

Christoph Konrath*

On concepts of parliament and parliamentarism in Austrian public law

INTRODUCTION

Among the main tenets of the Austrian Federal Constitutional Law (Bundes-Verfassungsgesetz, B-VG) and legal scholarship in Austria are the "Principle of legality" (Legalitätsprinzip, Art. 18 B-VG) and the "Principle of Hierarchy" (Weisungsprinzip, Art. 20 B-VG). In short, they state that the entire public administration shall be based on law. This means the entire administration can only act on grounds based upon law as enacted by parliament¹ and is accountable to parliament on these grounds. The functions and interpretations of these principles are multifaceted and recent debates have emphasised the decline of statutes,² a more flexible application of the principle of legality,³ the problem of "Entstaatlichung" (or retreat of the state)⁴ and the challenges of New Public Management for the principle of hierarchy.⁵ While all contributors to the debate share a specific concern for the principles of the "Rechtsstaat" and while they care about democratic legitimation of the administration they do not necessarily consider the principles of legality and hierarchy as a central feature of the conception of democracy established by the B-VG any more.⁶ The theoretical claim remains but the practical attitude of dogmatics is focused more on the Rechtsstaat-principle and on fundamental rights. Still, the theoretical basis of the combination of a parliamentary system and a strict principle of legality can be found in the identification of state and law as it is most famously expressed in the "Pure Theory of Law". In Austria, it was later characterised as the legal

* I am indebted to Harald Eberhard and Cornelia Amon-Konrath for valuable discussions and support. Also, I thank the reviewers of the ICL-Journal for some important comments.

1 This has, of course, to be complemented by the law of the European Community, today.

2 Cf. Clemens Jabloner, 'Das Gesetz als Problem' (2006) 128 *Juristische Blätter*, 409. For general reference see Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, Oxford and Portland, Oregon 2006).

3 For a discussion in comparative perspective see Harald Eberhard, 'Das Legalitätsprinzip im Spannungsfeld von Gemeinschaftsrecht und staatlichem Recht' (2008) 63 *ZÖR* 49.

4 Österreichische Juristenkommission (ed.), *Entstaatlichung. Gefahr für den Rechtsstaat?* (NWV, Wien and Graz 2002).

5 Cf. Clemens Jabloner, 'Ist das Weisungsprinzip überholt?' in Stefan Hammer et al. (eds.), *Demokratie und sozialer Rechtsstaat. Festschrift für Theo Öhlinger* (WUV, Wien 2004) 699, Konrad Lachmayer, 'Ausgliederungen und Beleihungen im Spannungsfeld der Verfassung' (2008) 129 *Juristische Blätter* 750.

6 Jabloner *ibid.* 712.

embodiment of late 19th century liberal theory and its aim to bind the administration by the law and thus secure democratic legitimation and democratic accountability of the administration.⁷ And it entails, as legal scholars claim, the idea that the legislative power is the "first among all powers" of the state.⁸

Interestingly, this status of parliament and the praxis of democracy receive comparatively little concern in Austrian legal scholarship – a fact that may refer to the discrepancies of constitutional theory and dogmatics and the role of parliament in today's political system.⁹ There is a huge body of literature on the principles of legality and hierarchy and their implications for the administration, the conditions of determinateness of statutes in Austria, and the demonstration of democratic legitimacy of administrative institutions and functions in an age of deregulation and privatisation.¹⁰ But little has been written on the conceptions and importance of legislation and legislative powers in Austria, the status of parliament in regard to other bodies established by the constitution, the legal rules and principles governing the democratic process in general and parliamentaryism and parliamentary procedures in particular. Sometimes it seems as if it is sufficient just to establish a link to a democratic, preferably representative body.

There are, of course, a number of reasons recounted in academic literature to explain this fact. Usually they relate to specific ways of interpreting the pure theory of law in Austria.¹¹ In this essay I will try to take a closer look at the obvious neglect of parliamentarism and parliamentary procedures in Austria. I will do so by reviewing the images and concepts of parliamentarism in contributions to public law in Part I. In Part II I will try to link these findings to theoretical approaches in Austrian constitutional law and point out their shortcomings. Throughout, this essay will retain an introductory character with the aim of providing a basis for further discussions on legal conceptions of parliamentarism and parliament in Austria, as well as an exercise in attitudes that inform the stances of Austrian jurists towards parliamentarism. In honour of Wolfgang Mantl, I will do so with an attitude that is informed by the methods of political science and that is concerned with liberal democracy, its legal conditions and foundations in their political, historical and sociological contexts.

7 Theo Öhlinger, *Das Problem des verwaltungsrechtlichen Vertrages* (Anton Pustet, Salzburg 1974), as well as Theo Öhlinger, 'Die Verwaltung zwischen Gesetz und Billigkeit' (1999) 24 *Zeitschrift für Verwaltung* 678 referring to Hans Kelsen, 'Demokratisierung der Verwaltung' (1921) 54 *Zeitschrift für Verwaltung* 5; Hans Kelsen, *Vom Wesen und Wert der Demokratie* (2nd ed. Mohr, Tübingen 1929) and for a critical assessment of this view:

8 Ewald Wiederin, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Österreich', in Armin von Bogdandy/Pedro Cruz Villalón/Peter Huber (eds.), *Handbuch Ius Publicum Europaeum, vol I: Grundlagen und Grundzüge staatlichen Verfassungsrechts* (C. F. Müller, Heidelberg 2008) 389 (434).

9 See already the critique of Helmut Widder, *Parlamentarische Strukturen im politischen System* (Duncker & Humblot, Berlin 1979) 317 f. and more recently Wolfgang C. Müller/Wilfried Philipp/Marcelo Jenny, 'Die Rolle der parlamentarischen Fraktionen' in Wolfgang C. Müller et al. (eds.), *Die österreichischen Abgeordneten. Individuelle Präferenzen und politisches Verhalten* (WUV, Wien 2001) 183 (184).

10 For an overview see Eberhard (supra n. 3) and Lachmayer (supra n. 5).

11 See below II. 1.

PART I – CONCEPTIONS OF PARLIAMENT

In this part, I try to review the common conceptions of parliamentarism and legislation in Austrian public law. At this point it will be more a kind of report than a thorough review and discussion. I do, however, believe that it is important to provide such a compilation as the basis for further debates. Also, I focus on works that have a – supposedly – higher impact, i.e. constitutional textbooks as they influence legal thinking and also political attitudes of a far greater number of jurists compared with highly specialised contributions to selected topics of laws and rules governing parliamentary affairs and their relation to the executive branch of government. Lastly, I consider primarily recent contributions to the legal debate. I do so not only because of the fact that jurists have a tendency to consult newer texts at first, but also because fundamental conceptions of democracy and parliamentarism are mostly received in mediated form in Austria, today.¹² Also, I will mainly focus on matters regarding the Nationalrat that is the most important legislative body in Austria.

1. Parliamentarism and constitutional law textbooks

In Austria, legal education is centred on studying textbooks and many of those have acquired the status of general works of reference. The habit of consulting textbooks as a rule at university and reading original contributions as an exception continues in legal practice. Any further research is preferably done with the help of legal databases and is often focused on periodical journals that claim to serve the demands of practitioners first.¹³ Parliamentarism and matters of legislation (apart from the occasional lamentation about state and quality of legislation in Austria) are not necessarily topics that feature much in these kinds of publications. At the same time, the before-mentioned textbooks serve as primary sources for any other discipline that is interested in the constitutional and legal architecture of the Republic of Austria.¹⁴

Austrian constitutional textbooks present parliamentarism in at least three respects: (semi-) representative democracy and the demand for democratic legitimation as key constitutional principles, the legislature as one of the functions

12 Problems of parliamentarism have been discussed by constitutional scholars especially in the 1970's, forming a part of wider public and scholarly debates on democracy. However, these contributions can hardly be found in the bibliographies of commentaries on the constitution or textbooks, today. See Peter Gerlich, *Parlamentarische Kontrolle im politischen System* (Springer, Wien-New York 1973) 11, Siegbert Morscher, *Die parlamentarische Interpellation* (Duncker & Humblot, Berlin 1973), Wolfgang Mantl, *Repräsentation und Identität* (Springer, Wien New York 1975), Widder (supra n. 9); for an overview of the Austrian public and scholarly discourse on democracy see Schaller, *Demokratie- und Verfassungs(reform)-Diskussionen in Österreich*, Final Report Project Nr. 5584 of the "Jubiläumsfonds der Österreichischen Nationalbank" (Wien 1997).

13 For a general characterization cf. Alexander Somek/Nikolaus Forgo, *Nachpositivistisches Rechtsdenken. Inhalt und Form des positiven Rechts* (WUV, Wien 1996).

14 Cf. Kathrin Hämmerle, 'Die Politikwissenschaft als wissenschaftliche Disziplin und ihr Verhältnis zum Verfassungsrecht', in Thomas Geiger/Martin Hartlieb/Birgit Winkel (eds.), *Fokus Politikwissenschaft. Ein Überblick* (Studien Verlag, Innsbruck 2007) 246.

of the state, and the conception of the "Gesetzgeber" or "lawgiver" as a point of reference especially in the context of legal interpretation.

In any democracy we presuppose some sort of "background of knowledge"¹⁵ that any citizen should have. This is of course a necessary condition of any liberal democracy that rests upon the assumption that all citizens are free and equal and thus able to articulate their opinions and take part in political debates. However, this "background of knowledge" of democracy is often challenged when it is confronted with the social reality of parliamentary processes and parliamentary procedures. Significantly, citizens of a majority of western liberal democracies share a certain distrust of parliaments because they cannot match what they see in parliaments with their imaginations of what a parliament should be. Gerhard Loewenberg has described this as the "paradoxes of parliamentarism" and he argues that they affect not only public debate but also academic reflection. He is concerned with the factors that sustain liberal parliamentarian democracies and calls for more attention of those who discuss and teach matters relating to parliamentarism in any academic discipline.¹⁶

When we look at constitutional law textbooks in Austria,¹⁷ we can discern such a presupposed knowledge and such paradoxes as well. The presupposed knowledge seems to rest on the assumption that law students are interested in political affairs and know about the principal workings of democracy in Austria, and that they are aware of the factual dominance of the federal government and the political parties and the influence they exert on the institutions of the state. So, a rather formalistic account of democracy and parliamentarism seems to be sufficient. What follows is usually a short definition of liberal democracy. Its points of reference are – in most common textbooks – Jean-Jacques Rousseau and (in all common textbooks) Hans Kelsen.¹⁸ Rousseau can be read as example of a kind of perfect though radical philosophy whereas bits and pieces of Kelsen's "Wesen und Wert der Demokratie"¹⁹ are taken as the key to understand the democratic and parliamentarian conception of the B-VG.²⁰

15 To use the term of Charles Taylor.

16 Gerhard Loewenberg, 'Paradoxien des Parlamentarismus. Historische und aktuelle Gründe für Fehlverständnisse in Wissenschaft und Öffentlichkeit' (2007) 38 *Zeitschrift für Parlamentsfragen* 816 (first published as 'Paradoxes of Legislatures' [2007] 136 (3) *Daedalus* 55).

17 I will here refer to Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger, *Österreichisches Staatsrecht, vol. 1 Grundlagen* (Springer, Wien-New York 1997) and *vol. 2 Staatliche Organisation* (Springer, Wien-New York 1998); Peter Pernthaler, *Österreichisches Bundesstaatsrecht* (Verlag Österreich, Wien 2004); Theo Öhlinger, *Verfassungsrecht* (7th ed. WUV, Wien 2007); Robert Walter/Heinz Mayer/Gabriele Kucsko-Stadlmayer, *Bundesverfassungsrecht* (10th ed. Manz, Wien 2007) and Walter Berka, *Lehrbuch Verfassungsrecht* (2nd ed. Springer, Wien New York 2008).

