

Implementation of International Treaties into National Legal Orders: The Protection of the Rights of the Child within the Austrian Legal System

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*“Children do not become,
but already are human beings”*
(Janusz Korczak 1878 – 1942)

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- I. Introduction
- II. Implementing the Convention on the Rights of the Child effectively within the Austrian Legal System
 - 1. Implementation of International Treaties into the Austrian Legal System
 - a. Implementation of the Convention on the Rights of the Child within the Austrian Legal Order
 - 2. Effective Implementation according to the Convention on the Rights of the Child
 - a. Effective Remedies – a Prerequisite for an Effective Implementation
- III. The Transformation of the Convention on the Rights of the Child into the Austrian Federal Constitution
 - 1. Consequences of the Transformation into Austrian Constitutional Law
 - a. Proceedings of Constitutional Review before the Austrian Constitutional Court
 - b. Enforcement of Constitutional Rights in other Proceedings
- IV. Transforming the Convention on the Rights of the Child into Austrian Constitutional Law: A Step forward towards an Effective Implementation?

I. Introduction

Today it is no longer questionable, whether or not human rights apply to all age groups. Children are nowadays undoubtedly fully-fledged beneficiaries of all human rights enshrined in various international treaties as well as in national legal orders appropriate to their age and stage of development.^{1 2} Moreover, bearing in mind the specific needs and

¹ However, certain human rights like, e.g., the right to life or the prohibition of torture can be enjoyed by everyone – thus, also by children – without any age restrictions. P.M. Huber, “Natürliche Personen als Grundrechtsträger”, in: D. Merten/ H.J. Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa, Grundrechte in Deutschland: Allgemeine Lehren I*, Vol. II, 2006, 1137 et seq.; R. Feik, “The territorial and personal scope of fundamental rights”, in: A. Weber (ed.), *Fundamental Rights in Europe and North America*, Part A, 2000, AUS 26 et seq.; W. Berka, *Die Grundrechte: Grundfreiheiten und Menschenrechte in Österreich*, 1999, 94 et seq.; W. Berka, *Lehrbuch Verfassungsrecht*, 2008, 340 et seq.; T. Öhlinger, *Verfassungsrecht*, 2009, 310; L.K. Adamovich/ B.C. Funk/ G. Holzinger, *Österreichisches Staatsrecht Grundrechte*, Vol. 3, 2003, 22 et seq.

vulnerability of children, special human rights instruments stipulating specific rights for children have been drawn up at the international as well as the regional level over the last decades.³ The Convention on the Rights of the Child (CRC) plays thereby an important role. Being the first comprehensive legally binding international instrument concerned with the rights of the child, this Convention obtained a huge number of States Parties shortly after its adoption, reaching thereby almost universal ratification.⁴ Given the large number of States Parties to the CRC it is all the more alarming that still millions of children all over the world suffer from poverty, violence, economic exploitation, preventable diseases, unequal access to education and legal systems that do not recognise their specific needs.

Signing and ratifying an international treaty like the CRC is only the first step. By agreeing to undertake the obligations of an interna-

² E. Brems, *Human Rights: Universality and Diversity*, 2001, 4; Huber, see note 1, 1137 et seq.; Feik, see note 1, AUS 26 et seq.; Berka, see note 1, 94 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 340 et seq.; Öhlinger, see note 1, 310; Adamovich/ Funk/ Holzinger, see note 1, 22 et seq.

³ See in this context first and foremost the following international and regional legal sources: the Geneva Declaration of the Rights of the Child, adopted by the Assembly of the League of Nations in 1924, the Declaration of the Rights of the Child, adopted by the United Nations General Assembly in 1959, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, both adopted by the United Nations General Assembly in 2000 as well as the European Convention on the Exercise of Children's Rights, adopted by the Committee of Ministers of the Council of Europe in 1996. Besides that, also major general human rights conventions like the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the European Social Charter contain provisions especially concerning children. Cf. G. Van Bueren, *The International Law on the Rights of the Child*, 1995, 6 et seq.; S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, 1999, 13 et seq.; S. Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, 1992, 19 et seq.

⁴ Information about the current status of ratification of the Convention on the Rights of the Child is available under the following link <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>.

tional treaty, national governments – as a rule – commit themselves to carry out all appropriate legislative and administrative actions and policies necessary to fully protect and ensure the rights guaranteed by that treaty – in a word, to implement the international treaty effectively within the domestic legal order. Continuous human rights violations in spite of existing binding international human rights treaties, however, show that this obligation is not always met by States Parties in reality.

Austria ratified the CRC in 1992. Since then several legislative and administrative reforms have been undertaken to improve the conformity of the national Austrian legal order with the principles and the provisions of the Convention.⁵ But, according to the concluding observations of the Committee on the Rights of the Child⁶ based on the first and the second periodic report of Austria, deficits regarding the implementation of the Convention in Austria still exist.⁷ The repeated recommendation of the Committee on the Rights of the Child to incorpo-

⁵ See in that context, for instance, the prohibition of all forms of corporal punishment by law in 1989, the establishment of Ombudsman systems for children and adolescents at the federal as well as the states level in the early 1990s, the adoption of the Parent and Child Amendment Act (Bundesgesetzblatt (BGBl) 2000/135) and the establishment of the Austrian Federal Youth Representative Council in 2001. See Committee on the Rights of the Child 20th Sess., Concluding Observations: Austria, 1999, 2, Doc. CRC/C/15/Add. 98 of 7 May 1999; Committee on the Rights of the Child 38th Sess., Concluding Observations: Austria, 2005, 1, 2, Doc. CRC/C/15/Add. 251 of 31 March 2005.

⁶ The Committee on the Rights of the Child is the responsible human rights treaty body for monitoring the implementation of the CRC by its States Parties via a system of periodic reporting. According to article 44 CRC States Parties must report initially two years after acceding to the Convention and thereafter every five years on the measures they have adopted to give effect to the rights guaranteed by the Convention and the progress they have made on the enjoyment of those rights. After examining each report, the Committee addresses in its “concluding observations” its concerns and general recommendations to the States Parties, based on the information enclosed in those states reports. Cf. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, see note 3, 41; Van Bueren, see note 3, 389 et seq.; H. Sax/ C. Hainzl, *Die verfassungsrechtliche Umsetzung der UN-Kinderrechtskonvention in Österreich*, 1999, 21 et seq.

⁷ Committee on the Rights of the Child 20th Sess., see note 5, 2, 5, 6; Committee on the Rights of the Child 38th Sess., see note 5, 2, 3, 8 et seq.

rate the rights of the child enshrined in the Convention into the Austrian Constitution thereby attracts special attention.

Using the implementation of the CRC by Austria as an example, in the following, certain aspects considered being part of such effective implementation of an international treaty within the national legal order will be examined in more detail. Particularly, the requirements for effective remedies and the question, whether or not an inclusion of the rights guaranteed by an international treaty into the national constitutional law is required in that context, will be discussed.

II. Implementing the Convention on the Rights of the Child effectively within the Austrian Legal System

As international treaties usually say little about how States Parties have to implement their international legal obligations within their domestic legal orders, the starting point for figuring out how international law is integrated into and applied within a national legal order is – in most instances – the national constitution. Basically, two different constitutional approaches exist: the *transformation approach*, following the theory of dualism on the one hand and the *incorporation approach*, following the theory of monism on the other hand.⁸ Whereas states following the transformation approach give effect to international law provisions on the national level by transforming them into domestic law, in states following the incorporation approach international law provisions themselves become part of the national law once the requirements for signing and ratifying the international treaty have been satisfied. However, in practice pure forms of monism or dualism rarely exist. Rather, there are almost as many ways of implementing international law as

⁸ While in the view of the monists only one universal legal order exists combining the international and the national law, under the dualist theory, international and national law operate on different levels. Cf. M.D. Evans, *International Law*, 2006, 428; J.L. Dunoff/ S.R. Ratner/ D. Wippman, *International Law Norms, Actors, Process. A Problem-Oriented Approach*, 2006, 267 et seq.; F. Ermacora/ W. Hummer, “Völkerrecht, Recht der Europäischen Union und Landesrecht”, in: H. Neuhold/ W. Hummer/ C. Schreuer (eds), *Österreichisches Handbuch des Völkerrechts*, Band 1 - Textteil 2004, 112 et seq.

there are national legal systems varying between pure monism and total dualism.⁹

1. Implementation of International Treaties into the Austrian Legal System

Since the conclusion of international treaties is not only subject to international law but also to the domestic legal order of the respective state, national law must contain provisions regarding the negotiation, conclusion and implementation of international conventions and agreements into the national legal order. In the Austrian Federal state, it is first and foremost the Federation (Bund) which has the power to conclude international treaties without being bound by the allocation of powers between the Federation and the States. Furthermore, the Austrian States (Länder) also have a limited power to conclude international treaties (article 16 Federal Constitution).¹⁰ In both cases, the conclusion of the treaties lies within the responsibility of the Federal President (article 65 para. 1 Federal Constitution).¹¹ In cases where, political treaties, treaties modifying or supplementing existing laws and international treaties amending the fundamental treaties of the European Union¹² are concerned, the parliament's approval additionally is required

⁹ Dunoff/ Ratner/ Wippman, see note 8, 267 et seq.; Evans, see note 8, 428 et seq.; Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, see note 3, 27 et seq.; Ermacora/ Hummer, see note 8, 113 et seq.

¹⁰ Bundesverfassungsgesetz (B-VG).

¹¹ M. Stelzer, *An Introduction to Austrian Constitutional Law*, 2009, 60 et seq.; N. Foster, *Austrian Legal System & Laws*, 2003, 59; H. Hausmaninger, *The Austrian Legal System*, 2003, 28; B. Raschauer, "Art 65 B-VG", in: K. Korinek/ M. Holoubek (eds), *Österreichisches Bundesverfassungsrecht, Kommentar zum B-VG*, Vol. II/2, 1999, 19 et seq.; S. Hammer, "Art 16 B-VG", in: K. Korinek/ M. Holoubek (eds), *Österreichisches Bundesverfassungsrecht, Kommentar zum B-VG*, Vol. II/1, 1999, 25 et seq.; Öhlinger, see note 1, 80 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 67 et seq.; R. Walter/ H. Mayer/ G. Kucsko-Stadlmayer, *Grundriss des österreichischen Bundesverfassungsrechts*, 2007, 116 et seq.

