The Austrian Constitutional Court: Kelsen's Creation and Federalism's Contribution?

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Résumé :

En concordance avec le questionnaire à la base de ce numéro spécial, le présent article traite des rapports entre la Cour constitutionnelle et le fédéralisme en Autriche. Il met cet aspect en lumière vis-à-vis de la perception largement partagée d'un modèle constitutionnel autrichien keynésien par essence. Ce faisant, nous postulons que ce modèle ne peut être entièrement compris que si l'on conjugue les enjeux du fédéralisme passés et actuels.

Abstract :

In line with a standardized question sheet for this special issue, this article discusses the relationship between the Constitutional Court and federalism in Austria. It highlights this aspect vis-à-vis the common perception of an inherently Kelsenian nature of the Austrian model of constitutional adjudication. In so doing, it argues that this model can only be fully understood by taking the both the historical as well as the current impact of federalism into account.

1.Introduction

The Austrian Constitutional Court (*Verfassungsgerichtshof* or *VfGH*) has risen to global prominence[1] due to its pioneering role[2]. As the prototype of concentrated constitutional review it may at first glance appear to be the very manifestation of Kelsenian legal theory. Hans Kelsen would even refer to the constitutional court as his favorite child[3]. However, Kelsen was not given license to write a constitution purely according to his legal theoretical assumptions. Rather, he was able to promote some of his concepts in the context of political compromises giving rise to Austria's 1920 federal constitution[4]. Key to this was the federal structure of the new Republic. Transforming political conflicts between the federal and federated entities into legal ones proved essential to Kelsen's *pièce de résistance* and left a lasting mark. Kelsen's legal scholarship eventually shifted the focus of scholarly attention to the hierarchy of legal norms[5]. The ongoing Europeanization of Austria's constitution has more recently led to another shift in favor of fundamental rights. Nonetheless, federalism remains a key aspect of Austrian constitutional adjudication to this day while the constitutional court continues to serve as an irreplaceable pillar of federalism in the framework of Austrian constitutional law.

2. Federalism in Austria: Key principles and their role in the rise of constitutional adjudication

According to its federal constitution, Austria is a *Bundesstaat* - a federal state[6]. For Kelsen,

this presented a challenge to the then-dominant theory of federal states: The new constitutional order had clearly not arisen from a compact of sovereign states but rather evolved from the decentralization of an originally highly centralized state[7]. However, the federated entities or *Länder* had old roots preceding not only the Republic but even modern Austrian statehood[8]. They had a history as direct subjects of the Holy Roman Empire (*reichsunmittelbar*) albeit *de facto* united by a common Habsburg prince, ruling as archduke, duke or count etc. respectively. The gradual waning of the Holy Roman Empire allowed for the no less gradual evolution of Austrian statehood which neither started with the Treaties of Westphalia in 1648 nor culminated in them. Several factors like the military threat posed by the Ottoman Empire hastened the evolution of the *Ländergruppe* or grouping of (imperial) territories ruled by the Habsburgs into an efficient *de facto* state with common military and administrative structures. By the time of the dissolution of the Holy Roman Empire in 1806 it was this *de facto* already existing state rather than the various Austrian territories, that became sovereign. The new formal common bond was the Austrian *Kaiserreich* or Empire. It had been preemptively promulgated in 1804[9] but already reflected political and diplomatic realities[10].

The events of 1918 could be interpreted as dissolving these common bonds and thus giving sovereignty to the *Länder*[11] (sometimes translated as states or provinces, neither of which fully captures the German meaning). Yet, it was not the imperial predecessors to the *Länder*, the *Kronländer,* which formed the basis of successor states. The latter were rather based on ethnicity, resulting in newly created ethnocentric states like Czechoslovakia or Poland. The remaining parts not claimed by them or by the victorious powers (quite literally "*Ce qui reste c'est l'Autriche*"[12]) had a mostly German speaking population seeking ethnic self-determination, originally as part of the new German Republic[13]. Kelsen would later recall "rapidly progressing movements for self-determination by the Czechs and the Southern Slavs" as having forced German-speaking Austrians to "carpenter a makeshift house to call their own."[14].

The *Länder* officially declared their "accession"[15] to this new state[16] of "German" Austria. This was, however, not generally accepted as the legal foundation for "German" Austria's statehood. The Provisionary National Assembly "noted" these declarations of accession by the *Länder* as well as *Kreise* and *Gaue* (roughly translatable as districts)[17]. Hans Kelsen in particular did not consider the federal state as a product of accessions by sovereign states[18]. In this, he is in line with prevailing legal scholarship today even though the opposite interpretation used to hold considerable scholarly sway[19]. The legal ideal type painted by Kelsen should be contrasted with the political reality at the time for a more complete picture: It is highly uncertain whether the Austrian federal (or rather at the time central) government could have exercised effective control over Austrian territory without substantial concessions to the *Länder*. The constitution[20] names the *Länder* in their German alphabetic order: Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg and Vienna. Two of the *Länder* are atypical in important respects: Vienna constitutes both a *Land* and the capital city while not constituting a former *Kronland* (the *Länder* in imperial Austria)[21]. Burgenland equally lacks a pre-Republican tradition as a *Land* as it was created in 1918 from mostly German speaking parts of western counties[22] of the Kingdom of Hungary[23].

The link between the Austrian system of constitutional adjudication and Kelsenian legal theory is well established[24]. This influence of legal theory can be boiled down to one key notion: If a hierarchy of legal norms can be scientifically ascertained and constitutional law identified as a level within this hierarchical order[25], a court can serve as the objective guardian of the highest level of legal norms[26]. While more than one possible interpretation of constitutional norms may

exist, Kelsen stressed that this applies to any judicial application of legal norms27. Older prominent calls for constitutional review of Acts are also noteworthy28. However, the concrete necessities of federalism would form the bedrock of constitutional politics, which allowed these ideas to be enshrined in constitutional law. In other words, the political intent of the fathers of the Austrian constitution employed a partially Kelsenian frame in the process of constitutional law making provided by Kelsen himself. Their constitutional intent was, however, not necessarily logically derived from Kelsenian legal theory29 and relied on political compromises between the major parties.30 The idea of implementing a constitutional court as legal mediator between the federal government and the *Bundesländer*31 (forthwith *Länder*) itself predates the Republic and points to a different source: Karl Renner, who had envisaged it for a multi-ethnic Austrian federation in 191732 and later called on Hans Kelsen to advise on the drafting of the new constitution. Moreover, a constitutional court was installed before the Constitution of 1920 (B-VG) and in 1919, given the authority to check bills of the *Länder*33 for possible violations of the federal constitution. This was the result of a compromise which became necessary due to stark resistance by the *Länder* to an earlier approach towards ensuring the compliance of their laws with federal constitutional law: Assent by the federal government34. Yet such a one-sided constitutional review mechanism not only ran counter to a tradition of equality between the Acts of the former *Reich* and the *Länder*.35 It also faced a greater political struggle between the two dominating political parties on the legal relationship between the Acts of the federal and federated entities and more broadly on the question of federalism.36

