Oñati Socio-Legal Series (ISSN: 2079-5971)
Oñati International Institute for the Sociology of Law
Avenida Universidad, 8 – Apdo. 28
20560 Oñati – Gipuzkoa – Spain
Tel. (+34) 943 783064 / opo@iisj.net / https://opo.iisj.net

The role of the judiciary: Interpreting vs creating law – or how Hans Kelsen justified "judicial activism"

OÑATI SOCIO-LEGAL SERIES FORTHCOMING: JUDGES UNDER STRESS
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL.1919
RECEIVED 9 NOVEMBER 2023, ACCEPTED 6 MARCH 2024, FIRST-ONLINE PUBLISHED 6 MAY 2024

PÉTER TECHET*

Abstract

Hans Kelsen was not only a legal theorist but also worked as a constitutional judge in the First Austrian Republic between 1919 and 1930. Faced with increasing political criticism due to its "activism", Kelsen radicalized his theory of law-application. He emphasized that judicial work generates law (i.e., it is genuinely political) and that a judge can also create new law outside the framework of possible norm meanings. In this way, he was able to refute political calls for the "depoliticization" of constitutional jurisdiction. In the paper, I present why the Austrian Constitutional Court was accused of "activism" and how Kelsen responded to it. The sociological question of how the judiciary exercises political power and how this power is perceived by politics is addressed in the paper with a focus on legal history, specifically regarding the Austrian Constitutional Court during the interwar period.

Key words

Hans Kelsen; Constitutional Court; judicial activism

Resumen

Hans Kelsen no fue sólo un teórico del derecho, sino que también trabajó como juez constitucional en la Primera República Austriaca entre 1919 y 1930. Ante las crecientes críticas políticas por su "activismo", Kelsen radicalizó su teoría de la aplicación del Derecho. Subrayó que la labor judicial genera derecho (es decir, es genuinamente política) y que un juez también puede crear nuevo derecho fuera del marco de los posibles significados de las normas. De este modo, pudo refutar los llamamientos políticos a la "despolitización" de la jurisdicción constitucional. En el artículo, expongo por qué se acusó al Tribunal Constitucional austriaco de "activismo" y cómo respondió Kelsen a ello. La cuestión sociológica de cómo el poder judicial ejerce

* Post-Doc-Researcher, University of Zurich, Faculty of Law (Zurich, Switzerland). Post-Doc-Researcher, University for Continuing Education (Danube University), Research Laboratory "Democracy and Society in Transition" (Krems, Austria). Email address: peter.techet@donau-uni.ac.at / p.techet@gmail.com

el poder político y cómo este poder es percibido por la política se aborda en el trabajo con atención a la historia jurídica, concretamente en relación con el Tribunal Constitucional austriaco durante el período de entreguerras.

Palabras clave

Hans Kelsen; Tribunal Constitucional; activismo judicial

Table of contents

1. Introduction

Hans Kelsen is still one of the best-known and most influential legal scholars, particularly in Italy, South America, and Central Europe. With his approach of describing the inner logic and structure of law in a purely legal way (Kelsen 1934, 1, 38), he also supported an anti-ideological view of law and jurisprudence (Kelsen 1934, 17, 36). Less well-known is his more "political" role in the First (Austrian) Republic. After World War I, he was involved in drafting the new constitution, where he helped institutionalize the so-called "concentrated constitutionality control," i.e. the "Austrian" model of "judicial review." Between 1919 and 1930, he himself served as a judge on the 1919 newly established Austrian Constitutional Court (*Verfassungsgerichtshof*; henceforth: VfGH), which was given the important power to strike down laws in 1920 with the new Constitution (Walter 2005).

My paper aims to examine the possibility of interpreting Hans Kelsen's *Pure Theory of Law* – specifically his theory of law-application – as a theorization of the experiences of an active and, in many ways, "activist" constitutional judge. By emphasizing the political character of "law-application", Kelsen was actually responding to the then conservative government policy in Austria of the interwar period, which tried to "depoliticize" the Constitutional Court. The debates of that time could be quite familiar to many even today: accusations of "judicial activism" and restructuring of the Constitutional Court in the interest of a conservative-authoritarian government policy. However, by justifying the political, "law-creating" power of the judiciary, Kelsen himself deconstructed at the end the main idea of "judicial review", i.e. the possibility of an objective constitutional application.

Especially for a socio-legal perspective, it is valuable to examine the legal history of the Austrian Constitutional Court during the First Republic. This shows patterns of argumentation and strategies utilized also in the present day against the "political" power of the judiciary. Additionally, Kelsen's theoretical reflection at that time on the inherently "political" (i.e., law-making) nature of the judiciary also provides a response to these contemporary criticisms. The paper is primarily a legal-theoretical analysis of a legal-historical issue that arose in interwar Austria: the political power of constitutional adjudication and the political attacks against it. The article does not aim to analyze current debates, but rather to illustrate the less-known European "prehistory" of the "activism"-accusation through the legal-historical case and to present the legal-theoretical reflection of that time (by Kelsen), which simultaneously provides a bold response to contemporary criticisms against the judicial power: The "political" power of the judiciary is not an anomaly but a necessity.

In my paper, therefore, the legal history of the Austrian Constitutional Court, especially the criticisms against it during the interwar period, serves as historical context for the theoretical question of whether and how the political power of constitutional adjudication is a pro or con argument for such an institution. The question is raised from a legal historical perspective, i.e. history of the Austrian Constitutional Court (I, II) and answered with the legal theory of one of the former constitutional judges of Austria, Hans Kelsen (III, IV): As he stated, the political power of the judiciary is inherent to and necessary in the legal system, meaning that the (in several countries also today formulated) demand for the "depoliticization" of the judiciary is not only politically

dangerous but also legally wrong. In the paper, this Kelsenian response, and its "radicalization" in contemporary legal theorists in Nanterre and Genova, is further discussed.

However, the legal theoretical proof of the political power of the judiciary is not yet a positive answer to why a constitutional adjudication should exist as a political power. This can only be positively answered in the context of liberal democracy, which, however, is not the primary purpose of this paper. Rather, this paper attempts to present a little-known debate about "judicial activism" from the legal history of the early 20th century (in Austria) and to answer the sociologically relevant question of the power position of the judiciary from a legal theoretical perspective based on this historical context.

2. Establishing of "Judicial review": Who is the first?

After the First World War, Constitutional Courts were established in Austria, Czechoslovakia (Osterkamp 2009), and Lichtenstein (Wille 2001), which had been strongly influenced by the Habsburg legal legacies. The idea of "judicial review" was not new to these countries, but the establishment of a single jurisdictional institution for this purpose was indeed a new concept. The question of which country had the first constitutional court is a matter of debate. The new German-Austrian state introduced a court called "Constitutional Court" (*Verfassungsgerichtshof*) in January 1919, but it was a continuation of the earlier Imperial Court (*Reichsgericht*) and did not have the power of striking down laws. In March 1919, the Court obtained the new competence of preventive "judicial review" over the legislation of the provinces (*Länder*). However, if we focus on the competency of striking down statutes, Czechoslovakia was the very first country in the whole world, which introduced a Constitutional Court (*Ústavní soud*) as repressive "judicial review" body in February 1920. Austria followed it in October 1920.

