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## Introduction to the Study of the Law of the Austrian Federal Constitution

### I. INITIAL REMARKS

"The Austrian constitution is a ruin."<sup>1</sup> A very well-known statement made in the mid-1960s that has become a legend and is as provoking today as ever. But is it really a ruin?

An initial reflection preceding more elaborate discussion shows that the Austrian Federal Constitution is a full-fledged member of the "European family of constitutions".<sup>2</sup> This is not only due to its historic development and territorial entrenchment in the heart of Europe, but also because Austria joined the Council of Europe as well as the EU, being also the only state that transformed the ECHR and its additional protocols into domestic *constitutional* law.<sup>3</sup> It is a Federal Constitution, at the top of the hierarchy of legal norms of a continental European civil-law country and of a federal system. Being the constitution of a small republic, it has nevertheless been inspired by many elements of the past Austro-Hungarian Empire. It is a particularly flexible constitution, with an unusually high number of amendments,<sup>4</sup> and it is a constitution that, until very recently, consisted of some 1,200 different constitutional norms.<sup>5</sup>

The years 2007 and 2008 stand for an era of far-reaching constitutional reform.<sup>6</sup> The abatement of the voting age,<sup>7</sup> postal voting within Austria,<sup>8</sup> the establishment of an Appeal Court for Refugees,<sup>9</sup> the explicit entrenchment of self-

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1 *Klecatsky*, Bundes-Verfassungsgesetz und Bundesverfassungsrecht, in Schambeck (ed), Das österreichische Bundes-Verfassungsgesetz und seine Entwicklung (1980) 83 (83).

2 Cf. most recently *Häberle*, Europäische Verfassungslehre<sup>5</sup> (2008) 53 et seq; *Grabenwarter*, Offene Staatlichkeit: Österreich, in von Bogdandy/Cruz Villalón/Huber (eds), Handbuch Ius Publicum Europaeum, vol II: Offene Staatlichkeit – Wissenschaft vom Verfassungsrecht (2008) 211 (240); *Schäffer*, Der Beitrag Österreichs zur europäischen Rechtskultur, JÖR 52 (2004), 51.

3 See *Grabenwarter*, Europäische Menschenrechtskonvention<sup>3</sup> (2008) 16.

4 So far, 97 amendments have been enacted since 1930, when the B-VG was republished (BGBl 1930/1).

5 *Wiederin*, Grundlagen und Grundzüge staatlichen Verfassungsrechts: Österreich, in von Bogdandy/Cruz Villalón/Huber (eds), Handbuch Ius Publicum Europaeum, vol I: Grundlagen und Grundzüge staatlichen Verfassungsrechts (2008) 389 (408) with further references.

6 Cf. in particular BGBl I 2007/27, BGBl I 2008/1 and BGBl I 2008/2. Some of the reform issues are discussed in the special edition of JRP 4/2007.

7 See Art 26 para 1 and 4 B-VG (BGBl I 2007/27).

8 See Art 26 para 6 B-VG (BGBl I 2007/27).

9 See Art 129c-129f B-VG, in force as of 1 July 2008 (BGBl I 2008/2).

governing bodies,<sup>10</sup> a broad constitutional authorisation to establish administrative authorities that cannot be bound to instructions,<sup>11</sup> the reduction and restatement of federal constitutional law and many other new arrangements ask for a reassessment of the Austrian Federal Constitution. While these reform issues are discussed elsewhere in this journal,<sup>12</sup> this will be the place for an introduction to the structural principles of the Austrian Federal Constitution, venturing also to evaluate them from the perspective of comparative constitutionalism.

## II. HISTORICAL PROFILES

The Republic of (then) German-Austria was founded in the aftermath of the First World War by a unilateral declaration made by representatives from the German-speaking *Länder* of the former Austro-Hungarian Empire (*Provisorische Nationalversammlung*) in Vienna. Following this declaration of 21 October 1918, also the constituent *Länder* themselves gave their explicit approval to join the new republic.<sup>13</sup> It took two more years, however, to adopt the new Federal Constitution, which was negotiated between the political parties, the central government and the *Länder* and was mainly drafted by *Hans Kelsen*.<sup>14</sup> Provisory legislation, part of which is still in force, had meanwhile been enacted by the *Konstituierende Nationalversammlung*, and also the State Treaty of St. Germain (1919) had been concluded in the time of the constitutional interregnum.

The new Federal Constitution of 1920 (*Bundes-Verfassungsgesetz*, hence *B-VG*) still forms the main body of Austrian federal constitutional law. In its long history, however, it has been amended 97 times after its republication in 1930,<sup>15</sup> being inapplicable between 1933 and 1945, during the periods of Austro-fascism and Nazi occupation respectively. The amendments since 1945 have had a varied character, some of them amending or supplementing the original text of 1920 to a large extent,<sup>16</sup> some of them consisting just of minor revisions. The – as yet – last amendment<sup>17</sup> is particularly significant, as it did not only amend many articles of the B-VG substantively, but also repealed or declared a wide range of federal constitutional laws (or parts of them), of federal constitutional provisions within ordinary federal laws and state treaties (or parts of them) as invalid, whilst other parts of federal constitutional law, including state treaties that had formerly been

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10 See Art 120a-120c B-VG (BGBl I 2008/2).

11 See Art 20 B-VG (BGBl I 2008/2).

12 See *Eberhard/Lachmayer*, Constitutional Reform 2008 in Austria. Analysis and Perspectives (in this issue) 112.

13 *Pernthaler*, Die Staatsgründungsakte der österreichischen Bundesländer (1979).

14 *Ermacora*, Die Entstehung der Bundesverfassung, vol I-IV (1986-1990); *Wiederin*, Grundlagen 394 et seq; *Berchtold*, Verfassungsgeschichte der Republik Österreich, vol I (1998) 189 et seq.

15 See BGBl 1930/1.

16 See *Walter/Mayer/Kucsko-Stadlmayer*, Grundriss des österreichischen Bundesverfassungsrechts<sup>10</sup> (2007) 34 et seq and *Pernthaler*, Verfassungsentwicklung und Verfassungsreform in Österreich, in *Festschrift Richard Novak* (2000) 67.

17 BGBl I 2008/2.

given the status of federal constitutional law in Austria, were transformed into ordinary federal laws.<sup>18</sup> This reduced the previous number of some 1,200 pieces of federal constitutional law considerably, although it did not create an incorporated single constitutional document.

### III. GENERAL CHARACTERISTICS

Fragmentation instead of incorporation was and to a smaller extent still is one of the key features of Austrian constitutionalism. Even though the B-VG entrenches the essential parts of the Federal Constitution, there (still) remain a number of federal constitutional laws of their own which have the same formal rank as the B-VG, but regulate matters more on a single-issue basis. Apart from these, many ordinary federal laws contain single constitutional provisions that have to be approved by parliament with a qualified quorum and majority. Further, Art 149 B-VG enlists several laws that had been enacted during the monarchy and were revived as federal constitutional laws in republican times: The most important of these is the Basic Law on the Rights of the Citizens of the Kingdoms and *Länder* represented in the Council of the Realm (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger für die im Reichsrat vertretenen Königreiche und Länder*) of 1867<sup>19</sup> which is the oldest Austrian catalogue of human rights. Finally, also international treaties (above all, the ECHR) and constitutional concordats between either the federation and the *Länder* or between the *Länder* themselves may have federal constitutional status, depending on how they are approved by parliament.

