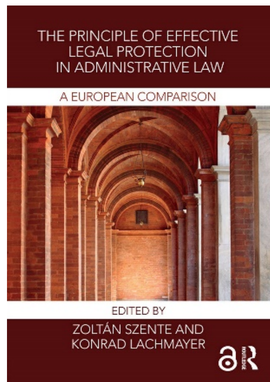

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The Principle of Effective Legal Protection in Administrative Law

A European comparison

Edited By Zoltán Szente, Konrad Lachmayer

Published: 2016
Imprint: Routledge
DOI: https://doi.org/10.4324/9781315553979
Pages: 416
eBook: ISBN 9781315553979

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5 The principle of effective legal protection in Austrian administrative law

Ulrike Giera and Konrad Lachmayer

1 Historical development: from the monarchy towards Europe

1.1 The beginnings in the nineteenth century

The Austrian idea of effective legal protection has its roots in the political liberalism of the nineteenth century. In the time of absolute monarchy, the administration was not bound by law and there was subsequently no legal possibility to appeal before a court in administrative matters. In the second half of the nineteenth century, this situation underwent significant change. The individual was not longer regarded as an object of governmental action, but as a legal subject with (subjective) rights against the state to protect his or her legally protected interests.[1]

This concept was promoted by the Revolution of 1848 that initiated constitutionalism in the Habsburg Empire and finally led to the adoption of a constitution consisting of five State Basic Laws (*Staatsgrundgesetze)* in 1867.[2] Most importantly with regard to our topic, these developments then resulted in the establishment of the (High) Administrative Court in 1876. The new Administrative Court introduced a new system of judicial control of the administration. The Court was competent to declare an administrative ruling void if the decision was unlawful and infringed the rights of the person concerned and thus initiated legal protection against administrative acts.

Due to the fact that the administrative procedure was not codified by the parliament, the progressive case law of the Administrative Court became very important. The Court developed several substantive rule of law principles that an administrative procedure had to be in accordance with and that administrative bodies had to follow if they did not want to risk their decision being declared unlawful by the Administrative Court.[3] Nevertheless, the margin of appreciation for the government and the administration remained very great.

1 R. Thienel and E. Schulev-Steindl, *Verwaltungsverfahrensrecht* (5th edn., Verlag Österreich, Wien 2009) 43.

2 The so-called ‘Constitution of December’ consisted of five separate acts. The Act on General Rights of the Citizens contained a catalogue of fundamental rights which is still in force today (*StGG über die allgemeinen Rechte der Staatsbürger, RGBl 1867/142*).

3 See R. Walter, D. Kolonovits, G. Muzak and K. Stöger, *Grundriss des österreichischen Verwaltungsverfahrensrechts* (9th edn., Manz 2011) para. 22.

1.2 From the Austrian constitution 1920 to the abolishment of any rule of law

After World War I, the Austrian state was created as a democratic republic (the so-called 1st Republic). The Austrian Constitution, which in its core is still in force, was enacted in the 1920. With regard to administrative procedure, the intentions for a consistent codification were realised as a result of the international pressure regarding the dramatic economic situation in the country, which led to the adoption of several procedural acts in 1925, including the General Administrative Procedure Act (GAPA) and the Administrative Penal Act (APA). These administrative procedural acts are still in force today, although they have been amended several times over the years.

Since the enactment of the Austrian Constitution in 1920, the Austrian system of judicial protection has been based on three supreme courts: the Constitutional Court, the Administrative Court and the Supreme Court. There is no formal hierarchy between these three courts and each of them is competent for a different substantive area of law.

The Austrian rule of law was abolished in 1933 with the introduction of an Austro-fascist regime, when the democratic constitution lost its force. This situation finally led to Austria's participation in the NS regime, which perverted any form of rule of law, rights and legal protection. After World War II, the so-called 2nd Republic was proclaimed and re-established the Austrian Constitution from the year 1920 as amended in 1929. The official government position on the NS regime, however, was based on the 'first-victim' thesis (*Opferthese*), ignoring the context of Austria's accession to Nazi Germany.[4] This position goes along with a reluctance on the part of the Austrian government to grant transitional justice to the victims of the NS regime. Effective legal protection was not guaranteed; restitutions were quite limited. It actually took until the late 1990s for certain forms of restitutions to be offered.

1.3 Enfolding the rule of law: From the ECHR to EU law

After World War II, judicial protection in administrative law was still the domain of the Administrative Court and Constitutional Court.[5] An appeal against an administrative body had to be filed before another – in the hierarchy, 'higher' – administrative authority before the Administrative Court decided in the final instance. Austria's accession to the European Convention of Human Rights in 1958 had an important impact on the organisation of legal protection and the conceptualisation of rights. The ECHR made significant changes to the Austrian system of legal protection over the next decades.

The Austrian system of non-independent administrative authorities and of having only a 'reviewing control' of the Administrative Court did not comply with the European Convention on Human Rights (ECHR).[6] The case law of the European Com-

4 In 1945, however, an anti-NS principle was integrated into the Austrian Constitution, and this does not allow any political party or political movement or even an individual to express National Socialist ideas.

5 See K Lachmayer and H Eberhard, 'Rule of Law in Austria' (2011) *Understandings of the Rule of Law in various Legal Orders of the World, Rule of Law Wiki* (available at http://wikis.fu-berlin.de/display/SBprojectrol/Austria) accessed 1 October 2015.

6 Thienel and Schulev-Steindl (n. 1) 54–55.

mission/Court of Human Rights made clear that Art. 6 ECHR requires a decision by an independent and impartial tribunal in matters concerning civil rights and obligations as well as criminal charges. The Austrian system of legal protection adopted the standards of the ECHR step by step. The acknowledgment of the ECHR as Austrian Constitutional Law in 1964 was an important move towards giving authority to the ECHR in the Austrian legal system. The application of Art. 6 ECHR furthermore strengthened the role of the Constitutional Court in deciding on procedural questions in administrative matters.

In 1989, Austria established so-called Independent Administrative Tribunals (*Unabhängige Verwaltungssenate*), which represented a major amendment of the Austrian Constitution. The Independent Administrative Tribunals met the requirements of the ECHR. Although they were classified as administrative bodies, they were independent and could be classified as tribunals with regard to Art. 6 ECHR.[7] The intensity of (quasi-)judicial control was therefore significantly enforced.

With the accession to the European Union in 1995, several other independent tribunals were established in order to comply with the standards and requirements of legal protection of European law.[8] EU law furthermore demanded the creation of legal protection, even in cases in which the legal system of the Member State did not thus far provide any legal protection. The effectiveness of EU law required a certain legal protection. The Constitutional Court, in particular, created new concepts to enable the enforcement of these principles of EU law.[9]

1.4 The fundamental reform of administrative justice in 2014

The Austrian legal system's adoption of European standards finally led to the introduction of administrative courts of first instance in 2014,[10] which is a decisive change to the overall constitutional system of judicial protection in Austria. The concept was obviously inspired by the German model of legal protection in administrative law. This new system changes the understanding of the Administrative Court, in so far as the control of the administration is primarily the duty of the administrative courts of first instance, and no longer that of the Administrative Court. The function of the Administrative Court is now to ensure the objective legality and a uniform case law of the administrative courts of first instance.[11] Although the new system of administrative courts of first instance has brought and will continue to bring an improvement to judicial protection, the Austrian legal system still does not provide fully effective legal protection in administrative law, which will be discussed in this paper.

7 Theo Öhlinger, *Verfassungsrecht* (6th edn., Facultas WUV 2005) para 653.

8 E.g. in the context of telecommunications or energy liberalisation and regulation.

9 See Konrad Lachmayer, 'Country Report: Austria' in Anneli Albi (ed.), *The Role of National Constitutions* (T. M. C. Asser Press, The Hague 2016 [forthcoming]).

10 See the Administrative Justice Amendment 2012 (Verwaltungsgerichtsbarkeits-Novelle 2012); Administrative Justice – Implementation Act 2013.

11 See Rudolf Thienel, 'Die Kontrolle der Verwaltungsgerichte erster Instanz durch den Verwaltungsgerichtshof' in Michael Holoubek and Michael Lang (eds.), *Die Verwaltungsgerichtsbarkeit erster Instanz* (Linde Verlag 2013) 331–379.

2 Constitutional framework

2.1 The constitutional foundation of effective legal protection

The core document of the Austrian Constitution does not explicitly mention the principle of effective judicial protection. This is only contained in Art. 13 ECHR, which is part of Austrian constitutional law. It provides an effective remedy in case of the violation of rights and freedoms of the ECHR. Nevertheless, the Constitution guarantees effective judicial protection through several other legal institutions. Effective legal protection is, for example, constitutionally ensured by the principle of legality, various fundamental rights, the separation of power principle and the system of independent judicial review. Effective judicial protection constitutes an implicit constitutional principle as part of the rule of law principle.[12] In this context the jurisdiction of the Constitutional Court was and is very important. The Court has determined different aspects of the principle of effective legal protection.

2.2 The case law of the constitutional court

First of all, the Constitutional Court developed according to and relies on the rule of law principle. Since the 1980s, the Constitutional Court has increasingly based its constitutional reasoning on the rule of law principle and promoted the principle of effective legal protection.[13] The Court understands the principle of effective legal protection as an essential aspect of the rule of law principle.[14] Based on the rule of law principle, the Court has derived the more specific principle that the legal order must provide sufficient and efficient legal protection.[15]

Based on its landmark case, in which the Constitutional Court qualified the rule of law principle for the first time as a fundamental principle of the Austrian Constitution in the 1950s, the Court developed its settled case law according to which the sense of the rule of law principle is that all governmental acts must be based on law and indirectly on the constitution (principle of legality in Art. 18 Austrian Constitution). The Court claims that a system of institutions for legal protection must be provided. This, however, only means that administrative acts adopted in accordance with laws higher in legal hierarchy (*Stufenbau der Rechtsordnung*) are legally binding.[16]

Nowadays, settled case law dictates that legal protection requires a minimum of 'factual efficiency' for the person concerned. 'Factual efficiency' means not only the enforcement of an administrative decision by legal means, but also the actual implementation of this decision in social reality. The word 'protection' – as part of the term

12 Martin Hiesel, 'Die Rechtsstaatsjudikatur des Verfassungsgerichtshofes' (1999) 53 *Österreichische Juristenzeitung* 522; Martin Hiesel, 'Die Entfaltung der Rechtsstaatsjudikatur des Verfassungsgerichtshofs' (2009) 63 *Österreichische Juristenzeitung* 111.

13 See Konrad Lachmayer, 'Constitutional Reasoning in the Austrian Constitutional Court' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds.), *Constitutional Reasoning* (Cambridge University Press, Cambridge 2016 [forthcoming]).

14 VfSlg 17.340/2004.

15 VfSlg 14.702/1996.

16 VfSlg 2455/1952; 2929/1955, 8.279/1978; 11.196/1986; 13.003/1992, 13.182/1992, 13.223/1992, 13.305/1992, 14.374/1995, 14.548/1996, 14.671/1996, 14.765/1997, 15.218/1998.

'legal protection' – also refers, in its constitutional sense, to the timely guarantee of a factual position. Therefore, the purpose to actually implement the right is inherent in institutions for legal protection.[17] Furthermore, the Court stated that the purpose of institutions for legal protection is to ensure a (certain) minimum of efficiency for the person seeking legal protection.[18]

According to the principle of effective judicial protection, the Constitutional Court declared several statutes unconstitutional.[19] Some conclusions of the Court can be listed as follows:

- A general elimination of suspensive effect of an appeal is unconstitutional.
- Burdening a person seeking legal protection generally and exclusively with the negative effects of a potentially illegal administrative decision should be avoided until his or her request for legal protection is taken care of.
- Not only the person's positions have to be taken into account, but also the purpose and the content of a regulation, the interests of any third person and the public interest. The legislative authority must find a balance between those circumstances, but the principle of factual efficiency of a legal remedy does take priority and it is only possible to limit that principle if objectively necessary and important grounds exist.[20]
- The general exclusion of a legal remedy is illegal in a court procedure.[21]
- A time limit for a legal remedy must be adequate in relation to the content of a decision and to the procedure and must guarantee an appropriate possibility to appeal against the decision.[22] A time limit of two days to file an appeal is therefore contradictory to the rule of law principle in an asylum proceeding because effective legal protection is not ensured for an asylum seeker, who normally does not speak German.[23]
- The possibility to gain knowledge about judgments of the Supreme Court is a requirement for the efficiency of legal protection.[24]
- An excessive time limit for an administrative ruling can contradict the principle of effective legal protection. In the concrete case, the Constitutional Court declared a time limit that was four times longer than the normal time limit to be unconstitutional.[25]
- If a legal remedy necessitates high fees, it can also contravene the principle of effective legal protection.[26]

In conclusion, the Constitutional Court identifies in a case-to-case strategy several elements of effective legal protection, such as the balance of interests when eliminating

17 VfSlg 11.196/1986.
18 VfSlg 11.196/1986, 15.218/1998, 15.369/1998.
19 See Hiesel (n. 12) (1999) 522; Hiesel (n. 12) (2009) 111
20 VfSlg 11.196/1986.
21 See Hiesel (n. 12) (2009) 113.
22 VfSlg 15.529/1999.
23 VfSlg 17.340/2004, see also VfSlg 15.218/1998; 15.369/1998; 15.529/1999.
24 VfSlg 12.409/1990.
25 VfSlg 16.751/2002; see also Hiesel (n. 12) 114.
26 VfSlg 17.783/2006.

suspensive effect of a legal remedy, the possibility to appeal against a decision, time constraints or appropriate fees. A legal remedy must not only exist in theory, but also has to fulfil effectively its purpose. Based on an overall idea of a rule of law and a certain understanding of access to justice, the Court expands its understanding of effective legal protection step by step.

2.3 Specific constitutional challenges

2.3.1 The constitutional concept of administrative acts

Although the new system of administrative courts of first instance brought and will bring an improvement to judicial protection, the Austrian legal system still does not provide full effective legal protection in administrative law. One of the most obvious deficits is the restriction of legal protection to certain forms of administrative action. The scholarly debate hypothesises that the Constitution is based on an exclusive enumeration of sources of law that existed when the Constitution was adopted in 1920 ('*Relative Geschlossenheit des Rechtsquellenssystems*'). The ordinary legislator must not create new sources of law because effective legal protection is ensured only against legal acts provided by the Constitution.[27] Judicial protection in Austrian administrative law is bound to a certain number of forms of action. Thus, an administrative authority that wants to adopt a legally binding act is limited to the forms of action the Constitution provides. However, in the scholarly debate, it has been demonstrated that the exclusive enumeration of sources of law is merely relative because there are also forms of action, that are implicitly accepted by the Austrian Constitution, although they are not mentioned in the text of the constitution.[28]

Due to the rule of law principle, administrative acts that have an extensive legal effect on an individual person must be legally defendable. Otherwise, the constitutionally guaranteed system of legal protection would be suspended.[29] In the underlying case, a statute, qualified as an administrative act, did not grant financial aid, as a non-binding expertise and not as a binding administrative issue. As already mentioned, in the Austrian constitutional framework, effective judicial protection is only possible against those forms of administrative action which are provided by the Constitution. Ordinary federal and state legislation must not create new sources of law because otherwise effective legal protection would not be ensured. Every administrative act that potentially infringes an individual person's rights must be enacted in a form of action that provides effective legal protection. However, the examination of the Constitutional Court stops at that point. It seems the Constitutional Court implies that every action is in accordance with the constitutional system of forms of action. But what happens if the system of forms of action provided by the Austrian Constitution is too narrow and some acts adopted by an administrative authority do not fit in? In such a case, the Austrian Constitution does not provide legal protection at all.

27 Heinz Schäffer, *Rechtsquellen und Rechtsanwendung* (Manz 1973) p. 34.
28 See Ibid. 34, 42; Harald Eberhard, *Der verwaltungsrechtliche Vertrag* (Springer 2005) 264.
29 VfSlg 13.699/1994.

2.3.2 EU law's challenges and potential for the constitution

Due to the influences of EU law, the link between certain forms of action and judicial protection becomes more and more difficult.[30] Within the scope of Union law, the strong constitutional link between effective legal protection and certain forms of action become problematic, because not all regulations provided by EU law fit into the Austrian system of administrative forms of action. In this case, the Austrian legal order does not provide effective judicial protection.[31]

An example from environmental law regarding air quality plans clearly shows the deficits of this system. Such air quality plans are implemented in the form of ordinances by administrative authorities. According to the case law of the ECJ, a person directly affected by air pollution is entitled to require the competent national authorities to draw up an action plan.[32] In general, a subjective right to an ordinance does not exist in the Austrian legal system. If a person who is concerned by air pollution exceeding permitted values requests the competent administrative authority to release an air quality plan and if the authority does not react to the application, the right to an air quality plan cannot be enforced effectively.[33] The right to an administrative decision within a reasonable timescale is only enforceable concerning administrative issues. The Austrian legal system does not provide legal remedies to challenge inactivity regarding ordinances.

EU law, however, also creates new potential for the effective legal protection in the Austrian constitutional system. The Constitutional Court declared in its leading case on the EU-CFR in 2012[34] that 'it follows from the equivalence principle [as a general principle of the EU][35] that the rights guaranteed by the Charter of Fundamental Rights may also be invoked as constitutionally guaranteed rights'. The Court thus strengthened the possibilities for invoking the rights of the Charter before the Constitutional Court. The Court opened the possibilities for legal protection in other cases too, by arguing with EU law.[36]

2.3.3 The principle of reasonableness

According to the established case law of the Constitutional Court, which is based on a mere interpretation of the wording, the Austrian Constitution does not contain any provision[37] that recognises parties' rights in an administrative procedure at all or to a

30 See Harald Eberhard, 'Altes und Neues zur "Geschlossenheit des Rechtsquellensystems' (2007) 61 *Österreichische Juristenzeitung* 679.

31 See Ulrike Giera, 'Individualrechte aus Unionsrecht' in S. Schmid, V. Tiefenthaler, K. Wallnöfer and A. Wimmer (eds.), *Auf dem Weg zum hypermodernen Rechtsstaat?* (Jan Sramek 2011) 183–213.

32 Case C-237/07 Dieter Janecek v Freistaat Bayern [2008] ECR I-6221.

33 See Giera (n. 31) 183–213.

34 VfSlg 19.632/2012; see also Konrad Lachmayer, 'The Austrian Approach Towards European Human Rights, VfGH 14 March 2012, U 466/11 et al.' (2013) 7 *ICL-Journal* 105–107.

35 See Takis Tridimas, *The General Principles of EU Law* (2nd edn., Oxford University Press, Oxford 2007) 424.

36 Konrad Lachmayer, 'Country Report: Austria' in Anneli Albi (ed.), *The Role of National Constitutions* (T. M. C. Asser Press, The Hague 2016 [forthcoming]).

37 An exception is of course Art. 119a para 9 Austrian Constitution that provides parties' rights to municipalities in a supervisory procedure initiated by the federal or state authority.

certain extent. It lies within the scope of the statute to provide parties' rights. Thereby the legislator is bound by the principle of legality and the principle of equality.[38] The Court explicitly stated that the rule of law principle does not require granting of locus standing.[39] Only in rare cases does the Constitutional Court derive from the rule of law principle the obligation to grant parties' rights to a person concerned.[40] Instead, the Constitutional Court usually relies on the principle of equality (Art. 7 Austrian Constitution), which the Court tends to interpret loosely.[41] Thus, the Court has derived from the principle of equality a general principle of reasonableness.[42] In some cases the Court uses this principle of reasonableness to determine whether a statute grants locus standing or not. The statute from which individual rights are derived is bound to the general principle of objectivity. In general, granting subjective rights requires at the same time granting locus standing. Depending on the purpose of the procedure and on the peculiarity and the importance of the rights concerned, the exclusion of parties' rights can be appropriate, if the procedure will primarily guarantee the interests of another person.[43] The Constitutional Court examines case by case whether a differentiation concerning parties' rights is on the one hand essential in relation to the regulation and on the other hand founded on actual differences regarding the interests considered in the procedure.[44]

The reference to the principle of equality has to be viewed critically.[45] In licensing procedures concerning industrial facilities, for example, neighbours have subjective rights granted by the particular statute (Industrial Act) and are thus parties to the procedure. They can claim that they are adversely affected in their life, health or property by the facility. Due to deregulation a simplified procedure was introduced, in which neighbours – although their substantive rights are the same – are no longer parties to the administrative procedure. The Constitutional Court, however, did not classify this provision as a violation of the principle of equality. The purpose of speeding up procedures is legitimate. In the case of licensing an industrial facility for which granting permission is the rule, neighbours can be excluded from the procedure. The administrative authority is obliged to take care of the public interest – which also lies in the neighbours' interest and therefore the rights protected under the Industrial Law Act are not violated.[46]

In general, the non-reference to the rule of law principle in the context of establishing rights is surprising considering the fact that effective legal protection in administrative law depends on the participation in an administrative procedure which requires locus standing. Individual rights are only effectively protected if the beneficiary participates in the procedure.

38 VfSlg 6664/1972, 10.605/1985, 14.512/1996, 15.545/1999; 17.593/2005.
39 VfSlg 15.123/1998.
40 For example VfSlg 13.646/1993.
41 Lachmayer (n. 13).
42 Manfred Stelzer, *The Constitution of the Republic of Austria* (Hart Publishing 2011) 242–243.
43 VfSlg 11.934/1988; 19.617/2012.
44 VfSlg 15.545/1999, 17.389/2004.
45 See Bernhard Raschauer, 'Anlagenrecht und Nachbarschutz aus verfassungsrechtlicher Sicht' (1999) 13 *Zeitschrift für Verwaltung* 506–520, see also Rudolf Thienel, 'Verfassungsrechtliche Grenzen für das vereinfachte Genehmigungsverfahren nach Art 359b GewO' (2001) 15 *Zeitschrift für Verwaltung* 718.
46 VfSlg 14.512/1996, see also VfSlg 16.103/2001.

3 Rights-based perspective

3.1 Constitutional rights

The Austrian Constitution contains several fundamental procedural rights that are linked to the principle of effective legal protection: the right to a lawful judge (Art. 83 para. 2 Austrian Constitution), the right to a fair trial (Art. 6 ECHR) or the right to an effective remedy (Art. 13 ECHR and Art. 47 CFR).[47,48] The scope of the right to a lawful judge is quite broad. Every governmental authority that makes legally-binding decisions is regarded as a lawful judge. Hence Art. 83 para. 2 Austrian Constitution also comprises administrative bodies. The right to proceed before the lawful judge is infringed if an authority exercises a power it does not have or if it wrongly rejects its competence and thus refuses to decide on the merits,[49] if an improperly constituted tribunal deals with the case[50] or if a court does not request a preliminary ruling of the ECJ although it is obliged to.[51] The right to a fair trial (Art. 6 ECHR) is usually applied in accordance with the ECtHR case law as well as Art. 13 ECHR, which guarantees an effective remedy before a national authority if someone alleges the violation of rights and freedoms of ECHR.

3.2 Individual and procedural rights

3.2.1 Individual rights as structural precondition to effective legal protection

In Austrian administrative law, access to justice and effective legal protection crucially depends on individual rights (*subjektives Recht*). Without an individual or subjective right, a person does not enjoy legal protection. The right to access administrative authorities, the right to appeal to an administrative court or the right to a decision within a reasonable timescale requires a subjective right. The most common and accepted doctrine defines subjective rights as the legal power that an individual person derives from a regulation of public law to claim his/her interests against the state.[52] The difficult and still not fully answered question is when and how a subjective right can be derived from administrative law. There is a scholarly consensus that not every statute provides subjective rights for individuals. On the contrary, administrative statutes regularly contain objective duties for authorities and do not grant rights to an individual. If an interest concerned is recognised as a legally protected interest by law, a subjective right can be derived and subsequently enforced. Economic or environmental interests are usually not regarded as legal interests, but as factual interests that the administrative authorities have to consider *ex officio* without granting legal protection in an administrative procedure. Moreover, legal interests are usually narrowly defined.

47 See, regarding the application of the CFR, Chapter 2.3.2.
48 See, regarding the overall situation of fundamental rights in Austria, Anna Gamper, ‘A “Bill of Rights” for Austria: Still Unfinished Business’ (2010) III *Percorsi costituzionali. Quadrimestrale di diritti e libertà* 211.
49 VfSlg 12.889/1991.
50 VfSlg 10.022/1984.
51 VfSlg 14.390/1995.
52 VwSlg 14.750 A/1997; see W. Antoniolli and F. Koja, *Allgemeines Verwaltungsrecht* (3rd edn., Manz 1996) 283.

3.2.2 How are individual rights determined?

Some statutes explicitly grant subjective rights to individuals, but other laws have to be interpreted. According to the case law of the Administrative Court and the so-called 'impairment of rights doctrine' (*Schutznormtheorie*) a person has a subjective right if a statute protects not only public interests, but also interests of a specific person. The specific interest of a person must be distinguishable from the interests of the general public.[53] Whether a statute grants a subjective right or not depends on the purpose and objectives of the statute.[54] The interests that are protected under the 'impairment of rights doctrine' are traditionally limited to the subjective interests and concerns of a person, for example life or property.[55] Various cases have dealt with these disputed questions. However, the case law of the courts does not fully resolve the question. The result of the interpretation of the statute also tends to be part of a free decision on the part of the relevant administrative authorities and courts. The distinction between legal and factual interests is very contingent and to a certain extent arbitrary. It is often unclear or disputed, whether a statute grants a subjective right or not. Due to the narrow interpretation of subjective rights, access to justice in administrative law is more limited than open. In the light of effective legal protection, the uncertainty about whether an individual right exists or not is unsatisfactory, and the negative result that no individual right exists is – at least in certain cases – highly problematic.

3.2.3 Locus standing of parties

Granting locus standing to parties makes subjective rights enforceable. According to the General Administrative Procedural Act (GAPA), a person who is involved in an activity of an authority by a legal title or legal interest is party to a procedure. In other words, the party to the administrative procedure is a person whose rights are affected by the procedure. The GAPA does not constitute a subjective right for the parties itself, but refers to the substantive administrative law. Substantive statutes must again be interpreted in order to deduce subjective rights (regarding the theories described above). If a person is granted a subjective right in an administrative statute, he or she normally has locus standing in an administrative procedure to defend his or her rights. Some laws explicitly specify persons whose legal interests are recognised by law and are therefore considered as 'parties' in administrative procedure.

Subjective rights and locus standing in an administrative procedure are closely linked, but the two terms are not equal. On the one hand, some statutes grant locus standing without a corresponding subjective right (several environmental statutes for example grant locus standing to governmental organs or NGOs), on the other hand, as already mentioned, in some cases statutes do not grant locus standing although

53 J. Hengstschläger and D. Leeb, *Kommentar zum Allgemeinen Verwaltungsverfahrensgesetz I* (Manz 2004) Sec. 8 GAPA para 6.

54 C. Grabenwarter and M. Fister, *Verwaltungsverfahrensrecht und Verwaltungsgerichtsbarkeit* (4th edn., Verlag Österreich, Wien 2014) 24.

55 Eva Schulev-Steindl, 'Vom Wesen und Wert der Parteistellung' in C. Jabloner, G. Kucsko-Stadlmayer, G. Muzak, B. Perthold-Stoitzner and K. Stöger (eds.), *Vom praktischen Wert der Methode, FS Mayer* (Manz 2011) 694.

a subjective right is affected (neighbours for example do not have locus standing in procedures regarding certain industrial facilities that have minor effects on the neighbourhood).[56]

3.2.4 Procedural rights

Once someone is recognised as a party in an administrative procedure according to the GAPA, he or she has various rights, such as the right to access the files, the right to be heard, the right to remedies, the right to service of process or the right to an administrative decision within due time. These rights ensure an effective participation in the procedure and enforcement of the subjective rights.

If the administrative procedure ends with a negative administrative ruling, a person who alleges infringement of his or her rights has the right to file an appeal before the competent administrative court.[57] The right to appeal requires the anterior position as party to the administrative procedure. If a party does not have a subjective right, he or she can neither participate in the administrative procedure nor in the procedure before the court. Subsequently, an appeal against a decision of the administrative courts before the Administrative or the Constitutional Court can be filed by the parties to the procedure. Once again, only the parties to a procedure are entitled to file an appeal before the two supreme courts. While before the Administrative Court the allegation of the violation of an individual right granted by an ordinary statute is sufficient, the appeal before the Constitutional Court requires the alleged violation of a constitutionally guaranteed fundamental right.

3.2.5 Individual rights which cannot be enforced in an administrative procedure under the GAPA

As already mentioned, effective judicial protection in Austrian administrative law is focused on subjective rights and the participation in an administrative procedure according to GAPA and the obtaining of an administrative ruling. If a person is party to an administrative procedure and therefore gains an administrative ruling, his or her rights are effectively protected – first, by participating in the procedure, and second, by filing an appeal before the competent administrative court.

The reality is different when it comes to subjective rights which are not the subject of an administrative procedure to which the GAPA applies. In this case, effective judicial protection is not ensured, due to the fact that the right to appeal requires the participation in the preceding administrative procedure. If a person requests the application of an ordinance or a so-called ‘factual act’ like for example, the submission of information or the conducting of inspections, then neither the GAPA, nor the ACPA nor any other general procedure act is applicable.

56 Bernhard Raschauer, *Allgemeines Verwaltungsrecht* (4th edn., Verlag Österreich, Wien 2013) para 1105–1109.

57 Art. 132 para. 1(1) Austrian Constitution.

- Ordinances

Ordinances are adopted in an internal procedure where the persons concerned or interested do not have locus standing.[58] In order to ensure effective judicial protection it is necessary to obtain an administrative ruling which opens access to justice for the parties of the procedure. If the GAPA cannot be applied because a person files an application for an ordinance or a factual act, effective judicial protection is not guaranteed in Austrian administrative law, which constitutes a breach of Art. 47 CFR.[59]

- Acts of law enforcement

Against acts of law enforcement and police powers – although the administrative authority does not issue an administrative ruling, due to the fact that it does not conduct a formal procedure – effective judicial protection is ensured. A person who claims infringement of his or her rights because of the exercise of law enforcement has the right to appeal before the administrative courts of first instance.[60] The aim of an appeal against the exercise of direct administrative power is to declare the act unlawful and, should it still be taking place, to terminate it. Acts of direct administrative power or compulsion include the arrest of a person, towing away of cars or seizure of goods.

- Further (factual) acts

The administrative courts of first instance can still only review those forms of actions the Constitution provides. However, the limitation to certain legal acts was softened by the constitutional amendment establishing the administrative courts of first instance.[61] The Constitution opens up the possibility of introducing new forms of legal protection regarding other (factual) acts of administrative authorities, including the submission of information or the conducting of inspections. Federal or state laws can provide complaints for illegality of the 'conduct of an administrative authority in executing the law' ('*Verhalten einer Verwaltungsbehörde in Vollziehung der Gesetze*').[62] It remains to be seen whether and how the ordinary federal or state legislator will make use of this option.

3.3 Rights of administrative authorities or groups to intervene

The right to intervention exists in some limited cases. It may be granted to administrative authorities which are then formal parties in an administrative procedure. According to Art.132 para. 1(2) Austrian Constitution, the competent Federal Minister has

58 Raschauer (n. 56) para. 789.

59 See Bernhard Raschauer, 'Realakte, schlicht hoheitliches Handeln und Säumnisschutz' in Michael Holoubek and Michael Lang (eds.), *Rechtsschutz gegen staatliche Untätigkeit* (2011) 265.

60 Art. 130 para. 1(2) Austrian Constitution.

61 See Chapter 4.1.

62 Art. 130 para. 2(1) Austrian Constitution.

the right to appeal before an administrative court of first instance against an administrative ruling in certain matters that are regulated by federal law, but executed by the states, for example matters concerning citizenship or environmental impact assessment. With this right, the federal state supervises the execution and performance of the states.[63] Furthermore, federal and state laws can grant the right to appeal against administrative rulings to certain persons[64] or organs.[65] The Ombudsman for the environment, for example, is entitled to appeal against administrative rulings of certain environmental or nature protection proceedings. Several statutes grant locus standing to environmental organisations. Locus standing is explicitly granted to such organs or groups.

Such 'administrative parties' do not have their own subjective rights that they are defending. They participate in the procedure without being directly and personally affected. Their task is to observe and ensure objective legality in administrative or court procedures. The Ombudsman for the Environment, for example, is entitled to represent the concerns and interests of the environment as a public interest. He can challenge compliance with environmental laws and regulations in an administrative procedure. For the purpose of ensuring objective legality, 'administrative parties' have procedural rights, but no substantive rights. They can only file an appeal in the case of an alleged infringement of procedural rights.

3.4 Right to challenge inactivity as an essential aspect of effective judicial protection

Judicial protection is only efficient if the legal system provides the right to an administrative act within a reasonable time. An administrative authority is obligated to issue a ruling on submissions of a party without undue delay, within six months at the latest. If the competent administrative authority does not issue a ruling within the term allowed for the decision, the party has the right to file a complaint to the administrative court to claim a breach of the duty to reach a timely decision (*Säumnisbeschwerde*). Only parties of the corresponding administrative procedure who are entitled to get a decision have the right to file a complaint. According to the Federal Administrative Court Procedure Act (FAPA, *Verwaltungsgerichtshofsgesetz*), the court itself has to decide on the case within six months. In case the judgment is not issued within this term, the party can file a motion to set a deadline for violation of the duty to decide by an administrative court of first instance (*Fristsetzungsantrag*) to the Administrative Court. The responding court is instructed to issue the judgment within a maximum term of three months and to submit a copy of the judgment to the Administrative Court or to explain why it did not violate its duty to reach a decision. This term can be extended one more time if the court can submit evidence for reasons regarding the merits of the case which made it impossible to issue a judgment in due time.

The Austrian legal order provides a remedy against unlawful delay, but it is questionable whether the right to an administrative act within a reasonable time is effective. First, it takes a long time to enforce an administrative act, and secondly, if the

63 T. Öhlinger and H. Eberhard, *Verfassungsrecht* (10th edn., Facultas.wuv 2014) para. 661.
64 E.g. citizens´ initiatives.
65 Art. 132 para. 5 Austrian Constitution.

administrative court of first instance does not issue a decision after the Administrative Court has extended the term, the administrative act cannot be enforced.[66] Another problem is the general focus on administrative rulings. Only administrative rulings can be enforced by a complaint to the administrative court of first instance and/or to the Administrative Court. The complaints apply only to an administrative request. If an applicant requests a factual act, such as the submission of information or the conducting of inspections or an ordinance, neither the GAPA nor the Administrative Court Act is applicable and the applicant cannot claim a violation of the duty to decide.[67]

4 Institutional perspective

4.1 Separation of powers

The introduction of the new system of administrative courts of first instance[68] started to make significant changes to the concept of separation of powers between the administration and the judiciary. Before 2014, the constitutional concept provided different instances and possibilities to appeal within the administration and only after the exhausting of the chain of appeals was it possible to apply either to the Constitutional Court or to the Administrative Court. Since 2014, the role of administrative authorities has been significantly limited and all appeals now have to be addressed to the newly introduced administrative courts of first instance.[69] Moreover, from a separation of powers perspective, the link between administrative decisions and judgments by administrative courts became imminent.

