

# The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity



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**Abstract** The report shows that the Austrian constitutional framework is composed of a range of domestic and international instruments. The core constitutional act from 1920 is detailed, as are amendments regarding EU and international law. However, the 1867 State Basic Law provides only a generic bill of rights, and therefore the ECHR is the main, constitutionalised source of fundamental rights protection. The Constitutional Court reads the relevant provisions from the different instruments together, to provide a comprehensive protection. Earlier, the constitutional culture had been characterised as formalistic; this changed in the 1980s under the influence of the German Constitutional Court and the ECtHR towards a strict approach to the rule of law and rights. Constitutional review is marked by the principles of legality and reasonability. It is notable that several cases at the heart of the present research project have originated from Austrian courts, such as *Data Retention (Seitlinger)*, *Heinrich*, *Schmidberger* and *Weidacher*. Regarding the European Arrest Warrant, the Austrian courts stand out with a rights-protective approach. The challenge to the ESM Treaty led to constitutional amendments that ensure parliamentary authorisation for increased expenditure. The report outlines areas where EU law has improved fundamental rights protection as well as those where it has been weakened. The report makes a case for retaining the pluralism and diversity of constitutional cultures, finding that it is necessary to see the incommensurability of the various legal traditions and the impracticability of attempting to unify all traditions in one common constitutional tradition.

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All translations are from the official translation of the Austrian Constitution [https://www.ris.bka.gv.at/Dokumente/Erv/ERV\\_1930\\_1/ERV\\_1930\\_1.pdf](https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf) and of other legal acts in English at the governmental website: <https://www.ris.bka.gv.at/defaultEn.aspx>.

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## 1 Constitutional Amendments Regarding EU Membership

### 1.1 *Constitutional Culture*

**1.1.1–1.1.2** The Austrian Constitution, enacted in 1920, is based on monarchic dynamics of constitutionalism from the second half of the 19th century but was also drafted by Hans Kelsen.<sup>1</sup> The Kelsenian influence on the Constitution is still visible today, although Austrian constitutional law has changed significantly and dynamically in the last 30 years.<sup>2</sup>

The Kelsenian concept of constitution focuses on the constitution as law and not on the constitution as a state-based approach.<sup>3</sup> Consequently, the Constitution neglects concepts like sovereignty and nation-building. The Constitution is understood as a set of procedural rules to enable the state to function. The Constitution is viewed far more as a legal tool of Parliament than as the foundation of the state. Yet the Constitution still contains various provisions with regard to the organisation of the state, e.g. with regard to the federal structure of the country.<sup>4</sup>

A major political divide between the conservatives and socialists in the 1920s meant that it was not possible to create a new set of fundamental rights in the Constitution.<sup>5</sup> Instead, the old State Basic Law from 1867 was adopted, which granted civil liberties to the citizens.<sup>6</sup> The development of human rights in Austria is more closely linked to the European Convention on Human Rights (ECHR). The ECHR was adopted into Austrian law in 1958, and Parliament declared in 1964

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<sup>1</sup> See Stelzer 2011, pp. 2–10; Wiederin 2007a, pp. 389–449.

<sup>2</sup> See Lachmayer 2017a, pp. 436–454.

<sup>3</sup> Jakab 2009, pp. 933–955; Wiederin 2007b, pp. 293–317.

<sup>4</sup> Stelzer 2011, pp. 107–174.

<sup>5</sup> The Treaty of St. Germain in 1919 includes certain rights, e.g. minority rights, but not a full fundamental rights catalogue.

<sup>6</sup> See the Basic Law on the General Rights of Nationals (Imperial Law Gazette 1867/142); see also Stelzer 2011, p. 209.

that the ECHR is part of Austrian constitutional law.<sup>7</sup> Since the 1960s, the ECHR has been a source of constitutional rights in Austria.

The Constitution can be amended by a two-thirds majority in Parliament. Only the abolition of the basic principles of the Constitution requires a popular referendum. For partly structural but mainly political reasons, constitutional law has been easily amendable over approximately the last 60 years.<sup>8</sup> The grand coalition government after WWII and the social partnership between worker and employer representatives<sup>9</sup> has guaranteed a constitution-amending majority in Parliament. This means that constitutional law is regularly amended and contains various details which are not usually part of constitutional law.<sup>10</sup> Another important characteristic of the Constitution is its fragmentation.<sup>11</sup> Austrian constitutional law consists not only of its core document, the Federal-Constitutional Act of 1920 (Constitution), but also of various other acts, including 'ordinary' constitutional acts, international treaties (that have constitutional rank) and so called 'constitutional provisions', which are provisions in ordinary statutes (which have constitutional rank). It is an Austrian particularity that certain sections within an act may have constitutional character. This fragmentation of constitutional law creates the impression among politicians that there is nothing special or unusual about making changes to constitutional law in Austria.

Austrian constitutional law has its historic core, but is highly dynamic, not only because of the regular formal amendments but also because of the interpretation on the part of the Austrian Constitutional Court, which has taken a considerably active role since the 1970s.<sup>12</sup> Influenced by the German Constitutional Court and the European Court of Human Rights (ECtHR), the Austrian Constitutional Court has developed a broad approach to human rights and, since the 1980s, has moved towards a more principle-based constitutional reasoning (e.g. principle of equality, principle of reasonability, rule of law principle, democratic principle, etc.).<sup>13</sup>

Austria acceded to the EU in 1995 (by a popular referendum) and has developed a Euro-friendly approach in its constitutional thinking over the last 20 years. The Constitutional Court has contributed significantly to this approach, and has also overseen other important legal developments. While the Constitutional Court established certain limits to privatisation in the 1990s, the Court has confirmed (e.g. in the European Stability Mechanism (ESM) case in 2013) that Austrian constitutional law is very open to the internationalisation of law.<sup>14</sup>

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<sup>7</sup> Federal Law Gazette 1964/59; see also Öhlinger and Eberhard 2016, para. 681.

<sup>8</sup> See below in Sect. 1.2.

<sup>9</sup> See Stelzer 2011, pp. 55–58.

<sup>10</sup> This especially refers to the detailed governance structure of the administration.

<sup>11</sup> Eberhard and Lachmayer 2008, pp. 113–116.

<sup>12</sup> See the website of the Austrian Constitutional Court available at [www.vfgh.gv.at](http://www.vfgh.gv.at).

<sup>13</sup> Lachmayer 2014b, pp. 78–80.

<sup>14</sup> See most importantly regarding privatisation the Austro Control Judgment (VfSlg. 14.473/1996), and regarding internationalisation the ESM Judgment (VfSlg. 19.750/2013) and the Judgment with regard to the Fiscal Compact (VfSlg. 19809/2013).

To summarise, the Constitution has to be understood in its historical and evolutionary context, with its strong legal character. The core constitutional document is extremely detailed, with 150 articles that each have extensive and detailed sub-provisions. Besides this core document, the Constitution also includes various other constitutional acts and more than 300 constitutional provisions in various ordinary statutes. From a formal perspective the Constitution is highly dynamic: it is regularly amended and greatly influenced by the Constitutional Court. From a substantive perspective, the Constitution deals with questions of state organisation and is equally concerned with limiting state powers by the rule of law, separation of powers and human rights.

In terms of the broader type of constitutionalism, on the one hand the Austrian Constitution is a post-WWI constitution and thus not a classical post-authoritarian type of constitution. It may be said that in its early years it was characterised by the influence of Kelsen and by quite formalistic and not substantive constitutionalism. On the other hand, since the 1980s the influence of the German Constitutional Court and the case law of the ECtHR have changed the approach of the Austrian Constitutional Court significantly towards a strict approach to the rule of law and rights.<sup>15</sup> Thus, I would argue that nowadays the Austrian Constitutional system is a strong one, which significantly protects constitutional values, but still – to a minor extent – relates to its old, formalistic patterns.

## ***1.2 The Amendment of the Constitution in Relation to the European Union***

**1.2.1–1.2.4** The Austrian Constitutional Court and its doctrine distinguish two levels of constitutional law: ordinary constitutional law and the basic principles of the Constitution, which form the basis for higher constitutional law. The starting point of this distinction is Art. 44 para. 3 of the Constitution, which requires a popular referendum for a ‘total revision of the Federal Constitution’ in addition to a constitution-amending majority in Parliament. The ‘total revision’ of the Constitution is interpreted as a significant change in the basic principles of the Constitution (including democracy, federal state, republic, the rule of law, separation of powers and human rights). The two-level structure of the Constitution also has the effect that the Constitutional Court is able to review ‘ordinary’ constitutional law for compliance with the basic principles.<sup>16</sup>

An obligatory popular referendum to change the basic principles of the Constitution has only been used once in Austrian constitutional history: the

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<sup>15</sup> Lachmayer 2017b, pp. 75–114.

<sup>16</sup> It is possible for constitutional law to be considered unconstitutional. Only once (in 2001), the Constitutional Court considered a constitutional provision as a breach of the basic principles and, thus, as unconstitutional. See Eberhard and Lachmayer 2008, p. 117.

Austrian EU accession in 1995 was preceded by a popular referendum in 1994, with 66% of those who participated voting in favour of the accession. The technical procedure of accession was as follows: a new Constitutional Act was drafted, which simply contained the statement that, with this referendum, the constitutionally competent institutions were authorised to accede to the Union.<sup>17</sup> The bill was accepted by a two-thirds majority in Parliament and a successful referendum held subsequently. As part of the procedure, the Constitution underwent a ‘total revision’, especially with regard to its acceptance of the EU system of democracy and ‘federalism’ or the EU rule of law. The scholarly debate was and still is influential regarding the Austrian approach towards the implementation of EU law in Austria. However, the ‘total revision’ of the Constitution makes it very easy to argue in favour of EU law in the Austrian context, as the ‘total revision’ changed the legally correct procedure of the whole constitutional and legal system.

Until 2008, it was possible to implement international treaties (including new EU treaties) as constitutional law in the Austrian legal system, which happened in the case of all the new European treaties in the same manner as the accession treaty (only without a popular referendum). Thus, in the case of the Amsterdam Treaty and the Nice Treaty, a separate constitutional act was enacted, which authorised the competent institutions to conclude these treaties. Since 2008, the Constitution has contained an explicit procedure stipulating how new EU treaties can be integrated in the Austrian legal system: Art. 50 of the Constitution clarifies that for all further changes to the EU treaties, Parliament has to authorise such changes with a two-thirds majority. A popular referendum is only necessary if the Union changes in a way that requires a ‘total revision’ of the Constitution and which was not already covered by the referendum in 1994.

Each new EU treaty has thus been adopted on the basis of the Constitution. The Constitutional Court has regularly had to decide whether a new treaty has gone beyond the ‘total revision’ of the Constitution in 1995; the Court has ruled that this has not been the case. In comparison to the German situation where the German Constitutional Court in Karlsruhe regularly creates hurdles for any new transfer of domestic powers,<sup>18</sup> the Austrian situation is completely different: first, the Constitution is not based on a strong concept of sovereignty and is thus open towards the transfer of powers on an international (European) level; secondly, the Austrian Constitution (in contrast to the German Constitution) was ‘totally revised’ by accession to the EU. Thus, the EU concepts of democracy, ‘federalism’ and the rule of law are already part of Austrian constitutional law.

As the Constitution is amended several times a year, it is not possible to analyse all of the constitutional amendments that have explicitly or implicitly related to EU law.<sup>19</sup>

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<sup>17</sup> Federal Constitutional Act on the Accession of Austria to the European Union, Federal Law Gazette 1994/744.

<sup>18</sup> See e.g. the Maastricht or the Lisbon judgment; Thym 2009, pp. 1795–1822.

<sup>19</sup> An example would be the amendment in 2008 (Federal Law Gazette I 2008/2), when the possibilities for establishing independent authorities were extended significantly. The new Art. 20 para. 2 of the Constitution contains an explicit provision that the establishment of independent

By way of a brief summary of EU-related amendments, the central provisions are contained in chapter B of the Constitution, entitled ‘European Union’, where Arts. 23 (a)–(k) contain extensive and detailed provisions regarding various EU-related matters. For example, Art. 23 (a) and (b) regulate the elections of the European Parliament, Art. 23c regulates Austrian appointments to high-level posts in the EU, e.g. the appointment of the members of the Court of Justice of the European Union (CJEU); Art. 23(d) regulates the right of information of the provinces in EU matters affecting their competence; Arts. 23 (e)–(i) regulate the involvement of Parliament (see Sect. 1.4.1); and Art. 23(j) regulates participation in the EU Common Foreign and Security Policy. Generally, numerous aspects of EU law are interwoven throughout the whole text of the Constitution, e.g. as regards elections of the European Parliament (Art. 6(4)); division of competences between the federal level and the provinces (Art. 10), independent administrative authorities (Art. 20(2)), ratification of changes to EU treaties (Art. 50), parliamentary participation in the ESM (Art. 50a–d), etc. Additionally, EU amendments are also frequently inserted into the constitutional provisions of statutes, as, for example, in the case of the European Arrest Warrant (EAW) amendment, which will be discussed in Sect. 2.3.

One notable amendment was the establishment of the administrative courts of first instance in 2014. This political project that was undertaken over 20 years was initiated by the ECtHR case law regarding Arts. 5 and 6 of the ECHR and was mainly influenced by the need under EU law to establish independent tribunals.<sup>20</sup> From a structural perspective it was the largest constitutional reform since accession to the EU. It is definitely possible to conclude that European influence on amendments to the Constitution is increasing.

### ***1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers***

**1.3.1** The Constitution was never built upon a strict concept of sovereignty, but on a constitutional concept that is based on law and its constitutional framework. It is remarkable that in the 1990s the Constitutional Court developed constitutional limits to privatisation, which are based on sovereignty and state-based thinking. The Court argued in favour of certain core functions (core areas) of the state, which cannot be transferred to private persons or companies (e.g. military services, the police and justice systems, foreign policy). The Court has never developed a similar concept regarding the transfer of power to an international level. Article 9 para. 2 of

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administrative authorities is in conformity with constitutional law ‘to the extent necessary according to the law of the European Union’.

<sup>20</sup> See Öhlinger and Eberhard 2016, paras. 645–49; see also Sect. 2.9.

the Constitution provides a general provision on the transfer of powers on an international level, which was recently extended.<sup>21</sup>

The transfer of power to the EU follows its own constitutional concept. The first step refers to the amendment of the EU treaties. As mentioned above, Art. 50 of the Constitution requires a constitution-amending majority (two-thirds majority) in both chambers of the Austrian Parliament for the ratification of new EU treaties.<sup>22</sup> The transfer of power within the EU Treaties is no longer identified as a specific constitutional question and only depends on the regular participation of the Government and/or Parliament in European legislative procedures. There are no ‘constitutional reservations’ or further limits. The only limit refers to the ‘total revision’ of the Constitution. Only if the Union were to abolish or significantly reconceptualise democracy, the rule of law, Austrian federalism, the separation of powers or human rights would another popular referendum be required.

**1.3.2–1.3.4** Although the direct effect and supremacy of EU law are not explicitly mentioned in the Constitution, these concepts were well established by the CJEU at the time of Austrian accession in 1995. The ‘total revision’ of the Constitution unquestionably also included these concepts in the Austrian legal system at the highest possible constitutional level. In academic literature, there were debates with regard to a constitutional core<sup>23</sup> which would resist any form of EU integration with regard to the basic principles of Austrian constitutional law. This, however, could not refer to EU law concepts, as they had been established before the accession in 1995, but only to fundamental violations of democracy, the rule of law or human rights in general, e.g. a European dissolution of the Austrian Parliament or the abolition of federalism in Austria as a whole. Any other kind of impact of EU law on the Austrian legal system seems to be possible within the Austrian constitutional framework.

The Constitutional Court has accepted the supremacy of EU law from the very beginning. There is no explicit provision in the Constitution that EU law is supreme, however, the total revision of the Constitution included EU supremacy. The Court has approached EU law from a point of view that neither defends its own position nor claims the particular importance of Austrian constitutional law. On the contrary, the Court follows a legalistic, pragmatic and procedural approach and has developed its case law towards the interrelation between Austrian constitutional law and EU law. Four years after Austria’s accession to the EU, the Constitutional Court initiated its first preliminary reference proceeding.<sup>24</sup> In the same year, the Court used the supremacy of EU law to set aside a constitutional provision.<sup>25</sup> In the *Telekom-Control Case*<sup>26</sup> the Court refused to apply Art. 133(4) Constitution, which limited – in the understanding of the Court – the possibilities to establish

<sup>21</sup> See Federal Law Gazette I 2008/2; see also Handl-Petz 2010, pp. 288–289.

<sup>22</sup> See Handl-Petz 2010, pp. 296–300.

<sup>23</sup> See Öhlinger and Eberhard 2016, pp. 156–158.

<sup>24</sup> VfSlg 15.450/1999.

<sup>25</sup> VfSlg 15.427/1999; see also VfSlg 17.065/2003, 19.632/2012.

