Gerhart Holzinger

vfgh
Verfassungsgerichtshof
Österreich

Constitutional Jurisdiction in a Democracy Governed by the Rule of Law

Constitution Day, 2 October 2017

I. Introduction

In his book "The End of History" which was published in 1992 and attracted world-wide attention at the time, *Francis Fukuyama* submits the proposition that liberal democracy has prevailed over all other systems of government, be it the monarchy, fascism, communism or any other ideology. Deficits which may still exist, were due to lacking implementation, but not to the principle itself. History, he argues, has reached its end, as there cannot be any further progress in the development of fundamental principles, since all the truly big questions have been solved for good.

For all the scepticism, even rejection, with which this proposition has always met, it seemed at the time (the early 1990s) from a European perspective that, after the collapse of the communist regimes in Central and Eastern Europe, the fall of the Iron Curtain and of the Berlin Wall, and Eastern enlargement of the European Union a

decade later, the way had been paved for our western model of liberal democracy.

Today – almost three decades after this political transformation in Europe – we see that history, by all appearances, does not evolve in such a linear manner. Times have become more difficult, problems more numerous and pressing: The banking and economic crisis, the crisis of the Euro, migration and flight to Europe, terrorist threats, fiercening economic competition on a global scale, as well as fast-paced technological change are the headings that characterise the situation. The beautiful new world of electronics has altered entire industries and professions at breath-taking speed, creating opportunities that were reserved to science fiction until only recently. Opportunities and risks unfold. What has been designed for our leisure can also be used for our surveillance. Both the individual states as well as the European Union find it difficult to cope with the resultant problems. More and more people, even in affluent countries, feel they are “losing out” in social development. More and more people become susceptible to slogans which promise simple solutions to complex problems. On top of all that, internet and social media have dramatically changed the way we are used to communicate and hence the requirements of democratic discourse.

What does this imply for each and every one of us and for society as a whole? Has our social model, the western model of liberal

democracy, reached a turning point? A point where, suddenly, we could find ourselves in a stagnant or even downward, but no longer upward development? Here and there it appears as if the clocks of social development have been turned back, instead of setting the pace for further progress.

To me, the answer is at hand: All experience from history, especially for us in Europe, suggests that our model of a liberal democracy, i.e. one that is based on the rule of law, is the only one which can ensure freedom, peace and prosperity for the long term!

The nature and qualities of this model have been frequently described. Two elements are of relevance: on the one hand, a democratically created legal order, and on the other, a liberal element or the rule of law, the existence of fundamental rights and freedoms and of a system of effective legal safeguards in the form of independent courts which ensure compliance with the legal order, both in the interaction between the state and its citizens, as well as between the citizens themselves.

In the following, I will always refer to a democratic state governed by the rule of law, in other words that state order which combines the liberal/rule of law element and the democratic element. I will focus in particular on constitutional jurisdiction, to which, naturally, I feel attached. As will be shown, constitutional jurisdiction is essential

when it comes to ensuring the existence of a such-constructed democratic state that is governed by the rule of law. I will then address the practical test which our constitutional sate is currently facing in view of the challenges described.

II. The Constitution and constitutional jurisdiction

The modern democratic state rests on the underlying idea of the primacy of the Constitution.

This means that every state activity must be based on and in conformity with the Constitution, in other words, it must not violate or be in contradiction with the Constitution. From this angle, the Constitution is not just a political programme, but a set of mandatory rules which all state bodies are held to comply with – including the legislative and executive branches as well as government administration. Nobody is excluded, nobody stands above the Constitution.

This binding character of the Constitution should, however, not just be put to paper, but take practical effect in the activities of the state. To reach that purpose, we need institutions which actually guarantee adherence to the Constitution, in other words institutions which, above all, ensure that all legislation is in keeping with the

Constitution. In Austria, the most eminent of these institutions is the Constitutional Court, the (supreme) “guardian of the Constitution”.

Austria has a long-standing tradition of constitutional jurisdiction which goes back to the monarchy, i.e. the December Constitution of 1867, or almost 150 years. The Imperial Court of Justice (*Reichsgericht*) which was then set up was tasked, in particular, with ruling on complaints brought for an infringement of political rights assured by the Constitution.[1] For the first time in European history,[2] the protection (of a part) of the Constitution, i.e. the fundamental rights of the individual, was entrusted to a court specifically established for that purpose.

