Felix NACHTLBERGER: The Judiciary of the Austrian Constitutional Court 1918–1920 (Especially the Decision on Theatre Censorship) in the Mirror of the Press

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1. Introduction

The formation of the Austrian First Republic was undoubtedly a turbulent time. After the defeat in World War I and the dissolution of Austria-Hungary, a new constitution had to be written. But more than a year before the promulgation of the *Federal Constitution*, a constitutional court was already established. It dealt with some special questions of the transitional period and, compared to the Imperial Court, had additional competencies, making its decisions worth examining. At the same time, due to the abolition of censorship and the foundation of the First Republic, the media landscape changed dramatically. The aim of this paper is to give insight into the state of affairs through analysing an important case of the Constitutional Court, the question of "Theatre Censorship", as well as the reactions of two large political newspapers, the "Arbeiterzeitung" and the "Reichspost" to the decision. To understand the context of the decision, the development of constitutional jurisdiction in Austria as well as the general political landscape after World War I will be examined first.

2. The Development of Constitutional Jurisdiction

In Cisleithania (1867 to 1918): After Emperor Franz Josef and his government finished negotiations with the Hungarian Diet, they required the approval of the newly formed Imperial Council to establish the so-called Dual Monarchy in 1867. In return, the Imperial Council demanded the constitutionalisation of Cisleithania, which was realized through the

so-called *December Constitution of 1867*. One of its components was the *Fundamental Law on the Establishment of an Imperial Court*.[1]

The Imperial Court ruled on competence conflicts between autonomous local-state organs, local-state representations, supreme government authorities, courts, administrative authorities, and from its establishment in 1876, also between the Administrative High Court and ordinary courts in the form of a senate composed of the two highest courts. It also had the so-called *competence-competence* [2], meaning it decided on its own competence conflicts. In competence conflicts between the Imperial Council and local-state parliaments in legislation, it lacked decision-making authority. Another responsibility were mutual claims of individual kingdoms and countries as well as claims of municipalities, corporations, and individuals against kingdoms, countries, or the entire Empire if the ordinary legal process was insufficient. The Imperial Court also determined violations of the political rights constitutionally guaranteed to citizens, but it could not annul the corresponding administrative act. Finally, like all other courts, it could examine the validity of regulations.[3]

Despite the lack of competence for examining laws, the Imperial Court was considered a constitutional court in legal doctrine, and the name chosen by the legislator was regretted. Constitutional law experts also demanded an expansion of competencies in the field of competence jurisdiction and partly also in law and election reviews, which would have upgraded the Imperial Court to a "*comprehensive constitutional court.* "[4] These demands were only implemented after the end of the monarchy.

In addition to the Imperial Court, the *Law on Ministerial Responsibility* [5], which was not a fundamental law [6], created a State Court for Ministerial Indictments. This court was to rule

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[1] ARBEITSGEMEINSCHAFT österreichische Rechtsgeschichte [KOHL, Gerald – NESCHWARA, Christian – OLECHOWSKI, Thomas – REITER-ZATLOUKAL, Ilse – SCHENNACH, Martin] (ed.): *Rechts- und Verfassungsgeschichte manual [Legal and Constitutional History Manual]*. Vienna, 2022, facultas, nn. 3096–3098.
[2] *Ibid.*, n. 3144.
[3] HELLER, Kurt: *Der Verfassungsgerichtshof. Die Entwicklung der Verfassungsgerichtsbarkeit in Österreich von den Anfängen bis zur Gegenwart [The Constitutional Court. The Development of Constitutional Jurisdiction in Austria from its Beginnings to the Present]*. Vienna, 2010, Verlag Österreich, pp. 105–108.
[4] *Ibid.*, p. 127.
[5] *RGBl 101/1867.*
[6] HELLER, *op. cit.*, p. 96.

on indictments by the houses of the Imperial Council against ministers. Such an indictment could be made if there were suspicions of intentional or grossly negligent violation of the constitution, local-state constitutions, or other laws within the framework of official duties.[7] However, no ministerial indictment was ever made during the monarchy. Formally, the State Court for Ministerial Indictments, due to its area of responsibility, was also a predecessor of the Constitutional Court.[8]

Thus, the examination of laws for their constitutionality and the review of elections remained outside the courts' competencies.