In the process of crafting of the B-VG, the debates on a potential competence of the Constitutional Court to review the constitutionality of laws were embedded in debates on the federal structure of the Republic. Representatives of the federal government pursued the competence to initiate a constitutional review procedure of the *Länder*'s Acts. They ultimately settled for equality in the form of mutual access to judicial control of legislation, empowering the *Länder* to initiate a review of Federal Acts as well37. According to the report by the Constitutive National Assembly's Constitutional Committee, the Constitutional Court was to be the "clip" holding together the federal state (*Klammer des Nationalstaates*)38 – a term that can still be found in today's legal commentaries on the B-VG39. However, the overwhelming number of cases of constitutional review currently stems from review procedures related to the protection of constitutional rights of individuals or review procedures initiated by the Court or other courts40. This reflects a stable pattern with little change over the course of the last two decades41.

A key characteristic of the Austrian model of federalism is its highly centralized judicial structure42. This includes the Constitutional Court's dual capacity as the guardian of constitutional law of both the *Bund* and the *Länder*43. It is therefore not just the guardian of the constitution, but the *guardian of multiple constitutions*44, a key difference to the German model of judicial federalism. By serving as the constitutional court for the *Länder* as well, the Constitutional Court's role as a clip for the federal state is reinforced: Diverging interpretations and any sense of hierarchy between separate constitutional courts of the *Bund* and the *Länder* are avoided.

The B-VG does not regulate the Constitutional Court in conjunction with the "ordinary" judicial branch *(ordentliche Gerichtsbarkeit*) but rather in conjunction with the (Supreme) Administrative Court (*Verwaltungsgerichtshof*) as well as the recently introduced lower-level administrative courts45. This is a direct result of path dependency stemming from Austria's 1867 constitution. It had established the *Reichsgericht* or Imperial Court46 as a predecessor to the Constitutional Court, serving as a special administrative court in its role as guardian of fundamental rights47. The

successful linking of this traditional competence with constitutional review allowed the expansion of the Court's power to review legislation beyond the concerns of federalism. The now-dominant protection against violations of individual fundamental rights did not figure prominently in the creation of the Austrian model of constitutional review[48]. It was however tied to the jurisdiction of the former Imperial Court which the Constitutional Court inherited[49]. The decisive subcommittee discussion demonstrates concerns to "take from (the Constitutional Court) the right to also decide on (an unconstitutional norm it would have to apply)."[50] .The impact of fundamental rights protection was therefore mostly in an indirect one.

Access to constitutional review of Acts has since been gradually expanded. A major overhaul of the Austrian constitutional system in 1929 introduced the right of the other two highest courts of the Austrian legal system, the Supreme Court and the (Supreme) Administrative Court, to initiate a review procedure of unconstitutional legislation which they would otherwise have to apply[51]. Only recently has this right been expanded to all courts[52]. The access of individuals to constitutional review was revolutionized with the (narrow) right of individual complaint against unconstitutional legislation (*Individualantrag auf Gesetzeskontrolle*) introduced in 1975[53]. The recently introduced *Gesetzesbeschwerde* further increased individual access to constitutional review. A review procedure of unconstitutional legislation, constituting the legal basis of a case before first instance ordinary (*ordentliche*, a.k.a. civil and criminal) courts, can now be directly initiated by a concerned party before the Constitutional Court[54].

The division of jurisdiction between the *Bund* and the *Länder* follows a comparatively complex list[55] which was completed during a major revision of the Austrian constitution in 1925[56]. The length and detail of this list serves to remove most of the decentralizing potential of the general clause in favor of the *Länder*[57]. The B-VG provides for the *Länder* to have their own constitutions but regulates their core normative content including voting rights, the existence and basic structure of regional parliaments (*Landtag*), the legislative procedure and the regional government[58]. The Austrian model of federalism is not one of parallel or autonomous governance by the *Bund* and *Länder*. Rather, it is based on a model of intense interaction exemplified by the system of indirect federal administration (*mittelbare Bundesverwaltung*)[59], which strongly enhances the actual importance of the *Länder.* In order to ensure effective governance by the *Bund* according to this model, the federal government or individual federal ministers can issue directives binding the governor of the *Land* (*Landeshauptmann*)[60]. Indirect federal administration, is thus a double-edged sword from the perspective of federalism: It strongly increases the actual importance of the *Länder* while creating an area where a hierarchical rather than equal relationship ensues.

The basic federal structure has largely remained intact since 1920 albeit interrupted by two starkly different unconstitutional periods. In 1933, the federal government's active abuse of the Republic's own constitutional structure (see below) enabled homegrown authoritarianism to effectively replace the democratic system. This was followed by the occupation[61] by Nazi Germany in 1938 lasting until 1945. The current challenges facing the Constitutional Court have not been driven by federalism, but rather by challenges posed by the European legal area[62]. It is this Europeanization and the new focus on fundamental rights resulting thereof which is currently driving the most remarkable recent development of the Court's case law[63]. Finally, one self-assessment by the Constitutional Court is noteworthy: In Austrian constitutional law, *Gesamtänderungen* or changes of the basic character of the federal constitution require a special procedure including a referendum (*Volksabstimmung*)[64]. Even constitutional Acts and provisions can be unconstitutional and become

subject to constitutional review if they fail to meet this requirement65. To assess whether such a change took place, several key principles have been put forward, including the rule of law and federalism. It is the former, not the latter, to which the Constitutional Court has strongly tied the qualified constitutional protection of its own existence66.

3. Organization of the Constitutional Court

The composition of the Constitutional Court fails to reflect its key role the as clip between the federal and the federated levels67. However, it fits the more general constitutional pattern of executive rather than judicial federalism. Nonetheless, the original Kelsenian constitution, had come very close68 but failed to achieve "full parity" between the National and the Federal Council of the Austrian parliaments in this regard69. Current constitutional law no longer bears any semblance to such a parity: Six out of twelve judges are proposed by the federal government, as compared to three members proposed by the National and Federal Councils each. Out of a total of six substitute judges only one is nominated by the Federal Council70 (*Bundesrat*, a legislative organ representing the *Länder*)71. While mathematically possible (twelve members, nine *Länder*) there is neither any guarantee of each federated entity being represented nor is it currently the case72. Only three judges and two substitute judges have to have their permanent residence outside of Vienna73.

