13

A Constitution without Qualities?

Three Narratives about Austrian Constitutional Law

Ulrich Wagrandl

13.1 INTRODUCTION

Every constitution is accompanied by imaginaries: ideas about how and why it emerged and what it is for.[1] Constitutional imaginaries are supported by narratives: stories that help to make sense of the text and the reality of a given constitutional order. Some of these stories are part of a country's national identity, as the American Founding Fathers' drafting of the Constitution in Philadelphia, or the French Revolutionaries' Declaration of the Rights of Man and of the Citizen. Other such narratives are confined to the ranks of constitutional lawyers. But they, too, need a set of background stories to guide their work.

This chapter seeks to explore and to contextualise three of these background stories of Austrian constitutional law. Those basic narratives are:

1. The Austrian constitution is in ruins.
2. The Austrian constitution is value-neutral and formalist.
3. The Austrian constitution is a role model for European integration and it gave the world judicial review.

These three narratives are deliberately arranged in reverse chronological order. The 'ruins' metaphor has its origin in the flood of legislation after 1945. It was coined to denote the poor state of constitutional law after a myriad of amendments allegedly made its text an incomprehensible mess. The narrative of value neutrality and formalism can be traced back to Austria's constitutional founding in 1920. Buttressed by Hans Kelsen's pure theory of law and his procedural theory of democracy, it is supposed to capture the constitution's essence as being a historical compromise between hostile political forces, which is, because of that, devoid of any

[1] See Jan Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies and the Other', in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press, 2023), 2; Martin Loughlin, 'The Constitutional Imagination' (2015) 78 *Modern Law Review* 1.

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substantial values. Both these narratives have made it hard to promote something like constitutional patriotism or at least surround the constitution with an aura of respect. The third narrative, however, compensates for this, as it showcases the achievements of the rule of law, constitutional adjudication and a unique openness towards European integration, which have their roots in 1867 and the Austro-Hungarian monarchy. The years of 1867, 1920 and 1945 mark the three defining constitutional moments in recent Austrian history. Each symbolises a moment of defeat that was only later reinterpreted as a new beginning. Like all such narratives, each contains some truth but glosses over the details.

Each one of the Austrian constitutional stories seems to be in flux. The 'ruins' narrative has recently been challenged by Austria's president, who admiringly spoke of the constitution's 'elegance and beauty'. The neutrality narrative begins to crumble as human rights and value-laden constitutional amendments demand a more purposive interpretive approach. The 'model for Europe' narrative is the youngest and is more and more promoted. Its future looks bright. Taken together, these three narratives about Austrian constitutional law provide insight into the ways that Austrian lawyers think. But they also have something to offer for the project of European integration; they can act as a warning or present a path worth emulating. They may have their basis in various constitutional provisions but, more than anything, they are *stories*.[2] Stories are important. No constitutional project has ever been successful without one.

13.2 NARRATIVE 1: RUINS AND BEAUTY

13.2.1 *Constitutional Aesthetics*

Studying law in Austria, one sooner or later comes across a famous quote by former Minister of Justice and professor of constitutional law, Hans Klecatsky, who declared the Austrian Constitution to be in ruins.[3] He continued his critique for years to come and in the starkest terms – 'work of destruction'[4] – and almost all constitutional scholars agreed.[5] It is difficult to evaluate if Klecatsky only expressed a widely held sentiment or if he managed to single-handedly create a new narrative. At any rate, the 'ruins' dictum became influential and has shaped the thinking of generations of Austrian constitutional lawyers. While there are a number of

[2] See, e.g., Jack Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press, 2011), 17ff.

[3] Hans Klecatsky, *Das österreichische Bundesverfassungsrecht*, 2nd ed. (Manz, 1973), V.

[4] See Hans Klecatsky, 'Bundes-Verfassungsgesetz und Bundesverfassungsrecht', in Herbert Schambeck (ed.), *Das österreichische Bundes-Verfassungsgesetz und seine Entwicklung* (Duncker & Humblot, 1980), 97, where he also quotes everyone who agreed with him over time.

[5] See Ewald Wiederin, 'Verfassungsbild', in Harald Eberhard, Michael Holoubek, Thomas Kröll, Georg Lienbacher and Stefan Storr (eds.), *100 Jahre Republik Österreich: Kontinuität – Brüche – Kompromisse* (Verlag Österreich, 2021), 62.

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somewhat less scathing metaphors for the Austrian Constitution, none of them express great respect for it. For example, former President of the Constitutional Court, Karl Korinek, likened Austrian constitutional law to suburban sprawl;[6] professor of constitutional law, Ewald Wiederin, to a village of larger and smaller houses, some of them with ugly backyards.[7] Another Minister of Justice, Supreme Administrative Court President and professor of constitutional law, Clemens Jabloner, felt the need to warn against constitutional cynicism.[8]

How is it possible that so many ministers, court presidents, professors – in short, the top of the Austrian legal world – could talk in such a way about the constitution? They were not populists intent on overthrowing the old order. They have devoted their life to studying the constitution and defending it. How do we make sense of their attitude? To be fair, these critiques were directed more at the legislature rather than the constitution itself.[9] The main point of contention has been and still is the constitution's impenetrable fragmentation and complexity, which are not the result of centuries of precedent, custom and statute but caused by the fact that the constitution is easily amendable and that constitutional provisions can be put in many places. Provisions do not need to be enacted within the core document but can be put into separate constitutional acts or even in regular statutes. Decades of governments with the parliamentary two-thirds majority required to amend the constitution have simply written into the constitution what would otherwise have been unconstitutional, aided by over-zealous constitutional scholars who saw unconstitutionalities everywhere.[10] This procedure has mostly been used to circumvent the constitution's cumbersome division of powers between the federal and the state level, but it has also been abused for whatever political compromise was the order of the day (written into the constitution, subsequent governments have a harder time undoing it). Today, there are more than 500 constitutional provisions outside the core document. Tellingly, no one knows the exact number. The core document – the *Bundes-Verfassungsgesetz* (Federal Constitutional Act) – had its centennial in 2020. It is itself a mere trunk, a torso,[11] to quote another unkind characterisation, because it does not include a list of fundamental rights. These and other contentious issues were left out

[6] Karl Korinek, 'Einleitungsstatement', in Bernd Wieser and Armin Stolz (eds.), *Verfassungsrecht und Verfassungsgerichtsbarkeit an der Schwelle zum 21 Jahrhundert* (Verlag Österreich, 2000), 126.

[7] Ewald Wiederin, in a radio interview with Austrian public broadcaster radio Ö1, 13 June 2019.

[8] Clemens Jabloner, 'Verfassungsentwicklung und Verfassungsvoraussetzungen', in Harald Eberhard, Michael Holoubek, Thomas Kröll, Georg Lienbacher and Stefan Storr (eds.), *100 Jahre Republik Österreich: Kontinuität – Brüche – Kompromisse* (Verlag Österreich, 2021), 1, 11ff.

[9] Ewald Wiederin, 'Über Ruinen und Verfassungen' (2003) 15 *juridikum* 192.

[10] See also Theo Öhlinger, 'Braucht Österreich eine Verfassung?' (2000) 12 *juridikum* 4. Öhlinger poignantly asks whether Austria, faced with all this debris, would need an actual constitution.

[11] Former Constitutional Court President Ludwig Adamovich in a speech reported by Wiener Zeitung, 2 October 2000.

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in order to secure approval in 1920 and have since been addressed (again, outside the core document).

It should be mentioned, however, that the unkind metaphors and comparisons of which the constitution has been the target are mostly concerned with its outer appearance. It is a question of constitutional aesthetics: We would like a booklet that we can carry around in our breast pockets. Scholars may lament the constitution's length and confusing structure, its needless attention to detail, its silence on the topic of fundamental rights, its politically motivated declarations and promises devoid of any enforceable meaning. But, apart from the occasional debates and reforms, it stands unchallenged as the (all-in-all well-functioning) basis of democracy, the rule of law and federalism in Austria. Even as the constitution was scheduled for a major overhaul and clean-up in the early 2000s (which did not happen),[12] the scholars and politicians involved in this project did not question its basic mechanisms, its institutions, its division of powers and the structure of administrative authorities it prescribes. Many of the ideas developed during this reform project were gradually introduced into the constitution later and without much fanfare.[13] The problem that the constitution allows for the creation of constitutional law outside the core document has not been remedied; it remains a point of contention and a technique sometimes used excessively. Apart from the fact that it is practically impossible for Austrian citizens to find and read their constitution in its entirety, it works well. The fact that so many scholars have taken part in its disparagement actually indicates a widespread concern for what has proven to be a time-tested, reliable document.

One might wonder, however, if the issue of constitutional orderliness would not have been better served if the constitution had been praised more often than maligned. While the critique of the lawgivers' excesses is justified, it seems that it missed its target and hit the constitution instead of those who made it. One can be forgiven for losing any sense of attachment to a constitution that looks so misshapen, has such a bad name and has been treated so badly by the legistlature.[14] It remains to inquire, though, why constitutional scholars, professionals and the interested public have let it come that far and why they have been complicit in treating the constitution like any other technical statute, to be amended at will. It seems that the state of being in 'ruins' is both cause and consequence of that widespread constitutional cynicism or, to put it more mildly, indifference. After all, a document revered and respected would not have been tampered with in the way the Austrian constitution has been. Obviously, once a disparaging narrative about the constitution takes hold,

[12] The so-called Österreich-Konvent, see Walter Schwartz, 'Structure, Objectives and Results of the Austrian Constitutional Convention, or: How Not to Change a Constitution' (2006) 12 *European Public Law* 167.

[13] Walter Schwartz and Irene Mayer, 'New Broom Sweeps Clean? An Attempt to Gradually Change the Austrian Constitution' (2009) 15 *European Public Law* 151.

[14] See Theo Öhlinger, 'Braucht Österreich eine neue Verfassung?' (2002) *Journal für Rechtspolitik* 1.