By creating the Constitutional Court, the Republican Federal Constitution of 1 October 1920 continued this course, assigning to it the task of reviewing laws as to their constitutionality.[3] Ever since, this power has in fact been considered a core function of every constitutional jurisdiction.[4]

It was *Hans Kelsen*, author of those provisions in the Federal Constitution which govern the Constitutional Court, who essentially developed the notion of constitutional jurisdiction, i.e. a review of

[1] Article 3 lit. b Basic Law of 21 December 1867 on the establishment of the Imperial Court of Justice, *Reichsgesetzblatt* No. 143.
[2] Stourzh, "Verfassungsgerichtsbarkeit und Grundrechtsdemokratie – die historischen Wurzeln", in Verfassungsgerichtshof der Republik Österreich (ed.), *70 Jahre Bundesverfassung* 17, at 30 (1991).
[3] Article 140 Federal Constitutional Act (*Bundes-Verfassungsgesetz – B-VG*).
[4] Cf. Böckenförde, "Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation", in *Neue Juristische Wochenschrift* 9, at 15 (1999).

compliance with the Constitution by a separate specialised court. It was based on the following general idea:

Constitutional disputes, i.e. disputes on the interpretation and application of the Constitution, are not only political but also legal conflicts. As such, they can be decided by a court – applying the instruments of law – and not just by political means.

The possibility of bringing political differences on constitutional issues before a body of judges gave rise to legal certainty that was ensured like in no other state in the world.

With the exception of the Principality of Liechtenstein[5] and what was then Czechoslovakia[6], the Austrian model of constitutional jurisdiction attracted little attention when it was created. In part, mainly in the German *Reich* of the Weimar Republic, it even met with staunch rejection.

Decades later, after the end of World War II and the painful experience of dictatorship and state-created injustice, this Austrian model of constitutional jurisdiction unfolded remarkable international appeal. Italy and – tellingly – Germany were the first to set up constitutional courts based on the Austrian model in 1947 and

[5] Cf. Articles 104 f. Constitution of the Principality of Liechtenstein of 5 October 1921.
[6] Cf. Act of 9 March 1920 on the Constitutional Court.

1949 respectively.[7] Others such as France,[8] Turkey,[9] Yugoslavia,[10] Spain,[11] Poland,[12] and Portugal[13] followed suit.

The notion of constitutional jurisdiction ultimately was a sweeping success in the late 1980s in the course of the aforementioned political transformations in Central and Eastern Europe. Constitutional courts were established in virtually all countries affected by this political development.

The same holds – beyond Europe– for a number of Latin American, Asian and African countries. The World Conference of Constitutional Justice which was founded some years ago today has 112 members.

Constitutional jurisdiction can therefore be rightly called an Austrian cultural achievement of world standing – a remarkable accomplishment which is intimately related to the person of *Hans Kelsen* and deserves being recalled time and again.

In addition to judicial review, most importantly the review of laws adopted by Parliament as to their constitutionality, the Constitutional Court has a number of other functions which are crucial for ensuring the lawfulness of state activity: these include the protection of the

[7] Cf. Articles 134 ff. Constitution of the Republic of Italy of 27 December 1947 and Article 93 f. Basic Law of the Republic of Germany of 23 May 1949, respectively.
[8] Cf. Articles 56 ff. Constitution of the Republic of France of 4 October 1958.
[9] Cf. Articles 145 ff. Constitution of the Republic of Turkey of 27 May 1961.
[10] Cf. Articles 241 ff. Constitution of the Republic of Yugoslavia of 7 April 1963.
[11] Cf. Articles 159 ff. Constitution of the Kingdom of Spain of 29 December 1978.
[12] Cf Article 33a Constitution of the Republic of Poland of 22 July 1952 as amended on 26 March 1982.
[13] Cf. Articles 277 ff. Constitution of the Republic of Portugal of 2 April 1976 as amended on 30 October 1982.

fundamental rights of the individual vis-à-vis government administration, ensuring the lawfulness of elections, ruling on conflicts of jurisdiction and disputes between state bodies (for instance in connection with parliamentary committees of enquiry), as well as jurisdiction over certain office holders of the state for culpable violation of the law in the exercise of their office (impeachment). These functions, which today are part and parcel of every constitutional jurisdiction around the world, were all provided for in the Federal Constitutional Act of 1 October 1920 and considerably extended later on.

The Austrian Constitutional Court is the oldest institutionally independent constitutional court in the world specialising on constitutional issues and as such a role model for all constitutional courts that were set up later. However, the international dissemination of the idea of constitutional jurisdiction clearly shows that the powers of the Austrian Constitutional Court are limited by comparison. Specifically, the Austrian Federal Constitution, to this very day, does not provide for a "constitutional complaint" against decisions rendered by ordinary courts of law. This has not changed by the introduction of an individual (party) petition for judicial review[14] in 2015.