In his autobiography, Kelsen described the Austrian Constitutional Court as "the section that was most important to me and which I regarded as my most personal work." (Kelsen 2007, 67) He was indeed involved in the constitution-making process, but it would be an exaggeration to characterize him as the "father of the constitution" or "father of constitutional jurisdiction" (Wiederin 2021a, 327). He designed the new Court based on existing institutions, primarily the Imperial Court, and long-standing legal debates from the Habsburg Monarchy (Wiederin 2021b, 21).

After 1867, some aspects of the state power were already under "judicial review". The Imperial Court, established in 1867/1869, anticipated elements of constitutional jurisdiction with its competences of protection of fundamental rights or in disputes over competences. The Austrian legal scholar Ludwig Gumplowicz characterized the Imperial Court as "[the] real Constitutional Court" (Gumplowicz 1891, 154). With the Administrative Court (*Verwaltungsgerichtshof*), established in 1875/1876, administrative ordinances were also placed under judicial control. Even the "judicial review" of statutes existed in a nascent form after 1867: although all courts had to apply duly promulgated statutes, i.e. they were not allowed to review their content, the courts were responsible for checking the appropriate announcement of the laws (approval by the representative bodies, publication in the law gazette, etc.).

The legal scholars also debated the introduction of a substantive "judicial review" concentrated in one single court. After the German Lawyers' Congress in 1862 raised the question of "judicial review", the Viennese lawyer Heinrich Jaques wrote one of the opinions in favour of its introduction, in which he emphasized that the judge only had to apply valid – i.e. constitutionally correct – law (an unconstitutional law would not be a law) (Jacques 1863, 248). Georg Jellinek also called for a Constitutional Court in Austria in 1885 (Jellinek 1885). However, he later shifted away from this idea (Jellinek 1887, 397) and became more sceptical about the role that judges could play as guardians of the constitution (Jellinek 1906, 19).

The question of judicial control also arose during the so-called Bohemian constitutional crisis of 1913. After years of party-political conflicts in the Bohemian regional parliament in Prague, which practically paralyzed the provincial legislation, Emperor Franz Joseph decided in two imperial edicts to dissolve the provincial parliament and establish an emergency regime (Kleinwaechter 1914). It was unclear how to classify an imperial edict, as the constitutional theory did not recognize such a legal source. The Administrative Court characterized it as "emergency law," i.e. a statute with legal force but enacted without the parliament. Kelsen noted that the lack of possibility to strike down unconstitutional ordinances was "an unfortunate omission in our constitution" (Kelsen 1913, 3).

3. Allegations of "judicial activism" in interwar-Austria

The accusation of "judicial activism" against courts that review laws, such as the US Supreme Court and the Austrian Constitutional Court, has been ongoing, with some political circles criticizing the courts for overstepping their competencies. The accusation that the US Supreme Court is engaging in "activism" is not exclusive to one political ideology or party and can come from both progressive and conservative sides (Easterbrook 2002, 1401). The progressives accused the Supreme Court of violating the legislative power (Gerhardt 2002, 588, 592, 597) when the judges blocked social legislation (Lambert 1921, 67–91). In Austria, both sides criticized the Constitutional Court when its decisions did not align with political expectations.

3.1. Social Democratic criticism against the Constitutional Court

In 1922, the Social Democrats accused the Constitutional Court of engaging in "judicial activism" – although the term was not yet in use at the time – after the Court abolished the Viennese Act on House Caretakers. The legality of the Viennese Ordinance on Cleaning Fees was being challenged, but Kelsen convinced the other judges to also review the entire provincial statute, the Act on House Caretakers (Minutes of the non-public session of the Constitutional Court, 07.02.1922). This marked the first time the Court used its power to review a federal or provincial law *ex officio*. During internal debates, Social Democrat judge Friedrich Austerlitz criticized Kelsen for disregarding the importance of democratic politics (Minutes of the non-public session of the Constitutional Court, 14.03.1922). The Constitutional Court struck down both the Act on House Caretakers and the Ordinance on Cleaning Fees in 1922 (Decision of VfGH, henceforth: VfSlg; VfSlg 90/1922; VfSlg 102/1922). Austerlitz feared that this decision would have serious socio-political consequences, but Kelsen argued that "practical

considerations must not prevent the Constitutional Court from examining a statute ex officio" (Minutes of the non-public session of the Constitutional Court, 07.02.1922).

The social-democratic daily *Arbeiter-Zeitung*, of which Friedrich Austerlitz was the editor-in-chief, complained about what it saw as antidemocratic attitudes of the Constitutional Court. The newspaper claimed that "the constitution has not appointed the Constitutional Court to guarantee constitutionality" (*Arbeiter-Zeitung*, 23.04.1922, 1)[1] and considered the abolition of the Viennese Act on House Caretakers as an attempt to "make the Constitutional Court a censor over legislation", which would manifest a kind of "aversion against democracy" (*Arbeiter-Zeitung*, 16.06.1922, 3). Austrian Social Democrats generally believed that it was the role of parliament, not the courts, to decide on political issues. They were afraid of a strong constitutional jurisdiction because it could obstruct the realization of social-democratic goals, particularly in the case of a social-democratic federal government. In 1925, Social Democrat judge Austerlitz warned against a constitution with a strong judicial power: "[I]t should be said that taking powers away from parliament and giving them to the courts is not always democratic progress" (Austerlitz 1925, 161).

3.2. Conservative criticism against the Constitutional Court

The Austrian Constitutional Court became the subject of legal and journalistic criticism later on due to a dispute over marriage law. The debate centred around whether ordinary courts were authorized to declare new marriages invalid after dispensation from the impediments to marriage. The Austrian General Civil Code (ABGB) contained elements of ecclesiastical marriage law that did not legalize divorce for marriages of Catholics (§ 111 ABGB), with one exception: Provincial governors were allowed to dispense from the impediments to marriage. (§ 83 ABGB) After 1918, the Social Democrat provincial governor in Lower Austria (which also included Vienna until 1922) almost automatically granted dispensations from the impediment of existing marriage for Catholics or those who were married to Catholics. However, ordinary courts declared these new marriages null and void, which caused complete legal uncertainty in marriage law (Harmat 1999).

The Constitutional Court first confirmed the judicial declarations on invalidity of the new marriages (VfSlg 726/1926), with Kelsen standing in minority with his opposing opinion (Minutes of the non-public session of the Constitutional Court, 12.10.1926). However, the jurisdiction of the Constitutional Court changed significantly in 1927, as Kelsen convinced his fellow judges that the marriage debate represented a conflict of competences between the administration and judiciary, which should be decided in favour of the administration (Minutes of the non-public session of the Constitutional Court, 05.11.1927). Whether there was a competence conflict is highly controversial, as the administration decided on dispensation and the judiciary decided on new marriages after the dispensation, i.e. they dealt with two different legal issues (Petschek 1929).

Kelsen stated that since the realm of administration was no longer without legal oversight, the idea of the judiciary having precedence over the administration could no longer be justified (Kelsen 1929a, 22). He praised the evolving role of the Constitutional

[1] Texts translated by author. The other German quotes are also translated by the author in the paper.