Another key feature is the flexibility of the Austrian Federal Constitution. In principle, the only additional requirement for constitutional amendments is a qualified quorum and majority in the National Council, being accompanied by the explicit indication "federal constitutional law": Whereas at least a third of the members of the National Council have to be present and a majority of the votes cast need to be in favour of the enactment of an ordinary law,<sup>20</sup> the presence of at least half of the members and a majority of two thirds of the votes cast are required in case of a constitutional amendment.<sup>21</sup> There may, nevertheless, be need for one further element of "rigidity", namely a compulsory referendum in case of a so-called "total revision" (*Gesamtänderung*) of the Federal Constitution. Neither, however, does the constitutional law-making procedure normally require a referendum nor qualified majorities in the Federal Council<sup>22</sup> nor the direct

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18 The difficulty was to distinguish between law that had to be repealed and law that had already become obsolete and therefore just had to be declared as invalid, whereas other parts of federal constitutional law still exist after being "downgraded" to an ordinary federal law. Accordingly, the long list enshrined in Art 2 of the latest Federal Constitutional Amendment, BGBl I 2008/2, is very detailed, which to some extent undermines the aim of constitutional clarification and simplification.

19 RGBI 1867/142.

20 Cf. Art 31 B-VG.

21 Cf. Art 44 para 1 B-VG.

22 Cf., as an exception, Art 35 para 4 and Art 44 para 2 B-VG.

approval of the constituent *Länder*<sup>23</sup> nor is there any explicit clause that would prohibit certain constitutional amendments.<sup>24</sup> Among other reasons, the large number of amendments and the fragmented nature of the Austrian Federal Constitution clearly stem from this flexibility that makes it quite easy to alter or add to the Federal Constitution.

Moreover, the Austrian Federal Constitution is a "written" and codified constitution. Whereas customary law is unfamiliar to the Austrian constitutional tradition,<sup>25</sup> the nature of constitutional judgments is twofold: On the one hand, the judgments of the Constitutional Court, apart from the repeal of general norms,<sup>26</sup> are basically not binding beyond the case that was incidental to the decision and cannot therefore be considered as precedents.<sup>27</sup> On the other hand, the decisions often have an informal quasi-precedential character as the Constitutional Court attempts to develop its own case-law "in accordance with former judgments" as far as possible.<sup>28</sup>

Finally, one has to draw a distinction between "formal" and "material" constitutional law in Austria. In legal terms, federal constitutional law is constitutional law only if it is formally adopted after a proper procedure and if it is explicitly titled "constitutional law", irrespective of its content.<sup>29</sup> Many of the constitutional provisions that were repealed, declared invalid or transformed into ordinary law by the last amendment had stood as examples for this distinction insofar as they had formally been part of federal constitutional law, without regulating matters that would normally deserve the description "constitutional". In contrast, there are "constitutional" matters in terms of content that are entrenched in ordinary federal law, such as the Standing Orders of the National Council or the Procedural Rules for Elections to the National Council. Hence, identity between "formal" and "material" constitutional law is often, but not always the case.<sup>30</sup>

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23 Exceptions are Art 14b para 4, Art 102 para 1 and 4, Art 129a para 2 B-VG, all concerning the making of certain ordinary federal laws.

24 Cf., also from a comparative perspective, *Wiederin*, Gesamtänderung, Totalrevision und Verfassunggebung, in Festschrift Heinz Schäffer (2006) 961; *idem*, Über Inkorporationsgebote und andere Strategien zur Sicherung der Einheit der Verfassung, ZÖR 2004, 175 (201 et seq).

25 *Wiederin*, Grundlagen 409.

26 See, with more detail, Art 139 para 5 and 6, Art 140 para 5-7 B-VG.

27 Another exception to this rule is Art 138 para 2 B-VG according to which the Constitutional Court decides whether draft laws or regulations, if enacted, would be in compliance with the distribution of powers between the federation and the *Länder*. The statement in which the Court expresses its opinion ("*Rechtssatz*") is considered to be adequate to "authentic interpretation" of the Federal Constitution and is considered by the Court to be binding, see *Zellenberg*, Art 138/2 B-VG, in Korinek/Holoubek (eds), Österreichisches Bundesverfassungsrecht (2001) marg. no. 30.

28 A brilliant reflexion of the continuity and discontinuity of the Constitutional Court's jurisdiction has regularly been provided by *Richard Novak*, whose annual analyses are now comprised in *Novak*, Lebendiges Verfassungsrecht (2008).

29 *Pernthaler*, Österreichisches Bundesstaatsrecht (2004) 45 et seq; *Öhlinger*, Verfassungsrecht<sup>7</sup> (2007) 25; *Berka*, Lehrbuch Verfassungsrecht (2005) 16 et seq.

30 *Gamper*, Staat und Verfassung (2007) 34 et seq.

#### IV. AMENDING THE CONSTITUTION

The Austrian Federal Constitution has no preamble,<sup>31</sup> even though the first two articles that entrench democracy, republicanism and federalism as key constitutional principles have a programmatic character.<sup>32</sup> The explicitness of their entrenchment is a valuable source for constitutional interpretation, although it is not to be concluded that only the principles that are explicitly mentioned therein may be counted as key constitutional principles. Rather, it depends on the content of the constitution as a whole to deduce which are leading principles due to their character of overall importance.<sup>33</sup> Following this method, which is applied broadly both by the Constitutional Court and doctrine, the rule of law, the separation of powers and fundamental rights must be added to the aforementioned principles.<sup>34</sup> Together, they compose the constitutional nucleus and are thus protected to a higher degree than ordinary constitutional law.

Under the aegis of Art 44 para 3 B-VG, a "total revision" of the Federal Constitution requires a referendum, in addition to the qualified quorum and majority required for any constitutional amendment. Neither Art 44 para 3 B-VG nor any other constitutional provision defines explicitly what is meant by a "total revision". Based upon the doctrine, however, the Constitutional Court undertook to define a "total revision" as the serious alteration or elimination of one of the key constitutional principles or one of their essential elements.<sup>35</sup> Although this definition is more extensive than could be expected from the wording (the revision does not need to be "total" insofar as the complete text of the Federal Constitution would have to be altered), there is just one case of a "total revision" in Austria that was officially recognized as such through the arrangement of a referendum: This referendum took place on the occasion of Austria's accession to the EU (although the question was not whether the people wanted to join the EU, but whether the people would specifically authorize the responsible authorities to ratify the accession treaty)<sup>36</sup> which had great impact on several key principles, namely democracy, federalism and the rule of law. No referendum took place in the context of ratification of the Treaties of Amsterdam<sup>37</sup> and Nice<sup>38</sup>, the respective

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31 During the Austrian Constitutional Convention the discussion on a future preamble and a possible reference to God in such a preamble was discussed with particular fervour ([www.konvent.gv.at/K/M\\_I/SWSUCHE/H\\_09536/K.shtml](http://www.konvent.gv.at/K/M_I/SWSUCHE/H_09536/K.shtml)).

32 See, most recently and profoundly, *Balthasar*, Die österreichische bundesverfassungsrechtliche Grundordnung unter besonderer Berücksichtigung des demokratischen Prinzips (2006) 203 et seq.

33 *Pernthaler*, Der Verfassungskern (1998) 28 et seq who nevertheless emphasizes the meaningfulness of Art 1 and 2 B-VG as expressing a basic constitutional decision in the light of which all other provisions must be interpreted (see also *Pernthaler*, Bundesstaatsrecht 62).

34 See *Öhlinger*, Verfassungsrecht 57 et seq; *Berka*, Lehrbuch 29 et seq; *Walter/Mayer/Kucsko-Stadlmayer*, Grundriss 75 et seq.