[14] Article 139 para. 1 no. 4 and Article 140 para. 1 no. 1 lit. d B-VG.

From a legal policy perspective, this status quo is quite deplorable.[15] Leaving aside the fact that a general constitutional complaint against decisions by ordinary courts of law would only be logical if one considers the hierarchical structure of the legal system, it would also allow for a uniform interpretation of the Constitution, including the fundamental rights, one that is detached from the specificities of individual fields of law, or branches of courts. The resultant elimination of duplication would moreover simplify the system of legal protection by a large degree. Whenever I try to explain it to colleagues from international constitutional courts, I realise how complex our system of legal protection actually is. And when invariably asked “Why is that so?“, I can only answer “because it has always been that way“.

III. The ECHR as a catalyst of constitutional jurisdiction

The most important function of the Constitutional Court under the rule of law is to protect the fundamental rights, i.e. ensuring their effectiveness as a barrier to state action. It exercises this function both in the course of judicial review, as well as through its special role in administrative jurisdiction, i.e. when ruling on complaints against decision from administrative tribunals. However, this task is

[15] Cf. Kopp/Pressinger, "Entlastung des VfGH und Abgrenzung der Kompetenzen von VfGH und VwGH", in *Juristische Blätter* 617, at 620, 623 f. (1978); Stelzer, "Stand und Perspektiven des Grundrechtsschutzes", in Österreichische Parlamentarische Gesellschaft (ed.), *75 Jahre Bundesverfassung* 583, at 611 (1995); for further references, see Frank, *Gesetzesbeschwerde. Der Parteiantrag auf Gesetzesprüfung im System der österreichischen Verfassungsgerichtsbarkeit* 190 f. (2015).

more and more influenced by the Europeanisation of the protection of fundamental rights, the beginnings of which date back to the post-World War II era.

By that I mean above all the European Convention on Human Rights of 4 November 1950. Austria has been a party to this Convention since 1958 and has acceded to most of its protocols.[16] Apart from its application as a multilateral state treaty, the ECHR has the rank of a (federal) constitutional law.[17] The rights and freedoms guaranteed by the ECHR can therefore be asserted also before the Constitutional Court; specifically, they are a standard for the constitutionality of laws.

If a certain human rights issue has already been dealt with by the European Court of Human Rights, its considerations are mostly adopted by the Constitutional Court[18] – even if that means that the Constitutional Court has to revisit or change its own settled case-law.[19]

It is also worth mentioning that the case-law of the European Court of Human Rights has shaped the human rights jurisprudence of the

[16] Only Protocols No. 12, 15 and 16 have not yet ratified by Austria.
[17] Article II no. 7 amendment to the Constitution BGBl. 59/1964.
[18] In a judgment of 1987, Official Collection No. 11.500, the Constitutional Court held that, in principle, it considers itself obliged to interpret the ECHR in the same way as the European Court of Human Rights.
[19] See, in particular, the judgments of 1995, Official Collection No. 14.258 (monopoly on broadcasting), of 1998, Official Collection No. 15.129 (right to emergency unemployment allowance), of 2005, Official Collection No. 17.659 (entitlement to co-insurance), of 2007, Official Collection Nos. 18.223 and 18.224 (expulsion of aliens), of 2010, Official Collection No. 19.166 (legal recognition of churches and religious societies), of 2012, Official Collection No. 19.704 (right to citizenship).

Constitutional Court not only in individual cases, but also in terms of human rights doctrine.[20] In particular, the Constitutional Court has accepted that the rights and freedoms set out in the Convention are subject to an elaborate proportionality scheme: Specifically, to be in conformity with the Convention, any interference by public authorities must be prescribed by law, have an aim or aims that is or are legitimate under the relevant provision of the Convention and are "necessary in a democratic society" for the aforesaid aim or aims. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient".[21]

The supranational human rights protection regime that was set up by the ECHR is globally unique in its current form. It rejects the principle of considering human rights violations as a domestic matter and is a milestone of European integration. It is encouraging to note that 47 out of 49 European countries have meanwhile joined this regime (with the exception of the Vatican and Belarus), including all states of the former Eastern bloc.

[20] Cf. Grabenwarter, "Der österreichische Verfassungsgerichtshof", in von Bogdandy/Grabenwarter/Huber (eds.), *Handbuch Ius Publicum Europaeum VI: Verfassungsgerichtsbarkeit in Europa: Institutionen* 413, at 460 ff. (2016); Korinek, "Von der Aktualität der Gewaltenteilungslehre", in *Journal für Rechtspolitik* 151, at 161 f. (1995).

[21] Cf. Constitutional Court, judgment of 12 December 2016, no. G 258/2016.