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the constitution will be treated carelessly, which in turn reinforces the idea that it is just a haphazard accumulation of ideas and provisions that do not belong in it in the first place. That, in turn, makes it hard to promote it.[15] The constitution is not part of Austrian national identity.[16]

13.2.2 *Constitutional Pride*

The Austrian constitution and attitudes towards it unfavourably contrast with how the German constitution is seen in Germany (with whom we Austrians always like to compare ourselves). Without delving into the sometime grandiose rhetoric of German constitutionalism, one can agree that the German Basic Law and the case law of the Federal Constitutional Court (FCC) have given the German constitution a much greater importance than merely being an instrument of government. It is, as is well known, a 'value-based order' (Wertordnung),[17] a 'total constitution'[18] founded upon human dignity and able, in principle, to provide answers to all social and political questions. That has not always been the case. It was the FCC's seminal *Lüth* judgment that set the tone for German constitutionalism.[19] As we now know, the Court wanted the Basic Law to be the embodiment of a historical breaking point. As Germany had to reinvent itself after Nazism, its constitution had to be built from a completely new foundation.[20] The Basic Law is, as the FCC once said, the counter-project to National Socialism and designed to prevent the possibility of fascism ever rising again.[21] The Basic Law is a new beginning that followed a decade of horror and devastation; a confession of guilt and a solemn promise never to be guilty again. What could be more inspiring? And, aesthetically, it is a concise booklet that can be carried around in one's pocket.

Like Germany's, Austria's 'constitutional moments'[22] mostly came at times of defeat: In 1867, when Austria received its first democratic and rule-of-law-based

[15] See also Herbert Schambeck, 'Gedanken über einen Verfassungspatriotismus in Österreich' in Franz Matscher, Peter Pernthaler and Andreas Raffeiner (eds.), *Ein Leben für Recht und Gerechtigkeit: Festschrift für Hans R. Klecatsky zum 90. Geburtstag* (WUV, 2010), 657, 659.

[16] See Oliver Rathkolb, *The Paradoxical Republic: Austria 1945–2020*, 2nd ed. (Berghahn, 2021), 52. He rehearses the argument that the Constitution is needlessly complex and confusing.

[17] See Michaela Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism' (2014) 12 *International Journal of Constitutional Law* 626.

[18] Mattias Kumm, 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341.

[19] Federal Constitutional Court, decision of 15 January 1958, nr 1 BvR 400/51, *Lüth*, collected under nr BVerfGE 7, 198.

[20] See, e.g., Inga Markovits, 'Constitution Making after National Catastrophes: Germany in 1949 and 1990' (2008) 49 *William & Mary Law Review* 1307.

[21] Federal Constitutional Court, decision of 4 November 2009, nr 1 BvR 2150/08, *Wunsiedel*, collected under nr BVerfGE 124, 300.

[22] After Bruce Ackerman, *We the People, vol I: Foundations* (Harvard University Press, 1991), 22, 40–41.

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constitution, it had lost a war against Prussia and had to make concessions to Hungary (the so-called compromise). In 1920, when the current constitution was first adopted, Austria was the 'state that no one wanted',[23] the 'rest, as French president Georges Clemenceau is reported to have said,[24] that had started and lost WWI. Then 1945, when the 1920 constitution was readopted, saw the even more crushing total collapse after WWII. But, unlike Germany, Austria missed its opportunity to reinvent itself. After Nazi Germany was defeated in 1945, Austria saw itself as Hitler's first victim.[25] It consequently did not see the need for a new beginning and a new constitution. It seemed logical to turn the time back to before the *Anschluss* and to reactivate the constitution of 1920. Austria's own participation in Nazism was something not to be mentioned; its own home-made variety of fascism in the years before the *Anschluss* was to be forgotten. Apart from these myths, which have begun to crumble only since the 1990s, there were legitimate strategic reasons for returning to the old constitution instead of creating something new. As Austria was occupied by the victorious Allied Powers, politicians sought to avoid a partitioning of the country like the one Germany would suffer. In the days after the end of WWII, the Austrian provisional government had to demonstrate that it was capable of governing the entire country. It needed an unquestionable basis for holding power. Taking up the former constitution, then, was an almost obvious choice. It had been agreed upon only twenty-five years prior by the same political parties that now ran the provisional government. Any lengthy constitutional debate would have weakened its stance and stalled its efforts.[26] Thus, the opportunity to initiate a new beginning and to shape a new society was not simply missed, it was actively prevented to secure the country's undivided independence.

Based on these two very different origin stories, it is understandable that Germany might see something called constitutional patriotism, whereas the idea has never really taken hold in Austria. Constitutional patriotism does not mean an uncritical reverence for a founding document. But it consists, as its progenitor Dolf Sternberger thought, in replacing nationalist love of a country with open-minded attachment to the constitution as the embodiment of a people's common values:[27] democracy, human rights, the rule of law and all the mechanisms and institutions they entail. As a consequence, the German Basic Law enjoys overwhelming support in the general public and its defence is to be conducted in the form of militant

[23] After the popular title by Hellmut Andics, *Der Staat, den keiner wollte* (Herder, 1962).

[24] This quote is probably a myth; see Manfred Zollinger, '"L'Autriche, c'est moi"? Georges Clemenceau, das neue Österreich und das Werden eines Mythos', in Lorenz Mikoletzky and Stefan Karner (eds.), *Österreich – 90 Jahre Republik* (Studienverlag, 2008), 621.

[25] See Rathkolb, *The Paradoxical Republic*, 23, 257ff.

[26] See ibid., 49ff

[27] Dolf Sternberger, 'Verfassungspatriotismus', in *Frankfurter Allgemeine Zeitung*, 23 May 1979.

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democracy.[28] Jürgen Habermas developed this idea further and emphasised that collective identities, including those anchored in patriotism, should be shaped by discursive processes of rational reflection, for which a state based on a constitution that guarantees democracy and the rule of law is the best environment.[29] Attachment to the constitution is not a mere *ersatz* for nationalism. Rather, allegiance to the constitution is generated by debate and conflict about what it means.[30] This theory seems to be backed up by the facts: the Basic Law entered public conscience in the 1970s at a time when social issues began to be negotiated in legal language, that is, in terms of the constitution and human rights. Since then, and regardless of Habermas' conception, which may be faulted for being somewhat too intellectual and sophisticated, the German public has professed a high degree of respect for the Basic Law.[31] Jan-Werner Müller has taken constitutional patriotism to the European level, where it could serve as a vehicle of European integration.[32]

13.2.3 *Constitutional Identity*

The flip side of this pride in a state's constitution may be said to be constitutional identity. The concept surely can be used to hide darker, nationalist motives directed against the alleged overreach of supranational bodies. As such, it has already been taken up by various actors intent on countering European integration.[33] Seen more benignly, it makes sense to hold on to a constitution that has become the focal point of collective identity, even more so if that constitution is highly developed and offers robust protections for human rights and the rule of law. No wonder, then, that constitutional identity is, originally, a German thing. It is no coincidence that the seminal *Solange I* judgment takes issue with the protection of fundamental rights on the European level because, as the Court declared, fundamental rights as enshrined in the Basic Law are part of Germany's identity.[34] A collective identity shaped by the adherence to and protection of human rights is nothing but constitutional patriotism. As patriotism in general, constitutional patriotism can become

[28] This synopsis is based on Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press, 2007), 23.

[29] E.g., Jürgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State', in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994), 107.

[30] See Müller, *Constitutional Patriotism*, 28ff.

[31] Hans Vorländer, 'Die Deutschen und ihre Verfassung' (2009) 18/19 *Aus Politik und Zeitgeschichte* 8.

[32] Müller, *Constitutional Patriotism*, 93ff.

[33] Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 *European Law Journal* 457.

[34] Federal Constitutional Court, decision of 29 May 1974, nr BvL 52/71, *Solange I*, collected under nr BVerfGE 37, 271.

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exaggerated, and the German Court's subsequent judgments on constitutional identity and ultra-vires[35] have been highly criticised in this respect.[36]

Where the constitution is not such a big factor in the collective self-image, the notion of constitutional identity does not have the same persuasiveness. It is then either abused for ulterior motives[37] or applied to technical details that may move some lawyers but do not affect what a state's citizens think about its constitution. This is the case in Austria. There are three judgments concerning matters of constitutional identity; only one may be said to have any bearing on identity, and it is a judgment by the ECJ, not a national court:[38] the *Sayn-Wittgenstein* decision, in which the court held that the prohibition of titles of nobility is justified in light of Austria's radical abolition of the monarchy and the constitutional status of that prohibition.[39] The other two concern the organisation of the executive branch. In one, the Constitutional Court declared that, if Article 6 of the European Convention on Human Rights really required broad access to courts against administrative decisions, it would be incompatible with the constitutionally mandated, democratic responsibility of the executive.[40] In the other, the Court alluded that the EU-induced proliferation of independent administrative agencies (which are not under the control of the executive) could, at some point, go beyond what Austria had agreed to when it had joined the EU, again because there is a constitutional principle that the executive branch must be responsible for administration.[41] Organisational details of the executive branch do not easily inspire constitutional patriotism.

Based on this tradition of constitutional thinking, it should come as no surprise that the Austrian constitution is not disseminated, celebrated or invoked outside of professional circles. There is no official holiday dedicated to it (although the Constitutional Court holds an annual event, which is – tellingly – not open to the general public), there are no free copies distributed in schools, there are no famous quotations taken from it and printed on t-shirts. At least there are some commemorative stamps. Its framers are mostly forgotten, with the one exception of Hans Kelsen. In this climate – a non-tradition of constitutional patriotism, a

[35] Federal Constitutional Court, decision of 30 June 2009, nr 2 be 2/08 et al, *Lissabon*, collected under nr BVerfGE 123, 267; Federal Constitutional Court, decision of 5/5/2020, nr 2 BvR 859/15 et al, *PSPP*, collected under nr BVerfGE 154, 17.

[36] See, e.g., Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 *German Law Journal* 979.

[37] Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 *German Law Journal* 534.

[38] Thomas Kröll, 'The European Court of Justice, a Guardian (Hüter) of the Republican Principle of the Austrian Federal Constitution – Case Note on C-208/09, Sayn-Wittgenstein' (2012) *Vienna Journal on International Constitutional Law* 110.

[39] European Court of Justice, judgment of 22 December 2010, Case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.

