

# General Principles and Challenges of Public Administration Organization in Austria

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## ABSTRACT

This chapter provides an overview of the Austrian administration, focusing on bodies at the federal, state and municipal levels. Furthermore, it elucidates the guiding principles of the administration, which can essentially be derived directly from the Federal Constitution. Subsequently, it also refers to current and future developments related to right to information and transparency issues. Austria is one of the few countries that continues to provide official confidentiality under the Federal Constitution. The abolition of official confidentiality and the possible right to information have long been part of political discourse. This topic is currently back on the agenda, and will likely trigger significant changes.

## KEYWORDS

Austria, public administration, Federal Constitution, principles of administration, Federal administration, State administration, Municipal administration, administrative bodies, right to information, official confidentiality, transparency

## 1. Basic social, geographical and economic overview

The Alpine Republic of Austria is a landlocked country bordered by Germany, the Czech Republic, Slovakia, Hungary, Slovenia, Italy, Switzerland and Lichtenstein, spanning across 84,000 square kilometres,<sup>1</sup> with a population of 9.1 million people, as of 1st of January 2023.<sup>2</sup>

It is estimated that Austria's value-added gross domestic product (GDP) totalled 478.223 billion euros in 2022, ranking it 15<sup>th</sup> in the European Union (EU), despite its

1 Geography and population [Online]. Available at: <https://www.migration.gv.at/de/leben-und-arbeiten-in-oesterreich/oesterreich-stellt-sich-vor/geografie-und-bevoelkerung/> (Accessed: 7 April 2023).

2 Population [Online]. Available at: <https://www.statistik.at/statistiken/bevoelkerung-und-soziales/bevoelkerung/bevoelkerungsstand/bevoelkerung-zu-jahres-/quartalsanfang> (Accessed: 7 April 2023).

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comparatively limited population.<sup>3</sup> Calculated on the basis of the population, GDP per capita amounted to 42,563 euros in 2022, ranking it 6<sup>th</sup> within the EU.<sup>4</sup> Concurrently, the unemployment rate remains relatively low. In March 2023, 259,440 people reported being unemployed, representing an unemployment rate of 6.2%.<sup>5</sup>

### **1.1. Development of the Republic**

The Republic of Austria evolved following the collapse of the Austro-Hungarian Monarchy under the leadership of Habsburg in 1918.<sup>6</sup> Consequently, Chancellor Karl Renner launched efforts to draft a Constitution. Various versions were drafted and submitted to the Constituent National Assembly, or to the Constitutional Committee and the Sub-Committee for the Drafting of a Constitution. The drafts prepared by Hans Kelsen were particularly decisive during this phase.<sup>7</sup> After prolonged negotiations in the subcommittee of the Constitutional Committee and later the Constitutional Committee, the Constituent National Assembly finally adopted the Constitution on 1 October 1920.<sup>8</sup> This established Austria as a democratic republic structured as a Federal State.<sup>9</sup> Since the 1929 amendment, which considerably extended the powers of the Federal President, the Federal President's role has been classified as semi-presidential. Prior to that, in the original version of the Constitution, the system of government was completely parliamentary.<sup>10</sup>

### **1.2. Characterisation of the Constitution**

The Austrian Constitution has several characteristic features. It is easy to amend, requiring only a two-thirds majority of deputies, with at least half of them being present in the National Council (*Nationalrat*).<sup>11</sup> However, if this affects the competence of the States, the second chamber, the Federal Council (*Bundesrat*), is also required to provide its consent.<sup>12</sup> If a constitutional law results in a total revision of

3 GDP [Online]. Available at: [https://wko.at/statistik/eu/europa-wirtschaftsleistung.pdf?\\_gl=1\\*t27nwo\\*\\_ga\\*NzU3NDk0MDUxLjE2NDAwNzkwOTk.\\*\\_ga\\_4YHGVSNS5S4\\*MTY3MDkyNDY0NS43LjEuMTY3MDkyNDcxNS42MC4wLjA.&\\_ga=2.76910161.596406005.1670924646-757494051.1640079099](https://wko.at/statistik/eu/europa-wirtschaftsleistung.pdf?_gl=1*t27nwo*_ga*NzU3NDk0MDUxLjE2NDAwNzkwOTk.*_ga_4YHGVSNS5S4*MTY3MDkyNDY0NS43LjEuMTY3MDkyNDcxNS42MC4wLjA.&_ga=2.76910161.596406005.1670924646-757494051.1640079099) (Accessed: 7 April 2023).

4 GDP per capita in 2022 [Online]. Available at: [https://wko.at/statistik/eu/europa-BIPjeEinwohner.pdf?\\_gl=1\\*xcy8gu\\*\\_ga\\*NzU3NDk0MDUxLjE2NDAwNzkwOTk.\\*\\_ga\\_4YHGVSNS5S4\\*MTY3MDkyNDY0NS43LjEuMTY3MDkyNDY2MS40NC4wLjA.&\\_ga=2.34597477.596406005.1670924646-757494051.1640079099](https://wko.at/statistik/eu/europa-BIPjeEinwohner.pdf?_gl=1*xcy8gu*_ga*NzU3NDk0MDUxLjE2NDAwNzkwOTk.*_ga_4YHGVSNS5S4*MTY3MDkyNDY0NS43LjEuMTY3MDkyNDY2MS40NC4wLjA.&_ga=2.34597477.596406005.1670924646-757494051.1640079099) (Accessed: 7 April 2023).

5 Unemployment rate [Online]. Available at: [https://www.ams.at/content/dam/download/arbeitsmarktdaten/%C3%B6sterreich/berichte-auswertungen/001\\_uebersicht\\_aktuell.pdf](https://www.ams.at/content/dam/download/arbeitsmarktdaten/%C3%B6sterreich/berichte-auswertungen/001_uebersicht_aktuell.pdf) (Accessed: 7 April 2023).

6 Olechowski, 2019, pp. 99–100.

7 Olechowski, 2020, pp. 159–163.

8 Olechowski, 2019, pp. 104–105.

9 Article 1 and Article 2 B-VG (Bundes-Verfassungsgesetz, Austrian Federal Constitution BGBl 1930/1 (WV) idF BGBl I 2022/222).

10 Wieser, 2024b, pp. 10 and 18.

11 Article 44, paragraph 1 B-VG.

12 Article 44, paragraph 2 B-VG.

the Federal Constitution (*Gesamtänderung*), that is a fundamental change in at least one of the basic principles of the Constitution, a referendum must also be held.<sup>13</sup> Such a referendum has so far only been held in 1994 regarding the question of accession to the EU.<sup>14</sup>

Another characteristic is the fragmentation of constitutional law. This implies that constitutional law is not found in just one central document, but is spread across many. This concept originated in positive constitutional law, which in Article 44 of the Federal Constitutional Law (B-VG; Bundes-Verfassungsgesetz BGBl 1930/1 (WV)) provides the possibility of implementing constitutional provisions in simple federal laws. Based on this, constitutional provisions were placed in many simple laws such as the Road Traffic Act 1960 (StVO – Straßenverkehrsordnung 1960 BGBl 1960/159), Motor Vehicles Act 1967 (KFG 1967 – Kraftfahrgegesetz 1967 BGBl 1967/267) and Data Protection Act (DSG – Datenschutzgesetz BGBl I 1999/165). Moreover, until 2008, it was possible to conclude international treaties with constitutional status, which is why the European Convention on Human Rights (ECHR) continues to hold constitutional rank.<sup>15</sup>

### ***1.3. Structure of the Republic***

As mentioned previously, the Democratic Republic of Austria was established as a Federal State. Below the Federal level, at which the National Council exercises legislative power together with the Federal Council, it comprises nine States (*Länder*):<sup>16</sup> Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg and Vienna.<sup>17</sup> At the level of the States, legislation is exercised by the State Parliament (*Landtag*), which is elected by the people of respective States.<sup>18</sup> Although there is no superordination between State and Federal law, as in Germany<sup>19</sup>, there is a precisely defined order of competences between Federal and State legislation in B-VG, with the Constitutional Court ruling on disputes over competences.<sup>20</sup>

Each State is required to enact its own Constitution, which must not contravene the Federal Constitution. The enactment and amendment of these State Constitutions require a two-thirds majority in respective State Parliaments, with half of the deputies present.<sup>21</sup> At the Federal (constitutional) legislation level, the Federal Council (*Bundesrat*), the second chamber of the legislature, represents the interests of States. It is composed in proportion to the number of citizens in the respective Federal

13 Article 44, paragraph 3 B-VG.

14 Berka, 2021, p. 39.

15 Wieser, 2024a, p. 115.

16 Article 24 B-VG, Article 2 B-VG.

17 Article 2, paragraph 2 B-VG.

18 Article 95, paragraph 1 B-VG.

19 Article 31 of the German Constitution: 'Federal law breaks state law'. Although an identical provision is found in Kelsen's drafts, it was ultimately not included in the Constitution; cf. Ermacora, 1990, p. 69.