18 See Adamovich/Funk/Holzinger (supra n. 17) vol 1., 144 f.; Pernthaler (supra n. 17) 56 ff. and passim; Öhlinger, *Verfassungsrecht* (supra n. 17) 157 ff.; Walter/Mayer/Kucsko-Stadlmayer (supra n. 17) 78 f.; Berka (supra n. 17) 32 f.

19 Kelsen (supra n. 7).

20 See also the commentaries on Article 1 B-VG by Heinz-Peter Rill/Heinz Schäffer, 'Artikel 1', in Heinz-Peter Rill/Heinz Schäffer (eds.), *Bundesverfassungsrecht Kommentar* (Verlag Österreich, Wien 2006) and Peter Oberndorfer, 'Artikel 1', in Karl Korinek/Michael Holoubek (eds.), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Springer, Wien New York 2000).

It cannot be disputed that Kelsen's work ranges among the most important contributions to democratic theory. Kelsen's work is especially important because it reaffirms democracy as management of diversity and contains low demands on homogeneity as a precondition for democracy and avoids any material conception of the state, the people, or even the will of the people.²¹ However, none of the before-mentioned books present this central feature of Kelsen's theory. And mentioning Kelsen alone can only provide one reading of the conceptions implied and expressed in the federal constitution.²² There is no hint to whether this conception is common or shared among other academic disciplines and in legal and political practice.²³ And founding democracy on Kelsen only ignores the academic and political discourse that has been going on since the late 1920's. Further, it is interesting that only Theo Öhlinger and Peter Pernthaler emphasise the close connection between Kelsen's thoughts on parliamentarism and its relations to the administration and the "Stufenbau"-doctrine.²⁴ Otherwise, democracy is explained by reference to the principles of majority, equality of the citizens before the law, and political freedom. And equality before the law and political freedom can serve as the groundwork of the principles of the Rechtsstaat and need not necessarily be considered in the light of democracy and parliamentarism.

Democracy in the Austrian context is defined as a representative viz. indirect democracy, which in turn places parliamentarism at its center. The justifications for representative democracy are explicated by reference to functional arguments, i.e. the "division of labour". It is only Pernthaler who draws from Swiss examples and devotes more attention to the conception of the "Staatsvolk", by discussing its' potentials and powers, and concepts of representation.²⁵ When it comes to political parties all texts state that they are necessary in a modern parliamentary system, which is an argument that follows Kelsen's work. Walter Berka,²⁶ Ludwig Adamovich, Bernd-Christian Funk and Gerhart Holzinger²⁷ attempt to link the

21 Cf. Gertrude Lübke-Wolf, 'Homogenes Volk – Über Homogenitätspostulate und Integration', (2007) 27 *Zeitschrift für Ausländerrecht und Ausländerpolitik* 121 (124 ff.); Oliver Lepsius, 'Kelsens Demokratietheorie', in Tamara Ehs (ed.) *Hans Kelsen. Eine politikwissenschaftliche Einführung* (Facultas, Wien 2009) 67, Ewald Wiederin, 'Denken vom Recht her. Über den *modus austriacus* in der Staatsrechtslehre', in Helmuth Schulze-Fielitz (ed.), *Staatsrechtslehre als Wissenschaft. Die Verwaltung – Beiheft 7* (Duncker & Humblot, Berlin 2007) 293 (295).

22 See Wiederin *ibid.* passim; Alexander Somek, 'Wissenschaft vom Verfassungsrecht: Österreich', in Armin von Bogdandy et al. (eds.), *Handbuch Ius Publicum Europaeum, Band 2: Offene Staatlichkeit – Wissenschaft vom Verfassungsrecht* (C. F. Müller, Heidelberg 2007) 637 ff.

23 Cf. Hämmerle (*supra* n. 14). Also, it is interesting that the numerous and diverse conceptions of democracy and parliamentarism that have been presented and debated in Austria are not even mentioned (even in one paragraph) in the common textbooks and in the diverse contributions of legal scholars. But see Schaller (*supra* n. 12).

24 Öhlinger, *Verfassungsrecht* (*supra* n. 17) 161 f.; Pernthaler (*supra* n. 17) 167 ff. See on this relationship already the notes in the introduction; on the "Stufenbau"-doctrin see *infra* II. 2.

25 Wolfgang Mantl (*supra* n. 12) and Alexander Somek, *Soziale Demokratie* (Verlag Österreich, Wien 2001) are examples for the rare discussions of fundamental concepts of democracy and representation in the context of Austrian public law.

26 Berka (*supra* n. 17) 37 f.

27 Adamovich/Funk/Holzinger (*supra* n. 17) 146 f.

perceived dominance of political parties with the democratic institutions as stipulated by the B-VG. Theo Öhlinger emphasises that political parties have for long been neglected by constitutional scholars.²⁸ This is remarkable insofar as Kelsen presented strong arguments for the essential role of political parties in a modern democracy.²⁹ In contrast, the formalistic account of Austria's democratic institutions that follows in all books can allude to a conception of an idealised 19th century assembly of dignitaries that aspire to the common good alone. The relevant sections of the B-VG and those parts of the "Geschäftsordnungsgesetz des Nationalrates" (GOG-NR; Rules of Procedure of the National Council) that are cited in textbooks still refer to the independent deputy who aims to act as the circumspect lawgiver and thorough controller of government and who is not affected by party affiliations.³⁰

Clearly, the focus is on electoral law and the creation of the National Council and not so much on how the parliamentary processes work and how they are governed by legal norms. With the exception of Berka who tries to give an impression of how legislative work and control are exerted in parliament all textbooks provide a descriptive account that does not necessarily say more than the text of the constitution. So, what we get from constitutional textbooks is a rather formal account of parliamentarism that suggests a strong position of parliament in relation to the federal government and an almost mechanical working of legislation and parliamentary control. What is lacking, however, are theoretical and legal foundations for the functions of parliament as well a discussion of parliamentary procedures at the crossroads of politics and law.³¹

Another line of argument that is characteristic of constitutional textbooks in particular, and Austrian legal textbooks in general, is the notion of the "Gesetzgeber" (the law giver) whose will has to be discerned from law and who is either bound by the law or expected to pass a law and amend the given situation. Another notion is the already mentioned quest for democratic legitimation. It is significant that both present an abstract picture of parliament and parliamentarism, and that the textbooks do not consider this relation or embed it into their underlying conception of democratic legislation. I will, in any case, come back to this point in part II of this essay.

Given the legal and political importance of the "Verfassungsgerichtshof" (Constitutional Court) in Austria and the disputed character of judicial review in relation to parliamentary powers, it is interesting to see that only Berka³² discusses this issue. By using a number of common examples he tries to explain

28 Öhlinger, *Verfassungsrecht* (supra n. 17) 163 f.

29 For an older attempt to describe and justify the Austrian "party state" in the context of the debates on democratic reform see Wolfgang Mantl, 'Der österreichische Parteienstaat' (1969) Retzhof-Schriften zur politischen Bildung Heft 13.

30 A vivid example for this attitude is provided by Franz H. Köck, 'Die Rolle der Parlamente in der Außenpolitik' in Herbert Schambeck (ed.), *Parlamentarismus und öffentliches Recht in Österreich*. Erster Teilband (Duncker & Humblot, Berlin 1993) 297 (303). See the general critique of Wolfgang C. Müller/Wilfried Philipp/Marcelo Jenny (supra n. 9) 184.

31 I'm well aware that we can find reasons for such a formalistic view in specific lines of thought that shape constitutional theory in Austria and I will tackle them below in section II. 2. Cf. also Wiederin, 'Denken vom Recht' (supra n. 21) and Somek (supra n. 22).

32 Berka (supra n. 17) 267 ff.

and justify judicial review and the role of the Constitutional Court in a political context.

This is – of course – only a superficial account. But it makes clear that there is an obvious dominance of a formalistic view of democracy and parliament in constitutional law textbooks. Democracy is presented as elections, votes in parliament, the creation of institutions, and representative and executive organs. It does not attempt to explain the manifest relations between law and politics or the diverse functions a parliament has and should fulfil. The paradoxes, of which Loewenberg speaks, seem to remain.

2. Representative democracy, immunity and parliamentary control – topics of constitutional discourse

When we compare the Austrian situation with Germany we will notice that there is a fairly rich body of literature and of decisions of the "Bundesverfassungsgericht" (Federal Constitutional Court) concerning matters of the Bundestag (but not necessarily with those of other representative bodies, i.e. the provincial diets).³³ We find a lot of works on "Parlamentsrecht" viz. specific legal problems of parliamentary procedures and also an intense and often detailed legal discussion of parliamentarism, representation, and the role of political parties. One reason for this difference can certainly be found in the institution of the "Organstreitverfahren" (dispute between organs of the state) as stipulated in Article 93 Grundgesetz which has led to a gradual juridification of numerous parliamentary procedures and opened the stage for a functional role of the Bundesverfassungsgericht in political disputes.³⁴ But apart from that there is also a strong interest in the constitutional and thus legal conditions of democracy and parliamentarism that range from the polemic criticism and devaluation by Carl Schmitt and his followers (especially on issues regarding the role of political parties) to their counterparts who aim to found, sustain and defend parliamentary democracy.³⁵

33 Pascale Cancik, 'Parlamentarische Kontrolle in den deutschen Bundesländern – Neuere Entwicklungen', in Peter Bußjäger (ed.), *Die Zukunft der parlamentarischen Kontrolle* (Braumüller, Wien 2008) 27.

34 Cf. Frank Schorkopf, 'Vorbemerkungen vor §§ 73ff. BVerfGG., § 73 BVerfGG (Verfahren nach Art. 99 GG; Verfassungsstreitigkeiten innerhalb eines Landes)' in: Peter Umbach et al. (eds.), *Bundesverfassungsgerichtsgesetz. Mitarbeiterkommentar und Handbuch* (2nd ed., C. F. Müller, Heidelberg 2004). However, it should not be overlooked that the B-VG holds some very specific provisions on disputes between organs of the state that have to be decided by the Constitutional Court. Art. 126a B-VG regulates the resolution of disputes about the competences of the Rechnungshof (court of audit), Art. 138a B-VG regulates the resolution of disputes about the scope of agreements among the Länder or the Länder and the Federation according to Art. 15a B-VG and Art. 148f B-VG regulates the resolution of disputes about the competences of the Volksanwaltschaft (Ombudsman Board) between the Volksanwaltschaft and the federal government. Note that these regulations concern two institutions that are widely regarded as auxiliary institutions of parliament, namely the Rechnungshof and the Volksanwaltschaft – see also *infra* at n. 93.

35 Cf. Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Duncker & Humblot, München 1923). For an overview see Wolfgang Mantl, 'Carl Schmitt und die liberal-rechtsstaatliche Demokratie', in Thomas Angerer/Brigitta Bader-Zaar/Margarete Grandner (eds.), *Geschichte und Recht. Festschrift für Gerald Stourzh zum 70. Geburtstag* (Wien-Köln-Weimar,

In Austria, matters of the Nationalrat, the Bundesrat (Federal Council) or the Landtage remain marginal in constitutional discourse. For once, there is no Organstreitverfahren and constitutional norms as well as rules of procedure remain rather vague and wide. But there is also a still strong strand of consociationalism that tends to favour informal political agreements between political parties, social partners and administrative institutions. Parliament has had – at least for a long time – the role of securing the constitutionally prescribed forms to make such agreements effective.³⁶ Thus, matters were mostly set when they reached the Nationalrat. Furthermore, for a long time there have only been two comparatively large parties and one small party in the Nationalrat which implied that there were hardly any public conflicts about problems of parliamentarism.³⁷ And last but not least there is an unwritten rule to regulate eventual conflicts preferably in informal and internal ways. It is sometimes explained by reference to (a supposed) parliamentary supremacy and it has so far not been a topic of academic debate.³⁸

The political parties who claim the majority in parliament and form the federal government continue to exert a dominant influence on parliamentary procedures, i.e. when the members of the Nationalrat are not informed about plans and proposals of the federal government, when bills introduced by the federal government come in late or when bills and resolutions introduced by opposition parties will not be discussed in committee and plenary sittings.³⁹ These are, by the way, practices that are also criticised by deputies of the governing parties.⁴⁰

Böhlau 1999) 99; Christoph Möllers, *Der vermisste Leviathan. Staatstheorie in der Bundesrepublik* (Frankfurt a. M., Suhrkamp 2008) and the review of this book by Mathias Jestaedt (2009) 134 Archiv des öffentlichen Rechts 120. See also Wiederin, 'Denken vom Recht' (supra n. 21).