[40] Constitutional Court, judgment of 14 October 1987, nr B 267/86, *Miltner*, collected under nr VfSlg 11.500/1987.

[41] Constitutional Court, judgment of 16 December 2021, nr G 390/2020, *AQ Austria*, collected under nr VfSlg 20.522/2021.

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somewhat technical constitutional identity, a constitution said to be in ruins – it needed a non-lawyer to remind constitutional scholars of the appeal that the Austrian constitution can and should have.

13.2.4 *Constitutional Surprises*

In 2019, Austria was shocked by the so-called Ibiza scandal. A secretly recorded video showed the person who would later – but before the recordings emerged – become vice chancellor, Heinz-Christian Strache, in a villa in Ibiza, talking openly to a presumed Russian oligarch about how he would take money for getting laws passed, how he would try to get Austrian newspapers under his control, which campaign donations should be solicited and other such details. He resigned after the video was leaked to the press. Then chancellor Sebastian Kurz was faced with the first successful parliamentary vote of no confidence in Austria. He and his government had to step down. The president, Alexander van der Bellen, appointed a cabinet of experts to govern until an election was held and a new government could be formed. It was the first time Austria had seen any of this happening.[42]

Something else that was unusual happened during these days: the Austrian president praised the 'elegance' and 'beauty' of the constitution. It was elegant and beautiful, he said, because it contained all the necessary precautions and procedures for what to do in these uncertain times.[43] It was an interesting thing to say. On the one hand, the constitution simply contains what constitutions are supposed to contain: provisions for the appointment and dismissal of governments. This may surprise someone who has never read the document but not constitutional scholars. On the other hand, it was quite surprising indeed to hear the constitution being praised rather than ridiculed. The president's remarks did not fail to impress the general public. A myriad of newspaper articles was devoted to that great unknown: the constitution. In hindsight, it proved the perfect prequel to its centennial in 2020, when another round of newspaper articles, speeches, interviews and exhibitions followed. One might suspect that it would not have been celebrated quite as much if van der Bellen had not brought the constitution to public attention. One can dispute whether 'elegant' and 'beautiful' are meaningful adjectives to describe a legal instrument (I think they are). The president chose these words because of their positive connotations. What he probably intended to express with them is that the constitution contains sensible

[42] Konrad Lachmayer and Lukas Wieser, 'Entering into New Constitutional Territory in Austria: From a Conservative Minority Government to a Transitional Expert Government' (3 June 2019) *Verfassungsblog*, https://verfassungsblog.de/entering-into-new-constitutional-territory-in-austria/.

[43] Speech by President of Austria Alexander van der Bellen on 21 May 2019; see www.bundespraesident.at/aktuelles/detail/gespraech-mit-bundeskanzler-sebastian-kurz. He later called it 'the Magna Charta of our country', see Alexander van der Bellen, 'Über die Schönheit unserer Bundesverfassung' (2020) *Anwaltsblatt* 537.

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arrangements, ingenious solutions and exemplary innovations and that it is, therefore, beautiful in the sense of well-crafted.[44] The president did not comment on its outer appearance, at which so much derision had been directed and which remains poor. He chose to emphasise what was good about it and, thus, gave Austrian constitutional discourse an entirely new spin. Finally, we scholars are allowed to actually like the document we spend so much time exploring.

Yet, old habits die hard. There is still no constitutional patriotism in Austria, and public engagement with the constitution remains weak. But it seems that something is growing. For its centennial celebration, the Constitutional Court arranged for the constitution to be illustrated and printed in the form of a magazine (not the whole, sprawling text but the main documents). It further organised an exhibition devoted to the constitution and the court, which travelled around the country, and it instituted a cooperation scheme with schools. In a historical first, the candidates running for president in the October 2022 election were subjected to an exam on constitutional law by the national broadcaster on live television.[45] It was (to my knowledge) the first time that the constitution got so much attention in political reporting. Ironically, Alexander van der Bellen, whose public praise had won the constitution this new-found interest, did not participate in the TV debate. He was re-elected.

A critical stance towards one's own constitution is not entirely bad. Yes, the way the Austrian constitution is talked about – ruins, torso, sprawl – has its drawbacks. People are not brought to meaningfully identify with 'their' constitution if constitutional lawyers themselves talk about it in such a way. Still, this attitude keeps us from putting the constitution onto a pedestal and from expecting too much of it. To quote Jabloner: what Austria seems to have is a kind of constitutional pragmatism.[46] The constitution is respected and upheld even if it is not admired and celebrated. Constitutional scholars identify with it even if they do not talk fondly about it. However, as we will see in Section 13.4, sometimes, they cannot hide a certain pride in the achievements of the Austrian – 'their' – constitution. After all, someone must believe in the constitution if it is to be successful.[47]

13.3 NARRATIVE 2: FORM AND SUBSTANCE

13.3.1 *Constitutional Bleakness*

The 'ruins' metaphor is often accompanied by another narrative that is well-entrenched in academia as well as in the interested public. It is the trope that

[44] Benjamin Kneihs, 'Die Schönheit der Verfassung' (2020) 75 *Zeitschrift für öffentliches Recht* 209; Christoph Hofstätter, 'Die Regierungskrise 2019 oder zur Eleganz und Schönheit der österreichischen Bundesverfassung', in Gerhard Baumgartner (ed.), *Jahrbuch Öffentliches Recht* 2020 (NWV, 2020), 27.

[45] See Österreichischer Rundfunk (17 September 2022), https://orf.at/stories/3284783/.

[46] Jabloner, 'Verfassungsentwicklung und Verfassungsvoraussetzungen', 11.

[47] See Balkin, *Constitutional Redemption*, 2.

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Austria's is a 'value-neutral constitution of rules of the game' (*wertneutrale Spielregelverfassung*). With this goes the assumption that Austrian constitutional law is purely formal. Since the constitution is said to be neutral regarding political ends, its provisions are to be understood as formal procedural rules rather than material guiding principles. Although this idea has never been entirely correct and is even less true today, it continues to shape how Austrian lawyers think about the constitution, even if it is mostly agreed nowadays that a purely formal approach does not fit most constitutional issues. The idea of the constitution as a purely formal set of rules to be interpreted 'formally' is deeply connected with Hans Kelsen, whose influence on Austrian constitutional thinking as a legal theorist, drafter of the constitution and judge at the Constitutional Court is unmatched. The formality narrative has three main roots: the minimalist compromise arising from the political climate surrounding the adoption of the 1920 constitution, Kelsen's procedural theory of democracy and Kelsen's pure theory of law. If ruins are not a fertile ground for the development of constitutional patriotism, neither is a supposedly neutral and formal constitution. These two underlying understandings of Austrian constitutional law may therefore well go hand in hand. Like the 'ruins' metaphor, to talk of a neutral and formal constitution can be a sign of contempt: Carl Schmitt famously argued that a purely neutral political system was bound to self-destruct.[48] Again, there is a core of truth here: the Austrian constitution, at least in its unadulterated 1920 version, exhibits much less rhetorical pomp and grandeur than others. But, unlike ruins, neutrality and formality are something of which Austrian constitutional scholars have been proud, especially because it sets us apart from many other constitutional traditions. Ruins can be beautiful. But when the Austrian president talked about the beauty and elegance of the constitution, what he had in mind were its transparent procedures and precise rules – in short, its formality.

The starting point of Austria's neutrality narrative is also the starting point of its constitution, namely that it begins without a preamble. The preamble question marks the convergence of two historical strands that mutually reinforced each other and the narrative that sprung from it: a climate of political tension that led to minimalist compromise and Hans Kelsen's well-known aversion to constitutional ornament.[49] He was even opposed to including what would become the constitution's first article: 'Austria is a democratic republic. Its law emanates from the people.' In his view, this superfluously stated the obvious. It was then Chancellor Karl Renner who overruled Kelsen in stating that a constitution needed to begin with something beautiful. He was proven correct. Nowadays, Article 1 of the Constitution graces the Constitutional Court's courtroom wall, while Kelsen's bust

[48] Carl Schmitt, *Legality and Legitimacy* (Duke University Press, 2004 [1932]), 45ff.

[49] A preamble can be much more than that; see Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 *International Journal of Constitutional Law* 714.

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stands in the hallway.[50] Yet, Kelsen shaped the narrative for years to come and managed to downplay one of the few uplifting passages the constitution contains:

> Article 1 has no relevant legal content. Whether the constitution really represents a democratic republic follows from its formal and substantial provisions.[51]

To be fair, in the years from 1918 to 1920, when the constitution was negotiated, drafted and adopted, there probably was a widespread feeling of constitutional disillusionment. As Kelsen notes, the preamble was omitted because not everyone was convinced of the viability of the new Austrian state.[52] In addition to famine, destruction, millions dead or displaced and massive unemployment, Austria had to come to terms with the fact that, after more than 600 years, the Habsburgs – and the power and glory that had come with them – were gone. Austria was reduced from an empire of almost 60 million to a tiny landlocked country of about 6 million people, many of whom did not consider themselves Austrians but Germans. Unsurprisingly, the provisional constitution of 1918 declared so-called German-Austria to be part of Germany. Both the name[53] and the unification[54] would be prohibited by the treaties of Versailles and St. Germain in 1920.

13.3.2 *Constitutional Beginnings*

In 1920, Austria needed a definitive constitution. The political spectrum was divided between the Social Democrats, who were socialist in orientation and favoured annexation by Germany because of the strong socialist movement there; the German Nationalists, more classically liberal, fiercely anti-Semitic and equally in favour of joining Germany; and the Christian Social Party, conservative, clerical, monarchist and the only party favouring Austrian independence. As the government consisted of a coalition between the Social Democrats and the Christian Social Party, constitutional negotiations were primarily conducted between these two parties, whose stark ideological differences did not make the task easier. Parliament appointed a Constitutional Committee and a Subcommittee; whose reports and drafts are an indispensable resource for constitutional interpretation

[50] Which is still a pretty good spot, since Kelsen's is the only bust on display at the Court.

[51] See Hans Kelsen, Georg Froehlich and Adolf Merkl, *Die Verfassungsgesetze der Republik Österreich, vol V: Die Bundesverfassung vom 1. Oktober 1920* (Franz Deuticke, 1922), 65 (author translation).

