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A Model for the World: The Austrian Constitutional Court Turns 100

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Abstract: The design of constitutional courts usually shows a specific concern for independence from political actors and for pluralism on the bench. We argue that many institutional features of today's constitutional courts can be traced back to the Austrian Constitutional Court (the first of its kind, which celebrated 100 years in 2020) and even further still to its predecessor, the Austrian Imperial Court of Justice of 1867. Strikingly, judicial independence is to be guaranteed against the existing judiciary as well, which is why constitutional courts often stand apart from the traditional judicial bureaucracy. Pluralism on the bench is to be ensured by specific criteria of eligibility, opening the constitutional court judgeship to a wider set of candidates (eg, attorneys, professors, civil servants), but also via institutional arrangements that make it easy for outsiders to join the court in the first place (eg, by allowing to continue one's job or by not requiring residence at the court's seat). Recounting the story of the Austrian model of constitutional adjudication in an unprecedented attempt to combine Austrian legal history with the structure and process of today's constitutional courts around the world, this paper also highlights how relatively minor features of court organization contribute to the overarching goal of ensuring the independence of the court and pluralism within the court.

Keywords: constitutional courts; judicial review; judicial independence; judicial pluralism; Austrian model of constitutional adjudication; Hans Kelsen

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1 Introduction

In 2020, Austria celebrated the centenary of its constitution, the Federal Constitutional Act of 1920 (*Bundes-Verfassungsgesetz, B-VG*),[1] which is now the 12th-oldest constitution still in force around the globe.[2] Its considerable age is proof of its ongoing success. One of the reasons for the Constitution's longevity might be its most prominent and influential feature, the Constitutional Court (*Verfassungsgerichtshof, VfGH*).[3] Today, the idea of a *separate constitutional court* may be said to be Austria's leading export,[4] just as the idea of judicial review of legislation[5] has spread around the world, although direct influence is hard to trace.[6] In many countries, a single, separate constitutional court has become state-of-the-art in constitution-making.[7] Especially in newly emerged democracies, constitutional courts are tasked with safeguarding the fledgling pluralistic political system[8] and are viewed as an integral part of the democratic process.[9]

1 All Austrian laws cited in this chapter can be accessed online via the Federal Legal Information System (*Rechtsinformationssystem des Bundes*) at <https://www.ris.bka.gv.at/Bundesrecht/>. Manfred Stelzer, *The Constitution of the Republic of Austria. A Contextual Analysis* (Hart 2011) provides a (somewhat dated) introduction to Austrian constitutional law.

2 For a list of constitutions ranked, inter alia, by date of enactment, see The Comparative Constitutions Project, <https://comparativeconstitutionsproject.org/ccp-rankings/> accessed 17 August 2023.

3 Throughout the text, 'Court' is capitalised when referring to the Austrian Constitutional Court and its predecessor.

4 See Anna Gamper, 'Constitutional Borrowing from Austria? Einflüsse des B-VG auf ausländische Verfassungen' (2020) 75 Zeitschrift für öffentliches Recht 99.

5 Unless otherwise stated, 'judicial review', 'constitutional adjudication', and similar terms that denote a constitutional court's main role are used synonymously.

6 See Giacomo Delledonne, 'Imitation, Adaptation, and Further Development: The German Federal Constitutional Court and the Austrian Model' (2021) 76 Zeitschrift für öffentliches Recht 451.

7 Nowadays, around 80 % of world constitutions allow for judicial review; since the 2000s, the Austrian model has surpassed the American model. See Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 Journal of Law, Economics and Organization 587, 590. See also Ewald Wiederin, *Vergessene Wurzeln der konzentrierten Normenkontrolle in Österreich/ Forgotten Roots of Concentrated Judicial Review in Austria* (Verlag Österreich 2021) 20 (German)/80 (English).

8 See Francesco Biagi, *European Constitutional Courts and Transitions to Democracy* (CUP 2020); Tom Gerald Daly, *The Alchemists. Questioning our Faith in Courts as Democracy Builders* (CUP 2017) and, eg, Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2011) 99 Georgetown Law Journal 961; Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice, CDL-PI(2020)004* (2020) 6, available at <https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)004-e> accessed 17 August 2023.

9 See, eg, Victor Ferreres Gomella, *Constitutional Courts and Democratic Values. A European Perspective* (YUP 2009).

Since the advent of constitutional adjudication in Europe, it has become customary to distinguish between the American and the European model, with the latter also known as the Austrian or the Kelsenian model.[10] It is said that they chiefly differ in how cases reach the court and in how judicial review is done. In the American model, constitutional questions can only be answered based on a real case or controversy. They need a claimant in court whose case depends on the solution of some constitutional issue. European model constitutional courts, however, may exercise judicial review without any connection to a real-life case. The American model is called concrete, the European one abstract review. One can further distinguish along other lines: whether, for example, courts are empowered to strike down laws or to issue only declaratory or interpretive judgments[11] or whether review is conducted before or after a law's promulgation.[12] In a more political fashion, one can ask whether constitutional courts are more or less democratically accountable in relation to the judicial nomination process and the lengths of office terms.[13] In the end, one has to admit that there are more types of judicial review than for them to be adequately captured by the American–European dichotomy.[14]

In any case, we believe that the European model of constitutional adjudication is better characterized by its *organization*, *structure* and *procedure* than by the concrete–abstract distinction. What defines the European model is the existence of an institutionally separate constitutional court with centralized judicial review:[15] in other words, constitutional courts possess the monopoly on judicial review – all

10 See Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 816; Mark Tushnet, 'Comparative Constitutional Law', in Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1194, 1208 ff. See also the ground-breaking Mauro Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill 1971) and Doreen Lustig and J H H Weiler, 'Judicial review in the contemporary world—Retrospective and prospective' (2018) 16 ICON 315.

11 For this and more distinctions, see Joel I Colón-Ríos, 'A new typology of judicial review of legislation' (2014) 3 Global Constitutionalism 143.

12 See, eg, Kader Asmal, 'Constitutional Courts – A Comparative Survey' (1991) 24 Comparative & International Law Journal of Southern Africa 315.

13 Miguel Schor, 'Judicial Review and American Constitutional Exceptionalism' (2008) 46 Osgoode Hall Law Journal 535.

14 See Virgílio Alfonso da Silva, 'Beyond Europe and the United States: The Wide World of Judicial Review' in Erin F Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Elgar 2018) 318.

15 See, among others, J A C Grant, 'Judicial Control of Legislation: A Comparative Study' (1954) 3 American Journal of Comparative Law 186; Herman Schwartz, 'The New European Constitutional Courts' (1992) 13 Michigan Journal of International Law 741; John Ferejohn and Pasquale Pasquino, 'Constitutional Adjudication: Lessons from Europe' (2004) 82 Texas Law Journal 1671; Victor Ferreres Gomella, 'The European Model of Constitutional Review of Legislation: Toward decentralization?' (2004) 3 ICON 461.

other courts are prohibited from undertaking it.[16] In this paper, we emphasize the specifics of the European model as exhibited in their prototype, ie, in Hans Kelsen's design of the Austrian Constitutional Court.[17] While we will show that the Court was not Kelsen's brainchild, we will demonstrate that he deftly managed to connect different currents and traditions. The organism he created is characterized by some specific institutional arrangements, many of which have their roots in the Austrian Constitutional Court's predecessor, the Imperial Court (*Reichsgericht*).[18] Its organizational and procedural features have, by way of being conserved in the Constitutional Court, endured until today and influenced other constitutional courts around the world. They are rooted in political considerations of the 19th century, but they are still applicable today. As we will demonstrate on the basis of concrete examples, the structure of the Austrian model of constitutional review embodies an overarching concern for two different but related aspects: outward independence combined with inner pluralism. Recent developments warrant a fresh look at the organization and procedure of constitutional courts because this is where they are at their most vulnerable. Slight tweaks in the judicial selection process or in procedural law can bring a court into line – or bring it down.[19]

2 The Austrian Constitutional Court: A Short History

2.1 The Idea of Judicial Review: Precursors and Preconditions

For much of the 19th century, no one in Europe imagined a separate court specialized in constitutional law. The concept of judicial review, however, was not new: In the

16 This monopoly is more and more threatened by the supremacy of EU law and the direct-effect doctrine: See Jan Komárek, 'National Constitutional Courts in the European Constitutional Democracy' (2014) 12 ICON 525; Marco Dani, 'National Constitutional Courts in Supranational Litigation: A Contextual Analysis' (2017) 23 European Law Journal 189.