The detailed provisions on the organization and procedure of the Constitutional Court are constitutionally delegated to a "special federal Act"74. This Act's (*Verfassungsgerichtshofgesetz* 1953 or *VfGG*) general procedural provisions provide for the invitation of all concerned parties to oral arguments75. Moreover, procedures with special relevance for the federal dimension of constitutional review contain additional provisions ensuring the invitation of the federal or federated parties to oral arguments76 or the summation to submit prior written statements77. Moreover, the Act defers to the Austrian Civil Procedure Act (*Zivilprozessordnung* or ZPO) for all procedural questions not regulated in the Act itself78. The *VfGG* also provides for the members of the Constitutional Court without permanent residence in Vienna to be compensated for the expenses for traveling to and staying in Vienna. The extent of such compensation, however, is to be regulated by the federal government rather than by representatives of the *Länder*79. The financing of the Court is regulated in the *Bundesfinanzgesetz*80 and therefore tied to the constitutional procedure for passing federal legislation81.

Neither the composition of the Court nor its financing therefore strongly reflect federalist tendencies. This is however mitigated by a lack of centralizing judicial activism82 stemming from the Court's focus on serving as a neutral arbiter. This is reflected in its approach to cases on the distribution of competences between the *Bund* and the *Länder* and resulted in a special brand of historical interpretation to settle questions on the competences of the *Bund* and the *Länder*: the *Versteinerungstheorie* or petrification theory83. Such an approach sharply diverges from the Court's more dynamic approach to human rights, being tied to the Court's strong commitment to interpreting the law as intended by its framers in questions relating to federalist power relations. Its composition and financing therefore do not translate into a self-perception by the Court as a centralizing agent. Rather, the Court seeks to limit itself the *applying* positive law on the distribution of competences as originally intended and therefore guard the constitutional compromise as intended rather than having *either* a centralist or a decentralist effect.

4. Competences of the Constitutional Court and the effects of its

decisions

The Austrian federal constitutional system generally relies on an *ex post* review of legal norms by the Constitutional Court. An important exception was made to prevent a conflict of norms created by the *Bund* and the *Länder*. In cases of planned legislation and administrative acts, potential normative conflicts between the federal and the federated levels can be preemptively prevented by referring the matter to the Constitutional Court[84]. Once passed, Acts by both the *Bund* and the *Länder* are subject to constitutional review which is complicated by a highly fragmented federal constitution. It is important to note that despite the existence of the B-VG, there is no single constitutional document. The original constitutional document had already awarded constitutional rank to other Acts[85]. Furthermore, it provided for the possibility not only to pass further Constitutional Acts but also to elevate individual provisions of a “simple” or non-constitutional Act to constitutional rank[86]. The resulting degree of fragmentation has been reduced from its earlier peak to a still-impressive number of approximately fifty Acts with constitutional rank and more than a hundred Acts containing provisions with constitutional rank[87].

The right to refer a matter to the Constitutional Court has expanded since the B-VG’s inception. Originally strongly focused on mutual review by the *Bund* and the *Länder* of the constitutionality of each other’s Acts, the focus on individual complaints has been considerably strengthened. As outlined above, the inception of the current federal constitution brought with it an indirect review system: appeals against administrative decrees leading to an *ex officio* review the Act or the ordinance the decree was based upon. As described above, access to constitutional review was gradually expanded, but was never limited to Acts. Rather, the concentration of review power with the Constitutional Court applies to all (domestic) legal norms of general and abstract nature. This applies not only to the review of the constitutionality of Acts (*Gesetze* or Acts of the *Bund* and the *Länder*) created by the legislative branch but also to the legality of ordinances (*Verordnungen* Acts of the *Bund* and the *Länder*) created by the administrative brand, even rendering exceptions to this model of centralized review unconstitutional[88]. The jurisprudential roots for this centralized review system of all legal norms of a general and abstract nature predate the Republic[89]. This model of centralization even includes international (state) treaties (*Staatsverträge*) which are procedurally tied to either Acts[90] or ordinances[91].

This concentration of review powers with one state organ (the Constitutional Court) played a decisive role in the *coup d’état* of 1933/1934 whose masterminds[92] were keen on upholding the appearance of a legal transition. To this end, the Federal Government issued ordinances which were manifestly unconstitutional but not null. Contrary to the Federal Government, the Land of Vienna was politically dominated by Social Democrats rather than the Christian Social (Welfare) Party. Preempting the *Land*’s legal action, the Constitutional Court was effectively rendered inoperative[93]. As the concentration of review powers was still in force, no court could strike down the ordinances in question. The Achilles heel of the entire system of normative review was dealt a fatal blow. It may therefore appear peculiar at first glance that Austria would return to such a system after 1945. However, according to currently prevailing legal opinion, the Constitutional Court cannot be rendered inoperative (*Ausschaltung*) by a legal norm lower in the hierarchy of norms than the ones establishing its position as organ of normative review[94].

While the review of all general and abstract legal norms is concentrated in the Constitutional Court, the role of the Court with regards to individual and concrete legal norms differs sharply. Judgements of ordinary (*ordentliche*, a.k.a. civil and criminal) courts are never subject to review

by the Constitutional Court. This used to be contrasted by the constitutional right of appeal against administrative decrees that violated constitutional rights[95]. As described above, this appeal system proved to be a driving force behind the development of Austrian model of constitutional adjudication. However, the recent implementation of lower-level administrative courts called this appeal system into question.[96] It was ultimately remodeled[97] into an appeal (*Beschwerden*) system against the judgements of lower-level administrative courts. Following the traditional model, such an appeal is directed either at the constitutionality of the judgement itself or at the legality of the general and abstract legal norm it was based upon[98].

