

## INVALIDATION AND CONVALIDATION IN CONSTITUTIONAL LAW IN FRANCE AND AUSTRIA

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### I. INTRODUCTION

The following deliberations were subject-matter of a presentation held at the University of Paris I (Panthéon Sorbonne) on 12<sup>th</sup> June 2009. On the next pages should be shown (I.) a short overview of the roles of the French Constitutional Council (“*Conseil Constitutionnel*”) and the Austrian Constitutional Court (“*Verfassungsgerichtshof*”) in national constitutional jurisdiction. In the course of this the amendment of the French Constitution in July 2008 is subjected to a description. Further (II.) follows an abstract description of the phenomena of invalidation and convalidation in constitutional law and their constitutional requirements. Finally (III.) invalidation of norms of simple law is shown by a concrete example, namely the invalidation of § 209 Austrian Criminal Code (“*Strafgesetzbuch*”) and its rescindment by the Austrian Constitutional Council in 2002.

### II. THE CONSTITUTIONAL COUNCIL IN FRANCE AND THE CONSTITUTIONAL COURT IN AUSTRIA

#### A. *The role of the Constitutional Council in the French Constitution*

The Constitutional Council is a body of the French Constitution and plays an important role in the legislative Process.<sup>1</sup> The Council is composed of nine appointed members. Three of these members, including

<sup>1</sup> See, e.g., *Fromont*, Der französische Verfassungsrat, in Starck/Weber (eds), *Verfassungsgerichtsbarkeit in Westeuropa I*<sup>2</sup> (2007), 227 (233); *Burdeau*, Manuel de droit constitutionnel et institutions politiques<sup>20</sup> (1984), 116 ff; *Heringa/Kiiver*, *Constitutions Compared* (2007), 70.

the chairman, are appointed by the President of the Republic, three are appointed by the speaker of the National Assembly, and three by the Senate speaker. The members serve non-renewable terms of nine years each; three of the members are replaced once every three years, meaning that once every three years the President and the two speakers get to appoint one new member each. In addition, former Presidents may join the Council as life members. When the number of Council members is even and votes are tied, the vote of the Council chairman decides (Article 56 French Constitution).<sup>2</sup>

The main tasks of the Constitutional Council are to check the validity of elections and referendums, and to control the constitutionality of bills adopted by parliament before they enter into force.<sup>3</sup> The setting up of the Council may be seen against the backdrop of the rationalization of parliament in the Fifth Republic: parliament is no longer the judge of its own elections, and its bills are subjected to further scrutiny as regards their compliance with the Constitution.<sup>4</sup>

Originally, constitutional review of bills mainly concerned the question whether or not parliament had stayed within its competences to legislate in the first place. In 1971, however, the Council expanded the scope of its review powers so as to include fundamental freedoms. While the French Constitution itself

<sup>2</sup> Cf. *Fromont*, *Verfassungsrat*, 230 ff; *Heringa/Kiiver*, *Constitutions*, 70; profoundly *Burdeau*, *Manuel*, 116 f; *Jouanjan*, *Grundlagen und Grundzüge staatlichen Verfassungsrechts*, in: *von Bogdandy/Cruz Villalón/Huber* (eds), *Handbuch Ius Publicum Europaeum I* (2007), 87 (127 f).

<sup>3</sup> Cf. *Heringa/Kiiver*, *Constitutions*, 70; *Burdeau*, *Manuel*, 118 f; *Jouanjan*, *Grundlagen*, 129.

