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To Mario, Andrea, Heike, Philipp
for the friendship & support.

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List of Abbreviations

B-VG	Federal Constitutional Law (*Bundes-Verfassungsgesetz*)
BVerfG	German Constitutional Court (*Bundesverfassungsgericht*)
CAT	United Nations Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CFR	Charter of Fundamental Rights of the European Union
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC / RESC	European Social Charter / Revised European Social Charter
GG	Basic Law for the Federal Republik of Germany (*Grundgesetz*)
ICESCR	International Covenant on Economic, Social and Cultural Rights
OGH	Supreme Court (*Oberster Gerichtshof*)
StGG	Basic Law on the General Rights of Nationals (*Staatsgrundgesetz*)
VfGH	Constitutional Court (*Verfassungsgerichtshof*)
VwGH	Administrative Court (*Verwaltungsgerichtshof*)

1. Introduction

Within the Austrian constitutional system, 'there is no concern for the social responsibility of the state and poverty reduction'.[1] This general statement summarizes a political, legal, and public debate that has been going on since the creation of the Austrian constitution more than 100 years ago. From the unsuccessful attempt to introduce a fundamental rights catalogue under the impression of the German Weimar Constitution in the negotiations before the adoption of the constitution in 1920 to the deliberations of the *Österreich Konvent* between 2003 and 2005 the goal of implementing a charter of fundamental social rights in Austria has not been fulfilled. In recent years, particularly under the impression of the social and political effects of the Covid-19-pandemic, these debates have once again entered the public domain and amplified calls for a new attempt towards the implementation of a comprehensive catalogue of fundamental social rights. In 2020 the Austrian NGO *Armutskonferenz* and *Amnesty International Österreich* have introduced their own draft of a 'Bundesverfassungsgesetz soziale Sicherheit'[2] while the current government coalition has committed to 'resume the all-party-negotiations for the development of a comprehensive Austrian fundamental rights catalogue'.[3] The *Volksanwaltschaft* has subsequently organized a high-level NGO-forum regarding the creation of social fundamental rights and introduced a detailed report to parliament.[4]

Given these developments, the fact that Austria is currently the last EU-member-state not guaranteeing explicitly constitutionally protected social rights has become the central narrative of various calls for the expansion of constitutional provisions regarding social welfare, but also economic and cultural rights.[5] This thesis aims to address these debates and to provide an in-depth analysis of the developments, proposals, and challenges regarding social rights within the Austrian constitutional system.

Particularly, this thesis aims to fill the research gap that has arisen between the end of the *Österreich Konvent* in 2005 and the current proposals by the *Armutskonferenz*, *Amnesty* and the *Volksanwaltschaft*. Besides legal aspects, the inherent political dimension of the discourses surrounding the question of social rights will be addressed. Furthermore, the intersection of domestic proposals for social rights with Austria's international human rights obligations will

[1] Ewald Wiederin, ‚Sozialstaatlichkeit im Spannungsfeld von Eigenverantwortung und Fürsorge' in Christoph Enders and others (eds), *Der Sozialstaat in Deutschland und Europa* (2005) 69.

[2] Armutskonferenz, *Soziale Menschenrechte in die Verfassung* <https://www.armutskonferenz.at/aktivitaeten/sozialrechtsnetz/soziale-menschenrechte-in-die-verfassung.html > accessed 11 July 2023.

[3] Bundeskanzleramt Österreich, *Aus Verantwortung für Österreich, Regierungsprogramm 2020-2024* (2020) 14

[4] Volksanwaltschaft, *NGO-Forum Soziale Grundrechte, Sonderbericht* (2022).

[5] A detailed analysis of social dimensions both within the Austrian constitutional system as well as in obligations derived from other fundamental rights through the VfGH's jurisprudence will be provided in chapter 3.

be a focus of this thesis. As Schulze points out in her plea for the expansion of the Austrian fundamental rights catalogue, social rights play an important role when it comes to the availability as well as the accessibility of those human rights, that guarantee a decent existence of people affected by poverty.[6]

For these purposes this thesis will consider a number of research questions: If and to what extent are social rights currently protected under Austrian constitutional law? How exactly could constitutional guarantees, particularly regarding social security and minimum care, be designed and which legal problems could the implementation of such rights create? Which reasons and arguments prevented the implementation of social rights within the constitutional framework until now – both on the political and the legal level? Finally, which concrete responsibilities would these rights establish for the legal structures and the competences of the VfGH as well as the financial management of the federal government and through which mechanisms could these provisions, providing for positive rights of bearers and corresponding obligations of states, be enforced in Austria?