<sup>26</sup> See Sect. 2.6.

independent administrative courts. Although the Court had declared that EU law would not be the standard model for constitutional review by the Court, in 2012 the Court declared that it would use the EU Charter of Fundamental Rights (Charter) as the standard model against which to review human rights violations in Austria on an equal basis with human rights provided by Austrian constitutional law.<sup>27</sup> The Court has developed an active and pro-European approach, which limits the application of Austrian constitutional law. The reasons for this approach can be found in the legalistic, Kelsenian culture of Austrian constitutional law, the total revision of the Constitution upon accession to the European Union and the overall Euro-friendly approach of the Court, which is also rooted in the fact that the ECHR is a formal part of constitutional law in Austria.<sup>28</sup>

Thus it can be said that the Constitution follows a very flexible concept of sovereignty, which does not provide significant limits to the transfer of powers to a transnational level. Only if a transfer of new powers were to go far beyond the concept of the Maastricht Treaty, which was approved by a constitutional referendum in 1994, might it be necessary to hold another referendum, which could always provide legitimation for another dimension of the transfer of powers to the European level. The Constitutional Court, however, has not seemed to have had any constitutional problems with the new EU Treaties (including the Lisbon Treaty) so far. When the Constitutional Treaty was being discussed by the EU, the Austrian position was quite clear – that another referendum would not be necessary.

## ***1.4 Democratic Control***

**1.4.1** The Constitution involves the Austrian Parliament in the EU decision-making process. On the day of Austria's accession to the EU, a new chapter (Arts. 23a–f) was added to the Federal Constitutional Law.<sup>29</sup> Article 23e of the Constitution determines that the competent Federal Minister is obliged to inform Parliament of any EU legislative proposal. The first chamber of the Austrian Parliament (National Council) has the opportunity to provide an opinion, which binds the federal minister in his or her actions at the European level. The only possibility for a minister to deviate from the parliamentary opinion is on the grounds of 'mandatory reasons with regard to integration or foreign policy'. The same procedure applies for upcoming resolutions of the European Council or the Council concerning 'the change from unanimity to a qualified majority' or 'the change from a special legislation procedure to the regular legislation procedure'. Moreover, the second

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<sup>27</sup> VfSlg 19.632/2012; see also Lachmayer 2013b, pp. 105–107.

<sup>28</sup> The Austrian Constitutional Court is used to applying international (human rights) treaties naturally, as Austrian constitutional law. This culture, developed over many decades (since the 1960s), has shaped Austrian constitutional thinking. From this perspective, it is easier to approach EU law and to implement it in the Austrian legal system.

<sup>29</sup> See Federal Law Gazette 1994/1013.



chamber of Parliament (Federal Council) has the same opportunities for involvement when the allocation of powers between the federation and the states is affected.<sup>30</sup>

While the Austrian Parliament rarely submitted an opinion in the first fifteen years of EU membership (five times), it has since 2010 done so regularly. For example, in 2013 a parliamentary opinion was issued with regard to the ‘placing on the market of a genetically modified maize product’.<sup>31</sup> Genetically modified products are a very sensitive topic in Austrian politics. Thus, the Austrian position on this topic does not seem to be an area of conflict between the Government and Parliament, rather Parliament’s opinion has to be understood more as an expression of Parliament that stresses the overall Austrian position.

As a consequence of the Lisbon Treaty, new provisions were added to the EU chapter of the Constitution regarding the involvement of national parliaments in 2010.<sup>32</sup> Article 23f of the Constitution clarifies that the Austrian Parliament will exercise the competences regarding subsidiarity and proportionality control, and provides further general provisions for parliamentary involvement (e.g. the right of the National Council to communicate its positions on legislative proposals to the EU institutions). The Constitution contains more detailed provisions for parliamentary opinions regarding subsidiarity (Art. 23g) and the possibility to refer a matter to the CJEU (Art. 23h). Finally, the new provisions allow Parliament to reject resolutions of the European Council or the Council concerning ‘the change from unanimity to a qualified majority’ or ‘the change from a special legislation procedure to the regular legislation procedure’ (Art. 23i).

**1.4.2** The direct democratic dimensions of the Constitution have only been used in the case of the referendum to accede to the EU. This, however, involved the strongest and most important way possible: through a total revision of the Constitution. The Constitution provides a number of direct democratic instruments that in general are rarely used by Parliament. Although different popular initiatives have been initiated over the last few decades, they have ultimately been ignored by Parliament, which shows the political culture concerning direct democracy.<sup>33</sup> In recent years, however, there has been a huge debate to foster direct democracy in Austria.<sup>34</sup>

To summarise, the Constitution provides for different ways for the Austrian Parliament to participate in the EU legislative process. It is interesting to observe that Parliament has become more aware of its possibilities and is more engaged in the European dialogue. It has definitely helped that the necessary constitutional provisions were already in place and could easily be used.

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<sup>30</sup> Öhlinger and Potacs 2017, pp. 30–36.

<sup>31</sup> [http://www.parlament.gv.at/PAKT/VHG/XXV/SEU/SEU\\_00001/imfname\\_333335.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/SEU/SEU_00001/imfname_333335.pdf).

<sup>32</sup> See Federal Law Gazette I 2010/57.

<sup>33</sup> Eberhard and Lachmayer 2010, pp. 241–258.

<sup>34</sup> Öhlinger and Poier 2015.

## 1.5 *The Reasons for, and the Role of, EU Amendments*

**1.5.1** As already mentioned above, the Austrian constitutional culture leads to regular constitutional amendments. This culture has formed a stable part of the Austrian legislative culture as long as the Government has had a constitution-changing majority in Parliament. However, even when there has been no required majority, for a ‘reason of the state’ (*Staatsräson*), over last few decades, opposition parties have usually tended to provide the necessary majority.<sup>35</sup> This, however, has changed in the last seven years, since the majority in the grand coalition has started to shrink, and the opposition parties have become aware of their political possibilities. The coalition Government nowadays has to negotiate with at least one opposition party to obtain the required constitution-changing majority. In most cases, the Austrian Government has had no problem finding a party in Parliament with which to cooperate.<sup>36</sup>

The constitutional amendments linked to the European Union are above all part of this culture. If it is necessary to change the Constitution because implementation is not possible without it, the Constitution is amended. This concept is rooted in the hierarchy of norms (*Stufenbau der Rechtsordnung*).<sup>37</sup> When it comes to constitutional amendments relating to the EU, the following examples show a more detailed picture of the concrete reasons for amending the Constitution. Five broader conceptual approaches can be distinguished:

- (1) *Total revision as a starting point.* The importance of total revision as a starting point to introduce EU law in the Austrian constitutional system should not be underestimated. Many constitutional amendments have not been necessary thanks to this total revision, and many constitutional concerns cannot arise. The Constitution fully integrates the EU legal system, including direct effect and supremacy, at least in the state of integration since the Maastricht Treaty.
- (2) *Constitutional law implementing procedure of new EU Treaties.* Besides the EU accession treaty in 1995, the subsequent EU Treaties, including Amsterdam<sup>38</sup> and Nice,<sup>39</sup> were implemented in the Austrian legal system by constitutional law that authorised these treaties domestically. A separate constitutional Act, which required a two-thirds majority in Parliament, was enacted. As mentioned above, this option was finally introduced in Art. 50 of the Constitution in 2008 and thus, today, the Constitution provides this option as the standard procedure for new EU Treaties.

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<sup>35</sup> See also regarding the role of the social partnership Stelzer 2011, pp. 55–58.

<sup>36</sup> The opposition parties have, however, been successful in negotiating further control competences in the context of parliamentary committees of inquiry. See Art. 53 Austrian Constitution (Federal Law Gazette I 2014/101).

<sup>37</sup> Stelzer 2011, pp. 23–27.

<sup>38</sup> Federal Law Gazette III 1999/83.

<sup>39</sup> Federal Law Gazette III 2003/4.

- (3) *Treaty supplementing constitutional amendments.* Besides constitutional revision and the constitutional procedure for implementing new EU Treaties (by a two-thirds majority), there are further constitutional amendments that enable the implementation of a Treaty. Such constitutional amendments provide for the necessary adaptation of existing provisions or the introduction of new provisions in Austrian constitutional law to make a new Treaty more efficient and effective. For example, the accompanying law regarding the Lisbon Treaty introduced new provisions (Art. 23g–i Constitution) to enable Parliament to use the subsidiarity procedure.
- (4) *Structural constitutional reforms.* Besides the constitutional amendments related to new EU Treaties, the Constitution has been reformed structurally – at least with regard to certain areas – to enhance the compatibility of the Austrian legal system with EU law. The most significant reform was the introduction of administrative courts of first instance, which completely changed the system of legal protection in administrative law.<sup>40</sup> Other examples relate to the amendment of Art. 20 para. 2 Constitution with regard to independent administrative authorities<sup>41</sup> and a new approach to allocation of powers with regard to public procurement<sup>42</sup>.
- (5) *Specific constitutional amendments.* Finally, Parliament does not avoid specific constitutional amendments to comply with EU law. The possibility of creating constitutional provisions in ordinary statutes is thus used to facilitate the implementation of EU law. For example, an independent EU style Energy (Control) Agency was established to comply with the third EU internal market package regarding electricity and gas.<sup>43</sup> Parliament established specific constitutional provisions referring to this Energy Control Agency in particular, which guaranteed the necessary independence from the state.

Thus, the constitutional amendments illustrate not only the unpretentious nature of the Austrian constitutional culture, but also the pro-European attitude of Austrian legislation. The flexibility of the Constitution leads to regular adjustments of constitutional law when there is a European necessity; in other words in order to make EU law effective in Austria, the Constitution is amended. However, not all constitutional questions lead to amendment, e.g. questions of state liability are not solved by introducing new procedures in the Constitution, but rather by interpretation on the part of the courts using existing mechanisms for these procedures. Although the text of the Constitution does not provide a legal basis, these procedures have been established by the dynamic interpretation of the courts (based on EU law principles like the principles of equivalence and effectiveness). Thus, the implementation of EU law in Austrian constitutional law is shared between

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<sup>40</sup> See Öhlinger and Eberhard 2016, paras. 650–670; see also Sect. 2.9.

<sup>41</sup> See Eberhard and Lachmayer 2008, pp. 119–120.

<sup>42</sup> Article 14b Austrian Constitution.

<sup>43</sup> See Lachmayer 2014b, pp. 297–300.

constitutional acts of Parliament and constitutional reasoning by the Constitutional Court.

### 1.5.2 Not applicable.

**1.5.3** The exercise of power on an international and European level is changing the role of domestic constitutions. The constitutionalisation of international law<sup>44</sup> and the internationalisation of constitutional law are not only corresponding dimensions of legal globalisation but also create an increasing interrelation between the national and international constitutions. The author has described this phenomenon as International Constitutional Networks.<sup>45</sup> These networks cannot be described as a homogeneous legal system. On the contrary, the different constitutional systems follow different approaches, defend divergent values and are based on their very own particular constitutional cultures.

But is it necessary to amend national constitutions so that they are able to retain their importance? I do not think so.

First, formal constitutional amendments play different roles in different domestic constitutional cultures. Some constitutions are hard to amend and it is up to the (constitutional or supreme) courts to guarantee the functioning of the interaction between the national and the international levels. In other constitutional cultures it is much more the role of ordinary statutory legislation to build solid links with international or European law. Ultimately, the constitution might be the right domestic legal level to link international and national law, but it might not be. It depends on the particular constitutional culture.

Secondly, different domestic constitutional systems react differently to the transnational realm. Based on Vicki Jackson's distinction,<sup>46</sup> one might identify the following approaches: resistance, convergence and engagement. Although domestic constitutional systems are affected by legal globalisation, it is not guaranteed that they will develop a positive approach towards these developments. Constitutional amendments can also be used to strengthen anti-international concepts.<sup>47</sup> The example of Hungary illustrates that constitutional amendments, even more than constitutional revisions, do not necessarily lead to a more international approach.<sup>48</sup>

Thirdly, constitutional amendments per se do not effectively guarantee stronger ties to international law. This approach would be too formalistic. Substantive cooperation depends on the overall knowledge of and attitude towards international or European law of the relevant politicians, lawyers and other decision-makers. Constitutional amendments might be the right tool to support these developments, but they might also be completely irrelevant.

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<sup>44</sup> See Peters 2010, pp. 50–61

<sup>45</sup> Lachmayer 2013a, pp. 1490–1491.

<sup>46</sup> Jackson 2013.

<sup>47</sup> Schepple 2006, pp. 347–373.

<sup>48</sup> See Uitz 2015, pp. 279–300.

The author therefore follows a concept of constitutional pluralism,<sup>49</sup> in which the relevance and function of constitutions, as well as the amending procedures in the different domestic constitutions can differ significantly. The Austrian Constitution can serve as an example of a pro-European and internationally open constitutional culture, which fully uses the possibilities of constitutional amendments to strengthen European integration domestically. These constitutional developments, however, do not mean that the Austrian legal system (or even the Constitution) adopts European concepts perfectly. On the contrary, the permanent struggle to do so leads to further amendments. Finally, it is questionable whether these amendments maintain the relevancy of the Constitution. One could also argue that Austrian constitutional law is, step by step, losing its unique character and being harmonised towards a European model constitution.

## 2 Constitutional Rights, the Rule of Law and EU Law

### 2.1 *The Position of Constitutional Rights and the Rule of Law in the Constitution*

**2.1.1** The Constitution does not provide a coherent catalogue of human rights, rather must be understood in its evolutionary context. The Austrian system of human rights consists of a variety of catalogues and constitutional provisions enacted nationally and internationally over the last 150 years. The main parts consist of the following. First, the State Basic Law on the protection of the rights of citizens from 1867 contains traditional civil liberties and builds the classic catalogue of fundamental rights in Austria, which was adopted into the democratic Constitution in 1920.<sup>50</sup> The State Basic Law is still an independent document separate from the core constitutional document of 1920, and continues to provide an important constitutional basis for the Constitutional Court's case law.

Secondly, the constitutionalisation of the ECHR in 1964 (supplemented by the rights in the additional protocols) created the second human rights catalogue in Austria.<sup>51</sup> The rights of the ECHR are understood as constitutional rights, as they are formally part of Austrian constitutional law (rather than the ECHR being applied as an international treaty). In addition to these two major layers of constitutional rights, the Constitution provides few but important rights, especially the right to equality in Art. 7.<sup>52</sup> Moreover, Austria has signed various peace treaties such as the Treaty of St. Germain 1919 and the Treaty of Vienna 1955, which contain constitutional rights (e.g. with regard to minorities). Austria has ratified other international treaties and

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<sup>49</sup> See Walker 2002, pp. 317–359.

<sup>50</sup> See Stelzer 2011, pp. 209–210.

<sup>51</sup> Stelzer 2011, pp. 211–215.

<sup>52</sup> See Pöschl 2008.

adopted them on a constitutional level (e.g. the International Convention on the Elimination of All Forms of Racial Discrimination)<sup>53</sup> or implemented them through a special constitutional act (e.g. the Convention on the Rights of the Child)<sup>54</sup>. Finally, the EU Charter is of rising importance in the Austrian human rights system.<sup>55</sup> To summarise, the Austrian human rights system is very complex and focuses on liberal equality and procedural rights. A social rights catalogue is missing in the Constitution.<sup>56</sup> Some particular rights, however, contain a social rights dimension.<sup>57</sup>

The application of the different human rights catalogues and provisions by the Constitutional Court follows a very particular approach of ‘reading the relevant provisions together’. Thus, the Court regularly applies all the relevant provisions from the different documents to provide a comprehensive protection of these rights.

**2.1.2** There is no general constitutional provision on the limitation of rights, but certain rights include a specific limitation clause (such as in the provisions of the ECHR).<sup>58</sup>

**2.1.3** The rule of law (*Rechtsstaat*) and (the existence of) human rights are two basic principles of the Constitution, which can only be abolished by a popular referendum.<sup>59</sup> This view regarding these basic principles, which is common to the Austrian courts and the doctrine, is not explicitly mentioned in the Constitution, but is the result of the constitutional reasoning of the Constitutional Court and the interpretation of the Constitution by academic scholarship in Austria.<sup>60</sup>

Article 18 para. 1 of the Constitution refers to the principle of legality, providing as follows: ‘[t]he entire public administration shall be based on law’. For a number of decades, this provision was understood to be the core of the Austrian (formal) understanding of the rule of law.<sup>61</sup> The substantive part of the rule of law is built on the legal protection of individuals through the existence of relevant institutions and procedures.

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<sup>53</sup> Adopted and opened for signature and ratification by UN General Assembly resolution 2106 (XX) of 21 December 1965, which came into force 4 January 1969. Transformation to Austrian constitutional law by Federal Law Gazette 1973/390.

<sup>54</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, which came into force 2 September 1990. Austrian Constitutional Act on the Rights of the Child, Federal Law Gazette I 2011/4.

<sup>55</sup> VfSlg 19.632/2012; see also Lachmayer 2013b, pp. 105–107.

<sup>56</sup> See further details in Sect. 3.5.

