

Felix Frankfurter, Hans Kelsen, and the Practice of Judicial Review

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Abstract

When *Hans Kelsen* had to flee Europe on the eve of World War II, *Felix Frankfurter* and *Roscoe Pound* invited him to teach at Harvard Law School. *Kelsen's* acquaintance with the Vienna-born *Frankfurter* dated back to the 1920s when *Frankfurter* developed a keen interest in European legal positivism. But *Frankfurter* and *Kelsen* had even more in common than an Austrian and Jewish background and their understanding of legal theory and history. Both men served as justices and both were concerned with the “political question” of constitutional review.

The article examines *Frankfurter's* and *Kelsen's* discussion of trans-legal systems in respect of the relation of judicial review to the democratic principle. Consequently, the analysis deals with a historic jurisprudential relationship between common law and civil law, between legal positivism and American legal realism – and their intersections.

I discuss whether and in how far *Frankfurter* and *Kelsen* made political statements as jurists, while exercising restraint in their capacity as judges at constitutional courts. Such a discrepancy goes hand in hand with the fact that they both concerned themselves with the position of a constitutional

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court within a democratic system, and with their self-image as constitutional judges, and, ultimately, with their theory of politics.

I. Prologue

In September 1936 two jurists encountered each other at Harvard, two men who had left, or were to leave their mark on the constitutional law of their native lands: *Hans Kelsen* and *Felix Frankfurter*.

Hans Kelsen had recently been appointed to the Chair of International Law at the German University of Prague, and would henceforth be commuting between this post in Prague and the Institut Universitaire de Hautes Etudes Internationales in Geneva. He was in the USA to receive an honorary doctorate from Harvard on the occasion of that institution's tercentenary, and to deliver a paper on *Centralization and Decentralization*¹ at the Harvard Tercentenary Conference of Arts and Sciences (31.8.-12.9.1936). It was on one of those late summer evenings that he was invited to dinner at *Felix Frankfurter's* house². *Frankfurter* had been teaching Administrative Law at Harvard Law School since 1913. His roots were in *Kelsen's* former home, Vienna, where he was born on November 15, 1882; he immigrated to the USA at the age of twelve. He took his doctorate at Harvard Law School in 1906 – the same year in which *Kelsen*, who was born in Prague in 1881 and moved to Vienna in 1884, received his from the Faculty of Law and Political Science at the University of Vienna. Both legal scholars had first-hand experience of the world of politics – *Kelsen* had been legal adviser to Chancellor *Karl Renner* during the transition from monarchy to republic in Austria, and *Frankfurter* advised President *F. D. Roosevelt* on matters concerning the New Deal. Another thing they had in common was their strong sense of social responsibility and their endorsement of academic work being put to use for the benefit of society and the good of the community at large.

In connection with this last point, both men had been influenced by *Roscoe Pound's* writings on the sociology of law. *Pound*, who was Dean of Harvard Law School from 1916 until 1936, was a colleague of *Frankfurter*

¹ *Kelsen* delivered his talk on September 9, 1936 before the Panel Authority and the Individual in Section A-3 (The Place and the Functions of Authority), cf. Pusey Library at Harvard, Conference of Arts and Sciences UA V 827.268. His contribution was published in *H. Kelsen*, *Centralization and Decentralization*. A paper delivered at the Harvard Tercentenary Conference of Arts and Sciences, in: *Authority and the Individual*. Harvard Tercentenary Publications, 1937, 211.

² Cf. Letter from *H. Kelsen* to *F. Frankfurter*, 11.10.1938, Rockefeller Center Archive, RF 1.1., Box 344, Folder 4089.

and called him, “unquestionably the leading jurist of the time”.³ Not only was *Pound* instrumental in conferring the honorary doctorate on *Kelsen* and inviting him to the tercentenary celebrations,⁴ but, together with *Frankfurter*, he also pushed for an invitation to Harvard for *Kelsen* when he was forced to flee Europe in 1940⁵ and gave him further assistance with finding a post in the USA.⁶ Initially, *Kelsen* was the first scholar to be appointed to the Oliver Wendell Holmes-Lectureship, which was created in the winter of 1940/41 with the help of grants from the Rockefeller Foundation.⁷ Subsequently, he was taken on as research associate in comparative law.

Oliver Wendell Holmes, after whom the lectureship was named, had been an Associate Justice of the United States Supreme Court (USSC) from 1902 until 1932 and during his period of office he had propounded the doctrine of judicial self-restraint. In his view, the decisions of the democratically elected legislative assembly had to be respected, which might well entail limiting the power of the Supreme Court. *Felix Frankfurter*, a pupil of *Holmes*, was already favorably inclined towards *Holmes*' ideas when he was a legal scholar at Harvard, and he became even more convinced of them when, in 1939, he finally became an Associate Justice of the USSC himself. For his part, *Hans Kelsen* was a worthy first incumbent of the Holmes-Lectureship, since he had not only played a significant part in setting up the Austrian Constitutional Court (Verfassungsgerichtshof, VfGH), but also sat on it for more than ten years.

Although *Felix Frankfurter* and *Hans Kelsen* were key players in the debates about constitutional courts and judicial practice in the USA and in Austria, apart from their encounter at Harvard in the late summer of 1936,

³ *R. Pound*, Law and the Science of Law in Recent Theories, Yale L. J. XLIII (1933/34), 525 (532).

⁴ Cf. Pusey Library at Harvard, Tercentenary, List of Scholars to be invited, UA V 827.10.19. As justification for his suggestion *Pound* writes in a statement of 7.12.1935, “(A) thinker of the first order and teacher of exceptional power, he has made most of the younger legal scholars of Continental Europe his disciples and has so influenced contemporary juristic thought that most of what has appeared in the Continental literature on jurisprudence in the past two decades has been written in support of or in criticism of his teachings.”

⁵ Cf. Letter of 25.10.1938 from *R. Pound* to *H. Kelsen*, Harvard Law School Library, Pound Papers, Box 140, Folder 7.

⁶ See also the extensive correspondence in the Pound Papers at the Harvard Law School Library, Box 140, Folder 7. On the same subject *T. Ebs*, Vertreibung in drei Schritten. Kelsens Netzwerk und die Anfänge österreichischer Politikwissenschaft, Österreichische Zeitschrift für Geschichtswissenschaften (Austrian Journal of Historical Studies) 21 (2010), 147.

⁷ From January until March 1941 *Kelsen* gave a series of public lectures on the subject of Law and Peace in International Relations in his capacity as Holmes Lecturer. A little later the lectures came out in print under the same title: *H. Kelsen*, Law and Peace in International Relations. The Oliver Wendell Holmes Lectures 1940-41, 1942.

we have hardly any evidence of a significant exchange of ideas. This is surprising on two counts: firstly, *Frankfurter's* approach to the law was frequently said to have a “Viennese aspect”⁸ and to show evidence of “continental background”.⁹ Secondly, both men, as a result of their practical experience as judges and justices, were very well aware of the powerful position and the political significance of supreme courts and so their particular notions of democracy and the constitution led them to reflect on the problems of constitutional jurisdiction in modern democratic societies that aspired to a separation of powers. Among other things they raised the question whether a judge’s scrutiny of a law or directive in respect of its constitutionality was a judicial or a legislative activity.

Such constitutional questions come up along the demarcation line between politics and law, a line that is actually determined by the power relations that obtain within a particular society.¹⁰ *Ferdinand Lassalle's* famous words, “Verfassungsfragen sind ursprünglich nicht Rechtsfragen sondern Machtfragen” (Constitutional questions are not primarily legal questions but questions of power [transl.]¹¹ remind us of how politics and law are intermeshed thanks to the “hybride Institution der Verfassung” (the constitution, that hybrid institution)¹². *Frankfurter* and *Kelsen* analyzed power along these lines; they were fully aware of their powerful positions as supreme court justices and ascertained that there can be no such thing as apolitical law or apolitical adjudication. The key question for them both was how to handle the politically significant activity of delivering an opinion on a constitutional matter in the most transparent way possible.

II. Scientific Approach

European political scientists have done little work on constitutional jurisprudence in general or on constitutional court judges in particular. At

⁸ *H. C. Dillard*, In Memoriam Felix Frankfurter. Preliminary Remarks, Va. L. Rev. 51 (1965), 547.

⁹ *A. N. Hand*, Mr. Justice Frankfurter, Harv. L. Rev. 62 (1949), 353.

¹⁰ Cf. *T. Ehs*, Verfassungsgerichtsbarkeit. Eine Vermessung der Grenzlinie zwischen Politik und Recht, in: T. Ehs/S. Gschiegl/K. Ucakar/M. Welan, Politik und Recht. Spannungsfelder der Gesellschaft, 2012, 135.

¹¹ *F. Lassalle*, Über Verfassungswesen (1862), in: F. Lassalle, Gesammelte Reden und Schriften, Vol. 2, 1919, 7 (60).