Using these guiding questions, this thesis will aim to evaluate the following hypothesis: The central arguments against the expansion of the fundamental rights protection through the Austrian constitution have been proven (partially) inadequate through recent jurisprudence, international developments, and contemporary changes to the Austrian constitutional framework. The implementation of fundamental rights for social security and minimum care would nonetheless require additional procedural and legal reforms, to adequately introduce new rights which could improve the human rights situation of many parts of the Austrian society living in poverty. Such reforms would inter alia require a new approach for the federal governments financial management as well as increase the authority of the VfGH.

An overview over the current protections of fundamental rights within the Austrian constitutional system in chapter 2 will therefore lay the groundwork for this thesis and allow the consideration of existing constitutional guarantees, relevant provisions like the general equality clause and the *BVG Kinderrechte*, and current jurisprudence. Subsequently, chapter 3 will provide the necessary analysis of social fundamental rights, focussing on existing social and economic provisions within the Austrian legal system as well as social dimensions established by VfGH jurisprudence. Chapter 4 will address the different proposals for an expansion of social constitutional guarantees since 1945, particularly the debates of the *Österreich Konvent* and current proposals by NGOs. Different models regarding the design of

[6] Marianne Schulze, ‚Mit deutlichem Abstand zu „unmenschlicher und erniedrigender Behandlung“: Plädoyer für den Ausbau des Grundrechtekatalogs‘ in Journal für Rechtspolitik 28 (2020) 191.

any (future) social rights and their normative requirements will be systematized in chapter 5. Finally, chapter 6 will use the discussed tools to evaluate contemporary proposals for social fundamental rights regarding social security and existential minimum security, before the conclusion in chapter 7 will use this thesis' findings to assess the presented hypothesis and possible perspectives for future debates about the protection of social fundamental rights in Austria.

2. Fundamental rights protections in Austria

The Austrian constitution in Article 144 gives the Constitutional Court (*Verfassungsgerichtshof*, VfGH) the ability to, inter alia, rule on judgements by an administrative court, if the complainant feels that their 'constitutionally guaranteed rights' were violated.[7] Constitutionally guaranteed rights in this context refer to those subjective fundamental rights that are protected within the Austrian legal system.[8] In the absence of a specifically designated catalogue of fundamental rights, those rights are comprised of the subjective rights of individuals established by constitutional law and enforceable before the VfGH, both through individual complaints pursuant to Art 144 B-VG and through applications for judicial review pursuant to Art 139 and 140 B-VG.[9]

The Austrian understanding of fundamental rights is especially characterized by the tradition of legal positivism – more than in most other European countries it is detached from its origins in natural law and reduced to its positivist content.[10] This fact is not only routed in the positivist tradition that is widely associated with the work of Kelsen but goes back even further to the creation of the constitutional monarchy.

2.1. Historic development of fundamental rights

Through the 'December Constitution' of 1867 and specifically the Basic State Law on the General Rights of Citizens (Staatsgrundgesetz, StGG), Austria has codified certain fundamental rights relatively early.[11] Among these rights were the right to property (Art 5), domiciliary rights (Art 9), the right to respect for correspondence (Art 10), the right to assemble and create associations (Art 12). These rights were not only programmatic statements but directly applicable and justiciable rights. This constitution therefore created a specialised court, the *Reichsgericht*, with the authority to rule on possible infringements of those rights by acts of the

[7] Art 144 (1) B-VG.

[8] The term 'fundamental rights' can itself hardly ever be found within Austrian constitutional law. Only within the decision by the Provisional National Assembly regarding the end of censorship in 1918 and within § 1 DSG (*Datenschutzgesetz*) this term is used. Instead 'constitutionally protected rights' can be seen as the umbrella term for all subjective rights, both in national and international law, that can be enforced within the Austrian legal system. 'The substantive concept of fundamental or human rights and the formal concept of constitutionally guaranteed rights largely coincide.' Walter Berka, Christian Binder and Benjamin Kneihs, *Die Grundrechte: Grund- und Menschenrechte in Österreich* (2nd edn, 2019) 9.

[9] Verfassungsgerichtshof, *Fundamental rights* <https://www.vfgh.gv.at/verfassungsgerichtshof/rechtsgrundlagen/fundamental_rights.en.html> accessed 03 August 2023.

[10] Theo Öhlinger, ‚Die Grundrechte in Österreich' in EuGRZ (1982) 216.