<sup>4</sup> *Heringa/Kiiver*, *Constitutions*, 71; see also, profoundly, *Fromont*, *Verfassungsrat*, 229; *Burdeau*, *Manuel*, 118; *Jouanjan*, *Grundlagen*, 127.

contains no human-rights catalogue against which to check bills, the Constitution's preamble does contain a reference to human rights as enshrined in the Declaration of the Rights of Man and the Citizen of 1789 and the preamble to the constitution of the Fourth Republic of 1946. Controlling the constitutionality of a bill that would have restricted the right to form associations, the Council held that, via the preamble, the revolutionary bill of rights and the preamble of the predecessor constitution formed an integral part of the current Constitution. As a result, bills must not only comply with formal rules on competence allocation but also with substantive human-rights standards. The disputed part of the bill in question was declared unconstitutional for a violation of the freedom of association.<sup>5</sup>

The judicial reviews of the Constitutional Council are completely abstract and, until 2008, the proceedings took place only a priori. Individuals couldn't appeal with the Council, and the Council did not hear any judicial disputes between private parties. Instead, the council maintained a check on the parliament before bills were promulgated, so as to make sure that enacted statutes are constitutional. Once statutes were enacted, the Council couldn't review their constitutionality any longer.<sup>6</sup>

### *B. The role of the Constitutional Court in the Austrian Constitution*

As distinguished from the French Constitutional Council the Constitutional Court cannot take action on its own respectively ex officio. If the Court is authorized to revise norms depends on relevant applications being filed with the Court. Even if the justices are of the opinion that a certain law is problematic in the constitutional sense, they cannot act until a person or institution initiates a proceeding that enables the intervention of the Court. When an application is filed with the Constitutional Court, the Court has to decide on the application.<sup>7</sup>

<sup>5</sup> *Heringa/Kiiver*, *Constitutions*, 71; cf. *Burdeau*, *Manuel*, 118 f.

<sup>6</sup> Cf. *Heringa/Kiiver*, *Constitutions*, 72; see also, profoundly, *Fromont*, *Verfassungsrat*, 233 ff; *Fromont*, *Die Verfassungsmäßigkeitskontrolle in Deutschland und Frankreich*, *DÖV* 2003, 542 (543 f); *Burdeau*, *Manuel*, 123, 628; *Jouanjan*, *Grundlagen*, 129.

<sup>7</sup> See e.g. *Stelzer*: *An introduction to Austrian constitutional law*<sup>2</sup> (2009), 77 f; the descriptions on the homepage of the Austrian Constitutional Court ([www.vfgh.gv.at](http://www.vfgh.gv.at)). Detailed and profoundly e.g. *Walter/Mayer/Kucsko-Stadlmayer*,

The Austrian Constitution regulates very detailed who is legitimated to file an application with the Constitutional Court. In general, anyone who thinks that his constitutional guaranteed rights have been by national authorities can file an application with the Constitutional Court. Other institutions can also apply to the Constitutional Court. So, for example, for proceedings concerning the review of the legislature - include the Administrative Court, the Supreme Court, the Courts of Appeal or the Independent Administrative Panel and the Independent Asylum Court. They are all obliged to file an application with the Constitutional Court if they have serious reservations against norms in a pending proceeding.<sup>8</sup> This type of judicial review of norms is referred to concrete judicial review and primarily regulated in Article 140 para 1 and Article 144 para 1 Austrian Constitution.<sup>9</sup>

Furthermore, the Austrian Constitution includes the possibility of abstract judicial review (primarily regulated in Article 140 para 1 Austrian Constitution). Most important is the so called "one-third-motion": One third of the members of the National or Federal Council, as well as a state council are authorized to enable judicial-review-proceeding of the Constitutional Court. The federal government is able to proceed against state legislation just as every state government can proceed against federal laws. Individuals can file an application to have a piece of legislation or a regulation reviewed if they are directly affected and if it is unreasonable for them to choose another path to protect against the claimed violation of law.<sup>10</sup>

*Grundriss des österreichischen Bundesverfassungsrechts*<sup>10</sup> (2007), 496 ff; *Öhlinger*, *Verfassungsrecht*<sup>8</sup> (2009), 453 ff; *Berka*, *Lehrbuch Verfassungsrecht*<sup>2</sup> (2008), 266 ff; *Adamovich/Funk// Holzinger*, *Österreichisches Staatsrecht II* (1998), 297 ff.

<sup>8</sup> Cf. *Stelzer*, *Introduction*, 77 ff; [www.vfgh.at](http://www.vfgh.at).