[52] Ibid., 62.

[53] See Michael Ioannidis, 'Naming a State: Disputing over Symbols of Statehood at the Example of Macedonia' (2010) 14 *Max Planck Yearbook of United Nations Law* 507 (see 538ff about the name 'German-Austria').

[54] See Detlef Merten, 'Siegermacht und Selbstbestimmungsrecht der Völker. "Deutschösterreich": Vereinigungsverbot zweier jahrhundertelang verbundener Staaten' (2020) 75 *Zeitschrift für öffentliches Recht* 317.

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today. The chief expert consulted during these talks was, of course, Hans Kelsen, who also contributed several drafts.

Whereas the Social Democrats saw democracy as the best way for the working class to seize power and to bring about socialism, the conservative Christian Social Party saw it as the best way to prevent a proletarian dictatorship. Both parties agreed, in a sense, that a democratic constitution was instrumental for political survival but was not an end in itself. Both parties had radically different visions of the state and society, but neither was strong enough to marginalise the other. Otto Bauer, leader of the Social Democratic Party and Marxist thinker, even came up with the concept of 'class balance' to justify why his party would compromise with the bourgeoisie:[55] its domination was over, but it was still large enough for proletarian dictatorship to not be feasible.[56] When the Social Democrats sought to introduce a constitutional article declaring that all power rests with the people, the Christian Social Party leader Ignaz Seipel, an ordained priest, objected on the grounds that the question of supreme power was a theological issue. The article was omitted.[57] Taking up John Rawls, one might say that the Austrian constitution was not an 'overlapping consensus' but a 'mere modus vivendi' born out of necessity.[58] The fragile political accord represented by the constitution broke apart in 1933 when the Christian Social government exploited an error in parliamentary proceedings to suspend Parliament for good, to ban the Social Democratic Party and to promulgate a fascist constitution a year later.[59] As Adolf Merkl, a disciple of Kelsen and himself a leading Austrian scholar of constitutional law, remarked after this authoritarian turn: 'Today, we know that democracy was but a legal platform from which the big political groups thought to best avert the others' dictatorship.'[60] Apart from the great ideological struggles, there were two basic points of contention between the Social Democratic and Christian Social parties: fundamental rights and federalism. The Social Democrats wanted only weak protections for property but strong rights to work, leisure and welfare. They favoured central government, especially as their only power base was Vienna. The Christian Social Party, in turn, felt the need to protect the propertied classes, opposed social rights, feared Social Democratic secularism, especially in such issues as civil marriage, divorce and cremation (none of which was allowed), and wanted Austria to become a federal state, as this would give

[55] Otto Bauer, *Die Österreichische Revolution* (Wiener Volksbuchhandlung, 1923), 96, 245.

[56] See also Jan-Werner Müller, *Contesting Democracy: Political Ideas in 20th Century Europe* (Yale University Press, 2011), 58.

[57] See Ignaz Seipel in the transcript of the ninth session of the Subcommittee of the Constitutional Committee on 23 August 1920; reprinted in Felix Ermacora, *Quellen zum österreichischen Verfassungsrecht 1920* (Berger und Söhne, 1967), 336.

[58] See John Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Studies* 1.

[59] See Steven Beller, *A Concise History of Austria* (Cambridge University Press, 2014), 221ff.

[60] Adolf Merkl, *Die ständisch-autoritäre Verfassung Österreichs: Ein kritisch-systematischer Grundriss* (Springer, 1935), 2 (author translation).

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the conservative-controlled rural regions an advantage. As Jabloner suggests, these differences persist. They lie dormant as long as the current constitution is in place but would return with full force the moment a new constitution was discussed.[61]

The Constitutional Committee dealt with these differences by way of omission, which inspired the constitution's reputation for being a trunk or a torso: even to its framers, the constitution looked incomplete without a set of rights.[62] As Ignaz Seipel freely admitted, the party negotiators did not manage to find common ground and decided to eliminate the chapter on fundamental rights in the spirit of mutual sacrifice.[63] But, as the constitution needed fundamental rights after all, it was decided to simply carry over the 1867 Bill of Rights (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*), which had served well during the monarchy and was the basis for fundamental rights review by the Imperial Court of Justice (which I shall discuss in Section 13.4). This episode is at the root of the idea that Austria's is a constitution of compromise, which is neutral in substantial political matters because the big opposing parties could not agree with one another. As history shows, however, this narrative has always been ambivalent, if not false. The rights catalogue of 1867 was not politically neutral; it was an ideological win the liberal bourgeoisie managed to wrestle from a weakened monarch,[64] and it embodies the basic tenets of nineteenth century liberalism. As such, it could not be further away from what the Social Democrats had hoped to achieve, especially in matters of property law and economic planning. As was said out loud much later but was equally true back then, the constitution, via the rights to property, to freedom of movement and to private enterprise, has always enshrined a capitalist market economy.[65] Still, the *Staatsgrundgesetz* already had a venerable tradition, which probably made its acceptance easier. The fact that it was a separate constitutional act surely helped to cement the narrative that the core document remained 'neutral'. This situation interestingly echoes Carl Schmitt's distinction between a constitution's 'political' and 'legal' parts.[66] In Austria, these two parts even form two separate documents.

The thorny question of federalism was resolved in an equally ambivalent compromise, which, for once, seemed to favour the Social Democrats. With the 1920 constitution, Austria became a federal union divided into nine states. While this may look like another win for the conservative agenda, the federal government retained

[61] Jabloner, 'Verfassungsentwicklung und Verfassungsvoraussetzungen', 10.
[62] See Kelsen et al., *Die Verfassungsgesetze der Republik Österreich*, 62.
[63] Ignaz Seipel, *Der Kampf um die österreichische Verfassung* (Braumüller, Wien, 1930), 96–97.
[64] See 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.
[65] See the influential article by Karl Korinek, 'Das Grundrecht der Freiheit der Erwerbsbetätigung als Schranke für die Wirtschaftslenkung', in Karl Korinek (ed.), *Beiträge zum Wirtschaftsrecht. Festschrift für Karl Wenger zum 60. Geburtstag* (Orac, 1983), 243.
[66] Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008 [1928]), 93.

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all important powers. These had to be enumerated expressly, which makes the division of competences between the federal and state legislatures the longest and most complex in the world.[67] This is why the constitution revels in details such as the responsibility for 'log driving' or 'air pollution control without prejudice to the states' jurisdiction over heating installations' (Article 10, para 1, nr 10 and 12). In a fatal reversal of fortunes, the Social Democrats were ousted from government just after the ratification of the constitution. As their only real power base was the state of Vienna, they henceforth took a federalist position in order to be left alone, whereas the Christian Social Party pushed for centralism so as to rein in 'Red Vienna'. Fundamental rights did not represent much of a political factor in the interwar years, but the division of powers did: two major constitutional conflicts arose around cremation and divorce. The issue was not framed in a fundamental-rights discourse but in terms of who had the power to decide (the federal or the state government?).[68] The division of power was the main reason for which the Constitutional Court was vested with the power to invalidate laws: the federal and the state governments feared mutual unlawful encroachment, and this fear was exacerbated by the different political alignments.

To recapitulate: 1920 saw Austria torn between irreconcilable political alternatives represented by hostile parties. The parties agreed on a minimalist constitution that laid down the institutions and procedures of government. As they could not agree on what the constitution should be about in the first place, a preamble was left out. They could not find agreement with regards to fundamental rights (too ideological) and federalism (too important), so they struck a deal to carry over the existing Bill of Rights, creating a nominally federal system with a massive central government. The constitution of 1920 was indeed a formal document. It laid out the rules of the political process and provided the basis for constitutional justice and the rule of law. It did not contain any material guidelines for politics, such as fundamental values to be upheld, goals or objectives to be achieved or national interest to be furthered.

13.3.3 *Constitutional Theory*

It is unsurprising, then, that it was during the interwar years in Austria in which Hans Kelsen developed his value-neutral conception of democracy and his formalist style of legal reasoning. There probably is an ambivalent relationship between Kelsen's theoretical positions and his practical experiences. His theory of democracy seems clearly influenced by the formalist compromise that was Austria's

[67] Greg Taylor, *Characterisation in Federations: Six Countries Compared* (Springer, 2006), 95ff.

[68] The question was, strikingly, resolved by a judgment by Hans Kelsen as a member of the Constitutional Court; see Clemens Jabloner, 'Kelsen and his Circle: The Viennese Years' (1998) 9 *European Journal of International Law* 368, 374–375; Tamara Ehs, 'Felix Frankfurter, Hans Kelsen, and the Practice of Judicial Review' (2013) 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 451, 464–465.

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constitution. In turn, his reflections on democracy have shaped Austrians' common understanding of our constitutional system.[69] Kelsen thought of democracy as a mere method for creating the legal order, a method that was, by definition, content-neutral.[70] Anything could be decided by a majority vote as long as the required formalities were met, because democracy is tacit about what constitutes a good state and a good society. It rests on parliamentary representation and, importantly, on the protection of political minorities: for there is no majority without a minority, and any minority must have the chance to become a majority one day. From the majority–minority dialectic, Kelsen inferred that political reality in a democracy is marked by compromise, because the majority is not all-powerful and the minority is not disenfranchised.[71] His praise of democracy being indifferent to the ends pursued and of compromise being democracy's true actualisation conveniently coincided with political reality in Austria. With his theory, Kelsen perhaps even sought to legitimise the new constitution. Democracy presupposes, as Kelsen famously argued, a relativistic worldview.[72] There are good reasons for doubting this,[73] and one can wonder if Kelsen himself really was a relativist.[74] But his theory provides a good explanation of a certain democratic mindset without which parliamentary debate, freedom of speech and recurrent elections lose their meaning:[75]

> He who views absolute truth and absolute values as inaccessible to the human understanding cognition must deem not only his own, but also the opinion of others at least as feasible. The idea of democracy thus presupposes relativism as its worldview. Democracy values everyone's political will equally, just as it gives equal regard to each political belief and opinion . . .[76]

[69] See Péter Techet, '"Historical turn" in der Hans-Kelsen-Forschung? Wechselwirkungen zwischen Rechtstheorie und Rechtsgeschichte' (2021) 76 *Zeitschrift für öffentliches Recht* 1329.