[11] ‚Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger' (21.12.1867). The provisions of this law are, through Art 149 para 1 B-VG, still in effect today.

administration. These regulations – subjective rights that can be enforced through a specialized procedure in front of a specialized court – defined the Austrian understanding of fundamental rights since the 19th century.[12]

Since these early beginnings of fundamental rights legislation in Austria, its further development is shaped by a number of central factors. Not the least among those are the difficulties any attempt to establish a reformed catalogue of fundamental rights within Austrian constitutional law faced in finding political majorities. Such an attempt failed for the first time after the World War I in negotiations between those political parties represented in the Constituent National Assembly.[13] Therefore, in 1920 the newly established Federal Constitutional Law (*Bundesverfassungsgesetz*, B-VG) through Art 149 re-established the StGG-provisions of 1867, supplemented by a decision by the Provisional National Assembly regarding the end of censorship and the restoration of the freedom of assembly and association from October 1918 as well as certain provisions regarding the rights of minorities established by the Treaty of Saint Germain.[14]

As Grabenwarter and Frank point out, Art 149 is until today of special significance for the fundamental rights protection in Austria:

> The Federal Constitutional Law (B-VG) does not contain a section on fundamental rights and freedoms to this day; the decisive factor for this was the profound ideological differences that existed on this point among the relevant political forces (…). As a kind of "substitute" for an independent codification of fundamental rights, Art. 149(1) incorporates several older sources of fundamental rights (…) with the status of (federal) constitutional laws. The rights and freedoms contained in these laws can therefore be invoked as constitutionally guaranteed rights within the meaning of Art. 144 before the Constitutional Court.[15]

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[12] Theo Öhlinger and Manfred Stelzer, ‚Der Schutz der sozialen Grundrechte in der Rechtsordnung Österreichs' in Julia Iliopoulos-Strangas (ed), *Soziale Grundrechte in Europa nach Lissabon* (Nomos, Baden-Baden, 2010) 500.

[13] As Christian Neschwara argues, a fundamental debate regarding fundamental rights did not occur during the negotiations regarding the Austrian constitution in 1919/20. In Kelsen's six drafts of the new constitution, drafts I and IV nearly verbatim referenced the provisions of 1967, while drafts II, III and VI saw their influence decrease due to a more prominent role of the fundamental rights provisions within the Weimar constitution.
Christian Neschwara, *Materialien zur Geschichte der österreichischen Grundrechte: 150 Jahre Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* (Wien 2017) 41.

[14] Furthermore, Art. 149 B-VG re-established the decisions by the Provisional National Assembly regarding the expulsion and expropriation of members of the House of Habsburg-Lothringen as well as regarding the abolition of nobility.

[15] Christoph Grabenwarter and Stefan Leo Frank, *B-VG, Bundes-Verfassungsgesetz und Grundrechte* (Wien 2020) 429.

Another important factor in the development of fundamental rights through the constitution of 1920 was the establishment of a constitutional court with the competency to review laws on the grounds of their constitutionality. The VfGH designed as a prototype for the judicial review of laws in Europe, taking over certain rights that were already established for the *Reichsgericht*, particularly the instrument of ex-officio initiatives (‘*amtswegige Prüfung’*). Its development will be further discussed in subchapter 2.5.

Furthermore, the B-VG established additional rights, particularly active and passive voting rights (Art 23 a, Art 26, Art 95, Art 117 B-VG)[16], the principle of equality (Art 7 B-VG), the right to a trial before a statutory judge (Art 83 B-VG), as well as the prohibition of a compulsion to self-incrimination, and the right to public and oral trials (both Art 90 B-VG).[17]

Given these early developments the Austrian understanding of fundamental rights has long been shaped by a liberal legal theory. Fundamental rights were designed as defensive rights against state intervention. Their aim was to ensure a *status negativus*, thus protecting the personal sphere of individuals which the state could not or just in special circumstances penetrate.[18] This principle objective began to shift through the implementation of these early fundamental rights into the constitutional system of the newly formed democratic state: ‘When every act of administration must have its basis in the law, as mandated by Art 18 B-VG, an original meaning of fundamental rights, namely to bind administrative interventions in freedom and property to the law, partially loses its significance.’[19] Instead of the administration, the legislature thus became the primary addressee of fundamental rights within the Austrian constitution. Judicial norm control regarding acts of the legislature became ‘a consistent safeguarding of this binding of legislation to fundamental rights.’[20]

Additionally, to the reinstatement of the provisions mentioned, Art. 149 (2) establishes a derogative effect of the B-VG. Therefore, the law regarding the general rights of citizens is to this day applicable only in so far as it does not contradict other provisions within the B-VG. This derogative effective concerns in particular provisions regarding Austrian citizenship (Art. 1 StGG; Art. 6 B-VG), the right to vote in municipal elections (Art. 4 (2) StGG; Art. 117 (2) B-VG), and the rights of ethnic minorities (Art. 19 StGG; Art. 67 StV St. Germain). Explicitly not reinstated was Art. 20 StGG, that allowed the temporal and local suspension of certain rights, since provisions regarding a state of emergency were not part of the B-VG. See ibid 430.