<sup>9</sup> Most profoundly and detailed *Rohregger*, Art 140 B-VG, in: *Korinek/Holoubek* (eds), *Österreichisches Bundesverfassungsrecht-Kommentar* (6<sup>th</sup> dely. 2003), 64 ff; *Schäffer*, Art 140 B-VG, in: *Rill/Schäffer* (eds), *Bundesverfassungsrecht-Kommentar* (5<sup>th</sup> dely. 2007), 53 f; *Kneihs/Rohregger*, Art 144 B-VG, in: *Korinek/Holoubek* (eds), *Österreichisches Bundesverfassungsrecht-Kommentar* (7<sup>th</sup> dely. 2005), 4 ff; *Potacs/Hattenberger*, Art 144 B-VG, in: *Rill/Schäffer* (eds), *Bundesverfassungsrecht-Kommentar* (4<sup>th</sup> dely. 2006), 5 ff. See also *Walter/Mayer/Kucsko-Stadlmayer*, *Bundesverfassungsrecht*, 535 ff; *Öhlinger*, *Verfassungsrecht*, 466 f; *Berka*, *Verfassungsrecht*, 276 ff; *Adamovich/Funk/Holzinger*, *Staatsrecht II*, 313 ff.

<sup>10</sup> Most profoundly and detailed *Rohregger*, Art 140 B-VG, 82 ff; *Schäffer*, Art 140 B-VG, 54 f. See also *Öhlinger*,

### III. THE PHENOMENA OF INVALIDATION AND CONVALIDATION IN GENERAL

#### A. What do the terms “invalidation” and its counterpart “convalidation” mean?

##### 1. Invalidation

The term “invalidation” means that a legal norm (especially a norm of simple law) is against the constitution. Basically, such a situation can have two different results. On the one hand the lower-ranked norm can be suppressed or, as lawyers say, the higher-ranked norm can derogate the lower-ranked norm. On the other hand the lower-ranked norm can get invalid but stays in force. This means that the unconstitutional norm remains applicable until it becomes repealed by the body that is scheduled in the constitution for judicial review of statutes.

In Austria different methods for solving conflicts between statutes are used. Which method is implemented depends on the rank of the conflicting norms. If both norms are from the same rank (e.g. norm of simple law vs. norm of simple law or ordinance vs. ordinance) the later or special norm derogates the earlier or general norm (principle of “*lex posterior derogat legi priori*” and principle of “*lex specialis derogat legi generali*”). But, in Austria, this type of norm conflict is not relevant if norms of simple law are against the constitution.

The Austrian Constitutional Law provides a special body for reviewing if general norms (laws and ordinances (see Article 139 and Article 140 Austrian Constitution) are constitutional. This body is the Constitutional Court (“*Verfassungsgerichtshof*” or “*VfGH*”). Until the Constitutional Court rescinds an unconstitutional norm it stays valid and in force.<sup>11</sup> Over the period between the development of the unconstitutionality and the rescission by the Constitutional Court the norm is *invalid* (unconstitutional but in force).

##### 2. Convalidation

Convalidation is, as good as, the counterpart of Invalidation. But typically convalidation of a norm is not possible without its earlier invalidation. With other words: Convalidation of general norms means that a

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Verfassungsrecht, 466 f; *Walter/Mayer/Kucsko-Stadlmayer*, Bundesverfassungsrecht, 537 f; *Berka*, Verfassungsrecht, 293 f; *Adamovich/Funk/Holzinger*, Staatsrecht II, 308 ff.

<sup>11</sup> Profoundly *Rohregger*, Art 140 B-VG, 11 f; see also *Schäffer*, Art 140 B-VG, 12 ff.

norm of simple law or a norm of an ordinance becomes against the constitution (or – in the case of an ordinance – against simple law) but becomes constitutional again later.

The described situation is only possible if the Constitutional Court don’t rescind the invalid norm before entry of their convalidation. After the norm is convalidated it is in ordinance with the constitution and the unconstitutionality is “healed”. An appeal to the constitutional court would no longer be useful respective promising.