¹² *G. F. Schuppert*, Verfassung und Verfassungsstaatlichkeit in multidisziplinärer Perspektive, in: P. M. Huber/M. Brenner/M. Möstl, Der Staat des Grundgesetzes – Kontinuität und Wandel, 2004, 529 (545).

present *Alec Stone Sweet* and his colleagues are the principal players in this field,¹³ which has led to a strong Anglo-American bias in European research, especially insofar as more theoretical democracy-related questions are concerned. The reason for the tentativeness of European work in political science in this area could be the relatively late emergence of the discipline from the subject Law and its emancipation from it – as opposed to the earlier establishment of the US American subject Political Science. The root of the problem may ultimately lie in the way academic disciplines reflect the three powers of government. Parliaments and administration are analyzed aplenty by political sciences while legal studies take care of the courts. The trichotomy of powers, however, seems to imply that constitutional adjudication is a judicial activity like any other. Looked at in this way constitutional courts are just law courts and nothing else. The frequent assertions of politicians, journalists and even academics that a constitutional court has overstepped the mark and delivered a “political” judgment can be traced back to this position, which derives from the classic threefold separation of the powers of government.

In my paper, however, I take the same line as *David Robertson*. He holds that the findings of constitutional court judges differ from ordinary judicial opinions because it is the job of a constitutional court “to choose and impose values”.¹⁴ Such an approach can best be described as neo-institutionalist and regards judges in constitutional courts as potential also-political agents, who will follow the “logic of appropriateness”.¹⁵ This kind of value institutionalism foregrounds the self-image of a constitutional judge and his or her attitude to the role played, which is why notes and comments, essays, newspaper articles, opinions and dissenting opinions by *Felix Frankfurter* and *Hans Kelsen* are my main sources when dealing with the controversy surrounding the political-legislative act of constitutional adjudication. Ultimately the question is, according to *Robertson*, which political theory underlies the course of action selected? “Political theory” here does not merely mean classic political philosophy but also “a sociological understanding of politics as well as normative preferences, and links the two via arguments about appropriate institutions – in this context, laws”.¹⁶ Thus constitutional court judges articulate values; just like political theorists they express the implicit and explicit values of a particular society that are in-

¹³ See for example *A. S. Sweet*, *Governing with Judges*, 2000; *A. S. Sweet/M. Shapiro*, *On Law, Politics, and Judicialization*, 2003.

¹⁴ *D. Robertson*, *The Judge as Political Theorist*, 2010, 19.

¹⁵ Cf. *J. G. March/J. P. Olsen*, *The Logic of Appropriateness*, in: M. Moran/M. Rein/R. E. Goodin, *The Oxford Handbook of Public Policy*, 2006, 689.

¹⁶ *D. Robertson* (note 14), 359.

scribed in its constitution, and they develop these further. From time to time I draw on such an analysis in an attempt not to force constitutional courts into the standard threefold model of the separation of powers, but to consider them as a fourth power, both judicial and legislative agents. Consequently, I can abandon the distinction between adjudication and administration, which is questionable anyway, and begin to think afresh about the powers of government.

Drawing on the value institutionalism approach, in this essay I shall be looking at *Felix Frankfurter* and *Hans Kelsen* as “scholars with commitment” after *Pierre Bourdieu*.¹⁷ For *Frankfurter* and *Kelsen* were not merely and not solely concerned with our topic as active judges, they also followed it up in their academic work. According to *Bourdieu*, academic research is also a site of political and scientific agency and a constituent part of sociocultural practice. Working along these lines, *Mitchell Ash* has come up with the concept of the varying resources which the political system and academic theory offer each other.¹⁸ He broadened the view of supposedly self-centered politics and misused science with the notion of “self-involvement” and takes scientists and academics to be (self-) assured active subjects in the field of politics. *Johannes Feichtinger* then made use of this approach and added to it *Bourdieu*’s idea of “relative autonomy”¹⁹ as being the role of the intellectual in the modern world. Such an intellectual is a politically active agent, someone who does not shrink from intervening in political matters outside of his or her academic field, without becoming a politician, however. The type in question is that of the responsible academic, someone who invests his or her authority politically for the public good and thereby transcends the dualism of autonomy and heteronomy. *Feichtinger* calls this kind of “scholarship with commitment” “autonom-engagierte Wissenschaft” (autonomously committed science [transl.]).²⁰

In the following I shall discuss whether and in how far *Frankfurter* and *Kelsen* made political statements as jurists, while exercising restraint in their capacity as judges at constitutional courts. Such a discrepancy goes hand in hand with the fact that they both concerned themselves with the position of

¹⁷ *P. Bourdieu*, *Forschen und Handeln*, in: *P. Bourdieu, Forschen und Handeln. Recherche et Action*, 2004, 93.

¹⁸ *M. G. Ash*, *Wissenschaft und Politik als Ressourcen für einander*, in: *R. Bruch/B. Kaderas, Wissenschaften und Wissenschaftspolitik*, 2002, 32.

¹⁹ *P. Bourdieu*, *Der Korporatismus des Universellen. Die Rolle des Intellektuellen in der modernen Welt*, in: *P. Bourdieu, Die Intellektuellen und die Macht*, 1991, 41.

²⁰ *J. Feichtinger*, *Wissenschaft als reflexives Projekt. Von Bolzano über Freud zu Kelsen: Österreichische Wissenschaftsgeschichte 1848–1938*, 2010.

a constitutional court within a democratic system, and with their self-image as constitutional judges, and, ultimately, with their theory of politics.

Criticism of “judicialization”,²¹ of over-constitutionalization and of the resultant “juristocracy”²² crops up repeatedly in discussions of constitutional jurisprudence; the development of New Constitutionalism has rendered it a supranational if not global issue nowadays. For, when legal norms are scrutinized from a constitutional perspective, a conflict breaks out as to who or what is actually to exercise supreme power in a constitutional democracy. The controversy culminates in the institutional question whether elected bodies such as parliaments or rather courts of law should arrive at decisions in the last instance. So we see the fundamental tension between legislature and judiciary as expounded in the theory of majority rule. As the significance of constitutional adjudication steadily grows, the supposed politicization of judges’ decisions and the judicialization of politics become more controversial than ever from the democratic point of view. *Alexander Bickel*, a Harvard graduate and sometime research assistant of *Felix Frankfurter* at USSC, commented dramatically from his position as an adherent of judicial restraint, “When precedence is given to a majority decision on the part of a small number of unelected and unaccountable justices, ordinary citizens are dis-enfranchised, and we negate cherished principles of representation and political equality that should obtain when legal problems are to be resolved in the last instance.”²³ *Robert Dahl* had already used the example of the US to show the potential for conflict between the legislature and constitutional jurisdiction inherent in the model of constitutionalism.²⁴

As we have seen, the current criticism of the powerful position of the judiciary is not a new phenomenon. It is rather the case that today’s discussions show parallels to the period between the two World Wars when *Hans Kelsen* and *Felix Frankfurter* were developing their political theories.

In yet another crisis of democracy, one that resembles that of the 1930s in many ways, with the added complication of the current primacy of economics over politics, we have to note that, as the power of the legislative and the executive branches diminishes, the relative power of the judiciary automatically increases. *Frankfurter* and *Kelsen* set new priorities in the debate about democracy. On reflection, from time to time they both called into question not the separation of powers itself but the resultant trichotomy, and at all events the myth of apolitical justice, and ultimately the notion

²¹ *M. Shapiro/A. S. Sweet* (note 13).

²² *J. Hirschl*, *Juristocracy*, 2007.

²³ *A. M. Bickel*, *The Least Dangerous Branch*, 1962, 38.

²⁴ *R. Dahl*, *Decision-Making in Democracy*, 1957.

of the constitutional court judge as a mere “mouthpiece of the law” (*Montesquieu’s* “*bouche de la loi*”).

III. *Kelsen* and the Austrian Constitutional Court – Theory

Called into existence on 25.1.1919 (Staatsgesetzblatt 48/1919) the Austrian Constitutional Court (VfGH) was one of the first institutions of the new Republic of Austria and pre-dates the Austrian Constitution (B-VG 1920). Its organization owed a great deal to the ideas of *Hans Kelsen*. In December 1918 *Kelsen* had been charged by the Austrian State Chancellor *Karl Renner* with the task of preparing a law whereby the competences of the former Imperial and Royal Supreme Court would be transferred to a constitutional court that would be newly set up and invested with more power to review legal norms. At that time *Kelsen* was an Associate Professor at the University of Vienna and had also been adviser to the Imperial and Royal Ministry of War. In November 1918 *Renner* appointed him research assistant with a view to devising a definitive constitution for the post-war Republic.