The ECHR integrates the national courts and the European Court of Human Rights (ECtHR) in a network of courts in which constitutional courts have specific functions to fulfil;[22] above all that of transposing European case law at the domestic level, but also ensuring its further development through a dialogue of jurisprudence in concert with the ECTHR. This is in keeping with the principle of subsidiarity of European human rights protection, according to which it is primarily the task of the contracting states and their jurisdictions to ensure respect of the rights and freedoms enshrined in this Convention and its protocols.[23]

Ever since the Lisbon Treaty, the European Union as well has been devoting heightened attention to the protection of human rights and fundamental freedoms. The fundamental rights – derived up to them by CJEU case law from the constitutional traditions common to the Member States – were codified in the Charter of Fundamental Rights (CFR) of the European Union and, together with the Lisbon Treaty, endorsed in December 2007 as a mandatory source of law in the rank of the Treaty on European Union. In a landmark judgment of 14 March 2012,[24] the Constitutional Court ruled that the rights guaranteed by the CFREU (within the scope of application of the CFR) can be asserted before the Constitutional Court as constitutionally

[22] Von Bogdandy/Grabenwarter/Huber, "Verfassungsgerichtsbarkeit im europäischen Rechtsraum", in von Bogdandy/Grabenwarter/Huber (eds.), *Handbuch Ius Publicum Europaeum VI: Verfassungsgerichtsbarkeit in Europa: Institutionen* 1, at 8 ff. (2016), with further references.
[23] Cf. Article 1 ECHR. This principle is now expressly referred to in Protocol No. 15.
[24] Official Collection No. 19.632.

guaranteed rights and are a standard of review in general judicial review proceedings. Unique in Europe, this formal incorporation into national constitutional law, praised by the former Vice-President of the European Commission *Viviane Reding* as the "Austrian model of charter incorporation"[25] exemplifies, on the one hand, the traditionally pro-European attitude of the Austrian Constitutional Court, and on the other, is instrumental for the creation of a uniform area of justice.

IV. The organisational set-up of the Constitutional Court

As regards its tasks, the Constitutional Court is an institution which operates at the “interface“ between law and politics: On the one hand, it is organised as an independent and nonpartisan court which rules on points of law only; its decisions are based on nothing but the law, in particular on the Constitution. On the other, its decisions are sometimes of eminent political relevance. They affect public life much more directly and lastingly than decisions handed down by other courts.

This holds in particular for the power to review the constitutionality of laws, i.e. acts passed by the democratically legitimised legislator. In this respect the Constitutional Court is latently at variance with the government and/or parliament as the lawmaker, or with the political

[25] Reding, "Observations on the EU Charter of Fundamental Rights and the Future of the European Union", XXV Congress of FIDE, www.fide2012.eu, speech/12/403.

parties which form the parliamentary majority of the day. When reviewing laws as to their constitutionality, the Constitutional Court must therefore, on the one hand, respect the legislator‘s freedom of designing its own policies. It is not for the Constitutional Court to enforce a more appropriate or meaningful solution to issues which are a matter of policy judgement. On the other hand, the Constitutional Court must ensure compliance with the Constitution. Whenever, thus, a legal provision is found to be in contradiction with the Constitution, the Constitutional Court must repeal it as being unconstitutional, even if that may be inexpedient from a political perspective. Especially when the assessment of laws as to their conformity with fundamental rights is concerned, the review of the constitutionality of laws often raises issues of value judgements, such as when compliance with the principle of equality is called into question which the Constitutional Court, traditionally, has interpreted extensively, and that for reasons of legal protection. The Constitutional Court must necessarily address these issues and not avoid them. This notwithstanding, its work consists in administering justice which must live up to specific demands as to the rationality of legal reasoning, in particular.

It is important to note that the Constitutional Court is tasked with guaranteeing the Constitution, which in turn is an expression of popular sovereignty. It would therefore be wrong to postulate a contradiction with the democratic principle in the Constitutional

Court's tasks of judicial review, which – as mentioned – is one of the main characteristics of the rule of law. On the contrary, judicial review actually serves to implement the democratic principle in that it upholds the Constitution, which rests not only on a special democratic consensus, but becomes a standard for ordinary legislation thanks to the status it was given by Parliament.[26]

The relevance of the Constitutional Court for the protection of minorities should be seen in the context of the rule-of-law principle as well as the democratic principle. This function manifests itself on the one hand in constitutional jurisprudence on those fundamental rights clauses which protect social minorities and which have been interpreted by the Constitutional Court in the context of the legal status of ethnic minorities as a "value judgement by the lawmaker in favour of the protection of minorities".[27]

On the other hand, under the democratic aspect, the Constitutional Court also ensures the protection of the political minority. One graphic example is what is called an "individual members motion" ("*Drittelantrag"*) for judicial review which allows a qualified parliamentary minority to initiate judicial review of the constitutionality of a law adopted by the majority.[28]

---

[26] Cf. Korinek, "Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen", in *Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer* 7, at 45 f. (1981).
[27] Official Collection No. 9224/1981.
[28] Article 140 para. 1 nos. 2 and 3 B-VG.