[70] Hans Kelsen, *The Essence and Value of Democracy* (Rowman & Littlefield, 2013, 2nd ed. 1929), 94ff, 101.

[71] Ibid., 67ff.

[72] For an account of Kelsenian relativism relating to democracy, see Carlo Invernizzi Accetti, *Relativism and Religion: Why Democratic Societies Do Not Need Moral Absolutes* (Columbia University Press, 2015), 163ff.

[73] The theory of 'militant democracy' presumes that democracy is built upon certain fundamental values that must be defended, sometimes, even against democratic movements. See the influential Karl Loewenstein, 'Militant Democracy and Fundamental Rights' (1937) 31 *American Political Science Review*', part I: 417, part II: 638; for a critique in Kelsenian spirit, see Carlo Invernizzi Accetti and Ian Zuckerman, 'What's Wrong with Militant Democracy?' (2017) 65 *Political Studies* 182; for an application of militant democracy to an allegedly value-neutral constitution, see Ulrich Wagrandl, 'Militant Democracy in Austria' (2018) 2 *Vienna Law Review* 95 and Ulrich Wagrandl, *Wehrhafte Demokratie in Österreich* (Verlag Österreich, 2019).

[74] Ulrich Wagrandl, 'Kelsen was no Relativist: Reading Hans Kelsen in the Light of Isaiah Berlin's Value Pluralism', in Matthias Jestaedt, Ralf Poscher and Jörg Kammerhofer (eds.), *Die Reine Rechtslehre auf dem Prüfstand / Hans Kelsen's Pure Theory of Law: Conceptions and Misconceptions* (Steiner, 2020), 373.

[75] As Carl Schmitt claimed they already had, see Carl Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press, 1988 [2nd ed. 1926]), 49.

[76] Kelsen, *The Essence and Value of Democracy*, 103.

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We can now see that the formality and neutrality narrative about Austria's constitution is amalgamated from different sources and that it encompasses the idea of compromise and the conception of relativism. In a parallel development but on another plane, Kelsen also provided a legal theory that by its very name seems well-suited to guiding the understanding of a value-neutral and formal order: the pure theory of law. As so often, it is difficult to establish a chain of causality here. We know that Kelsen laid the basis of his thinking well before the inception of Austria's 1920 constitution,[77] but it only came to fruition well after the constitution had been drafted.[78] It seems that his work as a legal adviser influenced Kelsen's theory as much as his constitutional drafts were an outcome of his theoretical work.[79] Kelsen's legal theory is famous for many reasons, such as the radical is–ought distinction, the basic norm, the identification of law and state and – especially relevant for constitutional interpretation – the *Stufenbau* theorem (the hierarchy or pyramid of norms, which was actually Adolf Merkl's idea). The latter represents the notion that the whole legal order forms a hierarchical structure of different levels, so that norms of a lower order gain their validity insofar as their creation is determined by laws of a higher order. The *Stufenbau* idea emphasises the law's perpetual changing as it brings the process of law-making (that is, the creation and abolition of norms) to the centre of attention. The constitution, as the highest norm, regulates the creation of all other norms within the system (that is, it defines the institutions, procedures and responsibilities of lawgiving), but the dialectic of norm creation and norm application recurs at every level of the legal order.[80] The *Stufenbau* doctrine is completed by the so-called *Fehlerkalkül* (reckoning with errors). As errors will inevitably be made when legislating, and every error – as a deviation from the norm empowering the lawgiver – would lead to absolute nullity, the legal system needs rules for dealing with these errors. The *Fehlerkalkül* theory posits that, as long as there is a legal remedy against erroneous and thus unlawful norms, these norms are not null and void but valid and applicable until revoked.[81]

[77] Hans Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze* (Mohr, 1911).

[78] Hans Kelsen, *Introduction to the Problems of Legal Theory* (Clarendon Press, 1997 [1st ed. 1934]); Hans Kelsen, *Pure Theory of Law* (Clarendon Press, 1967 [2nd ed. 1960]).

[79] See Clemens Jabloner, 'Kelsen comme technicien constitutionnel', in Eleonora Bottini, Bernard Harcourt, Pasquale Pasquino and Otto Pfersmann (eds.), *Nouveaux regards sur des modèles classiques de démocratie constitutionelle: Etats-Unis, Europe* (mare&martin, 2018), 157; Clemens Jabloner, *Zum Nachhall verfassungsrechtlicher Probleme der Monarchie in Rechtstheorie und Verfassungsrecht / Some Specifically Austrian Aspects of the Pure Theory of Law: Problems of Constitutional Law of the Austro-Hungarian Monarchy and Their Repercussions on the Theory of Law and Constitutional Legislation* (Verlag Österreich, 2021).

[80] See Kelsen, *Pure Theory of Law*, 221ff and, e.g., Stanley L. Paulson, 'How Merkl's Stufenbaulehre Informs Kelsen's Concept of Law' (2013) 21 *Revus* 29.

[81] See Kelsen, *Pure Theory of Law*, 276–277 and e.g., Christoph Kletzer, 'Kelsen's Development of the Fehlerkalkül-Theory' (2005) 18 *Ratio Juris* 46.

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No theory has had a bigger impact on Austrian constitutional law than Kelsen's. One of the classic Austrian constitutional law textbooks opens with a long theoretical disquisition about the nature of norms and their hierarchy. In this seminal work, the constitution is not characterized via its content, historical importance or philosophical foundation but as the 'norm of norm creation'.[82] Even those who have always taken another approach have to acknowledge that this formal view about the nature of the constitution has had a huge influence on constitutional thinking and on constitutional adjudication,[83] just as it is acknowledged that the 'rules of the game' metaphor is true to the constitution's roots but does not fully capture today's constitutional law.[84] Kelsen's relativistic account of democracy is approvingly repeated even by non-Kelsenians.[85]

13.3.4 *Constitutional Interpretation*

How do the historical background of the constitution and Kelsen's theories translate into actual constitutional interpretation? In a widely read article, Ewald Wiederin posited the *modus austriacus* of constitutional law scholarship,[86] which takes the law, not the state as its starting point for constructing the constitution. As Kelsen's pure theory dispenses with extra-legal, metaphysical entities, the notion of the state had to be dropped from constitutional thinking.[87] What remains is the law. The law, in turn, is structured via the *Stufenbau*, which broadens the viewpoint. The law not only consists of the constitution and statutes, but also of 'individual norms' such as administrative decisions and judicial opinions. As the *Stufenbau* doctrine makes no qualitative distinctions between these different levels of the legal order, the constitution looks like any other norm. Consequently, there is no specialised method of constitutional interpretation.[88] The constitutional sprawl, as discussed in Section 13.2, may have furthered this attitude among scholars, who, in a sense, only

[82] Robert Walter, *Österreichisches Bundesverfassungsrecht* (Manz, 1972), 1ff. This tradition is continued by Walter's intellectual heirs, Heinz Mayer, Gabriele Kucsko-Stadlmayer and Karl Stöger, *Grundriss des österreichischen Bundesverfassungsrechts*, 11th ed. (Manz, 2015), 2ff.

[83] See the other great classic, Theo Öhlinger and Harald Eberhard, *Verfassungsrecht*, 13th ed. (facultas, 2022), 36–37.

[84] See the third classic, Walter Berka, *Verfassungsrecht: Grundzüge des österreichischen Verfassungsrechts für das juristische Studium*, 8th ed. (Verlag Österreich, 2021), 25.

[85] See, e.g., Ludwig Adamovich, *Handbuch des österreichischen Verfassungsrechts*, 6th ed. (Springer, 1971), 82.

[86] Ewald Wiederin, 'Denken vom Recht her: Über den modus austriacus in der Staatsrechtslehre', in Helmuth Schulze-Fielitz (ed.), *Staatsrechtslehre als Wissenschaft* (Die Verwaltung Beiheft 7, Duncker & Humblot, 2007), 293.

[87] See Andras Jakab, 'Two Opposing Paradigms of Continental European Constitutional Thinking: Austria and Germany' (2009) 58 *International Comparative Law Quarterly* 933, 935ff.

[88] See Alexander Somek, § 33. Wissenschaft vom Verfassungsrecht: Österreich', in Armin von Bogdandy and Peter M. Huber (eds.), *Ius Publicum Europaeum*, vol II (C. F. Müller, 2008), nr 12.

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replicated the lawmakers' own indifferent views of constitutional law. If the constitution is nothing but a statute, the only difference being that its adoption requires a supermajority, it is going to be treated like a statute. This attitude gave rise to the formalist style of constitutional interpretation; a term that was once used as proud self-identification[89] but has since taken on a pejorative connotation.[90] Formalism, here, means allegedly restricting oneself to plain textual meaning, thus rejecting purposive (teleological) arguments, relying on historical research to see what the lawgiver 'really' meant[91] and avoiding balancing competing interests and values.[92] It has somewhat lost its decisive influence on constitutional issues,[93] but the narrative it shaped persists. The fate of the formalist style can be illustrated by two examples.

Austria's complex federalism, combined with a strictly formal interpretive approach, gave rise to the so-called petrification theory.[94] This applies when delineating the federal and the state powers, to which the constitution devotes much attention. The constitution's minuteness and the interpretation's rigidity are at the core of the ruins or sprawl problem. Since the division of powers is needlessly complex and often prevents reasonable solutions, the federal government has had to resort to constitutional amendments again and again to allot itself the legislative powers needed. According to the petrification theory, then, when interpreting a provision regarding the federal division of powers, one must assume that the constitution employs its vocabulary according to the meaning it had when the constitution was enacted. In this, it is comparable to American originalism.[95] This meaning, however, must first be gleaned from the statutes in force at the time that regulated the subject matter in question – this meaning is then 'petrified'. For example, the protection of monuments falls within federal power. At the time the constitution was enacted, the law on the protection of monuments only concerned human-made objects. Historical parks and gardens, being products of nature, even if shaped by human activity, did not count as monuments. Consequently, the federal

[89] See then Constitutional Court President, Ludwig Adamovich, 'Probleme der Verfassungsgerichtsbarkeit' (1950) 72 *Juristische Blätter* 73, who writes that the constitution is 'strictly formal' law.