In the Republic of (German) Austria (1918 to 1920): After World War I Austria-Hungary collapsed, and new states were proclaimed. On the territory of the former empire, the new state of German-Austria was established with the *Founding Resolution* on 30th October 1918. It adopted most of the laws and institutions of Cisleithania.[9] With the *Decision on the State Form* on 12th November 1918, continuity with the Austro-Hungarian monarchy was explicitly rejected. Thus, there was formal discontinuity but material continuity between the states.[10] The Imperial Court was also adopted and announced on 23rd November 1918, that it would hold sessions from 9th December to 17th December, possibly also on a case from Galicia[11], which would have only been part of now defunct Austria-Hungary. On 3rd December, the announced sessions were "*postponed indefinitely*"[12], effectively ending the work of the Imperial Court. Thus, the last decisions of the Imperial Court were those made on 15th October 1918.[13] The senate composed of the Imperial Court and Administrative High

[7] SZABÓ, István: Zwischen Politik und Öffentlichem Recht. Ministerverantwortlichkeit und Staatsgerichtsbarkeit in Ungarn 1848/1867–1949 [Between Politics and Public Law: Ministerial Responsibility and State Jurisdiction in Hungary, 1848/1867–1949]. In: KOHL, Gerald – SZABÓ, István (Hrsg.): *Staatsgerichtsbarkeit in Mitteleuropa, No. 38 [State Jurisdiction in Central Europe], No. 38*, Budapest, 2017, Pázmány Press, pp. 117–119.
[8] HELLER, *op. cit.*, pp. 113–114.
[9] *§ 16 StGBl 1/1918.*
[10] BRAUNEDER, Wilhelm: *Österreichische Verfassungsgeschichte [Austrian Constitutional History]*. Vienna, 2009[11], Manz, pp. 187–191.
[11] Nichtamtlicher Teil [Unofficial Section]. *Wiener Zeitung*, 23.11.1918, No. 271, p. 1.
[12] Nichtamtlicher Teil [Unofficial Section]. *Wiener Zeitung*, 03.12.1918, No. 279, p. 6.
[13] WALTER Robert: *Hans Kelsen als Verfassungsrichter [Hans Kelsen as a Judge of the Constitutional Court]*. Vienna, 2005, Manz, p. 6.

Court for competence conflicts between these courts made its last decision on 11th November 1918.

After the halt of the Imperial Courts work, Hans Kelsen created a first draft for a new Constitutional Court. On 25th January 1919, this Constitutional Court was established, and the tasks of the Imperial Court were transferred to it. The corresponding legal bases were "*put into effect* ", a formulation that must be understood under the pretence of discontinuity, which postulated a strict formal separation from the organs and laws of Austria-Hungary. Therefore, the German-Austrian Constitutional Court is not to be understood as the formal successor to the Imperial Court, which is why it did not deal with legal matters addressed to the Imperial Court and not to the Constitutional Court itself.[14] Procedurally and organizationally, the regulations for the former Imperial Court were adopted, only the number of members was reduced, and the term emperor in judgments was replaced by the republic, partly through handwritten corrections on already printed paper.[15] Thus, the hearings were generally to be held orally and publicly[16], making reporting on them easily possible. Deliberation and voting, however, were secret. The work of the Constitutional Court began immediately, with the first decision made on 10th March 1919.[17]

Before the elections to the constituent national assembly the Electoral Court was created on 6th February 1919, enabling the contestation of elections.[18] It was responsible for general electoral fraud, while in case of violations of the active voting rights of an individual voter, the Constitutional Court was responsible.[19]

After the first elections took place, among other things, the *Law on the Representation of the People* was passed[20], in which the Constitutional Court was given the competence to review local-state laws. After a law was passed, the federal government could contest it before the Constitutional Court and suspend its promulgation until a court ruling was

[14] BRAUNEDER, *op. cit.*, p. 5.
[15] HELLER, *op. cit.*, pp. 149–150.
[16] *§ 23 RGBl 1869/44.*
[17] HELLER, *op. cit.*, pp. 149–150, 160.
[18] *StGBl 1919/90.*
[19] HELLER, *op. cit.*, p. 155.
[20] *Ibid.*, p. 151.

made.[21] There was no full review of ordinary laws for their constitutionality. Federal laws were not contestable, and challenges to local-state laws could only be initiated by the federal government. The demands of legal scholars for a full competence to review laws were therefore not yet fully met.