In conceptualizing the Austrian Constitutional Court *Hans Kelsen* followed in the footsteps of *Georg Jellinek*. Back in 1885 *Jellinek* had demanded a Constitutional Court for Austria.²⁵ In his view such a court was sorely needed, given the existence of numerous cases of parliamentary injustice. The decision that even Parliament could contravene the constitution and so judges of some sort were needed to oversee the actions of what was, in effect, the supreme institution of the state, the legislature, struck at the very heart of the relationship between Parliament and the judiciary and therefore also at the organizational structure of the modern state based on the separation of the branches of government. For, if a Supreme Court can, with its opinion, change the laws passed by parliament and therefore having legal force, it is behaving like a legislative body. Before *Jellinek* the prevailing opinion was that parliaments were the guarantors of constitutional law and order and could do no wrong. *Jellinek*, however, addressed the issue of parliamentary abuse of power and wanted to work against this with the help of the supposedly apolitical judiciary. Such a naïve picture of the apolitical

²⁵ *G. Jellinek*, Ein Verfassungsgerichtshof für Österreich, 1885. Cf. also the following: *S. Paulson/M. Schulte*, *Georg Jellinek. Beiträge zu Leben und Werk*, 2000, in particular the essays by *A. J. Noll* und *D. Wyduckel*.

judge was widespread among *Jellinek's* contemporaries²⁶ and had nothing to do with being against parliaments per se. *Kelsen's* teacher *Edmund Bernatzik* also came down on the side of a scrutiny of the work of the ideologically biased representatives of the people based on the findings of politically neutral justices.²⁷ Only *Kelsen* and his pupil *Adolf Julius Merkl* – who made clear, using the image of the “double face of the law” (*doppeltes Rechtsantlitz*),²⁸ that judges not only interpret the law but also lay down new norms – reflected on the legislative and political importance of the judiciary, which would be even greater in the case of a constitutional court located in a democratic multi-party state. *Hans Kelsen's* criticism was even more fundamental. As a result of his theoretical considerations of the nature of democracy he rejected the separation of powers, “Only theoretical shortsightedness or political intent could describe the principle of the separation of powers as a democratic one”, he said in 1920. In fact, such a principle inhibited the full democratization of the state.²⁹ More specifically, he was against regarding the three powers as being intrinsically different in their nature, and he found the distinction between adjudication and administration “more than questionable” anyway,³⁰ for, as he saw it, they merely reflected, in accordance with the doctrine of the hierarchical legal system, various stages in the concretization of the law. That is why, in the light of democratic theory, constitutional jurisprudence as *Kelsen* conceived it derives from his idea that law-making is also a kind of enforcement, namely the enforcement of the constitution.³¹ According to the hierarchical legal system theory, all adjudication is also law-creating, and has a political component, which is why constitutional adjudication is also constitutional law-making. And this makes the Austrian Constitutional Court a legislative body as well as a judicial one.

Thus *Kelsen* was able to reconcile having a constitutional court with democratic theory and to counter the argument that constitutional adjudica-

²⁶ Cf. *R. Ogorek*, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert*, 1986.

²⁷ Cf. *E. Bernatzik*, *Rechtsprechung und materielle Rechtskraft* (1886), quoted from the reprint 1964, 262 (264).

²⁸ *A. J. Merkl*, *Das doppelte Rechtsantlitz. Eine Betrachtung aus der Erkenntnistheorie des Rechts*, *Juristische Blätter* 47 (1918), 425.

²⁹ “Nur theoretische Kurzsichtigkeit oder politische Absicht konnte das Prinzip der Trennung der Gewalten als ein demokratisches ausgeben”, *H. Kelsen*, *Vom Wesen und Wert der Demokratie*, 1920, 19.

³⁰ *H. Kelsen*, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, *VVDStRl* 5 (1929), 30 (50).

³¹ Cf. *T. Olechowski*, *Von der Ideologie zur Realität der Demokratie*, in: *T. Ehs*, *Hans Kelsen. Eine politikwissenschaftliche Einführung*, 2009, 113.

tion was incompatible with democracy, a point that had previously been made, primarily by *Carl Schmitt*.³² A pre-condition of his argument, however, was that democracy was seen as pluralistic:³³ the functions of passing laws, implementing them and seeing that they were properly interpreted were not regarded as being divided among three completely separate powers. Consequently no single body was appointed as “guardian of the Constitution”, but rather this responsibility was also shared in a pluralistic way among the organs of the branches of government. For in pluralistic democracy constitutional courts as well as parliaments, administrative bodies, and even individual citizens are called upon to safeguard the Constitution. From this perspective *Kelsen* decided that the Austrian Constitutional Court did not fly in the face of democracy but even guaranteed it.

The concept of constitutional jurisprudence was linked with *Kelsen's* interpretation of constitutions and ultimately of democracy itself. If a constitution is primarily form and not content, in other words only a sober catalogue of rules governing the cut and thrust of politics, if, under the influence of *Ernst Cassirer*,³⁴ *Kelsen* focuses on function rather than substance, then this functional approach means that constitutional adjudication is nothing other than the guarantee that people abide by the rules of the game that govern a democratic system. So the Austrian Constitutional Court becomes a kind of referee with the specific task of protecting the minority, a vital prerequisite of democracy. For a democratic “régime may only be organized in such a way that the minority, too, because it is not absolutely mistaken, not absolutely without rights, can become the majority at any given time. That is the real point of the political system we call democracy. The only reason we can set it up against political absolutism is because it is the expression of political relativism.”³⁵ This relativistic world view conditioned *Kelsen's* commitment to pluralistic democracy and thus the organization of the Austrian Constitutional Court. “Democracy is, in itself, only a formal principle which grants sovereignty to the views of the majority, with no guarantee that precisely this majority can bring about what is absolutely

³² Cf. *C. Schmitt*, *Der Hüter der Verfassung*, *Der Ring* 4 (1931), 328.

³³ Cf. *R. C. van Ooyen*, *Die Funktion der Verfassungsgerichtsbarkeit in der pluralistischen Demokratie und die Kontroverse um den “Hüter der Verfassung”*, in: *R. C. van Ooyen*, *Hans Kelsen. Wer soll Hüter der Verfassung sein?*, 2008, VII.

³⁴ *E. Cassirer*, *Substanzbegriff und Funktionsbegriff*, 1910.

³⁵ “Die Zwangsordnung darf nur so beschaffen sein, daß auch die Minderheit, weil nicht absolut im Unrecht, nicht absolut rechtlos, jederzeit selbst zur Mehrheit werden kann. Das ist der eigentliche Sinn jenes politischen Systems, das wir Demokratie nennen und das nur darum dem politischen Absolutismus entgegengestellt werden darf, weil es der Ausdruck eines politischen Relativismus ist”, *H. Kelsen*, *Allgemeine Staatslehre*, 1925, 371.

good or right. But majority rule differs profoundly from any other system of governance in that it postulates a minority, which it recognizes politically and – in strict adherence to the democratic ideal – also protects.”³⁶ For *Kelsen* constitutional adjudication was particularly suited to realizing this idea.³⁷

Drawing on such reflections on parliamentary democracy, *Hans Kelsen* conceived of the Austrian Constitutional Court as a body the members of which were to be appointed by Parliament. The National Council was to elect the President, the Vice-President and six members as well as three alternates; the Federal Council six members and three alternates. As the result of an inter-party agreement made in the Main Committee on 15.7.1921 (the affirmation of a basic agreement already made in 1919) new appointments to the Court after the Federal Constitutional Law came into effect followed a proportional system (*Proporz*) and were divided up among the parties represented in the National Assembly. From then on four members of the Court came from the Christian Socialist Party, three from the Social Democrats, one from the Greater Germany party and four were neutral. One of the latter was *Kelsen* himself, although the political theories he had developed would certainly have located him in the liberal-social-democratic camp. Members who did not belong to any political party or who had not been party-politically active in any clearly defined way were counted as neutral.³⁸

During the 1920s, the gap between the social classes widened, social unrest mounted and democracy was seriously called into question. Finally the Austrian Constitution was reformed in 1929, a reform which – under the banner of de-politicization – struck at the heart of the Constitutional Court. The constitutional amendment was intended to replace Austria’s fairly radical brand of parliamentarianism by a presidential republic, thereby weakening the influence of Parliament and political parties. In addition it would make it possible to break the power of the Social Democrats in parliament

³⁶ “Die Demokratie ist nämlich an sich nur ein formales Prinzip, das der jeweiligen Anschauung der Mehrheit die Herrschaft verschafft, ohne daß damit die Gewähr gegeben ist, daß gerade diese der Mehrheit das absolut Gute, Richtige erreicht. Aber die Herrschaft der Majorität unterscheidet sich von jeder anderen Herrschaft dadurch, daß sie ihrem innersten Wesen nach eine Minorität nicht nur begrifflich voraussetzt, sondern auch politisch anerkennt und – in konsequenter Verfolgung des demokratischen Gedankens – schützt”, *H. Kelsen*, *Sozialismus und Staat*. Eine Untersuchung der politischen Theorie des Marxismus, 3rd ed. 1965, based on the 2nd ed. of *Sozialismus und Staat* (1923), 161.

³⁷ *H. Kelsen* (note 30), 81.

³⁸ *T. Zavadil*, Die Parteienvereinbarungen über den Verfassungsgerichtshof und die Bundes-Verfassungsnovelle 1929, in: T. Angerer/B. Bader-Zaar/M. Grandner, *Geschichte und Recht*, 1999, 339 (350).

whose share of the vote had been steadily increasing although they had not been represented in any governing coalition since 1920.

