

# Constitutional Court of Austria Activity Report 2023



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Verfassungsgerichtshof  
Österreich



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# From the Archives



Cartoon on the paralysis of the Constitutional Court, in: Der Morgen. Wiener Montagblatt, 29 May 1933, p. 9. The Constitutional Court was accommodated in the parliament building from 1923.

## The Incapacitation of the Constitutional Court in 1933

Ninety years ago, Austria experienced a coup d'état in three acts. The first act unfolded in March 1933, when the Federal Government of Federal Chancellor Engelbert Dollfuß exploited a procedural crisis within the National Council – all three of its presidents had resigned one after the other following a controversial vote – and prevented the National Council from reconvening, using police powers to do so. The Dollfuß government euphemistically referred to this as the “self-elimination” (Selbstausschaltung) of the National Council. After this, Federal Chancellor Dollfuß governed using emergency regulations issued on the basis of the Wartime Economy Enabling Act 1917 (Kriegswirtschaftliches Ermächtigungsgesetz, KWEG 1917), which had been absorbed from the monarchy into the legislation of the Austrian Republic. Historians once called this the “belated curse of the Habsburg Monarchy on republican Austria”, because by then, application of the Wartime Economy Enabling Act 1917 was most probably unconstitutional in most cases: Firstly, because the emergency regulations contained provisions which had the effect of amending the Constitution, and secondly, because the extraordinary economic circumstances brought about by the First World War (the end of these economic circumstances was yet to be declared by Federal law) in large part no longer prevailed. The regulations were ripe for repeal by the Constitutional Court.

The Social Democrat Vienna Regional Government (Wiener Landesregierung), which was fiercely opposed to the Federal Government, along with a number of courts, brought proceedings for review of the constitutionality of those regulations

before the Constitutional Court. As the end of April 1933 approached, 17 such applications had been received. In seven cases, the Constitutional Court had already asked the Federal Government to submit written observations. It was expected that these cases would be heard in June 1933. The Federal Government searched feverishly for a way to avoid the proceedings. Senior civil servant Robert Hecht – legal advisor to Federal Chancellor Dollfuß and himself a substitute member of the Constitutional Court – came up with an ingenious plan to paralyze the Court. Mr. Hecht – whose idea it had initially been to make use of the Wartime Economy Enabling Act 1917 – suggested that all members and substitute members of the court who had been proposed by the ruling parties or the Government should resign so that the quorums needed for the Constitutional Court to hear cases could no longer be achieved. Under section 7 of the Constitutional Court Act (Verfassungsgerichtshofgesetz, VfGG) one presiding member and at least eight voting members needed to be present to conduct proceedings for the review of the constitutionality of laws and regulations. As the Constitutional Court was composed of 14 members and six substitute members at that time, a full 12 of these judges would have to resign for Hecht's plan to succeed. In any event, he was instructed to conduct the necessary negotiations with willing Constitutional Court judges behind the scenes.

The first resignation came on 18 May 1933. Adolf Wanschura, who had been proposed as a Constitutional Court judge by the National Council, stepped down and explained his decision in

PROPOSED BY		CONSTITUTIONAL COURT JUDGE				
			resigned before the regulation	affected by the regulation of 23 May 1933	resigned after the regulation	remaining
Fed. Gvmt.	President	Durig				Durig
	Vice-President	Froehlich				Froehlich
	Member	Adamovich sen.				Adamovich sen.
	Member	Bernegger			Bernegger	
	Member	Engel				Engel
	Member	Kulisch				Kulisch
	Member	Pockels				Pockels
	Member	Walker				Walker
	Substitute Member	Ganzwohl			Ganzwohl	
	Substitute Member	Hecht			Hecht	
	Substitute Member	Pilz			Pilz	
NC	Member	Eckel		Eckel		
	Member	Freundlich		Freundlich		
	Member	Wanschura	Wanschura			
	Substitute Member	Palla		Palla		
	Substitute Member	Praxmarer	Praxmarer			
FC	Member	Lenhoff		Lenhoff		
	Member	Mathias	Mathias			
	Member	Prey		Prey		
	Substitute Member	Berger		Berger		
		20	3	6	4	7

Effects of the resignations and the “Constitutional Court Formation Regulation” on the composition of the Constitutional Court (according to Zavadil, Ausschaltung, 72)

a wordy article in the Reichspost, a newspaper with links to the Christian Social Party. He condemned the applications for constitutional review as politically motivated and insinuated that in ruling on those applications, the members proposed by the Social Democrats would “virtually act as their own judges”. He also called for constitutional reform to remove the “party-political influence” over the composition of the Constitutional Court in the form provided for in the 1929 amendment to the Constitution (Bundes-Verfassungsgesetz, B-VG). Substitute member Ludwig Praxmarer (appointed on the proposal of the National Council) and member Friedrich Mathias (appointed on the proposal of the Federal Council) followed Wanschura’s example on 20 and 22 May 1933, respectively. That meant that all of the constitutional judges proposed directly by the Christian Social Party had resigned.