[16] These voting rights were further expanded in 1994 through the rights to vote and be voted for in European elections (Art 23 a B-VG), and the creation of a possibility to directly elect mayors through provisions in the constitutions of the federal states (Art 117 para 6 B-VG).

[17] After World War II further constitutionally guaranteed rights were established: The prohibition of the death penalty in 1968 (Art 85 B-VG), the expansion of Art 7 B-VG in 1988 to allow the use of gender-specific titles, the prohibition of discrimination against persons with disabilities in 1997, and the right of female citizens to serve as soldiers. During the reform of the parliamentary inquiry rights in 2014, individuals whose personality rights might have been violated through the work of a parliamentary committee of inquiry were given the right to appeal in front of the VfGH (Art 138 para 1).

[18] Öhlinger, Stelzer (n 12) 502.

[19] Berka, Binder, Kneihs (n 8) 19.

[20] ibid.

After the era of austrofascist and national-socialist rule, the Austrian constitution (as of March 5, 1933) and therefore also the fundamental rights provisions of 1920 were reinstated. The next expansion of fundamental rights protections occurred through the State Contract of Vienna 1955 (*StV Wien 1955*). This contract through Art 7 ('Rights of the Slovenian and Croatian minorities') expanded the protection of minorities, and through Art 8 ('Democratic Institutions') guaranteed the right to free and secret elections for all citizens without distinction of race, gender, language, religion, or political opinion.[21]

In 1958 the Austrian legal system saw probably the most consequential expansion of fundamental rights protections so far: Through the ratification of the European Convention on Human Rights (ECHR) and its retrospective elevation to constitutional status in 1964 began the process of an 'increasing internationalization of fundamental rights'.[22] The ECHR did not only extend the scope of existing rights from citizens' rights to human rights applicable for all individuals (e.g. the freedom of association and assembly) and implemented new rights (e.g. the right to education), but through Art 5 and Art 6 also introduced new human rights guarantees 'leading to a process of restructuring the legal protection system in public law and significant reforms in criminal procedural law.'[23] The ECHR is furthermore of special importance to the mechanisms of fundamental rights protection due to role it gives to individual complainants:

> Unique internationally is the European Convention on Human Rights (ECHR) because it guarantees the individual, subject to its norms, the right to lodge an individual complaint (for violation of convention rights) against any state party to the convention, including their own home state. In doing so, it has established a supranational system of protection for fundamental rights, and to that extent, it has (partially) recognized the individual as a subject of international law![24]

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[21] BGBl. Nr 152/1955.
This contract in Art. 6 (‚Human Rights') furthermore lais out a programmatic statement that committes Austria to take all necessary measures 'to secure to all persons living under Austrian sovereignty, without distinction of race, gender, language, or religion, the enjoyment of human rights and fundamental freedoms, including freedom of expression, the press and publication, the exercise of religion, political opinion, and public assembly.'

[22] Neschwara (n 13) 42.
The implementation of the ECHR was not without difficulties though: In 1960 the Constitutional Court expressed the opinion that the ECHR did not have constitutional status (VfSlg 3767/1960) which led to retroactive elevation of the Convention through the Austrian parliament in 1964 (BGBl 1964/59).

[23] Berka, Binder, Kneihs (n 8) 21.

[24] Heinz Schäffer, 'Die Entwicklung der Grundrechte' in Detlef Merten, Hans-Jürgen Papier and Gabriele Kucsko-Stadlymayer, *Handbuch der Grundrechte in Deutschland und Europa* (Heidelberg 2014) 37.

After initial difficulties, the Austrian courts and in particular the VfGH accepted the authority of the ECHR and adopted the principle of a convention-conform interpretation.[25] Subsequently Austria also ratified several additional protocols to the ECHR.[26] In addition to the ECHR, Austria also adopted a number of other international treaties with various implications on the fundamental rights protection. Among these was the European Social Charter (ESC), that was ratified by Austria with reservations in 1969[27]; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[28] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) respectively in simple-law rank but without reservations in 1984.

Through Austria's entry into the European Union in 1995 it also adopted the *acquis communautaire*, the entirety of the jurisprudence within the European Union.[29] Since the adoption of the Treaty of Lisbon in 2009, the Charter of Fundamental Rights of the European Union (CFR) offers additional fundamental rights protections.[30]

2.2. Systematization of fundamental rights in Austria

Even though the Austrian constitutional legislature did not use specific rules regarding the systematization of constitutionally guaranteed rights, there are several systems of classification that can be used to 'make the system-forming characteristics visible and thereby highlight differences and similarities' between the different fundamental rights.[31]

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[25] ibid 38.
The relationship between the ECHR and the mostly earlier adopted fundamental rights within Austrian constitutional law is therefore not defined by the lex *posterior derogat legi priori* principle. As Schäffer points out, the fundamental rights norm that yields a more favourable standard for its bearer has the inherent priority of application. See ibid 28.