The legislative aspect, and with it also the political element, could be seen in the system of constitutional jurisprudence that *Kelsen* devised in the fact that the constitutional court judges were chosen by Parliament and that deputies of the National and Federal Councils could be members of the Court. There was no need for members to have studied Law – the most prominent example of a non-jurist on the Constitutional Court was the Social Democratic National Council Deputy *Friedrich Austerlitz*, who was also Editor-in-Chief of the *Arbeiter-Zeitung*, a Socialist newspaper started by *Viktor Adler* in 1889. The close relationship between Constitutional Court and Parliament was soon reflected in the Court's location. To begin with it met on the premises of the former Imperial Court (k.k. Reichsgericht) on the Schillerplatz, but in May 1923 it moved to the Parliament building, to the wing that had been occupied by the Chamber of Deputies. However, the amendment to the Federal Constitutional Law of 1929 created the illusion that politics and law were two separate domains, or at least two areas that could be kept independent of each other, and that the Constitutional Court could function as an impartial adjudicator from its lofty position above all other democratic disputes.

Adolf Merkel commented that the reform of the Constitutional Court was necessary because “parliamentarians’ membership of a court charged with the scrutiny of Parliament’s actions [...] violated the cardinal principle underlying all jurisdiction, namely that no-one should give a judicial opinion on his or her own affairs”, but conceded nonetheless that “above and beyond that the change in the composition of the Constitutional Court did not serve the purpose of de-politicizing but only brought about a shift in political orientation”.³⁹ In fact, the reform of the system of appointing justices in particular only reflected a political re-alignment and drew a veil over the political significance of constitutional adjudication. For a conservative government did away with the positions that had life tenure and replaced them by persons that were deemed more acceptable now that the federal government was empowered to nominate the President, the Vice-President, six further members and three alternates. The remaining six members and three alternates were to be appointed from short lists of three candidates put forward by the National Council and the Federal Council, responsible for

³⁹ “Aber die darüber hinausgehende Aenderung in der Zusammensetzung des Verfassungsgerichtshofes diene offenbar nicht der Entpolitisierung, sondern wohl nur [...] der Umpolitisierung des Verfassungsgerichtshofes”, *A. J. Merkel*, *Der “entpolitisierte” Verfassungsgerichtshof*, *Der österreichische Volkswirt* 23 (1930), 509 (510).

nominating two and three members respectively, and two and one alternates. To begin with, the conservative reformers had even intended to dispense with the Parliament altogether as far as the nomination of the judges was concerned. The policy of excluding the Parliament as far as possible from the selection of judges at the Constitutional Court, which is still the practice nowadays incidentally, meant that the much vaunted “depoliticization” actually worked against democratization.

IV. *Kelsen* and the Austrian Constitutional Court – Practice

On the recommendation of *Karl Renner*, *Hans Kelsen* was appointed to the German-Austrian Constitutional Court on 3.5.1919. His predecessor was the legal scholar *Edmund Bernatzik*, who had died shortly before. *Kelsen* also succeeded *Bernatzik* as full professor at the University of Vienna. In July 1921 all the parties represented in parliament unanimously voted *Kelsen* into one of the new positions in the Constitutional Court as a neutral member with life tenure. He was a member of the Court until he was relieved of office on 15.2.1930 in accordance with § 25 Abs 1 V-ÜG 1929.

In contrast to the USSC, dissenting opinions were and still are not given in the Austrian Constitutional Court, so that the individual judge can retreat behind the judicial body as a whole. This is why there seem at first sight to be very few explanations or justifications of *Kelsen's* voting behavior. On the other hand, his work as a constitutional court judge has been investigated using the transcripts of the Court's sessions kept in the Austrian State Archives;⁴⁰ his style of interpretation clearly attests his awareness of the legislative component of the work of the Constitutional Court. On the occasion of a dispute about how authority should be divided up between central government and the provinces his unequivocal comment was, “The matter in question has in essence to do with subsumption. To be sure, one could also subsume differently. In giving an opinion on this case the Constitutional Court is exercising law-making powers. We were well aware that this might happen when the Court was first set up.”⁴¹ *Kelsen* had

⁴⁰ See *R. Walter*, *Hans Kelsen als Verfassungsrichter*, 2005.

⁴¹ “Die jetzt vorliegende Frage ist im Wesentlichen eine Subsumtionsfrage. Man könnte natürlich auch anders subsumieren. Der VfGH übt durch die Lösung dieser Frage eine rechtsschöpfende Tätigkeit aus. Daß er dies unter Umständen tun würde, war man sich bei seiner

worked out the idea of the Constitutional Court practically single-handed and had put a great deal of himself into this most personal of projects.⁴² Accordingly, his creation was most decidedly a law-creating body as well as a judicial one, with the result that the rulings of the Court were also decisions that reflected a political agenda.

The findings of the Court in the so-called Sever-Marriages case served as an example of a politically motivated vote in the Constitutional Court and, at the same time, provided the political backdrop to the re-organization of 1929, and this not only in the opinion of *Robert Walter* (VfSlg 878/1927). According to *Walter*, *Kelsen's* vote in this dispute about the re-marriage of divorced Catholics was indeed politically motivated since he abandoned "his conservative dogma-oriented line" and "in the case in point never rid himself of his bias – which looked at objectively was justified – when addressing the problem. As a result he ignored aspects such as legal effect, interpreted the regulations governing the positive clash of authorities in his own terms and in so doing introduced a theoretical position which was not sustainable".⁴³ Indeed, upon that occasion the Constitutional Court judges appointed by the Christian Social Party voted unanimously against granting exemptions to the church law prohibiting the re-marriage of divorced Catholics; all the others voted in favor of such a dispensation. According to *Walter*, *Kelsen* was against in this case, but cast his vote for the other side, nonetheless – perhaps because he had been in close touch with the Ehe-rechtsreformverein (The Society for the Reform of Marriage) for years and was an active member of progressive organizations such as *Bereitschaft* (Readiness), where the reform of marriage law was a topic of debate.⁴⁴

Be that as it may, *Hans Kelsen* was the main target of attacks in the press – as the Justice who announced the ruling of the Court he was seen as largely responsible for the decision. Insults were heaped upon him: he was designated as a "harem-keeper" and above all he was branded as a politically biased judge on grounds of his good relations with Social Democratic politicians like *Max Adler* or *Karl Renner*. In an academic essay *Kelsen* reflected

Schaffung bewusst", *H. Kelsen*, Beratungsprotokoll zu VfSlg 157/1922, ref. to *R. Walter* (note 40), 91.

⁴² Cf. *H. Kelsen*, *Autobiographie* (1947), in: M. Jestaedt, *Hans Kelsen im Selbstzeugnis*, 2006, 31 (70).

⁴³ "... in der gegenständlichen Sache von seiner – aus objektiven Gründen gegebenen – Befangenheit in der vorliegenden Problematik nie befreit hat. Sie führte ihn dazu, dass er Aspekte, wie z. B. die Rechtskraft außer Acht ließ, die Bestimmungen über den positiven Kompetenzkonflikt stets in seinem Sinne deutete und dabei eine theoretische Position ins Spiel brachte, die im vorliegenden Fall nicht zu tragen vermochte", *R. Walter* (note 40), 67.

⁴⁴ Cf. *T. Ehs*, *Hans Kelsen und politische Bildung im modernen Staat*, 2007, 120 and 129.

on “the fact that experts – consciously or unconsciously – are motivated by political considerations”.⁴⁵ Years later, in October 1938, he revealed his political feelings at this time in a letter to *Roscoe Pound*, in which he wrote that he had left Vienna because of a “conflict between the then already fascist Government and the Supreme Constitutional Court, whose permanent adviser I was”.⁴⁶ From this we can see that in *Kelsen’s* eyes the government of the Christian Socialists was already a Fascist one.

V. The Roosevelt Court

Felix Frankfurter only took up his appointment as Associate Justice of the USSC in 1939, but he had already been making his views on reforming of the Court heard since the 1920s, especially since the Black Monday decisions. Black Monday is the name given to 27.5.1935, the day on which the USSC found that laws passed by *Franklin D. Roosevelt’s* New Deal administration were anti-constitutional in three cases. At his inauguration in 1933 President *Roosevelt* swore to combat the Great Depression which followed the Stock Market Crash of 1929, and this he did, using radical and interventionist governmental economic and social measures which became known as the New Deal. In particular, the USSC promptly found the introduction of countless new agencies at federal level, the so-called Alphabet agencies, as well as the measures included in the Second New Deal, the laws passed in the 74th session of Congress from April to August 1935, which were primarily social welfare legislation like the Social Security Act, to be unconstitutional. They violated the allocation of Enumerated Powers set out in the 10th Amendment, which was why *Washington* had no right to pass such laws. The criticism was that the *Roosevelt* Administration sought to extend the power of the Union at the cost of the states. For *Roosevelt*, however, social security and welfare were indissolubly linked to the preservation of democracy and freedom. Freedom from fear and Freedom from want were two pillars of the Four Freedoms that were formulated in 1941.