17 For an overview, see Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 The Journal of Politics 183 and, among others, Stanley Paulson, 'Constitutional Review in the United States and Austria: Notes on the Beginnings' (2003) 16 Ratio Juris 223; John Ferejohn, 'Constitutional Review in the Global Context' (2002) 6 Legislation and Public Policy 49.

18 For overviews, see inter alia Theo Öhlinger, 'The Genesis of the Austrian Model of Constitutional Review of Legislation' (2003) 16 Ratio Juris 206; Georg Schmitz, 'The Consitutional Court of the Republic of Austria 1918–1920' (2003) 16 Ratio Juris 240; Christoph Hofstätter, 'Périodes de transition dans l'histoire de la Cour constitutionnelle autrichienne' (2020) 20 International and Comparative Law Review 283; Ewald Wiederin, 'From the Federalist Papers to Hans Kelsen's "Dearest Child"' (2021) 76 Zeitschrift für öffentliches Recht 313.

19 See, inter alia, Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019) 58ff.

United States, it had long been established,[20] a fact that did not escape European observers. In many Latin American states, the respective supreme courts have had a monopoly to strike down unconstitutional laws since before the concept took hold in Europe.[21] With the liberal-constitutional revolutions of 1848, the question of what a judge was to do when confronted with an unconstitutional statute was raised in Europe as well. The never-implemented revolutionary constitutions of 1849 (the German, so-called *Paulskirchenverfassung* and the Austrian 'March Constitution') included a court vested with the power of judicial review, an idea that clearly had come from the other side of the Atlantic. The issue revolved around the powers of the ordinary judiciary, ie, the American model. Defenders of monarchical power objected that since the monarch is the lawgiver and since judges dispense justice in the monarch's name, a judge voiding a law would amount to a contradiction within the sovereign's will. Advocates of judicial review referred to the separation of powers and the protection of fundamental rights.[22]

The year 1867, which saw the Austro-Hungarian Compromise, marks the beginning of the rule of law in Austria.[23] With Emperor Franz Joseph I weakened by military defeat and the realm partitioned into two separate entities, liberal forces had a window of opportunity. They managed to implement several constitutional acts that guaranteed fundamental rights, an independent judiciary, and the judicial review of administrative decisions. They also created a parliament, suffrage to which would be gradually expanded until the 20th century. The advent of constitutionalism in Austria coincides with similar developments in many other European countries. What made Austria's case special, though, was the fact that precautions were taken to make fundamental rights effective. Inspired by earlier constitutions that had included but never implemented special courts designed for the protection of fundamental rights, liberal reformers succeeded in creating a special institution to

20 See *Marbury v Madison*, 5 US 137 (1803) and Paulson (n 17).

21 Keith S Rosenn, 'Judicial Review in Latin America' (1974) 35 Ohio State Law Journal 785; Phanor J Eder, 'Judicial Review in Latin America' (1960) 21 Ohio State Law Journal 570.

22 For an intellectual history of judicial review in 19th century Germany and Austria, see, eg, Wolfgang Hoffmann-Riem, 'Two Hundred Years of Marbury v Madison: The Struggle for Judicial Review of Constitutional Questions in the United States and Europe' (2004) 5 German Law Journal 687, 693ff; Helmut Steinberger, 'Historic Influences of American Constitutionalism upon German Constitutional Development: Federalism and Judicial Review' (1998) 36 Columbia Journal of Transnational Law 189, 199ff; Christoph Gusy, *Richterliches Prüfungsrecht. Eine verfassungsgeschichtliche Untersuchung* (Duncker & Humblot 1985); Werner Frotscher, 'Die ersten Auseinandersetzungen um die richterliche Normenkontrolle in Deutschland' (1971) 10 Der Staat 383.

23 For an overview, see Gerald Stourzh, *Wege zur Grundrechtsdemokratie* (Böhlau 1989) 256ff; Pieter M Judson, *The Habsburg Empire. A New History* (Belknap/HUP 2016) 218ff; Pieter M Judson, 'The Lost Heroes of Austria's Fundamental Laws' in Franz Merli, Magdalena Pöschl and Ewald Wiederin (eds), *150 Jahre Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* (Manz 2018) 1.

do just that, the Imperial Court (*Reichsgericht*).[24] We will delve into the details of its inner workings in the coming sections, as they have survived until today. This Court's main function was to examine alleged violations of 'political rights' by the executive. As the executive and the judiciary were dominated by the Emperor, it was erected as a special court outside the normal judiciary and had a monopoly on fundamental rights review. The Imperial Court was expressly forbidden, however, to examine the constitutional validity of laws.

The first court in Europe authorized to examine legislation was the Swiss Federal Court (*Bundesgericht*), which was created in the same era by the 1874 Constitution of Switzerland. It could only review the conformity of cantonal law with federal law.[25] As Austria was similarly divided into separate entities, problems of federalism plagued its newly-emerged constitutional law as well. It did not take long, therefore, for the idea of a court acting as a federal arbiter to enter Austrian discourse. The first one to come up with the idea of a truly separate court tasked with judicial review of legislation was Georg Jellinek. In 1885, he devised such an institution and called it *Verfassungsgerichtshof*, thereby having earned the copyright on the name.[26] Georg Jellinek reversed course only two years later,[27] but conflicts over jurisdiction would prove to be at the heart of the Austrian model.[28] As recent research has uncovered, there were plans for creating a court tasked with the review of executive regulations well before 1920.[29] The idea to review state laws at the request of the federal government was put forth by Austria's first republican chancellor, Karl Renner, when the monarchy was abolished in 1918.[30] His proposal made it into law as the short-lived Republic of German-Austria got its own

24 See, generally, Kurt Heller, *Der Verfassungsgerichtshof* (Verlag Österreich 2010) 94ff and Christoph Grabenwarter, 'The Austrian Constitutional Court' in Armin von Bogdandy, Peter M Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, vol III: Constitutional Adjudication: Institutions* (OUP 2020) 19, 21ff.

25 See Giovanni Biaggini, 'Constitutional Adjudication in Switzerland' in Armin von Bogdandy, Peter M Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law vol III: Constitutional Adjudication: Institutions* (OUP 2020) 779, 800.

26 Georg Jellinek, *Ein Verfassungsgerichtshof für Österreich* (Hölder 1885).

27 Georg Jellinek, *Gesetz und Verordnung* (Mohr 1887) 395ff.

28 The situation was further troubled by the fact that the conservative Christian Social Party dominated the states, whereas the capital (Vienna) was ruled by the progressive Social Democrats. As research suggests, a tense political climate such as this often leads to the creation of constitutional courts. See Tom Ginsburg, 'Economic Analysis and the Design of Constitutional Courts' (2002) 3 Theoretical Inquiries in Law 49; Francisco Ramos Romeu, 'The Establishment of Constitutional Courts: A Study of 128 Constitutions' (2006) 2 Review of Law and Economics 103. It is interesting to note that federalism is at the heart of the veteran systems of judicial review (the US, Austria) but not a big factor in recent times. See Ginsburg and Versteeg (n 7) 587.