##### B. Constitutional requirements for invalidation

The phenomena of invalidation and convalidation have several common requirements. These requirements are shown as follows.

##### 1. Hierarchy of norms

The main requirement for invalidation is the existence of a hierarchy of norms. From the fact that a state has a constitution usually follows that in this state also exists a hierarchy of norms. The constitution normally is on the top of the “pyramid”. This is the case both in France as in Austria.<sup>12</sup>

In France and Austria various types of hierarchies of norms exist:

In France legislation and regulation are divided strictly (Article 37 French Constitution; “*Matters other than those coming under the scope of statute law shall be matters for regulation*”).<sup>13</sup> From this it follows that there is a “dualism” between legislative and executive power. Statutes may be passed by the French parliament in as far as they concern subject-areas that are explicitly listed as being matters for statute (Article 34 French Constitution). These parliamentary statutes are then called “*Lois*”. Subject-areas not listed as falling under parliamentary competence remain subject to “*Règlement*”.<sup>14</sup>

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<sup>12</sup> In Austria, however, exist different levels of constitutional law: Provisions that may be altered or amended only in the course of a total constitutional revision are higher ranking than constitutional provisions for which this is not the case. Laws that are not constitutional laws – and may thus be called “simple laws” – are of a rank below constitutional laws. These considerations already lead to three levels in the legal system: simple law, constitutional law and constitutional provisions that can only be amended by a total revision (*Stelzer*, Introduction, 6)

<sup>13</sup> See e.g. *Fromont*, Verfassungsrat, 243 f; profoundly *Burdeau*, Manuel, 599 ff; *Jouanjan*, Grundlagen, 130 ff.

<sup>14</sup> *Heringa/Kiiver*, Constitutions, 71.

In Austria, the hierarchy is extended downwards: below the level of simple law there is a level consisting of ordinances, administrative acts and court rulings. At the lowest level are enforcement acts. The essential legal impact of the hierarchy of norms is the possibility for checking the conformity of lower-ranked norms with higher-ranked norms: administrative acts must conform with simple law, simple laws must conform to constitutional law and even “simple” constitutional laws may not be in conflict with constitutional provisions that can be altered or amended only through a total revision.<sup>15</sup>

## 2. Change in constitution

The second requirement for invalidation and convalidation is a change in constitutional law. Constitutions aren’t rigid objects. To the contrary: Constitutions are always subjected to dynamic processes. This phenomenon is referred to as “flexible systems of constitutions”.

As a consequence from this conclusion follows that the fact that a norm of simple law is in order with the constitution at a certain time doesn’t mean that the same norm is always constitutional. It is incontestable that many norms of constitutional law are – seemingly (!) – “inflexible” as they don’t give place for diversity of interpretation. So – par exemple – the French Constitution determines that *the President of the Republic shall preside over the Council of Ministers* (Article 9). According to Article 94 of the Austrian Constitution *judicial and administrative powers shall be separate at all levels of proceedings*.

But constitutional law often includes vague norms. There can be mentioned multifarious examples: Article 7 of the Austrian Constitution determines that *all citizens are equal before the law*; accordingly to Article 9 of the Austrian “Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Länder represented in the Council of the Realm”<sup>16</sup> *the rights of the home are inviolable*; in order to Article 10 para 1 no 8 Austrian Constitution *the Federation has powers of legislation and execu-*

<sup>15</sup> Stelzer, Introduction, 7.

<sup>16</sup> The Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Länder represented in the Council of the Realm has the quality of constitutional law in order to Article 149 Austrian Constitution. To the “fragmentation” of the Austrian Constitution see cf. Gamper, Introduction to the Study of the Law of the Austrian Federal Constitution, icl-journal 2008, 92 (online available under [www.icl-journal.com](http://www.icl-journal.com)).