<sup>57</sup> E.g. the Convention on the Rights of the Child, the Equality Principle (Art. 7 Austrian Constitution), or the Right to Education (Art. 2, Add. Protocol No. 1 ECHR).

<sup>58</sup> The State Basic Law on the Rights of Citizens from 1867 includes specific paragraphs on the limitation of rights in relation to certain provisions, e.g. Art. 13 State Basic Law on the Freedom of Expression demands a statutory basis for legislation and Art. 10 State Basic Law regarding privacy of correspondence requires a judicial order. The concept of limitations of rights in the State Basic Law is – in contrast to the ECHR – a formal one and does not include substantive criteria.

<sup>59</sup> See Art. 44 para. 3 Constitution.

<sup>60</sup> See Öhlinger 1990, pp. 2–9.

<sup>61</sup> Mayer et al. 2015, paras. 165, 569.

The concept of legal protection against administrative action and law enforcement is (still) bound to certain forms of administrative action (*Handlungsformen*), which leads to an increasing lack of legal protection, because newer forms of administrative action do not necessarily fit into this relatively strict and old system of forms of administrative action (*relative Geschlossenheit des Rechtsquellensystems*). In particular, since the 1990s the Constitutional Court has started to actively develop its case law on the rule of law in new dimensions. The core of this new case law is linked to the principle of effective legal protection, which is directly derived from the rule of law principle. The rule of law principle includes many elements, including the rule that only published laws can be valid, and the requirement of legal certainty and of a certain level of clarity, which will be explored in Sect. 2.5. Other elements of the rule of law include non-retroactivity; the rule that the imposition of obligations, administrative charges or penalties and criminal punishments is only permissible on the basis of a parliamentary statute; and the prohibition on applying sanctions retroactively, by inferring from objectives through teleological reasoning or by analogy.

The rule of law does not constitute a constitutional right in itself; however, procedural rights and other constitutional rights can be brought forward with regard to violations of fundamental rights before the Constitutional Court.<sup>62</sup> An applicant can then claim a violation of the rule of law. The rule of law is an independent and – especially since the 1990s – frequent ground for annulment. Thus, a protective mechanism exists which allows for claims against rule of law violations at the Constitutional Court.

**The system of constitutional review and judicial review in Austria** The Constitutional Court was one of the first specialised courts with centralised constitutional review.<sup>63</sup> However, the Court is one out of three highest courts in the Constitution.<sup>64</sup> The other two are the Supreme Administrative Court and the Supreme Court of Justice. Following a subject-oriented approach, the Constitutional Court mainly reviews statutes and ordinances with regard to their constitutionality and reviews administrative acts with regard to constitutional rights, whereas the Supreme Administrative Court reviews the legality of administrative acts with regard to statutes. The Supreme Court is the highest of the ordinary courts, which deal with civil rights and obligations<sup>65</sup> as well as criminal charges. The system of ordinary courts is mainly separate from the administrative authorities and administrative courts.<sup>66</sup> Higher courts of appeal and the Supreme Courts have the right to initiate preliminary proceedings at the Constitutional Court to review the constitutionality of a statute or an ordinance.

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<sup>62</sup> See Art. 144 Constitution.

<sup>63</sup> Gamper and Palermo 2008, pp. 64–79.

<sup>64</sup> Stelzer 2011, pp. 188–189.

<sup>65</sup> The distinction between civil and administrative law in the Austrian legal system does not comply with the understanding of civil rights and obligations in Art. 6 ECHR.

<sup>66</sup> See Art. 94 Austrian Constitution; however, a newly (in 2012) enacted Art. 94 para. 2 Constitution broadened the possibility to create cross-subject procedures.

In contrast to the German legal system, the Constitution does not provide for a constitutional complaint against a final decision of an ordinary court or the Supreme Court. Since 2015, it is possible to file a constitutional complaint at the Constitutional Court in relation to a judgment of an ordinary court of first instance.<sup>67</sup> The claim, however, can only refer to the unconstitutionality of the statute on which the judgment is based, but it cannot be argued that the ordinary court judgment is unconstitutional itself.<sup>68</sup> The important consequence of this court system is that it is mainly up to the ordinary courts and the Supreme Court to protect the Constitution and constitutional rights. Although this protection of constitutional rights has improved over the last 20 years, several famous judgments of the ECtHR (with regard to violation of the freedom of speech according to Art. 10 ECHR) illustrate the struggles of the ordinary courts to fully guarantee constitutional rights in Austria.<sup>69</sup>

## 2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

**2.2.1** The fundamental rights in the Constitution also contain economic rights, especially the freedom to conduct a business (*Erwerbsfreiheit*) and the right to property (*Eigentumsfreiheit*). Both of these economic rights have played an important role in the case law of the Constitutional Court in the last few decades. The Court has also contributed to the liberalisation of protected professions (e.g. taxi drivers).<sup>70</sup> Moreover, the Court itself has had to balance these economic rights with other fundamental rights. One example was the *Kleiderbauer* case,<sup>71</sup> in which animal rights activists protested in front of a clothing store which was selling fur coats. The Court argued that the gathering of the animal rights activists was unlawful because it took place at the entrance of the store and thus made it more difficult to enter the store. The outcome of the Court's ruling was that the freedom to conduct a business had priority in this case but that the activists were allowed to demonstrate five meters from the entrance. Thus, independently of the EU freedoms, the Constitutional Court has also considered economic freedom as significantly relevant in its case law.

The Austrian *Schmidberger* case at the CJEU<sup>72</sup> never reached the Constitutional Court, because the transportation company 'Schmidberger' sued the Austrian state

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<sup>67</sup> Federal Law Gazette I 2013/114.

<sup>68</sup> See Art. 140 Austrian Constitution.

<sup>69</sup> See already the ECHR case *Lingens v. Austria*, 8 July 1986, Series A no. 103; see the further case law in Öhlinger and Eberhard 2016, paras. 918–918a.

<sup>70</sup> VfSlg 10.932/1986.

<sup>71</sup> VfSlg 18.601/2008.

<sup>72</sup> Case C-112/00 *Schmidberger* [2003] ECR I-05659.



in the ordinary courts for allowing a demonstration that blocked a major motorway in Tyrol. There is currently no legal protection against judgments of the ordinary courts in the Constitutional Court.<sup>73</sup> The *Schmidberger* case also illustrates the relevance of classic fundamental rights in Austria. The CJEU's Data Retention case – although it is known as '*Digital Rights Ireland*' – is also based on a preliminary reference from the Constitutional Court. Thus, the CJEU also showed that the Court is able to address fundamental rights concerns when it comes to the harmonisation of the internal market.<sup>74</sup>

From the perspective of the Austrian constitutional culture, the integration of the four freedoms thus does not seem too difficult. On the one hand, Austria acceded to the European Union at a time when rights were already on the rise and, on the other hand, the Constitutional Court has also accepted that economic rights form an important part of fundamental rights. Moreover, Austrian constitutional culture is rooted in its legal (and thus technical) approach to the interrelation between the European and the domestic legal system. The Court was able to accept economic freedoms as an important part of the EU legal systems, which can also take precedence over Austrian constitutional law.<sup>75</sup>

Another Austrian conflict that better shows the struggle between Austria and the EU<sup>76</sup> is the 'German students' case.<sup>77</sup> The CJEU decided that Austria had to open its free access to universities to all European Union citizens. The effect of that judgment was that German students who were not accepted to certain programmes of study in Germany, especially medical studies, because of their insufficient grades obtained at German high schools, applied for entrance to medical studies in Austria. The Austrian state universities were unable to offer enough places and had to restrict the number of students by introducing a preliminary exam. The result was – for many reasons<sup>78</sup> – that more German students passed the exam successfully, but after finishing their studies, they went back to Germany. The Austrian Government has drafted various bills to comply with EU standards, but has ultimately introduced an increasing number of exams before the beginning of the studies, thus changing the Austrian legal system. Although there were many complaints about the CJEU's judgment in Austria, the

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<sup>73</sup> Since 2015, it is possible to file a constitutional complaint at the Constitutional Court regarding a judgment of an ordinary court of first instance. The claim, however, can only refer to the unconstitutionality of the statute on which the judgment was based, but not argue that the ordinary court judgment is unconstitutional itself (see Art. 140 Austrian Constitution); see Ziniel 2014, pp. 437–444.

<sup>74</sup> See sceptical Albi 2015, pp. 158–161.

<sup>75</sup> In the *Telekom Control* case, the Austrian Constitutional Court accepted the supremacy of European legislation over Austrian constitutional law. Although the case did not relate either to the four freedoms or to domestic constitutional rights (but to questions regarding the concept of administrative authorities), the case showed the willingness of the Court to give EU law supremacy over domestic constitutional law. See VfSlg 15.427/1999.

<sup>76</sup> See also the debate on genetically modified food as discussed in Sect. 1.4.

<sup>77</sup> Case C-147/03 *Commission v. Austria* [2005] ECR I-05969.

<sup>78</sup> The German students tended to be older, had more preparation time and were more focused on the test.

Austrian courts did not try to obstruct the EU decision. On the contrary, the Constitutional Court declared several other attempts to resolve the overall problems facing universities in Austria as unconstitutional.<sup>79</sup> This example shows that Austrian struggles with European Union law might not be the result of EU economic freedoms but rather the result of the rights of EU citizens. The case also illustrates the willingness to adapt domestic law to comply with EU law standards.

### 2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

**Introductory note** Defence rights are mainly based on the ECHR (e.g. on fair trial, right to judicial protection), and are considered constitutional rights.

The overall constitutional framework for judicial and constitutional review in Austria, described at the end of Sect 2.1, was crucial when it came to the introduction of the EAW in Austria. EAWs have to be applied by the ordinary courts and are reviewed by the Supreme Court.<sup>80</sup> As the Constitutional Court is not involved and the Supreme Court and the ordinary courts are not primarily concerned with human rights, constitutional concerns have not arisen in the same manner as they might have within the jurisdiction of the Constitutional Court.

**The implementation** The introduction of the EAW was accompanied by a scholarly debate on the constitutionality of the EAW, but the matter never reached the Constitutional Court nor was there an overall objection to the EAW in Austria. However, there has been an intensive academic debate among criminal lawyers during the last 10 years, which includes concerns regarding the presumption of innocence, *nullum crimen, nulla poena sine lege*, fair trial and *in absentia* judgments, practical challenges regarding a trial abroad and the right to effective judicial protection.<sup>81</sup>

For example, regarding Art. 6 ECHR, Hinterhofer and Schallmoser<sup>82</sup> have criticised the Framework Decision<sup>83</sup> and stated that it requires improvement regarding *in absentia* cases, because the defendant should receive the decision before he is transferred to the Member State that issued the EAW and should have

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<sup>79</sup> See Lachmayer 2014c, pp. 77–120.

<sup>80</sup> The ordinary courts, however, had and have the possibility to file a complaint at the Constitutional Court themselves if they have doubts about the constitutionality of the act implementing the EAW, but have never actually approached the Constitutional Court on this matter.

<sup>81</sup> See e.g. Medigovic 2006, pp. 627–642; Murschetz 2007a, pp. 98–106; Murschetz 2007b, pp. 302–369; Zeder 2003, pp. 376–386; Sautner 2005, pp. 328–343; Hinterhofer and Schallmoser 2010, p. 365; Hinterhofer and Schallmoser 2011a, b, para. 7; Schallmoser 2012, pp. 134–235.

<sup>82</sup> Hinterhofer and Schallmoser 2010, p. 365.

<sup>83</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

the possibility to request a review of the judgment. Medigovic, for example, has exposed the problems of the partial relinquishment of the requirement of double criminality due to the broad and vague terminology of the list of offences.<sup>84</sup>

The scholarly debate and scepticism towards certain topics relating to the EAW were considered in the Austrian implementation of the EAW from the very beginning. One main criticism concerned the lack of a human rights clause in the Framework Decision. A human rights clause was introduced upon implementation of the EAW in Art. 19 para. 4 of the Judicial Cooperation in Criminal Matters in the Member States of the European Union Act:<sup>85</sup>

The execution of the arrest warrant can be refused on the following grounds: if the surrender would violate the principles of Art. 6 TEU or any objective indications exist that the warrant was issued for discriminatory purposes (e.g. regarding sex, race, religion, ethnicity, citizenship, language, political opinion or sexual orientation). The examination of these objections can remain undone when the person had the possibility to object before the competent judicial authorities in the issuing state, the ECtHR and the CJEU.

Thus, the Austrian legislator has created a real possibility to claim abuse of human rights in extradition proceedings. This legal practice not only accepts objections by the persons concerned (as indicated by the statute), but the courts also consider this clause *ex officio*. Moreover, the Austrian scholarship considers this clause to be in conformity with EU law.<sup>86</sup> This statutory starting point for the EAW gives Austrian legal practice the necessary flexibility in EAW cases. However, no specific Austrian EAW case has yet reached the CJEU, and thus the Luxemburg Court has not yet had to decide on the Austrian human rights clause.

The Constitution was involved in the introduction of a constitutional provision with regard to the extradition of Austrian citizens in the context of the execution of an EAW. The Austrian EAW implementation act includes Sect. 5, which is a constitutional provision,<sup>87</sup> to allow the extradition of Austrian citizens. The Austrian Parliament thus amended the Constitution to make the EAW possible. This provision, however, is mainly concerned with cases in which extradition is not possible (e.g. where the person concerned did not commit any act on the territory of the issuing state or where acts of the same type would not be subject to Austrian criminal law, thus issues regarding '*nulla poena sine lege*'). These exemptions to prohibit extraditions of Austrian citizens are formulated extensively and protect Austrian citizens broadly. As a result, up until 2013, in legal practice only one Austrian citizen who did not agree to extradition was extradited on the basis of an EAW.<sup>88</sup>

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<sup>84</sup> Medigovic 2006, p. 642.

<sup>85</sup> *Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union* (EU-JZG), Federal Law Gazette I 2004/36.

<sup>86</sup> Hinterhofer and Schallmoser 2011b, paras. 18–28.

<sup>87</sup> See regarding constitutional provisions Sect. 1.1; see also Eberhard and Lachmayer 2008, pp. 113–116.

<sup>88</sup> Hochmayr 2013, pp. 182–187.

To summarise, the Austrian Parliament has not only used the flexibility of the EAW Framework Decision to introduce a form of the EAW that is compatible with the Constitution, but has also been willing to adopt constitutional provisions to enable the integration of the Framework Decision in Austria. The changes to the Constitution, however, still guarantee the Europe-friendly implementation of the Framework Decision in Austria.

**The Austrian case law** The case law of the Supreme Court on the EAW is very limited and mostly technical. It does not touch upon sensitive questions related to the EAW. As mentioned above, for procedural reasons, the Constitutional Court has no involvement with the Austrian statute that implements the EAW. Politicians have also not considered the EAW as a particular threat to human rights, and none of the political actors with the possibility to seek a review by the Constitutional Court have initiated a review procedure. Some individual cases that have been covered by the media are discussed in Sect. 2.12 regarding the public debate.

There has been, however, an interesting case between Italy and Austria before the Austrian Supreme Court, which was based on traditional extradition and not on the EAW, because the EAW had not been implemented at that time.<sup>89</sup> The judgment was decided in 2008 and concerned an *in absentia* judgment of an Italian Court. The Austrian appeal court stated that there was no violation of the principle of fair trial (Art. 6 ECHR), because the person concerned left Italy after his pre-trial detention ended and he never informed the Italian authorities of his usual residence in Austria. The Supreme Court, however, recognised a violation of Art. 6 ECHR, because he had never waived his right to present an oral argument and his return to his life in Austria could not be understood as an attempt to escape. Finally, his failure to inform the Italian authorities of his residence did not release the Italian courts from the obligation to provide effective legal protection. The Supreme Court considered the Italian *in absentia* judgment as a violation of Art. 6 ECHR and did not agree that the requirements for an extradition had been fulfilled.<sup>90</sup> The Supreme Court especially referred to the case law of the ECtHR.<sup>91</sup> This leading case was the first (!) time that the Supreme Court had denied extradition on the basis of Art. 6 ECHR. The Austrian academic literature came to the conclusion that the same decision would have had to be made by the Supreme Court if the very same case would have been decided within the legal framework of the EAW. Section 11 of the Austrian implementation act provides similar human rights guarantees.<sup>92</sup> Although

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<sup>89</sup> OGH 21. 1. 2008, 15 Os 117/07f.

<sup>90</sup> Murschetz 2009, pp. 29–33.

<sup>91</sup> See e.g. ECtHR *F.C.B. v. Italy*, 28 August 1991, Series A no. 208-B; *T. v. Italy*, 12 October 1992, Series A no. 245-C; *Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II.

<sup>92</sup> Sect. 11 EU-JZG formulates the following criteria for the enforcement of an EAW on the basis of a custodial sentence imposed *in absentia*. The preconditions are that the Defendant: (1) was informed in due time by personal summons of the time and place of the trial and was also informed that a decision could be taken *in absentia*; (2) was aware of the time and place of the trial and was entrusted a lawyer and was in fact represented by this lawyer during the trial; (3) was served the decision taken *in absentia* and was instructed about the right to appeal against the decision and

the EAW Framework Decision does not invoke Art. 6 ECHR in its Art. 5, the consideration of human rights is set out in recitals 12 and 13 of the Framework Decision. This case therefore shows that Austrian courts are willing to invoke human rights in extradition cases. The actual number of cases is, however, very small.