Court, stating that "with its decisions in matters of marriage, which are so contested by civil and process lawyers, the Constitutional Court advocates for equal rights between administration and ordinary judiciary" (Kelsen 1928a, 110). Kelsen's theory of equality between judiciary and administration was particularly relevant in "Red Vienna", where the administration was more progressive than the conservative judiciary.

The new jurisdiction of the Constitutional Court also fulfilled the political goal of putting an end to confusion in marriage law and indirectly enabling separations: "The legislature is silent. But now the Constitutional Court has intervened" (Ehrenzweig 1928, 133). However, conservative circles in politics and legal scholarship viewed this intention as usurpation of legislative power. They believed that Kelsen was advocating at the Constitutional Court for his own constitutional theories. They felt that the Court was encroaching on the competence of the National Assembly by exercising legislative power itself (Mayr-Harting 1928, 1).

The Christian Socials sought to "depoliticize" the Constitutional Court. Critics of choices of the judges by political parties (in the parliament) were not unfounded, but they were particularly directed towards the independent judge, Hans Kelsen, which, according to Merkl, revealed the true motives behind the efforts to "depoliticize" the Constitutional Court (Merkl 1930, 511). In reality, the "depoliticization" of the court was a response to Kelsen's active role in marriage law cases.

The amendment of the Federal Constitution in 1929 restructured the Constitutional Court (§§ 58-66 BGBl. 392/1929). The constitutional judges, who were originally elected for life, lost their positions on February 15, 1930 (§ 25 para 1 BGBl. 393/1929). However, the political character of the selection process did not change much, as the Federal Government and parliament continued to appoint the judges.[2] As Merkl noted, the supposed "depoliticization" of the Court was a "repoliticization" (Merkl 1930, 509).

The real goal of "depoliticization" was achieved: the new Constitutional Court no longer overturned judicial declarations of marriage invalidity (VfSlg 1341/1930; VfSlg. 1342/1930; VfSlg. 1351/1930; VfSlg. 1352/1930). In the first decision involving a judicial declaration of marriage annulment, the new Court (without Kelsen) implicitly criticized the former one for "judicial activism" and stated that "it is not the role of the judiciary to eliminate unsatisfactory legal situations, but rather the responsibility of legislation" (VfSlg 1341/1930). Conservative circles welcomed the new decision as a "victory of the law" and the end of Kelsen's influence.

3.3. "Self-restraint" Austrian Constitutional Court?

Despite the criticisms mentioned above, which had significant consequences for Kelsen, the relevant literature describes the Austrian Constitutional Court as one that practiced self-restraint (Lachmayer 2017, 89). In contrast to today's constitutional courts, which are often criticized for being too "activist" (Cassese 2022), the Kelsenian "original model" of the Constitutional Court is perceived as non-activist. Agostino Carrino, for example,

[2] The president, the vice president, six members and three substitute members were proposed by the federal government, three members and two substitute members by the National Assembly and three members and one substitute member by the State Assembly, i.e. the position of the executive in the election of judges was stronger after 1929; § 65 para. 2 *BGBl*. 392/1929.

argues in his latest book that the Kelsenian Constitutional Court primarily focused on ensuring the formal unity and logical consistency of the legal system and did not attempt to defend a set of values against the legislature (Carrino 2022, 157).

During the debates about the political role of the Constitutional Court, particularly surrounding the issue of marriage, Kelsen defended the possibility and necessity of a strict, textual interpretation of the law. He believed that this approach would ensure the primacy of the democratic legislature (Kelsen 1928b, 240). In discussions about democratizing all stages of the legal process, Kelsen argued that democracy is realized through legislation (Kelsen 1929b, 73), and that later stages should strictly apply the laws (Kelsen 1929c, 2). He stated that constitutional jurisdiction requires a clearly formulated constitutional text without overly abstract principles (Kelsen 1928b, 241).

At the same time, the Constitutional Court had a decision whose reasoning was indeed a prime example of "self-restraint judiciary". It was about the Federal Renting Act, which the Provincial Government of Vorarlberg considered as expropriation that would not meet the conditions specified in the ABGB (expropriation was only possible in the "public interest"). Constitutional Court upheld the Act and stated that only the legislature was competent to define the specific meaning of such general terms like "public interest":

> It must be emphasized that the Constitutional Court cannot enter into a discussion of this question. The public good or public interest is a legally incomprehensible concept, it is exclusively up to the legislature to determine it. (...) It is the main task of the legislature to form an opinion about the many conflicting interests, to favour what they consider to be the higher interest, or to reach a compromise between conflicting interests. However, the Constitutional Court must firmly refuse to express an opinion on such a question. (VfSlg 1123/1928)

Independent, liberal, and Social Democratic constitutional judges voted in favour of upholding the Renting Act, while Christian Social judges voted against it (Minutes of the non-public session of the Constitutional Court, 07.12.1928). In this case, the majority of judges *actively* confirmed the socio-political goals of rent control through their "self-restraint" position.

While "judicial activism" is pushing for change, "self-restraint" judiciary can also be seen as an *active decision* to maintain the *status quo* (Ehs 2015, 19). A constitutional decision to abstain from reviewing a norm is just as "political" as an openly "activist" judgment (Pech 2001, 99). A decision is always "activist" (because it is a decision and not a recognition), and it is always correct in procedural sense (unless overridden by another decision). Therefore, the term of "judicial activism" is a purely political criticism, i.e. "a form of name-calling, a barely camouflaged way of saying 'judge with whom I disagree'" (Kmiec 2004, 1459).

4. Constitutional jurisdiction between law and politics

While Kelsen first justified the primacy of the legislature and the strict interpretation of the wording as a democratic imperative, and thus appeared to defend a "self-restraint" judiciary, as a constitutional judge he was more "activist" from the very beginning (Wiederin 2014, 304, Ehs 2017, 146). He recognized that constitutional jurisdiction, as the final decision-making power, had a law-making character as well. In the internal debate

at the Constitutional Court about the constitutionality of the Austrian Electricity Routes Act in 1922, he stated that "the actual question is essentially a question of subsumption. Of course, one could also subsume it differently. By resolving this question, the Constitutional Court exercises law-creating activity. As [the Court] was established, we were all aware that it might do this" (Minutes of the non-public session of the Constitutional Court, 14.10.1922).

However, Kelsen as a legal scholar only later justified this decisionist view of legal practice (Carrino 2022, 130, 135), as he was almost at the end of his career as a constitutional judge and was under political attacks in Austria.

4.1. Constitutional jurisdiction as legal theoretical and democratic necessity?

At the conference of the Association of German Constitutional Legal Scholars in 1928 in Vienna, Kelsen gave the first lecture on the question of "judicial review", in which he attempted to explain constitutional jurisdiction in terms of legal theory and democracy.