In April 1919, the Constitutional Court was assigned the tasks of the State Court for Ministerial Indictments.[22] The transition theoretically presented the same problems with the adoption of ongoing proceedings as with the Imperial Court due to formal discontinuity, but these are irrelevant in practice due to the lack of ministerial indictments.

Thus, the Constitutional Court had additional tasks compared to the Imperial Court: the review of local-state laws and ministerial indictments.

The new Constitution (1920): With the entry into force of the *Federal Constitution* on 10th November 1920, the competencies of the Constitutional Court were significantly expanded. It could now review all laws and regulations for their constitutionality and took over the tasks of the Electoral Court,[23] while it retained its previous powers. Finally, the long-standing demands by legal scholars for a "*comprehensive constitutional court*" were realised.

3. The Political Landscape and their Newspapers in German-Austria

Political Camps and Parties: Under the monarchy, after the decline of the grand bourgeois-liberal camp, three ideological camps formed, represented by political parties starting in the 1880s. Over time, the parties displaced the previously dominant estates in their political relevance.[24] In autumn of 1918, these parties created the new state of German-Austria, and constitutional development fell into the sole hands of them.[25]

In the first elections to the constituent national assembly in February 1919, the Social Democratic Workers Party, which united most of the leftists, emerged as the strongest force with 72 mandates, and the Christian Social Party, which was a conservative party that

[21] *Art 15. StGBl 1919/179.*
[22] *StGBl 1919/212.*
[23] BRAUNEDER, *op. cit.*, p. 223.
[24] ARBEITSGEMEINSCHAFT österreichische Rechtsgeschichte, *op. cit.*, n. 3159.
[25] BRAUNEDER, *op. cit.*, p. 194.

originally supported the monarchy, as the second strongest with 69 mandates. The German-national camp, which was split into several parties, but united by the demand for annexation to Germany, obtained only 27 mandates. The Social-Democrats and Christian-Socials formed a coalition-government. However, ideological differences lead to the coalition breaking up in June 1920.[26]

Development of the Media Landscape: Parallel to the political parties and with party newspapers in cooperation with them, the political press developed in the late 19th century, overtaking the previously dominant general local newspaper in importance. These new mass media newspapers saw themselves as mediators between the state and citizens to involve people in political discussions[27], which was possible due to the introduction of press freedom and the gradual expansion of voting rights.

This task gained importance after the abolishment of censorship after the end of World War I, which had dominated the media landscape for four years with war reporting and light entertainment as a distraction.[28] With the introduction of women's suffrage, the potential target audience expanded, and the new state urgently needed legitimacy from the public, as the ban on unification with Germany and the end of the monarchy made the question of identity central to the new Austria.[29] The lifting of wartime censorship[30] also opened the door to critical and polarizing journalism and overall higher circulation numbers.[31] As the parties were now the dominant force in politics, their party-newspapers increased in influence. Therefore, the newspapers of the Social Democratic Workers Party of Austria and

[26] HELLER, *op. cit.*, p. 151.
[27] KARMASIN Matthias – OGGOLDER Christian (Hrsg.): *Österreichische Mediengeschichte Band 1: Von den frühen Drucken zur Ausdifferenzierung des Mediensystems (1500 bis 1918), [Austrian Media History, Volume 1: From Early Prints to the Differentiation of the Media System (1500 to 1918)]*, Vienna – Klagenfurt, 2016, Springer VS, p. 180. https://doi.org/10.1007/978-3-658-11008-6_1
[28] *Ibid.*, pp. 225–226.
[29] KARMASIN Matthias – OGGOLDER Christian (Hrsg.): *Österreichische Mediengeschichte Band 2: Von Massenmedien zu sozialen Medien (1918 bis heute), [Austrian Media History, Volume 2: From Mass Media to Social Media (1918 to the Present)]*, Vienna – Klagenfurt, 2019, Springer VS, p. 8. https://doi.org/10.1007/978-3-658-23421-8
[30] *StGBl. 1918/3.*
[31] PAUPIÉ Kurt: *Handbuch der österreichischen Pressegeschichte 1848-1959, Band I: Wien, [Handbook of Austrian Press History 1848–1959, Volume I: Vienna]*, Vienna – Stuttgart, 1960, Braumüller, p. 90.