20 Articles 10–15 B-VG; Article 138, paragraph 1, number 3 B-VG.

21 Article 99 B-VG.

State,<sup>22</sup> and currently consists of 61 members.<sup>23</sup> Below the State level, Austria has been categorised into 94 political districts and 2,093 municipalities.<sup>24</sup> Both levels are administrative with no legislative competences.

#### 1.4. Administration

Alongside legislation and jurisdiction, the administration represents the third major pillar of the State's functions. Joseph Ulbrich was one of the first representatives of the administrative law scholarship. In 1927, Adolf Merkl's '*Allgemeines Verwaltungsrecht*' (General Administrative Law), created one of the first and still leading fundamental works.<sup>25</sup>

The tasks and actions of the administration must always be considered in the context of the country's respective development and current political situation.<sup>26</sup> Although information administrative law plays a major role in the State currently, social reforms were particularly important at the beginning of the 20<sup>th</sup> century owing to the difficult circumstances in Austria (economic crisis and resulting poverty).<sup>27</sup> As will be explained, the State of Austria is shaped by its federalist system and has grown historically.

The concept of Austrian administrative law today is to be read primarily as an organizational-formal one, which Wiederin describes as follows: 'Administrative law is the law to be enforced by administrative authorities, with the exception of constitutional law'.<sup>28</sup>

In addition to administrative procedure, the administrative law in Austria can be classified into general and special categories. General administrative law elaborates Austria's administrative structure, while special administrative law deals with individual subdisciplines (e.g. construction, hunting and trade laws). In the following sections, Austrian administrative law is presented without considering specific sub-disciplines.

## 2. Public administration and constitutional order

The Constitution comprises two main principles that apply to the entire administration (as well as many other provisions): the rule of law (*Rechtsstaatliches Prinzip*) and the bond of instructions (*Weisungsgebundenheit*).

22 Article 34, paragraph 1 B-VG.

23 Federal Council [Online]. Available at: <https://www.parlament.gv.at/PERK/NRBRBV/BR/> (Accessed: 7 April 2023).

24 Political districts [Online]. Available at: <https://m.politik-lexikon.at/bezirk/> (Accessed: 7 April 2023); Structure of the municipalities [Online]. Available at: <https://gemeindebund.at/themen-zahlen-und-fakten-struktur-der-gemeinden/> (Accessed: 7 April 2023).

25 Leitzl-Staudinger, 2011, pp. 198–204; cf. Merkl, 1927, *Allgemeines Verwaltungsrecht*.

26 Wiederin, 2010, p. 210.

27 Cf. Wiederin, 2010, p. 210.

28 Wiederin, 2010, p. 227.

### **2.1. Rule of law in the Federal Constitution**

The rule of law in Austria is not explicitly standardised in the Constitution. Rather, it is implicitly a result of several regulations. Nevertheless, the rule of law underlying the Constitution is considered to be fundamental such that a substantial change constitutes a total revision of the Federal Constitution. The essential features of the rule of law in the Austrian Constitution are briefly presented below.

#### *2.1.1. Principle of Legality (Legalitätsprinzip)*

Article 18, paragraph 1 B-VG stipulates that '[t]he entire public administration shall be based on law'. According to this provision, the administration must not only act in accordance with the laws, but may also act solely on their basis. Acting without legal basis contradicts the principle of legality. This ultimately leads to the democratic legitimisation of administrative action. However, the administration is not bound by this provision if it acts within the framework of private sector administration (*Privatwirtschaftsverwaltung*).<sup>29</sup>

The effect of this provision on legislation is that every regulation must be duly promulgated; therefore, every action based on the law is foreseeable. This also implies that laws must be determined with sufficient clarity.<sup>30</sup>

#### *2.1.2. Separation of Powers (Gewaltenteilung)*

The Austrian Constitution is fundamentally based on the principle of separation of powers. According to this principle, the three powers, legislation, execution and jurisdiction are independent of each other with mutual control mechanisms and dependencies (checks and balances). The segregation can be traced back to the 18<sup>th</sup> century, when judicial independence from the monarch was initially sought, which subsequently manifested itself in the separation of legislation and execution.<sup>31</sup>

#### *2.1.3. Legal protection system*

The principle of the rule of law implies that every act of the Federal State must be subject to judicial review. This applies to both, administrative acts such as rulings (*Bescheide*) or ordinances (*Verordnungen*) as well as legislative acts. Accordingly, Austria has a seamless system of ordinary, administrative and constitutional jurisdictions that guarantee the reviewability of every act. However, the mere existence of a legal protection system is insufficient. Rather, the efficiency of the proceedings must also be guaranteed.

#### *2.1.4. Protection of fundamental rights*

The protection of fundamental rights is also elementary within the framework of the rule of law. Fundamental rights are derived primarily from the Basic Act on the

29 Berka, 2021, pp. 157–158. For further details see the chapters Private sector administration (*Privatwirtschaftsverwaltung*) and sovereign administration (*Hoheitsverwaltung*).

30 Berka, 2021, pp. 159–160.

31 Grabenwarter and Holoubek, 2022, p. 319.

General Rights of Nationals (StGG – Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger RGBI 1867/142) and ECHR, both of which have constitutional rank, as well as from the Charter of Fundamental Rights, which is considered superior to the Constitution owing to its direct applicability and primacy of European law.

On an international level, it is striking that Austria guarantees the most important fundamental rights, but does not provide for any fundamental social rights. Furthermore, a right-to-good administration has also not been provided in the StGG or ECHR.

## ***2.2. Bond of instructions and hierarchical structure***

The structure of the Austrian administration is strictly hierarchical.<sup>32</sup> This stems from the basic democratic principle of Article 1 B-VG. The requirement of a democratically-legitimised administration is met by the fact that each body is either elected by the people or appointed by a body that has been elected by the people.<sup>33</sup>

Article 20 B-VG specifically states that the administration shall be managed under the direction of the supreme bodies of the Federation and the States by the administrative bodies. In their official activities, all these bodies report to their superiors, and unless they are not subject to directives pursuant to Article 20 paragraph 2 B-VG, they are bound by their instructions.

## ***2.3. Administrative assistance, duty to provide information and official confidentiality***

### ***2.3.1. Administrative assistance (Amtshilfe)***

According to Article 22 B-VG, among others, all Federal, State and Municipal bodies are obliged to provide mutual assistance within their legal sphere of activity. The obligation also refers to jurisdictional and parliamentary bodies, and therefore does not bind only bodies of the administration.<sup>34</sup>

The obligation is established by the request of the body seeking administrative assistance.<sup>35</sup> The aim is to ensure the most economical implementation possible, while maintaining the existing system of competences.<sup>36</sup>

### ***2.3.2. Duty to provide information (Auskunftspflicht)***

The legal situation presented herein after (Article 20, paragraph 3 to 5 B-VG) will cease to be in force as of September 2025. For further information on this matter, please refer to the expositions in Chapter 4.

Pursuant to Article 20, paragraph 4 B-VG, all bodies entrusted with Federal, State and Municipal administrative tasks must provide information on matters within their sphere of activity, unless a statutory duty of confidentiality precludes it.