Another competence of the Constitutional Court is the decision on conflicts of competences between the *Bund* and the *Länder* as well as conflicts amongst the *Länder*[99]. While only a tiny fraction of open cases before the Court stem from this procedure[100], it can still be considered as key to the Austrian model of federalism. Moreover, the Constitutional Court exercises judicial oversight over all direct elections, spanning the *Bund* and the *Länder* as well as the municipalities[101]. Also spanning these levels (as well as municipal associations) is the *Kausalgerichtsbarkeit* which allows the Court to settle pecuniary claims against them in cases in which no alternative access to a court exists[102]. Another important competence from the vantage point of federalism is the *Staatsgerichtsbarkeit* by which members of the governments of both levels can be held accountable for violations of the law, which can result in their impeachment and even the loss of political rights.[103]

The most important effect of Constitutional Court judgments concerns unconstitutional Acts. Contrary to the later German model, these are not declared null, but rather rescinded (*aufgehoben*)[104], "destroyed" in the sense of the theory of norms. In Kelsenian terminology, the Court thereby serves as a "negative legislator"[105]. This entails two important "positive" aspects of legislative power: On the one hand, in the case of Acts, the Court can choose between different courses of action. Firstly, it can either rescind them *ex nunc* or set a deadline for rescission of up to 18 months[106], thus giving the legislature of the *Bund* or the *Länder* time to act and thereby balancing the constitutionality of the law with possible negative effects on legal governance. Secondly, legal provisions rescinded by an Act declared unconstitutional by the Court become effective again unless the judgment pronounces otherwise[107], thus effectively granting the Court considerable leeway[108]. Parliamentary oversight of the Constitutional Court would run counter to the Kelsenian design of Austrian constitutional adjudication, though parliament can exert some influence through its role in the nomination process of justices.

5. Conclusion

The Austrian Constitutional Court is widely dubbed Kelsenian for good reasons. However, neither the Court's genesis nor its structure can be explained without the impact of federalism, which is still apparent in its competences. In this sense the title of this paper may well be reversed: Federalism's creation and Kelsen's contribution. The Kelsenian theoretical framework eventually proceeded to outshine the federal aspect, helped by the outsized role of Hans Kelsen in Austrian constitutional scholarship and his revolutionary legal (and political) theory. It is in turn increasingly outshined by the third decisive factor which was omitted in the title: Fundamental rights protection, which had suffered from a comparatively weak role in both the constitutional monarchy and in the First (and early Second) Republic. This aspect was gradually reinforced by additional constitutional revisions. Thoroughly revitalized by the ECHR, a new challenge arose with the EU Charter of Fundamental Rights after the Lisbon Treaty. Nonetheless, the Constitutional Court continues to serve in its

original primary function as part and parcel of a European system of constitutional courts.

The implications of the Court’s traditional Kelsenian self-perception as guardian of the hierarchy of positive legal norms rather than as guardian of a legitimate relationship of various levels of governance now extend beyond federalist power relations: It has facilitated the process of adapting to the new role of European and international law as well as to the new role of European courts. Its role in a network of interconnected guardians of human rights protection and European legal governance has not undone its role in the domestic system of federalism. To this day, it remains the “clip” holding the federal state together, transforming political disputes between the federal and the federated levels into legal matters. Today, this role has been complemented by the Court’s membership in a wider European “clip” of courts which provide an increasingly similar role for a legally integrated Europe.

Notes

1 Ewald Wiederin would go so far as to write that “(a)lmost the entire world concurs: As a function, constitutional review has many roots, as an institution it has exactly one father whose name is Hans Kelsen” (translation by the author). See Wiederin (E.), ‘Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht‘, in Simon (T.) and Kalwoda (J.), *Schutz der Verfassung*, Berlin, Duncker & Humblot, 2014, p. 283-315 (p. 283, translation by the autor). Consider also Besselink (L.F.M.), ‘The Proliferation of Constitutional Law and Constitutional Adjudication, or How American Judicial Review Came to Europe After All’, *Utrecht Law Review*, vol. 9, n° 2, 2013, p. 19-35 (p. 19), who refers to a “continental European Kelsenian model.”

2 The somewhat parallel albeit slightly earlier Czechoslovak development is noteworthy not least due to the close connection between Austrian and Czech jurisprudence at the time (see Öhlinger (T.), ‘Verfassungsgerichtsbarkeit und parlamentarische Demokratie’, in Schäffer (H.), König (K.) and Ringhofer (K.), *Im Dienst an Staat und Recht*, Vienna, Manz Verlag, 1983, p.125-148 (p.128)) but also due to the lack of comparable federalism in Czechoslovakia. The latter federal dimension including a constitutional court had in fact been proposed by the German minority in 1919 but rejected by the Czech and Slovak majority in favor of a centralist structure, which contributed to the Czechoslovak Constitutional Court’s relative weakness. See Osterkamp (J.), ‘Verfassungshüter ohne politischen Rückhalt. Das tschechoslowakische Verfassungsgericht nach 1920 im Vergleich mit Österreich‘, *Beiträge zur Rechtsgeschichte Österreichs*, vol. 1, n° 2, 2011, p. 275-290 (p. 279, 281ff, 287f).

3 His “liebstes Kind”, as reported by a friend of Kelsen, the legal philosopherMarcic (R.), *Verfassungsgerichtsbarkeit und Reine Rechtslehre*, Vienna, Verlag Franz Deuticke, 1966, p. 58.

4 For a concise overview of these compromises, the underlying political assumptions and the strongly diverging political views on federalism consider Ermacora (F.), *Quellen zum Österreichischen Verfassungsrecht (1920). Die Protokolle des Unterausschusses des Verfassungsausschusses samt Verfassungsentwürfen*, Vienna, Verlag Berger, 1967, p.9-26.

5 A core concept to Kelsenian approaches to law which had been developed by Hans Kelsen and Adolf Merkl in the decade prior to the drafting of Austria’s federal constitution in 1920. Key publications were penned by Merkl (A.J.), ‘Das doppelte Rechtsantlitz‘, p.893-911 and *idem*, ‘Das

Recht im Lichte seiner Anwendung', in KLECATSKY (H.), MARCIC (R.) and SCHAMBECK (H.), *Die Wiener rechtstheoretische Schule*, vol. 1, Vienna, Verlag Österreich, 2010, p.955-982; 'Das doppelte Rechtsantlitz' and 'Recht im Lichte seiner Auslegung' though Merkl himself believed the key ideas already implied in KELSEN (H.), *Hauptprobleme der Staatsrechtslehre*, Tübingen, J.C.B. Mohr (Paul Siebeck), 1911, see MERKL (A.J.), 'Der Begriff des Gesetzes in der Reichsverfassung', in MAYER-MALY (D.), SCHAMBECK (H.) and GRUSSMANN (W.D.), *Adolf Julius Merkl. Gesammelte Schriften*, vol. 1, Duncker & Humblot, 1993, p.423-424 (p.423).

6 Article 2 paragraph 1 B-VG (Short for the *Bundes-Verfassungsgesetz*, the main constitutional document). Unless otherwise noted, all Articles and paragraphs of cited Acts refer to the wording in force on July 15, 2017). Note that the original title of the B-VG in BGBl 1920/1 included "*womit die Republik Österreich als Bundesstaat eingerichtet wird*" or "by which the Republic of Austria is established as a federal state."

7 KELSEN (H.), *Österreichisches Staatsrecht*, Tübingen, Scientia Verlag, 1923, p.165.

8 For the exceptions of Vienna and Burgenland see below.

9 LEHNER (O.), *Österreichische Verfassung- und Verwaltungsgeschichte*, Linz, Trauner Verlag, 2007, p.77-91, 119-130, 161-171.

10 The wording in PGS 20/1804 (PGS 1804 II, 71-77) is noteworthy for referring to the Russian and French precedents. The text (p. 72) also refers to the "indivisible property rights to our independent kingdoms and states." (translation by the author) Austria's first modern constitution of 1848 would however explicitly refer to an Imperial "State" or "Kaiserstaat" in both its title and its first paragraph, see Allerhöchstes Patent vom 25. April 1848, PGS 49/1848.

11 There were diverging opinions on this question amongst Austrian political parties in 1920. The Christian Social (Welfare) Party largely stressed the sovereignty of the *Länder* while the Social Democrats considered only the National Assembly to have *pouvoir constituant*. See ERMACORA (F.), *Quellen zum Österreichischen Verfassungsrecht (1920). Die Protokolle des Unterausschusses des Verfassungsausschusses samt Verfassungsentwürfen*, Vienna, Verlag Berger, 1967, p.11-12.

12 A famous saying attributed to Clemenceau during the Peace Conference of Saint-Germain in 1919. For its impact on the Austrian discussion it is noteworthy that it was chosen as the title of one of the main scholarly reflections of the First Republic: MADERTHANER (K.), *...der Rest ist Österreich: Das Werden der Ersten Republik*, Vienna, Carl Gerold's Sohn Verlagsbuchhandlung KG, 2008 (2 volumes).

13 Article 2 of the Gesetz vom 12. November über die Staats- und Regierungsform von Deutschösterreich, StGBl 1918/5.

14 Kelsen (H.), 'Die Entstehung der Republik Österreich und ihrer Verfassung', in KLECATSKY (H.R.), *Die Republik Österreich*, Vienna, Verlag Herder, 1968, p. 9-76 (p. 11, translation by the author with slight deviations from a strictly literal approach).

15 For a comprehensive overview see ERMACORA (F.), 'Der Föderalismus in Österreich', in LEIBHOLZ (G.), *Jahrbuch des öffentlichen Rechts der Gegenwart*, vol. 12 (N.F.), Tübingen, J.C.B. Mohr (Paul Siebeck), 1963, p.221-248 (p.228).

16 *De facto* and also in the Kelsenian sense of not being logically derived from the prior legal structure. Consider KELSEN (H.), 'Die Verfassung der Republik Deutschösterreich', *Jahrbuch des öffentlichen Rechtes der Gegenwart*, vol. 9, 1920, p. 245-290 (p. 247ff). See also Article 1 of the Gesetz vom 21. Oktober 1919 über die Staatsform, StGBl 1919/484. This Act is also noteworthy for the relationship of the terms German Austria (*Deutschösterreich*) and Republic of Austria and for renouncing the earlier declaration of constituting a part of the German Empire in Article 3.

17 StGBl 1918/23.

18 KELSEN (H.), *Österreichisches Staatsrecht*, Tübingen, Scientia Verlag, 1923, p.97-102.

19 STORR (S.), 'Österreich als Bundestaat', in Härtel (I.), *Handbuch Föderalismus – Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt*, Berlin and Heidelberg, Springer Verlag, 2012, p.671-695 (p. 672f).

20 Article 2 paragraph 2 B-VG.

21 For their relative importance after the "Ausgleich," the state-transforming compromise with the Kingdom of Hungary of 1867, consider § 8 paragraph 3 of the Staatsgrundgesetz vom 21. Dezember 1867 betreffend die allen Ländern der österreichischen Monarchie gemeinsamen Angelegenheiten und die Art ihrer Behandlung, RGBl 1867/146.

22 Pozsony, Moson, Sopron and Vas. Note, however, that Article 27 of the Treaty of Trianon provided for a larger part of Western Hungarian territory to be transferred to Austrian sovereignty. This was not fully enforced and ultimately lead to the mutually contentious territorial compromise still in place. Note also that § 1 the Federal Constitutional Act of 1921 welcoming "Burgenland" as a *Bundesland* (Bundesverfassungsgesetz vom 25. Jänner 1921 über die Stellung des Burgenlandes als selbstständiges und gleichberechtigtes Land im Bund und über seine vorläufige Einrichtung, BGBl 1921/85) named Ödenburg/Sopron as its capital. This city would ultimately remain part of Hungary.

23 The Coalition Agreement of the two major Austrian parties of 1919 still referred to "German Western Hungary" which was to join the *Bund* as a separate *Land*. ERMACORA (F.), *Quellen zum Österreichischen Verfassungsrecht (1920). Die Protokolle des Unterausschusses des Verfassungsausschusses samt Verfassungsentwürfen*, Vienna, Verlag Berger, 1967, p.9.

24 For a representative perspective, see GRABENWARTER (C.), 'Der österreichische Verfassungsgerichtshof', *in* von BOGDANDY (A.), GRABENWARTER (C.) and HUBER (P.M.), *Handbuch Ius Publicum Europaeum*, vol. VI, Heidelberg, C.F. Müller, 2016, p.413-469 (p.423-425). For both a highly critical approach and a comprehensive study of the Austrian jurisprudence on the subject consider WIEDERIN (E.), 'Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht', in SIMON (T.) and KALWODA (J.), *Schutz der Verfassung*, Berlin, Duncker & Humblot, 2014, p.283-315.

25 Consider KELSEN (H.), *Reine Rechtslehre*, Leipzig and Vienna, Verlag Franz Deuticke, 1934, p. 73-76.

26 According to this logic, an unconstitutional Act is unconstitutional due to being a legal norm that violates another, higher norm. This could either be interpreted as a problem of a faulty normative logic or the precondition for a procedure that will eventually remove such a norm from

the legal system. Consider KELSEN (H.), *Reine Rechtslehre*, Leipzig and Vienna, Verlag Franz Deuticke, 1934, p.86f. The title of the Seventh Main Part (*Hauptstück*) of the B-VG follows this logic by referring to administrative and constitutional adjudication as "guarantees of the administration and constitution." For the legal theoretical significance of this terminology, see KELSEN (H.), 'Wesen und Entwicklung der Staatsgerichtsbarkeit', in Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, Berlin and Leipzig, Walter de Gruyter & Co., 1929, p.30-84.

27 Kelsen later clarified this in his famous response to Carl. Schmitt. Schmitt had postulated a categorical difference between the political question of guarding the constitution on the one hand, and the function of the judiciary on the other. See KELSEN (H.), 'Wer soll der Hüter der Verfassung sein?', in KLECATSKY (H.), MARCIC (R.) and SCHAMBECK.(H.), *op.cit.*

28 For an English summary of these earlier developments and more context on Kelsenian thought in international constitutional law developments consider Christoph Bezemek's comprehensive English-language introduction to the Austrian model, BEZEMEK (C.), 'A Kelsenian model of constitutional adjudication: The Austrian Constitutional Court', *Zeitschrift für öffentliches Recht*, vol.67, n° 1, 2012, p.115-128.

29 Note that Kelsen, while already a rising Austrian legal scholar (on the reception of his early scholarship consider DREIER (H.), *Rezeption und Rolle der Reinen Rechtslehre*, Vienna, Manz Verlag, 2001, p.17-35 (p.18-20)), had yet to write many of his now-famous publications including his pure theory of law published in 1934 albeit with important theoretical insights developed before 1920.

30 In this regard the recollections of KELSEN (H.), 'Die Entstehung der Republik Österreich und ihrer Verfassung', in KLECATSKY (H.R.), *Die Republik Österreich*, Vienna, Verlag Herder, 1968, p.9-76 (p.74-76) are noteworthy.

31 The B-VG uses both terms, albeit mostly the short version *Länder*. *Bundesländer* is used in Article 3 paragraph 1 B-VG which derives the territory of Austria from the territory of the *Bundesländer* and thereby precludes the existence of Austrian territory under the direct control of the federal government. By contrast, the authoritarian constitution of 1934 chose a radically different path in reaction to "Red" Vienna: Article 2 paragraph 1 declared the "federal state" to be composed of the *Länder* and the "bundesunmittelbare" (roughly translated directly subjected to the *Bund*) City of Vienna. See BGBl 1934/1.

32 RENNER (K.), *Das Selbstbestimmungsrecht der Nationen*, Leipzig and Vienna, Verlag Franz Deuticke, 1918, p.292-293. The idea to refer inter-ethnic questions to a specialized court has much older roots in the Austrian constitutional debate and had already been put forward almost seventy years earlier by František Palacký in the context of the (ultimately failed but highly influential) Kremsier Parliament's deliberations on a liberal constitution for the Austrian empire, stressing once again the conceptual links to the Czech debate. OSTERKAMP (J.), 'Verfassungshüter ohne politischen Rückhalt. Das tschechoslowakische Verfassungsgericht nach 1920 im Vergleich mit Österreich', *Beiträge zur Rechtsgeschichte Österreichs*, vol.1, n° 2, 2011, p.275-290 (p.278).

33 Gesetz vom 14. März 1919 über die Volksvertretung, StGBl 1919/179 (Article 15).

34 WIEDERIN (E.), *op.cit.*, p.291).

35 Consider *ibid*. p.283-315 in conjunction with WIEDERIN (E.), *Bundesrecht und Landesrecht*, Vienna and New York, Springer Verlag, 1995, p.63-70.

36 This assessment relies on WIEDERIN (E.), ‘Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht’, *op.cit*.

37 ÖHLINGER (T.), ‘Die Entstehung und Entfaltung des österreichischen Modells der Verfassungsgerichtsbarkeit’, in FUNK(B.C.) *et al*, *Der Rechtsstaat vor neuen Herausforderungen: Festschrift für Ludwig Adamovich zum 70. Geburtstag*, Vienna, Verlag Österreich, 2002, p.581-600 (p.589f).

38 ERMACORA (F.), *Quellen zum Österreichischen Verfassungsrecht (1920). Die Protokolle des Unterausschusses des Verfassungsausschusses samt Verfassungsentwürfen*, Vienna, Verlag Berger, 1967, p.556. Due to the above-described origins of the federal state the need for such a clip has been however disputed and its role as an instrument of conflicting party stressed. RILL (H.P.) and SCHÄFFER (H.), ‘Vorbemerkungen 7. Hauptstück B-VG’, in KNEIHS (B.) and LIENBACHER (G.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht6. Lieferung*, Vienna, Verlag Österreich, 2010, p.49.

39 SCHÄFFER (H.) and KNEIHS (B.), ‘Art 140 B-VG’, in KNEIHS (B.) and LIENBACHER (G.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht 12. Lieferung*, Vienna, Verlag Österreich, 2013, p.19.

40 Bericht des Verfassungsgerichtshofes über seine Tätigkeit im Jahr 2016 (latest available report at https://www.vfgh.gv.at/verfassungsgerichtshof/publikationen/taetigkeitsberichte.de.html (consulted on January 12, 2018)), 74.

41 See Bericht des Verfassungsgerichtshofes über seine Tätigkeit im Jahre 1996, 10; Bericht des Verfassungsgerichtshofes über seine Tätigkeit im Jahre 2001, 10; Bericht des Verfassungsgerichtshofes über seine Tätigkeit im Jahr 2006, 10; Bericht des Verfassungsgerichtshofes über seine Tätigkeit im Jahr 2011, 43. All reports are available at https://www.vfgh.gv.at/verfassungsgerichtshof/publikationen/taetigkeitsberichte.de.html (consulted on January 12, 2018).

42 Prior to the recent introduction of administrative courts Article 82 B-VG established the judiciary as a function reserved to the federal state. This is still true for the “ordinary” judiciary today. Consider also the commentary by KELSEN (H.), MERKL (A.J.) and FROEHLICH (G.), *Die Bundesverfassung vom 1.Oktober 1920*, Vienna, Verlag Franz Deuticke, 1922, p.178.

43 Consider on the latter SCHREINER (H.), ‘Grundrechte und Landesverfassungen’, *Zeitschrift für öffentliches Recht*, vol.54, n°1, 1999, p.89-96.

44 Note that “unconstitutionality” in Article140 B-VG is generally understood to refer to both federal constitutional law and that of the *Länder*, see RILL (H.P.) and SCHÄFFER (H.), ‘Vorbemerkungen 7. Hauptstück B-VG’, in KNEIHS (B.) and LIENBACHER (G.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht 6. Lieferung*, Vienna, Verlag Österreich, 2010, p.52-53.