Functionally, the Constitutional Court's tasks can ultimately also be attributed to the federal principle. This holds in particular for some areas of its competence jurisdiction, especially for the review of laws. From the federalist angle, it is not only the preservation of the federal allocation of powers which is concerned, but also interests of the provinces (*Länder*) which go beyond that.

Given the – resultant – exposed position of the Constitutional Court vis-à-vis the government and Parliament, within the framework of judicial review, as guardian of the fundamental rights of the individual and of social minorities, or as a neutral instance in the federal context, it is essential that the members of the Constitutional Court are politically independent.

The Federal Constitution takes account of this necessity by regulating the status of the members of the Constitutional Court in great detail. Most importantly, it stipulates that the members of the Constitutional Court, upon appointment, obtain the judicial guarantees of independence and irremovability.[29] They cannot be removed until the end of that year in which they have reached 70 years of age.[30] Earlier removal – for defined reasons that are set out in the Constitutional Court Act[31] or in the wake of a criminal conviction[32] – is the sole prerogative of the Constitutional Court

[29] Article 147 para. 6 in conjunction with Article 87 para. 1 and 2 and Article 88 para. 1 B-VG.
[30] Article 147 para. 6 B-VG.
[31] § 10 para. 1 Constitutional Court Act of 1953 *(Verfassungsgerichtshofgesetz 1953 – VfGG)*.
[32] § 27 Penal Code *(Strafgesetzbuch – StGB)*.

itself. In concert with the strict provisions on incompatibility,[33] it is this age-limit based appointment which ensures the independence of the members of the Constitutional Court in a most effective manner. It provides maximum guarantee of the "inner freedom" of a member of the Constitutional Court from extraneous influences.

This does not conflict with the fact that the mode of appointment for members of the Constitutional Court, which is laid down in constitutional law, grants significant influence to the supreme bodies of the state, i.e. the Federal President who is responsible for appointment, as well as the Federal Government, the National Council and the Federal Council which have a right of nomination.[34] On the contrary, the mode of appointment reflects the singular position of the Constitutional Court in the constitutional set-up and ensures the democratic legitimation of the work of its members. Besides, the appointment of members is governed similarly at all constitutional courts in the world.[35]

The members of the Constitutional Court are to be recruited from the major law professions, on the one hand that is – as stipulated in the Federal Constitution[36] – judges of ordinary courts of law or administrative tribunals, university professors of law at an Austrian university, civil servants in government administration with legal

[33] Article 147 para. 4 and 5 B-VG.
[34] Article 147 para. 2 B-VG.
[35] Constitutional Court, *Report on the activities of the Constitutional Court in 2001* 3 (2002).
[36] Article 147 para. 2 B-VG.

expertise and on the other hand lawyers or notaries. Its heterogeneous composition with members from all legal professions sets the Constitutional Court apart from all other courts, which are mostly composed of professional judges. In practice, this specific composition has proven immensely successful. It ensures that decisions handed down by the Constitutional Court, which often are fundamental for the entire legal system, reflect the knowhow and experience of the major law professions and is one of the most original, but also most valuable elements of constitutional jurisdiction in Austria.[37]

In addition to top-level qualifications as legal experts, the members of the Constitutional Court, already when being appointed to the Court, have many years of experience in the field of law, regularly exceeding the formal requirement of 10 years of professional experience[38] by far. Most importantly, the members of the Constitutional Court are highly aware of the responsibility assigned to them, a responsibility which presupposes a very specific ethical attitude motivated by a quest for the highest legal quality of the decisions rendered, passionate commitment to enforcing the Constitution, absolute detachment from all party-political, social or personal interests, and an uncompromising willingness to decide without bias.

[37] Cf. Adamovich (sen.), "Probleme der Verfassungsgerichtsbarkeit" in *Juristische Blätter* 73, at 77 (1950).
[38] Cf. Article 147 para. 3 B-VG.