The second act of the coup d’état began on 23 May, when the Federal Government issued a regulation founded on the Wartime Economy Enabling Act 1917 amending the rules for summons of constitutional judges to hearings of the Constitutional Court set out in section 6 of the Constitutional Court Act. This regulation, referred to as “Besetzungsverordnung” (Constitutional Court Formation Regulation) provided that members and substitute members appointed on the proposal of the National Council or Federal Council could participate, and be summonsed to participate, in sessions and hearings of the Constitutional Court only if all other members and substitute members proposed by the National Council or the Federal Council were also members of the Constitutional Court.

As since the 1929 amendment of the Constitution, the legislature had been permitted to propose six members and three substitute members (National Council: three members and two substitute members; Federal Council: three members and one substitute member), while the Federal Government could propose the President, Vice-President, six members and three substitute members, a total of nine judges (six members and three substitute members) were affected by the regulation. As three of those members had already resigned, this meant – applying the Constitutional Court Formation Regulation – that others could no longer be summonsed to participate in cases.

With eleven members remaining, it was in principle still possible for the new Constitutional Court to sit in the required formation, despite the first resignations and the Constitutional Court Formation Regulation. But then came four further resignations: member Matthias Bernegger (23/24 May) and substitute members Ernst Ganzwohl (25 May), Adolf Pilz (27 May) and Robert Hecht (28 May), all of whom had been nominated by the Federal Government. This reduced the number of judges to be summonsed to seven.

On 31 May 1933, in response to this incapacitation of the Constitutional Court, President Ernst Durig and the three judges rapporteur Vice-President Georg Froehlich, Ludwig Adamovich senior and Friedrich Engel, called on Federal President Wilhelm Miklas to inform him of what had occurred and how constitutional justice had been impacted. The Federal President summonsed Hecht to a meeting the following day and had a

“lengthy debate” with him. Also in late May and early June, the representative bodies of professors at the faculties of law at the universities of Vienna, Graz and Innsbruck passed a resolution calling on the Federal President to use his “constitutional authority” to counteract the “destruction of the rule of law”. Professor Alfred Verdross, Vice-Dean of the Faculty of Law in Vienna, and Professor Theodor Rittler from Innsbruck discussed the situation with the Federal President on 2 June 1933. A communiqué about this resolution originally promised by the Federal President was ultimately not published because the Minister of Education issued an instruction to the contrary to the universities.

The Constitutional Court’s June session, with a reduced case list, was rescheduled for 22 June. The Court could now only hear cases relating to pecuniary claims against and between territorial authorities (Kausalgerichtsbarkeit) and to conflicts of jurisdiction of courts and administrative authorities (Kompetenzgerichtsbarkeit) because at that time only a President and four voting members were needed to be present to hear those cases. President Durig summonsed the Vice-President and the five remaining members to the public hearing and session. President Durig’s position was that – although the regulation may have been unlawful – the Constitutional Court Formation Regulation was in force and he was required to apply it until it was repealed by the competent authority, that is to say the Constitutional Court. During discussion of the first case (a taxation-related action brought by the Vienna Regional Government against the Federation under Article 137 of the Constitution) President Durig expressed his “concerns regarding the proper composition” of the Constitutional Court and asked whether the Court should review the Constitutional Court Formation Regulation *ex officio*. The Court, on a motion proposed by judge rapporteur Ludwig Adamovich senior, seconded these concerns. The proceedings against the Federation were suspended and the Court resolved to review the Constitutional Court Formation Regulation. At the same time, in an unprecedented *obiter dictum* remark towards the end of the statement of grounds, it was pointed out that eight voting members were required for proceedings to review the constitutionality of a regulation and that the Constitutional Court had resolved to “call on the Federal President to endeavour to ensure that the Constitutional Court is enabled to perform its duties under the Constitution in full as soon as possible” (A 1/33/10). Adamovich senior had originally demanded that an enforcement order be issued to the Federal President, before changing his mind and requesting only that an official note be submitted to the Federal President. Reference to that note was also included in the resolution. Engel in particular had strongly supported this, because “If the public hears nothing of this, that would mean that this great moment has found a very small Constitutional Court”.