[26] Berka, Binder, Kneihs (n 8) 57-59.
Additional protocol 12, which would establish a general prohibition of discrimination (not only limited to certain social categories like in Additional Protocol 14), has only been signed but not ratified by Austria so far.

[27] Through 'Erfüllungsvorbehalt' pursuant to Art 50 (2) B-VG the ESC was adopted by Austria in its weakest possible form, thus not having constitutional rank or creating subjective rights for individuals.

[28] Art 1-4 of the convention were elevated to constitutional rank but ratified under reservations, thus not creating subjective rights but needing implementation through legislation. BGBL 1982/443

[29] Until the adoption of the CFR the EU-jurisprudence relied on 'general legal principles' within the primary law. Schäffer points out that the ECJ in its derivation of individual fundamental rights 'was guided by the common constitutional traditions of the member states, as well as indications arising from international treaties on human rights protection', in particular the Universal Declaration of Human Rights. On this basis, the ECJ acknowledged and specified a number of fundamental rights within the EU e.g., the principles of equal treatment, protection of property, and the right to effective legal protection and a fair trial. See Schäffer, 'Die Entwicklung der Grundrechte' (n 24) 42.

[30] Through this treaty the CFR is seen as equal to the treaties of primary law and subsequently legally binding. The ECJ has furthermore stated in 2013 that the restrictions implemented through Art 51 of the Charter – 'The Charter does not extend the field of application of Union law beyond the powers of the Union (…)' – are basically void since all legislation by member states is part of Union law. EuGH (26.2.2013) C-617/10.

[31] Berka, Binder, Kneihs (n 8) 99.

This systematization can firstly be based on the respective sources of fundamental rights, particularly the already mentioned B-VG, ECHR and CFR.[32] After 1945 the Austrian fundamental rights catalogue was furthermore extended through several separate constitutional laws.[33] Other fundamental rights are guaranteed either through specific constitutional provisions in ordinary federal laws[34] or through provincial constitutional laws.[35]

While the analyses of the different sources of fundamental rights focusses on their historical and political background, these rights can also be systematized regarding their subjects.[36] Art 2 StGG as well as Art 7 B-VG establish, that all citizens are equal before the law. After an expansion of that definition through the implementation of the ECHR as constitutional law[37], the group of fundamental rights subjects was further expanded through Austria's accession to the European Union: Art 18 AEUV and Art 4 EWRA obliges every member state of the union to grant the same rights that it grants to its citizens to every citizen of every member state.[38]

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[32] As Berka et.al. point out, neither the ECHR nor the CFR were initially designed to substitute fundamental rights catalogues within national constitutional law. Nonetheless they introduce new aspects and enrich the Austrian fundamental rights landscape by 'their material, dynamic, and evolutionary nature'.
The provisions within the CFR are seen as constitutionally guaranteed rights within the meaning of Art 144 B-VG. Furthermore Art 53 CFR contains a favourability clause that defines the rights within the Charter as minimal standards that do not restrain additional provisions in national or EU law. Johannes Hengstschläger and David Leeb, *Grundrechte* (3rd edn, Wien 2019) 21-22.

[33] In 1973 the Federal Constitutional Law for the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination domestically implemented the respective international treaty (CERD) of 1972 which Austria ratified with reservations (BGBl 1973/390). In 1988 the Federal Constitutional Law for the Protection of Personal Liberties, which came into effect in 1991, aimed to implement the provisions of Art 5 and 6 ECHR (BGBl 1988/684). Since 2008, the Austrian legislature is required to enact a separate law if it wants to elevate an international treaty, or certain parts of it, into constitutional rank (BGBL I 2/2008). This procedure was applied regarding the UN Convention on the Rights of the Child (CRC), which was ratified by Austria in 1992 with reservation of performance and reservations against Art 13, 15 and 17 (BGBl 1993/7).

[34] These are § 7 Minority School Law for Corinthia (*Minderheitenschulgesetz für Kärntner*, BGBl 1959/101), § 1 Community Service Law (*Zivildienstgesetz*; BGBl 1974/184); § 1 Party Law (*Parteiengesetz*; BGBl 2012/56); §§ 12 and 14 Extradition and Legal Assistance Law (*Auslieferungs- und Rechtshilfegesetz*; BGBl 1979/529); § 1 Minority School Law for Burgenland (*Minderheitenschulgesetz für das Burgenland*; BGBl 1994/641), and Art 1 Data Protection Law (*Datenschutzgesetz*; BGBl 1999/165).