In order to ensure quality, in particular consistent case law, all fourteen members of the Constitutional Court form one judicial body which can decide on every case as a plenary.[39] There is no division into panels or chambers. For reasons of procedural economy, the Constitutional Court may rule on cases in a diminished quorum consisting of still as many as six members.[40] Cases in which the relevant question of law has not yet been sufficiently clarified by the Constitutional Court's case law to date are at any rate reserved to the plenary.[41] In this respect, the Austrian Constitutional Court is different, not only from all other Austrian courts, but also from most foreign counterparts.

The Constitutional Court also meets the key postulate under the rule of law of rendering decisions within a reasonable period of time.[42] With an average length of proceedings of currently five months,[43] the Austrian Constitutional Court can stand up to any national and international comparison.

Moreover, the law explicitly states that the deliberations and voting at the Constitutional Court are secret and remain secret;[44] in

[39] Official Collection No. 16.650/2002.
[40] § 7 para. 2 no. 1 VfGG.
[41] § 7 para. 1 in conjunction with para. 2 no. 1 VfGG.
[42] Article 6 para. 1 ECHR, Article 47 para. 2 CFREU.
[43] Consitutional Court, *Report on the the activities of the Constitutional Court in 2016* 175 (2017).
[44] § 30 para. 1 VfGG.

particular, it is not disclosed to the public how the individual members voted in a given case.

Yet, time and again, we hear voices asking for the opinions of the individual members in decisions rendered by the Constitutional Court to be made public, in a call for greater "transparency at the Constitutional Court".[45]

Based on my experience of over two decades at the Constitutional Court, let me point out the following:

Making the opinion of individual members in decisions of the Constitutional Court public would seriously undermine the practice of collegial decision-making, which is a proven practice for decades, as well as the authority of the Constitutional Court's decisions in the public eye.

The Constitutional Court is, after all, more than the sum total of its individual members. Its task is to decide on legal issues brought before it. Only in this manner can it live up to its function of creating order and peace, which ultimately justifies its establishment and continued existence. And it is only the will of the collegiate body which is relevant for this decision, regardless of whether it was formed by majority or unanimity, not the opinion of any individual

[45] See, in particular, the stenographic report on the parliamentary inquiry of 16 October 1998 on the issue of disclosing separate opinions at the Constitutional Court, III-151 BlgNR XX. GP, the parliamentary debate on this record, StenProt NR XX. GP 146. Sitzung 80, as well as Austria Convention, *Final report* 211 (2005).

member. This is where the task of the Constitutional Court differs fundamentally from that of legal sciences which are to analytically and critically reflect on the development of law, also through judicial practice, and to express the legal doctrine such formed in lectures, publications and legal expertise, as appropriate.

The transparency of court decisions inherently unfolds through the specific means of judicial procedural law:

First, by a comprehensive deliberation of the case involving all those affected, i.e. the parties to the proceedings, in a public oral hearing, as the case may be, by heeding the parties' right to be heard which is a "cardinal requirement of due process" and "one of the major safeguards for the rule-of-law principle".[46] And second, above all, by careful reasoning which duly considers all arguments submitted in the decision that is issued in writing. In my view, the Constitutional Court's extensive *ratio decidendi*, in which every argument submitted by the parties that is relevant for the decision is discussed, creates a degree of transparency which need not shun comparison with the decisions of other supreme bodies!

Ladies and gentlemen!

Naturally, and all the more so in a constitutional democracy, discussion and even criticism about court judgments, , is legitimate

[46] Official Collection No. 1804/1949.

and indeed called for. What is no longer legitimate and a danger to the rule of law is when the limits of objectivity are transgressed and criticism turns into a polemic discourse against the personal and professional integrity of the members of a court.

To be absolutely clear, this is not about the sensitivities of the judges concerned. The problem is a different one: In this manner, journalists, politicians and also representatives of academia convey the impression that courts would be rendering decisions in a partisan or incompetent manner. This undermines people's trust in the rule of law and must be vehemently opposed to.

V. Constitutional jurisdiction and democracy

As discussed earlier, the notion of constitutional jurisdiction developed by *Hans Kelsen* is largely based on the idea that constitutional disputes, i.e. differences of opinion on the interpretation and application of the Constitution, generate not only political but also legal conflicts and as such can be dealt with through legal and court procedures, and not just politically.

The Constitutional Court, by ensuring the legality of state activity and, specifically, by protecting the fundamental rights of the individual and of social and political minorities vis-à-vis the state and its machinery of power, therefore is instrumental to political stability

and social peace in a country, beyond its eminent function under the rule of law.