The members of the USSC were by no means of one mind as to how the 10th Amendment was to be interpreted, especially with regard to the Commerce Clause. Four of the nine justices – the conservative Four Horsemen (*Butler, McReynolds, Sutherland* and *van Devanter*) – were always against the New Deal measures, three – the liberal Three Musketeers (*Brandeis,*

⁴⁵ *H. Kelsen* (note 30), 57.

⁴⁶ Letter from *H. Kelsen* to *R. Pound*, 11.10.1938, Harvard Law School Library, Pound Papers, Box 140, Folder 7.

Cardozo, Stone) – were in favor. The remaining two, *Charles Evans Hughes* and *Owen J. Roberts*, changed their opinions from case to case. As *Hughes* tended to be liberal, it was often *Roberts* who had the deciding vote. As the USSC went on making the New Deal reforms impossible to implement, exploiting a narrow conservative majority, *Roosevelt* finally launched a reform initiative. In 1937 he surprised Congress by introducing the Judicial Procedures Reform Bill, his justification being that the USSC “had been acting not as a judicial body, but as a policy-making body” and thus had “improperly set itself up as a third House of the Congress – a super-legislature”.⁴⁷ From then on, the 75th Session of Congress was marked by altercations concerning the Supreme Court.

The bill still stipulated that the President could not dismiss Justices, who were still to be appointed for life, but it did propose that he would appoint an additional Justice for each one who was over seventy years of age, who had been in office for at least ten years and who was not disposed to retire of his or her own accord. This would have meant enlarging the USSC, whose Justices numbered nine at the time, and would have been quite feasible, given that the US Constitution does not prescribe any fixed number of judges. After all, their number had already been amended by Congress on six previous occasions. *Roosevelt’s* bill was intended to inject new life into the USSC by introducing younger, more liberally inclined Justices, as a counterweight to the older, more conservative judges who were blocking his New Deal reforms. *Roosevelt’s* bill could not drum up a majority in Congress as his aim was allegedly court-packing, an attempt, in other words, to alter the political orientation of the Court.

The Judicial Procedures Reform Bill would have been successful, if *Roosevelt* had made a case based on his “super-legislature” criticism instead of proposing measures to create new Justices. He could have made use of ideas that would have led to a reform of the Supreme Court based on sound democratic principles. For years critical voices had been raised, particularly against the power of the more senior judges and more generally against the power the USSC enjoyed to strike down laws that had been passed by due democratic process. For example, in 1924 *Robert La Follette*, with the support of *Felix Frankfurter*, campaigned in the presidential election to introduce an Amendment to the Constitution whereby USSC opinions could be overruled by a two-thirds majority in Congress. This additional scrutiny would have been a curb on the Supreme Court and would have demonstrated that the legislature took precedence over the judiciary as legal instance of last resort. In 1927 *Frankfurter* elaborated on his reforming ideas

⁴⁷ *F. D. Roosevelt* quoted in *R. H. Jackson*, *The Struggle for Judicial Supremacy*, 1941, 349.

in the Business of the Supreme Court and also tried to reduce radically the influence of the USSC on the American system of democracy. In 1921 he had written to *Learned Hand*, “(T)he price we pay for this judicial service is too great, the advantages too slim for the cost.”⁴⁸ *Frankfurter* was in favor of amending the 14th Amendment because the USSC had exceeded its competences; he pleaded “strongly for restricting the 14th Amendment to ‘unreasonable’ racial and religious discriminations and withdrawing from those Nine Holies the reviewing power over purely intra-state ‘social legislation’”.⁴⁹

As a close adviser to and the main framer of the Social Security Act, for instance, or the Revenue Act, *Felix Frankfurter* was directly affected by the USSC decisions against the New Deal. And, although he thought *Roosevelt’s* court-packing plan was the wrong way to go about things, he did share the President’s condemnation of the extent of the Court’s power. In a letter to Justice *Louis Brandeis*, which was in fact never sent, *Frankfurter* expressed his feelings thus, “Tampering with the Court is a very serious business. Like any major operation it is justified only by the most compelling considerations. But no student of the Court can be blind on its long course of misbehaviour.”⁵⁰ In a subsequent letter to *Monte Lemann* he reiterated a remark made by Justice *Benjamin Cardozo* and added a comment, “[W]e have ceased to be a Court.’ And during this year, of course, they’ve proved it up to the hilt that they were as deep in politics as is the Hill and the White House.”⁵¹

The USSC was and still is one important element in the political process of US American democracy. *Felix Frankfurter* accepted this and certainly did not wish to do away with it,⁵² but simply reform it – not, however, in the direction of a political re-orientation, a similar initiative to *Roosevelt’s*, which had been so roundly condemned, but rather on the basis of objections deriving from democratic theory. These considerations will be outlined in the following pages.

⁴⁸ Letter from *F. Frankfurter* to *L. Hand*, 6.4.1921, Harvard Law School Library, Hand Papers, Box 104, Folder Nr. 9.

⁴⁹ Letter from *F. Frankfurter* to *L. Hand*, 17.4.1924, Harvard Law School Library, Hand Papers, Box 104, Folder Nr. 11.

⁵⁰ Draft letter from *F. Frankfurter* to *L. Brandeis*, 26.3.1937, Library of Congress, Frankfurter Papers, Box 28.

⁵¹ Letter from *F. Frankfurter* to *M. Lemann*, 2.7.1937, Library of Congress, Frankfurter Papers, Box 22, Folder Lemann Correspondence. See also *S. V. Levinson*, The Democratic Faith of Felix Frankfurter, *Stanford L. Rev.* 25 (1973), 430 (446).

⁵² “The Supreme Court is indispensable to the effective workings of our federal government. If it did not exist, we should have to create it.” *F. Frankfurter*, Dissenting Opinion on the Ruling *West Virginia State Board of Education v. Barnette*, 319 U.S., 1943, 667.

Even if *Franklin D. Roosevelt's* Judicial Procedures Reform Bill never became law, the threat it contained represented a victory over the Nine Holies, nonetheless. For, starting in spring 1937, Justice *Owen Roberts*, who had hitherto often voted with the Four Horsemen switched to the progressive side of the Court, and after this “switch in time that saved nine” a period of conservative judgments was followed by a long phase of liberal constitutional adjudication. In *Ronald Edsforth's* opinion, “The Supreme Court’s reversal – from rejection to affirmation of New Deal legislation – in the spring of 1937 was a great turning point in American constitutional history.”⁵³ This shift in position on the part of the USSC was indeed a constitutional revolution: without amending the Constitution or consulting Congress or the federal states, the Supreme Court opined that the Commerce Clause was to be interpreted differently from one day to the next. By so doing the USSC had granted *Washington* a huge power bonus at the expense of the federal states and had at the same time demonstrated what a powerful player it was in the game of politics.

Starting in 1937 *Roosevelt* was in a position to nominate successive new justices to the USSC. *Frankfurter* was nominated on 5.1.1939; a few days later, on 17.1.1939 his appointment was unanimously approved by the Senate. By 1940 five of the nine Justices had been nominated by *Roosevelt* and so he had a majority in the Supreme Court in the last year of his second term of office, which led to the Court being nicknamed the “Roosevelt Court”.

So, had the USSC actually been politically re-oriented as a result of all this? In fact, what surprised many people was that *Felix Frankfurter*, one of the most committed legal scholars and a close confidant of the President, often turned out to be an unreliable “Roosevelt Justice”, and did not deliver political opinions but practiced judicial self-restraint as propagated by his model *Oliver Wendell Holmes*.

VI. *Frankfurter* and the USSC

Felix Frankfurter's nomination as Justice of the USSC was not only unanimously accepted by the Senate, it also gave rise to great rejoicing as many people had high hopes of him. For instance, *Albert Einstein* wrote the following to *Frankfurter*, “Your mere presence there will be a breath of fresh air not to mention your mastery of the art of verbal thrust and parry.” (Ihre

⁵³ R. Edsforth, *The New Deal. America's Response to the Great Depression*, 2000, 264.

blasse Anwesenheit dort wird schon luftreinigend wirken, ganz abgesehen von Ihrer Beherrschung der Fechtkunst.)⁵⁴ The expectation was that *Frankfurter* would be a crusading Justice of *Roosevelt's* party, something the conservative press had been warning of for years. In 1936, during *Roosevelt's* presidential campaign, *Harold Lord Varney* had run a headline in the Sunday paper *New York American*, "Frankfurter – the Master Mind" and added by way of explanation, "The Frankfurter influence at Washington is a masterpiece of remote control". Actually the *Roosevelt* administration was, "a curious collection of Socialists and internationalists", by means of which "Marxian order can be achieved in America without any necessity of violent revolution". This nonviolent revolution would, according to *Varney*, be a judicial revolution, "The method by which this miracle is to be accomplished is to bootleg into the various laws which are enacted at Washington certain carefully worded enabling clauses which will empower public officials to undertake almost unlimited economic programs [...] This revolution by lawyers is probably the most subtle dangerous maneuver in the whole New Deal program, and Professor Frankfurter has been its architect."⁵⁵

Hauke Brunkhorst confirms this view of the New Deal as a judicial revolution and even regards it as "the greatest revolutionary reform since the Civil War and the abolition of slavery", a measure which transformed the USA "into a strongly centralized administrative, welfare and socialization state, and administrative law was turned into one of the pillars of American home affairs".⁵⁶ Indeed, *Felix Frankfurter* had been implementing a "revolution by lawyers" since 1933, insofar as he had found positions for many of his Harvard students in the *Roosevelt* administration and had himself been closely involved in devising laws such as the Social Security Act. This was the result of his adherence to the Wisconsin Idea, according to which universities should make a direct contribution to society by advising civil servants on how to deal with social problems or by providing "well-constructed legislation aimed at benefitting the greatest number of people".⁵⁷

⁵⁴ Letter from *A. Einstein* to *F. Frankfurter*, 10.1.1939, Library of Congress, Frankfurter Papers, Box 257, Reel 164.