The Austrian debate on the EAW has not been a public one, but rather a scholarly one.<sup>93</sup> Moreover, it has primarily been a discussion within the community of criminal law scholars and has not significantly involved constitutional lawyers.<sup>94</sup> As already mentioned above, the Constitutional Court has not been involved because criminal charges cannot not be reviewed by the Constitutional Court, only by the Supreme Court. The rising awareness of the Supreme Court of human rights has only led to consideration of Art. 6 ECHR on one occasion in the Italian extradition case, which did not refer to the EAW. The debate of Austrian criminal law scholars, however, can be observed in the context of the increasing case law of the CJEU.

**The CJEU's case law** The emergence of the CJEU case law on the EAW has had different effects on the Austrian approach towards the EAW. First of all, certain rights issues have been discussed within the Austrian community of criminal lawyers. Secondly, the Austrian legislator has amended the act implementing the Framework Decision.

A critique by Austrian scholars e.g. referring to the *Melloni* case<sup>95</sup> is that the interpretation of the CJEU overlooks that the Charter only determines a minimum standard, which is also evident from the vagueness of the provisions. The core idea of minimum standards is, however, that in the individual case the minimum standard may be transcended. With its interpretation of Art. 53 of the Charter, the CJEU prohibits this possibility.<sup>96</sup> In the *Radu* case the CJEU neglected to elaborate more on the rights' standards.<sup>97</sup> The Austrian act implementing the EAW was amended to integrate the CJEU's case law (*Kozłowski, Wolzenburg, Lopes da Silva Jorge*)<sup>98</sup> regarding the discrimination of EU citizens by including a new Sect. 5a in the Act.<sup>99</sup>

The CJEU's role in EAW cases shows an ambivalent approach, which primarily strengthens the overall concept of mutual recognition and the EAW. The Lisbon

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explicitly declared that he or she would not appeal against the decision, or within the existing time limits did appeal against the decision; or (4) has personally been served the judgment immediately after his or her surrender and on this occasion has explicitly been instructed about his or her right to appeal against the decision and thus achieve a new evaluation and suspension of the decision, and about the time limits for this.

<sup>93</sup> See also Sect. 2.12.

<sup>94</sup> See, however, Merli 2007, pp. 125–140.

<sup>95</sup> Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

<sup>96</sup> Wirth et al. 2014, p. 381.

<sup>97</sup> See with regard to the Austrian analysis of this judgment Zeder 2013b, p. 85.

<sup>98</sup> Case C-123/08 *Wolzenburg* [2009] ECR I-09621; Case C-66/08 *Kozłowski* [2008] ECR I-06041; Case C-42/11 *Joao Pedro Lopes Da Silva Jorge* [2012] ECLI:EU:C:2012:517.

<sup>99</sup> Federal Law Gazette I 2013/175.

Treaty gave the Court the full potential to embrace a rights-based approach. The future position of the Court will decide on further rights development in the context of the EAW. The end of the transition period for the Lisbon Treaty (2009–2014) will further impact the rising role of the CJEU as a human rights court in relation to judicial cooperation in criminal matters.<sup>100</sup>

**Enhancing the EU’s judicial cooperation** While the EU tends to intensify police and judicial cooperation relatively quickly, the enactment of the complementary rights of citizens in the same policy field takes significantly more time. The establishment of a framework decision on data protection in police and judicial cooperation is one such example, and the establishment of rights of defence demonstrates the same problem. Certain developments in recent years indicate the first steps in a rights-oriented direction. The rise of defence rights in European criminal procedural law is illustrated by Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings and the Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.<sup>101,102</sup> A fully-fledged system of rights in transnational criminal proceedings still seems far away. Many elements have still not been properly addressed, and it remains a challenge for the domestic courts (but also legislators) to guarantee constitutional rights properly in transnational prosecution and extradition. The problem of imbalances between European prosecutorial concepts and the lack of rights of defence could get even worse with the introduction of a European Prosecution Office.<sup>103</sup>

As regards abolition of the *exequatur* in civil matters, whilst one of the most important cases where the first instance court refused to forcibly send a child to live with her father in Italy was an Austrian case (both before the CJEU and the ECtHR – *Povse v. Austria*),<sup>104</sup> this is not regarded as a matter of constitutional rights or the right to access to courts in the Austrian discourse, because the Constitutional Court was not involved in this case law (which is the result of the Austrian court system as explained in Sect. 2.1). The case did, however, attract media attention.<sup>105</sup>

**Conclusion** Austria presents a very particular approach towards the EAW. It is not possible to find any significant case law on constitutional rights and the EAW. The reason for this can be traced to the limited possibility of the Constitutional Court to review criminal law statutes and the lack of a constitutional complaint against judgments of the Supreme Court. The Supreme Court itself is relatively reluctant

<sup>100</sup> Zeder 2015, pp. 126–130.

<sup>101</sup> COM (2011) 326 final.

<sup>102</sup> Zeder 2012b, p. 155.

<sup>103</sup> Zeder 2013a, p. 179–200; Zeder 2012a, p. 105.

<sup>104</sup> Case C-211/10 *Povse* [2010] ECR I-06673; ECtHR *Povse v. Austria*, no. 3890/11, 18 June 2013.

<sup>105</sup> Aichinger, P. and Winroither, E. (2013, August 6) *Gegen alle Instanzen: Kampf ums Kind*. Die Presse. [http://diepresse.com/home/panorama/oesterreich/1438411/Gegen-alle-Instanzen\\_Kampf-ums-Kind](http://diepresse.com/home/panorama/oesterreich/1438411/Gegen-alle-Instanzen_Kampf-ums-Kind).

when it comes to constitutional rights and has only shown a changing approach in recent years. The main elements of the Austrian rights approach towards the EAW can be identified in the implementing legislation, which employs an extensive interpretation of the Framework Decision to broaden the human rights guarantees. In Austrian legal culture, the Constitution is also involved in the general enabling of the extradition of Austrian citizens. The particular provisions are very complex, but tend to protect Austrian citizens against extradition in most cases.

With regard to rights in a criminal law context and the EAW, Austria generally has chosen a non-constitutional approach, using the potential of the implementing legislation. Concerns, especially regarding certain case law of the CJEU, have been raised by criminal law scholars, but real conflicts regarding the possibly of different approaches by the CJEU and the Austrian implementing legislation have not yet occurred. In the meanwhile, the pro-rights approach in the context of the EAW prevails in Austria.

## 2.4 *The EU Data Retention Directive*

**2.4.1** Before the EU introduced its Data Retention Directive,<sup>106</sup> the Austrian legal system did not have the police powers provided by the Directive. The Government waited a long time before implementing the Data Retention Directive in 2011.<sup>107</sup> Austria had already been punished by the CJEU for missing the implementation deadline for the directive.<sup>108</sup> This situation reflected the political scepticism in Austria. Finally, the bill was drafted by the Ministry of Technology in cooperation with a human rights institute to strengthen the constitutional rights elements in the Austrian implementation.<sup>109</sup>

The state of Carinthia, as well as human rights activists, immediately initiated proceedings at the Constitutional Court as soon as the implementing act entered into force. The Constitutional Court initiated preliminary proceedings in the CJEU,<sup>110</sup> where the Irish case<sup>111</sup> was already pending. The Constitutional Court submitted a number of questions, in particular regarding the validity of the Directive in the light of Arts. 7, 8, 11 of the Charter and regarding interpretation of the Directive in the context of the Data Protection Directive and the Charter. The Constitutional Court

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<sup>106</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

<sup>107</sup> See details regarding the political debate in Sect. 2.12.

<sup>108</sup> See CJEU Case C-189/09 *Commission and Council v. Austria* [2010] ECR I-00099.

<sup>109</sup> See <http://bim.lbg.ac.at/de/informationsgesellschaft/bimentwurf-zur-vorratsdatenspeicherung-begutachtung>.

<sup>110</sup> VfSlg. 19.702/2012.

<sup>111</sup> Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.



also referred to constitutional law (especially Art. 1 of the Data Protection Act) and extensively to Art. 8 ECHR, which is also understood to be Austrian constitutional law. The Court did not refer to its own case law on privacy; however, the Court referred to the German case law on data retention as well as to the German concept of informational self-determination and to Polish constitutional provisions. After the judgment of the CJEU in April 2014,<sup>112</sup> the Constitutional Court ruled in June 2014 on the (un)constitutionality of the Austrian statutory provisions implementing the EU Directive. The Court declared the relevant provisions in the Austrian Telecommunication Act, the Security Police Act and Criminal Procedural Act to be unconstitutional and thus null and void.<sup>113</sup>

The Court came to this decision by reviewing the Austrian implementing provision primarily under Sect. 1 of the Data Protection Act, which is a constitutional provision and contains constitutional rights on data protection.<sup>114</sup> This particularity of Austrian constitutional law, that ordinary statutes can contain constitutional provisions and even constitutional rights, was presented in Sect. 1.1; Sect. 1 of the Data Protection Act is a significant example. The Court used the usual proportionality test to review the provisions. By also explicitly considering the reasoning of the CJEU, the Court came to the conclusion that the Austrian provisions were disproportionate. Similarly to the Data Retention Directive, the Austrian provisions did not distinguish enough with regard to the criminal offences ('... it is not guaranteed that retained data is only then provided if it serves the criminal prosecution and resolution of the investigation which in the individual case is a serious threat to the objectives stated in Art. 8 para. 2 ECHR and which justifies such interference').<sup>115</sup> The Court further reasoned/stated that 'the "distribution range" of the unfounded storage exceeds those interferences in the legal sphere which it ever had to decide and which is protected by Sect. 1 DSG 2000. ... This applies to the affected category of individuals, the scope and nature of the data as well as the purposes for which it is required and also the modalities of the use of data.'<sup>116</sup> The Court concluded that:

The limitations of the fundamental right of data protection according to the legal reservation in S 1 para. 2 DSG 2000 are only permissible based on laws which are necessary for the reasons mentioned in Art. 8 para. 2 ECHR and which regulate in a sufficiently precise manner that is clear to everyone, the conditions under which the investigation or use of personal data for the performance of specific administrative tasks is allowed.<sup>117</sup>

The existing provisions, however, did not fulfil these requirements.

The Austrian police used the retained data for several purposes but not for prosecuting terrorism suspects. However, the pressure from police authorities to reintroduce these powers in the Austrian legal system is currently very high. The

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<sup>112</sup> *Ibid.*

<sup>113</sup> VfSlg 19.892/2014; see Lehner 2014, pp. 445–457.

<sup>114</sup> The Court also considered Art. 8 ECHR, and Arts. 7 and 8 of the Charter in its reasoning.

<sup>115</sup> VfSlg 19.892/2014, para. 172.

<sup>116</sup> VfGH 27.06.2014, G47/2012 et al., para. 181.

<sup>117</sup> VfGH 27.06.2014, G47/2012 et al., para. 199.



powers gained under the Data Retention Directive seemed to be very advantageous. The Minister of the Interior and the Minister of Justice have publicly stated on several occasions that there is a need to reintroduce these powers for police and judicial authorities.<sup>118</sup>

## 2.5 *Unpublished or Secret Legislation*

**2.5.1** The *Heinrich* case<sup>119</sup> was an Austrian case which did not happen by chance. The Austrian understanding of the rule of law focuses particularly on the necessity of publication of legal acts. There is a specific line of case law based on Arts. 89, 139 and 140 of the Constitution, which determines the requirements for the proper publication of ordinances (by ministries or administrative authorities). A ‘proper public announcement’ has to fulfil the constitutional or statutory provisions for public announcements. If there are no particular legal rules, a typical customary announcement has to be made. If an ordinance is not published at all, the ordinance cannot be deemed valid.<sup>120</sup> If an ordinance is not properly published, the Constitutional Court still has the possibility to invalidate the ordinance, while other courts will not apply the ordinance (*Fehlerkalkül*).

The Constitutional Court has created a link between the question of public announcements and the rule of law in general in its case law.<sup>121</sup> It is understood as an element of the rule of law that generally binding legal acts have to be published adequately, which above all means in accordance with statutory law. This understanding of the rule of law was already part of the traditional formal understanding of the rule of law in its elaboration as the principle of legality.<sup>122</sup> The principle of legality serves the function of legal certainty, which was also recalled by the CJEU in the *Heinrich* case.<sup>123</sup> Thus, the initiation of a preliminary reference procedure in the *Heinrich* case and the formal questions regarding the principle of legality reflect a typical Austrian constitutional understanding of the rule of law. The European result, however, that the measure remained valid but not enforceable vis-à-vis individuals, is not quite the same as the Austrian constitutional approach, as the Austrian approach would have been to invalidate the act.

With regard to the *Skoma-Lux* case, the publication of legal acts in the right language is crucial.<sup>124</sup> Article 8 of the Constitution determines that German is the

<sup>118</sup> See e.g. Wimmer, B. *Polit-Zwist um Neuregelung für Vorratsdaten*. Futurezone. <http://futurezone.at/netzpolitik/mikl-leitner-fordert-neuregelung-fuer-vorratsdaten/125.315.643>.

<sup>119</sup> Case C-345/06 *Heinrich* [2009] ECR I-01659.

<sup>120</sup> Mayer et al 2015, paras. 602–603.

<sup>121</sup> VfSlg 16.852/2003; see VfSlg 14.851/1997; 11.867/1988.

<sup>122</sup> Mayer et al 2015, paras. 165, 569.

<sup>123</sup> Case C-345/06 *Heinrich* [2009] ECR I-01659, para. 68.

<sup>124</sup> Case C-161/06 *Skoma-Lux* [2007] ECR I-10841.

official language of the Austrian state. Further minority languages (e.g. Slovene and Croatian) are also accepted as official languages for these minorities. Moreover, the author has carried out scholarly research on questions of the official state language in the context of police cooperation in operative measures.<sup>125</sup> The TFEU provides the legal basis for operative cooperation between the police forces of different Member States. Thus, foreign police officers have police powers without even speaking any of the languages of these citizens and without knowing the legal provisions (at least not the legal details) which they have to apply. Thus, there is a general problem regarding language in the operative cooperation of police forces in the EU.

Another interesting element of the Austrian principle of legality refers to a certain level of clarity which a statute has to provide. The Constitutional Court has developed case law regarding too complicated or too complex forms of legislation. The Court has stated that it is not the task of the citizens to show a level of diligence normally demonstrated by keepers of archives (*'archivarischer Fleiß'*) to understand the content of statutory legislation.<sup>126</sup> Moreover, the Court has emphasised that it is not necessary for statutory interpretation to incite the desire to solve brain teasers or word puzzles (*'Lust zum Lösen von Denksportaufgaben'*).<sup>127</sup> Again, the Court has established limits to legislation, which – although published – is not comprehensible to individuals.

## ***2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality***

**2.6.1** After the accession to the EU, the Constitutional Court declared in its early case law that the Court would not review domestic statutes on the basis of European legislation.<sup>128</sup> It would be the responsibility of the Supreme Administrative Court to review administrative decisions with regard to European regulations and directives. The Constitutional Court accepted the direct effect and supremacy of EU law even in relation to constitutional law. In the *Telekom Control* case, the Court clearly accepted that EU law takes precedence over constitutional provisions (which were related to the concept of administration in Austria and thus contributed to the rule of law).<sup>129</sup> Other cases in the context of energy regulation, for example, were already constitutionally considered by Parliament through the enactment of new constitutional legislation in Austria.

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<sup>125</sup> Lachmayer 2011, p. 419.

<sup>126</sup> VfSlg. 3130/1956.

<sup>127</sup> VfSlg. 12.420/1990.

<sup>128</sup> VfSlg. 14.886/1997.

<sup>129</sup> VfSlg. 15.427/1999.

The Court has not been confronted with any cases involving European market regulations limiting property rights, legal certainty, etc.<sup>130</sup> On the contrary, European market regulations have usually broadened the rights of individuals as well as business corporations against the state. Thus, while limiting the power of the state, the rights of individuals have been strengthened by European legislation.

In state aid cases, it might be possible to argue that the Constitutional Court, according to its own case law, would in certain cases have provided a higher standard of legitimate expectations.<sup>131</sup> Due to the European concept of limitation of state aid, however, the European Commission is more restrictive in these cases.<sup>132</sup>

It can therefore be said that the Constitutional Court is willing to adapt Austrian constitutional provisions to European legislation and the CJEU's case law, especially in the context of the rule of law. With regard to constitutional rights, the Court follows a hierarchical approach and uses the preliminary reference procedure to refer to the CJEU to declare European legislation void.