- 36 Cf. Tálos, Emmerich, *Sozialpartnerschaft – ein zentraler politischer Gestaltungsfaktor in der Zweiten Republik* (Studien Verlag, Innsbruck 2008); Emmerich Tálos/Bernhard Kittel, *Gesetzgebung in Österreich. Netzwerke, Akteure und Interaktionen in politischen Entscheidungsprozessen* (WUV, Wien 2001); Erhard Mock, 'Die politische Dimension der Rechtssetzung', in Heinz Schäffer (ed.), *Theorie der Rechtssetzung* (Manz, Wien 1988) 125 (143 ff.); Heinz Fischer, 'Die parlamentarischen Fraktionen', in Heinz Fischer (ed.), *Das politische System Österreichs* (3rd ed. Europaverlag, Wien 1982) 111 (133 f.).
- 37 Cf. Helmut Widder, 'Parlamentarische Untersuchungsausschüsse aus der Sicht des Bundes', in Heinz Schäffer (ed.), *Untersuchungsausschüsse. Politische Praxis – rechtliche Neugestaltung* (Manz, Wien 1995) 27 (31 f.).
- 38 On the effects that has on attempts to reform the rules of procedure see Christoph Konrath, '(Erfahrungs)Bericht Geschäftsordnungsreform in der 23. Gesetzgebungsperiode', in Peter Bußjäger (ed.), *Die Zukunft der parlamentarischen Kontrolle* (Braumüller, Wien 2008) 47 (61).
- 39 Sickinger, 'Die Funktion der Nationalratsausschüsse im Prozess der Bundesgesetzgebung' (2000) 29 Österreichische Zeitschrift für Politikwissenschaft 157 (172 f.); Marcelo Jenny/Wolfgang C. Müller, 'Die Arbeit im Parlament', in Wolfgang C. Müller et al. (eds.), *Die österreichischen Abgeordneten. Individuelle Präferenzen und politisches Verhalten* (WUV, Wien 2001) 261 ff.; Konrath (supra n. 38) 50. On the underlying political strategies see Andreas Khol, 'Koalitionsabkommen in der Regierungspraxis 1994 bis 2007', in: Andreas Khol et al. (eds.), *Österreichisches Jahrbuch für Politik 2006* (Verlag für Geschichte und Politik, Wien 2007) 141.
- 40 Cf. Wolfgang C. Müller, 'Amtsverständnis und Tätigkeit der Abgeordneten', in Wolfgang C. Müller et al. (eds.), *Die österreichischen Abgeordneten. Individuelle Präferenzen und politisches Verhalten* (WUV, Wien 2001) 65; see also the recent accounts of the former members of

But there have been a number of changes in the composition and the practices of the Nationalrat since the late 1980's that have transformed the style of politics and increased conflict in parliamentary procedures. Since 1986 there have been four parties in the Nationalrat, from 1993 to 1999, and again from 2006 the Nationalrat has been composed of five parties. This constellation as well as concessions that had to be made by the ruling majority in the wake of EU-accession led to a strengthening of parliamentary minority rights in the 1990's and rising pressure for a reinvigoration of such rights in recent years.⁴¹

Increased pressure from opposing parties has led to aggravated conflicts over the scope, interpretation and functions of constitutional norms and rules of procedure regulating parliamentary procedures. These conflicts are difficult to resolve as legal and political arguments intermingle and each side tries to use them for its very own purposes.⁴² But they are also (and somehow paradoxically) confronted with the Austrian tradition of trusting legal institutions and – foremost – legal experts who are able to say "what the law is" and how a conflict shall be resolved.⁴³ However, as legal experts follow the approach exemplified in constitutional textbooks they can – in most cases – only recount and explicate the text of constitutional norms without referring to or reflecting their interpretation and application in parliament and in regard to the functions of parliament.⁴⁴ Thus, their expertise may in the end not be acceptable for parliamentarians. Also, we need to consider that in parliament legal problems are not necessarily discussed separately from political questions and conflicts cannot be decided in any formal legal procedure. They will either be resolved in inter-party consensus or by an ultimately political decision of the president.⁴⁵

This observation shall not devalue the contributions of academics but it exemplifies the limits of strict constitutional and legal approaches to problems of

Parliament Josef Broukal and Erwin Niederwieser in Josef Boukal et al., *Politik auf Österreichisch. Zwischen Wunsch und Realität* (Goldegg, Wien 2009).

- 41 Schefbeck, 'Der Nationalrat zwischen Rechtssetzungsorgan und Tribüne (1997) 5 Journal für Rechtspolitik 117; Konrath (supra n. 38).
- 42 This is exemplified in VfSlg 17173/2004 where the Verfassungsgerichtshof referred to every detail of the GOGNR when it had to review the constitutionality of a complex statute.
- 43 On this specific attitude cf. Franz Fallend, 'Demokratische Kontrolle oder Inquisition? Eine empirische Analyse der parlamentarischen Untersuchungsausschüsse nach 1945' (2000) 29 Österreichische Zeitschrift für Politikwissenschaft 177 (188 f.); from a general point of view see Somek (supra n. 19) 658 f. A prominent example for this attitude can be found in the proceedings of the inquiry committee on the acquisition of combat aircrafts 2006/07. It invited a number of eminent law professors to explain certain constitutional matters and it is interesting to see how their arguments were used by committee members in successive sittings; see the transcript of the committee sitting on 20 April 2007 in 67/KOMM, 23. GP and the transcripts of successive sittings.
- 44 Interestingly, there is no commentary on Art. 30 B-VG that provides the constitutional basis for the parliamentary rules of procedure and stipulates the organisation (and arguably the autonomy) of parliament has so far.
- 45 See § 13 (2) GOGNR and § 34 (4) GOGNR with respect to committee chairpersons and the comments in Konrad Atzwanger and Werner Zögernitz, *Nationalrat-Geschäftsordnung* (3rd ed., Manz, Wien 1999) 102, 200. Zögernitz, 'Das parlamentarische Verfahren ab 1920' in Herbert Schambeck (ed.), *Parlamentarismus und öffentliches Recht in Österreich*. Erster Teilband (Duncker & Humblot, Berlin 1993) 235 calls this attitude "der Geist der Geschäftsordnung" ("the spirit of the rules of procedure").

parliamentary procedures. Also, this becomes evident in the fact that topics of parliamentarism are only discussed and presented in cursory ways. There has been no systematic treatise on parliamentary law and rules since the late Habsburg Empire⁴⁶ and the general work of reference is an edition of the federal statutes governing the procedures of the Nationalrat with short comments and references to cases and (internal parliamentary) experts' opinions.⁴⁷ Topical issues, that are discussed and commented concern the relation between representative and direct democracy, i.e. in regard to attempts to increase the binding forces of popular initiatives.⁴⁸ Also, the free or independent mandate of members of parliament and its (supposed) legal and factual limits viz. the dominance of political parties over parliamentary processes have been matters of controversial discussions and decisions by the Verfassungsgerichtshof.⁴⁹ As Bernd Wieser shows in his commentary on Article 56 B-VG⁵⁰ this article has for a long time been the focal point to discuss the role of political parties and democratic decision-making and has opened a possibility to introduce personal political convictions in constitutional discourse. Further, the basic principles of parliamentary control, parliamentary immunity and incompatibility of political functions have been discussed occasionally.⁵¹

-
- 46 See Friedrich Tezner, *Die Volksvertretung* (Manz, Wien 1912). Bernd Wieser sees this as one reason why legal scholars neglect issues of parliamentarism, see his 'Änderung des Geschäftsordnungsgesetzes des Nationalrates nur durch selbständigen Antrag von Abgeordneten – verfassungswidrig?', in Hedwig Kopetz et al. (eds.), *Sozio-kultureller Wandel im Verfassungsstaat. Phänomene politischer Transformation. Festschrift für Wolfgang Mantl* (Böhlau, Graz-Wien-Köln 2004) 447. There are some essays and collections on parliamentarism that were mostly published in the 1980ies that follow a kind of historical-chronological approach and present the development of i.e. parliamentary rules of procedure, cf. Zögernitz (supra n. 45).
- 47 Atzwanger and Zögernitz (supra n. 45). Werner Zögernitz, who functions as the chief contributor was the "Klubdirektor" (administrative head) of the parliamentary group of the "Österreichische Volkspartei" (ÖVP; Austrian People's Party) until March 2009. He is now director of the newly formed "Institut für Parlamentarismus und Demokratiefragen", a think tank sponsored by the ÖVP; see www.parlamentarismus.at.
- 48 See Theo Öhlinger, 'Bundesverfassungsrechtliche Grenzen der Volksgesetzgebung' (2000) 52 *Montfort* 402; Marko, 'Direkte Demokratie zwischen Parlamentarismus und Verfassungsautonomie, in: Hedwig Kopetz et al. (eds.), *Sozio-kultureller Wandel im Verfassungsstaat. Phänomene politischer Transformation. Festschrift für Wolfgang Mantl* (Böhlau, Graz-Wien-Köln 2004) 335.
- 49 See VfSlg 3426/1958 and 3560/1959 on the free mandate and the right to keep the seat in parliament after leaving a political party; VfSlg 6324/1970 on blank declarations to resign from parliament.
- 50 Bernd Wieser, 'Artikel 56 Abs 1' Karl Korinek/Michael Holoubek (eds.), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Springer, Wien New York 2000).
- 51 For a summary of the constitutional debates see Arno Kahl, 'Artikel 52'; 'Artikel 52b'; 'Artikel 53' and 'Artikel 55' in Karl Korinek/Michael Holoubek (eds.), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Springer, Wien New York 2005); Meinrad Handstanger, 'Artikel 52a' in Korinek/Holoubek (eds.), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Springer, Wien New York 2000); Christian Kopetzki, 'Artikel 57' and 'Artikel 58' in Korinek/Holoubek (eds.), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Springer, Wien New York 1999); Bernd Wieser, 'Artikel 59', in Korinek/Holoubek (eds.), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Springer, Wien New York 1999) and Gabriele Kucsko-Stadmayer, 'Artikel 59a' in Korinek/Holoubek (eds.), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Springer, Wien New York 1999). See also

The comminality between these issues can be discussed in the dogmatic and procedural way that is typical for constitutional discourse in Austria.⁵² But it is thus difficult to integrate the informal rules of interpretation and application that govern parliamentary processes – on the one hand as they may not be perceived in legal terms and on the other hand because they are not really accessible for outsiders.⁵³

Furthermore, a strict dogmatic approach is ultimately centred on the judge who decides a legal question according to legal procedural rules. This is certainly not the case in the parliamentary context unless one would argue for the juridification of politics. Also, the constitutional norms that govern parliamentary procedures presuppose certain ideas and conceptions of parliamentarism.⁵⁴ It is thus obviously difficult to resolve disputes over parliamentary issues without reference to any theoretical background that cannot be explicitly found in the constitutional and procedural rules.⁵⁵ Again, this shall not devalue the dogmatic approach that defines the limits and conditions for parliamentary procedures and the political process as conceived by the constitution. But it is objectionable if it suffices alone.