*tion in matters pertaining to trade and industry*. On the other side Article 34 French Constitution determines that *Statutes shall lay down the basic principles of the general organization of national defense or education*; in order to Article 1 of the “Declaration of the Rights of Man and of the Citizen of 26<sup>th</sup> August 1789” *men are born and remain free and equal in rights*. According to Article 17 of this constitutional law *the right to property is inviolable and sacred*.

These examples show how vague norms of constitutional law can be. What do the sentences “all citizens are equal before the law” and “men are born and remain free and equal in rights” really mean? What are the consequences for the citizens and the state if “property is inviolable and sacred”? Why are policemen – under special legal conditions – allowed to enter flats and houses, if the right of the home is inviolable?

Constitutional laws often give relatively wide room for interpretation. Possibly the best sample is “equality”. When are every citizens “equal”? It’s not the intention of this work to answer to this question. All that matters here is that the idea of equality is very dynamic and depends on time. Social ideas of equality and many other social opinions are important for the interpretation of constitutional law. And the respective time or historical background of these ideas or opinions can be the decisive factor for decision if a norm of simple law is constitutional.

In this context it is not necessary by all means that the text of the constitution must change that a statute becomes invalid or convalidates. A change in constitutional law is necessary for invalidation and convalidation of statutes or ordinances. But it’s not necessary that this change is due to a formal constitutional amendment.

## 3. A posteriori judicial review

The third requirement for invalidation is, as distinguished from both other requirements, a formal criterion: In order to uncover invalidation it is necessary that Constitutional Councils or Courts are authorized to a posteriori judicial review. In other words, it’s required that the Council or Court can review norms after their promulgation.

### a) A posteriori judicial review in Austria

In Austria, a posteriori review can take place in two ways, namely *abstract* and *concrete* judicial review of norms.

*Abstract* judicial review means that the Constitutional Court can review a norm without connection to a pending suit. But the Austrian Constitution (Article 139 para 1 and Article 140 para 1) includes several requirements for the legitimacy of a proceeding within abstract judicial review.

Ordinances issued by State administrative authorities can be subject to abstract review on application by the Federal Government, whereas ordinances issued by Federal administrative authorities are reviewed on application by a State Government. Further, the Federal Government is entitled to contest any State law and every State Government may contest any Federal law. Beyond that, “one-third-motions” are possible. That means that Federal laws can be contested by a third of the members of the National Council and State laws by a third of the members of a State Parliament if the respective State Constitution includes the relevant provision.<sup>17</sup>

*Concrete* judicial review relates to review of a norm if it is to be applied in a pending suit. This type of judicial review is primarily regulated in Article 89, Article 139 para 1 and Article 140 para 1 Austrian Constitution.

An ordinance or a provision of an ordinance may be performed on application by any court (including the Asylum Court), by an Independent Administrative Tribunal or the Federal Procurement Authority, ex officio by the Constitutional Court itself or by an individual alleging direct infringement of his or her personal rights.<sup>18</sup> The same holds true for the judicial

review of simple laws (with the restriction that courts of first instance are not entitled to contest laws before the Constitutional Court). If a court or one of the aforementioned independent administrative authorities has reservations against the application of a certain norm, in other words if it is seriously doubts a norm to be constitutional or lawful, it has the legal obligation to file an application with the Constitutional Court. However, the parties of the pending law suit have no legal right to make such an application.<sup>19</sup> A prerequisite for the admissibility of an application is that the contested norm would be directly applied in a pending case to resolve a legal question. In general, the Constitutional Court leaves it to the applicant court or independent administrative authority to decide which norms are fundamental for the decisions. However, if it turns out in the course of the proceedings that the contested norm is of no relevance to the case, the Constitutional Court has to dismiss the application.<sup>20</sup>

If a norm (or parts of it) is found to be not in accordance with the constitution, the Constitutional Court rescinds it. Rescission is normally published in the Federal Law Gazette.<sup>21</sup> Principally rescission becomes effective at the day after the day of publication in the Federal Law Gazette. However, the Constitutional Court has the possibility to set a time limit for rescission, which in the case of an ordinance may not exceed six months and in the case of a law may not exceed 18 months. If a time limit is set, rescission enters into force only after expiry of the specified period.<sup>22</sup> The rescinded norm cannot be contested within this period. This means that for this period of time a norm that has already been found to be not in accordance with the constitution remains applicable.<sup>23</sup> The only exception of this constitutional rule concerns the “case

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the law has become operative for the applicant without the delivery of a judicial decision or the issue of a ruling; Art. 89 para. 3 applies analogously to such applications“.