32 Muzak, 2020, p. 186.

33 Raschauer, 2021, pp. 147–148.

34 Grabenwarter and Holoubek, 2022, p. 478.

35 Muzak, 2020, p. 203.

36 Muzak, 2020, p. 203 with reference to VfSlg 5746/1968.

The Federal Act on the Duty to Grant Information Act (AuskunftspflichtG BGBl 1987/287) as well as special State laws (implementing laws in the individual State) provide the individual a concrete legal entitlement right to information under simple law.<sup>37</sup>

According to § 1 paragraph 2 of the Duty to Grant Information Act, however, information is to be provided only to the extent that it does not substantially impair the performance of other administrative tasks. It shall be provided if it is clearly requested with the intention of misuse. The duty to provide information includes both acts of public administration and private sector administration.<sup>38</sup>

The Supreme Administrative Court (*Verwaltungsgerichtshof*) has stated on several occasions that the duty to provide information enshrined in Article 20, paragraph 4 B-VG is based on the insight of a democratic state. Not only legislation but also the administration must be accessible to the public to a certain extent because disseminating proper information to citizens and a transparent administrative process are indispensable prerequisites for an effective exercise of citizens' democratic right of participation in Federal action.<sup>39</sup>

The term 'information' basically encompasses an obligation to provide data regarding the activities of public authorities. The term has been concretised by the jurisdiction.<sup>40</sup>

Accordingly, the duty to provide information extends to the provision of legal information, the scope of which has been disputed,<sup>41</sup> and only goes so far as the information is available to the authority. There is no obligation to obtain this information.<sup>42</sup> It must be provided without delay, but no later than eight weeks after receipt of the request.<sup>43</sup> The duty to provide information is limited and does not encompass certain confidential data, which are standardised either by constitutional law or simple law.<sup>44</sup>

### 2.3.3. Official confidentiality (*Amtsverschwiegenheit*)

In the Austrian Federal Constitution, the task of maintaining official confidentiality is constitutionally guaranteed under Article 20, paragraph 3. Accordingly, all bodies entrusted with the tasks of Federal, State and Municipal administration, as well as bodies of other corporations under public law, are in principle obliged to maintain confidentiality regarding facts that have become known to them exclusively in the course of their official activities, insofar as it is necessary for certain interests.<sup>45</sup>

37 Wieser, 2001b, p. 8.

38 Wieser, 2001b, p. 17.

39 Cf. with further proofs VwGH 13.9.2016, Ra 2015/03/0038, VwSlg 19.447 A/2016.

40 Grabenwarter and Holoubek, 2022, p. 476.

41 Muzak, 2020, pp. 195–196.

42 VwGH 25.3.2010, 2010/04/0019.

43 Muzak, 2020, p. 197.

44 Muzak, 2020, pp. 196–197.

45 The confidentiality is only required in the interest of maintaining public peace, order and security, comprehensive national defense, foreign relations, in the economic interest of a corporation under public law, for the preparation of a decision or in the overriding interest of the parties. Only the law may provide otherwise.

The duty to maintain confidentiality also extends to facts, encompassing written documents and unpublished files. Thus, the term is to be understood very broadly.<sup>46</sup> Specifically, this duty covers facts in which there is an interest in confidentiality. Additionally, official confidentiality may apply if it is in the interest of a designated party. However, this interest must prevail and should be assessed by authorities on a case-by-case basis.<sup>47</sup> Since it is not defined which affected interests of the party are considered of relevance, it can be assumed that all kinds of interests are admissible.<sup>48</sup>

A party within the meaning of Article 20, paragraph 3 B-VG refers to any person affected by official activities. The term must be understood in a broader sense and include all persons who come into contact with public authorities for any reason.<sup>49</sup>

## 2.4. Control of the administration

### 2.4.1. Legal control

As previously mentioned, every federal action must be reviewable by an independent authority. Depending on the legal act, there are different possibilities for legal protection against administrative action. Therefore, legal protection against individual administrative acts (rulings and the exercise of direct administrative power of command and enforcement) is examined first, followed by legal protection against general acts of the administration.<sup>50</sup>

#### 2.4.1.1. Rulings and the exercise of direct administrative power of command and enforcement

(Akt unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt)

A ruling is a formal, sovereign, individual act of the administration issued in external relations.<sup>51</sup> The addressee of a ruling may appeal against a specific decision to the competent Administrative Court.<sup>52</sup> Similarly, the addressee of an exercise of the direct administrative power of command and enforcement—that is, a (relatively) non-procedural, direct, outward, individual act of sovereignty<sup>53</sup>—may also file a complaint with the Administrative Court.<sup>54</sup> For example, an administrative body may resolve someone's demonstration by issuing an individual order.

The Administrative Courts are set up according to the '9+2 model'. There is a Federal Administrative Court (*Bundesverwaltungsgericht*), in addition to a Federal Financial Administrative Court (*Verwaltungsgericht des Bundes für Finanzen*) and for

46 Wieser, 2001a, p. 18.

47 Grabenwarter and Holoubek, 2022, p. 475.

48 Wieser, 2001a, pp. 28–29.

49 Grabenwarter and Holoubek, 2022, pp. 474–475; VwGH 25.11.2015, Ra 2015/09/0052.

50 It is worth mentioning that there are also legal remedies within the administration as part of administrative procedures.

51 Raschauer, 2021, pp. 319–344.

52 Article 130, paragraph 1, number 1 B-VG.

53 Raschauer, 2021, pp. 367–382.

54 Article 130, paragraph 1, number 2 B-VG.



each of the nine States there is a State Administrative Court (*Landesverwaltungsgerichte*).<sup>55</sup> Jurisdiction is determined by the matter to be enforced. If the law does not provide for the jurisdiction of a senate, the Administrative Courts decide by single judges.<sup>56</sup>

All parties to the suit can appeal the decision to the Supreme Administrative Court.<sup>57</sup> Under certain circumstances, the complainant may also file a complaint against the decision to the Constitutional Court (*Verfassungsgerichtshof*) according to Article 144 B-VG.

#### 2.4.1.2. Ordinances

Ordinances, as acts of administration with a general circle of addressees, can be challenged before the Constitutional Court in the same manner as laws. Administrative authorities can pass ordinances to specify acts; also, Municipalities can pass ordinances, without the need of specific act, in their own sphere of action.

The constitutional provisions are laid down in Article 139, B-VG. This procedure can be initiated by a court, the Constitutional Court itself, explicitly named bodies, and persons under certain conditions.<sup>58</sup> In these proceedings, the Constitutional Court can repeal the ordinance.<sup>59</sup>

#### 2.1.4.3. Charge of public administrative bodies (Staatsrechtliche Anklage)

According to Article 142, B-VG, the Constitutional Court decides on charges against organs. Here, an indictment against the supreme bodies of the administration (Federal President, members of the Federal and State governments) as well as other bodies (representatives in the Council, President of the State school board) shall be made by resolution of the general representative bodies (*allgemeine Verwaltungskörper*) named therein.<sup>60</sup> A simple violation of the law is sufficient for the charge to be justified,<sup>61</sup> except in the case of the Federal President, where a violation of the Constitution is required.<sup>62</sup> Charges can also be brought against members of the State government if they act within the framework of indirect Federal administration.<sup>63</sup>

The sentence of the Constitutional Court must be for loss of office. In the case of particularly aggravating circumstances, political rights may be declared forfeited for a limited period of time and in the case of minor violations of the law, the Constitutional Court may limit itself to a finding of illegality.<sup>64</sup>

55 Berka, 2021, p. 309; Öhlinger and Eberhard, 2022, p. 290.

56 § 2 VwGVG.