35 See VfSlg 2455/1952.

36 See BGBl 1994/744 and *Öhlinger*, EUBeitrittsBVG, in Korinek/Holoubek (eds), Österreichisches Bundesverfassungsrecht (1999) marg. no. 5 et seq; *idem*, Verfassungsrechtliche Grundlagen der EU-Mitgliedschaft Österreichs, in Hummer/Obwexer (eds), 10 Jahre EU-Mitgliedschaft Österreichs (2006) 17 (17 et seq); *Grabenwarter*, Staatlichkeit 217 et seq.

37 See BGBl I 1998/76.

accession treaties of 12 new EU member states<sup>39</sup> as well as the draft Treaty on a Constitution for Europe<sup>40</sup> that were ratified by Austria in the aftermath of her own accession. Neither was a referendum deemed necessary for the ratification of the Lisbon Treaty, although this was contested by parts of the political opposition.<sup>41</sup>

In 2001, the Constitutional Court repealed a constitutional provision of the Federal Public Procurement Act<sup>42</sup> which had been enacted without a referendum.<sup>43</sup> The Court held that this provision that had been singled out by vesting it with constitutional rank and declared *Land* law on the organisation and functions of authorities responsible for appeals against public procurement decisions to be "in conformity with federal constitutional law", irrespective of the constitutionality of its content, infringed the principles of democracy and the rule of law in a way that would have required a referendum. Since no referendum had taken place, the Court declined to answer the question whether such a violation that amounted to a "suspension" of the Federal Constitution *could* at all have been legitimized *even if* a referendum had taken place. According to the Court, the question did not need to be answered because there had not even been a referendum. Neither, however, did the Court totally deny the legitimacy of this question, which does at least not exclude that the Court will one day deal with the question more substantively.

With or without this judgment, some authors affirm that parts of the Austrian Federal Constitution are "unamendable".<sup>44</sup> The attempts to put this hypothesis on a legal basis vary: Whereas some try to construe the constitutional text – which does not contain any explicit provision that would advise such a construction – in the light of common European constitutional standards (so that not even a

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38 See BGBl I 2001/120.

39 See BGBl I 2003/53 and BGBl I 2006/25.

40 See BGBl I 2005/12.

41 See *Wirtschaftskammer Österreich* (ed), *Der Vertrag von Lissabon: Ratifikation – europaweites Referendum* (2007) 6 et seq and the expert opinions delivered by *Ludwig Adamovich* and *Theo Öhlinger* at [http://www.hofburg.at/show\\_content2.php?s2id=990](http://www.hofburg.at/show_content2.php?s2id=990).

42 BGBl I 1997/56 as amended by BGBl I 2000/125.

43 VfSlg 16.327/2001. See *Hiesel*, *Von der Verfassungskultur zur verfassungswidrigen Verfassungsgesetzgebung? Reflexionen aus Anlass der Erlassung des § 126a BVergG 1997*, *Anwaltsblatt* 2001, 306 et seq; *Novak*, *Lebendiges Verfassungsrecht* (2001), *Juristische Blätter* 2003, 894; *Janko*, *Gesamtänderung der Bundesverfassung* (2004) 462 et seq; *Gamper*, *La sospensione della costituzione e il principio dello Stato di diritto*, *Diritto Pubblico Comparato ed Europeo* 2002/I, 24 et seq and *eadem*, *Die Rolle der Bauprinzipien in der Judikatur des österreichischen Verfassungsgerichtshofes*, *Jahrbuch Öffentliches Recht* 55 (2007), 537 (550 et seq).

44 With different arguments: *Pernthaler*, *Verfassungskern* 78 et seq; *Oberndorfer*, *Art 1 B-VG*, in *Korinek/Holoubek* (eds), *Österreichisches Bundesverfassungsrecht* (2000) marg. no. 10; *Morscher*, *Lebendiges oder gerade noch lebendes Verfassungsrecht – Soll das B-VG seinen 80. Geburtstag erleben?*, in *Wieser/Stolz* (eds), *Verfassungsrecht und Verfassungsgerichtsbarkeit an der Schwelle zum 21. Jahrhundert* (2000) 117 (121); *idem*, *Über "unabänderliches" Verfassungsrecht*, *Festschrift Peter Pernthaler* (2005) 239 (245 et seq); *Öhlinger*, *Verfassungskern und verfassungsrechtliche Grundordnung. Gedanken zu Peter Pernthalers Verfassungstheorie*, *Festschrift Peter Pernthaler* (2005) 273 (283 et seq); *Janko*, *Gesamtänderung* 150 et seq.

referendum could alter or abolish the principles of democracy, the separation of powers, the rule of law or human rights), others seek for a more positivistic approach. Nevertheless, according to the prevailing opinion,<sup>45</sup> a "total revision" under Art 44 para 3 B-VG may concern any part of federal constitutional law so that no unamendable part remains.

In a couple of other cases, the question was raised whether a total revision could only happen *uno actu* or also on a step-by-step basis. In several periods, when a coalition government commanded a constitutional majority in the National Council, federal constitutional law was adopted in order to "immunise" certain rights violations from being repealed by the Constitutional Court. Although the Court did not repeal these federal constitutional provisions since they did not themselves constitute a total revision, the judges advised the constitutional law-maker to stop this ongoing process, as a comprehensive perspective of all measures put together could in the future be regarded as adequate to a total revision. While academics discussed intensely whether the Constitutional Court or the democratically legitimated constitutional law-maker should have the last say in such matters,<sup>46</sup> the present Federal Government again commands such a majority and seems well-inclined to use it for certain political purposes.<sup>47</sup>

## V. THE CONSTITUTIONAL NUCLEUS

The principle of democracy mainly enshrines a system of representative democracy. Like most democratic constitutions, direct or semi-direct democracy plays a minor role, since this kind of democracy would not meet the demands of efficient and professional decision-making in larger societies.<sup>48</sup> Representative democracy becomes most manifest through the general elections to the National Council, which is the first chamber of the Federal Parliament,<sup>49</sup> the *Länder* Parliaments,<sup>50</sup> the local councils<sup>51</sup> and the Federal President<sup>52</sup>. It is also a principle that can be found in a more indirect (e.g. election of the members of the Federal

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45 *Jabloner*, Verfassungsrechtliche Grundordnung und historisch erste Verfassung, *Journal für Rechtspolitik* 2001, 34; *Hiesel*, Gibt es in Österreich unabänderliches Verfassungsrecht?, *Österreichische Juristenzeitung* 2002, 121; *Rill/Schäffer*, Art 44, in idem (eds), *Bundesverfassungsrecht* (2001) marg. no. 2; *Mayer*, Gibt es unabänderliches Verfassungsrecht?, in *Festschrift Heinz Schäffer* (2006) 473; *Walter/Mayer/Kucsko-Stadlmayer*, *Grundriss* 76.

46 *Pernthaler*, *Verfassungskern* 42 et seq.

47 Cf., e.g., the *Pflege-Verfassungsgesetz* (BGBl I 2008/43).

48 *Gamper*, *Staat* 223; *Pernthaler*, *Bundesstaatsrecht* 83 et seq; *Haller/Kölz*, *Allgemeines Staatsrecht*<sup>3</sup> (2004) 78 et seq.

49 Art 24 et seq B-VG.

50 Art 95 et seq B-VG.

51 Art 117 B-VG.

52 Art 60 B-VG.

Council by the *Länder* Parliaments)<sup>53</sup> or more specific (e.g. election of democratic organs in self-governing bodies)<sup>54</sup> context.