[35] As Hengstschläger and Leeb point out, several federal states have 'within the scope of their constitutional autonomy, incorporated subjective rights into their state constitution alongside statements of state objectives and commitments to fundamental values'. Among these are provisions regarding the protection of property and rights to compensation in cases of expropriation through state laws in Tyrol (Art 11), Vorarlberg (Art 11), and Salzburg (Art 10). Furthermore, state constitutions also establish certain social rights, besides political rights regarding state elections, petitions etc. – e.g., in Upper Austria (Art 12) and Tyrol (Art 13). These rights can be seen as constitutionally guaranteed rights within the meaning of Art 144 B-VG, thus they can be asserted by means of a complaint before the Constitutional Court. See Hengstschläger, Leeb (n 32) 18-19.

[36] Regarding the question if legal entities can also be fundamental rights holders, the VfGH has established long-lasting jurisprudence that clarifies that most fundamental rights are not only applicable for individuals but also for legal entities. This aspect will be further discussed in subchapter 5.1.

[37] Art 14 ECHR guarantees that all rights established by the convention are valid without discrimination, particularly discrimination on the basis of national origin.

[38] The CRF in its fifth chapter explicitly grants the right to vote on the European and municipal level, the right to good administration, the right of access to documents, the accessibility of Ombudsmen, the right to petition, the right to freedom of movement and residence, and the right to diplomatic and consular protection to 'every citizen of the Union', thus e.g. giving citizens of other EU member states to right to vote and to be elected in municipal elections in Austria.

The third method to systematize fundamental rights is regarding their content and their area of protection – 'that is, according to the specific goods or interests that they cover'.[39] The origins of fundamental rights protections can be seen in liberal rights and particularly civil liberties: These were designed as defensive rights against state intervention and 'form the core of the liberal fundamental principle, which seeks to secure an area of individual freedom by keeping certain aspects of life free from state regulations'.[40] Civil liberties can therefore not only be found within the StGG of 1867 but also within the ECHR and the CFR.[41]

While these liberal rights define the vertical relationship between individuals and the state, equality rights also address the horizontal relationship between the individual holders of rights. Their aim is to achieve legal equality between all subjects. Art 7 B-VG can be seen as the most important example of such rights within the Austrian legal system: Together with Art 2 StGG this general principle of equality has 'become one of the most significant fundamental rights, especially before the Constitutional Court'.[42] An important aspect of all equality rights is their implicit requirement of objectivity that 'prohibits state action that is not objectively justifiable, but inherently irrational'.[43]

Democratic and political rights grant individuals the right to participate in affairs of the state. Their centre are the different rights to vote and to be elected as well as the different plebiscitary rights of citizens, which together build the basis of state authority in a representative democracy.[44] From these rights also arises the obligation of the state to ensure their accessibility and effectiveness through due processes of elections and voting. Additionally liberal rights, like rights of association and assembly, rights of free speech, rights of information, and rights to create political parties are of special significance to these political rights. Procedural rights define the fundamental legal procedural guarantees granted to individuals. These are not designed as rights of protection but as state obligations to 'take the necessary legal,

[39] Berka, Binder, Kneihs (n 8) 101.
[40] Hengstschläger, Leeb (n 32) 23.
[41] As Berka et.al. point out, liberal rights can not only be reduced to their protective character but also encourage positive actions by the states, e.g., rights to legal protections against attacks by third parties or regarding to participation in services offered by the state. Therefore, liberal rights can also be seen as protection and guarantee obligations by the state towards its citizens in the sense of 'specific dimensions of the already mentioned liberties'. Berka, Binder, Kneihs (n 8) 103-104.
[42] ibid 194.
The Austrian Constitution furthermore knows a series of additional, specific equality mandates, e.g., regarding the equal right to vote, regarding the accessibility of public institutions (Art 3 StGG), regarding the equal exercisability of rights (Art 7 para 4 B-VG, Art 14 ECHR), or in the form of prohibitions of discrimination (Art 1 *BVG-Rassendiskriminierung*, Art 66 and 67 StV St. Germain).
[43] Hengstschläger, Leeb (n 32) 24.
[44] In Austria these rights are enshrined in Art 23 (a) para 1, Art 26 para 1, Art 60 para 1, Art 95 para 1, Art 117 para 2 B-VG as well as in the provisions regarding popular initiatives, referendums, and consultations.

organizational, personnel, and procedural measures to ensure these rights and enable individuals to exercise them'.[45]

Different from liberal rights, social rights are not focussed on the defence from state intervention but on creating positive obligations regarding services of the state. Austrian constitutional law does not know social rights like the right to work, the right to housing, or the right to social security.[46] They will be further discussed in chapter 3.