<sup>19</sup> Cf. Mayer, B-VG-Kurzkommentar<sup>4</sup> (2007), 324.

<sup>20</sup> Stelzer, Introduction, 78.

<sup>21</sup> Art 140 para 5 first sentence B-VG: “The judgment by the Constitutional Court which rescinds a law as unconstitutional imposes on the Federal Chancellor or the competent Governor the obligation to publish the rescission without delay”.

<sup>22</sup> Art 140 para 5 third sentence B-VG: “The rescission enters into force upon expiry of the day of publication if the Court does not set a deadline for the rescission. This deadline may not exceed eighteen months”.

<sup>23</sup> Stelzer, Introduction, 79; cf. Rohregger, Art 140 B-VG, 11 f; see also Schäffer, Art 140 B-VG, 12 ff.

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<sup>17</sup> See Stelzer, Introduction, 78.

<sup>18</sup> Stelzer, Introduction, 78; cf Art 140 para 1 Bundes-Verfassungsgesetz (B-VG) Federal Law Gazette (BGBl) 1930/1 version of Federal Law Gazette (BGBl) I 2009/127: “The Constitutional Court pronounces on application by the Administrative Court, the Supreme Court, a competent appellate court, an independent administrative panel or by the Federal Procurement Authority whether a Federal or Land law is unconstitutional, but ex officio in so far as the Court would have to apply such a law in a pending suit. It pronounces also on application by the Federal Government whether Land laws are unconstitutional and likewise on application by a Land Government, by one third of the National Council’s members, or by one third of the Federal Council’s members whether Federal laws are unconstitutional. A Land constitutional law can provide that such a right of application as regards the unconstitutionality of Land laws lies with one third of the Diet’s members. The Court pronounces furthermore whether laws are unconstitutional when an application alleges direct infringement of personal rights through such unconstitutionality in so far as

in point” (“Anlassfall”): The person who was the finder of the unconstitutionality and who had to take risk and costs of the proceeding becomes rewarded in the form of being exempted from the applicability of the contested norm. This reward is referred to as “finderbonus” (“Ergreiferprämie”).

b) A posteriori review in France (?)

aa) The legal situation before July 2008

As opposed to the Austrian B-VG the French Constitution did not include an authorization for the Constitutional Council to a posteriori judicial review until July 2008. Previously Citizens could file an application with the European Court of Human Rights (ECHR) if they meant to be violated in fundamental rights. But there was no possibility for complaints with the Constitutional Council and, as a consequence, no authorization for the Constitutional Council to review if an already promulgated norm of simple law is in order with the constitution.<sup>24</sup> Appeal or preliminary reference to the Constitutional Council was not possible. Once a statute was promulgated, it was immune from constitutional review.<sup>25</sup>

The Constitutional Council was engaged in constitutional review of bills in two cases, namely via compulsory and options review. Draft organic statutes and draft rules of procedure of the two chambers of parliament had always to be checked for their constitutionality before they could become effective. All other draft statutes could be checked upon request. Such a request could be made by the President, the Prime-Minister, the speaker of the National Assembly, the speaker of the Senate, a group of sixty members of the Senate (Article 61 French Constitution). The President was not allowed to promulgate statutes pending constitutional review; the Council had to decide within one month or, if the government declared the matter urgent, within eight days. If the Constitutional Council held that the bill complied with the Constitution, the President promulgated it and the statute entered into force. If the Council found a violation of the Constitution in the bill examined, however, the bill, or the unconstitutional parts of it, couldn't enter into force (Article 62 French Constitution). The other actors in

<sup>24</sup> Karrenstein, Die französische Verfassungsreform vom 23. Juli 2008, DÖV 2009, 445 (450); cf also Fromont, Verfassungsmäßigkeitskontrolle, 543.

<sup>25</sup> Heringa/Kiiver, Constitutions, 110; cf also Fromont, Verfassungsmäßigkeitskontrolle, 543.

the lawmaking process was then confronted with the choice of either changing the bill so as to make it constitutional, or abandoning the bill, or trying to amend the Constitution itself.<sup>26</sup>

bb) The Constitutional law on the Modernization of the Institutions of the Fifth Republic

On 23<sup>rd</sup> July 2008 the Constitutional law on the Modernization of the Institutions of the Fifth Republic (*Loi constitutionnelle de modernisation des institutions de la V<sup>ème</sup> République*)<sup>27</sup> came into effect.<sup>28</sup> This constitutional amendment was substantial and included – inter alia – a new Article (61-1), which means:

*“If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d’État or by the Cour de Cassation to the Constitutional Council, within a determined period.*

*An Institutional Act shall determine the conditions for the application of the present article.”*

This new constitutional norm is the basis for a *posteriori* and *concrete* judicial review. As a consequence, the Constitutional Council will be confronted with the phenomena of invalidation and convalidation of laws. Of course there are some problems caused by this fundamental improvement. The implementation of the new constitutional standards into the French legal system will be a long and complex process and many questions are open, as like<sup>29</sup>:

- Is there an objective obligation for the Council of State (“*Conseil d’État*”) and the Court of Cassation (“*Cour de cassation*”) to file an application to the Conseil Constitutionnel?
- Do the parties of a proceeding have a subjective right that the Council of State or the Court of Cassation makes an application to the Constitutional Council?

<sup>26</sup> See Heringa/Kiiver, Constitutions, 110; detailed Fromont, Verfassungsrat, 234 ff; cf also Karrenstein, Verfassungsreform, 450 f.

<sup>27</sup> No. 2008-724 de 23.7.2008, JORF No. 0171 de 24.7.2008.

<sup>28</sup> Detailed Karrenstein, Verfassungsreform, 445 ff.

<sup>29</sup> See, profoundly, Pfersmann, Verfassungsrevision in Frankreich, in: Thaler/Stolzlechner (eds), Verfassungsrevision (2008) 27 (45 ff).

- Which rules can be reviewed by the Constitutional Council? All formal laws? All laws those entered into force since 1958? Only laws those entered into force since 2008?
- Which time limits will be provided?
- How will the problem of praejudiciality be regulated?

#### IV. INVALIDATION OF A NORM SHOWN BY A SPECIFIC EXAMPLE

The Austrian Criminal Code (“*Strafgesetzbuch*”, “*StGB*”) entered into force on 1<sup>st</sup> January 1975.<sup>30</sup> This criminal code included § 209. In order to this (simple) law (consensual) homosexual contact between men was forbidden if the perpetrator was over 18 years and his sexual partner “juvenile” (aged between 14 and 18 years; cf. § 74 no. 2 Austrian Criminal Code). The perpetrator (the adult partner) had to be sentenced to prison term from six months up to five years. The norm was insignificantly modified on 1<sup>st</sup> January 1989<sup>31</sup> as the perpetration started later (the perpetrator had to be older, namely over 19 years), but in this way the norm was existing and in force until 13<sup>th</sup> August 2002.

At this date not the legislator abrogated § 209 StGB, it was the Constitutional Court who rescinded this norm of simple law. What happened?

