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NULLITY APPEAL TO PRESERVE THE INTEGRITY OF THE LAW

THE UNDERLYING STATUTORY REGULATION

I will start by highlighting the provision of the Austrian Code of Criminal Procedure pertaining to the subject of this piece:

Section 23 subsection 1: The Procurator General's Office may, either on its own initiative (*ex officio*) or by order of the Federal Minister for Justice, file a nullity appeal to preserve the integrity of the law against judgments handed down by the criminal courts that are based on a violation or the incorrect application of the law, and against any unlawful order made or procedure followed by a criminal court, even if the court's decision has become *res judicata*, and in cases where the persons entitled to exercise an appellate instrument or seek legal redress did not do so within the time period stipulated by law.

Section 23 subsection 1a: If so requested by the Legal Protection Commissioner, the Procurator General's Office may lodge a nullity appeal to preserve the integrity of the law against the unlawful execution of a coercive measure by the criminal investigation authorities or the unlawful ordering of a coercive measure and a decision by the Public Prosecutor's Office concerning the conclusion of investigation proceedings, provided a person entitled to seek legal redress has not sought such legal redress or if a person entitled to seek legal redress cannot be identified.

Section 23 subsection 2: Where the Public Prosecutor's Office considers the filing of an appeal to be warranted, these cases must be presented to the Chief Public Prosecutor's Office on its own initiative (*ex officio*). The Chief Public Prosecutor's Office will then decide whether to forward such cases to the Procurator General's Office. Any other individual is otherwise entitled to seek the filing of a nullity appeal to preserve the integrity of the law.

GENERAL

The nullity appeal to preserve the integrity of the law (hereinafter referred to as a *Wahrungsbeschwerde*, or *preservation of integrity appeal*) is an extraordinary legal remedy. The purpose of this legal remedy, which is available in matters prosecuted both by the state and at the request of a private plaintiff, is to ensure the proper administration of criminal justice in the interest of the general public, irrespective of the interests of the actual parties involved. At its core is the aim of standardising the administration of the law in areas in which the ordinary legal process does not ultimately lead to the Supreme Court of Justice, as well as avoiding future infringements of the law. As already shown above, Section 23(1) of the Austrian Code of Criminal Procedure (hereinafter: CoCP) sets out the criteria which must be met for a *Wahrungsbeschwerde* to be filed. It states that the Procurator General's Office may, either on its own initiative (*ex officio*) or by order of the Federal Minister for Justice, file a nullity appeal to preserve the integrity of the law against judgments handed down by the criminal courts that are based on violation or incorrect application of the law, and against any unlawful order made or procedure followed by a criminal court, even if the court's decision has become *res judicata*, and in cases where the persons entitled to exercise an appellate instrument or seek legal redress did not do so within the time period stipulated by law.

The sole right to file such an appeal lies with the Procurator General's Office and it is at the Office's due discretion as to whether a *Wahrungsbeschwerde* will be filed. The Procurator General's Office is a public prosecution authority headed by a single person (monocratic) located in the same building as the Supreme Court of Justice in Vienna. The Office is directly responsible to the Federal Minister for Justice, which means that the manner in which it conducts its activities (*Dienstaufsicht*) is supervised by the Federal Ministry for Justice, but not the lawfulness and exercise of discretion (*Fachaufsicht*) in relation thereto. The core duty of the Procurator General's Office is to participate in appellate proceedings before the Supreme Court of Justice, in which it does not take the role of a prosecuting authority. The Office represents the state's interest in the administration of justice (cf. Section 22 CoCP); it does not supervise the activities of (Chief) Public Prosecutor's Offices, neither in terms of how they work nor the lawfulness thereof (no *Dienstaufsicht* and/or *Fachaufsicht*), nor

does it conduct criminal proceedings. In addition to its other duties, it is a key function of the Procurator General's Office to review whether a *Wahrungsbeschwerde* should be filed.

CONTESTABLE MATTERS

Only decisions rendered by criminal courts, that is to say judgments, rulings, and orders, as well as failures to act and other procedures may be contested using a *Wahrungsbeschwerde*. It cannot be used in the context of civil law and administrative courts. It does not matter whether the judicial decision being contested by the Procurator General's Office is *res judicata*.