57 Article 133, paragraph 1, number 1 B-VG.

58 Article 139, paragraph 1 B-VG.

59 Berka, 2021, pp. 382 and 385.

60 Berka, 2021, pp. 397–398.

61 Article 142, paragraph 2, lit. b–i B-VG.

62 Article 142, paragraph 2, lit. a B-VG.

63 Article 142, paragraph 2, lit. e B-VG.

64 Article 142, paragraph 4 B-VG.

#### 2.4.2. Political control

Political control of the administration is currently understood as the possibility of auditing the administration in general, which checks its lawfulness and expediency.<sup>65</sup> It is worth noting at this point that only the legal situation at the Federal level has been presented here. The means of control are found in the B-VG of Articles 50–55 and are conclusively regulated.<sup>66</sup>

First, the right of interpellation (*Interpellationsrecht*) is enshrined in Article 52, B-VG. It is regarded as a central instrument of political control and examines the political actions of members of the government.<sup>67</sup> According to Article 52, paragraph 1 B-VG, the National Council and the Federal Council are authorised to review the conduct of business by the Federal Government, question its members on all matters of execution, demand all relevant information, and convey their interest on the exercise of execution in resolutions. The latter is a legally non-binding suggestion to the government.<sup>68</sup>

In accordance with Article 52, paragraph 3 B-VG, every member of the National Council and the Federal Council is entitled to ask members of the Federal Government short oral questions in the sessions of the National Council or Federal Council. This is called ‘question time’ (*Fragestunde*); the questions must be submitted at least 48 hours in advance and must be answered orally.<sup>69</sup>

A strong political instrument according to Article 53, paragraph 1 B-VG is the committee of inquiry (*Untersuchungsausschuss*). The committee is not open to the public, but is accessible to the media and is thus a media-effective instrument.<sup>70</sup> Since 2015, the committee of inquiry can also be appointed by a quarter of the members of the National Council and therefore is a minority right.<sup>71</sup> Pursuant to Article 53, paragraph 2 B-VG, the subject of the investigation is a specifically completed process in the Federal administration. Jurisdictional reviews were also excluded.<sup>72</sup> Courts and Federal, State and self-governing bodies are obliged to submit the necessary files.<sup>73</sup>

Comparable rights of control also exist at the State and Municipal levels, which are standardised in State Constitutions and Municipal Acts (*Gemeindeordnungen*). These regularly provide control over administrative bodies by general representative bodies.

Finally, the National Council can withdraw its confidence from the Federal Government or individual members of the Federal Government pursuant to Article 74, paragraph 1 B-VG. This means that concerned members should be removed from

65 Grabenwarter and Holoubek, 2022, pp. 480–481.

66 Critically Öhlinger and Eberhard, 2022, p. 215.

67 Kahl, 2005, pp. 10–12.

68 Öhlinger and Eberhard, 2022, p. 217.

69 Kahl, 2005, pp. 15–16.

70 Critically related to issues of data protection; Baumgartner, 2022, p. 201.

71 Öhlinger and Eberhard, 2022, pp. 217–218 and 220.

72 Bezemek, 2020, p. 76.

73 Öhlinger and Eberhard, 2022, pp. 217–218.

office. This instrument represents the strongest form of political control. The first and only successful vote of no confidence to date was held against the Government headed by Sebastian Kurz in 2019.<sup>74</sup>

#### 2.4.3. *Economic control*

In addition to judicial control, there are other mechanisms to control the administration. In Austria, in addition to political control rights, control by the Court of Auditors (*Rechnungshof*) and the Ombudsman Board (*Volksanwaltschaft*) are particularly worth mentioning.

##### 2.4.3.1. Court of Auditors

The Court of Auditors, established as an auxiliary body of the National Council, regulates the financial resources used by the public sector. It is headed by a president elected by the National Council for a twelve year-term. The president has the right to nominate the Court of Auditors, who will be appointed by the Federal President.<sup>75</sup>

Essentially, the Court of Auditors performs the following tasks: budget management, financial control and certain special tasks. Within the budget management framework, the Court of Auditors is responsible for preparing Federal financial statements. The primary task is financial auditing. The Court of Auditors is required to audit the annual financial statements in Article 126b, B-VG listed authorities.<sup>76</sup> The audit is conducted with regard to numerical correctness, compliance with existing regulations and employment of thrift, efficiency and expediency.<sup>77</sup>

Based on these examinations, the Court of Auditors prepares a report to be submitted to the National Council or, if it acts on behalf of the State Parliament, the report is submitted to the State Parliament, and is subsequently published.

##### 2.4.3.2. Ombudsman Board

The Ombudsman Board generally investigates maladministration stemming from an individual complaint but can also investigate suspected maladministration *ex officio*. Similar to the Court of Auditors, the Ombudsman Board reports to the National Council or individual State Parliaments. The Ombudsman Board is particularly characterised by the fact that complaints can be submitted without financial barriers, informally and relatively smoothly, making this institution very close to citizens.<sup>78</sup>

The Vienna-based authority consists of three members, all of whom are elected by the National Council for a six-year term. Anyone can consult the Ombudsman Board for alleged maladministration by the Federal Government, if they are affected and have no legal remedies available to them. This right can be exercised because of

74 Federal Council [Online]. Available at: [https://www.parlament.gv.at/aktuelles/pk/jahr\\_2019/pk0589](https://www.parlament.gv.at/aktuelles/pk/jahr_2019/pk0589) (Accessed: 25 November 2024).

75 Berka, 2021, p. 293.

76 Berka, 2021, pp. 294–299.

77 Article 126b, paragraph 5 B-VG.

78 Berka, 2021, p. 299.

alleged human rights violations. The competence of the Ombudsman Board refers equally to the sphere of activity of the sovereign and private sector administrations.<sup>79</sup>

In the case of alleged human rights violations, the Ombudsman Board and its commissions are also entitled to visit and inspect places of imprisonment, observe and monitor the conduct of bodies authorised to exercise direct administrative command and coercive power, and inspect and visit institutions and programmes for persons with disabilities.<sup>80</sup>

Based on this review, the Ombudsman Board can make a recommendation to the competent supreme body of the administration. The body must either comply with this recommendation or justify any deviating action in writing to the Ombudsman Board. Furthermore, the Ombudsmans Board must submit an annual report to the National Council.<sup>81</sup>

#### 2.4.4. *Liability of Public Bodies (Amtshaftung)*

In Austria, in addition to the aforementioned control, administrative bodies or the legal entity (*Rechtsträger*) are also confronted with liability for damages. For this purpose, the Liability of Public Bodies Act (AHG – Amtshaftungsgesetz BGBl 1949/20), based on Article 23, B-VG, provides for a sophisticated liability regime.<sup>82</sup> According to this law, Federal, State and Municipal legal entities are liable for damages unlawfully and culpably caused to a third party by their bodies during sovereign acts. This applies equally to the administration and jurisdiction.<sup>83</sup>

The Public Liability Act is not applicable in the context of private sector administration. Liability is governed by the norms of civil law, which primarily means application of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*).<sup>84</sup>

### 2.5. *Selected Fundamental Rights in connection with the administration*

#### 2.5.1. *Equal protection clause (allgemeiner Gleichheitssatz), requirement of objectivity (Verhältnismäßigkeitsprinzip) and prohibition of arbitrariness (Willkürverbot)*

The equal protection clause is enshrined in Article 7, B-VG. It provides many guidelines for the actions of the administration and is considered a central provision of fundamental rights in Austria. All forms of administrative action are affected, including private sector administration.<sup>85</sup>

79 Article 148a, paragraph 1 B-VG.

80 Article 148a, paragraph 3 B-VG.

81 Berka, 2021, p. 302.

82 In addition, the Organ Liability Act (OrgHG – Organhaftpflichtgesetz BGBl 1967/181) provides for those provisions that regulate liability in the event of damage to the legal entity.

83 Legislative liability is not established, Article 57, 58, 96 B-VG. Only the so-called 'state responsibility' resulting from the case law of the ECJ may become relevant; cf. EuGH 19. 11. 1991, C-6/90 and C-9/90 *Francovich* and EuGH 5. 3. 1996, C-46/93 and C-48/93 *Brasserie du pêcheur*.