According to the principle of republicanism, the Federal President, being the head of state, is elected every six years and may be re-elected only once if there is no intermediate interval between the two terms of office. Members of (ex-)ruling houses are prohibited from becoming a candidate for the Federal President, and a special federal constitutional law applies to the banishment of the Habsburg family.<sup>55</sup>

Also federalism is a leading constitutional principle, although Austria belongs to the most centralized federal states worldwide.<sup>56</sup> Among other key elements of federalism, the Federal Constitution provides a distribution of powers between the federation and the nine *Länder* (Burgenland, Carinthia, Lower Austria, Salzburg, Styria, Tyrol, Upper Austria, Vienna, Vorarlberg). The *Länder* also enjoy some constitutional autonomy and are represented at the level of federal law-making via the Federal Council. Both the distribution of competences and financial equalisation are markedly centralistic, although the *Länder* are somehow compensated for this by a rather strong system of co-operative federalism and large executive responsibilities on behalf of the federation (indirect federal administration).

From a comparative perspective, the "rule of law" is no completely homogeneous principle as, differing from constitution to constitution, focus is put rather on a "due process of law" or on the principle of legality that binds all authorities to the law.<sup>57</sup> In Austria, *Rechtsstaatlichkeit* comprises a strict principle of legality so that, with minor exceptions, both courts and administrative authorities are bound to the laws. Moreover, *Rechtsstaatlichkeit* requires an efficient and effective system of legal protection, which requires, e.g., certain channels of appeal as well as independent courts and tribunals.

Two further principles are sometimes regarded as sub-principles of *Rechtsstaatlichkeit*, but more often seen as principles of their own: The so-called "horizontal" separation of powers stands for a system of government, where the legislative, executive and judicial branch are distinct from each other, but where the Federal Constitution at the same time provides for ties and interlocks between these powers that are basically separate. Due to the principle of federalism, also a system of "vertical" separation of powers is inherent to the Austrian Federal

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53 Art 35 B-VG.

54 Art 120c para 1 B-VG.

55 Cf. Art 60 para 3 B-VG and the *Gesetz betreffend die Landesverweisung und die Übernahme des Vermögens des Hauses Habsburg-Lothringen*, StGBI 1919/209 as amended by BGBl I 1999/194.

56 With further references *Pernthaler*, *Verfassungsentwicklung* 100 et seq, *Gamper*, Republic of Austria, in Le Roy/Saunders (eds), *Legislative, Executive, and Judicial Governance in Federal Countries* (2006) 72.

57 *Tamanaha*, *On the Rule of Law* (2004); *Gamper*, *Staat* 229 et seq; *Fleiner/Basta-Fleiner*, *Allgemeine Staatslehre*<sup>3</sup> (2004) 225 et seq; *Eberhard*, *Das Legalitätsprinzip im Spannungsfeld von Gemeinschaftsrecht und nationalem Recht*, *Zeitschrift für Öffentliches Recht* 63 (2008), 49 (72 et seq).

Constitution: In addition to the two state levels – i.e. the federation and the *Länder* –, the municipalities constitute the third tier in Austria.<sup>58</sup>

A wide range of constitutionally guaranteed fundamental rights, spread all over federal constitutional law, without, as yet, being incorporated into one single catalogue, forms what is occasionally called the "liberal principle". The term has not been chosen very luckily, since fundamental rights, as they are in force today, do not just reflect the earliest "liberal" phase of the development of human rights, but are also endowed with guarantees that demand active involvement from the state.<sup>59</sup> Among the various constitutional sources, the Basic Law on the Rights of the Citizens of the Kingdoms and *Länder* represented in the Council of the Realm of 1867 and, particularly, the ECHR and its additional protocols are most important. Apart from the principle of equality, which, according to the Constitutional Court, is an essential element also of democracy,<sup>60</sup> it is not clear whether there is a hierarchy of "more or less essential" rights.

Apart from the key constitutional principles whose essential elements are protected by Art 44 para 3 B-VG, there is a large number of constitutional provisions that entrench national objectives without granting them the status of a key principle. This means that such objectives may be amended or abolished without a referendum. National objectives are, for instance, the prohibition of Nazi activities and organisations, the neutrality of the state, national defence, environmental protection, macroeconomic balance, protection of autochthonous minorities, impartiality of broadcasting services, equal treatment of men and women and of handicapped and non-handicapped persons as well as excellent standards of school education.<sup>61</sup> Even more objectives, especially with a social focus, can be found in the *Länder* constitutions, but they are applicable only in the respective *Land*.<sup>62</sup> National or *Land* objectives do not entrench subjective rights, though, and this is what decreases their importance. Even though all state authorities are bound to consider these objectives, individuals can normally not sue for their assertion, nor are any specific sanctions provided in case of non-consideration. Particularly in the arena of the welfare state, the want of constitutionally guaranteed subjective rights is lamentable.

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58 See *Pernthaler/Gamper*, Local Government in Austria, in Steytler (ed), The place and role of local government in federal systems (2005) 65; *Weber*, Zwei- oder dreigliedriger Bundesstaat? Bemerkungen zur Stellung der Gemeinden in einer künftigen Bundesverfassung, in Festschrift Peter Pernthaler (2005) 413; *Gamper*, Die Stellung der Gemeinden im Vergleich europäischer Bundesstaaten, in Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed), Jahrbuch des Föderalismus 2006 (2006) 66; *eadem*, The "Third Tier" in Austria: Legal Profiles and Trends of Local Government, Hrvatska javna uprava 2008, 71.

59 Cf., fundamentally, *Holoubek*, Grundrechtliche Gewährleistungspflichten (1997).

60 See VfSlg 15.373/1998.

61 *Öhlinger*, Verfassungsrecht 70 et seq.

62 *Gamper*, Ist der "pursuit of happiness" ein Staatszweck? Zur Abgrenzung von Zweck, Aufgaben und Kompetenzen bei der Gemeinwohlerwirklichung, in Festschrift Norbert Wimmer (2008) 135 (149).

## VI. THE DEMOCRATIC REPUBLIC

### 1. Representative and (Semi-)Direct Democracy

Representative democracy is entrenched in a number of federal constitutional provisions that provide for the general elections to the National Council (henceforth, every five years),<sup>63</sup> the *Land* Parliaments (according to *Land* constitutional law), the municipal councils (according to *Land* legislation) and the Federal President (every six years). According to a strict notion of "democratic homogeneity", all general elections have to observe the same principles, namely that the right to vote must be granted on a general, equal, personal, direct, secret and free basis to the (federal, *Land* or local<sup>64</sup>) citizens entitled to vote; the minimum active voting age for general elections at federal level has recently been reduced to 16 years (to be completed on the election day at the latest), whilst 18 years is the minimum passive voting age. Certain criminals are prohibited from voting as well as those executive functionaries that the Constitutional Court declares to be devoid of their political rights.<sup>65</sup> The *Länder* may extend the electorate with regard to *Land* and local general elections. Moreover, all parliaments as well as the municipal councils have to be elected on a basis of proportionality, whereas in case of presidential elections the candidate who wins more than 50% of the votes is regarded as elected.<sup>66</sup> Also the Federal Council is a democratically legitimate body, although its members are not elected directly by the citizens, but by the *Land* Parliaments that are themselves elected by the *Land* citizens. The principle of representative democracy, however, is not only inherent to general elections, but also to self-governing bodies such as the chambers, social insurance authorities or, more specifically, universities. This means that the members of these self-governing bodies must be entitled to elect representative organs that have a considerable share in the body's decision-making.<sup>67</sup>

Apart from the system of representative democracy, the Federal Constitution also allows for some elements that have a semi-direct democratic nature: Most important are the three kinds of plebiscites, namely referendum, citizens' initiative and popular consultation. Whilst the instrument of popular consultation that has no binding force and is subject to certain conditions<sup>68</sup> has never yet been exercised at federal level, there have been only two cases of a referendum, the first taking

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63 BGBl I 2007/27.

64 According to Art 117 para 2 B-VG, also residential citizens that have their main residence elsewhere and, in compliance with Council Directive 94/80/EC of 19 December 1994 (OJ L 368, 31/12/1994, p. 38, in the amended version), also the citizens of other EU member states may be entitled to elect the local council.

65 See Art 142 para 4 B-VG.

66 See Art 60 para 2 B-VG.

67 See, recently, Art 120c para 1 B-VG: "The organs of a self-governing body have to be composed from among their members according to democratic principles."

68 Cf. Art 49b para 1 B-VG.

place "optionally" following a decision of the National Council,<sup>69</sup> the second being "compulsory" in the context of Austria's EU accession.<sup>70</sup> So far, 32 citizens' initiatives have taken place at federal level,<sup>71</sup> obliging the National Council to treat the initiative, even though the final decision depends solely on the will of parliament. Moreover, the Federal Constitution provides for a number of other forms of direct democracy, such as the authorisation of the *Länder* to adopt legislation on direct citizens' participation at local level<sup>72</sup> or the involvement of juries in certain criminal procedures<sup>73</sup>.

The Constitutional Court and the leading doctrine describe representative democracy as the nucleus of the democratic principle.<sup>74</sup> Whilst this is true in general, one must not forget that Art 44 para 3 B-VG, which entrenches the compulsory referendum in case of a total revision, enjoys the same standard of qualified protection.<sup>75</sup>

## 2. The Making of Laws

The law-making procedure at federal level always starts with a drafted bill that is tabled before the National Council, apart from a possible formal or informal procedure of previous consultation.<sup>76</sup> Such a bill may be introduced by the Federal Government (which is the usual way in practice), by at least five members of the National Council, by at least a third of the members of the Federal Council or by a citizens' initiative if it was supported by at least 100,000 citizens entitled to vote or by at least one sixth of the electorate of three *Länder*.<sup>77</sup> There are three plenary stages, the first of which is sometimes omitted, whereas the last stage consists just of minor amendments followed by the vote itself which requires a quorum of one third of the members and a simple majority in case of an ordinary bill, and a quorum of half of the members and a two-third

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69 On 5 November 1978, a referendum according to Art 43 B-VG was held on the question of the enactment of a Federal Act on the Peaceful Use of Nuclear Power in Austria.

70 See *Öhlinger*, EUBeitrittsBVG marg. no. 5 et seq; *idem*, Grundlagen 17 et seq.

71 See Art 41 para 2 B-VG and the list at [www.bmi.gv.at/innenressort](http://www.bmi.gv.at/innenressort).

72 See Art 117 para 8 B-VG.

73 See Art 91 B-VG.

74 See VfSlg 13.500/1993, 16.241/2001 (with many references to the literature). *Oberndorfer*, Art 1 B-VG; *Rill/Schäffer*, Art 1 B-VG, in *idem* (eds), Bundesverfassungsrecht (2006).

75 *Rill/Schäffer*, Art 44 marg. no. 17; *Janko*, Gesamtänderung 263 et seq; *Gamper*, JÖR 55 (2007), 559.

76 *Öhlinger*, Verfassungsrecht 194 et seq. A specific consultation procedure is provided by the Constitutional Agreement on a Consultation Mechanism (BGBl I 1999/35), according to which most draft laws or regulations that would impose financial burdens on other tiers have to be discussed with the representatives of these tiers (federation, *Länder*, municipalities) and, if no compromise can be reached, have to be financed by the tier that enacts them.

77 See Art 41 B-VG and § 26 para 4 of the Standing Orders of the National Council (BGBl 1975/410 as amended by BGBl I 2005/29).

majority in case of constitutional bills.<sup>78</sup> An important role is played by the various parliamentary committees whose members are experts for select pieces of legislation. After a bill was passed in the National Council, the legislative process, with few exceptions,<sup>79</sup> continues in the Federal Council. Normally, the Federal Council may only exercise a suspensive veto within a period of eight weeks.<sup>80</sup> A suspensive veto may be overruled by a second decision taken by the National Council with a qualified quorum of half of its members. There are only few cases where the Federal Council may exercise an absolute veto, e.g., if a constitutional amendment bill intends to deprive the *Länder* of competences.<sup>81</sup> As yet, however, the Federal Council has never exercised an absolute veto and rarely makes use of its suspensive veto. The Federal Council has been described as being much rather a "chamber of political partisans" than a chamber of *Länder* interests since most of its members vote according to instructions of their respective political party and therefore just copy majority decisions of the National Council in favour of governmental policies.<sup>82</sup> Only in a very limited number of cases, each of the *Länder* has to be directly asked to approve a bill, with entitles them to exercise an absolute veto.

Normally, however, a bill, after it received approval by both parliamentary chambers, is forwarded to the Federal Chancellor who submits it for assent to the Federal President.<sup>83</sup> According to the prevailing opinion, the Federal President may only refuse to sign the bill in case of procedural irregularities in the law-making procedure, which, however, may imply questions that refer to the content of the law.<sup>84</sup> After the Federal President's signature the Federal Chancellor countersigns the bill and publishes it in the online Federal Law Gazette. The act enters into force on the day after the online publication unless provided otherwise in the act.<sup>85</sup> The retroactive enforcement of an act would violate the Federal Constitution in case of a violation of the principle "*nulla poena sine lege*"<sup>86</sup> or of a breach of confidence<sup>87</sup> in the law.

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78 In specific cases, a constitutional quorum and majority is required for the enactment of ordinary federal laws (cf., e.g., Art 14 para 10 or Art 30 para 2 B-VG).

79 See Art 42 para 5 B-VG.

80 See Art 42 para 2 and 3 B-VG.

81 See Art 44 para 2 B-VG; *Bußjäger*, Die Zustimmungsrechte des Bundesrates (2001) 5 et seq.

82 See *Gamper*, The Austrian Bundesrat, in Luther/Passaglia/Tarchi (eds), *A World of Second Chambers* (2006) 781 (820); *Schäffer*, Reformperspektiven für den Bundesrat, *Journal für Rechtspolitik* 2007, 11.

83 See Art 47 B-VG.

84 Namely, whether the content of an ordinary law would be unconstitutional and therefore require a qualified procedure. In January 2008, the Federal President for the first time refused to sign a bill which he deemed to be unconstitutional (*Beschluss über ein Bundesgesetz, mit dem die Gewerbeordnung 1994 geändert wird*, cf. RV 283 BlgNR, XXIII. GP). The bill was amended by Parliament accordingly and has meanwhile become law (BGBl I 2008/42).