2.3. The general equality clause

The general equality clause is one of the central fundamental rights provisions within Austrian constitutional law. Its analysis offers important insights into the mechanisms and regulations of fundamental rights protections in Austria and is therefore an important foundation for further considerations regarding the possible implementation of social rights.

As was already mentioned the general equality clause is primarily composed of two constitutional provisions: Art 2 StGG which states that 'all citizens are equal before the law' and Art 7 B-VG which adopts the same wording in its first sentence and further expands on its principle.[47] Additionally, several other provisions can be seen as expansions of the general equality clause, among these are Art 3 StGG, Art 66 para 1 and 2 StV St. Germain, Art 14 ECHR, as well as Art 20 and 21 CFR.[48]

The principle of equality of citizens before the law is of great historical and political significance and can be seen as a central force behind 'the historical transition from a feudal

[45] Hengstschläger, Leeb (n 32) 26.
In Austria these rights include the right to a trial in front of a state judge (Art 83 B-VG), the right to public, oral and fair trial in front of a tribunal within a reasonable time (Art 6 para 1 ECHR, Art 47 CFR), rights of defence in criminal matters (Art 6 para 3 ECHR, Art 48 para 2 CFR), the right to a reviewing authority (Art 2 Protocol No. 7 to the ECHR), and the right to an effective fundamental rights complaint (Art 13 ECHR; Art 47 CFR). These rights also include obligations of refraining, e.g. the prohibition of actions that compel an accused person to make self-incriminating statements (Art 90 para 2 B-VG), or the prohibition of double punishment (Art 4 Protocol No. 7 to the ECHR; Art 50 CFR).

[46] Even though the Austrian constitution does not include explicit social rights, Art 7 B-VG does create derivative performance rights regarding unequal access to states services, which 'can be claimed not only in the public sector but also due to the fiscal application of the equality principle, even in cases of benefits (e.g., subsidies) granted under private law arrangements'. See ibid 28.

[47] As Berka et.al. point out, it can be debated if Art 7 para 1 B-VG has a *lex posterior* derogatory effect on Art 2 StGG. Nonetheless, the practical application 'tends to treat Art 2 StGG as on ongoing legal basis for the principle of equality' since these broadly formulated norms do not create a contraction between each other. Berka, Binder, Kneihs (n 8) 511.

[48] Furthermore Art 1 *BVG-Rassendiskriminierung* lays out rules regarding equal treatment among individuals with non-Austrian citizenship. Regarding Art 14 ECHR it is important to know that its 'Prohibition of discrimination' only creates an accessory claim that only includes the rights within the ECHR and its additional protocols. Further legal claims cannot be derived from this provision, it therefore 'does not extend the general principle of equality under Art 7 B-VG to foreigners' – 'they may only not be discriminated against in relation to Convention rights compared to individuals with Austrian citizenship'. See Hengstschläger, Leeb (n 32) 109.

society to a modern democratic civil society and (…) the dismantling of traditional privileges'.[49] It is therefore without question that the general equality clause has been an important influence on the jurisdiction of the VfGH and is one of the central practical standards regarding the assessment of the constitutionality of laws and provisions.[50] This importance is even further increased due to the fact, that the VfGH not only deduces a prohibition of unobjective differentiation and arbitrariness from Art 7 B-VG, but it derivates a general requirement of objectivity.[51] In this sense the general equality clause does not have a material scope of application but binds the legislator to set all necessary measures to guarantee factual equality.[52] In practice this means that in every case in which the legislator chooses to create any kind of benefits, the equality clause enacts derivative performance rights, thus binding those benefits to the principle of equality.

As Pöschl points out, in cases of a violation of the general equality clause the VfGH adheres to its general principles: The court therefore seeks to rule in the sense that 'no more should be excluded from the legal corpus than is necessary for the specific case' and that the 'remaining text should not undergo any change in its meaning'.[53] The court's objective is not to create advantages for the complainant, but to clear up of the legal situation – it therefore 'adopts the perspective of the norm-setter, not that of the specific citizen who brings the specific case'.[54]

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[49] Berka, Binder, Kneihs (n 8) 510.

[50] Given the importance of the equality clause it comes without surprise that 'most of the politically significant or controversial decisions' of the VfGH are based on this fundamental right, e.g., the decisions regarding the different retirement ages for men and women (VfSlg 12.568/1990, 19.832/2013), family taxation (VfSlg 14.992/1997, 19.791/2013), registered partnership and marriage equality (VfSlg 20.225/2017), and existential minimum benefits (VfSlg 20.244/2018, VfGH 01.12.2018, G 308/2018). See ibid 510-511.
This tradition goes back to the First Austrian Republic when the VfGH already acknowledged the far-reaching effect of the general equality clause on legislative procedures. As early as in 1932 the court stated in a decision: 'If the complainant argues that the principle of equality applies not only to the execution (…) but also to legislation, it is (…) to be agreed with.' See VfSlg 1451/1932.