These problems became evident in the disputes that accompanied three parliamentary inquiry committees in the years 2006 to 2008.⁵⁶ The scope and privileges of these committees were – and still are – contended.⁵⁷ It was disputed whether such a committee can demand files from independent authorities like the Financial Market Authority.⁵⁸ Also, it was contended whether an inquiry committee can demand any files and documents from any administrative body – including, i.e. tax files of private persons – or whether, i.e. a member of the federal government has the right to withhold or censor certain documents, e.g. for reasons of data protection of third parties. The underlying question was whether

52 See Wiederin, 'Denken vom Recht' (supra n. 21).

53 But see in the German context Helmuth Schulze-Fielitz, 'Parlamentsbrauch, Gewohnheitsrecht, Observanz', in Hans-Peter Schneider and Wolfgang Zeh (eds.), *Parlamentsrecht und Parlamentspraxis in der Bundesrepublik Deutschland* (de Gruyter, Berlin and New York 1989) 359; Martin Morlok, 'Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung?' (2003) 62 *VVDStRL* 37 (49; 58 ff.).

54 Cf. Öhlinger, *Problem* (supra n. 7).

55 For a short review of recent decisions of the Verfassungsgerichtshof on disputes about democratic legitimacy and their orientation on prevailing models of democracy in German constitutional discourse cf. Wiederin, 'Grundlagen' (supra n. 8) 423.

56 Inquiry committee on the acquisition of combat aircrafts (1/GO, 23. GP) 30 Oct 2006-3 July 2007; inquiry committee on the financial market authority, BAWAG, Hypo-Alpe-Adria and other financial service providers (3/GO, 23. GP) 30 Oct 2006-3 July 2007; inquiry committee on the administration of the Federal Ministry of the Interior and other Federal Ministries (129/GO, 23. GP) 3 March 2008-18 Sept 2008.

57 See Theo Öhlinger, 'Die Bedeutung von Untersuchungsausschüssen als besonderes Instrument parlamentarischer Kontrolle' in Peter Bußjäger (ed.), *Die Zukunft der parlamentarischen Kontrolle* (Braumüller, Wien 2008) 107.

58 Cf. Georg Lienbacher, 'Wen dürfen parlamentarische Untersuchungsausschüsse untersuchen?', in Konrad Arnold and Friederike Bundschuh-Rieseneder (eds.) *Recht – Politik – Wirtschaft – dynamische Perspektiven. Festschrift für Norbert Wimmer* (Springer, Wien-New York 2007) 319. In general cf. Bernd Wieser, 'Zur Prüfungskompetenz von parlamentarischen Untersuchungsausschüssen' (2002) 27 *Zeitschrift für Verwaltung* 618.

the members of an inquiry committee can be trusted to keep personal and sensible data secret and thus will neither infringe fundamental rights nor compromise political and administrative liabilities.⁵⁹ Thus, the question whether politicians with their specific political and personal aims are able to lead such inquiries dominated the conflicts and informed the quest for legal solutions.⁶⁰ As there is no procedure to resolve these conflicts in Austria⁶¹ the parliament as such, single parliamentary groups and federal ministries could – in the above mentioned Austrian manner to consult legal experts –⁶² commission legal expertise. It is interesting to observe that the expertise provided by the parliamentary administration and endorsed by the President of the Nationalrat as well as expertise by the Bundeskanzleramt-Verfassungsdienst (Constitutional Service of the Federal Chancellery) based their arguments on decisions of the German Bundesverfassungsgericht that has established a responsibility of parliament and of the executive together to secure state secrets and private secrets together.⁶³ They could in these regards only partly refer to the common Austrian approach and dogmatics. Other contributors, that submitted their expertise on request of a parliamentary group in later stages, tried to argue instead for limitations of the competences of inquiry committees and constructed analogies between parliament and administrative procedures which were heavily criticised.⁶⁴ Here is not the place to discuss the details of this issue but these examples can illustrate the difficulties of certain approaches and show how they become part of political disputes themselves – or even how the interpretation of statutes is influenced by the view that a parliamentary inquiry committee is prone to scandalise information it receives and the view that parliamentarians are not to be trusted.

3. Law-making and law-giving

Academic discourse about parliament and parliamentarism remains marginal in Austria and so does the debate on legislation and its theoretical aspects. Ever

59 This is – of course – a question any committee of inquiry has to face. For an overview cf. Paul Glaben, 'Der Schutz staatlicher und privater Geheimnisse im Spannungsfeld parlamentarischer Untersuchungen' (2007) 60 *Die öffentliche Verwaltung* 133.

60 This is exemplified in Helmut Epp, 'Die Untersuchungsausschüsse im Parlament', in Andreas Khol et al. (eds.) *Österreichisches Jahrbuch für Politik 2007* (Böhlau, Wien 2007) 575 and Epp, 'Commission of Inquiry versus Criminal Proceedings' (2008) 79 *International Review of Penal Law* 505.

61 Cf. Gottfried Strasser, 'Rechtsschutz im Verfahren vor den parlamentarischen Untersuchungsausschüssen in der Praxis' in Armin Bammer et al. (eds.), *Rechtsschutz gestern-heute-morgen. Festgabe für Rudolf Machacek und Franz Matscher* (Neuer wissenschaftlicher Verlag, Wien-Graz 2008) 455 (463 ff.)

62 See above at n. 43.

63 Cf. for an overview Arno Kahl, 'Untersuchungsausschüsse', in Georg Lienbacher and Gerhart Wielinger (eds.), *Öffentliches Recht. Jahrbuch 2008* (Neuer wissenschaftlicher Verlag, Wien-Graz 2008) 121. The decision by the Bundesverfassungsgericht is the so-called "Flick-Urteil", BVerfGE 67, 100.

64 See the expertise by Andreas Janko as published in the minority report of the parliamentary group of the Austrian People's Party: Austrian Parliament 679 d. B.

since Robert Walter published his essay "Die Lehre von der Gesetzestechnik"⁶⁵ in 1963 the debate has focused primarily on the technical aspects of the preparation of laws and statutes. This is in line with a common attitude that law can scientifically only be conceived and discussed from a formal perspective.⁶⁶ Only a small group of scholars, soon to be led and inspired by Heinz Schäffer, advanced the discussion in the 1970ies and 1980ies.⁶⁷ Theo Öhlinger compiled an important collection in 1982⁶⁸ and Wolfgang Mantl more recently edited a collection of essays that focused on problems of efficiency and de-regulation in the context of legislation.⁶⁹ Ever since those collections, there has not been any comparable work, although the economically inspired (but pre-dominantly academic) debate on regulatory impact assessment should not be overlooked.⁷⁰

Again we can perceive an intense debate in Germany.⁷¹ It gains impetus as new modes of governance emerge and as they are discussed in relation to the future importance of statutes as instruments of regulation and control and thus the role of parliament as centre of political debate and formal decision-making according to the Grundgesetz.⁷² As we will see in the next section, the role of parliament in Austria is not necessarily discussed in this context (what may be interpreted as expression of a widely held acceptance of informal procedures as characteristic of legislation⁷³).

Still, academics, judges of the Verfassungsgerichtshof and the Verwaltungsgerichtshof (administrative court) as well as journalists and politicians deplore the quality of statutes in Austria and call for reforms.⁷⁴ This should imply a need

65 18 Österreichische Juristenzeitung 85.

66 Wolfgang Mantl, 'Aufriß der Problemlage' in Wolfgang Mantl (ed.), *Effizienz der Gesetzesproduktion* (Signum, Wien 1995) 17 (49). Cf. for a general discussion of this approach Theo Öhlinger, 'Kann die Rechtslehre das Recht verändern?' (1991) 46 Österreichische Juristenzeitung 721.

67 Cf. i.e. Heinz Schäffer, *Verfassungsinterpretation in Österreich* (Springer, Wien New York 1971); Heinz Schäffer (ed.), *Theorie der Rechtssetzung* (Manz, Wien 1988) and numerous articles and other books.

68 Theo Öhlinger (ed.), *Methodik der Gesetzgebung* (Springer, Wien New York 1982).

69 Wolfgang Mantl (ed.), *Effizienz der Gesetzesproduktion* (Signum, Wien 1995).

70 Heinz Schäffer (ed.), *Evaluierung der Gesetze/Gesetzesfolgenabschätzung – in Österreich und im benachbarten Ausland* (Manz, Wien 2005); Heinz Schäffer (ed.) *Evaluierung der Gesetze/ Gesetzesfolgenabschätzung – weitere Erfahrungsberichte aus dem In- und Ausland. Staatspraxis und Wirtschaft* (Manz, Wien 2007); Helmut Hörtenhuber/Wolfgang Steiner, 'Normsetzung und qualitative Deregulierung', (2002) 10 *Journal für Rechtspolitik* 7 and the critical review of regulatory impact assessment ed. by Christoph Konrath in *juridikum* 2005 (1) 29-51.

71 See the thorough review by Gunnar F. Schuppert, *Gute Gesetzgebung. Bausteine einer kritischen Gesetzgebungslehre* (Zeitschrift für Gesetzgebung-Sonderheft, C. F. Müller, Heidelberg 2003).

72 Cf. Mathias Herdegen, 'Informalisierung und Entparlamentarisierung als Gefährdungen der Verfassung?' (2003) *VVDStRL* 7; Morlok (supra n. 53).

73 Sickinger (supra n. 39); Tálos/Kittel (supra n. 36).

74 Susanne Bachmann/Dietmar Jähnel/Georg Lienbacher (eds.), *Gesetzgebungsverfahren und Gesetzesqualität* (Manz, Wien 1992); Karl Korinek, 'Die Qualität der Gesetze – staatsrechtliche und legistische Verantwortlichkeiten im Gesetzgebungsprozeß', in Michael Holoubek/Georg Lienbacher (eds.), *Rechtspolitik der Zukunft – Zukunft der Rechtspolitik* (Springer, Wien New York 1999) 21; Heinz Schäffer, 'Vom Beruf der Politik zur Gesetzgebung in unserer Zeit' in Heinz Schäffer (ed.), *Evaluierung der Gesetze/Gesetzesfolgenabschätzung* (Manz, Wien 1995) 9.

to re-consider the role of the Nationalrat in the legislative process. Again it becomes evident that the formal account of constitutional scholarship cannot necessarily define the role of the Nationalrat with regard to the demands on and contents of the legislative process.⁷⁵ And neither can the members of the Nationalrat define it, as empirical research shows, they do not necessarily conceive a specific role of themselves in regard to legislative matters.⁷⁶ For a long time the debate has been centred on academic interests and administrative process. But legal discourse has not really included the political aspects and considered the formal and informal relations between the diverse actors in the legislative process. Karl Korinek, the former president of the Verfassungsgerichtshof, has, i.e., on several occasions stated that the Nationalrat should reflect its responsibility for the legislative process and called for expert assistance.⁷⁷ But neither he nor others have formulated criteria on how this could be achieved.⁷⁸

4. Deregulation and the retreat of the state

Deregulation, outsourcing and "Entstaatlichung" (retreat of the state) are major topics of the recent constitutional discourse in Austria.⁷⁹ In these debates, the problem of democratic legitimation is important – mostly because of the principles of legality and hierarchy that were sketched in the introduction. But the role of parliament, its legislative powers as well as parliamentary control do not feature prominently.⁸⁰ Again we can point to the German situation where similar problems are discussed in the light of the role of parliaments and

75 Cf. for the German debate on whether there is a constitutional duty of parliament to give reasons and justifications for a parliamentary decision Christian Waldhoff, 'Der Gesetzgeber schuldet nichts als das Gesetz' in Otto Depenheuer et al. (eds.), *Staat im Wort. Festschrift für Josef Isensee* (C. F. Müller, Heidelberg 2007) 325.

76 See the contributions in Wolfgang C. Müller et al. (eds.), *Die österreichischen Abgeordneten. Individuelle Präferenzen und politisches Verhalten* (WUV, Wien 2001).