On the one hand, Kelsen justified the constitutional jurisdiction by applying the "theory of legal gradation", also known as the *Stufenbaulehre* (Kelsen 1929d, 31). This theory, developed by the Austrian scholar Adolf Julius Merkl, suggests that the law is not fully established at the legislative stage, but is also emerging at further stages (Merkl 1918). This theory not only highlights the creative, law-making character of legal applications, but also relativized "the previously unchallenged position of the statute" (Merkl 1923, 203). The legislative stage is not law-making *ex nihilo*, as it must also apply the constitution (Eisenmann 1928, 100). Thus, there should be an institution to control whether lower norms (e.g. statutes) correspond to higher ones (ultimately the constitution) (Kelsen 1929d, 65).

On the other hand, Kelsen justified the judicial control of legislation as a necessary correction to prevent an unrestrained majority rule. He understood democracy as pluralism, where compromise is the key element (Kelsen 1929b, 65, 100). Therefore, constitutional judiciary must protect minorities to avoid the dictatorship of the majority (Kelsen 1929d, 81). Constitutional jurisdiction allows for individualized expression of different interests (Cappelletti 1984, 90, Kavanagh 2003, 481) and thus realizes a form of deliberative democracy (Ferejohn 2002, 53).

4.2. Anti-pluralist and legal positivist critique against constitutional jurisdiction

In the interwar period, Carl Schmitt fiercely opposed the idea of constitutional jurisdiction. He viewed democracy as requiring homogeneity and unity (Schmitt 1928/2017, 234, 1932/1988, 31) and saw the protection of minorities as unnecessary and contrary to democratic principles. He argued that in a "true" democracy, there are no permanent interests worthy of protection (Schmitt 1931/1996, 43) and that the outvoted minority should not receive special representation (Schmitt 1931/1996, 86). Schmitt believed that constitutional jurisdiction threatened the unity of the state and people (Schmitt 1931/1996, 70), and saw it as a form of constitutional legislation, rather than a law-application. (Schmitt 1931/1996, 45) He feared that "the guardian of the constitution would become the lord of it" (Schmitt 1931/1996, 53).

Schmitt viewed the constitution as a purely political category (Schmitt 1928/2017, 4, 15, 20) and believed that the judiciary should remain apolitical (Schmitt 1933, 9), as if its role was limited to simply applying laws set by the legislation rather than actively shaping them (Schmitt 1931/1996, 41). The idea of the "apolitical" judiciary is based on the view that the law is complete with the statute, and that the further stages only have to recognize and apply it.

Schmitt's critique of constitutional jurisdiction foreshadowed many of today's criticisms, particularly those from the left-wing "Critical Law Studies" movement, which aim to prove the "legal impossibility" and "democratic illegitimacy" of judicial control of politics. Critics of "judicial review" argue that it gives too much power to the judiciary and undermines the power of the legislature. All criticisms of "judicial review" have in common that they overvalue the competency of parliament to enact laws as if the parliamentary system established an *omnipotence of the legislature* and an *impotence of the judiciary*. The criticism of constitutional jurisdiction as "undemocratic judicial power" is the continuation of a populist understanding of politics and democracy (Blokker 2019, 547), which currently benefits political regimes that want to weaken the control mechanisms (Halmai 2019, 302).

4.3. Constitutional jurisdiction as political power?

In his response, Kelsen challenged Schmitt's arguments by placing a strong emphasis on the political nature of the "application of law" (Kelsen 1931, 586). He questioned the traditional division between law and politics, or between "law-making" and "law-application" (Kelsen 1931, 587). According to Kelsen, the "application of law" is just as much a political process as legislation. He stated that "there is only a quantitative, not a qualitative difference between the political character of legislation and that of the judiciary" (Kelsen 1931, 586), because "every legal conflict is a conflict of interests or power, therefore, every legal dispute is a political dispute" (Kelsen 1931, 587).

Kelsen believed that the separation between law and politics is untenable and that all judicial activity is inherently political (Kelsen 1953, 152). Nothing would be more "non-Kelsenian" than the idea of "apolitical" law and "apolitical" justice (Pegoraro 2020, 903, 927). By emphasizing the political nature of the judiciary, which is a more radical viewpoint than strict textualism, Kelsen deconstructed the idea of "objective law" and "apolitical judiciary." He referred to the term "application of law" as "obscuring terminology" (Kelsen 1924, 221).

5. Constitutional jurisdiction: Application or making of law?

The concept of constitutional jurisdiction can be justified if the "application of law" is understood as a knowledge-based process. In this case, judicial control of legislation would be theoretically possible and democratically legitimate. However, whether the "application of law" is a purely cognitive operation is a contentious topic in legal theory.

5.1. "Application of law" as knowledge or decision?

An important internal discussion took place among the scholars of the "Vienna School of Legal Theory" about whether the norm was recognized or produced during the "application of law". This question also affected the role of jurisprudence as legal

knowledge. Is there a norm before the "application" that the jurisprudence could recognize (as Adolf Merkl claimed), or does the norm only emerge as product of the "application" that jurisprudence could only register (as Kelsen's renegade student Fritz Sander claimed)?

Although Merkl acknowledged that the "application of law" is a function of the will, he located this operation within the framework of possible meanings (Merkl 1918, 463). Merkl distinguished between "legal interpretation" and "legal application". He assigned jurisprudence the task of interpreting the norms (reproducing their content and adding nothing to the norm that is not already inherent in it) (Merkl 1916, 540). Merkl defined interpretive jurisprudence as control of the "application of law" (Merkl 1923, 285), i.e. "law is what jurisprudence recognizes as true" (Merkl 1923, 290). Therefore, the "application of law" would not be a decision empowered to every result, but a decision about the correct meaning: Even if there is not just one correct solution, the "application of law" must stay within the framework of what is "right" and "true".

Of course, this does not mean that the legal system cannot contain an "untrue" law, for example because of an incorrect but final judgment. The legal system can very well justify the "legal errors" according to the specific logic of legal force, which Merkl called "error calculation" (*Fehlerkalkül*) (Merkl 1923, 277, 296, 301). However, by allowing the "application of law" as an act of will only within the framework of the possible norm meanings – i.e. within a framework that can be recognized –, Merkl ultimately gave jurisprudence the priority over the "application of law".

Fritz Sander rejected and criticized Merkl's distinction between "interpretation" (as cognition) and "application" (as decision). Sander argued that there is nothing before the "application of law", which can be interpreted (Sander 1921, 11). The idea of pre-existing law would be natural law (Sander 1918, 351). According to him, legal science should not formulate an "ought" for the "application of law", but rather the "application of law" should produce the "ought" (Sander 1926, 220). What is law cannot be determined *a priori* (Sander 1919, 482), only registered *a posteriori* (Sander 1923a, 294, 307, 1923b, 69, 122). According to him, anything that is enacted as law by an authorized (or capable) body is considered law until it is abolished by another authorized (or capable) body (Sander 1925, 177, 190). Therefore, it is unnecessary and impossible to distinguish between "correct" and "incorrect" law before a judge's decision has been made (Sander 1919, 478). Instead of determining the legal practice *a priori*, jurisprudence should only describe the dynamic, open legal process.

5.2. "Application of law" as empowerment?