¹² Whereas political treaties are considered to be treaties substantially and directly affecting the existence of the state, its territorial integrity, independence, position among states or political influence on other states, the distinction between "treaties modifying existing law" and "treaties supplementing existing law" specifies whether the matter in question was previ-

(article 50 para. 1 Federal Constitution), which must be obtained before the conclusion of the treaty. To become part of the Austrian legal system, international treaties, already binding Austria on the international level, are also to be published in Part III of the Federal Law Gazette or respectively in another appropriate manner.¹³ The rank of the international treaty within the national legal order is determined by its content: while treaties modifying or supplementing existing laws hold the rank of simple Federal law, all other international treaties are considered to be administrative regulations. However, until the amendment of the Federal Constitution in 2008, international treaties modifying or complementing the Austrian Constitution – like e.g. the European Convention on Human Rights – could also be provided with the rank of national constitutional law by the Austrian Parliament during the implementation process.¹⁴ As the international treaty itself has to be published in the Federal Law Gazette thereby becoming part of the Austrian legal system, one can conclude that, in the Austrian case a “moderate incorporation approach” regarding the implementation of international treaties into the national legal order applies.¹⁵

Once the international treaty has obtained legal effect within the Austrian legal system, its *direct applicability* depends on the following terms: provisions of the international treaty have to be sufficiently clear and detailed in the sense of article 18 Federal Constitution to serve as a legal basis for administrative procedures and litigation. If that is not the case, the provisions of the treaty additionally have to be implemented by national law to obtain applicability within the national legal order. But even if the international treaty is sufficiently clear and detailed the

ously subject to domestic regulation or not. In both cases, according to national provisions, the content of the treaty requires regulation by means of law. See Stelzer, see note 11, 60; Öhlinger, see note 1, 81 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 68 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 117 et seq.

¹³ T. Öhlinger, “Art 50 B-VG”, in: K. Korinek/ M. Holoubek (eds), *Österreichisches Bundesverfassungsrecht, Kommentar zum B-VG*, Vol. II/1, 2009, 20 et seq.; Ermacora/ Hummer, see note 8, 116 et seq.; Stelzer, see note 11, 60 et seq.; Hausmaninger, see note 11, 28; Foster, see note 11, 59; Öhlinger, see note 1, 80 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 68 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 116 et seq.

¹⁴ Öhlinger, see note 13, 26 et seq.; Hausmaninger, see note 11, 28; Stelzer, see note 11, 61 et seq.; Öhlinger, see note 1, 83 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 70 et seq.

¹⁵ Öhlinger, see note 13, 19 et seq.; Ermacora/ Hummer, see note 8, 112.

Federal President as well as the parliament – under certain conditions – retain the right to decide on a so-called “*reservation of implementation*” during the ratification process. In that case, the international treaty – although being part of the national legal order – must always be transformed into Austrian law and its direct applicability is excluded anyway, which means that no rights or obligations can be directly derived from this treaty and no national administrative or judicial decisions can rely on this international legal act but only on the executing national law provisions. This could be seen as an important exception from the moderate incorporation approach normally applying in the Austrian case. Even though such “non-self-executing” treaties have to be considered when national legal provisions are to be interpreted “in conformity with international law”, as long as the required executing national legislation has not been enacted, the legal effect and importance of such treaties, compared to “self-executing” treaties, are rather weak, as rights or obligations can not be directly derived from this international treaty and be invoked before national courts and administrative bodies.¹⁶

a. Implementation of the Convention on the Rights of the Child within the Austrian Legal Order

The CRC being considered as one of the most important human rights instruments ever adopted by the international community, was unanimously approved by the United Nations General Assembly in November 1989, opened for signature in January 1990 and entered into force within that same year, in September 1990.¹⁷ Up to now, more than 190 states have ratified the CRC, which is basically concerned with the following – so-called – three Ps: participation of children in all matters affecting their own destiny, protection of children against discrimination and all forms of neglect, violation and exploitation and provision of assistance for their basic needs such as, for example, a living standard

¹⁶ Öhlinger, see note 13, 47 et seq.; Stelzer, see note 11, 61; Öhlinger, see note 1, 82 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 69 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 118 et seq.

¹⁷ Detrick, see note 3, 1; Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, see note 3, 18; Van Bueren, see note 3, 15; Sax/ Hainzl, see note 6, 15 et seq.

which is adequate for the child's physical, mental, moral and social development.¹⁸

Although Austria was one of the first states to sign the CRC, it took two more years until the Convention was finally ratified and entered into force within the Austrian legal system.¹⁹ Being convinced that the Austrian legal order was, in most instances, already in conformity with the CRC, the Austrian Parliament decided on a so-called "reservation of implementation" during the ratification process. Consequently, the direct applicability of the CRC in Austria – although being part of the Austrian legal order – is "excluded", which – again – means that no rights or obligations can be derived directly from this Convention and no administrative or judicial decisions can rely on it but only on the executing national law provisions. While certain parts of the Austrian legal order were already in conformity with the CRC when it entered into force in 1992, making executing national law provisions in these cases unnecessary, a number of provisions guaranteed by the Convention still needed to be implemented by national law at that time.

Moreover, although, several legislative and administrative reforms have been undertaken in the last eighteen years increasing the conformity of the Austrian legal order with the CRC, deficits²⁰ regarding the implementation of the CRC into the Austrian legal system still exist! Due to the fact that the CRC was not considered to be an international treaty modifying or complementing the Austrian Constitution during the ratification process, it – compared to other Austrian human rights sources – does not hold the rank of national constitutional but only of simple law within the Austrian legal order.²¹

¹⁸ Van Bueren, see note 3, 15; Detrick, see note 3, 27; Sax/ Hainzl, see note 6, 18 et seq.; H. Sax, "Kinderrechte", in: G. Heißl (ed.), *Handbuch Menschenrechte*, 2009, 545 et seq.

¹⁹ More precisely, it became part of the Austrian system after its publication in BGBl III 1993/7.

²⁰ See therefore Committee on the Rights of the Child 20th Sess., see note 5, 2, 5, 6; Committee on the Rights of the Child 38th Sess., see note 5, 2, 3, 8 et seq.

²¹ Sax/ Hainzl, see note 6, 40 et seq.; Sax, see note 18, 549 et seq.; M. Haslinger, "Bewirkt die UN-Konvention über die Rechte des Kindes einen neuen völkerrechtlichen oder menschenrechtlichen Status des Kindes in Österreich?", in: M. Rauch-Kallat/ J.W. Pichler (eds), *Entwicklungen in den Rechten der Kinder im Hinblick auf das UN-Übereinkommen über die Rechte des Kindes*, 1994, 49 et seq.

2. Effective Implementation according to the Convention on the Rights of the Child

As one of the most important principles of the law of international treaties, according to article 26 Vienna Convention on the Law of Treaties (VCLT), every international treaty in force must be performed by its parties “in good faith”. In other words, by stating that States Parties must carry out the treaty obligations in good faith, article 26 VCLT obliges them to observe the treaty provisions in their spirit as well as according to their letter and prohibits all state acts calculated to frustrate the object and purpose and thus consequently the proper execution of the treaty. Moreover, article 27 VCLT makes clear that the obligation to perform international treaties in good faith applies irrespectively of any conflicting domestic law by stipulating that a State Party may not invoke national law provisions as justification for its failure to perform a treaty. Rather, it is the duty of the treaty party under international law to ensure that all national provisions are compatible or brought into line with the international treaty provisions.²²

In particular in the context of international human rights treaties, this obligation to perform an international treaty in good faith is of utmost importance. Hence, by signing and ratifying such an international human rights treaty, States Parties not only commit themselves to respect but also to ensure the enjoyment of all rights guaranteed therein to all individuals under their jurisdiction.²³ The CRC, being an international treaty in terms of article 1 and article 2 para. 1 (a) VCLT and therefore falling within the scope of article 26 VCLT, specifies the general obligation of implementing an international treaty effectively within the national legal order – as laid down in article 26 VCLT – first and foremost in its arts 2 and 4.

Thus, according to article 2 CRC, it is the basic obligation of the States Parties to the CRC to “respect” and “ensure” all rights set forth in the Convention to each child within their jurisdiction. While the term “respect” implies a duty of good faith on the part of the States Parties to refrain from all actions resulting in a breach of the Conven-

²² M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 2009, 367, 371, 372; T. Buergenthal/ S.D. Murphy, *Public International Law in a nutshell*, 2007, 119; Evans, see note 8, 196 et seq.; K. Zemanek, “Das Völkervertragsrecht”, in: Neuhold/ Hummer/ Schreuer, see note 8, 59.

²³ Sax/ Hainzl, see note 6, 25.

tion, the obligation to “ensure” all rights set forth in the Convention, requires States Parties to take all measures necessary in order to enable children to enjoy and exercise their rights guaranteed by the Convention. Consequently, article 2 CRC includes both, negative and positive obligations, thereby setting out the result which has to be achieved by the States Parties.²⁴

Article 4 CRC, in contrast, focuses on the manner in which this result has to be achieved. To ensure the realisation of all rights enshrined in the CRC for all children in their jurisdiction, States Parties are – according to article 4 CRC – under a duty to undertake “all appropriate legislative, administrative and other measures” for the implementation of the rights recognised in the Convention. As regards the economic, social and cultural rights recognised in the CRC, article 4 CRC specifically stipulates that States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.²⁵

By simply requiring that national governments have to undertake “all appropriate ... measures”, the CRC has adopted a broad and, at the same time, flexible implementation approach which – in principle – does not stipulate any specific means by which the Convention has to be implemented into the domestic legal order. Rather, it is first and foremost within the discretion of each State Party to assess what measures are to be considered appropriate in terms of article 4 CRC.²⁶ Nevertheless, while emphasising that there is no favoured legislative or administrative model for implementing the Convention, the Committee on the Rights of the Child – being the responsible human rights treaty body for monitoring the implementation of the CRC by its States Parties – has developed certain implementation standards in its general comments over the recent years. Thereby seeking to ensure an effective implementation of the CRC by its States Parties.

By making clear that legislative measures are to be supplemented by other measures, the Committee has identified a wide range of measures,

²⁴ Van Bueren, see note 3, 391; Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, see note 3, 68 et seq.; Sax/Hainzl, see note 6, 26.

²⁵ Van Bueren, see note 3, 391; Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, see note 3, 101; Sax/Hainzl, see note 6, 26.

²⁶ Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, see note 3, 27, 108 et seq.; Van Bueren, see note 3, 391 et seq.

necessary for an effective implementation. Comprehensive data collection, awareness-raising or the development and implementation of appropriate policies, services and administrative programmes are only few examples in this context. Regarding the required legislative measures, the Committee has pointed out the necessity of ensuring that all domestic legislation is fully compatible with the Convention. Believing that such a full compliance of the national legal order with the Convention is only one of the various obligations under article 4 CRC, according to the Committee, States Parties additionally have to ensure that the treaty provisions are given legal effect within the domestic legal orders. In a word, to implement the CRC effectively within the national legal order, the applicability of and possibility to enforce all rights set forth in the Convention within the national legal system are also required.²⁷ For that reason, although the CRC does not contain a provision expressly obliging its comprehensive incorporation into the national legal order, the Committee especially welcomes such incorporation, since it is considered as one of the most effective forms of implementation.

Furthermore, pursuant to the Committee's general comments, incorporation in that context should mean that the provisions of the Convention can be directly invoked before national courts and authorities and that the CRC will prevail whenever there is a conflict between domestic legislation and the treaty provisions. At the same time, the Committee makes clear, that incorporation by itself does not release the States Parties from their duty to ensure that all relevant domestic law is brought into conformity with the Convention.²⁸ Just as there is no CRC provision explicitly requiring the incorporation of the Convention into the national legal order, no specific type of status of the Convention within the national legal order is demanded by the CRC. All the more, the Committee welcomes the inclusion of the Convention in

²⁷ Committee on the Rights of the Child 34th Sess., General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child, 2003, 2, 3, 6, 7, Doc. CRC/GC/2003/5 of 3 October 2003; R. Hodgkin/ P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 1998, 51, 59; M. Rishmawi, "Article 4: The Nature of States Parties' Obligations", in: A. Alen/ J. Vande Lanotte/ E. Verhellen/ F. Ang/ E. Berghmans/ M. Verheyde (eds), *A Commentary on the United Nations Convention on the Rights of the Child*, 2006, 23, 24.

²⁸ Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, see note 3, 27; Van Bueren, see note 3, 392; Committee on the Rights of the Child 34th Sess., see note 27, 6; Hodgkin/ Newell, see note 27, 60; Rishmawi, see note 27, 24, 25.

certain national constitutions. However, believing that this inclusion does not automatically ensure respect for the rights of the children, the Committee – again – asks for direct applicability of children’s rights set forth in constitutions and additional legislative and other measures in that context.²⁹ Moreover, the Committee points out the importance of effective remedies to redress violations of the Convention within the national legal orders.³⁰

Summing up, the implementation of the CRC can only be regarded effective if two requirements are fulfilled: firstly, the domestic legislation has to be in full compliance with the Convention; secondly, the Convention must be given legal effect, which includes the need for effective remedies.

Coming back to the above made remarks about the implementation of the CRC within the Austrian legal system so far: whereas the “transformation approach” taken by Austria in case of the CRC as well as the rank of simple law seems to be in conformity with article 4 CRC, the explicit exclusion of the direct applicability of the treaty provisions within the Austrian legal order affects the required legal effect of the Convention – namely in those matters where an executing national legislation is still missing. Being aware of the bulk of measures necessary for an effective implementation of the CRC within the national legal system, including the necessity of a fully compatible domestic legal order, in the following only one aspect – namely the question, whether or not the Austrian legal system provides effective remedies in terms of the CRC – will be examined in more detail.

a. Effective Remedies – a Prerequisite for an Effective Implementation

The protection of fundamental rights can only be regarded as effective if the right to claim violations at an independent institution is guaranteed. The CRC does not explicitly contain a provision demanding a certain form of remedies. Nevertheless, the Committee on the Rights of the Child expresses in its general comment that the need for effective

²⁹ Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, see note 3, 27; Committee on the Rights of the Child 34th Sess., see note 27, 7; Hodgkin/ Newell, see note 27, 62; Rishmawi, see note 27, 24; Sax/ Hainzl, see note 6, 57.

³⁰ Committee on the Rights of the Child 34th Sess., see note 27, 7; Rishmawi, see note 27, 49 et seq.

remedies is implicitly included in the CRC and that States Parties consequently must provide effective remedies against breaches of the Convention to meet the requirements of an effective implementation. Moreover, these remedies have to be regulated in a child-friendly way.³¹ Usually the respective individuals assert violations of their rights themselves, perhaps represented by a lawyer. The CRC, however, contains guarantees created especially for the protection of children. The children's capacity to take legal actions themselves is usually rather limited. Therefore, it has to be discussed on which prerequisites children have the right to pursue the rights enshrined in the CRC according to the Austrian procedural laws and if this form of legal protection can be considered effective within the meaning of the Convention.

Generally, minors over 14 years can be held responsible for their deeds.³² Thus, they have the right to act in criminal proceedings and can consequently claim the violation of constitutionally guaranteed rights themselves. Moreover, their legal representatives³³ have the same rights as the minors themselves.³⁴ In civil law and administrative matters the capacity to conduct proceedings in one's own name³⁵ depends on a person's capacity to contract, which is regulated by the "Austrian Civil Code."³⁶ The capacity to contract can be, *inter alia*, limited by age. Persons that are older than 18 years are regarded adults; their capacity to contract is not restricted for age reasons. On the contrary, children under the age of seven are not able to contract except for matters which are regarded "affairs of daily life and of trivial importance."³⁷ Addition-

³¹ Cf. Committee on the Rights of the Child, see note 27, 7.

³² Cf. B. Loderbauer, "Strafrecht", in: B. Loderbauer (ed.), *Kinder- und Jugendrecht*, 2004, 119 et seq. (121).

³³ Usually parents are a child's legal representatives. If the child does not have a parent who is able to fulfil this task, the court appoints a guardian, cf. Hausmaninger, see note 11, 251.

³⁴ Cf. Loderbauer, see note 32, 166.

³⁵ The capacity to conduct proceedings on one's own has nothing to do with the need to be represented by a lawyer, which is provided under certain circumstances according to the different procedure acts. If children are not capable of conducting proceedings on their own, they have to be represented by their legal representatives, who could be represented by a lawyer themselves.

³⁶ Hausmaninger, see note 11, 234.

³⁷ Hausmaninger, see note 11, 244. This includes, for example, the use of public transport or the buying of snacks, but also the acceptance of small gifts. The contract becomes valid if the child fulfils her/his contractual obliga-

ally, minors between the age of seven and 14 years are provided with limited capacity to contract; they can conclude contracts which do not contain any contractual obligations for the child but only for the other contracting party. Minors between the age of 14 and 18 have an even more extended capacity to contract. They can enter into service contracts,³⁸ which, however, can be rescinded by the legal representative for important reasons. Moreover, they are in charge of their own income and anything that is put at their disposal as long as they do not endanger the satisfaction of their everyday needs. Every legal action that goes beyond these limits has to be carried out by the respective legal representative.³⁹

Pursuant to §§ 1 and 2 of the “Austrian Civil Procedure Code”⁴⁰ minors over the age of 14 years are capable of conducting proceedings in the field of civil law regarding all matters that fall within their capacity to contract on their own.⁴¹ Moreover, they can act in proceedings

tions, cf. Hausmaninger, see note 11, 244 footnote 5; Foster, see note 11, 151; H. Koziol/ R. Welser, *Grundriss des bürgerlichen Rechts*, Band I, 2006, 55; see also K. Zweigelt/ H. Kötz, *Introduction to Comparative Law*, 1998, 354.

³⁸ Except for articles of apprenticeship, to which the legal representative has to agree, cf. Koziol/ Welser, see note 37, 57.

³⁹ Cf. Hausmaninger, see note 11, 244; Koziol/ Welser, see note 37, 54 et seq.; A. Haberl, *Kinderrechte – eine zivilrechtliche Analyse*, 2007, 17 et seq.; S. Dullinger/ F. Kerschner, “Rechts- und Handlungsfähigkeit”, in: Loderbauer, see note 32, 1 et seq. (10-15).

⁴⁰ Hausmaninger, see note 11, 218.

⁴¹ W.H. Rechberger/ D.A. Simotta, *Grundriss des österreichischen Zivilprozessrechts*, 2009, 141; O.J. Ballon, *Einführung in das österreichische Zivilprozessrecht – Streitiges Verfahren*, 2009, 95; H.W. Fasching, *Lehrbuch des österreichischen Zivilprozessrechts*, 1990, 180 et seq.; Dullinger/ Kerschner, see note 39, 16; R. Fucik, “§ 2 ZPO”, in: W.H. Rechberger (ed.), *Kommentar zur ZPO*, 2006, para. 1; Haberl, see note 39, 57; S. Dullinger, “Zur Prozessfähigkeit minderjähriger und geistig behinderter Personen”, *Österreichische Richterzeitung* 67 (1989), 6 et seq. (6); M. Nademleinsky, “§ 151 ABGB”, in: M. Schwimann, *ABGB Praxiskommentar*, 2005, paras 19-20; H. Dolinar/ R. Holzhammer, *Zivilprozessrecht*, 2008, 200; E. Gitschthaler, “Prozess- und Verfahrensfähigkeit minderjähriger und besachwalteter Personen”, *Österreichische Richterzeitung* 81 (2003), 175 et seq. (175); D. Bramböck/ U.M. Hutter/ J.J. Hagen/ E. Paumgartner, “Wege zum kind-zentrierten Verfahren – vom Verfahrensobjekt zum Verfahrenssubjekt”, in: M. Rauch-Kallat/ J.W. Pichler (eds), see note 21, 245 et seq. (252).

regarding their care and upbringing or the right to personal contact.⁴² In proceedings that are not covered by their capacity to conduct, however, minors have to be represented by their legal representative. Children under the age of 14 are not capable to act in any proceedings on their own but are solely dependent on their legal representatives.⁴³

§ 9 of the Administrative Procedure Act⁴⁴ provides that if the respective administrative laws do not contain specific provisions concerning the capacity to conduct proceedings on one's own, the norms regarding the capacity to contract according to civil law have to be applied instead. However, it is not clear if this means that the provisions concerning the limited capacity to contract as described above are relevant in administrative proceedings, too, as it is quite difficult to apply them in administrative matters. From the point of view of the present authors these provisions have to be applied as well.⁴⁵ Consequently, minors over 14 years of age are capable to conduct administrative proceedings on their own concerning service contracts, their own income and property put at their disposal. The Administrative Court pursues this interpretation, too.⁴⁶ Moreover, the Court assumes that minors are capable to conduct proceedings on their own in matters concerning the affairs of daily life and of trivial importance as mentioned above.⁴⁷

⁴² See § 104 “Non-contentious Procedure Act”, cf. Hausmaninger, see note 11, 218; Außerstreitgesetz (AußStrG). Cf. P.G. Mayr/ R. Fucik, *Das neue Verfahren außer Streitsachen*, 2006, 145; A. Deixler-Hübner, “Familienrechtliche Bestimmungen”, in: Loderbauer, see note 32, 35 et seq. (59); A. Deixler-Hübner, “Die neuen familienrechtlichen Verfahrensbestimmungen”, in: S. Ferrari/ G. Hopf (eds), *Reform des Kindschaftsrechts*, 2001, 115 et seq. (118); Haberl, see note 39, 62; T. Klicka/ P. Oberhammer/ T. Domej, *Außerstreitverfahren*, 2006, 81; P. Barth/ A. Haidvogel, “Der Kinderbeistand. Ein Modellprojekt stellt sich vor”, *Österreichische Richterzeitung* 85 (2007), 14 et seq. (16); Gitschthaler, see note 41, 180.

⁴³ Cf. Dullinger/ Kerschner, see note 39, 16; Haberl, see note 39, 56; Nademleinsky, see note 41, para. 19; Dolinar/ Holzhammer, see note 41, 200 et seq.; Bramböck/ Hutter/ Hagen/ Paumgartner, see note 41, 252 et seq.

⁴⁴ Allgemeines Verwaltungsverfahrensgesetz.

⁴⁵ See also J. Hengstschläger/ D. Leeb, *Kommentar zum Allgemeinen Verwaltungsverfahrensgesetz*, 2004, § 9 AVG para. 14; P. Oberndorfer, *Die österreichische Verwaltungsgerichtsbarkeit*, 1983, 82.

⁴⁶ VwSlg 10.547A/1981, VwGH 6 March 1987, 86/11/0121; VwGH 22 September 1988, 88/08/0250, 0251.

⁴⁷ Cf. VwGH 86/11/0121, see note 46. Likewise regarding civil law proceedings, cf. Rechberger/ Simotta, see note 41, 141; Fasching, see note 41, 180 et

These considerations are not only relevant regarding proceedings at the ordinary courts or administrative authorities. As the Constitutional Court⁴⁸ has to apply the Austrian Civil Procedure Code if a question is not regulated in its own Procedure Act the above mentioned provisions are relevant as well.⁴⁹ The same holds true for the Administrative Court⁵⁰ that has to apply the respective norms of the Administrative Procedure Act.⁵¹ Therefore, minors are able to conduct proceedings at the highest courts within the limits described above.⁵²

These deliberations show that in civil law and administrative matters minors are dependent on their legal representatives' actions in most

seq.; G. Schubert, "§ 2 ZPO", in: H.W. Fasching/ A. Konecny (eds), *Kommentar zu den Zivilprozessgesetzen*, Vol. 2, 2002, para. 3; Ballon, see note 41, 95; Bramböck/ Hutter/ Hagen/ Paumgartner, see note 41, 252. The Administrative Court, however, is of the opinion, that proceedings at one of the highest courts cannot be regarded as an "affair of daily life and of trivial importance". Thus, minors are not capable of conducting proceedings at the Administrative Court in these matters. Unlike the Constitutional Court the Administrative Court judges the act of conducting proceedings itself ignoring the nature of the act causing the respective proceedings, see VwSlg 11.132 (A)/1983; regarding proceedings at the Constitutional Court, see VfSlg 7526/1975; critically: J. Stabentheiner, "§ 151-153 ABGB", in: P. Rummel (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, Vol. 1, 2000, para. 12.

⁴⁸ The Constitutional Court decides about the infringement of constitutionally guaranteed rights by an administrative ruling or a decision of the Asylum Court claimed by individuals. Moreover, they can file an individual application if certain prerequisites are fulfilled claiming that a law is not in conformity with the constitution or that a regulation violates simple law, cf. Stelzer, see note 11, 79 et seq.

⁴⁹ § 35 Verfassungsgerichtshofgesetz (VfGG); see R. Machacek/ M. Hiesel, "Der Verfassungsgerichtshof", in: R. Machacek (ed.), *Verfahren vor dem VfGH und VwGH*, 2008, 30 et seq. (30); K. Korinek, "Die verfassungsgerichtliche Kontrolle der Verwaltung in Österreich", in: G. Ress (ed.), *Entwicklungstendenzen im Verwaltungsverfahrensrecht und in der Verwaltungsgerichtsbarkeit*, 1990, 287 et seq. (296).

⁵⁰ The Administrative Court is, *inter alia*, competent to decide on the lawfulness of rulings or on the violation of the "onus to take a decision" by administrative authorities, cf. Stelzer, see note 11, 72 et seq. There is no appeal against the decisions of the Administrative Court.

⁵¹ § 62 Verwaltungsgerichtshofgesetz (VwGG); see Oberndorfer, see note 45, 81.

⁵² Regarding the Constitutional Court, see VfSlg 7526/1975; regarding the Administrative Court, see VwSlg 10.547A/1981.

proceedings. Except for matters of care and upbringing or the right to personal contact, their capacity to conduct proceedings on their own is usually rather limited. Thus, the legal representatives have to assert violations of the children's rights on their behalf. Regarding the different levels of a child's development it is impossible that children of all age groups act on their own in any kind of proceedings. The Austrian system, which takes into account not the individual development but the age of the respective child only, brings into line the children's right to act on their own and the certainty needed in legal actions.

It simplifies and accelerates the proceedings if it does not have to be decided in every case if a specific child has reached the capacity to act on her/his own.⁵³ As the number of proceedings in which children may act themselves increases once they get older and applies especially to proceedings that concern their care and upbringing⁵⁴ the children's welfare is taken into account appropriately. An extension to other types of proceedings could even come into conflict with their welfare as children could harm themselves because of their lack of experience if proceedings get too complicated. Regarding the different proceedings mentioned above, children's constitutionally guaranteed rights can usually be effectively pursued by their legal representatives, even if the children's capacity to conduct proceedings on their own is limited in the respective matter.

Nevertheless, problems occur if legal representatives do not claim the children's rights either because of a conflict of interests or by simply ignoring their task. As a solution to the former courts have to appoint a curator who replaces the legal representative if two prerequisites are met: firstly, the legal representative has to act on behalf of the minor and for her-/himself or on behalf of another person in the same matter (e.g. contracts between the legal representative and the minor or between two minors represented by the same adult); additionally, there has to be a conflict of interests regarding this matter.⁵⁵ In this case the

⁵³ In favour of a decision from person to person if minors over 14 years want to act on their own, Bramböck/ Hutter/ Hagen/ Paumgartner, see note 41, 282.

⁵⁴ Children under the age of 14 have to be heard in these proceedings, cf. Deixler-Hübner, see note 42, 121; Klicka/ Oberhammer/ Domej, see note 42, 81.

⁵⁵ Cf. J. Stabentheiner, "§§ 271, 272 ABGB", in: Rummel, see note 47, Supplementary Vol. 1, 2003, paras 1-2; H. Weitzenböck, "§§ 271, 272 ABGB", in: Schwimann, see note 41, paras 2-4; H. Koziol/ P. Bydlinski/ R. Bollen-

curator has to act on behalf of the minor and thus assert breaches of her/his rights.⁵⁶ However, if these prerequisites are not fulfilled or if the respective legal representatives simply ignore their task to pursue the child's rights, there is often no other institution that has the competence to do so, and this leads to a lack of children's legal protection. If legal representatives endanger the child's well-being severely by disregarding their task, this might lead to a complete or partial withdrawal⁵⁷ of the right to custody.⁵⁸ In this case a new legal representative is appointed who then may invoke the child's rights. Nevertheless, the prerequisites of a withdrawal of the right to custody are often not fulfilled. In these cases no effective means to pursue the children's rights do exist. The implementation of the CRC, however, can only be regarded effective if the pursuing of the guaranteed rights is ensured with regard to all children and all situations.

The "Children's Counsellor in Custody Proceedings"⁵⁹ is a recently established instrument to guarantee the children's right to be heard. A Children's Counsellor may be appointed by the court in highly disputed divorce proceedings with regard to children under the age of 14; in cases of special need it is possible to appoint a counsellor for children up to the age of 16 as well. As children often suffer in this situation the counsellor's task is to support them and accompany them during the proceedings. Moreover, she/he acts as the child's mouthpiece, passing the child's opinion and wishes to the court, but only if the child wants to do so.⁶⁰ Consequently, the counsellor has the duty to observe se-

berger, *Kurzkommentar zum ABGB*, 2007, §§ 271–272 ABGB paras 2-3; Koziol/ Welser, see note 37, 566; U. Schwarzl, "Obsorge, Kuratel und Sachwalterschaft nach dem KindRÄG 2001", in: S. Ferrari/ G. Hopf (eds), *Reform des Kindschaftsrechts*, 2001, 19 et seq. (30-31); F. Kerschner, *Bürgerliches Recht, Familienrecht*, Vol. V, 2008, 127; Barth/ Haidvogel, see note 42, 16.

⁵⁶ See Barth/ Haidvogel, see note 42, 17.

⁵⁷ Regarding the prerequisites of the withdrawal of the right to custody, see Deixler-Hübner, see note 42, 42 et seq.

⁵⁸ See also I. Mottl, "Das Kind als Rechtssubjekt oder nur Spielball familiärer Auseinandersetzungen?", in: Rauch-Kallat/ Pichler, see note 21, 167 et seq. (175).

⁵⁹ 3rd and 4th Report of the Republic of Austria to the United Nations pursuant to article 44 para. 1 b of the Convention on the Rights of the Child, 23, para. 109.

⁶⁰ Cf. Barth/ Haidvogel, see note 42, 17, 19; B. Lehner, "Dem Kind eine Stimme geben". Das Modellprojekt 'Kinderbeistand"', *Interdisziplinäre Zeit-*

crecy.⁶¹ Thus, the counsellor guarantees the children's right to be heard in all matters that concern them. Nevertheless, the Children's Counsellor cannot be regarded as the child's legal representative or curator. She/he has no right to conduct proceedings on behalf of the child.⁶² Therefore, the counsellor does not have the right to make applications or to lodge an appeal claiming the violation of the child's rights. Thus, it cannot be regarded as an independent institution as demanded above.

These deliberations show that the existing Austrian provisions concerning the children's representation and their right to act on their own do not fulfil the prerequisites of an effective implementation of the CRC. To meet these requirements the creation of an independent institution which helps children who cannot rely on the respective support to claim their rights at the competent courts and authorities must be considered.

III. The Transformation of the Convention on the Rights of the Child into the Austrian Federal Constitution

Although an inclusion of the Convention into the national constitution is not required by the CRC, the Committee on the Rights of the Child has repeatedly recommended an incorporation of the rights of the child into the Austrian constitutional law – both, at federal and states level – in its concluding observations⁶³ regarding the Austrian reports according to article 44 CRC. Whereas children's rights have already been successfully integrated into certain Austrian States (Länder) constitutions – namely in Upper Austria, Vorarlberg and Salzburg – in the meantime, such inclusion of the rights of the child into the Federal Constitution is still a matter of discussion. Since Austria's accession to the Convention,

schrift für Familienrecht 3 (2008), 275 et seq. (275-276); M. Reiter, "Das Modellprojekt 'Kinderbeistand'", *Zeitschrift für Ehe- und Familienrecht* 2 (2007), 84 et seq.; B. Krucsay/ Ch. Pelikan, "Aus dem Bericht der Begleitforschung zum Modellprojekt 'Kinderbeistand'. Unterstützung und Entlastung für Kinder", *Interdisziplinäre Zeitschrift für Familienrecht* 3 (2008), 288 et seq. (289).

⁶¹ See Barth/ Haidvogel, see note 42, 17; Lehner, see note 60, 276.

⁶² See Barth/ Haidvogel, see note 42, 17; Reiter, see note 60, 84.

⁶³ Committee on the Rights of the Child 20th Sess., see note 5, 2; Committee on the Rights of the Child 38th Sess., see note 5, 2, 3.

not only child- and youth organisations but also the relevant governmental bodies have undertaken several attempts to promote such an inclusion of children's rights into national constitutional law. The proposal of the "Austrian Convention for the Constitutional Reform" in order to include certain rights of the child into the Federal Constitution is only one important example in that context. This proposal has failed to reach the required political agreement in the past, a new draft law regarding the inclusion of certain children's rights guaranteed by the CRC into the Federal Constitution is currently being discussed by the Austrian Parliament.⁶⁴

In the following section the question will be examined, what consequences an inclusion of the CRC into the Austrian Federal constitution would have. In particular, it will be shown, how the legal protection of the child in Austria would be changed by transforming the CRC into constitutional law. The results of that examination will help to assess, whether or not such an inclusion of the rights of the child into the Austrian Constitution would increase the effectiveness of the implementation of the CRC.

1. Consequences of the Transformation into Austrian Constitutional Law

One could argue that in order to fulfil the requirements for an effective implementation of the CRC an implementation through simple law would be sufficient. Nevertheless, constitutional law takes a special position in the legal system acting as a guideline for the whole political process. To serve this purpose constitutional law cannot be changed as easily as simple law. Although – considering the international standards – the Austrian constitution can quite easily be amended,⁶⁵ it is still nec-

⁶⁴ Sax, see note 18, 550 et seq.; Report of the Austrian Convention for the constitutional reform, 2005, Part 3, 88; Part 4A, 36 et seq., available under the following link: <http://www.konvent.gv.at/K/DE/ENDB-K/ENDB-K_00001/pmh.shtml>; Bundesverfassungsgesetz über die Rechte von Kindern (935/A XXIV. GP) <http://www.parlament.gv.at/PG/DE/XXIV/A/A_00935/pmh.shtml>.

⁶⁵ Cf. H. Schäffer/ D. Jähnel, "The Protection of Fundamental Rights", in: Weber, see note 1, AUS 73 et seq.; D. Jähnel, "Bestandsschutz und Durchsetzung der Grundrechte", in: D. Merten/ H.J. Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa, Grundrechte in*

essary that two-thirds of the “National Council”⁶⁶ approve the amendment while half of its members are present during the voting. Moreover, the new norm has to be declared explicitly as “constitutional law” or “constitutional provision.”⁶⁷ Considering the so-called “hierarchy of norms”,⁶⁸ constitutional law is supreme to all other categories of legal acts, which consequently have to be in accordance with the higher norms.⁶⁹

If the entire CRC is transformed into constitutional law, every act at the level of simple law has to be in accordance with the Convention. Of course, if only some parts of the Convention are raised to constitutional rank, the same holds true for the respective rights. However, if a law does not fulfil these standards, this does not mean that it must not be applied by ordinary courts and administrative authorities. On the contrary, courts and authorities are obliged to apply norms, even if they seem to be inconsistent with constitutional law. The act of constitutional review is not a task which may be fulfilled by any court, but it is centralised by only one court, the Constitutional Court.⁷⁰

Österreich, Vol. VII/1, 2009, 569 et seq. (571); Öhlinger, see note 1, 25. Regarding the procedure, see article 44 para. 1 Federal Constitution.

⁶⁶ The National Council is one of the two Chambers of the Austrian Federal Parliament and – together with the Federal Council – responsible for the legislation.

⁶⁷ Cf. Stelzer, see note 11, 6; Hausmaninger, see note 11, 24; Foster, see note 11, 50; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 16; Öhlinger, see note 1, 25; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 241.

⁶⁸ Stelzer, see note 11, 6; Hausmaninger, see note 11, 24.

⁶⁹ See Stelzer, see note 11, 7; Hausmaninger, see note 11, 24; Foster, see note 11, 108; M. Welan, “Constitutional Review and Legislation in Austria”, in: Ch. Landfried (ed.), *Constitutional Review and Legislation*, 1988, 63 et seq. (68-69); Berka, *Lehrbuch Verfassungsrecht*, see note 1, 4; Öhlinger, see note 1, 27; H. Schäffer/ E. Melichar, “Sources of Law in the Republic of Austria”, in: C. Kourilsky/ A. Rácz/ H. Schäffer (eds), *The Sources of Law*, 1982, 17 et seq. (47).

⁷⁰ Cf. Hausmaninger, see note 11, 24, 140; Foster, see note 11, 118; Schäffer/ Melichar, see note 69, 47; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 289 et seq.; Öhlinger, see note 1, 461 et seq.; G. Ruhri/ W.L. Weh/ R. Zitta, “Vorschläge für eine Änderung und Ergänzung des Bundes-Verfassungsgesetzes”, *Österreichisches Anwaltsblatt* 66 (2004), 328 et seq. (331). See also Jahnel, see note 65, 581; G. Kucsko-Stadlmayer, “Die Beziehungen zwischen Verfassungsgerichtshof und den anderen Gerichten, einschließlich der europäischen Rechtsprechungsorgane”, *EuGRZ* 31 (2004),

a. Proceedings of Constitutional Review before the Austrian Constitutional Court

The Federal Constitution provides for two different proceedings of constitutional law review.⁷¹ The so-called “abstract judicial review”⁷² is not dependent on an actual suit in which the relevant norm must be applied. Austria is not a unitary but a federal state. Therefore, not only the Federation but also the parliaments of the nine states have legislative power.⁷³ The Federal Constitution applies for both federal and state law; to achieve this principle, abstract judicial review offers the federal government the chance to claim that a state law is not in accordance with the constitution. The state governments have the same right with regard to federal law. Moreover, one third of the members of the National Council or one third of the members of the Federal Council may initiate proceedings at the Constitutional Court regarding federal law. If the respective state constitution provides for this right, one third of the members of the state parliament also have the equivalent right.⁷⁴ Thus, these proceedings could be used to judge independently from an actual law suit the conformity of simple law with constitutionally guaranteed rights of individuals.

The second type of constitutional law review can be initiated in connection with pending proceedings only. As mentioned above, the Constitutional Court is the only institution within the Austrian system which has the right to declare a law to be unconstitutional. All other

16 et seq. (16, 17, 19); T. Öhlinger, “Die Grundrechte in Österreich”, *EuGRZ* 9 (1982), 216 et seq. (242).

⁷¹ Article 140 of the Federal Constitution.

⁷² Stelzer, see note 11, 77.

⁷³ Cf. Stelzer, see note 11, 39 et seq.; Foster, see note 11, 47; Welan, see note 69, 63; K. Heller, *Outline of Austrian Constitutional Law*, 1989, 3; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 101 et seq.; Öhlinger, see note 1, 119 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 381 et seq.; Öhlinger, see note 70, 242.

⁷⁴ Cf. Schäffer/ Jahnel, see note 65, AUS 83; Stelzer, see note 11, 78; Heller, see note 73, 24; Welan, see note 69, 67; R. Machacek/ T. Öhlinger, “The Constitutional Court of Austria and its Judgments”, *HRLJ* 1 (1980), 366 et seq. (366); Schäffer/ Melichar, see note 69, 47; A.R. Brewer-Carías, *Judicial Review in Comparative Law*, 1989, 199; Jahnel, see note 65, 581; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 293; Öhlinger, see note 1, 466; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 537 et seq.; Kucsko-Stadlmayer, see note 70, 18.

courts and administrative authorities are bound by the norms in force.⁷⁵ Of course, it would be highly unsatisfactory if they had to apply laws which might be unconstitutional without having the chance to challenge them. Therefore, the so-called “concrete judicial review”⁷⁶ makes it possible for certain courts and authorities to initiate proceedings at the Constitutional Court in order to decide if the relevant norms are in accordance with the constitution. In contrast to the abstract judicial review, in which any law can be judged by the Constitutional Court, here only norms which have to be directly applied in a concrete proceeding can be subject to concrete judicial review. If the proceedings show that the respective law is not relevant for the pending law suit, the Constitutional Court will dismiss the application.⁷⁷

Concrete judicial review can be initiated by all courts (except for the ordinary courts of first instance), the Independent Administrative Tribunals⁷⁸ and the Federal Procurement Authority.⁷⁹ Moreover, the Constitutional Court can start concrete judicial review itself if it has to apply a certain law in another proceeding but doubts its conformity with

⁷⁵ Cf. Hausmaninger, see note 11, 24, 140; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 289 et seq.; Ruhri/ Weh/ Zitta, see note 70, 331. See also Kucsko-Stadlmayer, see note 70, 16, 17, 19; Öhlinger, see note 70, 242.

⁷⁶ Stelzer, see note 11, 78.

⁷⁷ Cf. Stelzer, see note 11, 78. See also Berka, *Lehrbuch Verfassungsrecht*, see note 1, 294; Öhlinger, see note 1, 467 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 535 et seq.; Kucsko-Stadlmayer, see note 70, 18.

⁷⁸ The Independent Administrative Tribunals in the states are administrative authorities, their members, however, have similar guarantees as judges. Their competences are regulated in article 129 a Federal Constitution. Pursuant to this provision, they are instances of appeal in administrative penal matters, except for Federal fiscal penal proceedings. They also decide on complaints about the use of direct administrative power and on other matters if the respective laws provide for the competence of the Tribunals. Moreover, they decide on complaints alleging that an administrative authority has not met its “responsibility to take a decision” concerning civil actions in administrative proceedings, penal tax law regulated by the states and the matters explicitly assigned to them in the respective laws, cf. Stelzer, see note 11, 70 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 242 et seq.; Öhlinger, see note 1, 277 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 441 et seq.

⁷⁹ The Federal Procurement Authority is a Federal administrative authority, which is not subject to instructions and decides in the field of public procurement, cf. Stelzer, see note 11, 72; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 345.

the constitution. However, article 140 of the Federal Constitution does not allow the parties of a pending proceeding to start concrete judicial review by the Constitutional Court.⁸⁰

In proceedings at ordinary courts⁸¹ parties may only “propose” the initiation of proceedings at the Constitutional Court. In fact, ordinary courts of second instance and the Austrian Supreme Court⁸² are obliged to file an application to start concrete judicial review if they have doubts about a law being unconstitutional. Nevertheless, the decision to address the Constitutional Court rests with the courts only. The individuals themselves have no means to force the courts to initiate the respective proceedings.⁸³

In proceedings at ordinary courts of first instance the situation is even worse. These courts do not have the right to get the Constitutional Court to deal with the norm in question even if they want to. Therefore, parties have to lodge an appeal and express their reservations at the court of second instance, which then has the right to initiate proceedings at the Constitutional Court if it shares these doubts. As many scholars think this situation is inadequate the question of whether the right to start a concrete judicial review should be extended to the courts

⁸⁰ Cf. Schäffer/ Janel, see note 65, AUS 83; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 294.

⁸¹ These courts decide on civil law and criminal law matters.

⁸² The Supreme Court is the last instance in civil law and criminal proceedings. Nevertheless, this does not mean that the parties have the right to appeal to the Supreme Court in any case. The grounds of appeal to the Supreme Court are limited, cf. Stelzer, see note 11, 69; E. Markel, “Der OGH als oberste Instanz in Strafsachen”, *Österreichische Richterzeitung* 84 (2006), 110 et seq. (110).

⁸³ Cf. Stelzer, see note 11, 78; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 294; Berka, see note 1, 124; Ballon, “Verfassungswidrigkeiten in der Zivilgerichtsbarkeit und ihre Anfechtung”, *Österreichische Juristen-Zeitung* 38 (1983), 225 et seq. (231); Ruhri/ Weh/ Zitta, see note 70, 330; G. Kuras, “Gedanken zum Ausbau des Grundrechtsschutzes: ‘Justice must not only be done, it must also be seen to be done’. Information als Bringschuld des Rechtsstaates”, in: Österreichische Juristenkommission (ed.), *Aktuelle Fragen des Grundrechtsschutzes*, 2005, 179 et seq. (187). See also Schäffer/ Janel, see note 65, AUS 84; Kucsko-Stadlmayer, see note 70, 19; Öhlinger, see note 70, 243 et seq.; K. Ringhofer, “Über Grundrechte und deren Durchsetzung im innerstaatlichen Recht”, in: Rechtswissenschaftliche Fakultät der Universität Salzburg (ed.), *Aus Österreichs Rechtsleben in Geschichte und Gegenwart. Festschrift für Ernst Hellbling zum 80. Geburtstag*, 1981, 355 et seq. (364-365).

of first instance is subject of debate. For the time being, however, these courts are bound by the law in force.⁸⁴

Administrative authorities – apart from the Independent Administrative Tribunals and the Federal Procurement Authority mentioned above – do also have to apply the law in force.⁸⁵ Nevertheless, if parties are of the opinion that a final ruling of an administrative authority infringes their rights, they may file an application to the Administrative Court. If the Administrative Court doubts that the respective law is being constitutional, it is bound to initiate proceedings at the Constitutional Court. Of course, parties may point out their reservations to the Administrative Court as well; but the decision to consult the Constitutional Court rests with the court only.⁸⁶ However, apart from appealing to the Administrative Court the parties also have the right to file a complaint directly with the Constitutional Court, if they think the law applied in an administrative proceeding is unconstitutional.⁸⁷ If the Constitutional Court shares this view, it has to interrupt the proceedings and start concrete judicial review.⁸⁸ Thus, the application does not initiate the judicial review itself; nevertheless, other than in proceedings

⁸⁴ Cf. H. Mayer, “Die österreichischen Höchstgerichte und deren Verhältnis zueinander”, *Journal für Rechtspolitik* 16 (2008), 11 et seq. (11); W. Berka, “RichterInnen als GrundrechtswahrerInnen: Grundrechte und Rechtsprechung der ersten Instanz”, *Österreichische Richterzeitung* 86 (2008), 114 et seq. (124); Markel, see note 82, 119; Ruhri/ Weh/ Zitta, see note 70, 328; Kuras, see note 83, 189.

⁸⁵ Cf. Hausmaninger, see note 11, 24, 140; Schäffer/ Jahnle, see note 65, AUS 84. See also Ringhofer, see note 83, 365 et seq.

⁸⁶ Cf. Öhlinger, see note 70, 243. See also Schäffer/ Jahnle, see note 65, AUS 84; C. Jabloner, “Strukturfragen der Gerichtsbarkeit des öffentlichen Rechts”, *Österreichische Juristen-Zeitung* 53 (1998), 161 et seq. (165). See also Ringhofer, see note 83, 366.

⁸⁷ Article 144 para. 1 Federal Constitution. See Foster, see note 11, 120; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 278; Öhlinger, see note 1, 486 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 555; Jahnle, see note 65, 579 et seq.; Ballon, see note 83, 232; Jabloner, see note 86, 165; Brewer-Carías, see note 74, 201; Korinek, see note 49, 298; Öhlinger, see note 70, 243.

⁸⁸ Cf. Schäffer/ Jahnle, see note 65, AUS 83; Jahnle, see note 65, 580; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 294; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 557; Kucsko-Stadlmayer, see note 70, 19; Öhlinger, see note 1, 466. See also Ringhofer, see note 83, 366 et seq.; R. Machacek, *Austrian Contributions to the Rule of Law*, 1994, 12.

at the ordinary courts, the parties do have the right to explain their doubts directly to the Constitutional Court.

In the proceedings described above individuals do not have the right to initiate constitutional review by the Constitutional Court themselves. Nevertheless, article 140 Federal Constitution also provides for an "individual application."⁸⁹ To file this application, however, the respective law must affect the applicant's rights directly, i.e. not because of an administrative ruling or the decision of a court. Moreover, the Constitutional Court is of the opinion that an individual application is only admissible if the applicant has no other reasonable means to declare her/his reservations about the norm being unconstitutional at the Constitutional Court.⁹⁰

If the Constitutional Court declares a law to be inconsistent with constitutional law in the course of abstract or concrete judicial review, it is rescinded, which has to be published appropriately, e.g. in the Federal Law Gazette.⁹¹

As mentioned above, one of the advantages of transforming the rights guaranteed in the CRC into constitutional law is that simple law must be in accordance with these rights and that this can be judged by the Constitutional Court. Of course, this means an important improvement of legal protection in the field of children's rights. Nevertheless, individuals very rarely have the right to initiate constitutional review. However, in the field of administrative proceedings they get the chance to express their reservations directly to the Constitutional Court. Thus, the court considers the conformity of the respective law

⁸⁹ Stelzer, see note 11, 79.

⁹⁰ Cf. Stelzer, see note 11, 79; Hausmaninger, see note 11, 145; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 294 et seq.; Öhlinger, see note 1, 471 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 538, 521 et seq. See also Schäffer/ Jähnel, see note 65, AUS 84; Machacek, see note 88, 12; Brewer-Carías, see note 74, 200; Jähnel, see note 65, 581 et seq.; Öhlinger, see note 70, 244; Ringhofer, see note 83, 361 et seq.; Welan, see note 69, 67 et seq.

⁹¹ Cf. Stelzer, see note 11, 79; Hausmaninger, see note 11, 145; Heller, see note 73, 24; Machacek, see note 88, 12 et seq.; Machacek/ Öhlinger, see note 74, 369; Schäffer/ Melichar, see note 69, 46 et seq.; Brewer-Carías, see note 74, 201 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 299 et seq.; Öhlinger, see note 1, 477 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 541 et seq. See also Kucsko-Stadlmayer, see note 70, 19, 20, 26; Welan, see note 69, 68.

with the constitution and initiates concrete judicial review if it shares these reservations.⁹²

In proceedings at ordinary courts the rights of the individuals are more limited. In the end, it is the sole decision of the courts, if they file an application and thus offer the Constitutional Court the chance to decide about the lawfulness of the norms applied. Today, ordinary courts are more aware of their task to guarantee the protection of fundamental rights in their field of jurisdiction and consequently they respect their duty to initiate concrete judicial review as well.⁹³ Nevertheless too often, they still tend to decide themselves about the lawfulness of a norm applicable in the concrete proceedings, ignoring the competence of the Constitutional Court.⁹⁴ As the parties have no right at all to claim a law as unconstitutional before the Constitutional Court, it might take quite a long time until the Constitutional Court gets to decide about a respective law.⁹⁵ Until then this law might have been applied in many cases even though it is not in conformity with constitutional law.

These are problems that lie within the Austrian system of legal protection and the separation of powers between the Constitutional Court and the ordinary courts and do not only affect the field of children's rights. Of course, the improvements that are connected with the transformation of the CRC into constitutional law ought not to be diminished. Nevertheless, it must be shown that, in particular, in proceedings at ordinary courts legal protection of the individuals concerned remains inadequate. Consequently, it has been the subject of much debate, as to whether parties in civil rights and criminal proceedings should be granted the right to claim at the Constitutional Court that a law applied is unconstitutional.⁹⁶ For the time being, however, they remain dependent on the respective court's decision.

⁹² Cf. Schäffer/ Jahnle, see note 65, AUS 83; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 294; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 557.