On 20<sup>th</sup> December 2001 the Provincial Court of Appeal in Innsbruck (“*Oberlandesgericht Innsbruck*”) had to decide in a respective and doubtless case. But the Court of Appeal got serious reservations against the constitutionality of § 209 Austrian Criminal Court. Because of these reservations the Court of Appeal filed an application with the constitutional court. Particularly the Court of Appeal doubted that § 209 Austrian Criminal Court is in accordance with the principle of equality (Article 7 Austrian Constitution and Art 2 StGG) because it would be unequal if heterosexual contact between juveniles and adults is allowed but homosexual contact between juveniles and adults is forbidden. Another reservation was based on the principle of objectiveness (which is also – a judge made – part of Article 7 Austrian Constitution): It would be unobjective if – for example – consensual homosexual contact between a 16 and a 18 years old person is allowed, then, one year later (when the

younger becomes 17 and the older 19) the relationship is forbidden and finally, one more year later (after the younger became 18) the relationship is allowed again. The Constitutional Court avoided it to answer on the really fundamental legal issue and didn’t go into the first argument of the Court of Appeal. But he followed the second argumentation and got to the conclusion that § 209 StGB was unconstitutional because of unobjectiveness.

The decision of the Constitutional Court wasn’t unsurprising because he was confronted with a nearly similar case in 1989 and the Constitutional Court didn’t have any reservations against the same norm. But the unobjectiveness of this regulation was in 1989 certainly the same as in 2002. The real change that happened between this 13 years was that the norm became unequal in the moral concept of the society (even the Constitutional Court didn’t pronounce that explicit).

This change in the moral concept of the society found its way into the interpretation of constitutional norms by the Constitutional Court. In this manner the Austrian Constitution (particularly Article 7) was subjected to a change. Caused by this change § 209 StGB invalidated.

It’s not possible to mention the precise date of invalidation of § 209. It’s only certain that invalidation entered anytime between 1989 and 2001.

This example shows that all requirements for invalidation were fulfilled: (1.) A hierarchy of norms was existing (§ 209 StGB as simple law; Article 7 B-VG as constitutional law); (2.) There was a (material, not formal) change in constitutional law between 1989 and 2001 and (3.) it was possible for the Constitutional Court to apprehend the invalidation of § 209 because he is authorized to a posteriori judicial review.

As § 209 StGB entered into force in 1975, nobody would have had seriously doubts on the constitutionality of this norm. Only a priori and abstract judicial review is not fit to apprehend invalidation of norms. In this context the French Constitutional Council will be confronted with many interesting cases in the future.

#### V. SUMMARY

The results of the present work can be resumed as follows:

- The Constitutional Council in France and the Constitutional Court in Austria have different functions. As the Constitutional Council is not only a pure jurisprudence-body (but have also

<sup>30</sup> § 322 StGB Federal Law Gazette (BGBl) 1974/60 version of Federal Law Gazette (BGBl) I 2009/142.

<sup>31</sup> Article II no. 6 Federal Law Gazette (BGBl) 1988/599.

political functions) the Constitutional Court is strictly separated from the legislative power.

- The term “invalidation” describes if a norm of simple law becomes unconstitutional. This Unconstitutionality can be caused by a formal constitution amendment as well as by a change of interpretation of vague constitutional norms. These changes are caused by changes in the social opinions of the society which flow into judicial interpretations. This may be because constitutions are not rigid objects but are based on “flexible systems”.
- “Convalidation” means that an invalidated norm becomes constitutional again. This phenomenon is also caused by a constitutional change.
- The phenomena of invalidation and convalidation depend on three requirements: There have to be a hierarchy of norms in the respective legal system; a (formal or material) change in constitutional law is necessary; the respective constitutional jurisprudence-body has to be authorized for a posteriori judicial review of norms.
- As distinguished from Austria, a posteriori judicial review is a new institute in the French constitutional legal system and was (after failed approaches in 1990 and 1993)<sup>32</sup> part of the Constitutional law on the Modernization of the Institutions of the Fifth Republic. The implementation of this innovation in the French legal system will introduce many interesting problems.
- The (not precisely detectible) invalidation of § 209 Austrian Criminal Code between 1989 and 2002 gives a demonstrative example of a material change in the Austrian Constitution (more precisely in the understanding of the principles of equality and objectiveness based in Article 7 Austrian Constitution and Article 2 Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Länder represented in the Council of the Realm).

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<sup>32</sup> See *Fromont, Verfassungsrat*, 237.



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