As Hans Kelsen has pointed out so convincingly,[47] effective constitutional jurisdiction is almost a "*sine qua non*" for the existence of a democratic republic: democracy in actual fact does not mean unlimited rule (dictatorship) of the majority, but permanent compromise between the political groups represented in Parliament. Constitutional jurisdiction such ensures that essential political decisions which affect the Constitution (e.g. the fundamental rights) can only be made with the involvement of the minority. In this way, it effectively protects the minority from infringements by the majority "whose rule becomes tolerable only in that it is exercised in conformity with the law". Constitutional jurisdiction therefore is not in contradiction with democracy but, on the contrary, a most appropriate means to realize this idea. In this respect, constitutional jurisdiction at the same time stands the test as a "guarantor of political peace".

Therefore, it is certainly no coincidence that many countries set up constitutional courts in a phase of transition from a dictatorial or authoritarian regime to a constitutional democracy, quite obviously with the intention of paving the way for the rule of law and

[47] Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit", in *Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer* 30, at 80 ff. (1929).

democracy, and with the hope of being able to safeguard these achievements for the future.

Likewise, it is not by chance that constitutional courts, in turn, find themselves under pressure where trust in democracy is fading and gives way to an authoritarian attitude which concedes to the majority the power of deciding fundamental issues of public life "single-handedly". Even Austria, the "motherland" of modern institutionalised constitutional jurisdiction, was not spared of this painful experience: As early as in 1933, only a few years after the establishment of the Constitutional Court, the court was "paralysed" by the dominant political forces, so that they could break with the democratic constitutional state and set up an authoritarian corporative state.[48]

Such events ultimately reveal a fundamental dilemma which the German constitutionalist and judge at the Constitutional Court *Ernst-Wolfgang Böckenförde* once aptly described in the following terms as the much-quoted *Böckenförde Dilemma:*

"*The liberal, secularized state lives by prerequisites which it cannot guarantee itself. As a liberal state it can only endure if the freedom it bestows on its citizens takes some regulation from the interior, both*

[48] Cf. Huemer, *Sektionschef Robert Hecht und die Zerstörung der Demokratie in Österreich* 178 ff (1975).

from a moral substance of the individuals and a certain homogeneity of society at large."[49]

What does this mean?

Even the very best constitution, the very best parliament and the very best constitutional court are no guarantee for the continued existence of democracy. What is ultimately important in times of crisis is that the people are firmly resolved to preserve the rule of law and democracy! *Werner Kägi*, a Swiss scholar in constitutional law, once put this idea into words: "The constitutional state is that order in which a politically mature people recognises its own limitation".[50] What is needed in times of crisis is prudence and a sense of responsibility, in politics as well as at the Constitutional Court, but in particular with the *demos,* the people of a country!

VI. The current test for constitutional democracy

Böckenförde's famous dilemma is now over 50 years old and has lost nothing of its topicality! Whether we like it or not: the constitutional state is currently facing a critical test. In some places, even where it appeared to be firmly anchored, it is overtly being called into question. And it is not by chance that constitutional jurisdiction and, above all, the constitutional courts are being aimed at.

[49] Böckenförde, "Die Entstehung des Staates als Vorgang der Säkularisation", in *Festschrift for Ernst Forsthoff* 75, at 93 (1967).
[50] Kägi, "Rechtsstaat und Demokratie (Antinomie und Synthese)", in *Festschrift for Zaccaria Giacometti* 107, at 141 (1953).

The legitimacy of judicial review of state action is overtly called into question by reference to the majority obtained in elections – not anywhere in the world, but indeed also in countries of the West, in particular here in Europe!

Briefly after taking office, the incumbent US President *Donald J. Trump* issued a ban on entering the United States for citizens from seven Muslim states which was annulled by a US federal judge in Seattle. The President reacted on Twitter and rejected the decision by the "so-called judge" as "ridiculous";[51] in two more tweets, he doomed this "terrible" decision as a threat to national security.[52]

In Hungary, the prime minister openly condones "illiberal" democracy – whatever one takes this *contradictio in adjecto* to mean.

In Poland, the majority in place since the last parliamentary elections has largely paralysed the Polish Constitutional Tribunal [53] and, in an apparently targeted move, appointed its own followers to the Tribunal. This development is all the more painful as the Polish Constitutional Tribunal gained an excellent reputation in the family of European constitutional courts in the decades following the political

[51] "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned." (@realDonaldTrump, 4.2.2017, 3:12 PM.) Source: www.washingtonpost.com.

[52] "What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into U.S.?" (@realDonaldTrump, 4.2.2017, 10:44 PM.) "Because the ban was lifted by a judge, many very bad and dangerous people may be pouring into our country. A terrible decision." (@realDonaldTrump, 4.2.2017, 11:44 PM.) Source: www.washingtonpost.com.