⁵⁵ *H. L. Varney*, Frankfurter – the Master Mind, *New York American* 1936.

⁵⁶ *H. Brunkhorst*, Auf dem Weg zur civitas maxima? – Hans Kelsens Werk zwischen Krieg, Revolution und Neugründung der internationalen Gemeinschaft, in: T. Ehs, Hans Kelsen und die Europäische Union, 2008, 27 (34) (transl.).

⁵⁷ *R. D. Myers*, The Wisconsin Idea. Its National and International Significance, *Wisconsin Academy Review* 37 (4/1991), 4. The idea derives from *C. McCarthy*, The Wisconsin Idea, 1912.

However politically committed *Frankfurter* was as a Harvard professor and private citizen, as a Supreme Court Justice he practiced restraint, which was a disappointment to many. As a Jew and a Zionist activist, and as founder of the American Civil Liberties Union and on the basis of his experience hitherto as a judge, he was blamed for being insensitive, especially towards minorities and the socially disadvantaged, and for not making use of the USSC to defend them. In his Dissenting Opinion on *West Virginia State Board of Education v. Barnette* (1943) *Frankfurter* issued a very personal statement explaining his reticence in this area, “One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedom guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, Catholic nor agnostic [...] As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard [...] It can never be emphasized too much that one’s own opinion about the wisdom or evil of law should be excluded altogether when one is doing one’s duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law.”⁵⁸

In *Felix Frankfurter’s* opinion the USSC ought not to be too powerful and should not seek to extend the authority vested in it. For *G. Edward White*, *Frankfurter* the judge was the “architect of a passive model of appellate judging [...] he was slow to find necessity for Court intervention”.⁵⁹ The moot question of the extent of the authority of the Supreme Court had come up repeatedly ever since the early days of the USA. The Federalist Papers had seen the judiciary as clearly the weakest of the three branches but over time the high court judges claimed more and more competences so that eventually there was a lasting shift in the balance of power in their favor. *Frankfurter* commented critically on this, “In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the ‘spirit of the Constitution’ [...] Jefferson’s opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial

⁵⁸ *F. Frankfurter*, Dissenting Opinion on the Ruling *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 646 (1943).

⁵⁹ *G. E. White*, *The American Judicial Tradition*, 1976, 331.

and political functions. As a rule of judicial self-restraint, it is still as valid as Lincoln's admonition."⁶⁰

Frankfurter's support for judicial self-restraint was grounded in pro-democracy arguments. A belief in US democracy as "government by the people" and not "by the judges" was an article of faith for him, for judges would always take their concept of society into account and let their "political theories" (*David Robertson*) shine through. "It is most revealing that members of the court are frequently admonished by their associates not to read their economic and social views into the neutral language of the constitution. But the process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the justices are their 'idealized political pictures' of the existing social order".⁶¹ *Frankfurter* was only too well aware of the fact that judges were not logical computing machines, not mere mouthpieces for the law, and in a letter to Justice *Learned Hand* he reflected on his own difficulties with the unavoidable personal component of arriving at an opinion, "To what extent may a judge assume that his own notions of right moral standards are those of the community? But if it is his job – as you and I believe it to be – to divine what may rightly be deemed the standards of the community, by what process is he to make that divination? How and where should he look for the disclosure of the community's mores?"⁶²

The judicial self-restraint style of interpretation haunted the USSC from the constitutional revolution of 1937 on. This so-called Holmesian Approach was a functional way of arriving at decisions and had been initiated by *Oliver Wendell Holmes*, who had pondered over the role of the judiciary in a democratic system and exerted a strong influence on *Felix Frankfurter*. In the New Deal Court Era (1937 until 1954), the legislature and the executive branch took priority over the judiciary, which in its turn was supposed to moderate its power and influence. It was not the task of the judiciary to influence politics; it was not entitled to oppose the "felt necessities of the time".⁶³ "Holmes-Justices" such as *Frankfurter* conceded supremacy to the government and justified such a concession by referring to the "command of the American creed, and the function of the Supreme Court was limited to reminding the public that salvation could be attained only through indi-

⁶⁰ *F. Frankfurter* (note 58).

⁶¹ *F. Frankfurter*, Supreme Court, United States, Encyclopaedia of the Social Sciences 14 (1930), 480.

⁶² Quoted from *W. Wiecek*, Felix Frankfurter, Incorporation, and the Willie Francis Case, *Journal of Supreme Court History* 25 (2001), 53.

⁶³ *O. W. Holmes*, *The Common Law*, 1881.

vidual initiative – and that the American polity would reward such initiative with political success”,⁶⁴ according to *Sanford Levinson*.

Felix Frankfurter was very patriotic, had great faith in US American democracy and therefore felt that an active USSC was contrary to the idea of the USA as an “open polity”.⁶⁵ In holding this opinion he repudiated the view of the USSC as the one and only court of last resort in constitutional questions that had prevailed since the end of the 19th century. For him the USSC was only one of several guardians of the Constitution as “legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts”.⁶⁶ Notwithstanding this the USSC was necessary and compatible with democracy, if only the Justices were to practice self-restraint, “My starting point is, of course, the democratic faith on which this country is founded – the right of a democracy to make mistakes and correct its errors by organs that reflect the popular will – which regards the Court as a qualification of the democratic principle and desires to restrict the play of this undemocratic feature to its narrowest limits [...] More particularly, the history of this Court emboldens me to believe that men need not be supermen to observe the conditions under which judicial review of political authority – that’s what judicial review of legislation really amounts to – is ultimately maintainable in a democratic society.”⁶⁷ The USSC should be active only within the “narrowest limits”, that is to say that, as *Frankfurter* saw it, it should only defend the Constitution when democracy is endangered, when the rules of the game are no longer being observed; otherwise it has no business interfering with the democratic political process. Here *Frankfurter* is referring not so much to the legal ethos of judicial self-restraint, but is rather positioning non-majority proceedings in the realm of democratic theory following the doctrine of principled self-restraint. Years after *Frankfurter*’s time this concept was taken up by *John Hart Ely*.⁶⁸ According to him the sole task of constitutional courts is to safeguard the principles of democracy and make sure the pre-conditions for it exist. Consequently, such courts may only strike down laws if they undermine the conditions necessary for the realization of the democratic principle.

⁶⁴ *S. V. Levinson* (note 51), 447.

⁶⁵ Cf. *S. V. Levinson* (note 51), 430.

⁶⁶ *F. Frankfurter*, *The Public and Its Government*, 1930, 76.

⁶⁷ Letter from *F. Frankfurter* to *H. L. Black* (1943), quoted from *M. Silverstein*, *Constitutional Faiths. Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making*, 1984, 152.

⁶⁸ Cf. *J. H. Ely*, *Democracy and Distrust*, 1980.

VII. The Political Component

If one seeks to summarize and compare *Felix Frankfurter's* and *Hans Kelsen's* ideas on the political and legal aspects of constitutional jurisprudence and its compatibility with the democratic principle of majority rule, one needs to add a word or two of explanation about the differing systems of scrutinizing the compatibility of legislation with the constitution. The USA has a diffuse constitutional jurisdiction whereas in Austria the process of judicial review is more concentrated. In the case of diffuse jurisdiction there is no autonomous constitutional court; all courts are charged with upholding the supremacy of the constitution and ensuring that it is adhered to. Concentrated constitutional jurisdiction is based on a separate and autonomous constitutional court such as the Austrian Constitutional Court, VfGH, which is the ultimate authority. The USSC on the other hand, although it is the highest legal instance, is mainly invoked in cases involving the Constitution and so it can be regarded as a constitutional court as far as its function is concerned, which would justify the comparison I am making in this study.