84 Ziehensack, 2023, p. 146.

85 Holoubek, 2014, p. 451.

For example, ordinances (such as zoning or development plans) must be measured against equal protection clauses. In addition, the provision essentially binds Administrative Courts, whose decisions can be reviewed based on this.<sup>86</sup>

It prohibits legislation from making arbitrary distinctions: meaning any legal differentiation, that is not based on factual differences, must be objectively justified.<sup>87</sup> Specifically, the administration must observe the prohibition of arbitrariness and an administration's actions may not be arbitrary. This also includes serious violations of fundamental procedural rights.<sup>88</sup>

### 2.5.2. Lawful judge (*Gesetzlicher Richter*)

The Federal Constitution contains special procedural and judicial guarantees. Particularly noteworthy is Article 83, paragraph 2 B-VG, where the 'right to the lawful judge' is standardised, which originally had the primary purpose of separating the judiciary from the administration and independent jurisdiction.<sup>89</sup>

At present, Article 83, B-VG is understood more broadly and includes legal protection that encompasses statutory authority jurisdiction in administrative law.<sup>90</sup> Accordingly, the legislature is obliged to provide detailed regulations of the authority's competence, the applicability of concrete procedural law and the right of appeal.<sup>91</sup> The decision of the Administrative Court violates the right of the lawful judge if the authority claims a competence to which it is not entitled or if the authority unlawfully rejects a competence.<sup>92</sup>

## 2.6. Conclusion

The principle of the rule of law is an essential starting point for an administration's actions. Values, such as the separation of powers or the protection of fundamental rights, as well as the principle of legality, shape the core of administrative action and determine the relationship between legislation, jurisdiction and administration.

A much-discussed topic in Austria is the public administration's duty to provide information, as elucidated in the previous chapter. The current (constitutional) provisions on access to information in public administration in Austria are found in various provisions, the central one being the general duty to inform, under Article 20, paragraph 4 B-VG. To ensure efficient administration, the instrument of administrative assistance was anchored in constitutional law.<sup>93</sup>

86 Grabenwarter and Holoubek, 2022, pp. 262–263.

87 Öhlinger and Eberhard, 2022, pp. 349–350.

88 Öhlinger and Eberhard, 2022, pp. 370–374.

89 Grabenwarter and Holoubek, 2022, p. 269.

90 Leeb, 2021, pp. 13–14.

91 Öhlinger and Eberhard, 2022, pp. 461–465.

92 Öhlinger and Eberhard, 2022, pp. 461–465.

93 Holoubek, 2014, p. 449.

The core idea of Austria's administrative law is to protect individuals against erroneous administrative actions.<sup>94</sup> In Austria, administrative control takes different forms. In contrast to the Anglo-Saxon area, for example, specialised administrative jurisdiction is typical.<sup>95</sup>

The Austrian Constitution has a dedicated section on administrative jurisdiction and provides for different types of lawsuits. In contrast, detailed regulations on constitutional status are a special feature.<sup>96</sup> The Ombudsman Board and Court of Auditors also play a special role in the Federal Constitution of Austria.<sup>97</sup> The Committee of Inquiry is an important instrument of political control. It strengthened minority rights and offered opportunities for media coverage.

### 3. Organizational principles and structure of public administration

#### 3.1. Federal administration

##### 3.1.1. Federal President (*Bundespräsident*)

The Federal President is elected by the citizens based on an equal, direct, personal, free and secret vote for a six-year term. After the term of office expires, the Federal President may be re-elected once. He/she must be at least 35 years old on election day.<sup>98</sup>

If the Federal President is unable to attend to his/her duties, the Federal Chancellor must represent him/her. If the President is unable to attend to his/her duties for more than 20 days, the three Presidents of the National Council (*Nationalratspräsidenten*) shall take his/her place as a collegium. This also applies if the Federal President is permanently vacated.<sup>99</sup>

The Federal President is responsible for representing the republic externally, certifying envoys and concluding international treaties. The Federal President appoints officials and confers professional titles. Before an act is promulgated, it must be signed by the Federal President.<sup>100</sup> Furthermore, the Federal President appoints the Federal Chancellor and, based on the latter's proposal, the Federal Government as well. The Federal President can also dismiss the Federal Government, although the Federal Chancellor's proposal is required for the dismissal of individual ministers.<sup>101</sup> The Federal President can also dissolve the National Council based on the Federal Government's proposal.<sup>102</sup> The Federal President requires a proposal for all acts by

94 Leitl-Staudinger, 2011, p. 207.

95 Wieser, 2024a, p. 377.

96 Wieser, 2024a, pp. 378–379.

97 Wieser, 2024a, pp. 382–384, 388–390.

98 Article 60 B-VG.

99 Article 64 B-VG.

100 Article 65 B-VG.

101 Article 70 B-VG.

102 Article 29 B-VG.

the Federal Government or Federal ministers and the countersignature of the Federal Chancellor, unless otherwise stipulated in the Constitution.<sup>103</sup>

During a state of emergency, the Federal President has the right of emergency ordinance (*Notverordnungsrecht*). Therefore, if the immediate enactment of measures, which would otherwise be subject to the decision of the National Council, is necessary to avert obvious irreparable damage to the general public at a time when the National Council cannot convene, the Federal President may enact such measures through an ordinance on the proposal of the Federal Government. Such an ordinance may not amend the Constitution and may not impose a permanent financial burden on a territorial authority, a financial obligation on citizens or the disposal of Federal property.<sup>104</sup>

The term of office of the Federal President expires after six years (with the option of one re-election), by death or removal by referendum on the proposal of the Federal Assembly (*Bundesversammlung*).<sup>105</sup>

### 3.1.2. Federal Government (*Bundesregierung*)

The Federal Government comprises individual Federal ministers as well as the Federal Chancellor and Vice-Chancellor.<sup>106</sup> Federal ministers are assigned individual portfolios that are distributed by law for each term of office.<sup>107</sup> The Federal Government is not elected by the people directly but is appointed and sworn in by the Federal President. The Federal President first appoints a Federal Chancellor, who must submit a proposal on the composition of the Federal Government. Accordingly, the Federal President appoints individual ministers.<sup>108</sup> By contrast, the Federal President does not need a proposal for the appointment of the Federal Chancellor.

The Federal Government or individual members may—as already mentioned—be dismissed by the National Council at any time by the so-called ‘vote of no confidence’ (*Misstrauensvotum*), leading to the democratic legitimacy of the Federal Government.

Members of the Federal Government may be assisted by a State Secretary, appointed in the same manner as the minister. The State Secretary shall support the Federal Minister in the management of the ministry, may represent the Federal Minister in Parliament and may be entrusted with ministry tasks on an independent basis.<sup>109</sup>

### 3.2. Direct and indirect Federal administration (*Unmittelbare und mittelbare Bundesverwaltung*)

The Austrian Federal Constitution provides for the division of competences in Articles 10–15. Article 10 of the Federal Constitution lists matters that the Federal Council is responsible for in the legislation and Federal bodies in execution. In

103 Article 67 B-VG.

104 Article 18, paragraphs 3 and 4 B-VG.

105 Article 60, paragraphs 5, 6 B-VG.

106 Article 69, paragraph 1 B-VG.

107 Cf. the Federal Ministries Act 1986.

108 Article 70, paragraph 1 B-VG.

109 Berka, 2021, p. 239.

matters listed in Articles 11, 12 and 15 of B-VG, the responsibility for enforcement lies with the states.<sup>110</sup>

Although Article 10, B-VG provides for enforcement at the Federal level in the above-mentioned matters, this does not mean that the matter is necessarily enforced by Federal bodies. In Austria, a distinction is made between indirect and direct Federal administration. Matters for which Article 10, B-VG provides for the Federal Government's competence to enforce the law can also be enforced by bodies of the State within the framework of an indirect Federal administration. Federal authorities can be established for enforcement only if the matter is listed in Article 102, paragraph 2 B-VG.<sup>111</sup>

Within the framework of direct Federal administration, a matter is executed by the Federal Government, and Federal bodies are subordinate to them. Meanwhile, in indirect Federal administration, a matter is carried out by the organs of the State, which are bound by the instructions of the supreme organs of the Federation and are responsible to them.