29 Wiederin, *Vergessene Wurzeln* (n 7) 26ff/86ff.

30 Wiederin, 'From the Federalist Papers' (n 18) 321f.

Constitutional Court from 1919 to 1920. The newly formed state governments were, understandably, not satisfied with this arrangement and wanted the ability to challenge federal laws as well.[31]

Kelsen, as the principal adviser during the process of constitution-making in the years around 1920, had to work based on this history and the political implications that came with it. His task was further complicated by the fact that judicial review of legislation had gotten a bad name by the early 20th century. When the US Supreme Court struck down maximum-working-hour regulations as being incompatible with freedom of contract and voided similar social policies as unconstitutional – a period known as the *Lochner*[32] era – European observers were discouraged.[33] Ever since there have been warnings of a *government of judges*.[34] Kelsen knew that American-style judicial review, exercised by all courts on all levels and open to any claimant, would not be feasible in the political climate of his day. Still, his duty required him to come up with the definitive framework of constitutional adjudication. To make constitutional adjudication look less frightening, it had to be redesigned.[35] Erecting a dedicated court came with many advantages: constitutional adjudication would be concentrated and more predictable, and it would avoid conflicting decisions. Standing would be narrow; only the federal and state governments – not individuals – had the right to initiate judicial review. Most importantly, the judges would not be chosen from the judiciary but be political appointees. Austria's 1920 constitution implemented Kelsen's ideas:[36] thus, the Austrian model of judicial review was born and would later become the European standard.[37] The institution of the Imperial Court was so well-entrenched by 1918 that it seemed natural to keep it

31 See Ewald Wiederin, 'Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht' in Thomas Simon and Johannes Kalwoda (eds), *Schutz der Verfassung: Normen, Institutionen, Höchst-und Verfassungsgerichte* (Duncker & Humblot 2014) 283.

32 Lochner v New York, 198 US 45 (1905).

33 Wiederin, 'From the Federalist Papers' (n 18) 320ff.

34 Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Marcel Giard & Cie 1921) and, eg, Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (HUP 2004).

35 See Alec Stone Sweet, 'Why Europe Rejected American Judicial Review – And Why It May Not Matter' (2003) 101 Michigan Law Review 2744, 2766ff; Alec Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (OUP 2000) 34ff.

36 For a history of the Constitutional Court with special emphasis on Kelsen, see, inter alia, Sara Lagi, 'Hans Kelsen and the Austrian Constitutional Court (1918–1929)' (2012) 9 Co-herencia 273.

37 See Maartje de Visser, *Constitutional Review in Europe. A Comparative Analysis* (Hart 2014) 95; Venice Commission (n 8) 5.

for the newly emerged state. As we will explore later on, it provided the organizational frame on which the new Constitutional Court was grafted. Its power of fundamental rights review was carried over because of its already long tradition, but it was not, in itself, a major concern.[38]

Kelsen, to whom the idea of constitutional adjudication is generally attributed, has been reported to consider the Constitutional Court his 'dearest child'.[39] His personal interest in constitutional adjudication followed from his legal theory. Together with his colleague Adolf Merkl, he conceived of the legal system as a hierarchical order of norms, the so-called *Stufenbau* (a 'pyramid of norms').[40] The constitution, as paramount law, must have precedence over all other legal acts that derive their authority from it. In other words, if the constitution really is supreme, every law that contradicts it has to be considered void. In order for this idea to be effective rather than mere wishful thinking, it had to be enforced by a court.[41] The possibility of nullification of unconstitutional laws meant, in turn, that such laws remain valid until the Court decides otherwise (the so-called *Fehlerkalkül*).[42] Kelsen himself would serve as a judge on the Court he helped create from 1919 to 1930. In his writings, he was an opponent of judicial activism;[43] as a judge, however, he is said not to have been encumbered by his theoretical positions.[44]

38 Kelsen even suggested that fundamental rights review be ceded to administrative courts. See Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' (1929) 5 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 30, 86; for a translation, see Lars Vinx, *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015) 22.

39 Kelsen's remark is related by René Marcic, *Verfassungsgerichtsbarkeit und Reine Rechtslehre* (Deuticke 1966) 58.

40 See Hans Kelsen, *Pure Theory of Law* (2nd edn, University of California Press 1967) 221ff; on Merkl's concept of the *Stufenbau*, see Stanley L Paulson, 'How Merkl's Stufenbaulehre Informs Kelsen's Concept of Law' (2013) 21 Revus: Journal for Constitutional Theory and Philosophy of Law 29.

41 See Kelsen, 'Wesen und Entwicklung' (n 38) 78.

42 On the concept of *Fehlerkalkül* (unlawful norms are valid until repealed, not void ab initio), see, eg, Christoph Kletzer, 'Kelsen's Development of the Fehlerkalkül-Theory' (2005) 18 Ratio Juris 46.

43 See Kelsen, 'Wesen und Entwicklung' (n 38) 69f. His remedy was not judicial restraint, however, but to purge the Constitution of all vague and ambiguous terms. He was therefore critical of fundamental rights provisions in constitutions.

44 On Kelsen's judicial activism, see, eg, Robert Walter, *Hans Kelsen als Verfassungsrichter* (Manz 2005); Tamara Ehs, 'Felix Frankfurter, Hans Kelsen, and the Practice of Judicial Review' (2013) 73 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [Heidelberg Journal of International Law] 451; Peter Solyom, 'Between Legal Technique and Legal Policy: Remarks on Hans Kelsen's Constitutional Theory' (2017) 30 Canadian Journal of Law & Jurisprudence 399, 406ff.

2.2 The Practice of Judicial Review: 100 Years of Constitutional Justice in Austria

In 1920, Austria's current Constitution – and with it, the Constitutional Court – finally saw the light of day. The Constitutional Court inherited the structure of the former Imperial Court. The number of judges was left at 14 (a president, a vice-president, and 12 members), who were elected by both chambers of parliament and had life tenure. They did not need to be trained in law nor leave their occupations. Thus, figures like Friedrich Austerlitz, editor-in-chief of the influential social-democratic newspaper *Arbeiterzeitung*, made it onto the bench alongside trained lawyers. This shows the enormous importance the political parties accorded to the Constitutional Court. The Court's powers were expanded. The federal government could challenge state laws and the state governments could challenge federal laws. Additionally, the Constitutional Court itself could examine any law it had to apply in the course of its proceedings. If the Court found that a violation of fundamental rights was grounded in an unconstitutional statute, it could open judicial review proceedings *ex officio*. This way, the functions of the former Imperial Court were subsumed into the new Constitutional Court.

When Austria's political climate took an authoritarian turn in the late 1920s, the Constitutional Court suffered an interesting fate. Access to the Court was broadened, while at the same time, its judges were dismissed and the role of the executive in appointing judges was strengthened. This was motivated by political reasons: in several judgments, the Constitutional Court had ruled that state governors had the power to grant matrimonial dispensations, enabling Catholics to remarry, something the governing Christian Social Party could not accept.[45] A 1929 constitutional amendment, which was supported by the Social Democrats and whose purported aim was to 'depoliticize' the Court, introduced, for the first time, formal requirements for Court membership. These remain in force today and have been taken up by many European constitutional courts. Now, judges had to have completed their legal studies and were required to have at least 10 years of professional experience. Another change was less benign: it was now the federal government that chose the president, vice-president, and six members of the Court to be submitted to the Federal President for confirmation. Each chamber of parliament would select three judges, having to submit three candidates for each vacant position to the Federal President. Thus, the government controlled a majority of positions in the Court

45 On the crisis around matrimonial dispensations and Hans Kelsen's role in it as a judge, see Christian Neschwara, 'Hans Kelsen und das Problem der Dispensehen' in Robert Walter, Werner Ogris and Thomas Olechowski (eds), *Hans Kelsen: Leben, Werk, Wirksamkeit* (Manz 2009) 246.

(eight out of 14),[46] an instance of outright court-packing. This arrangement, too, is still in force today,[47] giving the Austrian executive the strongest influence over nominations of constitutional judges in Europe.[48] Both the Supreme Court and the Supreme Administrative Court received the power to refer constitutional questions to the Constitutional Court.