⁹³ Cf. Berka, see note 1, 124; G.E. Kodek, "Die Wahrung von Grundrechten durch die Gerichtsbarkeit. Bilanz – Probleme – Perspektiven", *Österreichische Juristen-Zeitung* 63 (2008), 216 et seq. (220). Critically, Ruhri/ Weh/ Zitta, see note 70, 328, 331.

⁹⁴ See also Berka, see note 84, 119; Ruhri/ Weh/ Zitta, see note 70, 328, 330.

⁹⁵ See Kuras, see note 83, 203 et seq.

⁹⁶ See Mayer, see note 84, 11; Ballon, see note 83, 232; Markel, see note 82, 119; Ruhri/ Weh/ Zitta, see note 70, 328; Kodek, see note 93, 221 et seq.; Kuras, see note 83, 203 et seq.; Jahnle, see note 65, 587.

b. Enforcement of Constitutional Rights in other Proceedings

All state organs (courts as well as administrative authorities) are bound by the rights guaranteed in the constitution and consequently have to respect them in all parts of the proceedings.⁹⁷ If the rights guaranteed in the CRC are transformed into constitutional law, parties may invoke these rights directly in proceedings at administrative authorities and courts.⁹⁸ The following deliberations will examine in which ways this fact improves the legal protection of the individuals concerned, firstly in the field of administrative proceedings and secondly in civil law and criminal matters.

Generally, it is the task of the Administrative Court to decide about the lawfulness of the final rulings of administrative authorities. However, parties may not claim the violation of their constitutionally guaranteed rights before the Administrative Court. It is the competence of the Constitutional Court to decide about this kind of appeal. On the other hand, only the Administrative Court is competent to decide on breaches of simple law after all administrative appeal stages have been exhausted.⁹⁹ Today it is clear that the legislator himself is also bound by the constitution.¹⁰⁰ Consequently, simple law has to be organised in

⁹⁷ Cf. Berka, see note 1, 115 et seq., 122 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 343 et seq.; Öhlinger, see note 70, 239; M. Holoubek, “Wer ist durch die Grundrechte gebunden?”, *Austrian J. Publ. Int’l Law* 54 (1999), 57 et seq.; G. Kucsko-Stadlmayer, “Die allgemeinen Strukturen der Grundrechte”, in: Merten/ Papier, see note 65, 49 et seq. (65 et seq.). See also Ringhofer, see note 83, 368.

⁹⁸ Cf. Schäffer/ Jahnel, see note 65, AUS 85. Regarding the field of ordinary jurisdiction, see E. Ratz, “Zur Bedeutung der Entscheidungen des EGMR in der Praxis des OGH”, *Österreichische Richterzeitung* 85 (2007), 166 et seq. (167). Regarding criminal law, see E. Ratz, “Grundrechte in der Strafjudikatur des OGH”, *Österreichische Juristen-Zeitung* 61 (2006), 318 et seq. (325); E. Ratz, “Grundrechtsschutz durch den Obersten Gerichtshof in Strafsachen”, in: W. Pilgermair (ed.), *Festschrift für Herbert Steininger*, 2003, 109 et seq. (111-112, 134). See also Ringhofer, see note 83, 368.

⁹⁹ Cf. Berka, see note 1, 182; Machacek, see note 88, 32; Foster, see note 11, 122; Stelzer, see note 11, 74, 80; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 277; Öhlinger, see note 1, 289; Korinek, see note 49, 299; Kucsko-Stadlmayer, see note 70, 17, 23. See also, Öhlinger, see note 70, 238, 240, 241; Oberndorfer, see note 45, 39.

¹⁰⁰ Cf. Berka, see note 1, 114, 173 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 343; Kucsko-Stadlmayer, see note 97, 66; Öhlinger, see note 1, 313; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 624; Holoubek, see

conformity with the constitution. If this task is fulfilled correctly, a violation of constitutionally guaranteed rights can usually be regarded as a breach of simple law as well.¹⁰¹ Moreover, laws have to be interpreted in conformity with the constitution. If a norm can be understood in different ways, the meaning has to be chosen which does fulfil the constitutional requirements. Of course, this meaning must be covered by the wording of the provision. If such an interpretation is not possible, the law is unconstitutional and can be rescinded by the Constitutional Court according to the procedure described above.¹⁰² Considering this, parties may start proceedings at the Administrative Court concerning the violation of simple law, which indirectly results in a decision on the violation of constitutionally guaranteed rights because of an administrative ruling.

Of course, parties may also assert a final administrative ruling to be unconstitutional directly at the Constitutional Court.¹⁰³ This provides an additional form of administrative review and is certainly an improvement of the legal protection in administrative proceedings. However, a decision of the Administrative Court is final. There is no appeal against it to the Constitutional Court.¹⁰⁴ Thus, a party has to decide before appealing to the Administrative Court if she/he wants to get the Constitutional Court to deal with the specific case. Nevertheless, it is possible to file an appeal at both the Administrative and the Constitutional Court at the same time.¹⁰⁵

note 97, 58 et seq.; J. Ferk, "Die privat- und familienrechtlichen Aspekte in den Grundrechten", *Österreichische Richterzeitung* 80 (2002), 202 et seq. (202); Markel, see note 82, 111. See also: Öhlinger, see note 70, 239.

¹⁰¹ Cf. Berka, see note 1, 182. See also Korinek, see note 49, 300; Kucsko-Stadlmayer, see note 70, 27; Öhlinger, see note 70, 241.

¹⁰² Cf. Schäffer/ Janel, see note 65, 79 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 23; Öhlinger, see note 1, 39; Berka, see note 1, 75 et seq. Regarding the limits of an interpretation in conformity with the constitution, see Berka, see note 84, 122 et seq.; Janel, see note 65, 577.

¹⁰³ See article 144 para. 1 Federal Constitution; cf. Foster, see note 11, 120; Machacek/ Öhlinger, see note 74, 366; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 278; Öhlinger, see note 1, 486 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 555 et seq.; Berka, see note 1, 179 et seq.; Janel, see note 65, 579 et seq.; Kucsko-Stadlmayer, see note 70, 22.

¹⁰⁴ Cf. Kucsko-Stadlmayer, see note 70, 17; Kucsko-Stadlmayer, see note 97, 68. See also Jabloner, see note 86, 165.

¹⁰⁵ Cf. Machacek, see note 88, 32; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 276; Öhlinger, see note 1, 290; Berka, see note 1, 182 et seq.; Korinek, see

Summing up, in the field of administrative law there is a special type of legal protection by the Constitutional Court concerning constitutionally guaranteed rights. Individuals affected can claim not only a violation of simple law appealing to the Administrative Court, but also a breach of their constitutionally guaranteed rights appealing directly to the Constitutional Court. If the entire Convention is transformed not only into simple law, but also into constitutional law, this leads to an additional way of legal protection.

The result, however, differs with regard to civil law and criminal proceedings at the ordinary courts. Of course, like the administrative authorities the ordinary courts are obliged to respect constitutionally guaranteed rights.¹⁰⁶ As mentioned above, it is first of all the task of the legislator to organise simple law in accordance with the constitution.¹⁰⁷ This holds true especially for criminal and civil procedure law as well as criminal law. A violation of these norms often results in a violation of the constitution, against which parties may appeal to the next instance asserting a violation of constitutionally guaranteed rights as well as of simple law.¹⁰⁸ The situation is slightly different regarding civil law, as these norms regulate the legal relations of citizens among each other and do not affect the relationship between citizens and the state. Therefore, it is not clear in which ways constitutionally guaranteed rights affect civil law disputes.¹⁰⁹ Nowadays, it is assumed that these rights also have a certain effect on civil law proceedings, especially if norms that are open to interpretation in conformity with the constitution have to be applied or if the court has to weigh up different rights of the respective parties.¹¹⁰ Moreover, in general the legislator has to take fundamen-

note 49, 298; Kucsko-Stadlmayer, see note 70, 23, 27; Öhlinger, see note 70, 241; Oberndorfer, see note 45, 45 et seq.

¹⁰⁶ Cf. Berka, see note 1, 122 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 345; Öhlinger, see note 1, 327; Berka, see note 84, 114.

¹⁰⁷ Cf. Berka, see note 1, 124; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 343; Berka, see note 84, 122; Holoubek, see note 97, 59; Ferk, see note 100, 202; Markel, see note 82, 111; Kodek, see note 93, 222. See also Öhlinger, see note 70, 239.

¹⁰⁸ Concerning procedure law cf. Berka, see note 84, 116 et seq. See also Ballon, see note 83, 225, 227, 232; Ratz, see note 98, 325; Kodek, see note 93, 216 et seq.; Schäffer/ Jähnel, see note 65, AUS 81; Jähnel, see note 65, 583.

¹⁰⁹ Cf. Stelzer, see note 11, 85 et seq.; Foster, see note 11, 113; Berka, see note 84, 119. In more detail, see Berka, see note 1, 128 et seq.

¹¹⁰ Cf. Stelzer, see note 11, 86; Foster, see note 11, 113; in more detail, see Berka, see note 1, 133 et seq.; I. Grifß, "Die Grundrechte in der zivilrechtlichen

tal rights into account when regulating civil law.¹¹¹ Parties have the right to claim breaches of constitutionally guaranteed rights in the course of appeals.¹¹²

The Supreme Court is the highest instance in the field of ordinary jurisdiction. As the Austrian Constitution provides for three highest courts of the same rank¹¹³ there is no appeal against the judgements of the Supreme Court. Therefore, parties cannot claim a breach of constitutionally guaranteed rights by a judgement of an ordinary court at the Constitutional Court.¹¹⁴ The Supreme Court is regarded a sufficient in-

Rechtsprechung”, in: Österreichische Juristenkommission (ed.), see note 83, 54 et seq. (57 et seq.); Kuras, see note 83, 186. See also Berka, *Lehrbuch Verfassungsrecht*, see note 1, 348; Jahnelt, see note 65, 585; Öhlinger, see note 1, 329; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 627; Berka, see note 84, 119 et seq. and W. Berka, “Der Schutz der freien Meinungsäußerung im Verfassungsrecht und im Zivilrecht”, *Zeitschrift für Rechtsvergleichung* 31 (1990), 35 et seq. (39, 41); Kodek, see note 93, 217; Holoubek, see note 97, 65 et seq.; Kucsko-Stadlmayer, see note 97, 70 et seq.