### **3.3. State administration (*Landesverwaltung*)**

#### *3.3.1. State Government (*Landesregierung*)*

At the State level, there is a hierarchically-structured administration headed by nine State governments—one for each State. Other bodies of the State administration are subordinate to it.<sup>112</sup>

The State government is elected by State Parliaments. It comprises the State Governor (*Landeshauptmann*) and other members (*Landesräte*).<sup>113</sup> The specific number of members of the State Government is regulated by individual State Constitutions.<sup>114</sup>

The State Government is the supreme body of State administration, which has the authority to govern and is also the highest authority in each State. It conducts its business as a collegial body through collegial decision-making, whereby, depending on the formulation of State law, the majority or unanimity principle applies. Deviating from this, the Federal Constitution also provides for the possibility of establishing the State Government as a departmental system. Accordingly, individual members of the State Government, such as monocratic bodies, are responsible for individual matters.<sup>115</sup>

110 Article 11 B-VG contains a legislative competence of the Federation, Article 12 B-VG contains a legislative competence of the Federation with regard to principles and of the provinces with regard to detailed provisions. Article 15 B-VG contains a general competence in favour of the provinces.

111 Berka, 2021, p. 241.

112 Berka, 2021, p. 249; Steiner, 2012a, p. 305.

113 Article 103, paragraphs 1 and 3 B-VG.

114 Berka, 2021, pp. 249–250.

115 Berka, 2021, p. 250.



The head of State Government is the State Governor. The Governor represents the State externally and is the head of the Office of the State Government (*Amt der Landesregierung*) and District Governors (*Bezirkshauptleute*).<sup>116</sup> As an expression of democratic legitimacy, members of the State Government are politically and legally responsible to the State Parliament.<sup>117</sup>

### 3.3.2. Office of the State Government

The Office of the State Government is secured by its own constitutional law. It is the central service at the State level and not an independent authority, but serves as an official auxiliary apparatus for the State Government as a collegial body and for individual members of the State Government.<sup>118</sup> According to Berka, it can be understood as a unified ‘ministry’ for the respective State.<sup>119</sup>

### 3.3.3. District administrative authorities (*Bezirksverwaltungsbehörden*)

District administrative authorities are central officials at the next lower territorial level, that is, the level of political districts. The district administrative authorities are understood to be the district head offices (*Bezirkshauptmannschaften*) as well as the cities with their own statute (*Städte mit eigenem Statut*).<sup>120</sup>

## 3.4. Territorial self-governments (*Territoriale Selbstverwaltung*) – Municipalities (*Gemeinden*)

The lowest territorial level of administration is the Municipal level. The municipalities do not have legislative powers vis-à-vis Federal and State territorial authorities, but only have administrative agendas.<sup>121</sup> Municipalities act as self-governing bodies and even have a subjective constitutionally-guaranteed right to do so, which they can also assert before the Constitutional Court, for example, in the event of a restriction on their sphere of action.<sup>122</sup>

A special feature at the Municipal level include the so-called ‘cities with their own statute’. This status can be granted to a Municipality on application by a State law if the Municipality has at least 20,000 inhabitants and the interests of the State are not endangered. Accordingly, it is responsible not only for administration at the municipal level but also at the district level (see above).<sup>123</sup> Currently, there are 15 such cities in Austria, including Vienna, Graz and Salzburg.<sup>124</sup>

116 Steiner, 2012b, pp. 388–391.

117 Berka, 2021, p. 251.

118 Bauer, 2012, p. 430.

119 Berka, 2021, pp. 251–252.

120 Pürgy, 2012, pp. 445–446.

121 Berka, 2021, p. 262.

122 Article 116 B-VG; Berka, 2021, pp. 262–263.

123 Article 116, paragraph 3 B-VG.

124 Berka, 2021, p. 264.

### 3.4.1. *Spheres of action*

At the Municipal level, a distinction is made between two spheres of action: own sphere of action and assigned sphere of action. The former is conducted autonomously by Municipalities and is free of instruction. The second step is carried out on behalf of and according to the instructions of other authorities.

#### 3.4.1.1. Own sphere of action

The Municipality autonomously performs tasks in its own sphere of action and is not required to follow any command. However, in any case, the Municipality must comply with Federal and State laws.<sup>125</sup>

The tasks to which the Municipality is entitled in its own sphere of action are derived from a general clause and demonstrative list in the Constitution itself. Accordingly, all matters are to be dealt with in the Municipality's own sphere of action—apart from its activity as an economic unit—which 'are exclusively or predominantly matters of the local community in the person of the Municipality and are suitable for fulfillment by the municipality within its local boundaries'.<sup>126</sup> These matters are to be designated as such in the act.<sup>127</sup> Based on this general clause, the Constitution provides a demonstrative list of those agendas that are in any case to be managed within the Municipality's own sphere of action. These include the appointment of Municipal bodies and staff (with exceptions), local public security administrations, local sanitary police, public decency and local construction police.<sup>128</sup>

Within this framework, there is also special authorisation to issue ordinances. The Municipality has the right to issue local police ordinances (*Ortspolizeiliche Verordnungen*) for 'the prevention of imminently to be expected or existent nuisances interfering with local communal life'.<sup>129</sup> Local police ordinances may not violate Federal or State laws.

#### 3.4.1.2. Assigned sphere of action

Within the scope of the assigned sphere of action, the Municipality executes matters transferred to it by the federal or state acts. The Municipality is bound by the instructions of higher-ranking administrative bodies. The mayor is the central body in the administration of the transferred sphere of action.<sup>130</sup>

### 3.4.2. *Bodies of the municipality*

#### 3.4.2.1. The Municipal council (Gemeinderat)

The Municipal Council is a general representative body of the population residing within a municipality at the municipal level. It is elected based on direct, personal,

<sup>125</sup> Article 118, paragraph 4 B-VG.

<sup>126</sup> Article 118, paragraph 2 B-VG.

<sup>127</sup> Article 118, paragraph 2 B-VG.

<sup>128</sup> Article 118, paragraph 3 B-VG.

<sup>129</sup> Article 118, paragraph 6 B-VG.

<sup>130</sup> Berka, 2021, pp. 264–265.

free and equal right to vote for male and female citizens residing in the Municipality. In this—and only in this—national election, EU citizens are also entitled to vote and contest in elections.<sup>131</sup> The term of office is not the same in all Federal States, and varies from five to six years.<sup>132</sup>

The Municipal Council makes decisions based on a simple majority and is the central body of its own sphere of action. It oversees all matters within its own sphere of action insofar as they are not assigned to other bodies.<sup>133</sup>

#### 3.4.2.2. The Mayor (Bürgermeister)

The mayor is the central body of the assigned sphere of action and the chairperson of the Municipal executive board. Various tasks are assigned to him/her.<sup>134</sup> The exact allocation of tasks cannot be described conclusively here considering that this is based on the Municipal acts of individual States.<sup>135</sup>

The election of the mayor is not harmonised in Austria. In most Federal States, the mayor, similar to the Municipal Council, is elected directly by citizens who have their main residences in the Municipality. In Lower Austria and Styria, the Municipal council elects the mayor.<sup>136</sup> In the Federal Capital of Vienna, direct election of the mayor is constitutionally impossible as Vienna is also a state and the mayor is the governor of the state.<sup>137</sup>

#### 3.4.2.3. The municipal executive board (Gemeindevorstand)

The Municipal executive board is a type of ‘Municipal government’.<sup>138</sup> In cities with their own statute, it is called the ‘city senate’. Members are elected according to the proportional representation principle of the Municipal council.<sup>139</sup>

Parties represented in the Municipal council are also represented in the Municipal executive board according to their proportion. Its composition depends on respective

131 Article 117, paragraph 2 B-VG.

132 Trauner, 2016, pp. 33–34.

133 Cf. e. g. § 43 Abs 1 Stmk GemO.

134 Berka, 2021, pp. 264–265.

135 For example, in Styria, he/she is responsible for representing the Municipality externally. He/she manages and supervises the entire administration of the Municipality and is the head of the Municipal office and supervisor of the Municipal employees and is authorised to issue instructions to them. Furthermore, he/she is responsible for the execution of the decisions of the Municipal council, Municipal board and administrative committees, the decision and disposal in all Municipal affairs of the own sphere of action, unless another Municipal body is responsible for this by law. In addition, he/she is responsible for the day-to-day administration of Municipal property, the handling of local police and the management of matters of delegated authority in accordance with the law (§ 42 GemO) cf. § 45 Steiermärkische Gemeindeordnung 1967 LGBl 1967/115.

136 § 23 stmk GemO; § 21 Statut der Stadt Graz LGBl 1967/130; § 26 NÖ GO 1973 LGBl 1000-0.