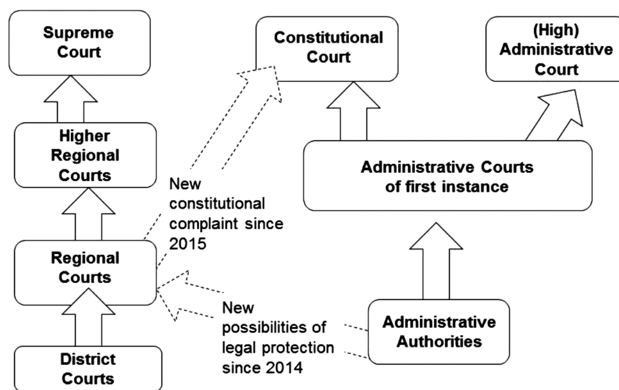

Figure 5.1 Separation of powers and court system

66 Ulrike Giera, *Individualrechte im europäischen Umweltrecht und ihre Durchsetzung im nationalen Recht* (Facultas-Nomos 2015) 228–247.

67 See Raschauer (n. 59) 265; Michael Potacs, ‘Subjektives Recht gegen Feinstaubbildung?’ (2009) 33 *Zeitschrift für Verwaltung* 874.

68 Most of the Courts were transformed from the existing independent administrative authorities.

69 An exception is a municipality’s own sphere of competence where an administrative two-stage appeal still exists that can, however, be excluded by law. See Art. 118 para. 4 Austrian Constitution.

The same constitutional amendment also opened up new possibilities of legal protection from administrative authorities to ordinary courts.[70] Federal or state legislation may provide in specific matters an appeal from the administrative authority to a court of justice instead of an appeal to the administrative court. The quite strict separation of powers between administration and ordinary judiciary[71] was significantly weakened. The legislator can thus change the institutional and procedural concepts of appeal; it will, however, always result in a judicial review of the administrative decision.

4.2 The new system of legal protection in administrative law

In 2014, Austria introduced – as mentioned above – a completely new system of administrative courts of first instance (the so-called 9+2 model): one federal administrative court of first instance, a federal fiscal court of first instance and nine state administrative courts of first instance. With this reform, all stages of administrative appeal were abolished: the appellant can only file a complaint against an administrative ruling before the competent administrative court of first instance and, subsequently, the appellant can appeal against the decision of the administrative court to the Constitutional Court and/or to the Administrative Court. The access to the Administrative Court was limited due to the introduction of the administrative courts of first instance. Revision is only admissible if the solution depends on a legal question of essential importance. This is the case if the decision of the administrative court of first instance deviates from the established case law of the Administrative Court, such established case law does not exist or the legal question to be solved has not been answered in a uniform manner by the previously established case law (Art. 133 para 4 Austrian Constitution). This new system changes the understanding of the Administrative Court, in so far as the control of the administration is primarily the duty of the administrative courts of first instance, and no longer that of the Administrative Court. The function of the Administrative Court is now to ensure the objective legality and a uniform case law of the administrative courts of first instance.[72]

Along with the establishment of administrative courts of first instance, a so-called Administrative Courts Procedure Act (ACPA)[73] was adopted, which regulates the procedure before the administrative courts of first instance. This new procedural statute for the administrative courts of first instance does not provide a solution for the aforementioned problem regarding legal protection.

Another point that has to be regarded critically is the subsidiary application of the General Administrative Procedure Act. The underlying constellation is different in administrative and judicial procedures: While in an administrative procedure, the

70 Art. 94 para. 2 Austrian Constitution.

71 Art. 94 para. 1 Austrian Constitution.

72 See Rudolf Thienel, 'Die Kontrolle der Verwaltungsgerichte erster Instanz durch den Verwaltungsgerichtshof' in Michael Holoubek and Michael Lang (eds.), *Die Verwaltungsgerichtsbarkeit erster Instanz* (Linde Verlag 2013) 331–379.

73 The Administrative Courts Procedure Act (ACPA) (*Verwaltungsgerichtsverfahrensgesetz*) regulates the procedure before the administrative courts of first instance, while the (Federal) Administrative Court Procedure (FAPA, *Verwaltungsgerichtshofsgesetz*) applies to the procedure before the Federal Administrative Court which is, apart from the Constitutional Court, the last instance in administrative law.

relation between administrative authority and applicant[74] is hierarchical, in a judicial procedure, both the administrative authority and the appellant are equal parties to the procedure. Furthermore, administrative and judicial procedures are governed by different principles and standards; a subsidiary application involves the danger of a transfer of administrative standards to the court procedure. Thus, the new enacted ACPA not only solves problems but creates new ones regarding effective legal protection.

4.3 The concept of three supreme courts

Since the enactment of the Austrian Constitution in 1920, the Austrian system of judicial protection has been based on three supreme courts: the Constitutional Court, the Administrative Court and the Supreme Court. There is no formal hierarchy between these three courts and each of them is competent for a different substantive area of law: The Constitutional Court deals with constitutional questions, for example with the infringement of fundamental rights or federal issues;[75] the Administrative Court is competent to decide on violations of administrative law as last instance, if there is no violation of constitutional law at the same time; and finally the Supreme Court has to rule on civil law cases and criminal charges.[76] The relationship between the three courts is characterised by equality, although the position of the Constitutional Court is somehow distinguished because of its exclusive competence to review laws and ordinances and to repeal them in case they violate the constitution.[77]

The Austrian legal system lacks a constitutional complaint to appeal against decisions of civil or criminal courts to the Constitutional Court. Therefore, it is up to the Supreme Court to rule on violations of fundamental rights. While judges argue that there is no need for a constitutional complaint,[78] scholars demand it due to existing deficits in the case law of civil and criminal courts.[79] The Austrian Constitution established the Constitutional Court as a specialised court for constitutional questions. Thus, the Constitutional Court is the 'guardian' of constitutional fundamental rights and not the Supreme Court. The case law differs to some extent from the case law of the Constitutional Court, which involves the danger of having two different standards in the protection of fundamental rights.[80]

74 The accused person in an administrative penal law procedure.

75 See, regarding the Austrian Constitutional Court, Christoph Bezemek 'A Kelsenian Model of Constitutional Adjudication. The Austrian Constitutional Court' (2012) 66 *Zeitschrift für öffentliches Recht* 115; A. Gamper and F. Palermo 'The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review' (2008) 3 *Journal of Comparative Law* 64.

76 Criminal law must be distinguished from administrative penal law which applies in case of a violation of administrative law. In first instance administrative authorities are competent to decide over breaches of administrative law. An appeal against their decision can be filed before an administrative court of first instance. Another peculiarity of administrative penal law is that administrative bodies are not only competent to impose fines, but also imprisonment.

77 Art. 139, Art. 140 Austrian Constitution.

78 See for example Eckhardt Ratz, 'Grundrechte in der Strafjudikatur des OGH' (2006) 60 *Österreichische Juristenzeitung* 318.

79 See for example A. Stufer and R. Soyer, 'Kritik des Grundrechtsschutzes in der Strafjudikatur des OGH' (2007) 61 *Österreichische Juristenzeitung* 139–148.

80 See Christoph Grabenwarter, 'Die österreichischen Höchstgerichte und deren Verhältnis zueinander' (2008) 16 *Journal für Rechtspolitik* 13.

This problem was addressed by another constitutional amendment of 2013, which came into force in 2015. Although there is still no constitutional complaint against judgments of the Supreme Court, a new appeal was introduced with regard to the judgments of the ordinary (!) courts of first instance. After a judgment of an ordinary court of first instance, the complainant can not only appeal to the ordinary court of second instance, but also file a complaint at the Constitutional Court that the provisions of the statutes, on which the judgment is based in the concrete case, contradict the constitution.[81] The new form of constitutional review enables a certain control of constitutionality in the proceedings of the ordinary courts. It is, however, still not a full constitutional complaint against the judgment of the ordinary court of first instance, and not at all a constitutional complaint against the judgment of the Supreme Court. Thus, the deficits of legal protection regarding a constitutional complaint against ordinary court judgments have not really been solved, although it is fair to say that the structural problems have been reduced.

4.4 Ombudsman board and mediation

From a constitutional perspective, the Austrian Ombudsman system (*Volksanwaltschaft*) is a politically important but legally very weak institution. People can, after exhausting the possibilities of legal protection, file a complaint against maladministration.[82] The Ombudsman board can investigate and make recommendations, but the administrative authorities only have to justify their decisions. In the end, the Ombudsman board cannot effectively protect the rights of individuals. The role of the Ombudsman Board was, however, developed in 2012. The powers of the Ombudsman Board were strengthened with regard to checking human rights in the administration, following a development of ombudsman institutions around the world in the last 20 years.[83] These new competences regarding human rights violation of the administration, however, refer only to parts of law enforcement, including prisons, policing and institutions for handicapped persons.

In certain cases, administrative law also provides possibilities for mediation and alternative dispute resolution, e.g. in the context of energy regulation between consumer and energy companies or in environmental law. The mediation procedures are, however, always provided before a formal legal procedure is started. It might be a possibility for weak legal protection with low access barriers, but legal protection will finally be granted by the courts.

5 Conclusion

An overall evaluation of the principle of effective legal protection would be quite positive. A strong concept of administrative procedures, a new system of administrative court and dynamic case law of the Constitutional Court are constantly improving

81 Thomas Ziniel, 'Strengthening the Judicial Review System in Austria' (2014) 8 *ICL-Journal* 437.
82 See Art. 148a-j Austrian Constitution.
83 See Gabriele Kucsko-Stadlmayer, *Europäische Ombudsmann-Institutionen: Eine rechtsvergleichende Untersuchung zur vielfältigen Umsetzung einer Idee* (Springer 2008).

the legal protection against different administrative acts. The huge impact of ECHR and EU Law is also contributing to an overall stable system.

The positive evaluation does not, however, mask various severe structural problems in the Austrian system of effective legal protection:

- The impact of the European Union not only provides new possibilities for domestic legal protection, but also affects the Austrian concepts of legal protection. The consequence might not only be deficits in legal protection, but also the necessity to reform the whole constitutional structure to create conformity with Union law. The introduction of the administrative courts of first instance can serve as such an example, with it being possible after 20 years to find a proper solution to such problems.
- While the new administrative courts signify a huge improvement to legal protection in Austria, the implementation of the new system goes hand-in-hand with manifold procedural problems in detail. This kind of transitional challenge will hopefully be resolved by the legislative adaption of the new procedural law and by the case law of the administrative courts.
- The concept of individual rights in administrative law remains quite restrictive and limits the possibilities of individuals to participate in administrative procedures. While such concepts help to accelerate administrative proceedings, especially in commercial administrative law, they limit the effectiveness of legal protection.
- The rather strict typology of administrative action also limits the possibilities of legal protection. The constitutional reform created new possibilities on the part of the legislator to open up the system regarding any kind of administrative acts. If the legislation is exploiting this new potential, significant deficits in legal protection could be resolved.

In conclusion, the principle of effective legal protection remains an important project of Austrian constitutional and administrative law. There is still plenty of room for improvement, but it is already based on the strong rule of law in the Austrian legal system.