[51] This general requirement of objectivity can be seen as one of the most essential parts of the equality clause. As Eberhard states, it 'has the character of a fundamental rights catch-all clause in those cases where all other forms of the constitutional and specifically fundamental rights organ fail'. In this sense it can be a guiding principle in cases without clear and distinct differences, e.g., in cases in which discriminations do not occur along the categories laid out in the second sentence of Art 7 para 1 B-VG but because of other unobjective differentiations. Harald Eberhard, 'Altersdiskriminierung aus verfassungs-, verwaltungs- und europarechtlicher Sicht' in Journal für Rechtspolitik 20 (Wien 2021) 116.

[52] This however does not mean that the general equality clause creates positive claims towards the legislator. The VfGH on multiple occasions stated that 'inaction by the legislature cannot be challenged based on this fundamental right'. See VfSlg 2586/1953, 3160/1957, 3810/1960, 4277/1962. Inaction by the legislator is contrary to this fundamental right only in cases of unjustified and discriminatory distinction. In its role as negative legislator the VfGH can therefore only influence existing regulations but not enact missing ones. See Berka, Binder, Kneihs (n 8) 530-531.

[53] Magdalena Pöschl, 'Armut und Gleichheit' in Journal für Rechtspolitik 24 (Wien 2016) 368.

[54] ibid.

In the sense of the general equality clause, the VfGH tends to rather adjust the exception to the general rule than expand the exception.[55] If there is no factual division between a rule and an exception, then 'the provision in the legal corpus that relies on specific circumstances (in the case of pensions: the previous decline in earning capacity and the double burden on women) is eliminated when these circumstances are proven to be unjustified'.[56] This consideration naturally is a simplified view on the immense constitutional jurisprudence regarding the general equality clause but aims to allow a basic assessment of its effects.

Given its vast scope and applicability, the general equality clause is often confronted with criticism:

> Within the standard repertoire of wisdom spread by constitutional textbooks, it is commonly stated that the principle of equality is particularly open to interpretation. Sometimes it is even said that this fundamental right is "pervaded by so many ideological elements that a purely rational statement about it must inevitably be meager", it serves as a "gateway for extralegal value judgments", and empowers the Constitutional Court to correct political decisions based on criteria that are inherently political themselves.[57]

This critique is not a new phenomenon: Even Hans Kelsen described the general equality clause as a 'commonplace of political liberalism' and saw its scope as 'extraordinarily unclear' from a constitutional point of view.[58]

Nonetheless the general equality clause does not hold a higher status than other fundamental rights. This allows for the adoption of other provisions that act contrary to the goal of factual equality as long as these provisions hold constitutional rank.[59] To that effect assessing claims

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[55] This modus operandi can, e.g., be seen in the decision regarding the extension of the option for heterosexual individuals to adopt the name of their partner or a double name to individuals in a registered partnership. See VfGH 3.3.2012, G131/11.

[56] Pöschl, 'Armut und Gleichheit' (n 53) 369.

[57] Magdalena Pöschl, 'Was kommt nach der Gleichheitswidrigkeit' in Journal für Rechtspolitik 20 (Wien 2012) 362.

[58] Berka, Binder, Kneihs (n 8) 515 citing Kelsen, *Österreichisches Staatsrecht* (1923) 50.
According to the protocol of the National Council's Constitutional Committee, its chairmen in 1920 stated that the first sentence of Art 7 para 1 B-VG 'essentially constitutes an elaboration of the word democratic in Art 1 para 1 B-VG'. As Ehs points out, Kelsen even showed scepticism towards the legal use of the word democratic, since 'such norms were merely prepositive adornments precisely because they were not justiciable or could only be justiciable under the application of non-rational verifiable criteria'. Tamara Ehs, *Der VfGH als politischer Akteur: Konsequenzen eines Judikaturwandels?* (Innsbruck 2015) 20.

[59] Such provisions have, e.g., been enacted regarding the different retirement age limits of men and women until 2033 (BGBl 1992/832), or regarding the limitation of the remuneration of the supreme bodies (BGBl 1987/281). As Berka et.al. point out, such constitutional measures have often been used to 'correct corresponding findings of the Constitutional Court'. Berka, Binder, Kneihs (n 8) 514.

regarding the general equality clause tasks the VfGH to consider if objective differences occur in the given case, and to publicly state the ratings and considerations of the divergent interests that led to its rulings.[60]

As every constitutionally guaranteed right, the general equality clause must be analysed in its historic context. