

AUSTRIA

Concern has arisen recently about the independence of the judiciary in Austria. An indicator of this concern was an open letter that was signed by two thirds of all judges and public prosecutors of the country. Allegations have also been brought to light about attempts of certain politicians to influence the course of justice in ongoing trials. The role played by the current Minister of Justice, Dieter Böhmdorfer, has also subject of some public debate.

Austria is a democratic republic and federal state, composed of nine autonomous states (*Länder*). Austria was annexed by Nazi Germany in March 1938 and liberated and occupied by the victorious Allies in 1945. The Provisional Government reinstated the Constitution which had been in force before the parliamentary democracy in Austria was suspended in 1933. A June 1946 agreement provided that the Austrian Government receive qualified authority over the entire country, including the right to legislate and to administer the laws. Austria's full sovereignty was restored on 15 May 1955, when the four Allied powers signed the State Treaty formally re-establishing the Austrian republic. The legislature adopted a constitutional provision on 26 October 1955 declaring Austria's "permanent neutrality." Subsequent to a referendum, Austria joined the European Union on 1 January 1995.

The Federal President (*Bundespräsident*) is the head-of-state, and is directly elected by popular vote for a term of six years. The current Federal President, Thomas Klestil, has been in office since 1992. The head of government is the Federal Chancellor (*Bundeschancellor*). The President appoints the Federal Chancellor and the other members of the cabinet pursuant to the Chancellor's recommendation. The Federal Chancellor, in office since 4 February 2000, is Wolfgang Schüssel.

The Federal Assembly (*Bundesversammlung*) is Austria's legislative branch. This bicameral parliamentary system comprises the National Council (*Nationalrat*) and the Federal Council (*Bundesrat*). The National Council is the lower house of parliament and has 183 seats. The members are elected every four years by direct popular vote. The Federal Council is the upper house of parliament and the members are elected by the parliaments of the states (*Landtage*) for five or six year terms.

The Federal Constitution of Austria is composed of several constitutional acts and state treaties. Parts of the Constitution date back to the 1860s. The Federal Constitutional Law of 1920 forms the core of the Austrian Federal Constitution. It contains the foundations of state organisation. Fundamental rights and civil rights and liberties are contained in the Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Länder represented in the Imperial Council (*Reichsrat*). The rights guaranteed include, *inter alia*, the inviolability of property, personal liberty, the right to a lawful judge, freedom of expression, freedom of the press, freedom of conscience and of worship. The European Convention for the Protection of Human Rights and Fundamental Freedoms has constitutional status in its entirety.

For the last 13 years the Government of Austria had been made up of a coalition between the Social Democratic Party (SPÖ), which was the dominant party in the ruling coalition, and the centre-right People's Party (ÖVP). Over the past decade, the far-right Freedom Party of Austria (FPÖ) has made increasing gains in a number of regional elections. The former leader of the FPÖ, Jörg Haider, has been a figure of some controversy, who had previously praised aspects of the Nazi Regime in

Germany and had been forced to resign as provincial governor of his home state Carinthia in 1991 after he had commended the "orderly employment policies" of the Third Reich.

In the elections to the lower house of the bicameral legislature (*Nationalrat*) on 3 October 1999, the SPÖ polled 33,1 percent and 65 seats and thereby registered the largest loss in the number of seats. Compared to their 38,1 per cent and 71 seats in the 1995 elections, this total represented a net loss. The FPÖ's share of the vote increased to 26,9 per cent and 52 seats from 21,9 per cent and 40 seats in the 1995 general elections, thereby allowing the party to pull even with the ÖVP, which went from 28,3 per cent and 53 seats in 1995 to 26,9 per cent and 52 seats.

The SPÖ faced difficulties trying to form a coalition government with the ÖVP. After coalition talks between the SPÖ and the ÖVP collapsed and attempts of Victor Klima, the leader of the SPÖ, to form a minority government failed, the leader of the ÖVP, Wolfgang Schüssel, formed a new coalition with the FPÖ. Due to the participation of Haider's extreme right FPÖ, the coalition agreement spurred international outrage. The 14 other member states of the European Union reacted by imposing diplomatic sanctions on Austria, on the premise that Austria was not acting in concurrence with common European values. Israel withdrew its ambassador and the United States froze all bilateral contact with Austria until November 2000.