## ***2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State***

**2.7.1** The implementation of the ESM Treaty in the Austrian legal system consisted of two stages. The Parliament first authorised the international treaty<sup>133</sup> and subsequently included new provisions (Art. 50a–d) regarding the role of Parliament within the ESM in the Constitution.<sup>134</sup> Parliament has to authorise the voting of the Austrian Government with regard to any ‘proposal for a resolution to grant stability aid to a member state in principle’; ‘an alteration of the approved share capital and an adaptation of the maximum loan volume of the European Stability Mechanism as well as the calling of approved share capital not having been paid in’ and ‘amendments of the financial aid instruments’.<sup>135</sup> Moreover, the competent minister has to inform Parliament about recent developments. Parliament has – similarly as in the case of EU policy matters<sup>136</sup> – the power to bind the minister by a parliamentary opinion. Furthermore, the Constitution authorises Parliament to establish further competences of Parliament by an ordinary statute. Parliament was therefore included significantly in the decision-making of the Government upon implementation.

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<sup>130</sup> However, regarding judicial review at EU level, legal certainty and non-retroactivity were unsuccessfully raised in a case regarding excess stocks (Case C-179/00 *Weidacher* [2002] ECR I-00501) after Austria's accession.

<sup>131</sup> Öhlinger and Eberhard 2016, paras. 787–788.

<sup>132</sup> See e.g. Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-09957.

<sup>133</sup> Federal Law Gazette III 2012/138.

<sup>134</sup> Federal Law Gazette I 2012/65.

<sup>135</sup> Article 50b Austrian Constitution.

<sup>136</sup> See above in Sect. 1.4.

Besides this constitutional integration and the democratic considerations, the Constitutional Court has had to decide on a constitutional complaint against the ESM Treaty.<sup>137</sup> The complaint was filed in an abstract review procedure by the Carinthian state government and addressed manifold concerns regarding the ESM Treaty, including the unconstitutional adoption of the interpretative declaration on the ESM, the undue transfer of various sovereign powers and the lack of reasonability of the ESM.<sup>138</sup> In an unusually long judgment, the Constitutional Court dismissed all arguments which were raised. According to Art. 9 para. 2 of the Constitution, the Republic of Austria is authorised to transfer individual governmental powers to international institutions. This provision had already traditionally been interpreted broadly. The Constitutional Court in its ESM judgment, however, broadened its already international-friendly approach even further. The Court based its decision on the CJEU's *Pringle*,<sup>139</sup> case and referred to the German Constitutional Court's judgment.<sup>140</sup> The Court declared that the ESM does not contradict the constitutional principle of an 'overall economic balance and sustainable balanced budget' nor the principle of reasonability nor the principles of economy, efficiency and expediency. The maximum amount allowed under the ESM for Austria would be about 27% of the Austrian annual state budget and 5% of the annual GDP. The Constitutional Court stated that these economic decisions still fall within the political leeway that must not be restricted by the Court.

**2.7.2** With regard to further financial matters it is – by Austrian standards – remarkable that it was not possible to find a constitutional amending majority in Parliament for the constitutionalisation of the golden rule (debt brake, *Schuldenbremse*), which was then only implemented on a statutory level.<sup>141</sup> Other political reasons (opposition parties tried to get further parliamentary minority rights) were behind this. However, the Austrian federation (*Bund*), the states (*Länder*) and the municipalities concluded an inter-state agreement with regard to financial stability within the Republic of Austria.<sup>142</sup>

Moreover, the Constitutional Court has had to decide on the European fiscal compact.<sup>143</sup> The Constitutional Court defended – with a similar approach as in the ESM case – the fiscal compact. The Court (especially in relation to the complaints) justified the involvement of European institutions in general and the powers transferred to them from a domestic level on the basis of Art. 9 para. 2 of the Constitution. Moreover, the Court stated that the establishment of a balanced

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<sup>137</sup> VfSlg. 19.750/2013; see also Mayer 2013, pp. 385–400.

<sup>138</sup> The irrevocable and unconditional clause was not addressed by the complainant. As the Constitutional Court was bound by the arguments put forward in this specific procedure of abstract review, the Court could not address any other topics.

<sup>139</sup> Case C-370/12 *Thomas Pringle* [2012] ECLI:EU:C:2012:756.

<sup>140</sup> *Urteil des Bundesverfassungsgerichts vom 12.09.2012*, 2 BvR 1390/12 ua.

<sup>141</sup> See regarding a European comparison Adams et al. 2014.

<sup>142</sup> See the Austrian Stability Pact, Federal Law Gazette I 2013/30.

<sup>143</sup> VfSlg. 19809/2013.

budget is the task of an ordinary majority of Parliament (and thus no constitution-amending majority is needed).

On the whole, Austrian legislation and the Constitutional Court seem to be open to European fiscal cooperation. However, it is important to mention the domestic challenges relating to bail-outs and hair-cuts. The Carinthian bank, Hypo Alpe Adria, which is completely bankrupt (heavily influenced by Jörg Haider's politics and systems of corruption), created a major threat to the economic situation in Austria and the state budget. Heavy financial losses have had a significant impact on the Austrian state budget, have increased national debt significantly and have demonstrated that in the Austrian Federal System economic challenges need further legal frameworks, stronger accountability and effective control. The Constitutional Court has declared certain forms of hair-cuts to be unconstitutional.<sup>144</sup> The Court argued that the Hypo Reorganization Act, in an unconstitutional manner, distinguishes between 'normal' creditors and 'junior creditors', whose position in the event of insolvency is junior, and 'further differentiates within the group of junior creditors merely on the basis of the cut-off date (set at 30 June 2019). Exposures of junior creditors falling due before this date are deemed to be expired; claims falling due after that date remain unaffected. Such procedure, i.e. the application of an unequal treatment regime within the group of junior creditors depending on the cut-off date, is unconstitutional. This constitutes a violation of the fundamental right to the protection of property.<sup>145</sup>

**2.7.3** Austria has not been subject to a bailout or austerity programme.

## **2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review***

**2.8.1** Since the accession of Austria to the EU in 1995, Austrian courts have referred to the CJEU in more than 200 cases overall. Since 2001, Austrian institutions have requested a preliminary ruling from the CJEU in seven cases with regard to the validity of EU legislation; thus, only a very small number have related to questions of validity. A closer look at these seven cases shows a highly diverse approach by the CJEU.

The most prominent preliminary reference is *Seitlinger and others* with regard to the Data Retention Directive, as discussed in Sect. 2.4. Another case regarding the Data Retention Directive submitted by the Austrian Data Protection Commission was not considered because the case submitted by the Constitutional Court was already pending.<sup>146</sup> As is widely known, the CJEU declared that the Data Retention Directive contradicts the Charter and is thus void.

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<sup>144</sup> See VfGH 3 July 2015, G 239/2014, G 98/2015.

<sup>145</sup> Ibid.

<sup>146</sup> Case C-46/13 *H* [2014] ECLI:EU:C:2014:1998.

In case C-309/10, the referring Administrative Court challenged the temporary scheme for the restructuring of the sugar industry in the European Community, as well as with regard to the principle of conferral of powers. The CJEU did not only review the EU principle of conferral of powers but also many other principles, including the ‘obligation to state reasons’ and the principle of proportionality. The CJEU, however, concluded that its review had not ‘revealed anything which might affect the validity of Art. 11 of Regulation No 320/2006’.<sup>147</sup>

Regarding some of the other cases, the CJEU stated in its judgment in case C-439/01 that the relevant provisions (Art. 8 of Regulation No 3820/85 on the harmonisation of certain social legislation relating to road transport)<sup>148</sup> do not contradict the principle of legal certainty.<sup>149</sup> In CJEU case C-216/03, the Court declared the preliminary reference to be inadmissible.<sup>150</sup>

In CJEU case C-329/13 (*Stefan*), the Austrian State Independent Administrative Authority questioned the validity of a provision of Directive 2003/4/EC, which granted an exception to the obligation to disclose environmental information where the disclosure compromises the right of any person to receive a fair trial with regard to Art. 47 para. 2 of the Charter. The CJEU could not find any violation of the right to fair trial. Finally, another preliminary reference at the CJEU in the context of environmental law concerned Commission Decision 2013/448/EU and questioned whether this decision is invalid because of an infringement of Directive 2003/87/EC.<sup>151</sup>

From the very beginning, the Constitutional Court has been willing to initiate preliminary reference proceedings at the CJEU. The Constitutional Court has not used these proceedings very often (four times), but it seems that they have always been a viable possibility for the Court. With regard to constitutional rights, the Constitutional Court has changed its approach since the enactment of the Lisbon Treaty. The Constitutional Court has used the EU Charter as the standard of its review since 2012 with the following effect: if Austrian statutes contradict domestic or European fundamental rights, the Court will declare them void and unconstitutional. Moreover, if European legislation contradicts European fundamental rights, the Court will file a preliminary reference with the CJEU for the European Court to determine whether the European legislation is invalid. The Court applied this approach with regard to the Data Retention Directive.<sup>152</sup> The *Schmidberger* case also exemplified that ordinary courts in Austria follow this approach.<sup>153</sup>

In summary it can be said that the Austrian cases in the context of preliminary rulings regarding validity are very limited. Other than in the Data Retention case,

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<sup>147</sup> Case C-309/10 *Agrana Zucker* [2011] ECR I-07333.

<sup>148</sup> [1985] OJ L 370/1.

<sup>149</sup> Case C-439/01 *Cipra and Kvasnicka* [2003] ECR I-00745.

<sup>150</sup> Case C-216/03 *DLD Trading Company Import-Export*.

<sup>151</sup> Case C-191/14 *Borealis Polyofine* [2016] ECLI:EU:C:2016:311 and Case C-192/14 *OMV Refining & Marketing*.

<sup>152</sup> VfSlg. 19.702/2012.

<sup>153</sup> Case C-112/00 *Schmidberger* [2003] ECR I-05659.

the CJEU has not found any problems with validity. If one excludes the cases which are still pending and those which have been rejected, only four cases remain. In one of the four cases the CJEU accepted the concerns (25%). The overall number is, however, too small to base any specific argument on the outcomes.

**2.8.2–2.8.3** The system of constitutional review in Austria is outlined in Sect. 2.1. According to the 2014 annual report of the Constitutional Court, in 41 cases of statutory review (out of 198) the Court declared a provision to be at least partly unconstitutional and void. In 102 cases the court declared the review to be inadmissible.<sup>154</sup> Thus, in 20% of all cases and 50% of admissible cases the Court declared a statutory provision to be void. Clearly the greatest challenge for a complainant is the acceptance of the case by the Court.

The Constitutional Court traditionally does not review EU legislation. It is up to the Supreme Administrative Court and the Supreme Court of Justice to review the implementation of EU legislation in the final instance. In 2012, however, the Constitutional Court introduced an exemption that concerns the Charter.<sup>155</sup> The Constitutional Court also uses the Charter to review administrative decisions within the scope of EU law.

If one compares the general standard of review between the Constitutional Court and the CJEU it is possible to argue that the domestic constitutional court has developed higher standards in different areas: the Constitutional Court has, based on the Constitution, a very distinctive and restrictive concept of the principle of legality.<sup>156</sup> The Constitutional Court has developed a principle of reasonability, which enables the Court to control every act of legislation regarding its reasonability.<sup>157</sup> Finally, the influence of the ECtHR has led to a detailed review of the principle of proportionality.<sup>158</sup>

The comparison of these two courts, however, has to be put into perspective, as the CJEU and the Constitutional Court fulfil different functions and both courts work together in the European network of (constitutional/supreme) courts. First, the CJEU has to guarantee general principles in 28 different jurisdictions, which makes it necessary not to exercise review in an overly detailed manner, since this would make it difficult for jurisdictions to consider these principles properly. Secondly, the CJEU is not the only court to review EU principles and human rights, but rather builds on the cooperation of courts in Europe. Thus, it makes sense that the CJEU does not have the same intensity of review of general principles or human rights as domestic constitutional courts.

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<sup>154</sup> See the annual report of the Court for 2014: [https://www.vfgh.gv.at/downloads/taetigkeitsberichte/VfGH\\_Taetigkeitsbericht\\_2014.pdf](https://www.vfgh.gv.at/downloads/taetigkeitsberichte/VfGH_Taetigkeitsbericht_2014.pdf). The statistic, however, does not consider the many cases in which an individual proposed a statutory review procedure that the Court did not consider.

<sup>155</sup> VfSlg 19.632/2012; see also Lachmayer 2013, pp. 105–107.

<sup>156</sup> Mayer et al 2015, paras. 165, 569.

<sup>157</sup> Stelzer 2011, pp. 242–244.

<sup>158</sup> Lachmayer 2014a, pp. 85–86; Grabenwarter 2007, p. 125.

**2.8.4** The *Bosphorus* case law<sup>159</sup> shifted the human rights responsibilities from the ECtHR to the CJEU, which has intensified its human rights approach accordingly in the last 10 years. The *Data Retention* judgment was the climax of these developments. The Lisbon Treaty even raised the protection of human rights within the Union to a new level; the accession of the EU to the ECHR should have been the next step in these developments. The opinion of the CJEU can be regarded as a backlash against these attempts to create a complex but coherent system of human rights protection.<sup>160</sup> This also means that it would be necessary to revisit the *Bosphorus* case law, should the CJEU fail to guarantee human rights protection. The CJEU's approach, however, can be understood in coherence with its claims of autonomy, which were already stated in the *Kadi* judgment.<sup>161</sup> The CJEU's approach could lead to a new balance in the European network of human rights protection if the ECtHR were to again intensify its own review of EU legislation.

## 2.9 Other Constitutional Rights and Principles

**The rule of law as a domestic concept** European administrative law fundamentally challenges the Austrian system of legal protection in administrative law. The Austrian system is based on certain forms of administrative acts and action (e.g. ordinance, decision, law enforcement).<sup>162</sup> Depending on the type of administrative act, different types of legal protection are available. The problem that arises in the Austrian system in relation to EU administrative law is that new forms of administrative acts have been introduced which do not fit in with the system of Austrian administrative law and thus lack the necessary legal protection. The result is that the Austrian Parliament and Government have sought to transform European concepts into Austrian administrative forms – attempts which have not always been entirely successful.

Two examples of this are air quality assessments and air quality management in environmental law.<sup>163</sup> Rights for individuals and legal protection against omissions by administrative authorities must be provided to enact these plans. Such plan would usually take the form of an ordinance in Austria, but the legal protection available against ordinances is quite limited in Austria and only directly possible at the Constitutional Court. Legal action against administrative authorities who fail to enact a plan is not directly possible. Moreover, the Austrian legal system provides a relatively narrow definition of 'parties' in administrative proceedings. In contrast to

<sup>159</sup> *Bosphorus Hava Yollarr Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

<sup>160</sup> Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU* [2014] ECLI:EU:C:2014:2454.

<sup>161</sup> See Halberstam 2015, pp. 105–146.

<sup>162</sup> See Öhlinger and Eberhard 2016, para. 81.

<sup>163</sup> See Directive 2008/50/EC on ambient air quality and cleaner air for Europe, [2008] OJ L 152/1; see also Case C-237/07 *Janecek* [2008] ECR I-06221.



the French model, which inspired the EU legislation, the Austrian system cannot provide the right for everybody to participate in administrative proceedings. The necessary changes to Austrian administrative law are not that easy to bring about because all of these questions are deeply rooted in constitutional law and it would be necessary to develop a completely different concept of the rule of law. The result is that currently the Austrian constitutional system cannot provide effective legal protection in all cases.<sup>164</sup>

The introduction of administrative courts of first instance in 2014, however, shows that the Constitution and the rule of law have been changed significantly to create a constitutional framework that better fits EU administrative law.

**The rule of law as a European value** The European Union has developed its own concept of the rule of law over the last 60 years. The Maastricht Treaty identified the rule of law and human rights as two of the core values of European constitutionalism, which have to be fulfilled by countries applying to join the EU, as well as by the existing Member States of the Union. The case of the ‘EU 14 sanctions against Austria’ in the year 2000 and the Hungarian case showed the increasing aspiration of the Union to strengthen the rule of law in the Member States’ constitutions.<sup>165</sup> Although the Union’s approach struggles between strong legal powers (Art. 7 TEU) and too weak political debates as well as too detailed infringement proceedings, the EU institutions are intensifying their efforts to protect the rule of law and human rights as part of European constitutionalism.<sup>166</sup>

## 2.10 *Common Constitutional Traditions*

**2.10.1** The search for common constitutional traditions seems to follow a harmonising and universalising approach. From the author’s perspective, two levels of common constitutional traditions can be distinguished: first, a general level of basic principles and rights, and secondly, a deeper understanding of the very same principles and rights, which focuses on the particular constitutional cultures.

The first and general level of a basic collection of principles and rights seem to be found easily. The core constitutional values of democracy, the rule of law and human rights are common to the EU Member States. It is even possible to elaborate these three values in more detail and to find certain principles and rights which can be understood as common constitutional traditions. With regard to democracy, the parliamentary concept of representation shares certain elements of democratic accountability or public debate, as well as the party system in general. With regard to the rule of law, the independence of the judiciary, the principle of legality and

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<sup>164</sup> Giera 2015, pp. 218–245; Potacs 2009, pp. 874–879.

<sup>165</sup> Lachmayer 2017a, pp. 436–454.

<sup>166</sup> See European Commission Communication: A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2.

access to justice are relevant. Finally, the ECHR creates a common foundation of European human rights. Common constitutional traditions can thus be identified and built upon, which leads to a harmonising and universalising approach.

On a second, deeper level of constitutional principles and rights, nothing seems to be the same. Each country has shaped its own constitutional approach by historical experiences, political decision-making or constitutional culture. The countries can be distinguished as federalised or centralised systems, presidential or parliamentary democracies, by the role of direct democracy, social rights or by civil or common law traditions. Particular rights are interpreted completely differently in the case law of the courts. Finally, the details of constitutional culture are shaped by history, language, politics and legal culture in general. While on a general level a common constitutional tradition seems obvious, it is more than doubtful that on a deeper level common constitutional traditions exist at all.

**2.10.2** If one tries to address the question of common constitutional traditions, it is the author's view that it is necessary to see the incommensurability of attempting to unify all traditions in one common constitutional tradition. Thus, it cannot be the task of the CJEU to create a proper unification of all traditions, but it was and is necessary that the European courts develop their own approach to addressing constitutional principles.<sup>167</sup> Beyond the surface of common constitutional traditions it is necessary to see the plurality of constitutional cultures. The solution that seems preferable to the author is to engage more intensely in a dialogue from a pluralistic perspective with these different constitutional traditions. It is not possible to unify them, but it is possible to actively approach and confront them with the European approach, which has to be different (at least from some constitutional cultures).

The author stresses the still unexploited potential of comparative research in practice and in academia to strengthen the dialogue on constitutional traditions in Europe. The potential for comparative research in e.g. the courts' practice does not, however, only refer to the European Courts, which could informally as well as formally engage more in the comparative project. This comparative approach is primarily addressed to the domestic courts, to raise awareness of the different constitutional cultures in the other Member States. It is not only a 'hierarchical' dialogue between the European and the domestic levels, but a cooperative dialogue between the domestic courts on a transnational level. The transnational dialogue can also currently be 'hierarchical', as certain courts, like the German Constitutional Court, (pro)claim a certain order of priority in constitutional reasoning when it comes to the EU/Member State interrelation of constitutional principles. This practical comparison, however, would need strong academic support to provide the relevant constitutional knowledge for the courts.<sup>168</sup> Finally it seems necessary that

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<sup>167</sup> Tridimas 2007.

<sup>168</sup> See different projects like this one on the role of national constitutions by Anneli Albi (<http://www.kent.ac.uk/roleofconstitutions/>), András Jakab's CONREASON project on constitutional reasoning (<http://www.conreasonproject.com/>) and Robert Schütze's project on neo-federalism ([www.federalism.eu](http://www.federalism.eu)).

the courts not only engage in this dialogue but also reveal their approach towards legal comparison, their comparative methodology and the practical outcome of the comparison.<sup>169</sup>

## ***2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards***

**2.11.1** Article 53 of the Charter has to be understood in its broader context as part of a very complex legal coordination of different human rights standards in Europe. The Charter, the ECHR and domestic constitutional rights systems compete legally to provide effective human rights protection. This legal complexity is created by the mutual interdependence of the different legal orders: the ECHR binds the domestic legal systems internationally and the EU is also bound by the Convention by its own reference in Art. 52 of the Charter. EU law in general binds the legal systems of the Member States by direct effect and supremacy supranationally. The human rights dilemma arises because the systems (EU, ECHR, domestic constitutions) do not provide the exact same constitutional rights, but vary significantly. On the one hand, the *Solange* approach – developed by the German Constitutional Court – gives EU law supremacy in human rights protection and was strengthened by the *Bosphorus* decision of the ECtHR. On the other hand, Art. 53 of the Charter and Art. 53 ECHR return the competence to advance human rights protection to the Member States. Within the scope of EU law, however, higher domestic constitutional protection might be in contradiction with the supremacy of EU law and the CJEU's function to 'ensure that in the interpretation and application of the Treaties the law is observed' (Art 19 TEU). The possibility to apply stricter human rights standards would create a different kind of EU law.<sup>170</sup> The increasing judicial conflicts between the European courts (CJEU, ECtHR)<sup>171</sup> and domestic constitutional/supreme courts<sup>172</sup> will increase the complexity and plurality of the whole human rights network.

An interesting element of this interrelation might be provided by the Constitutional Court's approach towards human rights. Austria is an interesting test case because it has worked with different national and international human rights catalogues for the last 50 years. The fragmented structure of Austrian constitutional rights<sup>173</sup> made it necessary for the Constitutional Court to create its own concept of constitutional reasoning regarding fundamental rights. The Constitutional Court

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<sup>169</sup> Lachmayer 2013a, pp. 1490–1491.

<sup>170</sup> See also Sect. 2.3.

<sup>171</sup> See Opinion 2/13, supra n. 160.

<sup>172</sup> In Austria, a new rivalry between the domestic supreme courts can be observed.

<sup>173</sup> See above Sects. 1.1 and 2.1.

‘reads the different texts together’<sup>174</sup> and creates a mixture of all the textual layers of fundamental and human rights. In particular, the Constitutional Court has had to apply the ECHR as Austrian constitutional law. Certain judicial divergences exist (e.g. with regard to the scope of Art. 6 ECHR) between the Constitutional Court and the ECtHR, but nowadays the Constitutional Court mainly follows the case law of the ECtHR.<sup>175</sup> Finally, the Constitutional Court – as mentioned above – has applied the EU Charter as the standard of its review since 2012. The Constitutional Court thus involves domestic and European (ECHR as well as Charter) human rights catalogues in its case law. The strategy of the Court does not follow a formal application of Art. 53 Charter or Art. 53 ECHR, but a more sophisticated interpretation of all different human rights catalogues, which takes each particular case into account. In its prominent judgment relating to the Charter, the Constitutional Court tried to combine Art. 6 ECHR case law and Art. 47 of the Charter.<sup>176</sup> Although the author is sceptical whether the interpretation in this concrete case is convincing, the inter-textual approach seems promising.

Thus, while Art. 53 of the Charter does not provide the solution to the complex interdependence of the different human rights catalogues, it might be useful in sensitive cases to consider the possibility of integrating Art. 53 of the Charter in the constitutional reasoning of domestic supreme and constitutional courts.

## 2.12 *Democratic Debate on Constitutional Rights and Values*

**2.12.1–2.12.3** In Austria no democratic debate on the EAW Framework Decision or on the EU Data Retention Directive took place at the time of adoption of these European acts. In the case of the Data Retention Directive, public information was released by the media,<sup>177</sup> and the EAW was even introduced on a European level without any significant public knowledge at the Austrian level. The implementation of the EAW and the following discussion in Austria show that the Austrian media did not perceive the EAW as a particular threat to the Austrian legal system or to the people living in Austria.<sup>178</sup>

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<sup>174</sup> See VfSlg. 19349/2011.

<sup>175</sup> See Mayer and Wutscher 2014, pp. 201–211; see also regarding the dialogue on the *ne bis in idem* principle Fuchs 2010, pp. 181–197.

<sup>176</sup> VfSlg 19.632/2012.

<sup>177</sup> Editorial (2006, May 12) *Umstrittene EU-Richtlinie zur Datenspeicherung in Kraft getreten*. Der Standard. <http://derstandard.at/2435410/Umstritten-EU-Richtlinie-zur-Datenspeicherung-in-Kraft-getreten>.

<sup>178</sup> Editorial (2006, May 2) *Europäischer Haftbefehl: ‘Österreich kann eine Auslieferung verhindern’*. Der Standard. <http://derstandard.at/2426050/Europaeischer-Haftbefehl-Oesterreich-kann-eine-Auslieferung-verhindern>.

Two cases shall be mentioned to illustrate the Austrian approach. The first is the *Elsner* case. Mr. Elsner is an Austrian banker who was sentenced for embezzlement and fraud in a huge bank scandal (BAWAG affair).<sup>179</sup> In the context of his prosecution, Austria issued an EAW against Mr. Elsner, who resided in France, because of an increased risk of escape.<sup>180</sup> The EAW was received as a positive opportunity for Austria to prosecute potentially corrupt Austrian bankers abroad. It showed the effectiveness of European judicial cooperation in criminal matters. The second is the *Haderer* case. Mr. Haderer is an Austrian cartoonist, who created a Jesus comic in which Jesus was basically portrayed as a junkie who smoked marijuana all the time. Mr. Haderer was sentenced by a Greek Court *in absentia* for the violation of religious feelings. Although the EAW was not relevant in the *Haderer* case because the violation of religious feelings does not fall within the scope of the EAW and the judgment was revised by the court of appeal, the case showed the tensions between human rights (freedom of speech) and transnational extradition in a European context, which was critically reported by the Austrian media.<sup>181</sup>

While the EAW was neither really discussed in Austria nor led to any negative reaction on the part of the Austrian media or public, there was a huge debate surrounding the implementation of the EU Data Retention Directive.<sup>182</sup> The media and civil society were critical of the implementation of the Data Retention Directive in Austria. Constitutional lawyers openly expressed their concerns.<sup>183</sup> Moreover, Austrian politicians were reluctant to implement the directive. Only when Austria was threatened with a penalty for non-implementation of the directive<sup>184</sup> did Austria finally implement the directive. Austrian civil society groups immediately filed an action against the implementation, and the Constitutional Court initiated preliminary proceedings. Thus, Austrian society and the state did everything possible to escape this unconstitutional situation and finally succeeded. The damage, however, was already done. The taboo was broken and since then, Austrian police authorities have increased political pressure for re-implementation.<sup>185</sup>

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<sup>179</sup> *Chronologie: Der Bawag-Skandal*. Die Presse. [http://diepresse.com/home/wirtschaft/economist/bawag/316119/Chronologie\\_Der-BawagSkandal](http://diepresse.com/home/wirtschaft/economist/bawag/316119/Chronologie_Der-BawagSkandal).

<sup>180</sup> Editorial (2006, September 15) *Für Elsner klickten die Handschellen*. Wiener Zeitung. [http://www.wienerzeitung.at/nachrichten/oesterreich/politik/282080\\_Fuer-Elsner-klickten-die-Handschellen.html](http://www.wienerzeitung.at/nachrichten/oesterreich/politik/282080_Fuer-Elsner-klickten-die-Handschellen.html).

<sup>181</sup> Editorial (2005, January 25) *Gerhard Haderer in Griechenland wegen Jesus-Buch verurteilt*. Der Standard. <http://derstandard.at/1923749/Gerhard-Haderer-in-Griechenland-wegen-Jesus-Buch-verurteilt>; Rohrhofer, M. (2005, April 21) *Freispruch für Gerhard Haderer am Olymp*. Der Standard. <http://derstandard.at/2013477/Freispruch-fuer-Gerhard-Haderer-am-Olymp>.

<sup>182</sup> Editorial (2007, June 8) *Vorratsdatenspeicherung: Neue Allianz sieht Bedenken Faymanns*. Der Standard. <http://derstandard.at/2907222/Vorratsdatenspeicherung-Neue-Allianz-sieht-Bedenken-Faymanns>.

<sup>183</sup> See e.g. Editorial (2008, January 9) *Karl Korinek: 'Da passt alles hinten und vorne nicht'*. Der Standard. <http://derstandard.at/3098462/Karl-Korinek-Da-passt-alles-hinten-und-vorne-nicht>.

<sup>184</sup> Case C-189/09 *Commission and Council v. Austria*, supra n. 108.

<sup>185</sup> Wimmer, B. (2015, April 16) *Polit-Zwist um Neuregelung für Vorratsdaten*. Futurezone. <http://futurezone.at/netzpolitik/mikl-leitner-fordert-neuregelung-fuer-vorratsdaten/125.315.643>.

The Austrian example shows that the domestic debates started very late: at the time of implementation or even later when the effects of the implementation became obvious. The EU Data Retention Directive, however, also illustrates that the implementation of an apparently unconstitutional EU legislative act will cause damage when it is implemented and effective (even if it is in force only for some years). Sufficient consideration of these concerns in the European legislative processes might provide an interesting step forward towards a truly European constitutional network.

First and foremost, there is a lack of domestic public debate taking place before new EU legislation is adopted on a European level. The integration of the national parliaments in the EU legislative process with regard to the subsidiarity principle is already an interesting step in the right direction. The European Parliament seems to be the place where these concerns should be relevant. I think that nowadays it would be possible for the concerns of domestic constitutional courts with regard to domestic constitutional issues to be raised in advance of the debates in the European Parliament. I do not think that further formal procedures are necessary at this stage. On the contrary, an over-formalised political process would create too many obstacles to enacting legislation on a European level at all.

When it comes to the implementation of EU legislation in the Member States, it seems an interesting idea to give constitutional or supreme courts (at least a certain number of courts) the possibility to raise their concerns in an infringement procedure with regard to the validity (constitutionality) of an EU act of legislation. Such a procedure, however, could not refer to the domestic constitution, but would have to be based on concerns regarding the EU Treaties, especially the Charter.

### ***2.13 Conclusion: Analysis on the Protection of Constitutional Rights in EU Law***

**2.13.1** The interrelation between the protection of constitutional rights and EU law can be characterised as complex and ambiguous. At least three different effects of EU law on domestic constitutional rights can be distinguished: first, the strengthening of constitutional rights through EU law, secondly the changing (and maybe challenging) of constitutional rights and thirdly, the weakening of constitutional rights. These three developments shall be exemplified from an Austrian perspective.

**Strengthening human rights through EU law** The strengthening of human rights through EU law in Austria can be related to many different legal sources, including EU secondary law, CJEU case law (especially regarding the general principles of the Union) and, finally, the Charter. After 20 years of EU membership, it is definitely possible to conclude that the EU has contributed significantly to the extension and increase of human rights in Austria.

EU secondary law was mentioned first for a reason. Although it is ordinary legislation of the Union, equipped with direct effect and supremacy, it has at least

the same legal force as domestic constitutional rights. EU regulations and directives contain significant rights and thus change the rights of individuals significantly. There are many examples, but the most significant ones might be the anti-discrimination directives<sup>186</sup> and the General Data Protection Regulation.<sup>187</sup>

As for CJEU case law, the general principles of the Union have also shaped the Austrian possibilities with regard to constitutional rights.<sup>188</sup> The right to effective judicial protection is the most prominent example, which changed the Constitutional Court's approach to grant (significantly more) judicial protection than was offered under the Constitution.<sup>189</sup> The EU concept of state liability, as another example, has also broadened the opportunities for legal protection in Austria.

Finally, the EU Charter will significantly widen the scope of rights which are protected by the Constitutional Court. With its important decision on the EU Charter in 2012, the Constitutional Court declared that the Charter will be the standard of review by the Constitutional Court in the scope of application of EU law. The consequence will be that completely new rights (like human dignity and the right to good administration) will be introduced in the Austrian constitutional system.

In conclusion, EU law has had many positive effects on domestic constitutional rights in Austria.

**Changing human rights through EU Law** The Austrian system of legal protection is primarily based on certain forms of administrative procedures and actions. The EU has introduced many new concepts in Austrian administrative law (e.g. in the context of emissions certificates and environmental protection), which do not fit in with the Austrian system.<sup>190</sup> The consequences, at least in certain fields, are structural constitutional problems which lead to a lack of judicial protection and, thus, challenge human rights protection in Austria. It will be up to further constitutional changes in Austria to adapt to these challenges.

**Weakening human rights through EU Law** The examples of the EAW and data retention illustrate that the transnational dimension of EU law creates deeper challenges to domestic constitutional systems and their protection of constitutional

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<sup>186</sup> See e.g. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16; Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22.

<sup>187</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119/1.

<sup>188</sup> See Tridimas 2007.

<sup>189</sup> See Hiesel 2009, pp. 113–114.

<sup>190</sup> See VfSlg 17.967/2006, 19.020/2010, 19.157/2010, 19.305/2011, 19.415/2011; see also Oberndorfer and Mayrhofer 2006, pp. 529–554.

rights. Certain well-established constitutional concepts like the non-extradition of a Member-State's own citizens have to be changed to be in line with the European concept of judicial cooperation in criminal matters. Moreover, the Union seems to be developing cooperation that impacts on constitutional rights faster than the necessary complementary rights protection regimes, especially with regard to transnational procedural rights. These effects can only be addressed by a robust rights regime, which has to be enacted on a European level. The proposed directive on data protection regarding police and judicial cooperation in criminal matters<sup>191</sup> serves as an example of adopting rights standards at the same time; however, the substantive value of the rights guarantees involved seems questionable.

From an overall perspective, it is possible to conclude that with regard to the Austrian legal system, EU law has had and continues to have positive and challenging effects on constitutional rights. The Austrian approach towards European human rights illustrates an active participation in the European constitutional network and the adaptation to European standards in constitutional law, including a broadening of Austria's own constitutional rights approach. Even such a domestic approach towards EU law, however, cannot absolve the Union of its responsibility to foster its own human rights regime, especially when it comes to challenges which clearly arise from the particular transnational nature of EU law.

The European approach towards human rights might be characterised as integration dynamics between rights' activism and rights' restraints. The constitutionalisation of the Union was significantly increased by the enactment of the EU's own Charter of Fundamental Rights, which subsequently became legally binding under the Lisbon Treaty. The integration of human rights by the CJEU is a process that has evolved over decades, which was given a further impetus by the Lisbon Treaty.<sup>192</sup> However, the EU also has to ensure that it develops its own human rights approach, as this approach affects the remaining competences of the Member States.<sup>193</sup> Thus, the strengthening of human rights has to be understood as a step in the right direction and the next dimension of European integration. This development of European integration will create even stronger ties between the EU and the Member States within a European constitutional network.

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<sup>191</sup> COM/2012/010 Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data.

<sup>192</sup> See e.g. Douglas-Scott, 2011, pp. 645–682.

<sup>193</sup> See e.g. Barnard 2008, pp. 257–283.



### 3 Constitutional Issues in Global Governance

#### 3.1 *Constitutional Rules on International Organisations and the Ratification of Treaties*

**3.1.1–3.1.3** Article 9 of the Constitution provides the major provisions for opening the Constitution to international law. While para. 1 states that ‘[t]he generally recognised rules of international law are regarded as integral parts of federal law’, para. 2 authorises Parliament to transfer state powers (including parliamentary, governmental and judicial powers) to international organisations or other (foreign) states.<sup>194</sup> Parliament has to enact a statute to authorise an international organisation and can only transfer specific powers.<sup>195</sup> The Constitutional Court recently confirmed its wide interpretation of Art. 9 para. 2 Constitution in the context of the ESM Treaty and the European fiscal compact. The Court argued in favour of broad competences to transfer powers to international organisations.<sup>196</sup>

Further constitutional provisions refer to the parliamentary authorisation process (Art. 50), the role of the President of the Republic in the ratification process (Art. 65), the possibilities of the states (*Länder*) to conclude international treaties (Art. 16) and the review competences of the Constitutional Court (Art. 145).

Austria has adopted certain international treaties on a constitutional level (e.g. the ECHR and its additional protocols).<sup>197</sup> The WTO Agreement, the Rome Statute and the International Covenant on Civil and Political Rights were adopted on a statutory level; however, certain provisions of the first two treaties were adopted as constitution-amending provisions. It is significant that amendments of the Constitution have been reduced since 2008 through the abolishment of the possibility to transform international treaties directly into Austrian constitutional law. At the same time, certain constitutional provisions in international treaties (like the WTO Treaty) have been de-constitutionalised and are now ‘only’ statutory law.<sup>198</sup> If international treaties are to be ranked as constitutional law, a particular constitutional act is now necessary. In 2008, the possibilities to transfer powers to international organisations and foreign states were broadened. The following sentence was added to Art. 9(2) of the Constitution: ‘Within this framework it may be provided for that Austrian agents shall be subject to the authority of institutions of other states or intergovernmental organizations or such be subject to the authority of Austrian institutions.’

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<sup>194</sup> Art. 9 para. 2 Constitution starts with the following sentence: ‘By Law or state treaty having been approved according to Art. 50 para. 1 may be transferred specific federal competences to other states or intergovernmental organizations’.

<sup>195</sup> The limitation to transfer only ‘specific’ powers is traditionally interpreted widely.

<sup>196</sup> See above in Sect. 2.7.

<sup>197</sup> See already Federal Law Gazette 1964/59, but e.g. also International Convention on the Elimination of All Forms of Racial Discrimination, Federal Law Gazette 1972/377.

<sup>198</sup> Federal Law Gazette I 2008/2.

**3.1.4** Does it make sense to amend constitutions to integrate international developments in the constitutional text? As mentioned in Sect. 1.5, the author argues that this depends on the constitutional culture of the particular country. Regarding Austria, it is interesting to observe that Parliament has actively amended constitutional law to adapt it to developments in EU law. It is, however, not possible to argue the same when international law is at stake. The Constitution is, as mentioned above, very open to international legal developments, but does not adapt to international law in the way it is used to adapting to EU law.<sup>199</sup> On the whole, I would not generally argue in favour of the internationalisation of domestic constitutional documents, but I would think that – when it comes to Austrian constitutional culture – it would make more sense to adapt international law more vigorously on a constitutional level and amend the Constitution regularly on the basis of international legal developments, than to de-constitutionalise international law, which does not correspond to Austrian constitutional culture. This development would weaken the Austrian approach towards constitutional law.<sup>200</sup>

## 3.2 *The Position of International Law in National Law*

**3.2.1** The Austrian discussion on the position of international law in domestic law is divided into three different parts: customary international law, international treaties and decisions of international organisations.

First, as regards customary international law, Art. 9 para. 1 of the Constitution declares that it is part of the domestic legal system. There is controversial debate on the level of customary international law in the Austrian hierarchy of norms.<sup>201</sup> The first and most important theory states that customary international law has the status of domestic statutory law. Other theories assume that it depends on the content of the customary international law. If the content would affect a certain level of domestic law (e.g. an Act of Parliament), the customary international law would require the same level.<sup>202</sup> Finally, a third theory positions customary international law between constitutional law and domestic statutory law (mezzanine theory).<sup>203</sup>

Secondly, with regard to international treaties, the situation is clear: Art. 50 Constitution provides the relevant procedures. If an international treaty affects statutory law, Parliament has to authorise the ratification. As a consequence, a

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<sup>199</sup> See regarding the comparative approach in Austria Gamper 2013, pp. 213–228.

<sup>200</sup> The abolition of the possibility to implement international treaties directly as constitutional law is an interesting development. The adaptation of constitutional law no longer means a simple integration of international law on a constitutional level, rather has become much more a conceptual consideration of international law in constitutional amendments.

<sup>201</sup> Handl-Petz 2010, pp. 330–335.

<sup>202</sup> Mayer et al 2015, paras. 219–220.

<sup>203</sup> Öhlinger and Eberhard 2016, para. 113.

particular international treaty has the same level as statutory law.<sup>204</sup> If no authorisation by Parliament is needed, the international treaty has the same level as an administrative ordinance. Since 2008, it has no longer been possible for Parliament to authorise an international treaty on a constitutional level (not even with a constitution-amending majority). It is, however, possible for Parliament to enact a specific constitutional act, which transforms the content of the international treaty into Austrian constitutional law.<sup>205</sup>

Thirdly, as regards decisions of international organisations, it seems to be a general scholarly opinion that their position is not clear.<sup>206</sup> The implementation of decisions of international organisations depends again on the content and the way the particular international organisation is integrated by international treaty in the Austrian legal system. For example, in the 1990s, the Supreme Court considered UN Security Council Resolutions as higher international law, and that *jus cogens* prevails in the context of UN Security Council Resolutions.<sup>207</sup> The lack of further debate shows a significant deficit in the Austrian approach towards international law.

**3.2.2** Although there has been debate on monism and dualism in Austrian scholarship for almost 100 years,<sup>208</sup> when it comes to the adoption of international law in domestic law, the relevance of the debate is relatively minor. The moderate monism and the moderate dualism are similar in their effect. The explanatory value of the theories seems to be increasingly diminishing. The theories are based on a traditional understanding of international law as law between nation states. International law is, however, confronted with manifold developments, like the rise of the individual in international law, the role of transnational corporations, the fragmentation of international law, the increase of transnational and supranational law and the privatisation of public international law. Both approaches (monism and dualism) thus seem to be suffering the same fate. These theories are not complex enough to address the complex legal interrelation between different legal systems sufficiently: international legal pluralism or governance theories approach the legal complexities more convincingly.<sup>209</sup>

### 3.3 Democratic Control

**3.3.1** Article 65 of the Constitution states that it is the role of the Austrian President to conclude state treaties. Although the President is a representative of the administrative branch, the President is elected directly in Austria (and not by

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<sup>204</sup> Handl-Petz 2010, pp. 296–300.

<sup>205</sup> Mayer et al 2015, paras. 239–242.

<sup>206</sup> Öhlinger and Eberhard 2016, para. 127.

<sup>207</sup> Handl-Petz 2010, pp. 333–334.

<sup>208</sup> Öhlinger and Eberhard 2016, paras. 109–111.

<sup>209</sup> Berman 2014; Zumbansen 2013, pp. 506–522.

Parliament). The President's direct democratic legitimacy is, thus, also part of the democratic control of the ratification of international treaties in Austria.

Article 50 of the Constitution determines the involvement of Parliament in the ratification process. Parliament has to authorise political treaties as well as international treaties that modify or complement statutory law in Austria. These treaties have the level of statutory law in the Austrian legal system. All other international treaties can be ratified by the President and have the status of administrative ordinances. If a treaty which has been authorised by Parliament provides a simplified modification procedure, Parliament does not have to be involved in that procedure as long as Parliament itself does not make a reservation in the primary authorisation.<sup>210</sup> In the context of competences of the states (*Länder*), the federal council (2<sup>nd</sup> chamber of the Parliament) has to authorise an international treaty. Finally, Parliament has the power to authorise an international treaty on the condition that the treaty itself will not become part of the Austrian legal system, but Parliament has to implement the treaty by a separate Act of Parliament.

Besides these 'traditional' competences of Parliament, it is quite unusual that the Austrian Parliament is subsequently involved in the activities of international organisations that do not result in another Act of Parliament. As mentioned above, the decisions of international organisations have not even been properly addressed by legal scholars. An example of the lack of involvement and awareness of Parliament are bilateral investment treaties.<sup>211</sup> Democratic concerns were only raised with regard to the free trade agreements with Canada (CETA) and the US (TTIP).<sup>212</sup> This democratic ignorance towards international legal development is complemented by a very open-minded Constitutional Court, which interprets the possibilities to transfer powers to international organisations very broadly.

The ESM Treaty, however, illustrates a new approach. The involvement of Parliament in the ESM activities was introduced in the Constitution as mentioned in Sect 2.7. The concept of this parliamentary involvement is similar to the possibilities that Parliament has to influence the Government in EU legislative matters. Because of its close proximity to the Union, it would seem obvious that parliamentary involvement in the ESM would be introduced by a constitutional amendment in the Constitution. The ESM Treaty, however, is an international treaty and the parliamentary involvement serves as an example of how democratic control could be improved in the Austrian constitutional order with regard to the increasing power of international organisations.

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<sup>210</sup> Mayer et al. 2015, paras. 239–242.

<sup>211</sup> See the list of Austria's bilateral investment treaties on the website of the Austrian Ministry of Economics: <https://www.bmdw.gv.at/Aussenwirtschaft/investitionspolitik/Seiten/BilateraleInvestitionsschutzabkommen-Laender.aspx>.

<sup>212</sup> See e.g. the parliamentary opinion on the TTIP (see in general Sect. 1.4), which was only published internally; there was also a parliamentary discussion on the TTIP in June 2015 (see [http://www.parlament.gv.at/PAKT/PR/JAHR\\_2015/PK0725/](http://www.parlament.gv.at/PAKT/PR/JAHR_2015/PK0725/)).

**3.3.2** Direct democracy is not the usual approach to international law in Austria. This, however, reflects the overall constitutional culture regarding direct democracy and domestic issues.<sup>213</sup> In Austria, a referendum is only obligatory when the Constitution is ‘totally revised’. As seen in Part I, this rule has only been applied once, for the referendum on EU accession. Other, optional referendums are possible for all other constitutional amendments and statutory acts. The optional referendum has only been used once, in the 1970s, with regard to the operation of a nuclear power plant in Austria. Thus, it is highly unusual for Parliament to ask the Austrian population for a referendum on domestic issues. This applies all the more in the case of international law.

### **3.4 *Judicial Review***

**3.4.1** Article 140a of the Constitution empowers the Constitutional Court to review international treaties regarding their conformity with domestic constitutional and statutory law (depending on the legal level of the particular treaty).<sup>214</sup> The Constitutional Court’s competence only refers to the domestic dimension of its validity. If the Constitutional Court declares an international treaty unconstitutional, it obviously does not affect the international treaty on an international level, but only its application in Austria. By the ruling of the Constitutional Court, the international treaty is no longer applicable and cannot legally affect any institution or authority domestically.<sup>215</sup> A domestic declaration of unconstitutionality might, however, violate Austria’s obligations in international law.

The last prominent cases concerned – as mentioned in Sect. 2.7 – the ESM Treaty and the European fiscal compact. The Constitutional Court stated in both cases that these international treaties were in conformity with the Constitution and confirmed its open approach towards the transfer of state powers to international and supranational organisations. Since 1980, there have been 18 proceedings in which provisions of international treaties have been – at least to a certain extent – reviewed by the Constitutional Court. In all of the cases the Constitutional Court rejected the complaints, for various (formal and substantive) reasons. The right of individuals to file a complaint with regard to an international treaty is very limited. The practical relevance of the review mechanism to limit the transfer of powers or to raise constitutional rights concerns is therefore quite limited. However, the Constitutional Court performs quite a thorough review and will declare a provision unconstitutional if necessary. Thus, the potential that the Court will use its

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<sup>213</sup> Eberhard and Lachmayer 2010, pp. 241–258.

<sup>214</sup> The provision was introduced in 1964 (Federal Law Gazette 1964/59). With the very same constitutional amendments, certain provisions from 13 international treaties were declared to be constitutional provisions. Most prominently, the ECHR was declared to be constitutional law.

<sup>215</sup> Handl-Petz 2010, pp. 304–306.

competence to effectively use its power to limit the transfer of state powers to the international level still exists.

According to Art. 145 of the Constitution, the Constitutional Court could gain the power to review domestic law on the basis of international law. The Constitution requires a specific statute as a precondition for this power, which Parliament can enact. Such specific statute has never yet been enacted and thus, the Constitutional Court cannot review domestic law from an international law perspective. It would be up to Parliament to empower the Court to do so. Due to the increasing importance of international law, this constitutional potential might be an interesting perspective for the changing role of the Constitutional Court in the future.

In conclusion it can be said that the Constitution provides significant possibilities for judicial review of international law and the involvement of international law in constitutional review. The case law of the Constitutional Court illustrates its open approach towards international law. The potential of judicial review, however, has not been fully developed as of yet.

### ***3.5 The Social Welfare Dimension of the Constitution***

**3.5.1** As mentioned in Sect. 2.1, the Constitution does not specifically provide a social rights catalogue. This was due to tensions between the conservatives and the social democrats in the 1920s, which made it impossible to agree on a human rights catalogue at all.<sup>216</sup> The reason for the impossibility to agree on a human rights catalogue lay explicitly in the social rights, which the social democrats insisted on integrating and the conservative refused to integrate. The subsequent developments in human rights in Austria have only been possible because of the influence of international law in Austria. The last serious attempt to enact an Austrian human rights catalogue was in 2003–2005 at the so-called ‘Austrian Convention’, which tried to significantly reform the Constitution.<sup>217</sup> The Convention, however, failed, and again, one reason was a failure to agree on social rights. International influence did not lead to the constitutionalisation of social rights in Austria.

Certain elements of social rights can be identified in the Constitution: the right to equality has certain social dimensions,<sup>218</sup> the right to education as guaranteed in the ECHR is part of Austrian constitutional law as well as the (limited) constitutional implementation of the UN Convention on the Rights of the Child in 2011.<sup>219</sup> As mentioned above, the most important impact on social rights has been the European Union, first with regard to EU legislation and secondly with regard to the EU

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<sup>216</sup> Stelzer 2011, p. 210.

<sup>217</sup> [www.konvent.gv.at](http://www.konvent.gv.at).

<sup>218</sup> Pöschl 2008, pp. 659–737.

<sup>219</sup> See the Federal Constitutional Law on the Rights of the Child, Federal Law Gazette I 2011/4; see also Fuchs 2011, pp. 91–110.

Charter. The decision of the Constitutional Court to apply the Charter similarly to Austrian constitutional rights will significantly affect the development of social rights case law in Austria.<sup>220</sup> No social welfare clause like in Germany can be found in the Constitution.

This constitutional situation regarding social welfare does not, however, change the overall legal situation in Austria as a social welfare state. The Austrian legal system provides manifold self-governing institutions, especially in the context of social security, which provide a broad and effective system of health insurance, casualty insurance, unemployment insurance, etc. The social security system is currently struggling with new forms of employment, the costs of the public health system and the increasing number of unemployed people due to the economic crisis. Other social benefits include a tuition-free university system provided by the states and, for example in Vienna, free kindergarten. Thus, the social welfare system is still very solid and provides various rights to individuals on a statutory but not constitutional level. The economic crisis is, however, affecting the social rights system in Austria.

To summarise, due to Austrian constitutional history and politics, social welfare is not addressed constitutionally, rather mainly by administrative law. Social rights are not constitutionalised, but are institutionalised. The Austrian social welfare system is still an effective model for providing social rights, but not on a constitutional level.

### ***3.6 Conclusion: Constitutional Rights and Values in Areas of Global Governance***

**3.6.1** While Austrian constitutional law is ready to adapt its standards to European law very flexibly and quickly, constitutional developments regarding international law are less dynamic. However, some adjustments, like the re-conceptualisation of Art. 50 of the Constitution in 2008 required that international law, which affects constitutional law, has to be implemented by a specific Act of Parliament and cannot merely be authorised by Parliament.

The general constitutional approach in Austria towards international law is open in many cases. The Constitutional Court has the power to review international law domestically and uses its powers to defend an open and flexible transfer of powers to the international level. The constitutional possibilities to transfer powers were recently even broadened by Parliament.<sup>221</sup> It still seems that the Austrian constitutional scholarly debate and legal practice underestimate the impact of the transfer of powers to international organisations and other forms of international institutions. Within the Austrian constitutional culture there is still plenty of leeway to

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<sup>220</sup> VfSlg 19.632/2012.

<sup>221</sup> Art. 9 para. 2 Austrian Constitution, Federal Law Gazette I 2008/2.

develop further constitutional concepts regarding international law. A plausible path to pursue is shown by the Austrian approach towards the ESM Treaty: amending the Constitution and involving the Austrian Parliament. Further international treaties would have the potential to be integrated in the same constitutional manner. Moreover, the legal integration of decisions of international organisations would be another important element for constitutional reform.

International counter-terrorism measures, including police and judicial cooperation in criminal matters, UN terrorist lists, asset freezing and secret prisons, have not played a significant role in the Austrian debate. The obligations of banks to freeze accounts have never been debated substantially either in public or academically.

However, one topic has triggered extensive public debate and scepticism in Austria: the introduction of an international conflict resolution mechanism in investment disputes with regard to the free trade agreement.<sup>222</sup> The TTIP debate is changing the public perspective and widespread public scepticism in Austria still remains; the parliamentary opinion on the matter was noted in Sect. 3.3.1. Although Austria has already concluded more than 60 bilateral investment treaties, there has been no debate on the constitutionality of the international conflict resolution mechanism, mainly because Austrian companies already use these opportunities and Austria itself has not been affected by any claims. However, a first investment treaty claim has been filed against Austria by an Austrian bank from its Malta branch.<sup>223</sup> Based on a bilateral investment treaty between Austria and Malta, the owners of Meisl bank, which was involved in corruption scandals and had been prosecuted, claimed it had suffered 200 million EUR in damage caused by unjust public prosecution over seven years.

With regard to constitutional issues arising in the context of constitutional rights and values in global governance, it is first and foremost important to stress that the most important improvements in rights have been incorporated in Austrian constitutional law from the international level. Austrian constitutional rights are mainly shaped by international law; thus, Austrian constitutional law is internationalised when it comes to rights.

A final remark on global governance and Austrian constitutional law relates to the structure of global governance itself. When discussing global governance, two important developments also have to be taken into account: the fragmentation of international law and the role of private actors. The fragmentation of international law<sup>224</sup> makes it necessary for domestic constitutional law to not only address one coherent and unified international law, but the various forms and concepts of international law separately. Global governance also includes private actors, e.g. powerful

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<sup>222</sup> (2015, March 4) *Mehrheit der Österreicher gegen TTIP*. Der Standard. <http://derstandard.at/2000012479763/Freihandel-Mehrheit-der-Oesterreicher-gegen-TTIP>.

<sup>223</sup> (2014, December 18) *Causa Meisl bringt Vorgeschmack auf TTIP*. Der Standard. <http://derstandard.at/2000009536985/Meisl-Bank-Aktionaer-klagt-Republik-Oesterreich>.

<sup>224</sup> See Martti Koskeniemi's Report on the Fragmentation of International Law: [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf).



NGOs like the International Standardization Organisation and transnational corporations like Google and Facebook.<sup>225</sup> In Austrian constitutional law, the legal power of these private actors is not constitutionally recognised. The consequence is that this dimension of global governance is neglected significantly. Only if both developments are addressed constitutionally in Austria will it be possible to uphold the role of the Constitution as guardian of the rule of law and constitutional rights.

## References

- Adams M., Fabbrini F., Larouche P. (eds.) (2014), *The Constitutionalization of European Budgetary Constraints*. Modern Studies in European Law. Hart Publishing Pty Ltd., Oxford.
- Albi A. (2015) *Erosion of Constitutional Rights in EU Law. A Call for 'Substantive Co-operative Constitutionalism'* Part 1. *Vienna Journal on International Constitutional Law* 9:151–185.
- Barnard C. (2008) *The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?* In: Griller S., Ziller J. (eds.) *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty*. Springer, Vienna, pp. 257–283.
- Berka W. (2018) *Verfassungsrecht. Grundzüge des österreichischen Verfassungsrechts für das juristische Studium*, 7th edn. Verlag Österreich, Vienna.
- Berman P.S. (2014) *Global Legal Pluralism. A Jurisprudence of Law beyond Borders*. Cambridge University Press, Cambridge.
- Douglas-Scott S. (2011) *The European Union and Human Rights after the Treaty of Lisbon*. *Human Rights Law Review* 11:645–682.
- Eberhard H., Lachmayer K. (2008) *Constitutional Reform 2008 in Austria. Analysis and Perspectives*. *Vienna Journal on International Constitutional Law* 2:112–123.
- Eberhard H., Lachmayer K. (2010) *Ignoranz oder Irrelevanz? – Direkte Demokratie auf österreichisch*. In: Feld L., Huber P., Jung O., Welzel C., Wittreck F. (eds.) *Jahrbuch für direkte Demokratie 2009*. Nomos Verlag, Baden-Baden, pp. 241–258.
- Fuchs C. (2010) *Ne bis in idem: Korrespondenzen zwischen Straßburg und Wien*. In: Lienbacher G., Wielinger G. (eds.) *Jahrbuch Öffentliches Recht 2010*. NWV Verlag, Vienna, pp. 181–197.
- Fuchs C. (2011) *Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern*. In: Lienbacher G., Wielinger G. (eds.) *Jahrbuch Öffentliches Recht 2011*. NWV Verlag, Vienna, pp. 91–110.
- Gamper A. (2013) *Austria: Non-cosmopolitan, but Europe-friendly – The Constitutional Court's Comparative Approach*. In: Groppi T., Ponthoreau M.C. (eds.) *The Use of Foreign Precedents by Constitutional Judges*. Hart Publishing, Oxford/Portland, pp. 213–228.
- Gamper A., Palermo F. (2008) *The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review*. *Journal of Comparative Law* 2:64–79.
- Giera U. (2015) *Individualrechte im europäischen Umweltrecht und ihre Durchsetzung im nationalen Recht*. *Facultas-Nomos*, Vienna & Baden-Baden.
- Grabenwarter C. (2007) *Zur Bedeutung der Entscheidungen des EGMR in der Praxis des VfGH*. *Österreichische Richterzeitung* 85:154–160.
- Halberstam D. (2015) *'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward*. *German Law Journal* 16:105–146.
- Handl-Petz E. (2010) *International Law in the Austrian Legal System*. In: Verschraegen B. (ed.) *Austrian Law – An International Perspective*, Jan Sramek Verlag, Vienna, pp. 287–344.

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<sup>225</sup> See e.g. the Austrian Initiative Europe versus Facebook: <http://www.europe-v-facebook.org/>.

- Hiesel M. (2009) Die Entfaltung der Rechtsstaatsjudikatur des Verfassungsgerichtshofs. *Österreichisch Juristen-Zeitung* 63:111–119.
- Hinterhofer H., Schallmoser N. (2010) Europäisches Strafrecht. In: Eilmansberger T., Herzig G. (eds.) *Jahrbuch Europarecht 2010*. NWV Verlag, pp. 353–374.
- Hinterhofer H., Schallmoser N. (2011a) § 3 EU-JZG In: Höpfel F., Ratz E. (eds.) *Wiener Kommentar zum Strafgesetzbuch*, 2nd edn. Manz Verlag, Vienna.
- Hinterhofer H., Schallmoser N. (2011b) § 19 EU-JZG. In: Höpfel F., Ratz E. (eds.) *Wiener Kommentar zum Strafgesetzbuch*, 2nd edn. Manz Verlag, Vienna.
- Hochmayr G. (2013) Schutz eigener Staatsbürger vor Auslieferung. *Österreichische Richterzeitung* 91:182–187.
- Jackson V. (2013) *Constitutional Engagement in a Transnational Era*. Oxford University Press, Oxford.
- Jakab A. (2009) Two Opposing Paradigms of Continental European Constitutional Thinking: Austria and Germany. *International and Comparative Law Quarterly* 58:933–955.
- Lachmayer K. (2011) Transnationales Polizeihandeln – Demokratische und rechtsstaatliche Herausforderungen der europäischen Polizeikooperation. *Juristische Blätter* 133:409–427.
- Lachmayer K. (2013a) Constitutional Reasoning as Legitimacy of Constitutional Comparison. *German Law Journal* 14:1463–1491.
- Lachmayer K. (2013b) The Austrian approach towards European human rights, VfGH 14 March 2012, U 466/11 et al. *Vienna Journal on International Constitutional Law* 7:105–107.
- Lachmayer K. (2014a) Eine Sprache, zwei Rechtskulturen: deutsches und österreichisches Verfassungsrechtsdenken. In Kischel U. (ed.) *Der Einfluss des deutschen Verfassungsrechtsdenkens in der Welt: Bedeutung, Grenzen, Zukunftsperspektiven*. Mohr Siebeck Verlag, Tübingen, pp. 65–91.
- Lachmayer K. (2014b) Regulatory Constitutional Law. *ENLR* 2:297–300.
- Lachmayer K. (2014c) Rechtliche Regelwerke der Universitätsfinanzierung. In: Funk B.-C. (ed.) *Rechtliche und ökonomische Fragen der Finanzierung öffentlicher Universitäten, Schriften zum österreichischen und internationalen Universitäts- und Hochschulrecht Band 7*. ÖGB Verlag, Vienna, pp. 77–120.
- Lachmayer K. (2015) Rethinking Privacy Beyond Borders. *Developing Transnational Rights on Data Privacy*. *Tilburg Law Review* 20:78–102.
- Lachmayer K. (2017a) Questioning the Basic Values I – Austria and Jörg Haider. In Jakab A., Kochenov D. (eds.) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*. Oxford University Press, Oxford, pp. 436–454.
- Lachmayer K. (2017b) Constitutional Reasoning in the Austrian Constitutional Court. In Jakab A., Deyevre A., Itzcovich G. (eds.), *Comparative Constitutional Reasoning*. Cambridge University Press, Cambridge, pp. 75–114.
- Lehner A. (2014) Data Retention: A Violation of the Right to Data Protection, Strengthening the Judicial Review System in Austria. *Vienna Journal on International Constitutional Law* 8:445–457.
- Mayer C. (2013) VfGH 16.03.2013, SV 2/12-18, ESM Treaty in accordance with the Austrian constitution. *Vienna Journal on International Constitutional Law* 7:385–400.
- Mayer C., Wutscher H. (2014) Are Austrian Courts Obligated to Consider the Jurisprudence of the European Court of Human Rights when Interpreting the ECHR? *Vienna Journal on International Constitutional Law* 8:201–211.
- Mayer H., Kucsko-Stadlmayer G., Stöger K. (2015) *Bundesverfassungsrecht*, 11th edn. Manz Verlag, Vienna.
- Medigovic U. (2006) Der Europäische Haftbefehl in Österreich. *Juristische Blätter* 128:627–641.
- Merli F. (2007) Europäischer Haftbefehl und nationales Verfassungsrecht. In: Lagodny O., Wiederin E., Winkler R. (eds.) *Probleme des Rahmenbeschlusses am Beispiel des Europäischen Haftbefehls*. NWV Verlag, Vienna, pp. 125–140.
- Murschetz V. (2007a) Der Rahmenbeschluss über den Europäischen Haftbefehl und seine Umsetzung im EU-JZG. *Österreichische Juristen-Zeitung* 61:98–106.

- Murschetz V. (2007b) Auslieferung und Europäischer Haftbefehl. Kontinentaleuropäische und anglo-amerikanische materielle Prinzipien des Auslieferungsrechts im Vergleich zum Europäischen Haftbefehl und dessen Umsetzung in Österreich. Springer Verlag, Vienna.
- Murschetz V. (2009) Aktuelles zur Auslieferung nach einem Abwesenheitsurteil. Juristische Blätter 131:29–33.
- Oberndorfer P., Mayrhofer M. (2006) Der nationale Zuteilungsplan für Emissionszertifikate – eine neue Rechtsquelle? In: Akyürek M., Baumgartner G., Jahnel D., Lienbacher G., Stolzlechner H. (eds.) Staat und Recht in europäischer Perspektive. Festschrift Heinz Schäffer. Manz Verlag, Vienna, pp. 529–554.
- Öhlinger T. (1990) Verfassungsgesetzgebung und Verfassungsgerichtsbarkeit. Österreichische Juristen-Zeitung 45:2–9.
- Öhlinger T., Eberhard H. (2016) Verfassungsrecht, 11th edn. Facultas, Vienna.
- Öhlinger T., Poier K. (eds.) (2015) Direkte Demokratie und Parlamentarismus: Wie kommen wir zu den besten Entscheidungen? Studien zu Politik und Verwaltung Band 84. Böhlau, Vienna.
- Öhlinger T., Potacs M. (2017) EU-Recht und staatliches Recht. Die Anwendung des Europarechts im innerstaatlichen Bereich, 6th edn. LexisNexis, Vienna.
- Peters A. (2010) Rechtsordnungen und Konstitutionalisierung: zur Neubestimmung der Verhältnisse. Zeitschrift für Öffentliches Recht 65:3–63.
- Potacs M. (2009) Subjektives Recht gegen Feinstaubbelastung? Zeitschrift für Verwaltungsrecht, pp. 874–879.
- Pöschl M. (2008) Gleichheit vor dem Gesetz. Springer, Vienna.
- Sautner L. (2005) Die Vollstreckung eines Europäischen Haftbefehls nach dem EU-JZG. Österreichische Juristen-Zeitung 59:328–343.
- Schallmoser N. (2012) Europäischer Haftbefehl und Grundrechte. Risiken der Verletzung von Grundrechten durch den Rahmenbeschluss über den Europäischen Haftbefehl im Lichte der EMRK. Manz Verlag, Wien.
- Scheppele K. (2006) The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency. In: Choudhry S. (ed.) Migration of Constitutional Ideas. Cambridge University Press, New York, pp. 347–373.
- Stelzer M. (2011) The Constitution of the Republic of Austria. A Contextual Analysis. Hart Publishing, Oxford.
- Thym D. (2009) In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court. CML Rev. 46:1795–1822.
- Tridimas T. (2007) The General Principles of EU Law, 2nd edn. Oxford University Press, Oxford.
- Uitz R. (2015) Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary. ICON 13: 279–300.
- Walker N. (2002) The Idea of Constitutional Pluralism. MLR 65:317–359.
- Wiederin E. (2007a) Grundlagen und Grundzüge staatlichen Verfassungsrechts: Österreich. In: von Bogdandy A., Cruz Villalon P.C., Huber P.M. (eds.) Handbuch ius Publicum Europaeum. Vol. I: Grundlagen und Grundzüge staatlichen Verfassungsrecht. C.F. Müller, Heidelberg, pp. 389–449.
- Wiederin E. (2007b) Denken vom Recht her. Über den *modus austriacus* in der Staatsrechtslehre. In: Schulze-Fielitz H. (ed.) Staatsrechtslehre als Wissenschaft: Die Verwaltung Beiheft 7. Duncker & Humblot, Berlin, pp. 293–317.
- Wirth B., Schallmoser N., Hinterhofer H. (2014) Europäisches Strafrecht. In: Herzig G. (ed.) Europarecht. Jahrbuch 2014. NWV Verlag, Vienna, pp. 363–390.
- Zeder F. (2003) Der Europäische Haftbefehl: das Ende der Auslieferung in der EU? Österreichisches Anwaltsblatt 65:376–86.
- Zeder F. (2012a) Europäische Staatsanwaltschaft: Die Nebel lichten sich. Journal für Strafrecht 9:105–109.
- Zeder F. (2012b) Der Europäische Haftbefehl im Fall Assange: Dichtung und Wahrheit. Journal für Strafrecht 9:151–157.
- Zeder F. (2013a) Der Vorschlag zur Errichtung einer Europäischen Staatsanwaltschaft: Große – kleine – keine Lösung? Journal für Strafrecht 10:173–180.

- Zeder F. (2013b) Neue Entwicklungen im Europäischen Straf- und Strafprozessrecht. Österreichisches Anwaltsblatt 75:192–203.
- Zeder F. (2015) Normalität und ein Sonderfall: Nach dem Ende der Übergangsperiode. Journal für Strafrecht 12:126–130.
- Ziniel T. (2014) Strengthening the Judicial Review System in Austria. Vienna Journal on International Constitutional Law 8:437–444.
- Zumbansen P. (2013) Administrative Law's Global Dream: Navigating Regulatory Spaces Between 'National' and 'International'. ICON 11:506–522.

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