77 He has already done so as professor at the Law Faculty of the University of Vienna and judge of the Verfassungsgerichtshof, cf. i.e. 'Die Qualität der Gesetze – staatsrechtliche und legitistische Verantwortlichkeiten im Gesetzgebungsprozess' in Michael Holoubek/Georg Lienbacher (eds.), *Rechtspolitik der Zukunft – Zukunft der Rechtspolitik* (Springer, Wien-New York 1999) 21.

78 But see, i.e., Helmuth Schulze-Fielitz, 'Der politische Kompromiss als Chance und Gefahr für die Rationalität der Gesetzgebung', in Dieter Grimm/Werner Maihofer (eds.), *Gesetzgebungstheorie und Rechtspolitik* (Westdeutscher Verlag, Opladen 1988) 290.

79 For an overview and the uses of this concept see Österreichische Juristenkommission (supra n. 4); Gabriele Kucsko-Stadlmayer, *Grenzen der Ausgliederung* (Manz, Wien 2003), Katharina Pabel, 'Verfassungsrechtliche Grenzen der Ausgliederung' (2005) 13 *Journal für Rechtspolitik* 221.

80 Only in 2008 the "Institut für Föderalismus" and the Austrian Parliament jointly organised a conference on the future of parliamentary control, see Peter Bußjäger (ed.), *Die Zukunft der parlamentarischen Kontrolle* (Braumüller, Wien 2008). Later that year the institute organised another conference on parliamentary control and outsourcing of organs of public administration and companies that are owned by the public. It is, however, interesting to see that the presentations of this second conference only partly covered the parliamentary aspects. For a brief report see Föderalismus-Info 6/2008 (Dezember) at www.foederalismus.at.

democratic accountability.⁸¹ In Austria, the legal debate is primarily centred on the state that is about to lose influence and control in many regards. Although it is evident that this state can legally only be conceived as a liberal democratic and parliamentary republic this point is neither articulated nor does it inform the line of argumentation.⁸²

The Verfassungsgerichtshof and academics have so far considered the limits of instruments of direct democracy in regard to binding the powers of legislative bodies.⁸³ But they have not yet discussed the influence that other actors exert on legislation and legislative bodies in the contexts of new modes of governance and legal instruments introduced in their wake. Developments that are going on in this field differ in many aspects from the traditional influence, i.e., of the widely accepted influence of the social partners on legislation.⁸⁴ One of the key questions in this respect is how public interest and democratic accountability that are traditionally connected with parliamentary procedures and debates can be guaranteed under changing conditions.⁸⁵ But parliament has not discussed these topics, either. Its scope remains focused on the legal responsibilities and the traditional tasks of the public administration. This becomes evident, i.e., in the fact that parliamentary interpellations focus primarily on legal duties and matters of (party) political influence but do hardly ever touch upon matters of deregulation or the retreat of the state. Meanwhile the discussion and possible justification of the legitimacy of establishing independent organs or outsourcing or privatisation of public duties remains the domain of the Constitutional Court.⁸⁶

High ranking officials who advance methods of public management and public governance in the public administration have thus expressed doubts whether parliament will even realise the powers it has in these contexts.⁸⁷ The latest amendments of the B-VG that paved the way for a complete reform of the federal budgetary system have introduced, i.e., a number of potential new instruments for the Nationalrat to access information and exert political control.⁸⁸ Also, the new regulation for the creation of independent administrative bodies has been combined with new instruments of parliamentary control that should

81 Florian Becker, *Kooperative und konsensuale Strukturen in der Normsetzung* (Mohr, Tübingen 2005); Florian Becker, 'Parlamentarische Gesetzgebung im "kooperativen Staat"' (2005) 44 *Der Staat* 433; Morlok (supra n. 53); Armin von Bogdandy, *Gubernative Rechtssetzung* (Mohr, Tübingen 1999)

82 Harald Eberhard/Christoph Konrath/Rita Trattnigg/Stefan Zleptnig, 'Governance – zur theoretischen und praktischen Verortung des Konzepts in Österreich' (2006) 14 *Journal für Rechtspolitik* 35 (58).

83 See VfSlg 16241/2001 and the comments by Anna Gamper, 'Direkte Demokratie und bundesstaatliches Homogenitätsgebot' (2003) 58 *Österreichische Juristenzeitung* 441, and Marko (supra n. 45); Eberhard et al. (supra n. 79) 59.

84 Eberhard et al. (supra n. 82) 57.

85 Cf. Harald Eberhard, *Der verwaltungsrechtliche Vertrag* (Springer, Wien New York 2005) 205 f., 397 f.

86 So far, this fact has neither been analysed by political scientists nor by legal scholars. Cf. Konrath (supra n. 38) 57.

87 Gerhard Steger, 'Ziele und Umsetzung der Haushaltsrechtsreform des Bundes' (2008) 49 *Das öffentliche Haushaltswesen in Österreich* 5 (9).

88 BGBl. I 1/2008.

compensate for the lack of administrative and hierarchical control.⁸⁹ These instruments have so far neither been used by the Nationalrat and a recent proposal on how to effectuate them in the Rules of Procedure merely copies the text of the constitution.⁹⁰ Also, they have so far not been the subject of academic debate.⁹¹

5. Parliament as guarantor for independence

It should not be overlooked that parliament as an institution is sometimes regarded as a kind of nonpartisan "guarantor for independence". This means that governmental⁹² institutions that do not fit in a common view of a (strict) separation of powers between legislature, executive and judiciary shall be constitutionally constructed with a specific relation to the parliament in general and the Nationalrat in particular. This follows the model of the "Rechnungshof" (Court of Auditors) and the "Volksanwaltschaft" (Austrian Ombudsman Board). The rationale behind this is that these institutions cannot impose sanctions on the administration but can provide the Nationalrat with qualified information that enables parliamentarians to provide for effective political control and legislative reforms and thus both are regularly characterised as "parlamentarische Hilfsorgane" ("auxiliary institutions of the parliament").⁹³ While this function is disputed it is evident that Rechnungshof and Volksanwaltschaft are regarded as practically independent from all other governmental institutions and are highly valued in the general public. Thus, any other institution that is constructed in such a way could possibly expect a similar public standing. In the course of the "Österreich-Konvent" (Austrian Convention), a constitutional reform debate in Austria,⁹⁴ the construction of a "Rat der Gerichtsbarkeit" (Council of the Judiciary) was a highly disputed issue. The "Richtervereinigung" (association of judges) lobbied for such a council that should guarantee administrative *and* budgetary independence of the judiciary from the Federal Ministry of Justice. Among their proposals was the institutional connection to parliament as guarantee for independence.⁹⁵ However, the matter was neither settled in the convention nor in its diverse follow-ups.

89 See the new Art. 20 Abs. 2 and Art. 52 Abs. 1a B-VG (BGBl. I 2/2008) and Dragana Damjanovic, 'Weisungsfreie Behörden: der Vorschlag für eine Neufassung des Art 20 Abs 2 B-VG' (2007) 15 *Journal für Rechtspolitik* 222 (224 f.).

90 See the bill 705/A, XXIV. Gesetzgebungsperiode.

91 Konrath (supra n. 38) 57.

92 Understood in a wide sense.

93 Claudia Kroneder-Partisch, 'Artikel 122', in Karl Korinek/Michael Holoubek (eds.), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (Springer, Wien New York 2000) 4; Johannes Hengstschläger/Andreas Janko, 'Der Rechnungshof – Organ des Nationalrates oder Instrument der Opposition?' in Österreichische Parlamentarische Gesellschaft (ed.), *75 Jahre Bundesverfassung* (Verlag Österreich, Wien 1997) 452.

94 Cf. Andreas Khol/Christoph Konrath, 'Der Österreich-Konvent. Auf dem Weg zu einer neuen Verfassung', in Österreichische Notariatskammer (ed.), *Festschrift Nikolaus Michalek* (Manz, Wien 2005) 191 and www.konvent.gv.at.

95 See the report of working group 9 "Rechtsschutz und Gerichtsbarkeit" of the Österreich-Konvent on www.konvent.gv.at and Vereinigung der Österreichischen Richterinnen und Richter

6. The perspective of political science

This overview has introduced the range of academic legal discourse on parliament and parliamentarism. I am aware that it remains a sketch and that I cannot discuss any details in the given context. But what should have become obvious are the difficulties constitutional scholars face when they are confronted with problems of parliament and parliamentarism. It is, however, remarkable that many aspects of parliamentarism are not discussed and not even mentioned, namely, what the constitutional norms concerning parliament actually regulate: the framework for some of the most important (many would say: *the* most important) spaces that allow for public expression, debate and political action, the arena for making political decisions, stating political verdicts and creating statutes.⁹⁶ I am aware that this thesis may sound strange – what else should parliaments be than such venues? This function of parliaments seems to be so self-evident that it is not even necessary to mention it any more. And what else should be established by a democratic constitution if not the framework for a democratic polity? But when legal scholars focus primarily on the formal rules and the concrete steps of parliamentary procedures they establish and regulate, they may, as we have seen above, neglect that these clauses at the same time span the framework for the political process. A framework that is defined by constitutional law and thus is not something that is just "self-evident". As Loewenberg, amongst others, has shown in empirical regards⁹⁷ and Mantl has discussed in the genealogical perspective of political and constitutional theory⁹⁸ these "self-evident" conceptions and functions are the most puzzling and difficult to explain and understand.⁹⁹ And they may gain special importance once the conditions of and for parliamentary processes face major changes, i.e. in the context of European integration or of deregulation and outsourcing.

What seems to be missing in Austria is – in modification of Jeremy Waldron –¹⁰⁰ a jurisprudential model that is capable of making (normative) sense of legislation and parliaments, recognising the "wisdom of the multitude"¹⁰¹ and is

(ed.), *Gewaltenteilung im demokratischen Rechtsstaat* (NWV, Wien-Graz 2006), Otto Oberhammer, 'Justizverfassung neu – Zum Vorschlag, einen Rat der Gerichtsbarkeit einzurichten' and Gero Debusmann, 'Die Entfesselung der Dritten Gewalt – Der Geist aus der Flasche' in Österreichische Juristenkommission (ed.), *Der Österreich-Konvent. Zwischenbilanz und Perspektiven* (NWV, Wien-Graz 2004).

96 I'm aware that this is a view of politics that is predominantly influenced by the works of Hannah Arendt, especially her *The Human Condition* (University Press, Chicago 1958), and I'm also aware that Arendt's works are characterised by an ambivalence towards parliamentarism. Still, I think that the core conception can be adapted to parliaments as well.

97 Loewenberg (supra n. 13).

98 Mantl (supra n. 12).

99 A recent and remarkable contribution to this debate is Christoph Möllers, *Demokratie – Zumutungen und Versprechungen* (Wagenbach, Berlin 2008).

100 *The Dignity of Legislation* (University Press, Cambridge 1999). It has to be noted that Waldron formulated his argument in the context of Anglo-American jurisprudence, its preference for judicial decision-making and its scepticism about models of legislation.

101 This is Waldron's interpretation of Aristotle's *Politics*, Book III, chapter 11. See Waldron *ibid.* 93 f. See also, though based on different assumptions, Oliver Lepsius, 'Die erkenntnistheoretische Notwendigkeit des Parlamentarismus', in Martin Bertschi et al. (eds.), *Demokratie und Freiheit* (Richard Boorberg Verlag, Stuttgart and others 1999) 123.

not misled by "noise and tumult, conflict and disagreement, the smell or the sound of the rabble, into thinking that an indecorous politics is necessarily a symptom of an unhealthy politics."¹⁰² Thereby I do not want to argue for some kind of political jurisprudence, but I do think that the perspective of political science can offer insights for the Austrian discussion.¹⁰³

From the 1970ies onwards, Austrian political scientists have compiled a number of important studies on political processes in general and the role of parliament and parliamentarians in particular. Like in legal scholarship, however, a systematic or general approach is missing in this discipline as well. It is also noteworthy that the latest empirical studies that analyse the profile and self-conception of Austrian members of parliaments date back to the year 2001 and 2002.¹⁰⁴ Since then the composition of the Nationalrat has changed significantly.