Also on 23 May, horrified at Wanschura’s Reichspost article, Federal President Miklas wrote a private note: “I am utterly shaken [...] Is this still a country under the rule of law? First they destroyed Parliament and now comes the destruction of the Constitutional Court, the last anchor of constitutional law!! [...] If the Constitutional Court too is eliminated, there is no longer any limit to the Government’s dictatorial rule by emergency regulation other than the acquiescence of the Federal President who has been rendered deliberately powerless in the Federal Constitution by the all-powerful parties. How can any a catholic conscience endure this?!” In late May, after receiving the official note from the Constitutional Court, Federal President Miklas wrote to the Federal Government, requesting it to submit proposals for the vacancies “insofar as these [...] are the responsibility of the Federal Government”. In the meantime, he had taken the Constitutional Court’s position in numerous discussions, but was apparently ultimately intimidated by the government into “acquiescence”. It goes without saying that the Federal Government gave no response. It proposed no new members and did not submit observations in preliminary proceedings relating to further challenges to the Constitutional Court Formation Regulation brought before the Constitutional Court.

These proceedings ended with the Constitution of 1934 – the third act of the coup d’état – or rather with the transition to the 1934 Constitution (Verfassungsüberleitung). A new Federal Supreme Court (Bundesgerichtshof) was established and a constitutional senate given powers to decide on the lawfulness of regulations (Article 169 of the 1934 Constitution). However, all regulations issued prior to 1 July 1934 on the basis of laws authorizing the executive to issue regulations amending legislation – i.e. the regulations issued under the Wartime Economy Enabling Act 1917 – were excluded from review [section 51 of the Constitutional Transition Act (V-ÜG 1934)]. Cases pending before the Constitutional Court were transferred to the Federal Supreme Court. The proceedings for review of the constitutionality of the Constitutional Court Formation Regulation were finally terminated in October 1934.

The legal debate around the paralyzation of the Constitutional Court and the Court’s response to it was multifaceted at the time and remains so to this day. There is a spectrum of opinions ranging from the position that the Constitutional Court Formation Regulation was absolutely null and void to the view that the rump Constitutional Court acted consistently in the only way possible. We will not go into detail regarding those opinions here. A common understanding unites them all, however: It would only have been possible to resolve this situation if the necessary political will had been present. Very little can be done when policymakers act with malicious intent. Ultimately, democracy depends on the acceptance of the constitutional rules by those who participate in it.

Josef Pauser

Further reading:

Neda Bei, Die Zerstückelung des Verfassungsgerichtshofes vor der Junisession 1933, Juridikum 2009, 32–36; Klaus Berchtold, Verfassungsgeschichte der Republik Österreich, volume 1: 1918–1933, 1998; Wilhelm Brauner, Österreichische Verfassungsgeschichte, 11th edition, 2009; Kurt Heller, Der Verfassungsgerichtshof. Die Entwicklung der Verfassungsgerichtsbarkeit in Österreich von den Anfängen bis zur Gegenwart, 2019; Stephan G. Hinghofer-Szalkay, Richterliche Rechtsnormverrichtung im Notstand. Verfassungsgerichtsbarkeit und Notverordnung, Beiträge zur Rechtsgeschichte Österreichs 2018, 357–370; Peter Huemer, Sektionschef Robert Hecht und die Zerstörung der Demokratie in Österreich. Eine historisch-politische Studie, 1975, 178–192; Christian Neschwara, Verfassungsgerichtsbarkeit im Spannungsfeld von Regierung und Parlament: Österreichs Verfassungsgerichtshof 1918–1934, ZRG GA 2013, 435–453; Thomas Olechowski, Die Ausschaltung des Verfassungsgerichtshofs 1933, in Bernhard Hachleitner et al. (eds), Die Zerstörung der Demokratie, 1933, 156–159; Markus Vašek, Die Gesetzesprüfungskompetenz des VfGH und ihr rechtlicher Schutz, Juristische Blätter 2015, 213–224; Robert Walter, Die Ausschaltung des Verfassungsgerichtshofes im Jahr 1933, in: Verfassungsgerichtshof der Republik Österreich (eds), Verfassungstag 1997, 1998, 17–34; Ewald Wiederin, Münchhausen in der Praxis des Staatsrechts, Gedenkschrift Robert Walter, 2013, 865–888; Ewald Wiederin, Die Verfassungsgerichtsbarkeit in Österreich 1919–1939, Beiträge zur Rechtsgeschichte Österreichs 2022, 276–286; Thomas Zavadi, Die Ausschaltung des Verfassungsgerichtshofs 1933, geisteswissenschaftliche Diplomarbeit Universität Wien 1997.