Things took another turn in 1933, the year that is generally held to mark the end of democracy in Austria. When the three presidents of Parliament resigned simultaneously over a hotly contested bill, Parliament was left without leadership and dispersed. The conservative government sent in the troops to prevent Parliament from assembling again and used a state of emergency law to govern without parliamentary approval.[49] The Constitutional Court, the last bastion of democracy and the rule of law, clearly needed to be brought under control. Using its emergency powers, the government changed the Court's inner organization. A new rule was created, stating that the Court's members could only meet if all positions were filled (somewhat like a 100 % quorum). Some judges loyal to the government duly resigned, thus paralyzing the Court. In 1934, a new constitution introduced a corporatist and clerical regime.[50] The Constitutional Court, or what remained of it, was merged with the Supreme Administrative Court. Judicial review was, in principle, still within this new court's powers but ceased to exist when Germany annexed Austria in 1938 and introduced national-socialist law.

Following Austria's resurrection as an independent state after World War II, the Constitution of 1920, as amended in 1929, was swiftly reinstated. The Constitutional Court resumed its work in 1946. Its institutional design has remained the same ever since. Access to the Court has been gradually expanded. 1975 saw the introduction of individual petitions for judicial review. In the 1980s, fundamental rights were bolstered by a new approach in the Court's case law, which (until today) heavily relies on the European Convention on Human Rights.[51] A next step was taken in 2012.

46 Since the Court president only votes in case of a tie, the government appointees represent seven votes out of 13, which is still a majority.

47 Federal Constitutional Act, art 147 para 2.

48 See Christoph Grabenwarter, 'Die Bestellung der Richter in vergleichender Perspektive' in Armin von Bogdandy, Christoph Grabenwarter and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum, vol VII: Verfassungsgerichtsbarkeit in Europa: Vergleich und Perspektiven* (CF Müller 2020) 129, 132ff.

49 See, eg, Steven Beller, *A Concise History of Austria* (CUP 2007) 222ff.

50 Its preamble read: 'In the name of God Almighty, from whom comes every law, the Austrian people is given this constitution for its Christian, German, federal and corporatist state.' (Authors' translation).

51 See the seminal judgment no VfSlg 10.179/1984, in which the limitation clauses of Articles 8 to 11 of the European Convention are applied to the rights guaranteed under the Austrian Constitution, with the effect of constraining legislation much more than before.

Whereas in administrative law litigation, the Constitutional Court could be reached via appeals proceedings, this was not the case in civil and criminal law. If a constitutional question arose, the individual claimant had to rely on the willingness of the ordinary courts to refer the question to the Constitutional Court.[52] Now, any party to a civil or criminal proceeding, when appealing the decision, can simultaneously petition the Constitutional Court for review of the applicable legislation. It is still not possible, though, to directly challenge a civil or criminal judgment before the Constitutional Court.

Today, the Constitutional Court has become a source of pride among Austrian jurists. Unlike in the United States, where the fight over the legitimacy of judicial review rages on,[53] the institution of constitutional adjudication has never been challenged in Austria. It is too tightly interwoven with the creation of the Constitution and too strongly connected to the figure of Hans Kelsen, who enjoys a kind of superhero status in Austrian constitutional scholarship. Outside Austria, the Court has been eclipsed by its most prominent and influential offspring, the German Federal Constitutional Court,[54] which has shaped German Constitutionalism in its own (very non-Kelsenian) way.[55]

3 No Ordinary Court: Some Characteristics of the Austrian Constitutional Court

The Austrian Constitutional Court exercises three main functions which constitute the core of constitutional adjudication. It examines whether laws conform to the constitution; it examines whether decisions of lower administrative courts respect fundamental rights, and it decides conflicts of competence (between courts, courts and administrative agencies, the federal and the state governments, and other state institutions).[56] It has other competencies as well, such as settling electoral disputes,

52 Just as it is in Italy: See Raffaele Bifulco and Davide Paris, 'The Italian Constitutional Court' in Armin von Bogdandy, Peter M Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law vol III: Constitutional Adjudication: Institutions* (OUP 2020) 447, 485.

53 See, eg, Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.

54 Justin Collings, *Democracy's Guardians. A History of the German Federal Constitutional Court 1951–2001* (OUP 2015) xxv ff.

55 See Michaela Hailbronner, *Traditions and Transformations. The Rise of German Constitutionalism* (OUP 2015).

56 For English-language overviews concerning the Court's organisation, procedure, and powers, see Grabenwarter, 'The Austrian Constitutional Court' (n 24); Christoph Bezemek, 'A Kelsenian Model of Constitutional Adjudication' (2012) 67 Zeitschrift für öffentliches Recht 115; Konrad Lachmayer,

trials of officials, etc.[57] Compared with other constitutional courts, it may be considered rather powerful,[58] and it even exercises review of constitutional amendments.[59] In this section, we will discuss what it is that makes the Constitutional Court a truly special institution. In doing so, we will explore the following characteristics: the Court's size, its members' professional background, the part-time design of the judicial office, and the relation between its two principal procedures – fundamental rights review and judicial review. We will also attempt to elucidate the reasons and motives behind these institutional features, which will take us back to the old Imperial Court, from which these arrangements were taken over. In our opinion, the Court's design shows a specific concern for pluralism and independence, which is what sets it apart from ordinary courts.

3.1 Court Size and Membership

When the Constitutional Court's predecessor, the Imperial Court, was established in the late 1860s, the first thing to strike observers as new was its sheer size. The Court had, as it does now, 14 members, who always sat *en banc*. As is still the case today, other courts may have had more judges in total, but the actual panels were much smaller. In Austria, trial courts generally sit as single judges, appellate courts sit in panels of three, and the highest courts act in panels of five. They may reinforce their panels with additional judges when the case at hand is important or difficult, but even such panels never exceed 11 judges.[60] The number of 14, then, is quite extraordinary.

Why exactly 14 members? It was considered a given that the Court would only act in plenary sessions, the reasons for which we will explore shortly. Since the

'Austria: Constitutional Courts as Positive Legislators' in Allan R Brewer-Carías (ed), *Constitutional Courts as Positive Legislators. A Comparative Study* (CUP 2011) 251; Anna Gamper and Francesco Palermo, 'The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review' (2008) 3 Journal of Comparative Law 64; Ronald Faber, 'The Austrian Constitutional Court – An Overview' (2008) 1 Vienna Online Journal on International Constitutional Law 49.

57 For this type of powers, see Tom Ginsburg and Zachary Elkins, 'Ancillary Powers of Constitutional Courts' (2009) 87 Texas Law Review 1431.

58 See Stephen Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts?' (2018) 29 Duke Journal of Comparative and International Law 1.

59 See the Constitutional Court's seminal judgment nr VfSlg 16.327/2001 and, for a general overview, Yaniv Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (OUP 2017); Richard Albert, 'How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments' (2017) 77 Maryland Law Review 181.

60 Supreme Administrative Court Act (*Verwaltungsgerichtshofgesetz*), ss 11–13 and Supreme Court Act (*Bundesgesetz über den Obersten Gerichtshof*), ss 6–8.

institution as such was new and endowed with a wide array of competencies, lawmakers were convinced that the Court needed a high number of judges to handle the caseload,[61] which was expected to be high.[62] We can only assume that the specific number of 14 is based on the number of 12 judges – 12 traditionally being considered a symbol of perfection – which is then increased by the two positions of president and vice president. The Constitutional Court has retained this number, which has proven influential: constitutional courts in Europe generally consist of nine to 16 judges;[63] they all have more members than ordinary apex courts.[64]

The complexity of constitutional cases as such cannot justify the Court's size. Ordinary apex courts handle difficult cases as well (as this is their main purpose), with significantly fewer judges. There is a certain crowd intelligence: according to Condorcet's jury theorem, if each person is more likely to give a correct solution than an incorrect one, increasing group size makes sense.[65] Nevertheless, behavioral science tells us that when it comes to working together effectively, a group of 14 people is vastly oversized, as a group's productivity decreases with each additional member.[66] The problem is exacerbated further when, as is the case in most courts, judges do not simply vote yes or no but collectively discuss, amend, and redact draft opinions.