85 See Art 49 para 1 B-VG.

86 Art 7 ECHR.

87 According to the Constitutional Court's (rather casuistic) jurisdiction, "confidence in the law" is protected by the principle of equality (Art 7 B-VG, Art 2 StGG) insofar as serious and sudden

## VII. THE FEDERAL STATE

Federalism has for many years been a crucial issue of constitutional discussion, but despite almost innumerable attempts to improve the federal system no large-scale reform has been realized yet.<sup>88</sup> Although being one of the leading constitutional principles, Austrian federalism has always been described as "weak", due to a high degree of centralism within the federal system.<sup>89</sup> Centralism becomes most manifest in the aforementioned malfunctions of the Federal Council and in the distribution of competences which is entrenched mainly in Art 10-15 B-VG. Accordingly, the federation is responsible for the legislation and execution of an impressive number of tasks (Art 10 B-VG), including e.g. civil and criminal law, the judiciary, foreign affairs, many matters pertaining to commerce and finances, environmental protection, health and social welfare.<sup>90</sup> A much shorter list of matters (Art 11 B-VG) includes those that are shared between the federation (as regards legislation) and the *Länder* (as regards execution). Another rather short list comprises those where the federation is responsible for framework legislation whilst the *Länder* are responsible for implementing these laws (through their own legislation) and executing them. As it is usual in federal systems,<sup>91</sup> the *Länder* also hold a residuary competence (Art 15 para 1 B-VG), being thus responsible for all matters that have not been enumerated explicitly in favour of the federation. Since most (important) matters are explicitly enumerated, not very much remains in the residuary *Länder* sphere, though. Apart from these main distribution models, there is a number of specific power-sharing regimes, including § 3 F-VG that entitles the federation to enact the Fiscal Adjustment Act<sup>92</sup> which usually favours federal finances, even though the *Länder* and municipalities take part in the political negotiations preceding its enactment.<sup>93</sup> Neither do the *Länder* have a broad sphere of constitutional autonomy: Since the Federal Constitution determines most institutional aspects of the *Länder* (such as the *Land* Parliaments, *Land* Governments and the relations between them), there is little more than the details they can add, and the risk of restrictive judgments delivered by the Constitutional Court is high. On the other hand, however, the *Länder* are responsible for the execution of many federal matters that, even

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infringements in vested rights are prohibited. See *Berka*, Art 7 B-VG, in Rill/Schäffer (eds), *Bundesverfassungsrecht* (2001) marg. no. 95 et seq.

88 See *Pernthaler*, *Verfassungsentwicklung* 102 et seq; *Gamper*, *Die Regionen mit Gesetzgebungshoheit* (2004) 329 et seq.

89 See supra, at note 56, and *Pernthaler*, *Bundesstaatsrecht* 304 et seq.

90 From a comparative perspective, fewer powers are commonly assigned to the federal level: Cf. *Kincaid*, *Comparative Observations*, in idem/Tarr (eds), *Constitutional Origins, Structure, and Change in Federal Countries* (2005) 409 (422); *Watts*, *Comparing Federal Systems*<sup>2</sup> (1999) 35 et seq.

91 See *Gamper*, *Regionen* 104, *Schäffer*, *Kompetenzverteilung im Bundesstaat*, in Schambeck (ed), *Bundesstaat und Bundesrat in Österreich* (1997) 65 (68) *Gamper*, *Staat* 88 et seq; *Kincaid*, *Observations* 424.

92 BGBl I 2007/103.

93 *Pernthaler*, *Bundesstaatsrecht* 421.

though they remain in the federal competence, are executed by the *Land* Governors or the Independent Administrative Senates in the *Länder* (indirect federal administration). Moreover, a number of instruments of co-operation and co-ordination serve *Länder* interests: The *Länder* cannot only conclude treaties with each other and with the federation respectively under Art 15a B-VG, but they may also participate to a not inconsiderable degree in the national decision-making in EU matters.<sup>94</sup> Apart from these formal instruments, the *Länder* also co-operate informally through joint conferences (most important of which is the Conference of *Land* Governors), their EU representatives in Brussels and their own liaison office.<sup>95</sup> Austrian federalism can therefore be described as co-operative as well as rather symmetric, since the *Länder*, with few exceptions, have the same constitutional status.<sup>96</sup>

### VIII. THE RULE OF LAW

The rule of law, in the Austrian sense of *Rechtsstaatlichkeit*, is not a uniform concept, but encompasses several aspects.<sup>97</sup> According to the "principle of legality", laws must have a clear and precise meaning, even though the standard of clarity depends on the nature of the concerned legal issue which may allow less precision in one case and demand more accuracy in another ("differentiated principle of legality"). In principle, all legal acts must be based on a law and the law itself on the Federal Constitution, which clearly shows the hierarchical order of the Austrian legal system as well as the idea of the legislative power being the "first among all powers".<sup>98</sup> Whereas it is the legislator's duty to determine the actions of the executive power, the administrative authorities are strictly bound to observe the laws. They must normally not issue regulations without authorisation by law, although there are some exceptions, such as in certain emergency cases.<sup>99</sup> Apart from the legality principle, the rule of law demands efficient and effective instruments of legal protection. These include remedies such as administrative and judicial appeals, tribunals under Art 6 ECHR, an independent judiciary, the Administrative Court, the Constitutional Court and a number of constitutionally

94 *Bußjäger*, Die Mitwirkung der österreichischen Länder an Vorhaben im Rahmen der EU, in Hummer/Obwexer (eds), 10 Jahre EU-Mitgliedschaft Österreichs (2006) 55; *idem*, Die Länderparlamente Österreichs in der Europäischen Union – Beteiligungsföderalismus statt Selbstgestaltung?, in *idem* (ed), Beiträge zum Länderparlamentarismus (2007) 163; *Öhlinger*, Art 23c B-VG, in Korinek/Holoubek (eds), Österreichisches Bundesverfassungsrecht (1999); *idem*, Art 23d B-VG, in Korinek/Holoubek (eds), Österreichisches Bundesverfassungsrecht (1999); *idem*, Die Aufgabenverteilung zwischen Bund, Ländern und der Europäischen Union, in Olechowski (ed), Der Wert der Verfassung – Werte in der Verfassung (2005) 41.

95 *Rosner*, Koordinationsinstrumente der österreichischen Länder (2000).

96 *Pernthaler*, Der differenzierte Bundesstaat (1992); *idem*, Lo stato federale differenziato (1998); *idem*, El estado federal asimétrico (1999).

97 See *Mantl*, Der österreichische Rechtsstaat zwischen habsburgischer Tradition und europäischer Zukunft, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 2005, 367.

98 *Wiederin*, Grundlagen 434; a critical general analysis is given by *Leisner*, Krise des Gesetzes (2001).

99 See Art 18 para 3 and Art 118 para 6 B-VG.

guaranteed procedural rights that do not only have to be established by law, but have to grant legal protection "in an efficient and effective way".<sup>100</sup>

The traditional Austrian dichotomy between administrative authorities and the courts was challenged by the jurisdiction of the European Court of Human Rights that, by construing Art 6 ECHR extensively, demanded tribunals as instances of appeal instead of administrative authorities in a number of administrative procedures. Since the Administrative Court and the Constitutional Court have only a limited jurisdiction, appeals lodged at these Courts against an administrative decision were not regarded as sufficient in order to meet the standards set by Art 6 ECHR. The incompatibility between Austrian law and Art 6 ECHR<sup>101</sup> induced the constitutional law-maker to establish certain kinds of tribunals previously unknown to the Austrian legal system. Among these tribunals, the Independent Administrative Senates are most important, as they do not only decide in cases where force was directly applied by public authorities, but also when an appeal is made against an administrative penalty and, in some cases, when an appeal is made against other administrative rulings. Another type comprises so-called "collegiate bodies with judicial character" (Art 133 n. 4 B-VG) whose decisions, as it is the case with all bodies that cannot be bound to instructions, are of last instance, except for an appeal to the Constitutional Court or, if provided explicitly, to the Administrative Court. Whilst the Constitutional Court held that an unlimited establishment of such bodies would be unconstitutional, unless based on reasonable grounds,<sup>102</sup> the most recent constitutional amendment<sup>103</sup> authorizes ordinary legislation to establish such bodies on a very broad basis. The classical administrative structure of the state has thus been undermined strongly which suggests to speak of a quasi-judicial system in many fields that formerly had been subject to administrative authorities only.<sup>104</sup>