of the Christian Social Party are best looked at to understand the political situation at that time and the ideological differences which lead to the end of the coalition.

Arbeiter-Zeitung: First published in 1889, the "Arbeiter-Zeitung" was an essential tool of the Social Democratic Workers Party. It was characterized by a comprehensive, critical social-politics section, quickly forming its own column for courtroom reporting. As expected, the reporting was socially critical, with a biting tone against the Christian Socials, Liberals, and later the Fascists, a reporting style which was particularly prominent in the First Republic.[32]

Reichspost: On 1st January 1894, the first issue of the openly Christian Social "Reichspost" appeared. Initially, it advocated for the preservation of the multi-ethnic state and the monarchy. After their collapse, it supported Christian Social policies and continued to observe events in the Danube region. It strongly polemicized against Liberals, Social Democrats, and German Nationals. It was also known for extensive courtroom reports with socially critical comments.[33]

4. *Freedom from Press Censorship – Theatre Censorship*

After general theatre censorship was abolished in 1848, it was reintroduced under the name "*performance approval* " in the *Theatre Ordinance of 1850*. In 1867, nothing changed; theatres were still required to submit a play to the authorities before performance.[34] During the state founding, a resolution by the provisional national assembly on 30th October 1918 stated that 1. "*every censorship* " was considered abolished and 2. "*full freedom of the press* " was established.[35] The Lower Austrian (Vienna and Lower Austria were not yet separated) local-state government asked the State Office of the Interior on 25th November 1918, whether this resolution also applied to theatre censorship. It also argued for the necessity of theatre censorship to uphold morality. The question remained unanswered, and

[32] *Ibid.*, pp. 88–91.
[33] *Ibid.*, pp. 97–100.
[34] DIRNBERGER Franz: Theaterzensur im Zwielicht der Gesetze (1918-1926), [Theater Censorship in the Twilight of the Law]. *Mitteilungen des Österreichischen Staatsarchivs, [Messages of the Austrian State Archive]*, No. 36, Vienna, 1983, pp. 237–238.
[35] *StGBl. 1918/3.*

the local-state government continued to exercise theatre censorship, now with the police directorate as the first instance of censorship.[36]

Soon, the theatre scene resisted, with the "Neue Wiener Bühne" refusing to submit a play for approval. Quickly, the police and theatre made an informal compromise: a representative of the authorities could attend the dress rehearsal and give out approvals, but performance approvals would not be recognized. After fifty successful performances, this solution ultimately failed. On 5th September 1919, the play "Dimpfl" was performed at the "Neue Wiener Bühne" without being submitted for censorship before or after being requested and without notifying the dress rehearsal to the police.[37] For this, the theatre director received a fine from the police, confirmed by the Lower Austrian state government after a first appeal. He then appealed in his complaint to the Constitutional Court, citing the resolution of the provisional national assembly that "*every censorship*" was considered abolished.[38] On 16th December 1919, the Constitutional Court decided that the freedom from censorship only protected the press, not the theatre, which thus remained subject to state censorship. The resolution of the provisional state assembly had merely established that press censorship was already invalid due to its contradiction with fundamental rights.[39] The decision was published on 18th December 1919, with some reports on the trial appearing before that. Interesting about the judgment was the legal interpretation method used. The majority of judges followed a subjective-historical interpretation in this case, according to which the legislator intended to establish the invalidity only of press censorship. Kelsen, on the other hand, advocated for an objective interpretation based on the wording, which would have forbidden theatre censorship and corresponded more to today's prevailing opinion. A few years later, the Constitutional Court followed Kelsen's opinion and abolished theatre censorship.[40]