In the debate between Merkl and Sander, Kelsen did not take a clear stance. He accepted the legally recognizable framework of possible norm meanings as a theoretical barrier for "application of law", but later moved towards Sander's radical position. The main difference between Merkl and Kelsen was the direction of their interest. Merkl aimed to frame "application of law" in order to prevent any "incorrect" products or at least to be able to criticize them, while Kelsen aimed to explain why "application of law" was possible even outside of the recognizable framework. However, while Sander rejected the idea of jurisprudence as *a prior* knowledge, Kelsen did not deconstruct jurisprudence so radically. Thus, Kelsen oscillated between the positions of Merkl and Sander:

recognizing legal knowledge as a framework, but also *justifying "application of law" as authorized to produce any results*.

Kelsen wrote that an act imputable to the state should be regarded as "error-free" until another body whose decisions are also imputable to the state abolish it (Kelsen 1914, 55). As long as a legal act is valid, it is considered to be "error-free". The sociological question of whether the law is "wrong" was transformed by Kelsen into a legal-theoretical question of why even "wrong" law is considered law. However, his answer was not that of classical legal positivism. Instead, Kelsen highlighted the socio-political power of judges by placing the legal interpreter at the very center of the legal system. Even though his doctrine in this regard was purely theoretical, it simultaneously serves as an explanation for the socio-political power-position of the judiciary.

Kelsen was primarily interested in understanding how and why "application of law" can sometimes produce "incorrect" law. To justify this, he posited that "application of law" is an *authoritative decision* about what the law should be (Kelsen 1960, 351). Kelsen emphasized the significant power of this process, describing it as the "*authentic interpretation*". He explained that through "*authentic interpretation*", a legal organ can not only realize one of the possibilities indicated by cognitive interpretation, but can also produce a norm that lies completely outside of the framework established by the standards (Kelsen 1960, 352). This radical realistic and anti-ideological description of the inner-logic of legal system reveals the *structurally closed but open-ended legal dynamics* (Chiassoni 2012, 246). Thus, Kelsen clearly departed from classical legal positivism: What may appear from the internal perspective of the legal system as "authentic interpretation," thus as empowerment of the judges for law-making, can be viewed from an external perspective as political power and the sociological dynamics of the law-application.

Kelsen argued that the "application of law" was empowered to establish new laws through "authentic interpretation" (*Alternativermächtigung*). This means that there is no room for error within the legal system as any decision made by a legal body with the authority to interpret the law is considered legally correct. Therefore, the "errors" of law is not a question of substance but rather a question of competency, i.e. who has the authority to apply the law. The "legal" force of a legal act does not depend on the on the legal act itself, but on the effectiveness of its author (interpreter). And thus, we are actually dealing with a sociological question that Kelsen did not directly answer but opened up with his doctrine: Why and how do judges exert political power?

Kelsen's theory (on the interpretation of law) was radicalized in Nanterre (*théorie réaliste de l'interprétation*) and Genoa (*giusrealismo genovese*). This legal realist approach in France and Italy emphasizes the *ambiguity of the "norm text"* and the *independence of the "norm" from the text*. According to this theory, because only the text is available, the norm can neither be interpreted nor applied – it only arises in the non-cognitive operation of the "application of law", also known as "authentic interpretation". As Riccardo Guastini writes: "Before the interpretation, there is no 'norm'" (Guastini 1995, 17). This is why the judge is considered the sole legislator (Troper 2006, 29, 31).

The positions of Michel Troper and Riccardo Guastini differ on the question of how the "norm text" affects the "application of law." Guastini sees the "norm text" as a framework in which the "application of law" sets the norm (Guastini 2001, 43, 2006, 80,

84, 2019, 14). He does not dispute that the "application of law" creates the norm, but believes that the "norm text" provides a framework for it. Troper is more radical, he claims that "application of law" is completely unrestricted (Troper 1981, 521, 1994, 87, 99). If the norm is created by interpretation, any "legal application" would be by definition valid (Troper 2006, 35). Troper also disputes the idea that a "competency norm", which grants the body applying the law the authority to exercise its competence, must exist before the "application of law". He argues that the "competency norm text" also requires interpretation, so the "competency norm" only arises in the interpretation process. This means that a body applying the law can expand its competencies without any restrictions (Troper 2006, 33).

Guastini emphasized that the legitimacy of the "application of law" (at least for the outside) is dependent on legal arguments provided by the "norm text." For this reason, the voluntarist "application of law" also presupposes the cognitive knowledge of the text (Guastini 2011, 256). However, even if the text can be recognized, it does not necessarily mean that the arguments related to the text represent the true reasons of a judgment. As Matthias Jestaedt remarks ironically: "[T]here are three types of reasons for a judgment, namely the verbal and written reasons as well as the real ones" (Jestaedt 2011, 15). Troper understands the written, published reasons of a decision as a mere concealment of the completely free law-making power of "application of law" (Troper 1978, 295). Not legal, but extra-legal (professional, sociological, organizational, psychological, etc.) barriers would ensure that that the "application of law" in reality – despite the possibility of being able to do and want everything – is not completely arbitrary (Champel-Desplats and Troper 2005). This means: While the legal-realist "radicalization" of Kelsen's theses reveals the pure political power of every legal application, the sociological jurisprudence, which serves as a complement to legal theoretical analysis in Nanterre, demonstrates the limits and possibilities of juridical political power in light of societal and professional circumstances.

5.3. "Judicial review": Increasing the effectiveness of the constitution or the power of judges?

The idea of constitutional jurisdiction presupposes a hierarchical and uniform legal order in which the supremacy of the constitution must be guaranteed. Merkl believed that a constitution without constitutional jurisdiction was "a lex imperfecta, a wish addressed to the legislation" (Merkl 1921, 579). Kelsen also justified constitutional jurisdiction as a tool of "increasing the validity of the constitution" (Kelsen 1929d, 80). However, the question arises as to whether these ideas correspond to the radical-realistic theory of the "application of law" (described above). Is the constitution effective only if norms can be stroke down on grounds of "unconstitutionality"? Does the abolishment of a norm result from the recognition of an objective, "true" meaning of the constitution? Is a constitution really less valid if the norms that exist under the constitution are not subject to "judicial review"?

The idea that constitutional jurisdiction would make the constitution more effective and increase its validity misunderstands the nature of validity. The question of whether a norm is constitutional is one of validity, not that of content. A norm's validity is based on whether it was produced by a body empowered to produce norms, not on its content

being "right" or "wrong". The "correctness" or "rightness" of a norm is a philosophical, moral, or political question that can be discussed in jurisprudence, but it does not affect the norm's validity. A norm is valid if it is produced by a body empowered to produce norms. Its validity is based on the constitution, therefore, a valid norm is constitutional by definition. A norm cannot be "constitutional" or "unconstitutional" because its validity presupposes constitutionality.

However, Merkl viewed constitutional jurisdiction as the inclusion of legislation that was unrestricted within the legal system (Merkl 1921, 579), as if the legislation had to be the objective "application" of the constitution and could not produce norms of any content. In contrast to Merkl, Kelsen recognized that it is possible for statutes to be *"unconstitutional" but still be constitutionally valid*. As long as a norm is not stroked down, it has to be considered a full part of the legal system, because its validity can be traced back to the constitution. (Kelsen 1934, 85) This means that the constitution empowers the legislature to enact even "unconstitutional" laws (*Alternation*) (Kelsen 1929d, 79).

But then we have a serious problem: If we take the Kelsenian thesis seriously, the purpose of constitutional jurisdiction becomes questionable. If the constitutionality of the legal system is already guaranteed by the validity of norms, the task assigned to Constitutional Courts seems unnecessary. All valid norms would be, by definition, constitutional and the entire legal system is constitutional without the need for constitutional jurisdiction (Troper 1977, 138). Therefore, a constitution without constitutional jurisdiction would be completely effective and would not require "judicial review" (Troper 1977, 140).

Validity is not a gradual property; a constitution on which the validity of other norms is based is not less valid than a constitution that empowers judges to abolish the law. The fact that norms can be overruled by a court with reference to the constitution does not reinforce the validity or effectiveness of the constitution, but only the power of the body tasked with reviewing the "constitutionality" of laws. This also explains why there is no "judicial review" of the federal legislation in Switzerland, as the Federal Constitution grants the Federal Assembly (the parliament) the power to legislate and abolish laws, ensuring the constitutionality (validity) of the federal legislation.

Although constitutional jurisdiction does not contribute to the effectiveness of the constitution, it can be justified as a means of controlling substantive "constitutionality", particularly in regards to fundamental rights (Kelsen 1929d, 37). The political idea behind constitutional jurisdiction is to justify the judicial control of politics as a legal cognition that would necessarily recognize the "correct" meaning of the constitution. This understanding of "application of law" would imply that the decisions of constitutional judges would be valid only if they are "correct", i.e., if they correspond to the sole meaning of the constitutional text:

> And if one says, for example, that the [Austrian] Constitutional Court cannot err, this does not mean that every act of the Constitutional Court, no matter how contradictory it may be, is legally correct, but only that the Constitutional Court did not manifest itself at all in that act, even though it may have been authored by the group that we are accustomed to addressing as the Constitutional Court. (Merkl 1921, 605)

Merkl stated that it would be "sad if a court designated as the guardian of the constitution did not provide the guarantees of almost exclusively *correct* constitutional

jurisdiction" (Merkl 1921, 609). The expectation for the "application of the law" to be "correct" is based on the idea that applying the norm means recognizing its content.

However, as Daniel Fässler, a member of the Swiss Council of States (the Upper House of the Federal Assembly), noted during the last debate on constitutional jurisdiction: "Whether a statute is constitutional or not cannot be determined with a ruler or a scalpel" (*Amtliches Bulletin der Bundesversammlung*, 12.09.2022, 653). A norm is therefore not abolished because it was always "unconstitutional" – it *becomes* "unconstitutional" because (or rather: *after*) it is abolished (Troper 1995, 167). The "constitutionality" (or the "unconstitutionality") of a norm is not recognized, but *created by the judge* (Troper 2005, 34). A constitutional judge's decision is empowered to shape and interpret the constitution, as outlined in Kelsen's theory of "law-application", no matter what the result is. Accordingly, constitutional jurisdiction means the authorization to disqualify norms in an "authentic" way as "unconstitutional" and thus to eliminate them from the legal system:

> What is called 'unconstitutionality' of the law is therefore by no means a logical contradiction between the content of a law and the content of the constitution, but a condition stipulated by the constitution for the initiation of a procedure that either leads to the abolishment of the law which was until then valid and therefore also constitutional... (Kelsen 1934, 86)

Kelsen only addresses the question of why the decisions of a constitutional court are always considered lawful. If there is no higher body to review a decision, the decision is presumed to be valid (Kelsen 1925, 277). However, the explanation of why every decision of a constitutional court is by definition valid does not resolve the issue of the democratic legitimacy of the institution, and may even bring it into sharper focus.

6. Conclusion: "Pure Theory of Law" as deconstruction of the idea of objective "law-application"?

Kelsen's attempts to legitimize constitutional jurisdiction through legal theory reveal that the concept is fundamentally *political* in nature (Bisogni 2017, 57, 69). The "Pure Theory of Law" cannot justify the institution of constitutional jurisdiction itself, but it can explain its legal practice and *power* (Bisogni 2017, 59). As a *legal scholar*, Kelsen was able to refute criticisms he faced as *constitutional judge*. However, in doing so, he developed a radical realistic theory of the "application of law" which, as Kelsen himself acknowledged, can undermine the idea of law as a fixed order (Kelsen 1934, 99). If the content of law is not clear at the highest stage of the norm hierarchy, which the other stages can recognize and apply, the predictability of the law turns out to be an illusion (Kelsen 1934, 100). Instead of legal certainty, there is only *certainty of the judge* (Fechner 1969, 110), i.e. the "Pure Theory of Law" justifies the legal body whose decisions ("legal applications") determine the law (Carrino 2011, 223).

When the Austrian Constitutional Court came under political attacks in the interwar period, it was crucial and relevant for Kelsen to refute the assertion that the judiciary could / should be entirely "apolitical". However, this thesis can also be turned against constitutional adjudication (if the judiciary exercises political power, it is not a check but merely another political power without checks), hence constitutional adjudication cannot be positively justified without a theory of democracy. Nevertheless, for socio-

legal research on judicial power itself, Kelsen's theory is very helpful because it can frame and explain the sociological findings about judicial power.

Thus, it is insufficient to demonstrate in a pure theoretical way the law-making power of the law-application. Instead, the broader socio-political context must be considered: The necessity of constitutional adjudication (in a rule-of-law system) arises from the pluralistic democracy, wherein legislative majority does not mean absolute power; and the constraints on constitutional adjudication stem from the societal, political, and scholarly milieu, where not all that is theoretically conceivable would be assumed or tolerated.

References

Amtliches Bulletin der Bundesversammlung, Herbst-Session 2022, Bern: Schweizer Parlament.

Arbeiter-Zeitung, 16.06.1922, 3.

Arbeiter-Zeitung, 23.04.1922, 1.

Austerlitz, F., 1925. Verfassungsrevision. *Der Kampf*, 18(5), 161–165.

Bisogni, G., 2017. *La 'politicità' del giudizio sulle leggi. Tra le origini costituenti e il dibattito giusteorico contemporaneo*. Turin: Giappichelli.

Blokker, P., 2019. Populism as a constitutional project. *International Journal of Constitutional Law* [online], 17(2), 536–553. Available at: https://doi.org/10.1093/icon/moz028

Cappelletti, M., 1984. *Giudici legislatori?* Milan: Giuffrè.

Carrino, A., 2011. *La giustizia come conflitto. Crisi della politica e Stato dei Giudici*. Milan: Mimesis.

Carrino, A., 2022. *Legge e libertà. Primato del parlamento e sindacato delle leggi nella costituzione austriaca del 1920*. Milan: Mimesis.

Cassese, S., 2022. *Il governo dei giudici*. Bari: Laterza.

Champel-Desplats, V., and Troper, M., 2005. Proposition pour une théorie des contraintes juridiques. *In:* V. Champel-Desplats, M. Troper and C. Christophe, eds., *Théorie des contraintes juridiques*. Paris: LGDJ, 11–23.

Chiassoni, P., 2012. Il realismo radicale della teoria pura del diritto. *Materiali per una storia della cultura giuridica*, 42(1), 237–261.

Easterbrook, F.H., 2002. Do Liberals and Conservatives differ in Judicial Activism? *University of Colorado Law Review* [online], 73, 1401–1416. Available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2135&context=journal_articles

Ehrenzweig, A., 1928, Die Dispensehe im Kompetenzkonflikt. *Juristische Blätter*, 57(7), 133–136.

Ehs, T., 2015, Der VfGH als politischer Akteur. Konsequenzen eines Judikaturwandels? *Österreichische Zeitschrift für Politikwissenschaft* [online], 44(2), 15–27. Available at: https://doi.org/10.15203/ozp.296.vol44iss2

Ehs, T., 2017. Das politische Moment der Verfassungsgerichtsbarkeit. *In:* E. Özmen, ed., *Hans Kelsens Politische Philosophie*. Tübingen: Mohr, 133–147.

Eisenmann, C., 1928. *La justice constitutionnelle et la Haute-Cour constitutionnelle d'Autriche*. Paris: Pichon & Durand-Auzion.

Fechner, E., 1969. Ideologie und Rechtspositivismus. Ideologische Elemente in positivistischen Rechtsanschauungen dargestellt an Hans Kelsens "Reiner Rechtslehre". *In:* W. Maihofer, ed., *Ideologie und Recht*. Frankfurt am Main: Klostermann, 97–120.

Ferejohn, J., 2002. Judicializing Politics, Politicizing Law. *Law and Contemporary Problems* [online], 65(3), 41–68. Available at: https://doi.org/10.2307/1192402

Gerhardt, M.J., 2002, The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights. *William and Mary Bill of Rights Journal* [online], 10(3), 585–646. Available at: https://scholarship.law.wm.edu/wmborj/vol10/iss3/3/

Guastini, R., 1995. *Il Giudice e la legge. Lezioni di diritto costituzionale*. Turin: Giappichelli.

Guastini, R., 2001. Realismo e antirealismo nella teoria dell´interpretazione. *Ragion pratica*, 17, 43–52.

Guastini, R., 2006. *Lezioni di teoria del diritto e dello Stato*. Turin: Giappichelli.

Guastini, R., 2011. *Interpretare e argomentare*. Milan: Giuffrè.

Guastini, R., 2019. *Prima lezione sull´interpretazione*. Modena: Mucchi.

Gumplowicz, L., 1891. *Das österreichische Staatsrecht (Verfassungs- und Verwaltungsrecht). Ein Lehr- und Handbuch*. Vienna: Manz.

Halmai, G., 2019. Populism, Authoritarianism and Constitutionalism. *German Law Journal* [online], 20(3), 296–313. Available at: https://doi.org/10.1017/glj.2019.23

Harmat, U., 1999. *Ehe auf Widerruf? Der Konflikt um das Eherecht in Österreich 1918–1938*. Frankfurt am Main: Klostermann.

Jacques, H., 1863. Gutachten. *Verhandlungen des Vierten Deutschen Juristentages*, 1, 240–257.

Jellinek, G., 1885. *Ein Verfassungsgerichtshof für Österreich*. Vienna: Hölder.

Jellinek, G., 1887. *Gesetz und Verordnung*. Freiburg: Mohr.

Jellinek, G., 1906. *Verfassungsänderung und Verfassungswandlung. Eine staatsrechtlich-politische Abhandlung*. Berlin: Häring.

Jestaedt, M., 2011. Verfassungsinterpretation in Deutschland. *In:* G. Lienbacher, ed., *Verfassungsinterpretation in Europa. Heinz Schäffer Gedächtnissymposion*. Vienna: Sramek, 5–35.

Kavanagh, A., 2003. Participation and judicial review: A reply to Jeremy Waldron. *Law and Philosophy*, 22(5), 451–486.

Kelsen, H., 1913. Die böhmische Verwaltungskommission vor dem Verwaltungsgerichtshof. *Neue Freie Presse (Abendblatt)*, 5 November, 3.

Kelsen, H., 1914. Über Staatsunrecht. Zugleich ein Beitrag zur Frage der Deliktsfähigkeit juristischer Personen und zur Lehre vom fehlerhaften Staatsakt. *Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart*, 40, 1–114.

Kelsen, H., 1924, Die Lehre von den drei Gewalten oder Funktionen des Staates. *In:* F. von Wieser, ed., *Kant-Festschrift zu Kants 200. Geburtstag am 22. April 1924*, Berlin: Rotschild, 214–248.

Kelsen, H., 1925. *Allgemeine Staatslehre*. Berlin: Springer.

Kelsen, H., 1928a. Der Begriff des Kompetenzkonfliktes nach geltendem österreichischen Recht. *Juristische Blätter* 57(6), 105–110.

Kelsen, H., 1928b. La garantie juridictionnelle de la Constitution (La Justice constitutionnelle). *Revue du Droit Public et de la Science Politique en France et à l´étranger*, 45, 197–257.

Kelsen, H., 1929a. *Justiz und Verwaltung*. Vienna: Springer.

Kelsen, H., 1929b. Geschwornengericht und Demokratie. Das Prinzip der Legalität. *Neue Freie Presse*, 03. 02. 1929, 2.

Kelsen, H., 1929b. *Vom Wesen und Wert der Demokratie*. Tübingen: Mohr.

Kelsen, H., 1929d. Wesen und Entwicklung der Staatsgerichtsbarkeit. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 5, 30–88.

Kelsen, H., 1931. Wer soll der Hüter der Verfassung sein? *Die Justiz*, 6, 576–628.

Kelsen, H., 1934. *Reine Rechtslehre*. Leipzig/Vienna: Deuticke.

Kelsen, H., 1953. Was ist die Reine Rechtslehre? *In:* M. Imboden *et al*., eds., *Demokratie und Rechtsstaat. Festgabe für 60. Geburtstag von Zaccaria Giacometti*. Zurich: Polygraphischer, 143–162.

Kelsen, H., 1960. *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit. Zweite, vollständig neu bearbeitete und ergänzte Auflage*. Vienna: Deuticke.

Kelsen, H., 2007. Autobiographie (1947). *In:* M. Jestaedt, ed. *Hans Kelsen Werke*, Vol. 1, Tübingen: Mohr, 29–91.

Kleinwaechter, F., 1914. Die böhmische Frage. *Zeitschrift für Politik*, 7, 644–670.

Kmiec, K.D., 2004. The Origin and Current Meanings of Judicial Activism. *California Law Review* [online], 92(5), 1441–1477. Available at: https://doi.org/10.2307/3481421

Lachmayer, K., 2017. The Austrian Constitutional Court. *In:* A. Jakab, A. Dyevre and G. Itzcovich, eds., *Comparative Constitutional Reasoning* [online]. Cambridge University Press, 75–114. Available at: https://doi.org/10.1017/9781316084281.005

Lambert, E., 1921. *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis. L´expérience américaine du contrôle judiciaire de la constitutionnalité des lois*. Paris: Giard.

Mayr-Harting, F., 1928. Groteske im Rechtsstaat. *Reichspost*, 10.07.1928, 1–2.

Merkl, A.J., 1916. Zum Interpretationsproblem. *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart*, 42, 535–556.

Merkl, A.J., 1918. Das doppelte Rechtsantlitz. Eine Betrachtung aus der Erkenntnistheorie des Rechtes. *Juristische Blätter*, 47(41/42), 425–427, 444–447, 463–465.

Merkl, A.J., 1921. Die gerichtliche Prüfung von Gesetzen und Verordnungen. Die Idee einer gerichtlichen Rechtskontrolle. *Österreichisches Zentralblatt für die juristische Praxis*, 39, 569–609.

Merkl, A.J., 1923. *Die Lehre von der Rechtskraft entwickelt aus dem Rechtsbegriff. Eine rechtstheoretische Untersuchung*. Vienna/Leipzig: Deuticke.

Merkl, A.J., 1930, Der "entpolitisierte" Verfassungsgerichtshof. *Der Österreichische Volkswirt*, 22(19), 509–511.

Minutes of the non-public session of the Constitutional Court (05.11.1927). *In:* Austrian State Archive (henceforth ÖStA), Archive of Republic (henceforth AdR), Justiz, VfGH, box 74, K 6/27.

Minutes of the non-public session of the Constitutional Court (07.02.1922): *In*: ÖStA, AdR, Justiz, VfGH, box 89, V 1/22.

Minutes of the non-public session of the Constitutional Court (07.12.1928). In: ÖStA, AdR, Justiz, VfGH, box 72, VfGH G 4/28.

Minutes of the non-public session of the Constitutional Court (12.10.1926). *In:* ÖStA, AdR, Justiz, VfGH, box 74, K 4/26.

Minutes of the non-public session of the Constitutional Court (14.03.1922). *In:* ÖStA, AdR, OBh Justiz, VfGH, box 72, G 1/22.

Minutes of the non-public session of the Constitutional Court (14.10.1922). *In:* ÖStA, AdR, OBh Justiz, VfGH, box 72, G 92/22.

Osterkamp, J., 2009. *Verfassungsgerichtsbarkeit in der Tschechoslowakei (1920–1939). Verfassungsidee – Demokratieverständnis – Nationalitätenproblem*. Frankfurt am Main: Klostermann.

Pech, L., 2001. Le remède au gouvernement des juges: le judicial self restraint? *In:* S. Brondel, N. Foulquier and L. Heischling, eds., *Gouvernement des juges et démocratie* [online]. Paris: Sorbonne, 63–113. Available at: https://doi.org/10.4000/books.psorbonne.80659

Pegoraro, L., 2020. "Politico" e "giurisdizionale" a cento anni dal Verfassungsgerichtshof. *Diritto Pubblico Comparato ed Europeo*, 12(4), 903–930.

Petschek, G., 1929. Indirekter Kompetenzkonflikt und Bindungskonflikt. *Österreichisches Zentralblatt für die juristische Praxis*, 57, 349–376.

Sander, F., 1918. Rechtswissenschaft und Materialismus. *Juristische Blätter*, 47(31–32), 350–352.

Sander, F., 1919. Die transzendentale Methode der Rechtsphilosophie und der Begriff des Rechtverfahrens. *Zeitschrift für öffentliches Recht*, 1(3), 468–507.

Sander, F., 1921, *Rechtsdogmatik oder Theorie der Rechtserfahrung? Kritische Studie zur Rechtslehre Hans Kelsens*. Vienna/Leipzig: Deuticke.

Sander, F., 1923a. Der Begriff der Rechtserfahrung. *Logos*, 11, 285–308.

Sander, F., 1923b. *Kelsens Rechtslehre. Kampfschrift wider die normative Jurisprudenz*. Tübingen: Mohr.

Sander, F., 1925. Staat und Recht als Probleme der Phänomenologie und Ontologie. *Zeitschrift für öffentliches Recht*, 4(1/2), 166–191.

Sander, F., 1926. Das Verhältnis von Staat und Recht. Eine Grenzauseinandersetzung zwischen allgemeiner Staatslehre, theoretischer Rechtswissenschaft und interpretativer Rechtsdogmatik. *Archiv für öffentliches Recht*, 49(1/2), 153–227.

Schmitt, C., 1933. *Das Reichstatthaltergesetz*. Berlin: Heymanns.

Schmitt, C., 1988. *Legalität und Legitimität*. Berlin: Duncker & Humblot. (Originally published in 1932).

Schmitt, C., 1996. *Der Hüter der Verfassung* [online]. Berlin: Duncker & Humblot. (Originaly published in 1931). Available at: https://doi.org/10.3790/978-3-428-48743-1

Schmitt, C., 2017. *Verfassungslehre* [online]. Berlin: Duncker & Humblot. (Originally published in 1928). Available at: https://doi.org/10.3790/978-3-428-55206-1

Troper, M., 1977. Le problème de l'interprétation et la théorie de la supralégalité constitutionnelle. *In:* M. Waline, pref., *Recueil d'études en hommage à Charles Eisenmann*. Paris: Cujas, 133–151.

Troper, M., 1978. La motivation des décisions constitutionnelles. *In:* C. Perelman and P. Foriers, eds., *La motivation des décisions de justice*. Brussels: Bruylant, 287–302.

Troper, M., 1981. La théorie de l´interprétation et la structure de l´ordre juridique. *Revue Internationale de Philosophie*, 35(4), 518–529.

Troper, M., 1994. *Pour une théorie juridique de l´état* [online]. Paris: PUF. Available at: https://doi.org/10.3917/puf.trope.1994.01

Troper, M., 1995. Kelsen el le contrôle de constitutionnalité. *In:* C.M. Herrera, ed., *Le droit, le politique autour de Max Weber, Hans Kelsen, Carl Schmitt*. Paris: L'Harmattan, 157–182.

Troper, M., 2005. Marshall, Kelsen, Barak and the constitutionalist fallacy. *International Journal of Constitutional Law* [online], 3(1), 24–38. Available at: https://doi.org/10.1093/icon/moi002

Troper, M., 2006. La liberté de l´interprète. *In:* G. Darcy, V. Labrot and M. Doat, eds., *L´office du juge*. Paris: Sénat.

Walter, R., 2005. *Hans Kelsen als Verfassungsrichter*. Vienna: Manz.

Wiederin, E., 2014. Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht. *In:* T. Simon and J. Kalwoda, eds., *Schutz der Verfassung: Normen, Institutionen, Höchst- und Verfassungsgerichte*. Berlin: Duncker & Humblot, 283–306.

Wiederin, E., 2021a. From the Federalist Paper to Hans Kelsen´s "Dearest Child": The Genesis of the Austrian Constitutional Court. *Zeitschrift für öffentliches Recht* [online], 76(2), 313–329. Available at: https://doi.org/10.33196/zoer202102031301

Wiederin, E., 2021b.*Vergessene Wurzeln der konzentrierten Normenkontrolle in Österreich*. Vienna: Verlag Österreich.

Wille, H., 2001. Verfassungsgerichtsbarkeit im Fürstentum Liechtenstein – Entstehung, Ausgestaltung, Bedeutung und Grenzen. *In:* H. Wille, ed., *Verfassungsgerichtsbarkeit im Fürstentum Liechtenstein. 75 Jahre Staatsgerichtshof*, Vaduz: Liechtensteinische Akademische Gesellschaft, 9–64.