¹¹¹ Cf. Kuras, see note 83, 185; Öhlinger, see note 1, 328. See also A. Bammer, “Die Grundrechte in der Rechtsprechung der Zivilgerichte”, in: Österreichische Juristenkommission (ed.), see note 83, 63 et seq. (65-66).

¹¹² Cf. Berka, see note 1, 185; Ratz, see note 98, 167.

¹¹³ These are the Constitutional Court, the Administrative Court and the Supreme Court, cf. Kucsko-Stadlmayer, see note 70, 17.

¹¹⁴ Cf. Foster, see note 11, 118; Machacek/ Öhlinger, see note 74, 366; Berka, see note 1, 185; Schäffer/ Jahnelt, see note 65, AUS 81; Jahnelt, see note 65, 583; Kucsko-Stadlmayer, see note 97, 68; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 277; B.Ch. Funk, “Schützt die Verfassung im Strafverfahren?”, in: R. Soyer (ed.), *Strafverteidigung – Konflikte und Lösungen*, 2004, 9 et seq. (16); H. Steininger, “Empfiehl es sich, die Zuständigkeit des Verfassungsgerichtshofs durch Einführung einer umfassenden, auch Akte der Gerichtsbarkeit erfassenden Individualverfassungsbeschwerde zu erweitern?”, in: Verfassungsgerichtshof der Republik Österreich (ed.), *Verfassungstag 1994*, 1995, 15 et seq. (16); Ballon, see note 83, 225; F. Ermacora, “Holprige Wege im Grundrechtsschutz”, *Österreichische Juristen-Zeitung* 48 (1993), 73 et seq. (74); Markel, see note 82, 111; Korinek, see note 49, 288; Kucsko-Stadlmayer, see note 70, 17, 25, 28; Öhlinger, see note 70, 239; H. Steininger, “Grundrechtsschutz im Bereich der ordentlichen Gerichtsbarkeit”, in: H. Fuchs/ W. Brandstetter (eds), *Festschrift für Winfried Platzgummer*, 1995, 191 et seq. (193). See also Ringhofer, see note 83, 367 et seq.; Holoubek, see note 97, 63.

stitution for legal protection within the ordinary jurisdiction.¹¹⁵ However, both in criminal and in civil law procedures the access to the Supreme Court is limited. Therefore, parties do not always have the right to appeal to the highest court; often the judgement of a Provincial Court¹¹⁶ or a Provincial Court of Appeal¹¹⁷ is the final decision.¹¹⁸ Of course, in these cases an appeal to the Constitutional Court is inadmissible as well. Even if it is assumed that the Supreme Court is a sufficient guardian of constitutionally guaranteed rights in the field of ordinary jurisdiction, the limitation of the grounds for appeal is problematic.

Summing up, regarding the field of ordinary jurisdiction, a transformation of the rights guaranteed in the CRC into constitutional law generally has the same effects as a transformation into simple law. The individuals concerned can claim the violation of their rights in the course of appeals, but unlike administrative proceedings there is no additional means to ensure the protection of constitutionally guaranteed rights at national institutions.¹¹⁹ As already stated, ordinary courts nowadays are more aware of their task to protect fundamental rights.¹²⁰ Nevertheless, many scholars still demand the right to appeal to the Constitutional Court against a judgement of an ordinary court.¹²¹ This

¹¹⁵ Cf. Schäffer/ Jähnel, see note 65, AUS 81; Jähnel, see note 65, 583; Steininger, "Empfiehl es sich ...", see note 114, 21; Steininger, see note 114, 198; Kodek, see note 93, 221.

¹¹⁶ Stelzer, see note 11, 69 (Landesgericht).

¹¹⁷ Stelzer, see note 11, 69 (Oberlandesgericht).

¹¹⁸ Cf. Stelzer, see note 11, 69; Foster, see note 11, 92, 98; Ruhri/ Weh/ Zitta, see note 70, 330. Regarding civil law, see E.M. Bajons, "Austria", in: J.A. Jolowicz/ C.H. van Rhee (eds), *Recourse against Judgments in the European Union*, 1999, 25 et seq. (30-31). Regarding criminal law, see also Markel, see note 82, 110.

¹¹⁹ Cf. Berka, see note 1, 185.

¹²⁰ Cf. Berka, see note 1, 123; Kucsko-Stadlmayer, see note 97, 69. Critically A.E. Hollaender/ Ch. Mayerhofer, "Das Gebot effizienten Rechtsschutzes und die Beschränkung des Zugangs zum OGH in Strafsachen durch dessen Judikatur", *Österreichische Juristen-Zeitung* 60 (2005), 447 et seq.; Ruhri/ Weh/ Zitta, see note 70, 328, 331.

¹²¹ Cf. Berka, see note 1, 123; Hollaender/ Mayerhofer, see note 120, 456; Jähnel, see note 65, 586 et seq. Regarding this discussion, see Steininger, "Empfiehl es sich ...", see note 114, 17 et seq., 21 et seq. and Steininger, see note 114, 193 et seq., 197 et seq. In favour of an appeal, Ermacora, see note 114, 74; Ruhri/ Weh/ Zitta, see note 70, 330 et seq.; B. Schilcher, "Gedanken zum Ausbau des Grundrechtsschutzes", in: *Österreichische Juristenkommission* (ed.), see note 83, 169 et seq. (177-178); R. Moos, "Polizei und

would create an additional type of legal protection and would certainly be an improvement for the individuals concerned.

IV. Transforming the Convention on the Rights of the Child into Austrian Constitutional Law: A Step forward towards an Effective Implementation?

Taking into account the examination above, in the following and final section, the question will be discussed as to whether such an inclusion of the rights of the child into the Austrian Constitution increases the effectiveness of the implementation of the CRC.

Although Austria has been a State Party to the CRC for eighteen years, deficits regarding the implementation of the CRC within the Austrian legal system still exist. While several legislative and administrative reforms, aimed at improving conformity with the Convention, have been undertaken over the last years – according to the Committee on the Rights of the Child – the Austrian legal system still lacks full compliance with the Convention. Ongoing areas of concern are e.g. family reunification, refugee children and juvenile justice.¹²² Moreover, because of the children's limited capacity to conduct proceedings on their own, their rights can not be effectively pursued if parents neglect their task acting as their legal representatives. Thus, the justiciability of children's rights still has to be improved within the Austrian legal system.

Since the direct applicability of the CRC is explicitly excluded in Austria, executing national law provisions have to be enacted to implement the rights set forth in the Convention. For assessing whether or

Strafprozess", in: *Verhandlungen des 14. Österreichischen Juristentages*, Vol IV/1, 2000, 142 et seq.; R. Soyer, "Thesen zur Reform von Ermittlungsbeugnissen und Verteidigungsrechten im Vorverfahren", in: *Verhandlungen des 14. Österreichischen Juristentages*, Vol. IV/2, 2001, 24 et seq. (38-39); in favour of a limited review, Ch. Bertel, "Die Überprüfung der Tatfrage im schöffnen- und geschworenengerichtlichen Verfahren", *Österreichisches Anwaltsblatt* 67 (2005), 386 et seq. (390). Against an appeal, Mayer, see note 84, 11; Steininger, "Empfiehl es sich ...", see note 114, 21 et seq.; id., see note 114, 197 et seq.; Ballon, see note 83, 225; Markel, see note 82, 117 et seq.; Kodek, see note 93, 221 et seq.; Kuras, see note 83, 191 et seq.

¹²² Committee on the Rights of the Child 38th Sess., see note 5, 2, 3, 8 et seq.; Sax, see note 18, 552 et seq.

not transforming the CRC – or parts of it – into Austrian constitutional law would increase the effectiveness of the implementation of the CRC within the Austrian legal system, one has to distinguish between areas in which an executive national legislation already exists and those areas in which such national legislation is still missing.

As constitutional law is considered supreme to all other categories of legal acts within the Austrian legal system, as a consequence, every act at the level of simple law has to be in accordance with the constitutional provisions. From that it follows, that in case the whole Convention or parts of it are transformed into constitutional law, the conformity of existing executing national law provisions – holding the rank of simple law – dealing with certain rights set forth in the Convention could be reviewed by the Constitutional Court. In the event of a breach of the constitutionally guaranteed treaty provisions, the executing national law provisions are to be rescinded by the court. Even though the rights of individuals to initiate such constitutional review are rather limited – as noticed above –, the improvements regarding the legal protection of children's rights in that context cannot be ignored. Transforming rights of the child as set forth in the CRC into constitutional law, however, does not automatically impose an obligation on the Austrian legislator to enact executing simple law in matters in which it is additionally required. However, if the parliament decides to do so, it is bound by the constitutionally guaranteed treaty provisions, serving as a guideline for the whole legislative process.

Regarding the applicability and the enforcement of the rights set forth in the Convention, an inclusion of those rights into constitutional law would mean an additional way of legal protection by the Constitutional Court. However, this is only true in those cases in which an executing national legislation, granting children's rights at the stage of simple law, already exists. Furthermore, such an increase of legal protection concerning children's rights is limited to administrative proceedings only. In contrast, rights set forth in the Convention, which are not guaranteed by national law provisions so far, might – for the first time – be invoked directly in proceedings at administrative authorities and courts, once they have been transformed into constitutional law. Thus, the improvement of the legal protection of those rights would be – compared to the cases in which an executing national legislation already exists – even higher. Even though, the same result could be reached by transforming them into simple law, including them in constitutional law improves their legal effect even more, as a violation of constitutionally

guaranteed rights could be additionally claimed before the Constitutional Court in the field of administrative proceedings.

Summing up, although an inclusion of the Convention into the national constitution is not required by the CRC, it would undoubtedly increase the effectiveness of the implementation of the CRC within the Austrian legal system. Although the required full compliance of the Austrian legal order could also be achieved by transforming the whole Convention into simple law, the review of those provisions by the Constitutional Court – being of utmost importance for ensuring a durable compliance of the Austrian legislation with the Convention – is only possible by transforming it into constitutional law. The same holds true for the necessity to ensure that the treaty provisions are given legal effect within the domestic legal orders. Even though an (additional) legal protection of the constitutionally guaranteed treaty provisions by the Constitutional Court would be restricted to administrative proceedings, an inclusion of the rights of the child into the Austrian Constitution would once and for all ensure the required direct applicability and enforceability of all children's rights set forth in the Convention, thereby helping Austria to finally fully fulfil its implementation obligations according to article 4 CRC.