As Austrian politics have for a long time been characterised by a specific kind of consociationalism, the role and interdependencies of politicians, political parties, social partners and the administration on the federal level and in the Länder and thus the "democratic quality" of political processes in Austria has received special attention.¹⁰⁵ This has led to a number of attempts to reassess the function and role of parliament in the system of separation of powers, viz. the distinction of the diverse functions of government and checks and balances. Locating parliament in a multipolar system of actors and influences and considering especially the role of political parties gives a picture that is very different from that of the B-VG and its treatment in constitutional textbooks. Thus, political scientists try to overcome the inconsistencies that prevail in the legal debates about individual members of parliament, political parties and the parliament as constitutional organ.¹⁰⁶ Also, this entails the assessment of the specific roles and responsibilities of the opposition and the function of parliaments as political arenas. It is especially this function that political scientists see as central and as potential to regain importance and prominence.¹⁰⁷ This produces differences and even discrepancies to general perceptions of parliament as sovereign legislator, supreme constitutional organ or hard-working assembly. Of course, the research interests of political scientists and their methods cannot be compared to that of constitutional scholars. On the other hand, it becomes

102 Ibid. 165.

103 I'll come back to the problem of a conception of the political and constitutional discourse infra II. 2.

104 Wolfgang C. Müller et al. (eds.), *Die österreichischen Abgeordneten. Individuelle Präferenzen und politisches Verhalten* (WUV, Wien 2001); Erika Pfeifhofer, *Die Abgeordneten zum Nationalrat. Berufsprofil und Abhängigkeit von Partei und Fraktion* (Braumüller, Wien 2002).

105 Tálos (supra n. 36); Tálos/Kittel (supra n. 36); David Campbell et al. (eds.), *Die Qualität der österreichischen Demokratie* (Leske+Budrich, Opladen 2002).

106 Müller et al. (supra n. 9) 184 f. Hubert Sickinger, 'Zur Demokratiequalität des österreichischen Parlamentarismus' in David Campbell et al. (eds.), *Die Qualität der österreichischen Demokratie* (Leske+Budrich, Opladen 2002) 47.

107 Anton Pelinka, 'Reinventing Parliamentarism? Rollenverständnis und Vertretungsstile, in Anton Pelinka, Fritz Plasser and Wolfgang Meixner (eds.), *Die Zukunft der österreichischen Demokratie* (Signum, Wien 2000) 311; Sickinger (supra n. 106) 63 f.; Anton Pelinka, 'Gesetzgebung im politischen System Österreichs', in Wolfgang Ismayr (ed.), *Gesetzgebung in Westeuropa* (Verlag für Sozialwissenschaften, Wiesbaden 2008) 431 (457 f.).

obvious how the general characterisation of parliament and its functions, from a legal point of view, may have lost touch with the developments of parliament within the political system.

PART II – EXPLANATIONS AND ADJUSTMENTS

The overview can provide only a first and admittedly rather diverse account of concepts and conceptions of parliament and parliamentarism and their often rather broad use in Austria. True comprehension requires more detailed empirical analysis and thorough definitions and distinctions. In any way it has to be sustained by a discussion of the theoretical background and methods that construct and by which the democratic Rechtsstaat and law in such a state are conceived. I will but sketch three points of references for such a discussion: the prevailing mode of theorising in Austrian constitutional discourse and the view of politics that is connected with it, the underlying conception of the Rechtsstaat and the widespread view of the separation of powers as well as the institutional role of parliament therein. The comparison with the approach of political science has already shown that legal discourse is centred on a rather narrow conception of parliamentarism. The following examples will narrow this view even more as they focus predominately on the (formal) law-making process.

1. The irrationality and the art of legislation

I have argued above (I. 3.) that academic discourse about parliament and parliamentarism remains marginal in Austria and so does the debate on legislation in the sense of making and drafting laws, its political contexts and its theoretical aspects. This is commonly explained by reference to Kelsen's "Pure Theory of Law" and the view of legislation that is propounded there is recounted roughly as follows: in the context of the Pure Theory legislation cannot be conceived with the means of a legal science ("Rechtswissenschaften"). The domain of a legal science is the analysis of the given law whereas the drafting of laws and all the processes that accompany the legislative procedures in its pre-parliamentary and parliamentary stages are the domain of practice.¹⁰⁸ So, apart from guidelines on what a statute should "look" like in a technical sense and that concepts words should be defined properly and used in a coherent way, there is not much that can be obtained from a so-conceived legal science. Following that, legislation – in the above mentioned sense – cannot be viewed other than as a kind of intuitive practice or an art.¹⁰⁹ The only problems that matter in such a view are that all the legally prescribed formal procedures are fulfilled. The way how laws are

108 Markus Lammer, 'Grundfragen der Gesetzgebungslehre', in: Wolfgang Mantl (ed.), *Effizienz der Gesetzesproduktion* (Signum, Wien 1995) 59 (60) has shown how this reference to Hans Kelsen, *Reine Rechtslehre* (2nd ed., Deuticke, Wien 1960) 1, 74 is used in Austrian debates.

109 Theo Öhlinger, 'Planung der Gesetzgebung und Wissenschaft', in Theo Öhlinger (ed.), *Methodik der Gesetzgebung* (Springer, Wien-New York 1982) 1 (3) who is careful to point out that this is a specific interpretation of Kelsen's works that can be disputed.

drafted and why it is done so, who dominates the legislative process and what material role remains for parliament cannot be assessed in this context. Now, I do not deny that such a conception of the domain of legal scholarship can have its merits especially with regard to the role of legal experts and the public administration in the context of political decision-making. But it can also not be denied that this attitude is coupled with a specific view of political, democratic and parliamentary processes which can be seen as erratic and irrational. Thus, politics and parliamentarism are secluded from the perspective of legal science: Kelsen holds that the condition for the "Wissenschaftlichkeit" of a statement is that it can be analysed and discussed rationally. Political statements and convictions will, however, always be subjective and value-based and thus not be fit to be discussed scientifically and with the claim to objectivity. Hence, Kelsen is not only delineating the spheres of politics and legal analysis but he is also implying that political debates cannot be rational and objective while legal analysis can be founded and performed in rational and scientific ways. This is of course in line with Kelsen's epistemology and his democratic theory that is based on moral relativism.¹¹⁰

It would, however, be too quick to blame Kelsen for this attitude and it would deny that it was he who has argued consequently that a democratic regime depends on normative procedures and forms.¹¹¹ The specific opinion of legislation, politics and parliamentarism that is found in Austria may have deeper roots. Alexander Somek¹¹² and Theo Öhlinger¹¹³ have thus emphasised that Kelsen's theoretical approach was only received in an eclectic manner while the traditional Austrian legal positivism and its view of state and politics prevailed for a very long time. Ernst Hanisch has called this attitude the "long shadow of the state" and used it as title and theme for his social history of Austria in the 20th century. There he defends the thesis that Austria is characterised by a particularly strong state-run-bureaucratic tradition where modernisation will mostly come (and be expected) from "above" and where civil society has paradoxically remained in the realm of state authorities (at least for a long time). The "state" of which Hanisch speaks comprises the public administration, dominant and bureaucratic (at least for a long time) political parties and strong corporatism.¹¹⁴

These attitudes were particularly strong before 1945. Austrian bureaucrats and judges proudly claimed that they had outlasted any regime change and remained faithful civil servants, viz. servants of the administration and judiciary.¹¹⁵

110 Kelsen, *Wesen und Wert* (supra n. 7) 98 ff. This claim is – of course – disputed and any further discussion of the theoretical foundations of the theoretical foundations of democracy, parliamentarism and law would depend on closer analysis. Cf. Martin Kriele, *Einführung in die Staatslehre* (6th ed., Kohlhammer, Stuttgart 2003) 224.

111 Möllers, *Demokratie* (supra n. 99) bases his defence of democracy on this view.

112 Somek (supra n. 22) 638 ff.

113 Theo Öhlinger, 'The Genesis of the Austrian Model of Constitutional Review of Legislation' (2003) 16 *Ratio Iuris* 206 (219).

114 Ernst Hanisch, *Der lange Schatten des Staates. Österreichische Gesellschaftsgeschichte im 20. Jahrhundert* (Ueberreuter, Wien 1994).

115 Cf. on the self-conception of the public administration Adolf J. Merkl, 'Entwicklung und Reform des Beamtenrechts' (1932) 7 *VVDStRL* 55, 112; on the self-conception of the judiciary (especially after the destruction of the "Justizpalast" in Vienna in July 1927) Gustav Ratzen-

Their approach was centred on the imperial heritage and thus on a primarily formalistic view of the constitution with emphasis on organisational matters.¹¹⁶ Only the end of World War II and the fall of the Nazi regime – not necessarily the critique of ideology characteristic of Kelsen's works – gradually lead to a new paradigm among Austrian politicians and legal scholars and practitioners that denied totalitarianism and opened the stage for a new democratic and republican consensus.¹¹⁷ Still, jurists in the Austrian public administration and constitutional scholars tried to preserve the earlier "unpolitical attitude", as Somek has characterised it,¹¹⁸ while at the same time they remained sceptical of parliament. Parliament was seen – and it may still be so among members of the administration – as an assembly that lacks the knowledge and experience of the public administration and has the potential to compromise the doings of the administration.¹¹⁹

It is also common that jurists in the public administration and especially judges as well as the already mentioned "legal experts" style themselves as detached from politics or even "unpolitical" in Austria.¹²⁰ Now, it is indisputable that independence and objectivity are at the core of the public service. But it could be challenged whether politics and thus parliamentarism are the antipode of administrative rationality as some proclaim. And this is not necessarily a phenomenon of days long gone. When the "Österreich-Konvent"¹²¹ met from 2003-2005, for instance, it was interesting to observe that the discussions on the main problems of a reform of the Austrian constitution and especially of federalism were defined as "political" discussions by proponents of the public administration and among legal scholars meaning that this debates could not be regarded as rational in their conception.¹²²

hofer, 'Die Juli-Ereignisse und ihre Lehren' (1927) 78 *Gerichts-Zeitung* 225. For a historical analysis see Waltraud Heindl, 'Bürokratie und Beamte', in Emmerich Tálos (ed.), *Handbuch des politischen Systems Österreichs. Erste Republik 1918-1933* (Manz, Wien 1995) 91 and Gerhard Botz, 'Zum Verhältnis von Politik und Rechtswesen in der Ersten Republik', in Erika Weinzierl (ed.), *Justiz und Zeitgeschichte. Symposionsbeiträge 1976-1993* (Jugend & Volk, Wien 1995) 99. On the cleavages and continuities that characterise Austria in the 20th century see Hanisch (supra n. 114).

116 Somek (supra n. 22); see also Manfred Welan, *Republik der Mandarine? Ein Beitrag zur Bürokratie- und Beamtenrechtsdiskussion* (1996) WPR-Diskussionspapier 57-R-96.

117 Cf. Peter Pernthaler, 'Verfassungsentwicklung und Verfassungsreform in Österreich', in Bernd Wieser and Armin Stolz (eds.), *Verfassungsrecht und Verfassungsgerichtsbarkeit an der Schwelle zum 21. Jahrhundert* (Verlag Österreich, Wien 2000) 67 (70 ff.); Wolfgang Mantl, 'Aktuelle Transformationsprobleme Österreichs', in Franz Schausberger (ed.), *Geschichte und Identität. Festschrift für Robert Kriechbaumer* (Böhlau, Wien-Köln-Weimar 2008) 333 (334 f.).

