution of public schools are the business of the Federation. The province or, according to the provincial statutory provisions, the municipality or a municipal association is the authority so required by law in so far as legislation or implementing legislation and execution in matters pertaining to establishment, maintenance and dissolution of public schools are the business of the province. Admission to public school is open to all without distinction of birth, sex, race, estate, class, language and religion, and in other respects within the limits of the statutory requirements. The same shall apply mutatis mutandis to kindergartens, day homes and student hostels.

Artikel I of the Federal Constitutional Act on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination reads:

(1) Any form of racial discrimination – also to the extent not already in contradiction with Article 7 of the Federal Constitutional Act as amended 1929 and Article 14 of the Convention for the Protection of Human Rights and Fundamental Liberties, Federal Law Gazette 210/1958 – is forbidden. Legislation and execution shall refrain from any discrimination for the sole reason of race, colour of skin, descent or national or ethnic origin.

(2) Para 1 shall not prevent granting special rights to Austrian citizens or imposing special obligations on them, unless contradicted by Article 14 of the Convention for the Protection of Human Rights and Fundamental Liberties.

Art 63 of the Treaty of Saint-Germain reads:

Austria undertakes to assure full and complete protection of life and liberty to all inhabitants of Austria without distinction of birth, nationality, language, race or religion.

All inhabitants of Austria shall be entitled to the free exercise, whether public or private, of any belief, religion or creed, whose practices are not inconsistent with public order or public morals.

Points 1, 2 and 3 of the Resolution of the Provisional National Assembly of 30 October 1918 read:

1. All censorship is abolished as illegal because contradictory to the basic rights of the citizen.

2. Stops on publications and the issue of a postal distribution veto on such cease forthwith.

Hitherto operative stops and postal distribution vetoes are abolished. Complete freedom of the Press is established.

3. The emergency ordinances with respect to rights of assembly and association are abolished. Complete freedom of assembly and association, without distinction of sex, is established.

Section 1 of the Rights of the Home Act reads:

A domiciliary visit, that is, a search of a home or the appurtenant premises may rule only be undertaken on the strength of a judicial warrant stating the reasons. This warrant shall at once or at least within 24 hours be served on the party concerned.

Section 1 of the Data Protection Act reads:

Section 1. (1) Every person shall have the right to secrecy of the personal data concerning that person, especially with regard to the respect for his or her private and family life, insofar as that person has an interest which deserves such protection. Such an interest is precluded if data cannot be subject to the right to secrecy due to the data's general availability or because they cannot be traced back to the data subject.

(2) Insofar as personal data are not used in the vital interest of the data subject or with the data subject's consent, restrictions of the right to secrecy are permitted only to safeguard overriding legitimate interests of another person, namely in the case of interference by a public authority only on the basis of laws which are necessary for the reasons stated in Article 8 para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Federal Law Gazette No 210/1958. Such laws may provide for the use of data that, due to their nature, deserve special protection only in order to safeguard substantial public interests and, at the same time, shall provide for adequate safeguards for the protection of the data subjects' interests in confidentiality. Even in the case of permitted restrictions, a fundamental right may only be interfered with using the least intrusive of all effective methods.

(3) Insofar as personal data concerning a person are intended for automated processing or processing in files managed manually, i.e. files managed without automated processing, every person shall, as provided for by law, have

1. the right to obtain information as to who processes what data concerning the person, where the data originated from, for which purpose they are used, and in particular to whom the data are transmitted;

2. the right to rectification of incorrect data and the right to erasure of illegally processed data.

(4) Restrictions of the rights according to para. 3 are only permitted under the conditions laid out in para. 2.

The Federal Constitutional Act on the Protection of Personal Liberty reads:

Article 1

(1) Everyone has the right to liberty and security (personal liberty).

(2) No one may be arrested or detained on grounds other than those named in this Federal Constitutional Act other than in accordance with the procedure prescribed by law.

(3) The deprivation of personal liberty may be legally prescribed only if this is requisite for the purpose of the measure; deprivation of personal liberty may in any instance only occur if and inasmuch as this is not disproportionate to the purpose of the measure.

(4) Whoever is arrested or detained shall be treated with respect for human dignity and with all feasible personal consideration and may be subjected only to such restrictions as are commensurate with the purpose of the detention or necessary for the maintenance of security and order in the place of his/her detention.