137 Berka, 2021, pp. 271–273.

138 Berka, 2021, pp. 264–265.

139 Cf. Article 117, paragraph 5 B-VG; Weilguni, 2017, p. 17.

State laws. For example, in Styria, the body consists of three–seven members.<sup>140</sup> Under these laws, several Municipal administrative tasks were assigned to the body.

### 3.5. Other self-government

In Article 120a–c, B-VG, the Constitution regulates other self-governing bodies.<sup>141</sup> People can be grouped by law into self-governing bodies, which can be entrusted with the performance of public duties, if they are in the exclusive or predominant common interest and can be performed jointly by them.<sup>142</sup> These bodies have the right to perform tasks on their own, particularly when free of instructions.<sup>143</sup> However, the Federation or State retains the right to supervision. Federal administrative tasks can also be transferred to self-governing bodies.<sup>144</sup>

Self-governing bodies are formed among members in accordance with democratic principles. Within the framework of the law, as independent economic entities, they may acquire, hold and dispose of assets of all types to fulfil their tasks.<sup>145</sup> In Article 120a, paragraph 2, the Austrian Federal Constitution explicitly recognises social partners. They are therefore constitutionally guaranteed to be self-governing bodies.<sup>146</sup>

### 3.6. Public administration carried out by private institutions

Under certain circumstances, non-governmental entities may also perform authoritative administrative acts (*Hoheitsakte*). This form is called lending (*Beleihung*). In these cases, authoritative acts can be performed by private subjects via ‘outsourced legal entities’ (*ausgegliederte Rechtsträger*).<sup>147</sup> Outsourced legal entities are specifically created to perform administrative functions, and are established and controlled by the Federal State and can also assume non-authoritative tasks.<sup>148</sup>

If non-governmental legal entities are allowed to take authoritative acts, it must be ensured that the requirements of the Federal Constitution for administration are also met in these areas. The Constitutional Court has therefore, developed criteria, which must be observed in these cases and which derive, in particular, from Article 20 B-VG.<sup>149</sup> Primarily, the right to issue instructions must be observed.<sup>150</sup> Therefore, principles of objectivity and efficiency must be applied. Furthermore, only specific activities that do not affect the core area may be used.<sup>151</sup> The principle of legality (Article 18, B-VG) must also be applied in this case. One of the important elements is

140 Cf. § 18, paragraph 1 Stmk GemO.

141 Berka, 2021, p. 256.

142 Article 120a, paragraph 1 B-VG.

143 Article 120b, paragraph 1 B-VG.

144 Article 120b, paragraph 2 B-VG.

145 Article 120c B-VG.

146 Berka, 2021, p. 257.

147 Grabenwarter and Holoubek, 2022, pp. 372–374.

148 Grabenwarter and Holoubek, 2022, p. 380.

149 VfSlg 14.473/1996 – Austro Control GmbH.

150 Holoubek, 2014, p. 446.

151 VfSlg 14.473/1996, VfSlg 3685/1960; cf. Raschauer, 2000, pp. 25–26.

the possibility of controlling these legal entities. The Federal Minister has the right to provide instructions to entrusted entities. Nevertheless, Article 20, paragraph 2 B-VG also applies to the case of lending.<sup>152</sup> Accordingly, legislators may exempt bodies from instruction under certain conditions.<sup>153</sup>

### **3.7. Private sector administration (*Privatwirtschaftsverwaltung*) and sovereign administration (*Hoheitsverwaltung*)**

Pursuant to Article 17, B-VG, regional and local authorities may act within the framework of the private sector administration and in areas that are not assigned to them under Articles 10–15 of the Federal Constitution.<sup>154</sup>

The distinction between sovereign and private sector administrations primarily concerns administrative action.<sup>155</sup> This distinction refers to the legal means by which an action is performed. Sovereign administrative action must be based on law and manifest itself in the form of rulings, ordinances and the charge of public administrative bodies.<sup>156</sup>

Private sector administration is understood as the action of administrative bodies, particularly in the area of civil law. In this area, authorities act primarily through contracts and other instruments available to individuals. However, so as not to disadvantage private parties, various obligations also apply to this area, particularly the equal protection clause and other fundamental rights. This is called the ‘fiscal validity of fundamental rights’ (*Fiskalgeltung der Grundrechte*).<sup>157</sup> The distinction between sovereign and private sector administration is central and has implications for numerous administrative areas.<sup>158</sup>

### **3.8. Conclusion**

A special feature of the Austrian constitutional law is that the organization of the administration is precisely regulated by the Constitution. The Federal, State and Municipal administrations are regulated exhaustively.<sup>159</sup> In Austria, the Federal President has no real political influence on day-to-day affairs, although he/she is vested with numerous powers under the Constitution.

The Federal Chancellor and Federal Government are the pillars of politics. Considering the expedient ‘reduction of complexity’, the Austrian Federal Constitution also includes the government as the supreme administrative body in the administration and does not make any distinction here.<sup>160</sup>

152 Grabenwarter and Holoubek, 2022, p. 377–379.

153 Grabenwarter and Holoubek, 2022, p. 372.

154 Nonetheless, the Federal requirement for consideration must be observed; cf. Grabenwarter and Holoubek, 2022, pp. 456–457.

155 Raschauer, 2021, p. 271.

156 Raschauer, 2021, p. 274.

157 Grabenwarter and Holoubek, 2022, p. 454.

158 Grabenwarter and Holoubek, 2022, p. 456.

159 Holoubek, 2014, pp. 455–458.

160 Holoubek, 2014, p. 438.

The most distinctive feature of the Municipal administration is its establishment as a self-governing body that can act autonomously within its own sphere of action. While the administration at the Federal and State levels is strictly hierarchical, self-administration of the Municipality is its counterpart; it is not bound by instructions (but is subject to supervision).<sup>161</sup>

Since certain organizational matters also lie within the competence of States, there are sometimes inconsistent regulations. For example, in some States, the mayor is elected directly by the people, whereas other State Constitutions provide for election by the Municipal council.

In administrative law scholarship in Austria, there has never been any question of whether non-sovereign administration is also counted as part of the Federal administration. The handling and special nature of the public law binding of private sector administrations are central topics of scholarly debate.<sup>162</sup>

This distinction is important because, for example, the principle of legality cannot be applied to the private administration of the economy; rather, in these cases, the Federal State, as a private entity, is subject to the principle of legality.<sup>163</sup>

Legal protection is the most important principle in administrative activity and is the reason why the ‘privatisation’ of the Federal State by means of lending and outsourcing is increasingly being considered in administrative law. Nevertheless, the Constitutional Court has determined that certain areas are not amenable to lending.<sup>164</sup>

## 4. Current challenges in public administration

The Austrian People’s Party (ÖVP) and Green Party (*Grünen*), which existed in Austria at the time, dedicated the first point of its government programme to the topics of ‘constitution, administration and transparency’.<sup>165</sup> Upon closer examination, this aspect contains major and important efforts to deal with current challenges in public administration. Two recurring points stand out: freedom of information and transparency.