118 Somek (supra n. 22) 646.

119 Cf. Peter Gerlich, *Parlamentarische Kontrolle im politischen System* (Springer, Wien-New York 1973) 11.

120 This is exemplified in the statements of Austrian judges on independence and politics, see i.e. the contributions and remarks in Österreichische Juristenkommission (ed.), *Rechtsstaat und Unabhängigkeit, Kritik und Fortschritt im Rechtsstaat* vol. 30 (Neuer wissenschaftlicher Verlag, Wien-Graz 2007).

121 See supra at n. 94.

122 For an analysis of the debate in the Österreich-Konvent (Austrian Convention) see Christoph Konrath, 'Dann bleibt es eben so. Föderalismus und Kompetenzverteilung als Themen des Österreich-Konvents' (2005) 34 *Österreichische Zeitschrift für Politikwissenschaft* 351.

2. A closed system and a single lawgiver

But again we should not judge too quick. There is, as historians suggest, a strong administrative tradition prevalent among Austrian jurists. But there is also a predominant theoretical approach in constitutional and administrative law that aims to formulate a relationship between law and politics. However, this element is often not stated in the common presentations and conceptions of the "Stufenbau der Rechtsordnung" (doctrine of hierarchical structure of the legal system). The basic idea of the Stufenbau-doctrine is that law regulates its own creation and destruction and that the production of legal norms as well as their derogation is performed in discrete steps ("Stufen"). Thus, the constitution determines a (in Austrian terms) simple ("einfaches") statute,¹²³ the statute in turn determines the decision of a judge or the enactment of an ordinance ("Verordnung") and again of an administrative act. The constitution as well as statutes, ordinances, rulings of courts and administrative authorities form different levels of the legal pyramid. This doctrine was conceived by Adolf Merkl during World War I and taken up by Kelsen in his Pure Theory.¹²⁴ In essence it is a forerunner of legal systems theory that builds on the operative closure of the legal system.¹²⁵

The Stufenbau-doctrine dominates Austrian legal thinking and sets the analytical stage for any discussion on the applicability and legitimacy of a legal norm.¹²⁶ Therefore, it is important to note in the given context that the relationship between constitution and statute has the same character as the relationship between statutes and administrative acts in Austria. Legislation is conceived as the execution of the higher level of law manifest in the constitution, just as administrative acts execute a statute. Because there was no doubt in the early 20th century that the legality of the execution of statutes by administrative authorities could be reviewed by a court, there could be – in the same way – no doubts about the review of the execution of the constitution by the legislature.¹²⁷ So legislation, viz. parliament, is bound by law in a very specific sense in Austria and judicial review is justified by a distinct view of legislation.

This view has at least three further implications. One relates to the distinction between parliament, administration and courts, the second to the role of politics and political decisions and the third to the status of parliament in the legal and political system.

As any legal norm on any hierarchical level is determined by yet another norm and in turn determines other norms there is no explicit difference between

123 Compared to a "constitutional statute" ("Verfassungsgesetz") that is higher in rank.

124 For the first full account cf. Adolf Merkl, *Die Lehre von der Rechtskraft entwickelt aus dem Rechtsbegriff. Eine rechtstheoretische Untersuchung* (Deuticke, Leipzig-Wien 1923) and then Kelsen (supra n. 108) 228 ff.; a critical assessment is provided by Theo Öhlinger, *Der Stufenbau der Rechtsordnung. Rechtstheoretische und ideologische Aspekte* (Manz, Wien 1975).

125 Wiederin, 'Denken vom Recht' (supra n. 21) 300; Somek (supra n. 22) 644.

126 It is thus no wonder that matters of the application and status of EC-law were discussed in the context of its place in the Stufenbau, cf. Gerhard Baumgartner, 'Der Rang des Gemeinschaftsrechts im Stufenbau der Rechtsordnung' (2000) 8 *Journal für Rechtspolitik* 84; Stefan Griller, 'Der Stufenbau der österreichischen Rechtsordnung nach dem EU-Beitritt' (2000) 8 *Journal für Rechtspolitik* 273.

127 Öhlinger, 'Genesis' (supra n. 113) 217.

creation and application of norms. Each creation of a legal norm is at the same time the application of another enabling legal norm. However, no enabling legal norm can fully determine the creation of other legal norms on its basis. It can only determine the scope within which a legislative, administrative or judicial organ can make a decision. This explains the Austrian tendency to compare the constitution with rules of a game that do not determine the intentions with which a game should be played. But in consequence, the Stufenbau-doctrine exposes a political role of the judiciary and administrative organs:¹²⁸ just like parliament that executes the constitution within a given scope the courts and administrative organs execute statutes and ordinances within a given scope and create new legal norms on a lower level. And as the Stufenbau-doctrine is essentially a structural analysis of a legal system it can not prescribe how legal norms should be interpreted and applied.¹²⁹ Thus, deciding for one or another possibility of legal interpretation in a given case attains more or less the same quality as deciding for one or another option to enact a statute under the constitution.¹³⁰ So, in consequence the Stufenbau-doctrine could be conceived as a theory that is aware of the interplay between formal and informal, political and legal processes and procedures that has to be regulated in any democratic polity – and it could thus even be discussed in the context of a broader view of parliamentarism.¹³¹

Also, it should be clear that, under such a system, legislative bodies should have a certain – though maybe only gradual – precedence over other organs and functions of the state.¹³² However, such a gradual precedence can be constricted by a theoretical and a practical argument: As I have argued before, the Stufenbau-doctrine is essentially a structural analysis of a legal system. Thus, it can be difficult to discern any conditions on the role and status of a specific institution from such a view. Also, a practical approach can show that the application of the Stufenbau-doctrine can – and has in effect – reduce(d) the importance and status of parliament. In Austria, this has happened in the context of the debate about the principle of legality and the "determinateness" of legal statutes. The Constitutional Court and constitutional scholars have long favoured a rather

128 For a detailed analysis of the Austrian reluctance to enter arguments on principles in this context see Somek (supra n. 22) 642 ff.

129 A full account of the Stufenbau-doctrine and the prevailing mode of Austrian constitutional and administrative law discourse would, however, have to consider the dispute on the scope and purpose of legal interpretation. The 1980ies and 1990ies witnessed a number of controversies on whether courts and scholars could only aim to discern the "real will" of the legislator or whether they do actually influence and form the legal system (note the inherent paradox in regard to the Stufenbau-doctrine!). See Bernd-Christian Funk, 'Zur Rationalität der rechtswissenschaftlichen Argumentation' (1988) *Wissenschaft und Glaube. Vierteljahresschrift der Wiener Katholischen Akademie* 171; Robert Walter, 'Zur Frage des Rechtsbegriffes' (1991) 46 *Österreichische Juristenzeitung* 336; Theo Öhlinger, 'Rechtslehre' (supra n. 66); Somek/Forgo (supra n. 13); Bernd-Christian Funk, 'Rechtswissenschaft als Erkenntnis und kommunikatives Handeln' (2000) 8 *Journal für Rechtspolitik* 65; see also Peter Pernthaler, *Das Recht der Richter im Recht ohne Staat* (2000) 122 *Juristische Blätter* 691 for a review of adjudication and the power of courts in the European Union as seen from an Austrian perspective.

130 Cf. Wiederin, 'Denken vom Recht' (supra n. 21) 304.

131 Widder (supra n. 9) has done so by applying methods of systems theory but remained singular in Austria.

132 Ibid. 305.

extensive interpretation of these principles and thus gradually limited the practical and political scope of parliament to enact statutes.¹³³

On the other hand, when the Stufenbau-doctrine emphasises that law regulates its own creation and destruction the legal system can be conceived and discussed without any reference to a political assembly or legislative body – except as a source of primordial legitimation or in its formal role of securing the constitutionally prescribed forms to make statutes effective.¹³⁴ Thus, in legal discourse parliament is more or less reduced to being the "Gesetzgeber" or legislator. Of course, the will of the "Gesetzgeber" has – in one way or the other – to be discerned and the "Gesetzgeber" is reminded of the conditions under which it should enact statutes and each legal act should be – in the end – ascribed to the "Gesetzgeber" from whom it derives its legitimacy. But any more detailed conception of it is not really necessary for legal discourse.

Now, we can object that the "Gesetzgeber" is just a chiffre and that we are of course aware that we speak of a democratically elected, diverse and plural assembly.¹³⁵ But the notion of the "Gesetzgeber" can reveal just another aspect of the Stufenbau-doctrine. Öhlinger has argued that the fascination of this theory emanates from its apparently seamless fusion of the two guiding ideas of modern political thought in continental Europe: the Rechtsstaat and democracy.¹³⁶ It provides a sound basis for the Rechtsstaat in which every act of the state can but be a legal act. And it incorporates democracy as the prevailing mode of the creation of law. The Rechtsstaat need not necessarily be a democratic state and the development of the Rechtsstaat especially in Austria and in Germany excels the development of democracy by far in the late 19th century.¹³⁷ While the "rule of law" in the Anglo-American sense has always been oriented on the dialectic process characteristic of courts and also of parliaments the idea of the Rechtsstaat has originally been connected with the (single) sovereign that decides *ex parte* and by decree.¹³⁸ The Rechtsstaat is thus primarily oriented on an administrative and hierarchical system. It is interesting to note, that while the Rechtsstaat-aspect of the Stufenbau-doctrine has been widely discussed among legal scholars the democratic-aspect, that could be debated in a similar extent, has more or less been reduced as we saw in part I. It seems as if those aspects that are elsewhere discussed in the context of democracy (and parliamentarism) are conceived within the framework of the Rechtsstaat-conception in Austrian legal scholarship.

I do, however, think that there is yet another reason why the Stufenbau-doctrine can seem to offer a way to reconcile the Rechtsstaat and democracy that bears on conceptions of parliamentarism and parliamentary legislation. In

133 See already Öhlinger, *Stufenbau* (supra n. 124) 36.

134 See supra at 36.

135 Cf. Heinz Peter Rill, 'Hermeneutik des kommunikationstheoretischen Ansatzes', in: Helmuth Vetter and Michael Potacs (eds.), *Beiträge zur juristischen Hermeneutik* (Litas, Wien 1990) 51.

136 Öhlinger, *Stufenbau* (supra n. 120) 32.

137 Cf. Gerald Stourzh, *Wege zur Grundrechtsdemokratie* (Böhlau, Wien 1989); Widder (supra n. 9) 185 ff.

138 Kriele (supra n. 110) 287 f.

general, jurisprudence and legal education are modelled on the role and function of the judge who has to make a *legal* decision based on the law. It is not her or his will that is expressed. The appeals of a legal system are its anonymity and – as long as that is sustained – its apparent neutrality, or at any rate its distance or independence from politics. Thus, we may regard ourselves as subject to government by laws and not by men. Waldron has described the danger of focusing on legislation is "*that, as a source of law, it is all too human, all too associated with explicit, datable decisions by identifiable men and women that we are to be subject to these rules rather than those.*"¹³⁹ Waldron does not overlook that the image of law as neutral and anonymous, as vested with a view from nowhere, is contested¹⁴⁰ and he certainly does not want to give up the claim to be governed by laws. But he asks why in general the processes by which courts reach their decisions are supposed to be special and distinctive and why it is a matter of importance for jurisprudence to find out whether these claims about the special character of judicial reasoning can be sustained and why there is no similar discussion about legislative reasoning.

Given my account above, the Stufenbau-doctrine does not – at least when interpreted consequentially – distinguish between the application of law in courts and parliaments, but it does not focus on reasoning either. Its formalistic perspective, its postulate that law regulates its own creation and its seemingly logical validity, can, in the end, sustain the view that law, the administration and the judiciary will in fact be able to perform their duties in a neutral way and be the perfect epitome of a government by laws. At the same time, these strengths of the Stufenbau-doctrine seem to mark its limits. Öhlinger has argued that it rests on premises that can not be questioned within its own context and he has pointed out that it is based on a specific and reduced view of socio-political reality that has strong bearing on our conceptions of democracy and parliamentarism. It is his analysis that will bring me to my final point on the status and view of parliament in the Austrian political system and which could provide a basis for a reassessment of the concepts of parliament and parliamentarism in Austria and connect them to the discourse known i.e. from Germany or the European Union.