The high number of judges must, therefore, have different reasons. We argue that it is linked to the selection of the judges, their professional provenience, and the special status of the Court outside the traditional judiciary. When constitutional adjudication in Austria was created in 1867, what mattered most was the independence of the court from traditional judicial structures and its pluralistic composition.

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61 On the difficulties of assessing the adequate number of judges, see Marco Fabri, 'Comparing the number of judges and court staff across European countries' (2019) 26 International Journal of the Legal Profession 5.

62 See the 1867 Report of the House of Lords Juridical Commission (*Bericht der juridischen Kommission des Herrenhauses*) as printed in *Die neue Gesetzgebung Österreichs. Erläutert aus den Reichsratsverhandlungen, vol I: Die Verfassungsgesetze und die Gesetze über den finanziellen Ausgleich mit Ungarn* (Manz 1868) 410; available at <https://digital.onb.ac.at/OnbViewer/viewer.faces?doc=ABO_%2BZ219360604> accessed 17 August 2023.

63 de Visser, *Constitutional Review* (n 37) 210ff.

64 Cf Ginsburg, 'Economic Analysis' (n 28) 49, 64: The mean number of judges of constitutional courts erected after 1989 is 11.25; for supreme courts with the power of judicial review, it is 8.25.

65 See, eg, Bryan C McCannon, 'Condorcet Jury Theorems', in Jac C Heckelman and Nicholas R Miller (eds), *Handbook of Social Choice and Voting* (Elgar 2015) 140; Maxwell L Stearns, 'The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore' (2002) 3 Theoretical Inquiries in Law 125.

66 This is the so-called Ringelmann effect; see Alan G Ingham, George Levinger, James Graves and Vaughn Peckham, 'The Ringelmann effect: Studies of group size and group performance' (1974) 10 Journal of Experimental Social Psychology 371.

Ever since, the composition of constitutional courts has, in general, differed from ordinary courts with the aim of better representing society as a whole.[67]

In the 19th century, when the idea of the monarch as the ultimate dispenser of justice was firmly entrenched, it was natural to assume that judicial nominations were at the sole discretion of the sovereign. The Imperial Court, however, was a novel institution with previously unknown powers and its main task was to protect fundamental rights against the monarchical executive. Therefore, it had to be staffed differently from other courts. After all, its independence needed to also be secured against the traditional judicial bureaucracy, which depended on the Emperor.[68] Even in the earliest draft constitutions of 1848/1849, the Imperial Court judges were to be selected with parliamentary approval. The fact that this approach has become today's gold standard in constitutional court nominations[69] makes it easy to miss how revolutionary it was. A look into the parliamentary minutes of the time confirms the acting lawmakers' prescience. Their reasoning can easily be applied to contemporary constitutional courts. In 1867, the House Committee on Constitutional Affairs wrote in its report:

> 'Considering the high political importance of the Imperial Court, it is an essential precondition to its value that the representatives of the people have a decisive influence over the selection of its members and, thus, on the independence of its pronouncements, so that the former is not left entirely to the executive branch, but rather so that both branches of government find, in the judicial nomination process, the required guarantees for those interests they are entrusted to protect.'[70]

Another factor for the Court's size and nomination process is the concern for the greatest possible pluralism. On the one hand, the Court was intended to reflect society's diversity as an end in itself; on the other hand, such pluralism provided yet another vehicle to secure the Court's independence. Since the judges would not have to be taken from the ordinary judiciary, it was possible to staff the Court with new

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67 See also Venice Commission (n 8) 5, 8ff.

68 Independence from the traditional judiciary is emphasized by Gottfried Dietze, 'Constitutional Courts in Europe' (1955) 60 Dickinson Law Review 313, and, with regard to the ex-communist judiciary of Eastern Europe, by Wojciech Sadurski, *Rights before Courts* (Springer 2005) 21ff and Lech Garlicki, 'Constitutional Courts versus Supreme Courts' (2007) 5 ICON 44.

69 For an overview of appointment procedures, see de Visser, *Constitutional Review* (n 37) 206ff; Venice Commission (n 8) 16ff. Parliaments are involved almost everywhere.

70 See the 1867 Report of the House Committee on Constitutional Affairs (*Bericht des Verfassungsausschusses des Abgeordnetenhauses*) as printed in *Die neue Gesetzgebung Österreichs. Erläutert aus den Reichsratsverhandlungen, vol I: Die Verfassungsgesetze und die Gesetze über den finanziellen Ausgleich mit Ungarn* (Manz 1868) 404; available at <https://digital.onb.ac.at/OnbViewer/viewer.faces?doc=ABO_%2BZ219360604> accessed 17 August 2023 [translated by the authors].

faces and independent thinkers. Thus, Parliament was free to select anyone, provided that they were 'knowledgeable men' (*sachkundige Männer*). They did not need to be lawyers; this condition was not introduced before 1929. Even today, nomination requirements in different countries differ widely, and there are some constitutional courts staffed with non-lawyers.[71] The very low nomination prerequisites were intended to open the office of Imperial Court judge to men from the periphery, ie, non-lawyers but also lawyers that were not part of the bureaucracy. Today, the Venice Commission even holds that all-too-narrow professional and training requirements would 'go contrary to the logic of a specialized constitutional court'.[72] Special emphasis was put on representing the different regions and nations of the Empire.[73] The Court was designed as a representative institution, as another passage from the Committee report shows:

> 'The fact that [Parliament] is not restricted in proposing judges, save that it has to name "knowledgeable men", is believed to be the safest guarantee that all parts of public life will be considered in judicial nominations; that not only ordinary judges, but also civil servants, professors of law and the nations of the Empire will be represented in the Imperial Court, as far as this is possible without prejudice to the whole institution.'[74]

Pluralism in the Court's composition was taken so far that there were no provisions for incompatibility of offices. Almost everyone (provided they were knowledgeable and male) was eligible for judgeship. The office of the judge was designed as a part-time job. Today, this strikes us as odd. In most countries, the office of constitutional court judge cannot be reconciled with any other occupation.[75] Sometimes, there are exceptions for professors who are allowed to continue teaching. In the old Austrian Imperial Court, active politicians worked as judges on a regular basis. A high number of members of the House of Lords and of the House of Representatives were appointed to the bench during the 50 years of the Court's existence but kept their seats in parliament. Over the years, the list of Imperial Court judges additionally included seven active government ministers and three mayors, namely those of Vienna, Brno, and Ljubljana. It was practice, though, that judges holding a political office abstained from taking part in the Court's business for the duration of their mandate. The other members were professors of law, ordinary judges, and attorneys-at-law. Parliament also sought to represent, to an extent, the nations of the Austrian Empire: among the first set of judges, three were Czech, two were Polish,

71 See de Visser, *Constitutional Review* (n 37) 211ff.

72 Venice Commission (n 8) 11.

73 In many countries, this is still a vital concern; see Venice Commission (n 8) 9, 10.

74 House Committee on Consitutional Affairs (n 70) 404.

75 See, in general, Venice Commission (n 8) 14ff.

and one was Slovenian – the rest came from German-speaking Austria.[76] To our knowledge, there is no country where active government ministers can double as judges. In many countries, it is common, though, that former politicians are appointed judges, in some, it is even mandated. In Belgium, the Constitutional Court is partly staffed by former members of parliament;[77] in France, former presidents can claim a seat in the Constitutional Council.[78] In Austria, a former minister of Justice was appointed to the Constitutional Court in 2018 (but resigned in 2021). In the US, the last two Supreme Court Justices to hold an elected office prior to their judgeship were Earl Warren (as Governor of California from 1943 to 1953) and Sandra Day O'Connor (as an Arizona State Senator from 1969 to 1975).[79]

The radical pluralism and independence envisioned by the Court's creators meant that Parliament would inevitably have to choose among men who already had a job and a livelihood, many of whom also came from far away. This had a lasting influence on the Court's inner workings and has given rise to some institutional characteristics that endure until this day. Today's Constitutional Court nominations reflect this tradition. There is a concern to preserve a variety of professional backgrounds within the Court and to cover a broad range of legal expertise. As of 2023, the Court is composed of seven law professors, four civil servants and three attorneys. Interestingly, there currently are no civil, criminal or administrative judges on the bench.