A particular role is played by the Constitutional Court and the Administrative Court, both being so far the only real courts with jurisdiction in the field of public law. Whereas the Administrative Court<sup>105</sup> decides on the compliance of administrative rulings with ordinary laws, in case of delaying administrative authorities and on appeals against administrative authorities that are lodged by certain other authorities, the Constitutional Court<sup>106</sup> has a broad number of very different powers. Among them, the Court's special jurisdiction in the field of illegal administrative rulings (which otherwise, i.e. in the case of non-compliance with ordinary laws, is a competence of the Administrative Court) is just one

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100 See, as a leading case, VfSlg 2455/1952 and *Hiesel*, Die Rechtsstaatsjudikatur des Verfassungsgerichtshofes, ÖJZ 1999, 522; *Gamper*, JÖR 55 (2007), 543.

101 See VfSlg 11.500/1987.

102 VfSlg 15.427/1999, 15.886/2000, 16.048/2000, 16.189/2001; *Wiederin*, Grundlagen 423; *Grabenwarter/Holoubek*, Demokratie, Rechtsstaat und Kollegialbehörden mit richterlichem Einschlag, ZfV 2000, 194 (196 et seq).

103 BGBl I 2008/2.

104 See the discussion statement made by *Öhlinger*, in Bußjäger/Knüpling (eds), Können Verfassungsreformen gelingen? (2008) 194.

105 See Art 130 et seq B-VG.

106 See Art 137 et seq B-VG.

important function that could be mentioned: In this case, the Constitutional Court repeals an administrative ruling because it violates a person in constitutionally guaranteed fundamental rights or because it is based on law that is unconstitutional.<sup>107</sup> Apart from this specific function, the Constitutional Court also decides on the constitutionality of laws and the legality of regulations, competence disputes, agreements under Art 15a B-VG, accusations made against supreme executive organs, the legality of elections, and in some other fields of minor importance.<sup>108</sup> Considering the Constitutional Court's forerunner model, the *Reichsgericht* of 1867, one may state that the Austrian Constitutional Court is one of the two main historic prototypes of institutionalised constitutional review worldwide.<sup>109</sup> Many states, not only in Europe,<sup>110</sup> adopted similar systems where constitutional jurisdiction is concentrated at a single and centralized court that, among other powers, is vested with the power to review and repeal laws as well as administrative acts.

## IX. CHECKS AND BALANCES

Until the Federal Constitutional Amendment of 1929,<sup>111</sup> the Republic of Austria had been a system of strong parliamentary government, for the Federal President had been elected by the Federal Assembly which is a parliamentary body composed of National Council and Federal Council. With the introduction of direct presidential elections, a mixed semi-presidential system was established where the Federal President depends both on the citizens and on parliament. He exercises a large number of important functions most of which, however, must be based on the proposal of another state authority (e.g. the Federal Government) and must be counter-signed by another (e.g. the Federal Chancellor). Whereas, in legal terms, it is up to the Federal President to appoint the Federal Chancellor, to dismiss the Federal Chancellor or the whole Federal Government, the Federal

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107 Art 144 para 1 B-VG.

108 See *Öhlinger*, *Verfassungsrecht* 445 et seq; *Berka*, *Lehrbuch* 273 et seq; *Walter/Mayer/Kucsko-Stadlmayer*, *Grundriss* 506 et seq; *Pernthaler*, *Bundesstaatsrecht* 271 et seq; *Ermacora*, *Der Verfassungsgerichtshof* (1956).

109 See *Korinek*, *Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)* 39 (1981), 8 (9 et seq); *v Brünneck*, *Verfassungsgerichtsbarkeit in den westlichen Demokratien* (1992) 29; *Öhlinger*, *The Genesis of the Austrian Model of Constitutional Review of Legislation*, *Ratio Juris* 2003, 206; *Häberle*, *Die Verfassungsgerichtsbarkeit auf der heutigen Entwicklungsstufe des Verfassungsstaates*, *Europäische Grundrechte-Zeitschrift* 2004, 117 (118); *idem*, *Funktion und Bedeutung der Verfassungsgerichte in vergleichender Perspektive*, *EuGRZ* 2005, 685; *idem*, *Verfassungslehre* 462 et seq; *Montoro-Chiner/Schäffer*, *Die Rezeption des österreichisch-deutschen Modells der Verfassungsgerichtsbarkeit in Spanien*, in *Starck* (ed), *Fortschritte der Verfassungsgerichtsbarkeit in der Welt – Teil I* (2004) 57; *Jablonek*, *Stufung und "Entstufung" des Rechts*, *Zeitschrift für öffentliches Recht* 60 (2005), 163 (171); *Wieser*, *Vergleichendes Verfassungsrecht* (2005) 124 et seq.

110 See *v Brünneck*, *Verfassungsgerichtsbarkeit* 29; *Wieser*, *Verfassungsrecht* 125 et seq.

111 BGBl 1929/392.

President is bound to consider the Federal Chancellor's proposal when it comes to appointing other members of the Federal Government or to dismiss them individually. Again, it is the Federal President who appoints judges, including those of the three Austrian Supreme Courts (Supreme Court [as a last instance of ordinary courts], Constitutional Court, Administrative Court), although the Federal President is bound to consider other bodies' proposals in these cases. Whilst the Federal President, on the proposal of the Federal Government, may dissolve the National Council,<sup>112</sup> the National Council may resolve with a qualified quorum and majority to convoke the Federal Assembly that decides if a referendum is held on the question whether the Federal President should be dismissed from office<sup>113</sup>. If the referendum answers in the negative, the Federal President is confirmed in his office for another period, whereas the National Council is dissolved automatically. This is just one example to show how the separation of powers is rather a system of checks and balances than a strict "separation".

## X. FUNDAMENTAL RIGHTS

Fundamental rights have a longer tradition in Austria than other pieces of federal constitutional law, since the Law of 1862 on Protection of the Rights of the Home<sup>114</sup> and the aforementioned Basic Law of 1867 were enacted in the monarchy, being revived by Art 149 B-VG. Unlike more modern European constitutions, however,<sup>115</sup> the Austrian Federal Constitution lacks an incorporated catalogue of fundamental rights which can be found nowhere in the B-VG (although the B-VG entrenches some rights *passim*) nor in any other part of the Federal Constitution. Nevertheless, fundamental rights are guaranteed widely, even though they are entrenched in an unincorporated manner, including federal constitutional laws of their own<sup>116</sup> or federal constitutional provisions in ordinary laws<sup>117</sup>. Only the Basic Law of 1867 includes a cohesive catalogue of rights, which is not complete, though.

The ECHR and its additional protocols are of major importance. Austria ratified all of them – with the exception of Additional Protocol no. 12 – and, what is unique in Europe, transformed them into domestic constitutional law. This means that the Constitutional Court when deciding whether a law, regulation or administrative ruling violates "constitutionally guaranteed rights" (Art 144 para 1 B-VG) applies ECHR rights as well.

Due to the leading and very active role of the European Court of Human Rights, which, after a long period of judicial self-restraint, was acknowledged and

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112 See Art 29 para 1 B-VG.