3. The relationship between parliament, government and administration

Öhlinger already asserted in 1975 that in political reality the relation of parliament and executive government had been reversed.¹⁴¹ While the Stufenbau-doctrine emphasises the primacy of parliament, political reality is – and has since been – characterised by the factual dominance of the executive government and those political parties that form the latter. The tension that characterises the (old) relationship between parliament and executive government and that is the basis for effective parliamentary control ceases to exist, then.

139 Waldron (supra n. 100) 24. Emphasis in the original text.

140 For a detailed and thorough account cf. Martha Minow, *Making all the Difference. Inclusion, Exclusion, and American Law* (Cornell University Press 1990).

141 Öhlinger, *Stufenbau* (supra n. 124) 36.

Scrutiny of legislative initiatives and political control, once perceived as the domain of parliament as an institution, becomes the function of the opposition – a function that is in Austria neither mirrored in the constitution nor in the rules of procedure. They refer to "minority rights" – that can of course be used by the majority as well.¹⁴² At the same time, political control gradually lost touch with the development of the public administration. Öhlinger goes on to argue that parliamentary control of the federal executive government feigns a closed, manageable and by means of directives and orders easily controllable system.¹⁴³ Already in the 1960ies this model had been disputed and thus some of the central ideas of the Stufenbau-doctrine that concern the structure of normative sentences and decision making had already been called into question.¹⁴⁴ Indeed, the 1970ies witnessed a debate about the shortcomings of traditional conceptions of democratic legitimacy of the public administration. A number of arguments were propounded that aimed to compensate the perceived "legitimacy deficit" by a new, participatory conception of democracy and public administration.¹⁴⁵

Thus, Öhlinger has argued that the Stufenbau-doctrine may be of high theoretical and analytical importance but in practical-political terms it remains steadfast in a conception of the Rechtsstaat that does not comply with the socio-political and administrative reality anymore.¹⁴⁶ The socio-political and administrative contexts have changed again significantly since the 1970ies.¹⁴⁷ But as we have seen in part I the conceptions of parliament in constitutional discourse have not been adapted ever since.

In a more recent contribution Öhlinger has taken up his earlier line of argumentation and applied it to common conceptions of the separation of powers that might provide hints for an adaptation of the view of parliament and parliamentarism today.¹⁴⁸ Now, the discussion of the principle of the separation of powers is difficult in the context of the B-VG. It is never stated explicitly though it can be discerned from the functional separation of legislation and executive powers.¹⁴⁹ For a long time it did not receive much attention among constitutional scholars, and only the late 1960ies saw the beginning of a new, though comparatively confined debate on the topic.¹⁵⁰

While common interpretations of the separation of powers in Austria follow a formalistic and technical conception of 19th century political and constitutional

142 Ibid. 37.

143 Ibid.

144 Ibid. 40 based on Niklas Luhmann, 'Lob der Routine' (1964) 55 *Verwaltungsarchiv* 1; *Recht und Automation in der öffentlichen Verwaltung* (Duncker & Humblot, Berlin 1966) and *Rechtssoziologie* vol. 2 (Rowohlt, Reinbek 1972); for a thorough account in the Austrian context see Widder (supra n. 9).

145 Öhlinger, *Stufenbau* (supra n. 124) 41; Wolfgang Mantl, 'Die Partizipation in der Verwaltung' in: Felix Ermacora (ed.), *Allgemeines Verwaltungsrecht* (Orac, Wien 1979) 485.

146 Öhlinger, *ibid.* 42.

147 For an overview see Eberhard et al. (supra n. 82).

148 Öhlinger, 'The Doctrine of Separation of Powers in the Relationship between Parliament, Government and Administration at the Beginning of the 21st Century' (2001) 13 *ERPL/REDP* 1317.

149 Wiederin, 'Grundlagen' (supra n. 8) 433.

150 Wiederin, 'Denken vom Recht' (supra n. 21) 305.

theory that strictly separated the state's powers and functions into legislative, administrative and jurisdictional¹⁵¹ the Stufenbau-doctrine follows a different model. In the latter's view, the legislation enacts general rules whereas the executive government is confined to the implementation of these rules. It is regarded as the head of the administrative machinery but there is no room for any further or independent role of the executive government. Such a concept assumes a clear hierarchy of parliament over the executive government. It is imbedded in a comprehensive concept of democracy, namely that all power of the state originates from the people. They are represented in parliament and via parliament they control the executive government and thus the public administration and all doings of the state.¹⁵²

This comprehensive (and theoretical) concept of democracy does not comply with the transformation of executive government that started with the emergence of the modern welfare state.¹⁵³ The once – theoretically and politically – perceived dominance of parliament has given way to a dominance of the executive government and governing cannot be reduced to implementing the statutes enacted by parliament. The task of governing a late-modern welfare state requires a high level of expertise and administrative organisation that is itself part of a complex network of national, supranational and international bodies, social and economic actors, rules and interests.¹⁵⁴ Parliament thus depends on the information and insight it receives from the executive government and the administration today. Statutes can but be enacted by parliament acting on a governmental proposal under such conditions. In all modern democracies parliaments depend on the initiative of the executive governments and their expert staff to make proposals for statutes and hence dominate legislative processes.¹⁵⁵

So, the relation between parliament and executive government has to be reconsidered. It cannot be described as a relation between two antagonistic powers, anymore. And it can – given the complex character of modern politics – not be described as a relationship between the central powers of a state. Both are important elements of networks that link – inter alia/in special – political,

151 Hans Fenske, 'Gewaltentrennung', in Otto Brunner, Werner Conze and Reinhard Koselleck (eds.), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Klett-Cotta, Stuttgart 1975) 923 (952); cf. the common constitutional law textbooks (supra n. 17) that will usually just tackle the separation of powers-doctrine.

152 Öhlinger, 'Separation of Powers' (supra n. 143) 1319. For a discussion of opposing classical statements and their impact on legal theory and the status of parliaments cf. Peter Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s' (2004) 113 *Yale Law Journal* 1341 (1380 ff.). Note also the sceptical stance of Kelsen on the separation of powers as exemplified in the first edition of *Wesen und Wert der Demokratie* (Mohr, Tübingen 1920) 19 f. and the modified view in the second edition (supra n. 7) 82, see also the overview in Thomas Olechowski, 'Von der "Ideologie" zur "Realität" der Demokratie' in Tamara Ehs (ed.), *Hans Kelsen. Eine politikwissenschaftliche Einführung* (Facultas, Wien 2009) 113 (127 f.).

153 For a comprehensive account see Lindseth (supra n. 146), Widder (supra n. 9).

154 Cf. for an account of governing and the quest for democratic legitimation under such conditions Anne-Marie Slaughter, *A New World Order* (University Press, Princeton 2004).

155 Among others Öhlinger, 'Separation of Powers' (supra n. 148) 1321.

administrative, social as well as economic actors and structures on regional, national, supranational, transnational and international levels.¹⁵⁶

The preceding discussion of conceptions of parliament and parliamentarism in Austria may imply that the theoretical background can only partly serve as a basis for such a reconsideration. It might – as in many other European countries – lead to the conclusion that parliament faces a decline and gradually loses all the powers it once had. In fact, the presentation of parliament in constitutional textbooks, widely held conceptions of parliament in the public and the media and the tradition of constitutional discourse suggest a parliament as centre of social and political autonomy. This centre seems to be under threat from executive domination and more recently from the European Union. The decline of parliament and the danger of an eroding democracy loom large in many contributions to the debate.¹⁵⁷

Closer legal analysis of this perceived decline calls this thesis into question.¹⁵⁸ On the contrary, i.e. Armin von Bogdandy's comparative studies show that competences of parliaments have not been limited in the EU member states. He goes on to emphasise the gradual increase of powers of the European Parliament and the establishment of democratic parliaments in the former socialist countries of middle and eastern Europe.¹⁵⁹ Von Bogdandy – among others –¹⁶⁰ argues that in contrast to a perceived decline the legal competences of most parliaments have been increased. However, these scholars are careful to state that such an account does not imply that parliaments are actually the main and central institutions in the political and constitutional system. Martin Morlok has convincingly argued that the German Grundgesetz is characterised by a "realistic understanding of politics" ("realistisches Politikverständnis"). Thereby he refers to the fact that political processes are not confined to the precincts of parliamentary procedures and that they are constituted by the interplay of informal and formal procedures and of diverse actors. What is, however, important is that parliament has the power to control those processes in the sense of steering and influencing

156 Cf. Slaughter (supra n. 154); Morlok (supra n. 53); Peter Saladin, *Wozu noch Staaten? Zu den Funktionen eines modernen demokratischen Rechtsstaats in einer zunehmend überstaatlichen Welt* (Beck-Manz-Stämpfli, München-Wien-Bern 1995).

157 For a critical review see Armin von Bogdandy, 'Parlamentarismus in Europa: eine Verfalls- oder Erfolgsgeschichte?' (2005) 130 *Archiv des öffentlichen Rechts* 445; Marcus Obrecht, *Niedergang der Parlamente? Transnationale Politik im Deutschen Bundestag und der Assemblée nationale* (Ergon, Würzburg 2006); for an analysis of the actual impact of EC-legislation on national legislation and its scope cf. Annette Elisabeth Töller, 'Mythen und Methoden. Zur Messung der Europäisierung der Gesetzgebung des Deutschen Bundestages jenseits des 80-Prozent-Mythos' (2008) 39 *Zeitschrift für Parlamentsfragen* 3; for an early account in Austria that has hardly been received or discussed cf. Widder (supra n. 9) 49 ff.

158 Cf. Lindseth (supra n. 152); von Bogdandy (supra n. 157).

159 von Bogdandy, *ibid.* 453 ff.; for the increase of minority rights in the Austrian contexts cf. Scheffbeck (supra n. 41) and Konrath (supra n. 38).

160 Cf. the overview by Morlok (supra n. 53). Given the understanding of the Stufenbau-doctrine that is presented by Wiederin, 'Denken vom Recht' (supra n. 21) and that emphasises the interplay between formal and informal processes such an understanding might apply to the Austrian situation as well.

them.¹⁶¹ The argument of (a possible) increase of relevance of parliaments rests on the assumption that legal procedures are only one aspect of political processes and that the role of parliament does not extend to the whole political process but – at its core – to the legal norms that are necessary to regulate and sustain a democratic polity.¹⁶²

These arguments contrast the conceptions of parliament that are prevailing in Austrian constitutional law. But they might provide a basis on which a revised legal concept of parliament and parliamentarism could be formulated that is sensible of the political and institutional context in and under which parliament and parliamentarians act and that is aware of the roles parliaments could and should perform today. Wolfgang Mantl has always emphasised that we cannot rely on the virtues of rulers but we have to rely on the operational capability of our institutions.¹⁶³ In order to do so, we need to have a conception of our institutions, the contexts in which they operate and the interfaces between them. Jurisprudence should not lack such conceptions and should avoid to lose touch with the development of the democratic Rechtsstaat if it carries on to consider itself as one of its guardians.

- *Dr. Christoph Konrath works for the Austrian Parliamentary Administration and lectures occasionally at Universities in Vienna and Bratislava. For comments please send an e-mail to christoph.konrath@parlament.gv.at.*

161 Morlok, *ibid.* 65 ff., 79.

162 von Bogdandy (*supra* n. 157) 457 ff.

163 See in the typical condensed sentences of Wolfgang Mantl the comment on Martin Morlok's lecture in (2003) 62 VVDStRL 37, 102 (103).