3.2 The Court's Inner Mode of Operation

One may think of the Austrian Constitutional Court as a cumbrous institution. After all, it always acts as a single body: all decisions are made by the entire plenary assembly of 14 members, and it takes time for 14 people to deliberate and reach decisions. The official figures suggest otherwise, though. The Court handles approximately 5000 to 6000 cases a year; on average, a case is decided within four to

76 For a list of members grouped by professional background, see Karl Hugelmann, 'Das österreichische Reichsgericht (Entstehung, Organisation und Wirksamkeit)' (1925) 4 Zeitschrift für öffentliches Recht 458, 490, 502f.

77 See Christian Behrendt, 'The Belgian Constitutional Court' in Armin von Bogdandy, Peter M Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, vol III: Constitutional Adjudication: Institutions* (OUP 2020) 71, 80.

78 See Olivier Jouanjan, 'Constitutional Justice in France', in Armin von Bogdandy, Peter M Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, vol III: Constitutional Adjudication: Institutions* (OUP 2020) 223, 237.

79 See Nick Robinson, 'The Decline of the Lawyer-Politician' (2017) 65 Buffalo Law Review 657, 725 ff.

five months.[80] This remarkable schedule is due to several accelerating factors that have been introduced over the years because of the Court's mode of decision-making and that show a concern for preserving the plenary as the main forum of deliberation without sacrificing speed and efficiency.

Before considering the specific circumstances that make decisions by a 14-person panel feasible, we must inquire into its *raison d'être*: why make decisions in plenary sittings? When the early institutions of constitutional justice were debated in the 19th century, it was agreed that Parliament should share nomination rights with the executive. However, concerns arose that the Court would be divided into two panels, one chosen by either branch of government. Apparently, members of the 1848 Parliament feared that the panel selected by the executive would not act independently enough. They, therefore, expressly requested that the Court always act as one entity.[81] This was never changed and has influenced other constitutional courts around the world.[82] The plenary assembly thus reveals itself to be yet another instrument to ensure pluralism and independence on the Court's bench. After all, it would not make sense to have a complicated process of selecting judges aimed at achieving diversity of backgrounds and viewpoints when this could be undercut by then creating panels of, say, three or five judges.

The size of the Court and the requirement of plenary sittings, combined with the judges' background in many different areas of the legal profession and the design of judgeship as a part-time job, have led to a special arrangement as to how the Court's deliberations take place. Unlike other courts, the Austrian Constitutional Court is not permanently assembled. Rather, it meets only four times a year for fixed periods of time. These quarterly meetings have, so far, varied in length from a few days to three weeks and are referred to as 'sessions' (*Sessionen*). Every case that is ready in time is scheduled for deliberation in one of these sessions. In between the sessions, judges prepare draft opinions together with their clerks and, apart from that, pursue their original jobs.

There has always been speculation about why the Austrian Constitutional Court works this way and why it does not meet more frequently.[83] The design of the

80 See the Court's yearly report: Verfassungsgerichtshof, *Tätigkeitsbericht für das Jahr 2022* (2023) 7ff, 84ff; available at <https://www.vfgh.gv.at/downloads/taetigkeitsberichte/VfGH_Taetigkeitsbericht_2022.pdf> accessed 17 August 2023.

81 Hugelmann (n 76) 461.

82 See the emphasis on 'collegiality' in Venice Commission (n 8) 9.

83 Austrian scholarship reports but does not fully explain this system: See Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (13th ed, Facultas 2022) nr 989; Stefan Leo Frank, 'Art 148 B-VG' in Benjamin Kneihs and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (17th supplement, Verlag Österreich 2016) nr 14; Ulrich Zellenberg, 'Art 148 B-VG' in Karl Korinek, Michael Holoubek ea (eds), *Österreichisches Bundesverfassungsrecht. Kommentar* (6th supplement, Verlag

judgeship as a part-time office has led many to conclude that four separate meeting periods a year would be easier to reconcile with the judges' main occupations. This explanation is not quite satisfactory. In our opinion, it would seem more convenient to dedicate one day a week to such sessions instead of three full weeks every quarter. There is, however, an interesting historical reason for this arrangement. As stated before, the Imperial Court included judges from all over the Empire, which was much larger than present-day Austria. Additionally, transport was not as fast as today. It must have seemed unacceptable to require judges whose lives were centered elsewhere to be present throughout the entire year. Given that it probably seemed equally unfeasible to force them to travel to Vienna every week, it was decided that the Court meet only a few times a year so that every judge would be willing and able to make the trip – even more so as the first sessions of the Court did not take three weeks but only a few days each. While this explanation may sound trivial now, it once again shows the overarching concern for pluralism and independence: by not requiring permanent residence in Vienna, the Court's business was scheduled around its judges' lives, not the other way around. The question of judges' residence has since made it into law. The Constitution demands that three members and two substitute members not be residents of Vienna;[84] conversely, the Constitutional Court Act stipulates that the president, vice-president, two judges-rapporteurs, and two substitute members are to live in Vienna.[85] Today, this arrangement is explained with regard to federalism and as a measure for securing the constant availability of the Court.[86]

The Constitutional Court continues to meet in four sessions a year of three weeks each, even though the territorial extension of its jurisdiction has grown smaller and transport has become faster. This means that the session system is in need of a new justification. Perhaps it can be found in the group dynamics of a 14-person body. When 14 people meet to deliberate cases, they take some time to 'warm up' together as a group. Observations from within the Court confirm that in the first few days of each session, the Court has not yet reached its full operational potential. The part-time nature of the job may also require, each time anew, a phase of mental adjustment. Judges are forced into a three-week period of heightened concentration, almost as if in a conclave, with all other concerns shut out. Moreover, deliberating a single case simply takes more time if 14 people are entitled and expected to voice

Österreich 2003) nr 25; Thomas Horvath, '§ 6 VfGG' in Harald Eberhard ea (eds), *Verfassungsgerichtshofgesetz* (Facultas 2020) nr 1.

84 Federal Constitutional Act, art 147 para 2.

85 Constitutional Court Act (*Verfassungsgerichtshofgesetz*), s 2 para 2.

86 Stefan Leo Frank, 'Art 147 B-VG' in Benjamin Kneihs and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (17th supplement, Verlag Österreich 2016) nr 32.

their opinions. Each contribution opens the possibility of discovering unforeseen aspects or new arguments, which prolongs discussions even more. The looming end of each session, in turn, builds up the pressure needed to reach a decision – without such pressure, 14 people may well deliberate without end.[87]

3.3 Keeping the Plenary Assembly While Speeding Things Up

As we have seen, the session system is the consequence of a diverse body of 14 people who decide in plenary sittings without being expected to reside at the Court's seat or to hold their positions full-time. Subsequent procedural improvements have always taken the deliberation in plenary as the default mode of operation but have added features that enable the Court to continue working in this way without collapsing under its ever-increasing caseload.

From the very beginning, the Court appointed judges-rapporteurs (*ständige Referenten*) from among its 14 members, who were tasked with drafting the Court's opinions. In the early days, two judges-rapporteurs were sufficient; all other judges were not involved in this preparatory work and would only convene at the Court for hearings and deliberations. The draft opinion and the case files would be mailed to them in advance. In the penultimate week before each session, Friday noon marks the 'end of dispatch' (*Versendungsschluss*) – drafts that the judges-rapporteurs wish to schedule for deliberation must be mailed before this date. Today, every judge except the president simultaneously acts as judge-rapporteur and is, therefore, present at the Court. There is no need to mail the required documents anymore, but the terminology and timetable persist. Without the collective effort that is the result of every judge's serving also as judge-rapporteur and preparing cases, the Court would not be able to cope with its caseload.