Article 2

(1) A person may in the following cases be deprived of his/her personal liberty in accordance with the procedure prescribed by law:

1. if judgment has been pronounced by reason of an offence to which a threat of penalty applies;

2. if he/she is suspected of a particular offence to which a threat of penalty by a legal or fiscal authority applies;

a) so as to end to aggression or to establish at once the actual circumstances in so far as the suspicion arises from the close link in time to the occurrence or is due to his/her possession of a specific item,

b) to prevent him/her from evasion of the trial or from interference with evidence, or

c) to impede him/her in the case of an offence to which a threat of substantial penalty applies from the commitment of a similar offence or the effectuation of such;

3. for the purpose of bringing him/her before the competent authority on suspicion of being surprised in the commitment of an offence of administrative transgression if the arrest is necessary to ensure prosecution or for the prevention of further similar offences;

4. to enforce compliance with a valid judicial ruling or the fulfilment of any obligation prescribed by law;

5. if there is reason to presume that he/she is a source of danger for the spread of infectious diseases or due to psychic disorder endangers himself/herself or others;

6. for the purpose of necessary educational measures in the case of a minor;

7. if necessary to secure a proposed deportation or extradition.

(2) No one may be arrested or detained simply because he/she is not in a position to fulfil a contractual obligation.

Article 3

(1) Only a court may pronounce upon a deprivation of liberty for an offence to which a penalty applies.

(2) Provision may however be made for the imposition of a term of imprisonment or the establishment of alternative penalties by administrative authorities if the extent of the deprivation of liberty does not exceed six weeks or in so far as the decision rests with an independent authority three month.

(3) If a term of imprisonment is not imposed by an independent authority or an alternative penalty established by it, there must be a guarantee for comprehensive appeal with suspensory effect being able to be lodged with such an authority.

Article 4

(1) An arrest under Art. 2 para 1 sub-para 2 lit. b and c above is admissible only in execution of a substantiated judicial order which must be served on the person concerned on arrest or at the latest within 24 hours thereafter.

(2) If delay entails danger as well as in the case of Art. 2 para 1 sub-para 2 lit. a above, a person may be arrested also without judicial order. He/she shall be set free as soon as it is established that no reason for his/her further detention is on hand, otherwise he/she shall be brought without needless deferment, at the latest however prior to the expiration of 48 hours, before the competent court.

(3) A judge shall without delay interrogate a person brought before a court and inquire into the grounds for the detention.

(4) An arrest under Art. 2 para 1 sub-para 2 lit. b and c above on suspicion of an offence to which a threat of penalty by fiscal authority applies is admissible only in execution of a substantiated order by an officer authorized by law to exercise judicial power. If however delay entails danger as well as in the case of Art. 2 para 1 sub-para 2 lit. a above, a person may be arrested also without such an order. Furthermore paras. 1 to 3 above hold good analogously with the proviso that the person arrested shall be brought promptly before the competent fiscal penal authority.

(5) A person arrested under Art. 2 para 1 sub-para 3 above shall, if the reason for the arrest has not already been obviated, be promptly delivered to the competent authority. He/she may on no account be detained for longer than 24 hours.

(6) Everyone arrested shall at the earliest opportunity, if possible at the time of his arrest, be informed in a language which he/she understands of the reasons for his/her arrest and of any charge against him/her. The rights accorded by constitutional law to the lingual minorities remain unaffected.

(7) Everyone arrested is entitled to have at his/her request a relative and a legal adviser of his/her own choosing notified without unnecessary delay of the arrest.

Article 5

(1) Whoever is detained on suspicion of an offence to which a threat of penalty by a legal or fiscal authority applies is entitled within a reasonable time to termination of the proceedings initiated on account of the charge against him/her or to release pending trial.

(2) If slighter means suffice, deprivation of liberty shall be waived. Whoever is detained to prevent him/her from evasion of the trial for an offence to which no severe penalty applies shall in any event be released if he/she furnishes the security established by the court or by the officer authorized by law to exercise judicial power taking into account the gravity of the penal offence with which he/she is charged, his/her personal circumstances, and the means of the person standing as security; additional slighter means to ensure the trial are admissible.

Article 6

(1) Everyone arrested or detained is entitled to take proceedings in which a court or other independent authority decides on the lawfulness of the deprivation of liberty and if the detention is not lawful orders his/her release. The decision must be issued within a week unless the detention should have already ended.

(2) In the case of detention for an indefinite period the need for such must be reviewed at appropriate intervals by a court or other independent authority.

Article 7

Everyone unlawfully arrested or detained shall have an enforceable right to full satisfaction including compensation for injury to other than material assets.

Article 8

(1) (no longer in force)

(2) (no longer in force)

(3) The Convention for the Protection of Human Rights and Fundamental Freedoms, Federal Law Gazette 210/1958, remains unaffected.

(4) (no longer in force)

(5) The Federal Government is entrusted with the execution of this Federal Constitutional Act.