Criminal courts generally render decisions in the form of judgments, rulings, and orders. Pursuant to Section 35(1) CoCP, the criminal court uses a judgment first and foremost in main or appeal proceedings to rule on the guilt and sentence of the defendant, as well as on any private law claims, or to order measures depriving an individual of their liberty. Orders are court decisions with external effect that are not rendered in the form of a judgment. Pursuant to Section 35(2) CoCP, they are issued in all other matters unless an order is issued merely for the continuation of proceedings or the announcement of a court decision. A *Wahrungsbeschwerde* can ultimately be brought for any unlawful procedure undertaken by a criminal court. The word 'procedure' is not defined in the Austrian Code of Criminal Procedure. The prevailing opinion is that it definitely includes procedural orders, such as the unlawful scheduling of a trial (cf. Schroll/Oshidari, *WK StPO* § 23 margin no. 2 with further references). Supreme Court of Justice case law also holds that a procedure initiated by a person or office of the criminal justice system must exist in order for it to be possible to file a *Wahrungsbeschwerde* (13 Os 62/08). It is not just actions that can be contested by means of a *Wahrungsbeschwerde*. A failure to take the required action (e.g. the failure to provide notification as required by law or the failure to provide a preceding file or at least a copy of the judgment in which the decision is taken to revoke a conditional suspension (*Widerrufsentscheidung*) may constitute an infringement of the law (cf. 13 Os 52/09k). This means that procedures attributable to the court such as reasoning based on an incorrect interpretation of the law may be brought before the Supreme Court of Justice with a *Wahrungsbeschwerde*.

ADMISSIBILITY CRITERIA

There is no statutory time limit on when a *Wahrungsbeschwerde* can be filed. There is also no need to provide notification of it. In theory, a *Wahrungsbeschwerde* can be filed at any time in the future. Since a *Wahrungsbeschwerde* is decided on the basis of the legal situation at the time of the decision concerned, its purpose is not to adapt decisions rendered in the past to new legal opinions (cf. 13 Os 39/06v). This means that the Procurator General's Office cannot review past decisions with a view to amending them in line with the latest developments in jurisprudence and the administration of law.¹

A matter generally becomes *res judicata* once a decision has been rendered by a court of last instance or against which there is either no legal redress permitted or the time limit for filing an appellate instrument has expired. This does not apply to the *Wahrungsbeschwerde*. It can be filed either before or after a decision has become *res judicata*, or even at the same time as ordinary appellate instruments. It does not, however, have a suspensive effect, which means that the decision in question can be enforced without any restriction.

By the same token, there is no need for the parties involved in the proceedings and who are entitled to appeal to exhaust the appeals process. It also allows for errors made by district courts and regional courts of first instance to be taken directly to the Supreme Court of Justice. Finally, it is of no relevance whether one of the parties to the proceedings believes they have been disadvantaged in some way. A *Wahrungsbeschwerde* is entirely independent of the interests of the parties involved. This means that it can also be filed if it has no effect on the defendant or it is no longer possible to pursue a particular offender for reasons such as the defendant is now deceased.

INSTIGATION BY THE LEGAL PROTECTION COMMISSIONER

Section 23(1a) cited above was added to the Austrian Code of Criminal Procedure in 2011. According to the legislative materials available (Explanatory Notes to the Government Bill 918 Supplements to the National Council 24th Legislative Period 11), its purpose is to increase the transparency of the activities

¹ WIESINGER 2022: 47.

of the Public Prosecutor's Offices and ensure that the individual rights of the persons concerned are protected. It is now possible to contest decisions made by the Public Prosecutor's Office using a *Wahrungsbeschwerde*, provided that these decisions pertain to measures that have been ordered unlawfully or to the conclusion of the investigation proceedings. The Procurator General's Office can only file a *Wahrungsbeschwerde* for such matters if so requested by the Legal Protection Commissioner.

LEGAL PROTECTION COMMISSIONER

Pursuant to Section 47a(1) of the Austrian Code of Criminal Procedure, the Federal Minister for Justice must appoint a Legal Protection Commissioner and the required number of deputies for a period of three years on the basis of a joint proposal made by various institutions so as to ensure special legal protection under the Code of Criminal Procedure. The Legal Protection Commissioner is an independent body of the state *sui generis* and acts in the capacity of an official party. The Legal Protection Commissioner and their deputies must have special knowledge and experience in the field of fundamental rights and civil liberties, and must have worked for at least five years in a profession requiring a law degree and in which experience in criminal and criminal procedural law can be obtained. Serving (active) judges and public prosecutors, lawyers appearing on the list of lawyers and other individuals excluded from serving as a juror or lay judge or those who cannot be called to serve as one, may not be appointed. The Legal Protection Commissioner is independent in carrying out the duties incumbent upon the position and cannot be instructed. They are bound by official secrecy. The Commissioner's four deputies (at present) have the same rights and duties. Following my retirement, I have held the position of Deputy Legal Protection Commissioner since 1 September 2023.

ADMISSIBILITY

A *Wahrungsbeschwerde* filed at the instigation of the Legal Protection Commissioner is secondary to other legal remedies. It can only be filed when persons entitled to file a legal remedy fail to do so or it is not possible to identify such

a person who would be entitled to do so. Nor can it be used once a court has ruled on the procedure followed by the Public Prosecutor's Office. An unsuccessful appeal cannot be remedied using a *Wahrungsbeschwerde* filed at the instigation of the Legal Protection Commissioner. Pursuant to Section 23(1) CoCP, the *Wahrungsbeschwerde* can be brought against a potentially unlawful court decision.²

CONTESTABLE MATTERS

Pursuant to section 20(1) CoCP, the Public Prosecutor's Office is in charge of the investigation proceedings. Pursuant to Section 98(1) CoCP, it must issue orders to the criminal investigation authority as required, provide a justification for said orders and do so in writing – in urgent cases after having first issued the order verbally. This written order, which is kept in the investigation file, is the subject of the *Wahrungsbeschwerde* in question here. The specific investigative measures are detailed in Chapter Eight of the Austrian Code of Criminal Procedure. These include, by way of example, surveillance, seizure, undercover investigations over an extended period of time or orders pertaining to fictitious transactions not related to controlled substances or counterfeit money.

Another way to contest decisions made by the Public Prosecutor's Office using a *Wahrungsbeschwerde* relates to the conclusion of the investigation proceedings. This concerns decisions to discontinue the investigation proceedings (Section 190 CoCP), to discontinue the investigation proceedings due to the minor nature of the matter (Section 191 CoCP), and to discontinue in cases where multiple offences are being prosecuted (Section 192 CoCP), yet only to the extent that the victim has not petitioned for the investigation to be continued or the victim is unknown and the offence is to be heard before a single judge at the district or regional court (cf. Schroll/Oshidari, *WK StPO* § 23 margin no. 24).

The law also stipulates that cases in which the criminal investigation authority unlawfully carries out a coercive measure can also be contested by the *Wahrungsbeschwerde*. Following rulings handed down by the Constitutional Court, in Austria some legal scholars argue that action taken by the criminal investigation

² WIESINGER 2022:60.

authority cannot currently be contested using a *Wahrungsbeschwerde* for lack of a legal remedy to which the person concerned would be entitled (cf. Schroll/Oshidari, *WK StPO* § 23 margin no. 21). On the other hand, another group of legal scholars takes the view that the execution of a coercive measure by the criminal investigation authority may be subjected to a legal review by way of a nullity appeal to preserve the integrity of the law following an amendment to Article 94 of the Austrian Federal Constitution (cf. Ratz, *WK StPO* § 292 margin no.18/2).³ No judicial decisions regarding this application exist at this time.

FILING A ‘WAHRUNGSBESCHWERDE’

To ensure that the Procurator General’s Office is informed of the cases suitable for filing a *Wahrungsbeschwerde*, Section 23 CoCP outlines various courses of action.

First of all, the Procurator General’s Office can take action on its own initiative (*ex officio*). This often happens in instances where, for example, infringements of the law committed by the courts come to light during appeal proceedings and need to be addressed by way of a *Wahrungsbeschwerde*. The Procurator General’s Office may also be tasked by the Federal Minister for Justice with filing a *Wahrungsbeschwerde*. The Federal Ministry for Justice has a considerable overview of potential cases and often refers cases for review.

And, as already mentioned, the Legal Protection Commissioner can instigate a *Wahrungsbeschwerde* by the Procurator General’s Office as per Section 23(1a) CoCP.

Section 23(2) CoCP effectively provides for a control mechanism whereby Public Prosecutor’s Offices must conduct a review (on their own initiative) to determine if the law was infringed in any way during a particular set of criminal proceedings. This provision of the CoCP stipulates that any subsequent recommendation to take action must be submitted to the Chief Public Prosecutor’s Office for a decision on whether to refer the matter to the Procurator General’s Office.

Finally, the last sentence of Section 23(2) CoCP enables any other individual to ask for the Procurator General’s Office to file a *Wahrungsbeschwerde*. This

³ Likewise WIESINGER 2022: 59, 64 et seq.

means that even persons not involved the proceedings, and not just the defence counsel, convicted offender or a court that identifies a procedural infringement of the law at a later point in time, can instigate a review by the Procurator General's Office (cf. Ulrich in Schmölzer/Mühlbacher, *StPO* 1 § 23 margin no. 11; Hinterhofer/Oshidari, *Strafverfahren* [Criminal Proceedings] margin no. 11.74).