[90] See Öhlinger and Eberhard, *Verfassungsrecht*, 37.

[91] See also Ewald Wiederin, 'Verfassungsinterpretation in Österreich', in Georg Lienbacher (ed.), *Verfassungsinterpretation in Europa: Heinz Schäffer-Gedächtnissymposion* (Sramek, 2011), 84ff.

[92] Somek, 'Wissenschaft vom Verfassungsrecht', nr 11.

[93] Wiederin, 'Denken vom Recht her', 307ff; Jakab, 'Two Opposing Paradigms', 943ff; Somek, 'Wissenschaft vom Verfassungsrecht', nr 24ff.

[94] See, generally, Taylor, *Characterisation in Federations*, 95ff; Anna Gamper, 'Judge Made Federalism? The Role of the Constitutional Court in Austria', in Hans-Peter Schneider, Jutta Kramer and Beniamino Caravita di Toritto (eds.), *Judge made Federalism? The Role of Courts in Federal Systems* (Nomos, 2009), 205ff; Jakab, 'Two Opposing Paradigms', 944ff.

[95] Although it is not clear whether petrification is 'original intent' or 'original public meaning' originalism; see Keith E. Whittington, 'Originalism: A Critical Introduction' (2013) 82 *Fordham Law Review* 375.

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government had no authority to extend the protection of monuments to parks and gardens, a matter which therefore fell under state jurisdiction.[96] In the tradition of constitutional sprawl, the federal government amended the Monuments Protection Act and inserted a constitutional provision containing fifty-six named parks which, from then on, counted as monuments.[97]

Human-rights legislation provides the second example. Austrian constitutional scholarship came late to the widespread human-rights euphoria of the post-war era.[98] Again, Hans Kelsen's position forms the backdrop against which scholarship had to evolve. His view was somewhat contradictory. Kelsen viewed fundamental rights as leading to dangerous judicial activism;[99] at the same time, he considered them meaningless if they contained limitation clauses and thus could be restricted by law.[100] Constitutional rights are not precepts of justice or nature but simply content-defined negative conditions of norm creation (in that they prohibit norms with a certain content).[101] In his democratic theory, Kelsen briefly but approvingly mentions rights regarding the protection of minorities.[102] His work as a Constitutional Court judge is reported not to have been encumbered by his theoretical positions.[103] At any rate, the Constitutional Court's case law was marked by a decidedly formalist approach, to the effect that hardly any statute was ever unconstitutional because of a fundamental-rights violation. As almost all fundamental rights provided for limitations enacted by law, the Constitutional Court granted an immense amount of discretion, constrained only by the rather theoretical limit that no fundamental right was allowed to be 'effectively eliminated'[104] or 'hollowed out'.[105] Legislation hardly ever came close to this. Unlike the petrification theory, which enjoys overwhelming support and is still adhered to, the formalist approach to fundamental rights has always been met by severe criticism. It is in this arena that the neutrality and formality narrative was most contested and eventually began to crumble.[106] Beginning in the 1980s, the Court could not help but be influenced by German *Grundrechtsdogmatik*, the European Court of Human Rights and the scholarship of those 'rebels'[107] who demanded that

[96] See Constitutional Court of 19 March 1964, nr K II 4/63, collected under nr VfSlg 4680/1964.
[97] Protection of Monuments Act, Sec 1 para 12 (Denkmalschutzgesetz), published in Federal Law Gazette Nr 533/1923 as amended.
[98] See Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010).
[99] Hans Kelsen, *The Nature and Development of Constitutional Adjudication* (Cambridge University Press, 2015 [1929], ed. and trans. Lars Vinx), 60f.
[100] Ibid., 29.
[101] Kelsen, *Pure Theory of Law*, 223–234.
[102] Kelsen, *The Essence and Value of Democracy*, 67–68.
[103] See Ehs, 'Felix Frankfurter', 451.
[104] Constitutional Court, judgment of 8 December 1956, nr G 16/56, collected under nr VfSlg 3118/1956.
[105] Constitutional Court, judgment of 17 March 1976, nr B 165/75, collected under nr VfSlg 7770/1976.
[106] See Jakab, 'Two Opposing Paradigms', 944–945.
[107] See Somek, 'Wissenschaft vom Verfassungsrecht', nr 33–34.

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fundamental rights be taken seriously. They have since become the majority.[108] In a seminal judgment of 4 October 1984 concerning the regulation of scrap-metal markets, the Constitutional Court introduced the principle of proportionality into Austrian fundamental rights law[109], where it has remained. Judicial activism has, expectably, increased.

All in all, the narrative around neutrality and formality, compromise and relativism has seen better days. It was not completely true in the first place and its excesses are met with less and less tolerance. The constitution has changed as well. Its 1920 version is very lean compared to its current state after more than 100 years of service and more than 120 amendments (more than one per year, on average!). Nowadays, the constitution contains a host of 'material' principles, such as a commitment to fighting discrimination based on gender and disability, a long list of values that public schools are required to teach and a separate constitutional act dedicated entirely to another long list of commitments of dubious enforceability, such as commitments to sustainability, the protection of animals, the environment, the natural water supply, the provision of healthy, locally produced food and the funding of research.[110] Newer textbooks tell students that the constitution embodies a social consensus on certain fundamental values that is not neutral but based on liberty, equality and solidarity.[111] The last thirty years have seen an ever denser development of the constitution's 'basic order', which is immune to constitutional amendment but requires a referendum to change.[112] It took a German law professor teaching in Austria to tell the truth: The 'value-neutral constitution of rules of the game' is gone.[113]

13.4 NARRATIVE 3: EMPIRE AND EUROPE

13.4.1 *Constitutional Comparisons*

The third narrative to be presented here is the most recent, although it refers back to the oldest developments in Austrian constitutional law and is generally presented

[108] Jakab, 'Two Opposing Paradigms', 944–945; Somek, 'Wissenschaft vom Verfassungsrecht', nr 33; and Stephan Kirste, 'Das B-VG als Werteordnung – Zum Abschied vom Mythos einer wertneutralen Spielregelverfassung' (2020) 75 *Zeitschrift für Öffentliches Recht* 173, 178ff, refer to Ludwig Adamovich junior, Walter Berka, Bernd-Christian Funk, Karl Korinek, Theo Öhlinger, Peter Pernthaler and Günther Winkler.

[109] Constitutional Court, decision of 4 October 1984, nr G 70/84, *Schrottlenkung*, collected under nr VfSlg 10.179/1984.

[110] Federal Constitutional Act on Sustainability, the Protection of Animals, the Comprehensive Protection of the Environment, the Safeguard of Water and Food Supply, and Research, published in Federal Law Gazette I Nr 111/2013.

[111] Berka, *Verfassungsrecht*, 25; Christoph Grabenwarter and Michael Holoubek, *Verfassungsrecht – Allgemeines Verwaltungsrecht*, 5th ed. (facultas, 2022), nr 21.

[112] See Wiederin, 'Verfassungsbild', 64–65. I have participated in this endeavour; see Wagrandl, 'Militant Democracy in Austria'.

[113] Kirste, 'Das B-VG als Werteordnung', 173.

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with unabashed pride. Forget that the constitution is (allegedly) in ruins and that it (allegedly) only contains formal rules. Austria is the inventor of modern constitutional adjudication and a champion of European integration. What is there not to love? At last, the ubiquitous Austrian nostalgia for all things imperial[114] has found its way into constitutional thinking. It is justified, as, for once, Austria proved to be on the right side of history.[115] As has been alluded to before, the current Austrian constitution carries over many institutions and ideas of the old monarchy (such as its judiciary and system of administration, the division into states, etc.) and Hans Kelsen's thinking was shaped by his pondering over constitutional issues of the Empire. This story shall not be retold here.[116] Rather, I will explore how the old monarchy is represented as a model for Europe and the world and how Austrian constitutional law and practice relate to that. It is not a purely Austrian narrative but a 'World-Austrian'[117] one. No part of the Austrian constitution has given rise to more international, English-language literature than the so-called Austrian or Kelsenian model of constitutional adjudication. The Austro-Hungarian monarchy, once derided as a 'dungeon of peoples' (*Völkerkerker*), is increasingly seen as an early model of peaceful coexistence of nations under a common supranational roof and, hence, as a model for Europe.[118]

As always, the present narrative has more than one root. Kelsen himself drew a connection between his pure theory of law and the constitutional situation of the Austro-Hungarian empire. Kelsen, of Galician-Jewish origin, grew up in Prague but

[114] Promoted by such authors as Stefan Zweig, Robert Musil and Joseph Roth and visible on any stroll through the streets of Vienna. See, e.g., Katy Heady, 'Self-Ridiculing Nostalgia: Joseph Roth's Die Kapuzinergruft' (2018) 54 *Seminar: A Journal of Germanic Studies* 23.

[115] See Franz-Stefan Gady, 'Habsburg Nostalgia: Europe's Most Embarrassing Anachronism? Paradise Saved?' (10 June 2014) *Huffington Post*, www.huffpost.com/entry/habsburg-nostalgia-europe-austria_b_5473374.

[116] See Ewald Wiederin, '§ 7: Grundlagen und Gundzüge staatlichen Verfassungsrechts: Österreich', in Armin von Bogdandy and Peter M. Huber (eds.), *Ius Publicum Europaeum*, vol I (C. F. Müller, 2007), nr 1ff: 'the monarchy's long shadow'; Somek, 'Wissenschaft vom Verfassungsrecht', nr 1ff: 'the imperial heritage'; Jabloner, *Zum Nachhall*.

[117] To quote Christoph Bezemek and Alexander Somek, 'Die Wiederentdeckung Weltösterreichs: Eine Denkschrift' (2018) 57 *Der Staat* 135.

[118] See, e.g., Caroline de Gruyter, *Das Habsburgerreich: Inspiration für Europa?* (Böhlau, 2022); Philippe Gréciano and Martial Mathieu (eds.), *L'Autriche, un modèle pour l'Europe?* (Institut Francophone pour la Justice et la Démocratie, 2021); Jana Osterkamp, *Vielfalt ordnen: Das föderale Europa der Habsburgermonarchie (Vormärz bis 1918)* (Vandenhoeck & Ruprecht, 2020), 413ff; Helmut Rumpler, 'Introduction: The Habsburg Monarchy as a Portent for the New Europe of the Future', in Helmut Rumpler and Ulrike Harmat (eds.), *Die Habsburgermonarchie 1848–1919, vol XII: Bewältigte Vergangenheit? Die nationale und internationale Historiographie zum Untergang der Habsburgermonarchie als ideelle Grundlage für die Neuordnung Europas* (Verlag der Österreichischen Akademie der Wissenschaften, 2018); Johannes Feichtinger and Heidemarie Uhl (eds.), *Habsburg neu denken: Vielfalt und Ambivalenz in Zentraleuropa* (Böhlau, 2016); Solomon Wank, 'Some Reflections on the Habsburg Empire and Its Legacy in the Nationalities Question' (1997) 28 *Austrian History Yearbook* 131.

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spoke German and completed his studies in Vienna. His life and career are a typical example of trajectories in this period (including forced emigration and death in exile).[119] He identified state and law and shed the traditional, metaphysical notion of the state because, as he claimed:

> the state closest to me, the one I knew best from personal experience, the Austrian state, obviously was a mere union of law. Faced with the Austrian state, which was composed of so many different groups defined by race, language, religion and history, such theories that sought to found the state's unity on whatever social-psychological or social-biological connection between the people legally belonging to it were revealed as obvious fictions.[120]

It is not a big step to apply Kelsen's reasoning to European integration, which has been famously conceptualised as 'integration through law'.[121] The European Union itself is referred to as a 'community based on the rule of law',[122] which carries even more meaning in the German *Rechtsgemeinschaft* – a community of law. It has become fashionable to compare Austria-Hungary and the European Union,[123] with such comparisons often focusing on broad characteristics rather than technical details.[124] The similarities are striking enough. The Austrian half of the Austro-Hungarian so-called double monarchy was, at the beginning of the twentieth century, inhabited by approximately 29 million people of eight different language communities:[125] German, Czech, Polish, Ukrainian, Romanian, Slovenian, Italian and Croatian-Serbian (nine if one also counts Yiddish). As the Austrian half of the monarchy had no official language, anyone could address the authorities in their respective mother tongue.[126] Of the 516 representatives in the Austrian Parliament, only a (sizeable) minority, 233, spoke German. A complicated electoral system

[119] For a monumental biographical work, see Thomas Olechowski, *Hans Kelsen. Biographie eines Rechtswissenschaftlers* (Mohr Siebeck, 2020).

[120] Hans Kelsen, *Autobiographie* (1947), reprinted in Matthias Jestaedt (ed.), *Hans Kelsen Werke, vol I: Veröffentlichte Schriften 1905–1910 und Selbstzeugnisse* (Mohr Siebeck, 2007), 29 (60; author translation).

[121] See Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds.), *Integration through Law, vol I: Methods, Tools and Institutions, book 1: A Political, Legal and Economic Overview* (de Gruyter, 1986).

[122] European Court of Justice, Judgment of 23 April 1986, Case C-294/83, *Les Verts*, para 23.

[123] See, e.g., David Lawday, 'The Return of the Habsburgs' (18 November 1995) 337/7941, *The Economist*; Robert Cooper, 'The European Union and the Habsburg Monarchy' (2012), *Transit online*, www.iwm.at/transit-online/the-european-union-and-the-habsburg-monarchy; Caroline De Gruyter, 'Habsburg Lessons for an embattled EU' (23 September 2016), https://carnegieendowment.org/2016/09/23/habsburg-lessons-for-embattled-eu-pub-64658.

[124] See, e.g., Anthony M. Stevens-Arroyo, 'Austria-Hungary 1914: Nationalisms in Multi-National Nation-State' (2015) 75 *Comparative Civilizations Review* 99.

[125] For an excellent recently published history, see Pieter M. Judson, *The Habsburg Empire* (Harvard University Press, 2016).

[126] See Rosita Rindler-Schjerve and Eva Vetter, 'Linguistic Diversity in Habsburg Austria as a Model for Modern European Language Policy', in Jan D. ten Thije and Ludger Zeevaert (eds.), *Receptive Multiculturalism* (John Benjamins Publishing, 2007).

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ensured that everyone could vote for a representative who shared their language. The 1867 Bill of Rights guaranteed the right of every national group to protection and development of its culture and language, especially the right to the required state-funded schools, and it allowed everyone to choose to which national group they belonged. As Austria was a single country, there was, of course, free movement of persons, goods and services as well as shared Austrian citizenship in those parts of Europe that are now Austria, the Czech Republic, Slovenia and Bosnia as well as in parts of Poland, Croatia, Ukraine and Romania (Austrian citizenship did not apply to Hungary and the realms attached to it). To complete the picture, Austria-Hungary was also a customs[127] and a monetary[128] union. Its scientific and artistic zenith, captured by the 'fin-de-siècle Vienna' imaginary, barely needs any mention.[129] As nostalgic narratives go, all of this is a rosy image,[130] but it is not false.

13.4.2 *Constitutional Adoptions*

How does this tale of a benevolent, multicultural, supranational polity shape the Austrian constitution of today? In my view, the empire's legacy is best seen in a specific openness towards international law and, specifically, European integration. As mentioned in Section 13.2, no strong constitutional identity has ever developed that could be levelled against European demands. Here, the 'ruins' metaphor and the constitution's fraught origin story have prevented any sort of exaggerated pride. The Constitutional Court, for instance, never shied away from requesting preliminary rulings from the European Court of Justice. There have been four such requests, the first of which came in 1999, only four years after Austria's accession to the EU.[131] Incidentally, it was the first national Constitutional Court ever to issue such a request. The German Federal Constitutional Court only asked its first question in 2014,[132] despite having had the opportunity to do so for more than fifty years. Deep down, Austrian thinking about the constitution seems used to the fact that there is always one more level above it.

However, the Habsburg past and Kelsen's musings do not fully explain why there is no fear of contact between national and supranational law in Austrian legal

[127] Georges de Ménil and Mathilde Maurel, 'Breaking Up a Customs Union: The Case of the Austro-Hungarian Empire in 1919' (1994) 130 *Weltwirtschaftliches Archiv* 553.

[128] See Marc Flandreau, 'The Logic of Compromise: Monetary Bargaining in Austria–Hungary, 1867–1913' (2006) 10 *European Review of Economic History* 3.

[129] Carl E. Schorske, *Fin-de-siècle Vienna: Politics and Culture* (Knopf, 1979).

[130] For a critical account, see Helen Thompson, 'The Habsburg Myth and the European Union', in Francesco Duina and Frédéric Merand (eds.), *Europe's Malaise: The Long View* (Emerald, 2020).

[131] Constitutional Court, decision of 10 March 1999, nr B 2251/97; see the Judgment of the European Court of Justice of 8 November 2001, nr C-143/99, *Adria Wien Pipeline*.

[132] Federal Constitutional Court, decision of 14 January 2014, nr 2 BvR 2728/13 et al.; see the Judgment of the European Court of Justice of 16 June 2015, Case C-62/14, *Gauweiler*.

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practice. The real reason is the immense impact of the European Convention on Human Rights. Austria is one of the very few countries in which the Convention enjoys direct constitutional status.[133] When the Convention was ratified in the late 1950s, Austria's only source of human rights was the above-mentioned Bill of Rights of 1867 along with scattered provisions in various other places. To close the gap before a new, complete list of rights would be formulated, the Convention was retroactively declared a constitutional act in 1964.[134] A new Austrian Bill of Rights never materialised. It did not need to. Because its provisions enjoyed constitutional status and could be invoked before the courts, the Convention radically transformed Austrian constitutional law. Innovations in the field of human rights from now on came from Strasbourg, and the Constitutional Court learnt to acquiesce. Nowadays, it cites case law from the European Court of Human Rights frequently and extensively, without making any difference between the domestic and international level.[135] In a seminal judgment, the Constitutional Court even arrogated to itself the power to review conformity with the European Charter of Fundamental Rights,[136] which had been thought to be outside the Court's purview because it is not part of the constitution.[137] The establishment of administrative tribunals in 2014 can be seen as the ultimate concession to Strasbourg.[138] The ECHR's extensive case law on Article 6 regarding the right to a fair trial always posed a problem for Austria as there was no comprehensive judicial review of administrative acts.[139] A centuries-old tradition of review within the administrative branch itself was upended because

[133] See David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights*, 4th ed. (Oxford University Press, 2018), 28.

[134] See H. Petzold, 'The European Convention on Human Rights in the Austrian Constitutional Court' (1972–1973) 46 *British Yearbook of International Law* 401.

[135] See, e.g., Anna Gamper, 'Foreign Precedents in Austrian Constitutional Litigation' (2015) *Vienna Journal on International Constitutional Law* 9 27; 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, 66, 75.

[136] Constitutional Court, decision of 14 March 2012, nr B U 466/11, collected under nr VfSlg 19.632/2012.

[137] See, e.g., Andreas Orator, 'The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?' (2015) 16 *German Law Journal* 1429; Reinhard Klaushofer and Rainer Palmstorfer, 'Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law' (2013) 19 *European Public Law* 1; Stefan Kieber and Reinhard Klaushofer, 'The Austrian Constitutional Court Post Case-Law after the Landmark Decision on Charter of Fundamental Rights of the European Union' (2017) 23 *European Public Law* 221; Heinz Verdino, 'The Charter of Fundamental Rights of the European Union as Review Standard in Proceedings before the Constitutional Court' (2013) 7 *Vienna Journal on International Constitutional Law* 93.

[138] See, generally, Stefan Storr, 'Administrative Procedure and Judicial Review in Austria', in Giacinto della Cananea and Mauro Bussani (eds.), *Judicial Review of Administration in Europe* (Oxford University Press, 2021), 37.