[53] Cf. Venice Commission, *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, www.venice.coe.int.

change in Eastern Europe and acted as a remarkable role model for other constitutional courts. Therefore, I am especially pleased that the former President and the former Vice-President of the Polish Constitutional Tribunal, *Andrzej Rzepliński* and *Stanisław Biernat*, have accepted my invitation to attend this solemn ceremony here today. By this invitation, the Austrian Constitutional Court deliberately wanted to send out a signal of fellowship with those colleagues at the Polish Constitutional Tribunal who have done outstanding work in the past years and decades as constitutional judges, also in an act of solidarity to underline that preoccupation about a well-functioning constitutional jurisdiction cannot be limited to any one state, but must be a pan-European concern.

Constitutional jurisdiction is witnessing its most dramatic development in Turkey – after all a NATO member and still a candidate for accession to the European Union, where two constitutional judges were arrested after the attempted coup in July 2016 alongside 10,000 other civil servants. Similar to Poland, the development in Turkey is most deplorable as the Turkish Constitutional Court, until very recently, handed down courageous decisions upholding fundamental rights and the rule of law without being intimidated by threats from the government which, to some extent, had been quite substantive already in the past.

In the United Kingdom – the motherland of parliamentary democracy – a yellow press newspaper defamed the members of the High Court of England and Wales as “enemies of the people” [54] for their decision that Brexit could not be declared by the government alone, but required the consent of Parliament; a term which, incidentally, was used in the darkest periods of Stalinist terror for followers who had fallen from grace, dissenters and members of the opposition. Oddly enough, we have not seen any government support forthcoming for the High Court of England and Wales in the face of these attacks.

What is more, European law and the decisions of European Courts are not readily accepted everywhere:

A most recent example is a statement by the British prime minister *Theresa May* who suggested that fundamental rights should be "amended" if they obstruct the fight against terrorism.[55] What she means is not difficult to gather. Besides, there have been repeated instances of serious reservations being held against decisions by the European Court of Human Rights – remarkably – in Switzerland and again in Great Britain and – not entirely surprising – in the Russian Federation.

This sombre picture is completed by the open rejection directed against a recent decision by the Court of Justice of the European

[54] Daily Mail, 4 November 2016.
[55] "And if human rights laws get in the way of doing these things, we will change those laws to make sure we can do them." (Speech of 6 June 2017 in Slough.) Source: www.telegraph.co.uk.

Union[56] endorsing the EU Council's resettlement programme for refugees.[57] In the last analysis, this calls into question the European Union as a common area of justice and thus one of the foremost achievements of European integration.

And what about Austria? Luckily, we have been largely spared of such developments to date. But here as well, appearances may be deceptive. Time and again, one cannot help but gaining the impression that commitment to the rule of law and democracy is a popular theme for Sunday-best speeches, but forgotten quickly once Monday has come. In Austria as well, the rule of law and democracy tend to be pitted against one another. The words of a former *Landeshauptmann*, who claimed that the Constitutional Court should be downsized to a level that is tolerable for democracy, are still fresh in our memory. The conspicuous loss of control of the state during the refugee and migration crisis of 2015 has shattered people's faith in the functioning of the state. Legislative actionism, which, as if by reflex, reacts to newly emerging problems by calling for "stricter" laws without verifying whether the rules in place would be sufficient if only applied consistently, goes in the same direction. This holds in particular for those areas where the balance between freedom and security, precarious as it is, is at risk of being tilted, because a

[56] Court of Justice of the European Union, judgment of 6 September 2017, nos. C-643/15, C-647/15, Slovak Republic of Slovakia and Hungary/Council of the European Union.
[57] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2015 L 248, p. 80.

multitude of surveillance rules threaten to excessively limit the freedom of the individual which is a guaranteed fundamental right.

All in all: Although we can take pride in having a comparably well-established constitutional state in Austria, we still need to remain alert.

Democracy and the rule of law are the most precious assets we share, alongside economic prosperity and social peace. It has taken great effort to develop them to the level we have achieved today. If we look back 70 years in time, they were the answer to war, dictatorship, incitement and genocide. As said in the beginning, the democratic state that is governed by the rule of law in a united Europe, which has overcome the conflicts that were waged for centuries by bloodshed, is the best model to organize our community. I do not believe that history has come to an end, rather I am convinced that, day by day, we must continue striving to preserve what we have achieved. In a democracy, this can only be achieved if each and every one of us makes their contribution, the political decision-makers as well as the electorate. In just a few days, the latter will again be called upon to make use of their right of vote and, after careful consideration, vote for those who, according to their personal conviction, are most likely to guarantee the rule of law, democracy, economic prosperity and social peace in Austria.