45 In the seventh “Hauptstück” (Chapter VII) of the B-VG, Articles 129 to 148.

46 The constitutional framework of 1867 relied on several Basic Acts (*Staatsgrundgesetze*), one

of which established the Imperial Court (*Reichsgericht*). See Staatsgrundgesetz vom 21. Dezember 1867 über die Einsetzung eines Reichsgerichtes, RGBl 1867/143.

47 A function that was seriously impaired by the uncertainty on the legal quality of the Court's judgements, see HINGHOFER-SZALKAY (S.G.), 'Die Grundrechtserkenntnisse des Reichsgerichts', *Zeitschrift für Neuere Rechtsgeschichte*, vol.33, n°3-4, 2011, p.192-204; for a contemporary overview of scholarly positions during the court's existence and what can be considered the leading paper on the subject at the time, see EPSTEIN (L.), 'Die Rechtswirkung der Entscheidungen des Reichsgerichtes über Beschwerden wegen Verletzung der durch die Verfassung gewährleisteten politischen Rechte', *Zeitschrift für öffentliches Recht*, vol.3, 1918, p.434-451.

48 This can be seen in the context of a remarkable lack of focus on fundamental rights in Austria's first democratic and republican constitution (not counting the provisional constitutional arrangements) in 1920 due to a lack of political consensus. This resulted in the fundamental rights catalogue of 1867 (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*) being elevated to constitutional rank in the new Republican constitutional framework (Article 149 paragraph 1 B-VG names it as the first of a list of Acts given constitutional rank, while paragraph 2 repealed Article 20 (the emergency suspension clause). Contrary to fundamental rights that were enshrined in the new constitution (most notably the reinforced principle of equality in Article 7 B-VG), this fundamental rights catalogue explicitly did not provide for legal protection against the legislator. Such a protection was later developed for core areas of these fundamental rights in post WWII case law of the Constitutional Court with significant German influence (beginning in 1956 with VfSlg 3118 (this refers to the official number in the collection of the Constitutional Court's case law) and noteworthy for Courts *Wesensgehalts*- approach (a special protection for the essence of a constitutional right). The latter was developed without any basis in constitutional law comparable to Article 19 paragraph 2 of the German *Grundgesetz*).

49 A complaint against an administrative concrete decree issued against an individual (*Weisung*) could give rise to a check of constitutionality of the Act on which such a directive was based. See KELSEN (H.), MERKL (A.J.) and FROEHLICH (G.), *Die Bundesverfassung vom 1.Oktober 1920*, Vienna, Verlag Franz Deuticke, 1922, p.259, 278f.

50 ERMACORA (F.), *Quellen zum Österreichischen Verfassungsrecht (1920), op.cit.*, p. 445.

51 Article I § 60 Bundesverfassungsgesetz vom 7. Dezember 1929, betreffend einige Abänderungen des Bundes-Verfassungsgesetzes vom 1. Oktober 1920 in der Fassung des B.G.Bl. Nr. 367 von 1925, BGBl 1929/392.

52 BGBl I 2013/114.

53 Bundesverfassungsgesetz vom 15. Mai 1975, mit dem das Bundes-Verfassungsgesetz von 1920 in der Fassung von 1929 durch Bestimmungen über die Erweiterung der Zuständigkeit des Verwaltungsgerichtshofes und des Verfassungsgerichtshofes geändert wird, BGBl 1975/302.

54 For the considerable dispute preceding this reform consider footnote 20 in SCHÄFFER (H.) and KNEIHS (B.), 'Art 140 B-VG', in KNEIHS (B.) and LIENBACHER (G.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht 12. Lieferung*, Vienna, Verlag Österreich, 2013, p.14.

55 Articles 10 to 15 B-VG. Adolf Julius Merkl in an 1931 article in honor of Hans Kelsen's 50th

birthday would refer to them as the "editorially weakest parts of the B-VG, (...) the irrationally casuistic articles on the division of competences (between the Bund and Land), only made even more superfluously complex by the changes to the Constitution in 1925 and 1929" (translation by the author) MERKL (A.), 'Hans Kelsen als Verfassungspolitiker', *Juristische Blätter*, vol.60, n°18, 1931, p. 385-388 (p.386).

56 Bundesverfassungsgesetz vom 30. Juli 1925, betreffend einige Abänderungen des Bundes-Verfassungsgesetzes vom 1. Oktober 1920, BGBl Nr 1 (Bundes-Verfassungsgesetz) BGBl 1925/268.

57 Article 15 paragraph 1 B-VG.

58 See the forth "Hauptstück" (Chapter IV) of the B-VG, Articles 95 to 106; of these, Articles 108 to 112 cover the special status of the Capital City of Vienna.

59 Note that according to Article 102 paragraph 1 B-VG this is the regular model for federal administration while paragraph 2 provides *possible* (not mandatory) areas for direct federal administration. In all other areas of federal administration, the implementation of direct federal administration is dependent on the assent of the *Länder* involved (paragraph 4).

60 Article 103 paragraph 1 B-VG.

61 From a legal point of view, which in no way negates the active collaboration of numerous Austrian citizens in the crimes of the Nazi regime.

62 For a sense of these new challenges consider Verfassungsgerichtshof der Republik Österreich, *The Cooperation of Constitutional Courts in Europe*, Vienna, Verlag Österreich, 2014 (2 volumes), specifically the report by Holoubek (M.), 'The Constitutional Court of the Republic of Austria', in vol.1, p.256-268, and the report by the (Austrian) General Rapporteur GRABENWARTER (C.), 'The Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives', in vol.1, p.35-62.

63 Most notably VfSlg 19.632/2012.

64 Article 44 paragraph 3 B-VG.

65 VfSlg 16.327/2001.

66 VfSlg 11.196/1986.

67 For KELSEN (H.), 'Wesen und Entwicklung der Staatsgerichtsbarkeit', in Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, Berlin and Leipzig, Walter de Gruyter & Co., 1929, p. 30-84 (p. 83), sufficient objectivity of such a court in a federal state would require parity between the federal and federated entities in terms of the court's composition.

68 Article 147 paragraph 2 according to BGBl 1920/1.

69 Kelsen (H.), Merkl (A.J.) and Froehlich (G.), *Die Bundesverfassung vom 1.Oktober 1920*, Vienna, Verlag Franz Deuticke, 1922, p. 283.

70 Article 147 paragraph 2 B-VG, consider on the background and the legal context of the

provision Frank (S.L.), 'Art 147 B-VG', in Kneihs (B.) and Lienbacher (G.), *Rill-Schäfer-Kommentar Bundesverfassungsrecht 17. Lieferung*, Vienna, Verlag Österreich, 2016 (p. 5-28, 35-54).