Two other procedural features enable the Court to function relatively well in its plenary mode. One of them is the 'small bench'; the other is the option of declining to hear a complaint. In cases in which there is settled case law, the Court can deliberate with a reduced presence quorum. Normally, a decision requires the presence of at least the chair (generally, the president or vice-president) and eight other members (ie, nine out of 14 altogether).[88] Most cases, however, do not require such encompassing involvement. They can be dealt with in a reduced setting of no fewer than five judges (the chair and four members),[89] who are then referred to, within the

87 For a general discussion, see Michael Holoubek, 'Plenarentscheidungen und Sessionssystem' (2019) 27 Journal für Rechtspolitik 233, 236f.

88 Constitutional Court Act, s 7 para 1.

89 Constitutional Court Act, s 7 para 2.

Court, as the small bench (*kleine Besetzung*). Legally, the small bench is still the plenary assembly but with reduced attendance. This is why every judge is formally invited to small bench meetings, it being perfectly understood that only the minimum quorum has to actually attend. In practice, more than 90 % of cases are handled this way. Is it still true, then, that the Court always acts in plenary sittings? Yes and no. Of course, when the small bench acts on behalf of the Court, it means that a majority of judges were not involved in the decision. It could even happen, contrary to historical intent, that the small bench finds itself composed only of judges appointed by the same branch of government. Still, the Court is not subdivided into different panels. Instead, the small bench uses a rotating system, which means that in each session, each judge takes part in at least four different sittings of the small bench. All of the different small bench meetings are always chaired by the president and vice-president in order to ensure the continuity and uniformity of case law. If even just one judge requests that a case be transferred from the small bench, it must be deliberated in the plenary assembly. Overall, the small bench presents a reasonable way of preserving the plenary character of deliberations while at the same time acknowledging the exigencies of speed and efficiency.[90]

Since 1975, the Court has been allowed to decline to hear a complaint.[91] This is neither a rejection on procedural grounds nor a real finding on the merits. Rather, the Court can refuse to hear a complaint if its chances of success are considered insufficient or if it is deemed to not raise a question of constitutional law. Most requests for fundamental rights review now meet this fate. Upon application, the Court can refer these requests to the Supreme Administrative Court for further investigation if the claimant decides to file a second appeal. This instrument secures the effectiveness of the Court as it enables judges to skip lengthy deliberations if it is obvious that a case is not going to succeed. It may happen, however, that the Court decides to refuse to hear a complaint only after intense discussions. Either way, a refusal requires a unanimous vote; otherwise, the case must be decided on the merits.

Finally, the Court's judicial clerks deserve to be mentioned. Each judge-rapporteur is entitled to three full-time clerks, whom they can choose freely. These are usually recent law school graduates, most of whom have also completed a PhD in legal studies or have worked as university researchers. They are employed as clerks for approximately four years, after which they usually embark on a promising career. Some Constitutional Court judges were once clerks themselves. Alongside the

90 The Venice Commission stresses the importance of deliberations in plenary sittings but acknowledges the need for less burdensome decision-making modes, although they come with their own dangers; see Venice Commission (n 8) 42ff.

91 Federal Constitutional Act, art 144 para 2.

judges, the clerks prepare draft judgments, handle files, and deal with parties. The position of clerk is not constitutionally mandated (unlike in Belgium, for example, where some of the judges must be selected from among former clerks),[92] but it is safe to say that the Court would not function without them.

3.4 Fundamental Rights Review and Constitutional Review: Two Procedures Intertwined

The Constitutional Court carries out two different but related functions: fundamental rights review (inherited from the Imperial Court) and judicial review (instituted in 1920). The former of these powers aims at the executive, the latter at the legislature. We will examine their interplay in the following.[93]

The individual's protection against the state developed in several stages. Before the idea of an independent Court that can strike down laws was palatable, there was a less radical solution found in the concept of administrative justice, ie, the review of executive acts by the courts. Once it was accepted that law not only bound individuals but the state as well and that there were certain rights so fundamental that they required special protection, the understanding that there needed to be a legal remedy against state action took hold. In Austria, this role was assigned to the Imperial Court. Its primary function was to guarantee the fundamental rights enshrined in the so-called 'Basic State Law of 1867 on Citizens' General Rights' (*Staatsgrundgesetz 1867 über die allgemeinen Rechte der Staatsbürger*), which is still in force today. A few years later, Austria saw the creation of the Supreme Administrative Court,[94] which secures the legality of the administration in general.[95] In 2014, the system of administrative justice in Austria was completely overhauled: Now, an appeal to the (lower) Administrative Courts is required prior to appealing to the Constitutional Court. Thus, the Court's role has changed: fundamental rights review is not exercised against the executive anymore but against the courts.

92 Christian Behrendt, 'The Belgian Constitutional Court' (n 77) 71, 80.

93 For an overview, see Markus Vasek, 'Verfassungsgerichtsbarkeit und Grundrechtsschutz in Europa' in Armin von Bogdandy, Christoph Grabenwarter, and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum, vol VII: Verfassungsgerichtsbarkeit in Europa: Vergleich und Perspektiven* (CF Müller 2020) 417, 430ff.

94 See Angela Ferrari Zumbini, 'Standards of Judicial Review of Administrative Action (1890–1910) in the Austro-Hungarian Empire' in Giacinto della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe* (OUP 2021) 41.

95 Naturally, some conflicts of competence result from this arrangement; see Harald Eberhard, 'Zuständigkeitsabgrenzung von VwGH und VfGH' in Michael Holoubek and Michael Lang (eds), *Das Verfahren vor dem Verwaltungsgerichtshof* (Linde 2015) 331 and, for a general discussion, Garlicki (n 68) 44.

It might be obvious that fundamental rights review of this kind works well when faced with acts of the executive or the judiciary but is less helpful when the violation of fundamental rights is located within the law itself. Without judicial review of legislation, a court's hands are tied. When, in 1919/1920, the Constitutional Court was established and vested with the power to strike down laws, this was done, as indicated before, out of federalist concerns. No one thought, at the time, that fundamental rights would one day become the main reason for judicial review. Still, fundamental rights review – because it already had a longstanding tradition by then – was carried over to the Constitutional Court. At the time, only the federal and state governments could challenge the constitutionality of laws. Fundamental rights review, however, has always been open to anyone affected by an administrative act. Then as now, the Constitutional Court was faced with many requests for fundamental rights review and comparatively few direct challenges of laws. In order to bring out the full potential of constitutional review, these two procedures had to be linked together. The Court needs to be able to address constitutional issues irrespective of the constellation in which they arose.

Against this background, a special provision was introduced in Articles 139 and 140 of the Constitution, which concern the constitutional review of laws (and executive regulations). The articles provide a list of who can challenge laws for unconstitutionality. The usual roster of actors appears: governments, courts, individuals. What is unusual is that the Constitutional Court itself can review laws *ex officio*. It can do so when the law in question is applicable in pending cases, such as cases of fundamental rights review. Review is not conducted incidentally, ie, within the ongoing proceedings. Rather, the Constitutional Court has to open a separate procedure. This is done with a so-called 'decision of examination' (*Prüfungsbeschluss*). In this decision, the Court states its concerns regarding the constitutionality of the law in question. As this act only initiates the process, these decisions are phrased in hypotheticals; they are not allowed to anticipate the result of the review, which is yet to be undertaken. A change in proceedings is then needed because of the different parties involved. In a regular case of fundamental rights review, the claimant and the administrative court whose decision is impugned are parties to the proceedings. In cases of judicial review, the government is asked to defend the law's constitutionality. The Court may also hear testimony or ask other institutions to give their opinion.