113 See Art 60 para 6 B-VG.

114 RGBl 1862/88.

115 Cruz Villalón, Grundlagen und Grundzüge staatlichen Verfassungsrechts: Vergleich, in von Bogdandy/Cruz Villalón/Huber (eds), Handbuch Ius Publicum Europaeum, vol I: Grundlagen und Grundzüge staatlichen Verfassungsrechts (2008) 729 (758 et seq).

116 Cf. the *Bundesverfassungsgesetz über den Schutz der persönlichen Freiheit* (BGBl 1988/684 as amended by BGBl I 2008/2).

117 Cf., e.g., Art 1 § 1 of the *Datenschutzgesetz* (BGBl I 1999/165 as amended by BGBl I 2008/2).

to some extent reflected by the Austrian Constitutional Court, fundamental rights are today interpreted much more extensively.<sup>118</sup> Both laws and administrative acts have to be repealed if they are unconstitutional, i.e. in breach of a fundamental right. It depends on the type of right, however, if its infringement is unconstitutional or not. While some rights are entrenched with an explicit reservation clause (e.g. in the ECHR and additional protocols), others, in particular those of the Basic Law of 1867, either lack such a reservation or even allow all kinds of infringements "if provided by law". Today, however, the Constitutional Court, being under the influence of Strasbourg jurisprudence,<sup>119</sup> does not only review administrative rulings and regulations, but also scrutinizes laws whether they themselves are in compliance with constitutionally guaranteed rights and – depending on the concerned right – applies certain "formulae" that allow infringements to a certain extent: In particular, if they are reasonably justified or proportional.

A quantitative evaluation of the Constitutional Court's case law shows that the large majority of cases deal with rights violations.<sup>120</sup> In terms of quality, "judicial activism", as emerging since the beginning of the 1980s, has surely co-developed the Austrian constitutional culture. The dynamic interpretation of fundamental rights stands *pars pro toto* for a trend towards judge-made law, which is guided by a number of constitutional principles belonging to some "common European" standard. To a certain extent, at least, one can thus recognize a shift from a strictly positivistic and legalistic approach towards a more flexible and discretionary interpretation of constitutional law according to principles that are only to some part explicitly entrenched in federal constitutional law.<sup>121</sup> While, on the one hand, the danger of "judge-made" arbitrariness must not be neglected, Austria's accession to the Council of Europe and, much later, to the EU are surely landmarks in the process of a "Europeanization" of Austrian law.<sup>122</sup> Taking actively part in the striving for a common European constitutional heritage, by both importing and exporting legal traditions and judicial cultures, the Austrian Federal Constitution proves to be a "living" and flexible instrument. The Constitutional Court, too, has shown remarkable creativeness and adaptability when dealing

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118 Schäffer, Die Grundrechte im Spannungsverhältnis von nationaler und europäischer Perspektive, Zeitschrift für öffentliches Recht 62 (2007), 1; Wiederin, Grundlagen 439 et seq; Grabenwarter, Staatlichkeit 233 et seq; Pernthaler, Bundesstaatsrecht 631.

119 Öhlinger, Die rechtliche Bedeutung der Entscheidungen internationaler Menschenrechtsschutzinstanzen für die Tätigkeit der Gesetzgebung, Verwaltung und Rechtsprechung, in Klein (ed), Gewaltenteilung und Menschenrechte (2006) 196.

120 See, most recently, the Constitutional Court's activity report 2007, according to which the Court delivered a judgment in 2205 cases under Art 144 B-VG, whereas only 233 judgments were delivered under Art 140 B-VG and even fewer judgments in all other fields under the Court's jurisdiction.

121 Cf. Somek, Wissenschaft vom Verfassungsrecht: Österreich, in von Bogdandy/Cruz Villalón/Huber (eds), Handbuch Ius Publicum Europaeum, vol II: Offene Staatlichkeit – Wissenschaft vom Verfassungsrecht (2008) 637 (656 et seq and 660); Wiederin, Grundlagen 441 et seq.

122 Grabenwarter, Staatlichkeit 237 et seq.

with ECHR rights<sup>123</sup> or EU law<sup>124</sup>, whereas the Court is normally not much inclined to practice constitutional comparison.<sup>125</sup>

Nevertheless, a reform of human rights still remains an unfinished business. As yet, neither the codification of an incorporated "bill of rights" nor their substantive amelioration, e.g. in the field of social rights which are more or less lacking at the federal constitutional level,<sup>126</sup> has been achieved,<sup>127</sup> while the discussion on bioethical values or on the invasion of privacy is led with great fervour.<sup>128</sup>

## XI. CONCLUSIONS

After an eventful history and despite many drawbacks in the endeavours to reform, the Federal Constitution, trunk though it may have been at the beginning, is perhaps stancher than supposed by many. Surely, it is a patchwork document, and ruinous insofar as the multitude of constitutional norms on the one hand and the easiness to put through constitutional amendments on the other hand challenge the stability, coherence and sustainability that should be expected from any "instrument of government". Considering, however, that too much rigidity prevents a constitution from corresponding adequately to a changing society, public and economic life, some scope for constitutional metamorphosis is surely needed.<sup>129</sup>

It is perhaps paradoxical that, although the Austrian Federal Constitution is not at all a rigid constitution, crucial reform issues such as federalism or a bill of rights have not been resolved so far, even in times when the Federal Government commanded a qualified majority in both houses of the Federal Parliament. The latest reforms, put into effect in 2007 and 2008, even though their impact may be debatable, clearly carried more weight than many previous constitutional reforms. Arguing with the predominance of representative democracy, the political inclination to hold a referendum on these and possible future reform packages –

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123 Art 6 and 10 ECHR, in particular, are a source of dispute between various Austrian courts and the European Court of Human Rights, though.

124 Schäffer, Österreich und die Europäische Union – Erfahrungen und Leistungen des österreichischen Verfassungsgerichtshofes, *Zeitschrift für öffentliches Recht* 60 (2005), 345 (374); *idem*, ZÖR 62 (2007), 4; Chojnacka, Zur Kooperation von EuGH und nationalem Verfassungsgericht, *Zeitschrift für öffentliches Recht* 59 (2004), 415 (429); Novak, Der Verfassungsgerichtshof im Dialog mit dem Europäischen Gerichtshof, *Festschrift Ludwig Adamovich* (2002) 539.

125 See Heller, Rechtsvergleichung und Verfassungsrecht, in *Festschrift Fritz Schwind* (1993) 147 (149) and Wieser, *Verfassungsrecht* 36.

126 Holoubek, Zur Struktur sozialer Grundrechte, in *Festschrift Theo Öhlinger* (2004) 507; *Wiederin*, Soziale Grundrechte in Österreich?, in *Österreichische Juristenkommission* (ed), *Aktuelle Fragen des Grundrechtsschutzes* (2005) 153.

127 See [http://www.konvent.gv.at/K/M\\_I/SWSUCHE/H\\_09467/K.shtml](http://www.konvent.gv.at/K/M_I/SWSUCHE/H_09467/K.shtml).

128 See, recently, the amendment to the *Sicherheitspolizeigesetz*, BGBl I 2007/114, which allows new forms of supervising internet users by the police.

129 Gamper, *Staat* 56 et seq.

one has been drafted recently –<sup>130</sup> has been low, although one cannot exclude the possibility of a total revision on a step-by-step approach. The ambitious aspiration must be not to let a solid ruin break into pieces.

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130 On 12 March 2008, a draft constitutional amendment concerning a reform of the federal system was published for pre-legislative evaluation ([www.austria.gv.at/site/5732/default.aspx](http://www.austria.gv.at/site/5732/default.aspx)), but it is not very likely to be realized at present.