71 The members of this legislative organ are elected by the federated parliaments (*Landtage*) according to Article 35 paragraph 1 B-VG.

72 Consider https://www.vfgh.gv.at/verfassungsgerichtshof/verfassungsrichter/mitglieder.de.html (consulted on July 14, 2017) for current information on the members of the Austrian Constitutional Court.

73 Article 147 paragraph 2 B-VG.

74 Article 148 B-VG.

75 Article 19 paragraph 1 VfGG.

76 § 56 paragraph 2, § 56b paragraph 1 VfGG.

77 § 56 paragraph 3, § 56b paragraph 2 VfGG.

78 § 35 paragraph 1 VfGG.

79 § 5a paragraph 1 VfGG.

80 Currently the Bundesgesetz über die Bewilligung des Bundesvoranschlages für das Jahr 2016 (Bundesfinanzgesetz 2016 – BFG 2016) samt Anlagen, BGBl I 2015/141, see Anlage (Annex) 1, Untergliederung (Subsection) 03 Verfassungsgerichtshof.

81 On the basic differences between the *Bundesfinanzgesetz* and ordinary federal legislation and its historical reasons, see Öhlinger (T.) and Eberhard (H.), *Verfassungsrecht*, vol.11, Vienna, Facultas Verlag, 2016, p.208-209.

82 It is noteworthy that this has been used as a contrast to the ECJ in Austrian constitutional jurisprudence, see Rill (H.P.) and Schäffer (H.), 'Vorbemerkungen 7. Hauptstück B-VG', in Kneihs (B.) and Lienbacher (G.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht 6. Lieferung*, Vienna, Verlag Österreich, 2010, p.49. This is further noteworthy as the "favor unionis" is mentioned there as a "clip" for the Union, while the original "clip" function of the Austrian Constitutional Court was as stemming from the idea of an impartial judicial organ rather than an judicial activism favoring the federal (or any other) level.

83 Grabenwarter (C.), 'Der österreichische Verfassungsgerichtshof', in von Bogdandy (A.), Grabenwarter (C.) and Huber (P.M.), *Handbuch Ius Publicum Europaeum*, vol. VI, Heidelberg, C.F. Müller, 2016, p.413-469 (p. 442).

84 Article 138 paragraph 2 B-VG. Note: This instrument of federalism is exclusively preemptive and ceases to be a legal option once a Bill is passed. Consider the wording of § 54 VfGG, see Hiesel (M.), 'Art 138 B-VG', in Kneihs (B.) and Lienbacher (G.), *op.cit.*, p.62-65. Consider also Zellenberg (U.E.), 'Art 138/2 B-VG', in Korinek (K.) *et al.*, *KommentarÖsterreichisches Bundesverfassungsrecht 4. Lieferung*, Vienna, Springer Verlag, 2001.

85 Article 149 paragraph 1 B-VG in its original form in BGBl 1920/1.

86 ("Verfassungsgesetze oder in einfachen Gesetzen enthaltene Verfassungsbestimmungen)" Art 44 paragraph 1 B-VG in its original form in BGBl 1920/1.

87 Öhlinger (T.) and Eberhard (H.), *Verfassungsrecht*, vol. 11, Vienna, Facultas Verlag, 2016, p.27.

88 See VfSlg 18.221/2007.

89 Wiederin (E.), 'Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht', *op.cit.*, p.299 and Grabenwarter (C.), 'Der österreichische Verfassungsgerichtshof', , C.F. Müller, 2016, p. 413-469 (p. 426) concur on the key role of Bernatzik (E), *Rechtsprechung und materielle Rechtskraft*, *op.cit.*, p. 290-296.

90 Article 140a B-VG.

91 Article 139a B-VG.

92 The key legal mastermind behind this strategy, Dr. Robert Hecht, would be sent to the Dachau concentration camp immediately after the Nazi occupation of Austria due to his Jewish background and died shortly thereafter. (For a biography of Hecht that also sheds light on the period of Austrian history he would both mark and become a victim of, see Huemer (P.), *Sektionschef Robert Hecht und die Zerstörung der Demokratie in Österreich*, Vienna, Verlag für Geschichte und Politik, 1975.) His fate signals the stark difference between Austrian authoritarianism and Nazism: While also non-democratic, it did not share Nazism's extreme streak of antisemitism or its totalitarianism.

93 For historical context see Lehner (O.), *Österreichische Verfassung- und Verwaltungsgeschichte*, Linz, Trauner Verlag, 2007, p. 318-321.

94 Aichlreiter (J.), 'Art 139 B-VG', in Kneihs (B.) and Lienbacher (G.), *op.cit.*, p. 9f

95 Article 144 paragraph 1 in ist original wording according to BGBl 1920/1.

96 Compare the diverging Bills 2031/A and 2032/A XXIV.GP.

97 See Verwaltungsgerichtsbarkeits-Novelle 2012, BGBl I 2012/51.

98 Article 144 paragraph 1 B-VG.

99 Hiesel (M.), 'Art 138 B-VG', in Kneihs (B.) and Lienbacher (G.), *op.cit.*, pp.40-41. Consider also Zellenberg (U.E.), 'Art 138 Abs 1 B-VG', *op.cit.*, p. 35-36.

100 Bericht des Verfassungsgerichtshofes über seine Tätigkeit im Jahr 2016 (latest available report at https://www.vfgh.gv.at/verfassungsgerichtshof/publikationen/taetigkeitsberichte.de.html (consulted on January 12, 2018)), 72f.

101 Article 141 paragraph 1a B-VG, on the background and development of the Constitutional Court's role in this key area for the democratic rule of law see Strejcek (G.), 'Art 141 B-VG', in Korinek (K.) *et al.*, *op.cit.*, p.21-28).

102 Article 137 B-VG, consider the commentaries of Frank (S.L.), 'Art 137 B-VG', in Kneihs (B.)

and LIENBACHER (G.), *op.cit.* and Zellenberg (U.E.), 'Art 137 B-VG', *op.cit.*.

103 Article 142 B-VG, *ibid.*

104 Article 140 B-VG.

105 See KELSEN (H.), 'Wesen und Wirklichkeit der Staatsgerichtsbarkeit', *op.cit.*, p.1506.

106 Article 140 paragraph 5 B-VG.

107 Article 140 paragraph 6 B-VG.

108 Schäffer (H.) and Kneihs (B.), 'Art 140 B-VG', in Kneihs (B.) and Lienbacher (G.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht 12. Lieferung*, Vienna, Verlag Österreich, 2013 (p. 96-98).