[139] The above-mentioned *Miltner* case (n 40) illustrates the Constitutional Court's reluctance to accept Strasbourg's view; in the end, it had no choice.

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the Convention required it.[140] The change happened remarkably smoothly, but took a few decades. The Austrian constitution is used to Europe.

13.4.3 *Constitutional Innovations*

A second strand of the Empire-to-Europe narrative concerns the institution and radiance of the Austrian model of constitutional adjudication. It is even more self-congratulatory, depicting Austria as the nation that gave the world judicial review. As always, there is some truth and a lot more embellishment. The establishment of the Imperial Court of Justice (*Reichsgericht*) in 1867, which was entrusted with protecting the 1867 Bill of Rights, indeed marks a historical turning point. It was the world's first specialised court whose only task was fundamental-rights review; it could not, however, examine the constitutionality of laws.[141] After having exhausted all other remedies, persons who saw their fundamental rights violated by administrative acts could sue before the Imperial Court of Justice. In the almost fifty years of its existence, it developed a refined case law and enforced the promise that all nations of the empire had equal rights opportunities. There are countless examples in which the Court took the side of a national, religious or linguistic minority, be it the apportionment of school funds or the fight against antisemitism.[142]

Hans Kelsen's 1920 design for the Constitutional Court draws heavily on this already existing and well-respected institution. The new Constitutional Court inherited its judges, staff and procedure from the old Imperial Court of Justice. What Kelsen and the 1920 constitution essentially did was to give an additional function to an institution that had already worked well. It received the full power of judicial review, that is, the power to quash laws that it found to be unconstitutional.[143]

[140] See Friederike Bundschuh-Rieseneder and Alexander Balthasar, 'Administrative Justice in Austria in the Stage of Transition: From Administrative Appeals to Administrative Courts or the Final Stage of "Tribunalization" of Administrative Disputes', in Dacian Dragos and Bogdana Neamtu (eds.), *Alternative Dispute Resolution in European Administrative Law* (Springer, 2014), 209.

[141] See 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* (Oxford University Press, 2020), 21–26.

[142] See Ewald Wiederin, 'Die Rechtsprechung zum Staatsgrundgesetz', in Franz Merli, Magdalena Pöschl and Ewald Wiederin (eds.), *150 Jahre Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* (Manz, 2018), 71; Gerald Stourzh, *Wege zur Grundrechtsdemokratie* (Böhlau, 1989).

[143] See Grabenwarter, 'The Austrian Constitutional Court', 19; Christoph Bezemek, 'A Kelsenian Model of Constitutional Adjudication' (2012) 67 *Zeitschrift für öffentliches Recht* 115; Konrad Lachmayer, 'Austria: Constitutional Courts as Positive Legislators', in Allan R. Brewer-Carías (ed.), *Constitutional Courts as Positive Legislators. A Comparative Study* (Cambridge University Press, 2011), 251; Gamper and Palermo, 'The Constitutional Court of Austria', 64; Ronald Faber, 'The Austrian Constitutional Court: An Overview' (2008) 1 *Vienna Online Journal on International Constitutional Law* 49.

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Hans Kelsen is often credited with having developed the idea of a centralised, specialised court with the monopoly on judicial review of legislation.[144] More recent research has shown that he did not invent the full structure from scratch but worked on the basis of existing institutions and conceptions.[145] Rather than having born the idea of judicial review out of nowhere, Kelsen's genius manifests itself in his clever combining of and improving upon what he was given to work with. The idea of judicial review of legislation had been known at least since *Marbury v Madison*,[146] and the discussion around it had reached Germany and Austria in the mid-nineteenth century. The revolutionary constitutions of 1848/49 all provided for a court vested with the power of judicial review, but none of them lived long enough for such a court to be established.[147] Some Latin-American states had already copied US-style judicial review in the nineteenth century but had concentrated it in their respective apex courts.[148] The discussion around judicial review in Austria was revived by famous scholar of constitutional law Walter Jellinek in 1885, when he posited that only a specialised court could adjudicate on matters of (quasi-)federal division of competence between the empire and its provinces.[149] Only recently, a long forgotten draft from 1916 resurfaced, which devised a special court tasked with reviewing the legality of administrative regulations.[150] Kelsen drew on all these inspirations. His achievement was to give constitutional justice its final shape within a specialised, separate court outside the judiciary and with a monopoly on repealing

[144] See Alec Stone Sweet, 'Constitutional Courts', in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), 816; Mark Tushnet, 'Comparative Constitutional Law', in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford University Press, 2019), 1193, 1208ff; 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; Sara Lagi, 'Hans Kelsen and the Austrian Constitutional Court (1918–1929)' (2012) 9 *Co-herencia* 273.

[145] See, most recently, Ewald Wiederin, *Vergessene Wurzeln der konzentrierten Normenkontrolle in Österreich / Forgotten Roots of Concentrated Judicial Review in Austria* (Verlag Österreich, 2021); Ewald Wiederin, 'From the Federalist Papers to Hans Kelsen's "Dearest Child": The Genesis of the Austrian Constitutional Court' (2021) 76 *Zeitschrift für Öffentliches Recht* 313.

[146] See *Marbury v Madison*, 5 U.S. 137 (1803) and Stanley Paulson, 'Constitutional Review in the United States and Austria: Notes on the Beginnings' (2003) 16 *Ratio Juris* 223.

[147] See, e.g., 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.

[148] 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.

[149] Georg Jellinek, *Ein Verfassungsgerichtshof für Österreich* (Hölder, 1885).

[150] See Wiederin, 'From the Federalist Papers to Hans Kelsen's "Dearest Child"'.

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unconstitutional laws – which is now state of the art in constitution-making. Federalism, not human rights, would prove to be the decisive factor for establishing the Constitutional Court in 1920.[151] As the political parties fiercely fought about the centralism–federalism issue and only reached a fragile and complicated compromise, they did not trust each other to keep the peace. In this climate, erecting a Constitutional Court as a neutral arbiter was seen as a viable solution.[152] The protection of fundamental rights was inherited from the Imperial Court of Justice because it had a long tradition, not because it was the most pressing concern. It was not in Austria, however, that Kelsen's ideas would be implemented first. The Constitutional Court of Czechoslovakia was established a few months earlier than the one in Austria. Nowadays, it is the German Federal Constitutional Court that is most often depicted as the archetype of European judicial review, and judicial review itself is strongly associated with the protection of fundamental rights, not so much with questions of jurisdiction. The Austrian narrative ('We invented it!') must, therefore, be taken with a grain of salt. But, faced with rather unkind narratives about our constitutional law, the Constitutional Court provides a rare source of unquestioned pride.

13.5 CONCLUSION

What is there to learn from these constitutional narratives? The 'ruins' dictum and its belated refutation teach us that Austrian constitutional law scholars should be more careful with the words they use. They self-identify as guardians of the constitution. As such, they have a responsibility to show the constitution its due respect. Because, why should the public if even constitutional lawyers do not? Apart from that, it is true that accessible and easily comprehensible constitutions are important. Constitutional aesthetics should be upheld in the face of ever growing legislative and regulatory activity. Constitutions should not be abused to entrench whatever the current government wants in order to tie the hands of future governments. Democracy needs room for manoeuvre and meaningful choices. German constitutional court justice and professor, Dieter Grimm, has famously argued that the European Union is over-constitutionalised. Its treaties contain too many policy decisions that should be left to the political process.[153] This is not to say that the European Constitution is in ruins, no more so than the Austrian one. But they share a common trait that should not be the basis of pride in either case: they seem

[151] As is true for all older constitutional courts; see Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *Journal of Law, Economics and Organization* 587.

[152] Many constitutional courts were established based on the same rationale; 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.

[153] Dieter Grimm, *Europa ja – aber welches?* (Beck, 2016), 95. For an English translation, see Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press, 2017).

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bloated. However, derision, even if directed at obvious flaws, is not the way to go. It can easily miss its target and hit the innocent. A European constitutional patriotism, extravagant as this concept might be,[154] needs a constitution that is appreciated by the people closest to it: judges, public officials, constitutional scholars and their students.

This does not mean that we need a more formal, neutral style in European treaty making, at least if formality and neutrality are taken as ends in themselves. As shown, imagining the constitution as a purely formal set of rules of the game has never captured what a constitution is all about. A formalist approach to constitutional interpretation makes sense when delineating competences, jurisdictions and powers. These constitutional contents normally do not inspire great devotion. But every constitution is built on certain assumptions and certain values. If democracy, human rights and the rule of law are to be Europe's treasured principles, they require us to presuppose a certain notion of freedom and equality that must be defended when necessary, such as via militant democracy or in regard to Russia's invasion of Ukraine. The Austrian approach can teach us, though, that a constitution need not be treated as an article of faith in order to flourish.

Loyalty towards institutions, such as constitutional courts, requires a reason and motivation for it that everyone can grasp. In other words, it needs a persuasive story. In Austria, the Constitutional Court is perceived as a uniquely Austrian invention by constitutional superhero Hans Kelsen. That makes for a good foundation. The idea of judicial review remains unchallenged. I would suggest that, out of all the different constitutional features, it is the one most easily recalled by the public. The Constitutional Court's judgements are publicly discussed and often widely celebrated, in particular when they are seen as dealing a blow to the government. Not every court can tell such tales; not every court is as self-confident; not every court is as widely acclaimed. Founding stories cannot be generated out of a void. But they can be told more or less convincingly; they can be spun strategically; they can be directed at the public or at the experts.

The constitutional narratives presented here do not form an exhaustive list of the many ways the Austrian constitution has been thought of. I endeavoured to showcase three main currents of Austrian constitutional law scholarship. Some convey a feeling of malaise, such as the 'ruins' metaphor. Others are based on historical origin stories and theoretical reflection, such as the myth of the value-neutral constitution. Others still are told in retrospect because they are about something that has become seen as a great achievement, such as the 'invention' of constitutional adjudication. As the Austrian constitution embarks on its 105th year, some narratives will fade and others will arise. Old stories will be forgotten and new stories will be told. A constitution without narratives about it would be like a constitution without qualities: a curious object of study, but not fit for use.

[154] But see Müller, *Constitutional Patriotism*, 93ff.

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