Judicial review thus mostly takes place within intermediate proceedings opened and closed by the Court itself. This is a delicate situation with regard to the separation of powers. On the one hand, the Court should not be forced to apply unconstitutional statutes and should, therefore, have the power to initiate judicial review proceedings if it encounters such statutes. On the other hand, the Court's jurisdiction needs to be

constrained so that it cannot strike down any law at will.[96] The first condition to opening proceedings via the decision of examination is that the law in question must be applicable in the present case, ie, its application must be necessary to solve the case at hand. This requirement is called *Präjudizialität*.[97] It is similar to Article 267 TFEU, which states that a Member State court can ask for a preliminary ruling by the EU Court of Justice 'if it considers that a decision on the question is necessary to enable it to give judgment'.[98] The *Präjudizialität* requirement also applies if the Constitutional Court rules on constitutional questions referred to it by other courts.

The second condition is that the Court's scrutiny may never go beyond the concerns raised in the 'decision of examination'. In other words, the scope of the Court's power to examine the constitutionality of the law in question is restricted to those grounds it has itself raised in its decision. If a law is being tested from the point of view of non-discrimination, for example, it cannot be struck down because of reasons of federalism if these are not addressed in the respective decision of examination. In its ruling, the Constitutional Court is bound by the concerns raised beforehand (*Bedenkenbindung*) and can only declare whether these concerns have proven justified or not.

After judicial review is concluded, the fundamental rights review proceedings (or the other proceedings that gave rise to the constitutional question) resume their course. Depending on whether the impugned law has been found unconstitutional or not, the case is judged with or without applying the statute in question. However, the law is still applicable to everyone else until its annulment is promulgated in the official journal. The Court may, at its discretion, extend the benefit of annulment to other cases.

Today, the protection of fundamental rights against executive action and judicial review of statutes in general are two of the main functions of constitutional courts in Europe.[99] In the European system of constitutional adjudication, they are, as we have shown, based on different historical traditions. Fundamental rights review has primarily been exercised vis-à-vis the executive. Judicial review of laws was introduced later and is directed at the legislature. The combination of these two functions

96 The Venice Commission nowadays recommends adopting the Austrian system – the court should not be forced to apply unconstitutional statutes – but discourages granting the courts the power to open proceedings on their own initiative lest they become political actors; see Venice Commission (n 8) 38.

97 See Alexandra Kunesch, 'The concept of "Präjudizialität" in the Jurisprudence of the Austrian Constitutional Court' (2018) 2 Vienna Law Review 129.

98 See Nils Wahl and Luca Prete, 'The Gatekeepers Of Article 267 TFEU: On Jurisdiction And Admissibility Of References For Preliminary Rulings' (2018) 55 Common Market Law Review 511, 531ff.

99 See also de Visser, *Constitutional Review* (n 37) 142ff.

completes constitutional adjudication.[100] Unlike in systems of decentralized, concrete review, the Austrian Constitutional Court needed a specific procedural instrument to link those two functions together. A similar procedure is found within the constitutional complaint system in Spain (the *recurso de amparo*), where the Constitutional Tribunal must suspend the *amparo* proceedings and rule on the constitutionality of the law in question.[101] The procedural law of other courts merges fundamental rights review and judicial review of laws into a single proceeding, as in the case of the constitutional complaint (*Verfassungsbeschwerde*) at the German Federal Constitutional Court, in the course of which the Court can review lower-court decisions and nullify the underlying law at the same time.[102] Abstract review proceedings, though at the origin of the Austrian and the European model of constitutional adjudication, do not realize this institution's full potential. The future of judicial is the individual constitutional complaint.[103]

4 Conclusion

The Constitutional Court is old, the idea of judicial review is older still. Its origins lie in the United States, achieving its institutional completion, however, must be claimed for Austria. In this chapter, we started from the assumption that the design of constitutional courts shows a specific concern for independence from political actors and for pluralism on the bench. Constitutional courts share one of these with ordinary courts: judicial independence is the primary feature of every system of justice worthy of its name. Judges must be free from political interventions. Their decisions, as well as their tenure in office, should not depend on the government's goodwill. Still, the independence of constitutional courts goes even further. The earliest institutions of constitutional justice – including the Austrian Imperial Court –

100 This is why some courts, especially in Latin America, have arrogated themselves the power of fundamental rights review: See Allan R Brewer-Carías, 'Constitutional Courts as Positive Legislators in Comparative Law' in Allan R Brewer-Carías (ed), *Constitutional Courts as Positive Legislators. A Comparative Study* (CUP 2011) 5, 174ff.

101 See Juan Luis Requejo Pagés, 'The Spanish Constitutional Tribunal', in Armin von Bogdandy, Peter M Huber, and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, vol III: Constitutional Adjudication: Institutions* (OUP 2020) 719, 745ff.

102 See Anuscheh Farahat, 'The German Federal Constitutional Court', in Armin von Bogdandy, Peter M Huber, and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, vol III: Constitutional Adjudication: Institutions* (OUP 2020) 279, 318ff.

103 See Rainer Grote, 'Die wichtigsten verfassungsgerichtlichen Verfahren im europäischen Rechtsraum', in Armin von Bogdandy, Christoph Grabenwarter, and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum, vol VII: Verfassungsgerichtsbarkeit in Europa: Vergleich und Perspektiven* (CF Müller 2020) 167, 207ff.

confirm that independence was to be guaranteed against the traditional judiciary as well. The Constitutional Court was built with this example in mind, which is why its judges are selected politically. This is where the unique concern for pluralism, which lies at the heart of today's constitutional court appointment mechanisms in Europe, comes in. Independence alone does not suffice. In sharp contrast to common expectations about courts of law, constitutional courts are, for the most part, not filled with professional judges. This, too, is rooted in the Austrian example. From the very beginning, the Imperial Court members were taken from among professors of law, attorneys, and civil servants, many of whom were also active in politics. While this practice goes against modern notions of incompatibility of offices and the avoidance of conflicts of interests, it shows that constitutional justice has always been considered something special. This is why constitutional court judges are picked, now as they were then, in ways to ensure pluralism, diversity, and the representation of different (legal) backgrounds and viewpoints.

Naturally, this concern shows itself in specific organizational arrangements. The fact that most constitutional courts consist of a single panel, the plenary assembly, finds its justification in the judges' appointment process, which is also the reason for the often large size of constitutional courts. As history shows, the plenary is the best way to make sure that the pluralism in appointments translates itself into diversity-based decision-making. Obviously, this complex way of handling cases requires the necessary personnel, which is why constitutional courts generally have more judges than ordinary apex courts. The history of the Austrian Constitutional Court demonstrates all of this, which we argue represents a common European standard. Some characteristics reveal themselves to be Austrian idiosyncrasies: the Court is not permanently in session and the judges only work there part-time. As we have discussed, this finds its reason in pluralism yet again. The Court has been built around the lives of its judges in order to be able to attract candidates who otherwise would not consider (or would not be eligible for) a constitutional court judgeship. To our knowledge, this system has not been emulated elsewhere. It is to be expected that the oldest constitutional court features some older institutional mechanisms that do not serve as models anymore.

Constitutional justice is complete when the protection of fundamental rights is combined with the judicial review of legislation. While the origins of judicial review lie in federalist concerns, its future lies in safeguarding fundamental rights. At first, these were only guaranteed against the executive. Nowadays, human rights issues are at the core of constitutional courts' duties. They are vigorously defended against the legislature, which sees its statutes voided by activist constitutional courts. The respective procedures for fundamental rights review and judicial review need to be linked. Thus, the Austrian Constitutional Court is empowered to open judicial review proceedings ex officio should it encounter a potentially unconstitutional statute in a

pending case. More recently established courts have adopted this model, as in Spain, or have merged the two procedures into one, as in Germany.

Constitutional Courts have never been more powerful. In the course of their 100-year history, they have grown in number and have accrued powers and legitimacy. No democracy is complete without constitutional justice – or so it seems. It is to be expected that the constitution and those who are entrusted to protect it meet the opposition of the powerful. What is to be condemned, and to be resisted, are the many moves and ploys to bring constitutional courts under control. The Austrian Constitutional Court has had its own episode of court-packing. And things turned bad before they ended up well. The architecture of constitutional courts is fragile, as this paper has shown. Small organizational and procedural details can have a significance only seen at second glance. Thus, let us always look twice when people tamper with them.