Although having expressed disapproval with regard to its composition, President Thomas Klestil swore in the new government on 5 February 2000. The cabinet is headed by the new Federal Chancellor Wolfgang Schüssel, leader of the ÖVP and previous Vice Chancellor and Foreign Minister. The 12-member cabinet includes six FPÖ members, but Mr. Haider did not take control of a ministry. In an attempt to persuade the EU to restore full diplomatic ties with Austria, he resigned as leader of the FPÖ on 28 February 2000. Vice-Chancellor Susanne Riess-Passer took over his position. Mr. Haider nevertheless remained Governor of Carinthia and thereby kept his influence within the party and stayed in the public arena.

Despite several attempts by Mr. Schüssel and Mr. Klestil, the EU refused to lift sanctions in March and April 2000, with matters reaching a climax when the French Government invited representatives from all EU member states with the exception of Austria, for an official briefing concerning the upcoming assumption by the French Government of the rotating European presidency. The Austrian Government responded with an official protest and threatened to withhold its financial contributions to the EU. Nevertheless, the French Government announced on 25 May 2000 that sanctions would be maintained when France assumed the presidency. In reaction, Austria announced a popular referendum on the EU sanctions later that year if sanctions persisted and declared that Austria could be forced to withdraw from the EU.

On 12 September 2000 the EU formally lifted the diplomatic sanctions after an EU committee of three "wise men" (Martti Ahtisaari, Jochen Frowein and Marcelino Oreja) published their report on 8 September 2000 stating that "the measures taken by the XIV Member States, if continued, would become counterproductive and should therefore be ended." The report concluded that "the Austrian Government is committed to the common European values" and "the Austrian Government's respect in particular for the rights of minorities, refugees and immigrants is not inferior to that of the other European Union Member States." Commenting on the FPÖ, the report concluded, that "in contradiction with past FPÖ behaviour and statements made by other FPÖ officials, the Ministers of the FPÖ have by large worked according to the Government's commitments in carrying out their governmental activities so far." Nonetheless, the report did express strong criticism at the Justice Minister for its conduct in regard to the judiciary.

In February 2000 a speech delivered by the newly appointed Minister of Justice, Michael Krüger, in 1995 was published in which he had made compromising remarks concerning the definition of concentration camps. He resigned shortly thereafter, and Dieter Böhmdorfer was appointed as the new Minister of Justice.

HUMAN RIGHTS BACKGROUND

The Government of Austria generally respects human rights. However, there have surfaced repeated allegations of police brutality. In May 1999, Marcus Omofuma, an asylum applicant from Nigeria, died while being deported. He suffocated because his hands and feet were cuffed and his mouth was taped shut allegedly to control his violent behaviour. There were reports about incidents of alleged ill-treatment of detainees and the excessive use of force by the police. Individuals who complained about such ill-treatment or who reported on them as witnesses were said to risk counter-charges, such as defamation or resisting state authority.

The FPÖ continuously ran controversial campaigns prior to elections. Prior to the Viennese local elections, the FPÖ used posters that linked the words "foreigners" and "criminality", thereby invoking xenophobic sentiments.

Jörg Haider has been repeatedly accused of using anti-Semitic rhetoric and racist language. In March 2001, 67 academics, including professors from the United States, Israel and European Universities, signed an open letter to the Austrian President Thomas Klestil. The letter was published in *Der Standard* and stated, *inter alia*,: "Haider's manipulation of racist sentiments to serve political ends lays bare the illegitimacy of his claim to be a democrat or an adherent to the basic tenets of Austrian democracy. He hides behind the democratic principle of free speech even as he reviles the democratic cornerstones of fairness and equality by invoking anti-Semitic rhetoric to further his political agenda."

This letter was prompted by a remark that Haider made about Ariel Muzicant, the head of Vienna's Jewish Cultural Community, at a Freedom party meeting in February 2001. He said: "I don't know how someone called Ariel, can have so much dirt on his hands." [Ariel is also the name of a commonly used laundry powder.] Muzicant sued Haider for this remark and several other remarks he had made on other occasions. In May 2001 a court banned Haider from repeating or making similar statements, pending a final decision on whether his comments were anti-Semitic.

The number of libel or defamation suits filed in Austria has increased substantially. Jörg Haider and other FPÖ politicians have filed many law suits against journalists and political scientists. FPÖ members are frequently represented by the law firm still carrying the name of the current Minister of Justice, Dieter Böhmdorfer, who before his appointment regularly represented his friend Jörg Haider.

The three "wise men" in the report to the EU noted:

One of the most problematic features concerning important members of the FPÖ are attempts to silence or even to criminalize political opponents if they criticise the Austrian Government. The frequent use of libel procedures against individuals who have criticised the FPÖ or the statements of its political leaders should also be seen in this context. ... It can only be concluded that the systematic use of libel procedures to suppress criticism of ambiguous statements gives rise to very serious concern in

the context of the political debate pursued by the FPÖ in Austria, in particular after the FPÖ forms part of the Federal Government.

One example is the case of Professor Anton Pelinka. He had made the following statement to the Italian television station RAI on 1 May 1999: "In his career, Haider has repeatedly made statements which amount to trivialising National Socialism. Once he described death camps as penal camps. On the whole, Haider is responsible for making certain National Socialist positions and certain National Socialist remarks more politically acceptable." After Haider's then lawyer and now Minister of Justice Dieter Böhmdorfer had filed a suit for defamation against Pelinka, he was found guilty on 11 May 2000 and fined 60.000 ATS by the Viennese Criminal Court. Upon appeal the decision was reversed.

In another interview with CNN On 27 September 2000, Pelinka had said, *inter alia*, that Haider is "using the same prejudices, the same sentiments as the Nazis did to win popular acceptance by exploiting xenophobic racism." Pelinka was found not guilty by a Vienna court, but Haider's lawyer has appealed the case and the outcome was still pending at the time of this writing. Jörg Haider has sued a number of prominent persons for similar statements. Among the people sued by Haider are, Peter Michael Lingens from the journal *Profil* and Hans Rauscher from the newspaper *der standard*.

This exaggerated use of libel procedures to suppress criticism may serve to restrict the free speech of those who oppose the current government and it may have general adverse consequences for the respect of the right to freedom of expression.

International Obligations

Austria has ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights. Austria has signed, but not yet ratified, the two Optional Protocols to the Convention of the Rights of the Child.

THE JUDICIARY

The Austrian legal system is a civil law system with origins in Roman law. Article 82 of the Federal Constitutional Law provides that jurisdiction is a federal not a state, function. According to Article 83 of the Federal Constitutional Law, the Constitution and competence of the courts are laid down by Federal law. It follows from these articles that the states cannot create their own provincial courts. The constitution stipulates in Article 94 that judicial and administrative powers shall be separate at all levels of proceedings.

A special feature of Austria's legal system is that the Federal Constitutional Law, in Article 91, stipulates that the people shall participate in the jurisdiction. In crimes entailing severe penalties and in all cases of political felonies and misdemeanours a jury brings the verdict. Lay judges (*Geschworene* and *Schöffen*) take part in the administration of justice in certain criminal proceedings.

The court structure

Austria has 191 local, 21 regional, and 4 regional higher courts. The highest courts in Austria are the Supreme Court, the Administrative Court and the Constitutional Court. The Supreme Court is the last instance in civil and criminal suits. The Administrative Court is the court of supervision over the administrative branch, and the Constitutional Court deals with constitutional matters. It is competent to strike down state laws and federal laws as unconstitutional and to decide on individual human rights complaints against the Executive power. Besides these three judicial organs, the European Court of Human Rights and the European Court of Justice are also recognised by Austria.

The local courts are the courts of first instance for civil cases for which damages do not exceed 130.000 *Schilling*. In addition, they have jurisdiction in first instance over certain civil matters specified by law, particularly matters relating to family law and tenancy law. In criminal matters, they have jurisdiction of first instance over cases that are only punishable by a fine or with a prison term that does not exceed one year.

The regional courts are courts of first instance for all civil and criminal matters that do not fall under the jurisdiction of the local courts. They are also the appellate courts of the local courts. The regional higher courts are the appeal courts in criminal and civil matters for decisions originating in the regional courts. Each of the presidents of the four higher regional courts is the head of the administration of the judiciary in the respective region and in this function, the presidents are only accountable to the Minister of Justice.

The Court of Audit (*Rechnungshof*) examines the administration of public funds by the federal state, the states, the municipalities (*Gemeindevverbände*) and other public legal entities.

Ombudsman

In Articles 148 a to 148 j, the Federal Constitutional Law establishes the People's lawyer (*Volksanwaltschaft*), charged with the main function of examining individual complaints of maladministration by a public administrative body. This independent body is composed of three People's lawyers, which are nominated by the three largest parliamentary parties and elected by the National Council. The People's lawyer submits an annual report to the National Council. When this body investigates individual complaints, it has the right to inspect the relevant documentation and to recommend the necessary action to the public authority. The states can declare in their Constitution that the People's lawyer is also competent within the state administration or they can create agencies in the sphere of the state administration with similar tasks.