[36] DIRNBERGER, *op. cit.*, pp. 241–242.
[37] *Ibid*, p. 243.
[38] *StGBl. 1918/3.*
[39] *VfSlg. 32/1919, pp. 61–63.*
[40] WALTER, *op. cit.*, pp. 15, 19; *VfSlg 552/1926.*

5. Reactions of the Media

The "Arbeiter-Zeitung" reported on 17th and 19th December 1919 on the case of theatre censorship, both times the article was not in their "*courtroom*" section, instead these articles were placed alongside reports about current political affairs. In the first report[41] there was only a brief summary of the case, without going into details of the arguments. The arguments of the state secretary representing the state office responsible for censorship were not mentioned at all. What also stands out is that the fine, which the theatre director received, was highlighted. The second report[42] began with an attention-grabbing title: "*The Theatre Censorship Exists Rightfully!*" in bold letters. In the first paragraph the case was summarized again, for those who did not read the first report. An unusual formulation stands out: the theatre director was "*violated in his right to freedom from censorship*", not just claiming it, even though it was just decided, that the censorship was legal. Then, the arguments of the state secretary were presented, only to emphasize that the wording of the law was different. The position of the newspaper was that the wording should be valued higher than the legislator's thoughts, an argument also made by Kelsen as a judge. The article ended with an appeal to the legislator ("[…] *making it the duty of the national assembly*") to re-regulate theatre censorship. *In conclusion, the arguments of both sides were presented, but there was a bias towards the side of the theatre director.* The newspaper's position was clear: even if the arguments of the court and state secretary were understandable, it would have been better if the court's ruling had been different. Since it wasn't, the legislator must act now. This view becomes more understandable when comparing the article with that of the "Reichspost."

The "Reichspost" on the other hand made only one report on the theatre censorship decision on 17th December 1919. In the section "*From the Courtroom*", the "Reichspost" begins with stating that there is "*no freedom of censorship for theatre*", using a different rhetoric with the negation than the "Arbeiter-Zeitung", which directly states the existence of censorship. After then presenting the case, it extensively discusses the state secretary's arguments, while those in favour of the theatre director are not further addressed – again a

[41] Ist die Theaterzensur aufgehoben? [Has theatre censorship been abolished?] *Arbeiter-Zeitung*, 17.12.1919, No. 343, p. 5.
[42] Die Theaterzensur besteht zu Recht! [The Theatre Censorship Exists Rightfully!] *Arbeiter-Zeitung*, 19.12.1919, No. 345, pp. 4–5.

clear bias, but this time in the opposite direction. Then, the "Reichspost" emphasizes the necessity of theatre censorship to counter works which were "[…] *standing on the lowest moral level under the guise of enlightenment.*" It sees the authorities' duty to uphold good morals as paramount in the republic just as it was in the monarchy.[43] Although the "Reichspost" did not directly report about the court's decision on 19th December 1919, they did write an article about an incident in Salzburg and Wiener-Neustadt, where members of the Social Democrats threatened journalists and destroyed machinery of conservative newspapers.[44] The "Reichspost" accused the Social Democrats of missing respect for the freedom of the press, which in context can be seen as a reaction to the indignation of the "Arbeiter-Zeitung" to the theatre censorship ruling. Compared to the "Arbeiter-Zeitung", the "Reichspost" took the opposite position. Theatre censorship was not only legally permissible but also politically necessary for cultural preservation. Here, the conservative and Christian values of the newspaper are noticeable, where preservation of tradition is a central state task, unlike with the Social Democrats. The differences between the reporting of the "Reichspost" and the "Arbeiter-Zeitung" foreshadowed the struggle between the Christian-Socials and the Social Democrats in the following years.

[43] Keine Zensurfreiheit für Theater und Kino, [No Freedom from Censorship for Theater and Cinema], *Reichspost*, 17.12.1919, No. 427, p. 8.
[44] Die Sozialdemokraten und die Pressefreiheit, [The Social Democrats and Freedom of the Press], *Reichspost*, 19.12.1919, No. 429, p. 5.