It is at the due discretion of the Procurator General's Office as to whether to file a *Wahrungsbeschwerde*. In view of the fact that filing such an appeal is a right held exclusively by the Procurator General's Office, any statement it issues in which it decides not to file a *Wahrungsbeschwerde* does not constitute an official notice (*Bescheid*) and cannot be appealed (*Österreichische Juristenzeitung* 1959, 166, *Juristische Blätter* 1956, 229). This also means that the defendant does not have the right to have knowledge of the files held by the Procurator General's Office (*Österreichische Juristenzeitung* 1962, 54). By the same token, any decision not to file a nullity appeal to preserve the integrity of the law cannot entail any official liability claims for merely financial losses.

EFFECT OF A 'WAHRUNGSBESCHWERDE'

It is the Supreme Court of Justice that rules on a *Wahrungsbeschwerde* in a public court hearing. If the Supreme Court of Justice finds the *Wahrungsbeschwerde* to be substantiated, it is required by Section 292 fourth sentence CoCP to hold that a law was infringed by the contested order or procedure, by the proceedings conducted or by the judgment rendered in the criminal matter at hand. According to Section 292 fifth sentence CoCP, this ruling does not usually have any effect on the defendant. And here we see the very essence of the *Wahrungsbeschwerde* come to the fore, namely that it exists to identify unlawfulness with a view to standardising and correcting the administration of law and assisting in the further development of criminal law as a whole, in the hope of preventing errors of this kind from being reproduced in the future.

In addition to the aim of establishing uniformity in the law, the *Wahrungsbeschwerde* also looks at guaranteeing the principle of a fair trial in individual cases, specifically in cases where the defendant was negatively impacted by a legally deficient decision. It is with this in mind that the last sentence of Section 292 CoCP stipulates that the Supreme Court of Justice may, at its discretion, acquit

the defendant, impose a lesser sentence or, as dictated by the circumstances, order the proceedings to be conducted again if the defendant was sentenced by such a judgment found to be invalid.

A ruling on a specific effect will only be made if the infringement of the law so identified had a negative impact on the defendant. Considering that Section 292(2) CoCP stipulates a prohibition of worsening a sentence on appeal (*reformatio in peius*), any specific effect may only be in the defendant's favour. It is very difficult to abstractly define what is meant by a negative impact (disadvantage). A negative impact always exists in cases where the defendant was potentially put in a worse position as a result of the infringement of the law.⁴ There is a considerable amount of casuistry on the question of negative impact. The specific effect is examined on a case-by-case basis.

DECISION OF THE SUPREME COURT OF JUSTICE

As per the last sentence of Section 292 CoCP, in cases where a specific effect is recognised, the Supreme Court of Justice (within its discretion provided in the law) will rule on whether to acquit the defendant, impose a lesser sentence or order the proceedings to be conducted again. The Supreme Court of Justice also makes amendments to awards made to persons having joined the proceedings as private parties. The Supreme Court of Justice treats court orders in the same way as judgments. When a specific effect is recognised, it decides on a case-by-case basis whether to amend the order in question or to declare it invalid and refer the matter back to the lower courts, either in full or in part. The same applies to procedures followed by the criminal courts. In the overwhelming number of cases, the specific effect is that the decision is declared invalid and referred back, especially when you consider that it is rarely possible to modify factual procedures. It sometimes makes sense to reverse a procedure by declaring part of the proceedings null and void. Doing this reverts the proceedings back to the position they were in before the unlawful procedure was made (cf. Ratz, *WK StPO* § 292 margin no. 35).

⁴ WIESINGER 2022: 117.

CONCLUSION AND THE
'WAHRUNGSBESCHWERDE' IN PRACTICE

As outlined above, the *Wahrungsbeschwerde* is a tried-and-tested as well as appropriate extraordinary legal remedy which exists to correct legal errors, to standardise the administration of law, and to remove specific disadvantages experienced by the defendant as a result. I worked at the Procurator General's Office from July 1997 to December 2006 as Advocate General (Referent), from January 2010 to November 2016 as group leader (First Advocate General), and from December 2016 until retirement at the end of August 2023 (reaching the statutory retirement age of 65) as Procurator General. During this time, an average of three to four hundred cases each year (fluctuating of course within this time) were referred to the Procurator General's Office for it to consider whether to file a *Wahrungsbeschwerde*. The majority of these referrals were at the request of parties involved in the proceedings pursuant to the last sentence of Section 23(2) CoCP. An average of between 80 and 120 *Wahrungsbeschwerde* appeals were brought before the Supreme Court of Justice each year. The success rate is very high, at more than 90 per cent.



I wish Péter Polt all the very best for the future, much success and, above all, the best of health.

REFERENCES

WIESINGER, Bernd (2022): *Die Nichtigkeitsbeschwerde zur Wahrung des Gesetzes*. Wien: MANZ. Online: <https://doi.org/10.5771/9783214164843>