Although the Austrian and the US American constitutions differ substantially in a number of ways – the former is a fairly crude framework that facilitates political activity, and is relatively easy to amend; the latter is value-laden and much more difficult to change – *Felix Frankfurter* and *Hans Kelsen* share the same way of looking at the constitution as such, namely focusing on its function. A constitution regulates the way people live together in a modern democratic state, and it is the job of a constitutional court simply to ensure that nobody breaks the rules. Since, by virtue of the fact that the US Constitution is so difficult to amend, the USSC enjoys more power than the Austrian Constitutional Court, *Frankfurter's* strictures on the political and legislative component of the USSC's work are much harsher than *Kelsen's* ever needed to be. After all, the Austrian Constitution is relatively easy to amend, which favors the constitutional legislators in Parliament at the expense of the Austrian Constitutional Court. A VfGH that gives rulings which have a political impact is therefore less of a problem than a USSC whose decisions have a political component. *Frankfurter* expressed himself quite clearly on this point, "In neither situation is our function comparable to that of a legislature or are we free to act as though we were a super-legislature",⁶⁹ whereas from *Hans Kelsen's* point of view it was completely irrelevant whether or not the VfGH represented "true justice"⁷⁰ or was

⁶⁹ *F. Frankfurter* (note 58).

⁷⁰ *H. Kelsen*, Wer soll Hüter der Verfassung sein?, *Die Justiz* VI (1930-31), 576 (583).

rather a body which also had legislative powers, and could be positioned as such in the judicial hierarchy.

Since *Kelsen's* concept of democracy was pluralistic, and since after the Federal Constitutional Law of 1920 the Austrian system of government was set up in a way that combined the branches rather than separating them, constitutional jurisprudence and democracy were not antithetical for *Kelsen*; rather the VfGH was one of the guarantors of democracy in a pool of not completely differentiated, overlapping authorities. Because of the overlapping of the various branches he did not consider the constitutional court as an institution to be incompatible with the notion of parliamentary sovereignty, for sovereign power is not the preserve of one state body alone but rightly belongs to the state as such, in other words it is vested in the entire legal system, which in its turn is created, implemented and safeguarded by more than one official body.

Felix Frankfurter shared the view that the USSC was only one of a number of guardians of the Constitution; the problem, however, was that the USSC – thanks to the US American idea of the strict separation of the branches of government and the proscription of any mutual influence between them – had managed to make itself into the lord and master of constitutional matters. According to *Frankfurter*, this flouted the US American citizen's right to self-government. He did not desire to restrain the power of the USSC because he was afraid of wrong judicial decisions but rather because even “right” rulings would rob the people of their democratic rights. The influence of *James Bradley Thayer* can be felt here. *Thayer* feared for democracy when the defence of liberty was relegated to the law courts, “Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence – the power of the judiciary to disregard unconstitutional legislation – it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question in the ordinary way, and correcting their own errors [...] The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people and to deaden its sense of moral responsibility.”⁷¹ *Frankfurter* believed in the US polity, in committed and politically active citizens and in a well-functioning executive branch as the guardians of democracy, “Ultimate protection is to be found in the people themselves, their

⁷¹ *J. B. Thayer*, John Marshall, in: *J. B. Thayer, Oliver Wendell Holmes, and Felix Frankfurter on John Marshall*, 1967, 85.

zeal for liberty, their respect for one another and for the common good – a truth so obviously accepted that its demands in practice are usually overlooked. But safeguards must also be institutionalized through machinery and processes. These safeguards largely depend on a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure ... easy access to public scrutiny, and a constant play of criticism by an informed and spirited bar.”⁷² Within such a scheme of things the Justices of the USSC would play a lesser role than that they had appropriated for themselves.

Hans Kelsen had fewer problems with the powerful position of the VfGH. For just as law-making was at the same time a kind of law enforcement, as the constitution is invoked in order to generate new legal norms, so the VfGH shared legislative power with Parliament in its capacity as a “negative law-maker”. *Kelsen* understood constitutional adjudication as always being political, too, because of its high degree of legislative shaping power, whereby, for him, “political” implied dependent on one’s own personal values,⁷³ because, “there only existed a quantitative not a qualitative difference between the political nature of law-making and that of jurisdiction”.⁷⁴ This is why he was not in favor of denying the political aspect, but actually supported the idea of openly taking party-political influence into account and advocated appointing judges to the court by means of parliamentary election – as he had envisaged in 1919 when he first drew up plans for the VfGH, “However desirable it might be to keep all party-political influence out of the judicial work of the Constitutional Court, putting this into practice proves very difficult [...] and so it almost seems better to accept political parties being legitimately involved in the constitution of the Court rather than having an inofficial and uncontrollable party-political influence. This could perhaps be achieved by having a certain number of the appointments made by parliamentary election, whereby the relative strength of the respective parties should be taken into consideration. If the remaining positions are filled by legal experts, these people would be much better placed to weigh up the judicial pros and cons as their political consciences would be salved by the fact that the other members of the Court were called upon to look after political interests.”⁷⁵ *Kelsen* even went so far as to suggest that the

⁷² *F. Frankfurter*, The Task of Administrative Law, U. Pa. L. Rev. 75 (1927), 618.

⁷³ *H. Kelsen*, *Reine Rechtslehre*, 1934, 16.

⁷⁴ *H. Kelsen* (note 70), 586.

⁷⁵ “So wünschenswert es wäre, alle parteipolitischen Einflüsse von der Judikatur des Verfassungsgerichts fernzuhalten, so schwierig ist gerade die Verwirklichung dieses Postulats [...] dann ist es beinahe besser, an Stelle eines inoffiziellen und unkontrollierbaren parteipolitischen Einflusses die legitime Beteiligung der politischen Parteien bei der Bildung des Gerichts

public at large be involved in the discussion⁷⁶ in order to do justice to the political factor in ruling on constitutional matters.

Although dissenting opinions are published in the USA, for *Felix Frankfurter* this was not enough to counter the undemocratic aspect of the USSC. He found his solution in the doctrine of judicial self-restraint, “The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.”⁷⁷

Did the doctrine of judicial self-restraint make *Felix Frankfurter* a “steward of democracy”⁷⁸ or is self-restraint not a democratic category at all? Is it only akin to the moderation which an enlightened absolute monarch would exercise as he or she saw fit, as *Ingeborg Maus* contends?⁷⁹ At all events, *Felix Frankfurter’s* conception of the Constitution and of democracy led him to see the judiciary as the least significant of the three branches of government and made him want to undermine the powerful position of the USSC Justices, who were, not without good reason, known as the Nine Holies. He preferred the legislature and the administration as political players and pinned his hopes on an excellent, academically-trained civil service. A civil service staffed with experts and academics would be the best solution for a modern society based on the division of labor. For *Hans Kelsen* bureaucratization had already meant “the maintenance of democracy”⁸⁰ and *Felix Frankfurter* emphasized the “social scientist”⁸¹ from the Wisconsin Idea. Both men set great store by what the sociology of the law could achieve in the service of the modern state. *Kelsen*, for example, was a member of the executive committee of the Wiener Soziologische Gesellschaft (Socio-

zu akzeptieren. Etwa in der Weise, dass ein Teil der Stellen durch Wahl seitens des Parlamentes besetzt wird, und daß bei dieser Wahl die verhältnismäßige Stärke der Parteien zu berücksichtigen ist. Werden die anderen Stellen mit Fachleuten besetzt, können diese den rein fachlichen Erwägungen viel ungehinderter Raum geben, da dann ihr politisches Gewissen durch die Mitwirkung der zur Wahrung der politischen Interessen Berufenen entlastet wird.”, *H. Kelsen* (note 30), 56.

⁷⁶ *H. Kelsen* (note 30), 77.

⁷⁷ *F. Frankfurter* (note 58).

⁷⁸ *P. D. Carrington*, *Stewards of Democracy*, 1999.

⁷⁹ *I. Maus*, *Vom Rechtsstaat zum Verfassungsstaat*, *Blätter für deutsche und internationale Politik* 49 (2004), 835 (849).

⁸⁰ *H. Kelsen*, *Demokratie*, *Der deutsche Volkswirt* 1 (1926), 238 (240).

⁸¹ Cf. *F. Frankfurter*, *The Manager, the Workman, and the Social Scientist*, *Bulletin of the Taylor Society* 3 (1917).

logical Society of Vienna) and, as a university professor, was always very supportive of doctoral and post-doctoral dissertations with a sociological bent. At Harvard, together with *Roscoe Pound*, *Frankfurter* promoted sociological jurisprudence and carried out research in criminal sociology.⁸²

In spite of all this common ground, cross-references between *Felix Frankfurter* and *Hans Kelsen* are extremely rare. One documented instance is an article by *Kelsen* in the *Journal of Politics* of 1942. At that time *Kelsen* was teaching at Wellesley College as Mary Whiton Calkins-Professor; in a comparative study of the US American versus the Austrian democratic (i. e. between 1920 until 1929/1934) constitutions *Kelsen* explains once again that, “the administrative authorities are not only law-applying but also law-creating organs”, and states, with reference to the New Deal measures, that “the administrative organs of the United States in the course of actual political and economic evolution will have attained a similar legal position as the administrative organs of the European Continent”.⁸³ For the “revolution by lawyers” that the *Roosevelt* Administration set in motion has already tipped the balance of power in favor of the federal government. This phenomenon is naturally accompanied by a centralization of the process of judicial review in order to uphold the authority of the Constitution, as was the case in Austria in 1920. *Kelsen* explains the rulings of the VfGH as “negative acts of legislation”.⁸⁴ In this case, since the court is vested with a law-creating function, a task that is basically reserved for Parliament as democratic representative of the people, the nomination of judges has to receive particular attention. Constitutional court judges should not be nominated, as ordinary judges are, by the government, but elected by the parliament, “in order to make the Court as independent as possible from the administration”.⁸⁵ As a result of his own practical experience *Kelsen* is only too aware of the highly political significance of ruling on constitutional matters, colored as it is by the struggle for power and influence. If the constitutional court is to function not only as a judicial but also as a law-creating organ, then it has to be democratically legitimized. That is why he regards the Amendment to the Federal Constitution of 1929, which largely removed the power to appoint VfGH judges from Parliament and transferred it to the Government, as an anti-democratic act. He sums the matter up, “This

⁸² For instance R. Pound and *F. Frankfurter*, *Criminal Justice in Cleveland*, 1922.