### 4.1. Freedom of information

As described above, the Austrian Constitution includes an interplay between the duty to provide information and official confidentiality. According to this, anybody entrusted with tasks of the Federal, State and Municipal administration, as well as bodies of other corporations under public law, must provide information on matters

161 Holoubek, 2014, pp. 457 and 458.

162 Leitl-Staudinger, 2011, p. 208.

163 Lukan, 2018, p. 102.

164 Leitl-Staudinger, 2011, p. 208.

165 Government programme 2020–2024, pp. 10–12 [Online]. Available at: <https://www.bundestkanzleramt.gv.at/dam/jcr:7b9e6755-2115-440c-b2ec-cbf64a931aa8/RegProgramm-lang.pdf> (Accessed: 13 December 2022).

within their sphere of activity.<sup>166</sup> However, these bodies are obliged to maintain confidentiality regarding facts that have become known to them exclusively in the course of their official activities, if their secrecy is required to maintain public peace, order and security, comprehensive national defence, foreign relations, in the economic interest of a public body, for the preparation of a decision, or in the overriding interest of the parties.<sup>167</sup>

The Federal Act on the Duty to Provide Information (*Auskunftspflichtgesetz*<sup>168</sup>) provides detailed information at the Federal level. The original purpose of this act was to extend the norm of the Federal Ministries Act 1986 (*BMG – Bundesministeriengesetz* 1986 BGBl 1986/76) regarding the provision of information by Federal ministries to all bodies of the Federal Government and self-governing bodies regulated by Federal law.<sup>169</sup> Regarding the bodies of State and Municipalities, individual States enact state information acts.<sup>170</sup>

The Federal Act on the Duty to Provide Information stipulates that the aforementioned bodies must provide information, which does not conflict with any duty of confidentiality. A written oral or telephone request for information requires compliance within eight weeks, but a request does not have to be complied with if it is wilful.<sup>171</sup> If information is not provided, the person requesting the information shall be issued with a ruling upon request, which shall provide possibility of legal recourse to the person requesting the information.<sup>172</sup>

At this point, a paradigm shift has been attempted for years by replacing the legal situation with comprehensive freedom of information. This idea originates from the programmes of the current and<sup>173</sup> previous governments,<sup>174</sup> and various motions by opposition parties.<sup>175</sup>

An obligation to provide information cannot currently be derived from Article 20, B-VG, but from the case law of ECHR, which derives—under certain conditions—from Article 10 of ECHR.<sup>176</sup> Wieser recognises two information regimes in Austria: ‘general’

166 Article 20 Abs 4 B-VG.

167 Article 20 Abs 3 B-VG.

168 Auskunftspflichtgesetz BGBl 1987/287.

169 RV 41 BlgNR 17. GP, 3.

170 For example in Styria: Steiermärkisches Auskunftspflichtgesetz LGBl 1990/73.

171 An applicant wilfully acts ‘if he or she uses the resources of the Freedom of Information Act solely to pursue purposes that the Freedom of Information Act does not serve to protect’. VwSlg 8155 F/2006.

172 §§ 1–5 Auskunftspflichtgesetz.

173 Government programme 2020–2024, pp. 17–20 [Online]. Available at: <https://www.bundestkanzleramt.gv.at/dam/jcr:7b9e6755-2115-440c-b2ec-cbf64a931aa8/RegProgramm-lang.pdf> (Accessed: 13 December 2022).

174 Government programme 2013–2018, p. 91 [Online]. Available at: [https://www.politik-lernen.at/dl/OkopJKJKonmKNJqx4KJK/131216\\_Regierungsprogramm\\_Barrierefrei\\_pdf](https://www.politik-lernen.at/dl/OkopJKJKonmKNJqx4KJK/131216_Regierungsprogramm_Barrierefrei_pdf) (Accessed: 14 December 2022).

175 Cf. IA 61/A BlgNR 27. GP.

176 EGMR 8.11.2016, 18030/11, Magyar Helsinki Bizottság v. Hungary; referring to the national level VwGH 29.05.2018, Ra 2017/03/0083.

obligation to provide information according to Article 20, paragraph 4 B-VG, which applies to ordinary citizens and the duty to provide information according to Article 10, ECHR, which applies to ‘watch dogs’ such as journalists or NGOs.<sup>177</sup>

The right to information can be understood as a democratic necessity, since information is ‘the basis of meaningful political participation’.<sup>178</sup> It is often remarked that in international comparison, Austria lags behind in this respect because no other European Constitution provides for official secrecy.<sup>179</sup> However, the significance of international rankings should not be overestimated.<sup>180</sup> According to Bertel, Austria is not the only country with a constitutional restrictive transparency obligation. The decisive factor for Bertel is the formulation of a simple law.<sup>181</sup>

In February 2024, an amendment to the Federal Constitution was adopted, which will come into effect in September 2025. As a result, Article 20, paragraph 3 to 5 B-VG, i.e. official confidentiality and the duty to provide information, will be repealed, and a new Article 22a will be enacted.

The new Article 22a B-VG introduces two significant changes. Firstly, per paragraph 1 it establishes active information obligations, and secondly, in paragraph 2 it grants the right to information as stipulated.

According to paragraph 1, organs entrusted with federal or state administration, organs of ordinary jurisdiction, administrative courts, the Supreme Administrative Court, and the Constitutional Court are required to publish information of general interest in a manner accessible to everyone. This excludes information subject to confidentiality under paragraph 2. Only Municipalities with fewer than 5,000 inhabitants are exempt from this provision. This amendment marks a systemic change, as previously information was only provided upon request, whereas now it must be actively made available—constituting an active information obligation.

Paragraph 2 of Article 22a B-VG provides a norm comparable to the previous duty to provide information. It stipulates that everyone has the right to access information from organs entrusted with federal or state administration. Again, information subject to confidentiality is exempt. The distinctive feature of this norm compared to the previous legal situation is that it represents a constitutionally guaranteed subjective right, thus establishing a fundamental right to access information. According to paragraph 3, this right to access information also extends to certain enterprises.

177 Wieser, *Auskunftspflicht – neue Dynamik im Sog grundrechtlicher Entwicklungen*, (unpublished paper).

178 Barth and Ennöckl, 2019, p. 177.

179 Barth and Ennöckl, 2019, p. 178.

180 Austria, for example, is ranked second to last in the RTI (right to information) ranking, while Afghanistan, Mexico and Serbia occupy the first three places. The Global Right to Information Ranking has placed Austria in penultimate (134/135) position [Online]. Available at: <https://www.rti-rating.org/country-data/> (Accessed: 14 December 2022).

181 Bertel, *Informationsfreiheit im europäischen und internationalen Vergleich*, (unpublished paper).



As with the previous legal framework, the legal details regarding the new Article 22a B-VG will be laid through simple legislation—the Freedom of Information Act (IFG – Informationsfreiheitsgesetz BGBl I 2024/5).

#### 4.2. Transparency

Concurrently, the demand for freedom of information—not least due to past and acute scandals—a higher degree of transparency is demanded, which is also reflected in the current government programme in several ways.<sup>182</sup>

For example, there is a plan to reform electoral law, strengthen the audit rights of the Court of Auditors and ensure transparency in the appointment of staff to companies with public participation.<sup>183</sup>

With the introduction of Article 20, paragraph 5 B-VG, a concrete amendment to the Constitution has already been introduced to promote transparency.<sup>184</sup> The amendment stems from the idea of preventing hidden financing of studies and surveys by ministries, thus ensuring a higher degree of transparency.<sup>185</sup> The regulation stipulates that all bodies entrusted with Federal, State and Municipal Government tasks must publish studies, expert opinions and surveys commissioned by them, including their costs, in a manner accessible to everyone as long as it is not covered by official secrecy pursuant to Article 20, paragraph 3 B-VG, which is still in force.<sup>186</sup> It should be noted that the relatively new Article 20, paragraph 5 B-VG will also be abolished with the aforementioned constitutional amendment, which introduces freedom of information. Information falling under this provision will subsequently be covered by the new Article 22a B-VG.

Ultimately, it remains to be seen what will be left of the abovementioned plans upon completion of the term of office of the current government. These proposed approaches have also been addressed by previous governments and have not produced any major results to date. It should also be considered that the government programme was drafted at a time when no one could foresee the problems the government would face. The government programme, which was finalised at the turn of 2019 and 2020, could not foresee the global pandemic, the Ukraine war or the economic crisis fuelled by both aspects. It is therefore a matter of waiting and being considerate.

182 Government programme 2020–2024, pp. 10–20 [Online]. Available at: <https://www.bundestkanzleramt.gv.at/dam/jcr:7b9e6755-2115-440c-b2ec-cbf64a931aa8/RegProgramm-lang.pdf> (Accessed: 13 December 2022).

183 Government programme 2020–2024, pp. 16, 18, 20 [Online]. Available at: <https://www.bundestkanzleramt.gv.at/dam/jcr:7b9e6755-2115-440c-b2ec-cbf64a931aa8/RegProgramm-lang.pdf> (Accessed: 13 December 2022).

184 IA 2509/A BlgNR 27. GP.

185 IA 2509/A BlgNR 27. GP, p. 4.

186 BGBl I 2022/141.

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