Judges

The Federal Constitutional Law stipulates in Article 87 (1) that judges are independent in the exercise of their judicial office. Judges are assigned cases in advance for a certain period stipulated by the law on the organisation of the courts. The removal of a matter allocated to the jurisdiction of a judge is governed by Article 87 (3) of the Federal Constitutional Law. That provision requires a decree of the judiciary's administrative authorities and provides that this can only be done if the judge is prevented from the discharge of his/her responsibilities or he/she is unable to cope with his/ her duties within a reasonable time due to the extent of the duties.

Appointment

Article 86 of the Federal Constitutional Law stipulates that judges are generally appointed by the Federal President pursuant to the proposal of the Federal Government. The Federal President may also authorise the competent Federal Minister to appoint judges. Prior to the appointment, the Federal Government or the Federal Minister shall obtain proposals for appointment from the chambers competent under the law on the organisation of courts. Provided a sufficient number of candidates is available, the proposal shall comprise at least three names and, if there is more than one vacancy to be filled, at least twice as many names as judges to be appointed.

The President, the Vice-President, and the other members of the Administrative Court are appointed by the Federal President on the proposal of the Federal Government. With regard to the appointment of the President and the Vice-President, a plenary session of the Administrative Court submits a list of three candidates for each vacancy to the Federal Government, which then makes its recommendations on that basis.

The Constitutional Court consists of a President, a Vice-President, twelve additional members and six substitute members. The Federal President appoints the court President, the Vice-President, the six additional members and three substitute members on the recommendation of the Federal Government. The Constitution stipulates that these members shall be elected from among judges, administrative officials and professors holding a chair in law. The remaining six members and three substitute members are appointed by the Federal President on the basis of recommendations by the National Council and the Federal Council, each listing three candidates for each vacancy.

For judges of the Supreme Court, the Administrative Court and the Constitutional Court, the Federal Constitutional Law provides that they cannot be members of the Federal Government, a state Government, or a popular representative body. For the President and Vice-President of the Supreme Court, the Administrative Court and the Constitutional Court, this limitation applies for the four years prior to their election.

Candidates eligible to be appointed to the Administrative Court and the Constitutional Court must have completed their studies in law and political science and must have held a professional position requiring the completion of these studies for at least ten years prior to their appointment.

Trained employees acting in the capacity of judges

Article 87a Federal Constitutional Law provides that Federal law can assign the performance of certain kinds of cases, which fall within the jurisdiction of a civil court of first instance, to specially trained employees of the federal state who are not judges. However, the judge competent in accordance with the allocation of business of that court can at any time reserve or take over the discharge of that business. These employees are only bound by instructions from the competent judge and, according to Article 20 (1), only bound in so far as compliance with that instruction would not infringe the criminal code.

Discipline and Removal - Security of tenure

The law on the organisation of the courts prescribes that judges must retire when they reach the age of 65. Article 88 (2) of the Federal Constitutional Law stipulates that judges may only be removed from office or transferred against their will or superannuated in the cases and ways prescribed by law and by reason of a formal judicial decision. However, this Article provides that this does not apply to transfers and retirements which become necessary through changes in the organisation of the courts. A judge can only be temporarily suspended from office by decree of a senior judge or

the higher judicial authority and the matter has to be simultaneously transferred to the competent court.

The Federal Constitutional Law stipulates that judges of the Administrative Court shall retire when they reach the age of 65 and that the term of office of judges of the Constitutional Court ends when they reach the age of 70.

Lawyers

Currently, there are approximately 4,000 practising lawyers in Austria. Each state has its own Bar Association. All lawyers, whose headquarters are in that state are members of that State Bar Association. These Associations are corporations of public law and represent the professional interests of the lawyers. Matters that are relevant on a federal level are coordinated by the Austrian Bar Association.

INDEPENDENCE OF THE JUDICIARY IN AUSTRIA

Recent developments in Austria have raised concerns among judges and public prosecutors in the country with regard to the independence of the judiciary. In December 2000, some 1,300 judges and state prosecutors, a number representing about two-thirds of all such jurists, signed an open letter publicly condemning all attempts at influence by the authorities in the operation of the courts.

Incidents leading to the open letter

In February 2000, a 1995 speech by the newly appointed Minister of Justice, Michael Krüger, was published. In this speech he made some compromising remarks about the definition of concentration camps. He resigned shortly thereafter due to health reasons, and Dieter Böhmdorfer was appointed as the new Minister of Justice.

Currently Minister of Justice, Dieter Böhmdorfer was previously the lawyer of his friend Jörg Haider and of the FPÖ. In that role he was active in bringing frequent libel procedures against individuals critical of the FPÖ, which were the subject of concern expressed by the three "wise men" in their report to the EU (see *Human Rights Background*). Mr. Böhmdorfer's former law firm still carries his name and continues to represent FPÖ members frequently. Furthermore, Mr. Böhmdorfer was the only Minister of the Government of Austria who was singled out by the report of the three "wise men" to the EU. The authors concluded in the report that "(they) have gained the impression that the overall performance of the Ministers of the FPÖ in Government since February 2000 cannot be generally criticised. Some actions of the Minister of Justice have caused concern."⁷⁶

Dieter Böhmdorfer's appointment spurred a public debate about the appointment of a candidate as Minister of Justice who openly associates himself with a party. After the appointment, various media alleged that the judiciary would be inappropriately influenced by the Minister of Justice.

This constellation as such does not threaten the independence of the judiciary and it cannot necessarily be concluded that Dieter Böhmdorfer would influence the course of justice in cases involving the members of the FPÖ. However, concerns have been voiced that he may lack the neutrality and independence necessary for a Minister of Justice. While the President of the Association of Austrian Judges, Barbara Helige, has repeatedly expressed the aforementioned

opinion concerning the lack of a threat to judicial independence per se, she has also remarked in this regard, that she was concerned Böhmdorfer's engagement in favour of Jörg Haider and the FPÖ would damage public confidence in his independence.

Another incident that added to the suspicion of lack of independence of the current Minister of Justice was the so called "spy affair" (*Spitzelaffäre*). In the fall of 2000, a former policeman, Josef Kleindienst, alleged that Haider and 17 other high-ranking members of the FPÖ had bribed police officers to give them confidential police files on their political opponents in order to spy on them. There were also allegations that Böhmdorfer himself had used such confidential documents in earlier court cases when he was still representing members of the FPÖ in court. According to reports by the magazine *Falter*, in its issue of 25 October 2000, Böhmdorfer had a surprising degree of insider knowledge in some cases. Nevertheless, Austrian prosecutors dropped an inquiry into the alleged misbehaviour by Haider and Ewald Stadler, a senior FPÖ member, in February 2001. Investigations against Hilmar Kabas, the leader of the FPÖ in Vienna, continued.

While the investigation into the spy affair of the public prosecutor Michael Klackl was ongoing, Böhmdorfer said in a public interview that the innocence of his friend Jörg Haider was beyond all doubt. This comment was widely criticised because, though this might have been his personal opinion, he made the remark while being interviewed as the Minister of Justice. As the Minister of Justice, he exercises ultimate authority over the public prosecutors of Austria and has the final right to give instructions (*Weisungsrecht*) to them. Although Böhmdorfer publicly announced that he would refrain from giving instructions in this case, the future career of the investigating prosecutor depended on him. Böhmdorfer ignored repeated calls for his resignation after this incident.

Most of the cases arising out of the "spy affair" have been dismissed, despite overwhelming evidence of impropriety.

The open letter was finally triggered by remarks by Peter Westenthaler, FPÖ Vice-Chair and Parliamentary Group Leader. He called for the suspension from office of the public prosecutors and of the judge, Stefan Erdei, investigating the alleged misconduct by party officials in the spy affair. Among others, Barbara Helige, the President of the Association of Judges of Austria and Erwin Felzmann, the President of the Supreme Court of Austria, criticised these attempts by the FPÖ politician to influence an ongoing judicial investigation. The following is the text of the open letter:

Open letter for an independent judiciary

We, approximately 1,300 judges and public prosecutors, are concerned about public statements about the judiciary made recently by leading politicians. These remarks would suggest that commitments to the independence of the judiciary are often mere lip service.

The justice system should not serve personal interests but rather exists to enforce the law regardless of one's position in society. Independence and the separation of powers are in danger when ongoing trials can be influenced by barely veiled political pressure.

Therefore, all representatives of this republic are called upon to take a stand against attempts to make the justice system a tool for politics. We, the undersigned judges and public prosecutors, strongly oppose such attempts and call upon all public actors to guard and to respect the rule of law.