⁸³ *H. Kelsen*, *Judicial Review of Legislation*, *The Journal of Politics* 4 (1942), 183 (184).

⁸⁴ *H. Kelsen* (note 83), 187.

⁸⁵ *H. Kelsen* (note 83), 188.

was the beginning of a political evolution which inevitably had to lead to Fascism".⁸⁶

In the final paragraph of his essay *Kelsen* goes into more detail about the negative attitude of US American jurists such as *Felix Frankfurter* towards granting courts the opportunity to give advisory opinions, because this was ostensibly incompatible with the doctrine of the separation of powers.⁸⁷ *Kelsen* counters *Frankfurter's* opinion, "But this is an argument against the whole institution of judicial review of legislation which is a legislative and not a purely judicial function".⁸⁸ This objection concisely subsumes *Frankfurter's* and *Kelsen's* different conclusions and offers an explanation as to why *Frankfurter* opined, "*Kelsen's* juristic abstractions are not very congenial to my taste."⁸⁹ Both men recognized the problems inherent in judicially reviewing the constitutionality of legislation in democratic, power-separating states but arrived at different solutions. While *Frankfurter* opted for judicial self-restraint and wished to position the USSC as clearly judicial and the weakest of the three branches of government, *Kelsen* was in favor of incorporating the political element in a more transparent way and having democratically legitimized judges. He accepted the VfGH as a law-creating body as well as a judicial one.

Once each of the two men started to look for the discrepancies in his own conclusions the academic exchange with the other was over. What remained was personal esteem, ("I have great respect for him as a man and would bank much on his judgment about people.")⁹⁰ Thanks to this, when he was a European refugee in the USA, *Hans Kelsen* was able to count on *Felix Frankfurter's* help in his struggle to find employment, and could include him as a referee in his letters of application.⁹¹

⁸⁶ *H. Kelsen* (note 83), 188.

⁸⁷ Cf. *F. Frankfurter*, *Advisory Opinions*, *Encyclopedia of the Social Sciences* 1 (1927), 475.

⁸⁸ *H. Kelsen* (note 83), 200.

⁸⁹ Letter from *F. Frankfurter* to *P. Elman*, 23.10.1944, Harvard Law School Library, Elman Papers, Box 1, Folder 30.

⁹⁰ Letter from *F. Frankfurter* to *P. Elman* (note 89).

⁹¹ Cf. letter from *H. Kelsen* to *A. Flexner*, 11.10.1938, and letter from *H. Kelsen* to *F. Aydelotte*, 15.2.1944, The Shelby White and Leon Levy Archives Center, Historical Studies-Social Science Library, Institute for Advanced Study Princeton, Records of the Office of the Director: General Files, Box 34, Ka-Kh file.

VIII. Conclusion

If one looks, along with *Kelsen*, at both constitution and constitutional jurisdiction in a functional light, current complaints about the judicialization of the political process and the nightmare vision of politicized justice turn out to be groundless. For if one understands the branches of government as not being intrinsically different from one another and not really separate but rather overlapping and sharing various tasks, one can fulfill the requirements of a pluralistic, parliamentary democracy. The administration and the judiciary can be informed by politics, and judicial restraints can be applied to the legislature. As parliament does not exercise sovereignty alone, another body also vested with supreme authority such as the VfGH can and must decide on the constitutionality of legislation. Furthermore, this does not make adjudication and politics incompatible since both of them only express constellations of power in the democratically organized state, “Any legal dispute is a clash of interests respectively a power struggle, consequently every legal dispute is a political conflict, and any dispute that is a clash of interests, a power struggle or a political conflict can be decided by employing judicial means ...”⁹² *Alexis De Tocqueville* came to the same conclusion on his famous visit to America, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question”.⁹³ And so, apolitical constitutional adjudication can be construed as a myth similar to the myth of apolitical law.

Moreover, *Kelsen* pointed out that a constitutional court may well be powerful, but it is not actively involved in the exercise of power, which is why it does not compete with the legislature or the executive. Modern research on democracy shows that *Kelsen* was right insofar as constitutional courts are not strictly speaking veto players as described by *George Tsebelis*,⁹⁴ but rather “conditional veto players”,⁹⁵ that have to be called upon before they can exercise authority. Nevertheless, researchers do warn that supreme courts are reducing the scope of what politics can do and frequently not only issue rulings but also formulate values. They do this, on the one hand, by means of “active judicialization”, that is to say courts not only explain constitutional texts but also interpret them according to their own

⁹² “Jeder Rechtskonflikt ist doch ein Interessen- bzw. Machtkonflikt, jeder Rechtsstreit daher ein politischer Streit, und jeder Konflikt, der als Interessen-, Macht- oder politischer Konflikt bezeichnet wird, kann als Rechtsstreit entschieden werden ...”, *H. Kelsen* (note 70), 587.

⁹³ *A. de Tocqueville*, *Democracy in America*, 1835, Chapter XVI.

⁹⁴ Cf. *G. Tsebelis*, *Veto Players*, 2002.

⁹⁵ *S. Kneip*, *Verfassungsgerichte als demokratische Akteure*, 2009, 21.

ideological principles and in so doing specify the contents of the constitution; on the other hand, there can also be “passive” or “pre-emptive judicialization” whereby political agents refrain from pursuing a preferred policy if there is the likelihood of an unfavorable constitutional court decision.

Felix Frankfurter, who was confronted by an extremely active USSC, had already warned of such developments. And in *Hans Kelsen's* day the VfGH delivered many a ruling on matters it would actually have been up to Parliament to decide, like, for instance, the *Sever Marriages case*. And yet the VfGH was positioned differently to *Frankfurter's* USSC in the system of government. This is why the VfGH never developed a political question doctrine as the USSC did. This doctrine fleshes out and also qualifies the notion of judicial self-restraint: the USSC holds that political questions are not subject to their scrutiny. In *Frankfurter's* time the Supreme Court already abdicated responsibility for the judicial review of certain cases, but what actually constituted a political question always remained unclear. For instance, in 1946 the court refused to rule on the division of the state of Illinois into electoral districts (*Colegrove v. Green*), but it has been accepting submissions about racial discrimination in political parties since 1944 (*Smith v. Allwright*). In 1962 with *Baker v. Carr* we finally find an attempt to define the political question doctrine. According to *Robert Pushaw*, however, if this definition were to be strictly applied, constitutional adjudication would be completely impossible,⁹⁶ which *Frankfurter* would probably have approved of, with the exception of those cases which, in accordance with the principled self-restraint of *John H. Ely*, call for the safeguarding of democratic principles and the pre-conditions thereof.

Hence, when today's researchers (re-)discover the fact that constitutional courts are politically active and judges do not deliver legal opinions but formulate values, they are only breathing new life into an old debate, under a new banner (keywords: globalization, the decisions of the European Court of Justice, New Constitutionalism and so on). This discussion had already engaged constitutional lawyers of the Weimar Republic, for example *Karl Loewenstein*, who was in exile in the US when he coined the expression “judicialization of politics”. If past debates were not passed over in silence, current arguments about the power of the judiciary and the danger of a juristocracy that threatens to undermine democracy could be placed in a new/old context. Moreover, more studies with a political sciences orientation should be carried out in addition to existing research work in the field of legal studies. For judges articulate their own values; their actions and

⁹⁶ Cf. *R. J. Pushaw*, Justiciability and Separation of Powers, *Cornell L. Rev.* 81 (1996), 393.

their decisions are grounded in a political theory of society. According to *Felix Frankfurter*, the way a judge makes use of the authority vested in him to scrutinize legislation for constitutionality depends, “upon the judge’s philosophy, conscious or implicit, regarding the nature of society; that is, on his theory of the clash of interests. This, in turn, will influence his conception of the place of the judge in the American constitutional system”.⁹⁷ Both *Frankfurter* and *Kelsen* reflected on the position of the constitutional court judge and the process of constitutional judicial review within the political structure of the modern state. Both men were scholars with commitment, politically active and quite open about their political allegiances. They did not shrink from taking a stand on an issue in public. Yet, or perhaps for this very reason, in their capacity as justices in their respective supreme courts, it mattered very much to them that they were perceived as being politically unbiased judges.

⁹⁷ *F. Frankfurter*, Mr. Justice Holmes and the Supreme Court, 1938, quoted from the 1961 reprint, 56.