*Leitenschef Dr. Robert Hecht,  
Präsident des Verfassungsgerichtshofes*

*Alte*

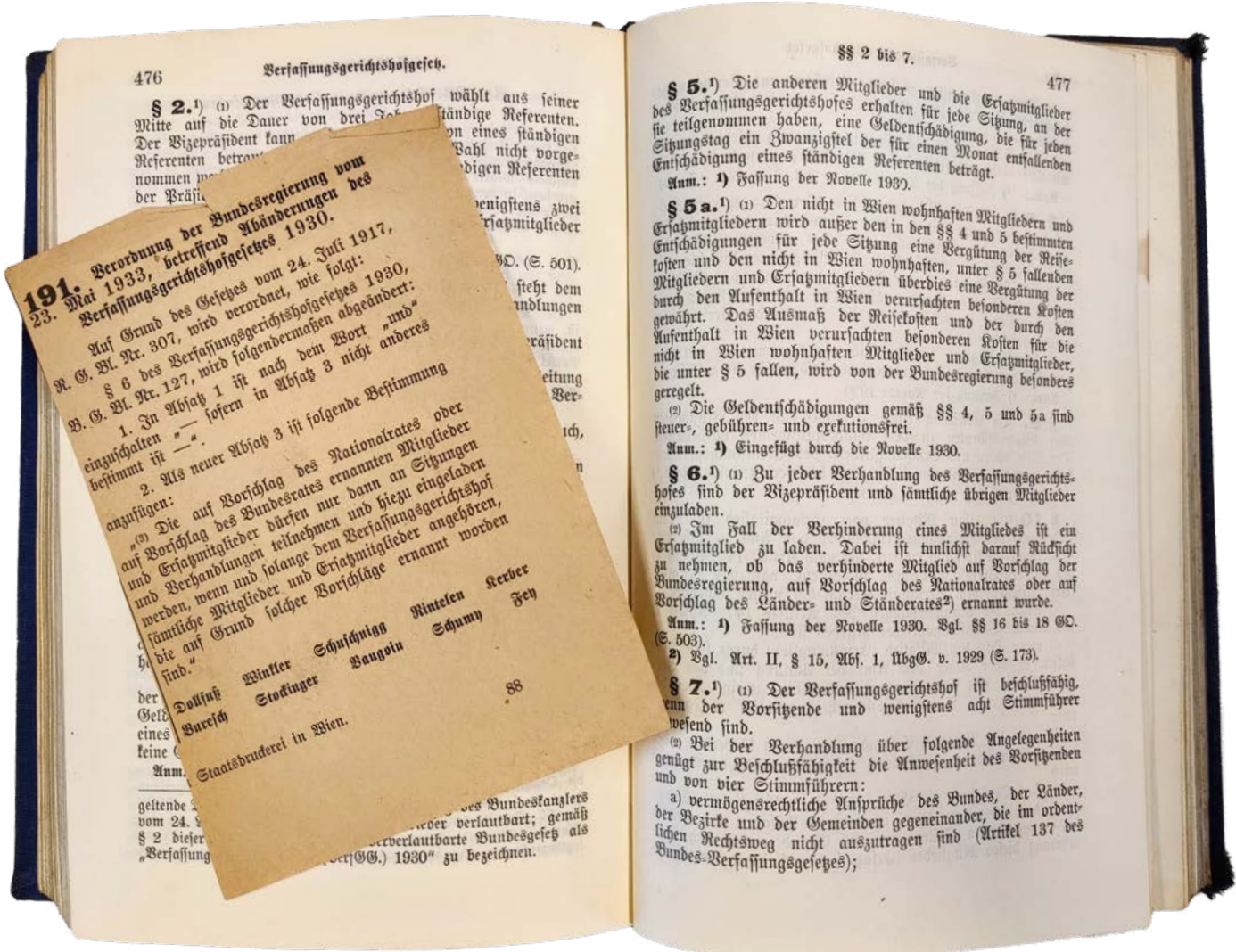
*Präsident des Verfassungsgerichtshofes  
in  
Wien.*

*Ich habe mich mitgeteilt, dass ich auf  
meine Amt als Ersatzmitglied des Ver-  
fassungsgesetzgebungsorgans verzichte.*

*Dr. Robert Hecht*

*Wien, am 28. V. 1933.*

Letter of resignation from Dr Robert Hecht, 28 May 1933  
(Records of the Presidium of the Constitutional Court)



Ludwig Adamovich sen. / Georg Froehlich (ed.), Die österreichischen Verfassungsgesetze des Bundes, 3rd ed., Vienna 1931, 476 f., with the "Constitutional Court Formation Regulation" inserted in the VfGG and cut out of the BGBl. (copy of the old VfGH-library shelfmark A II-65)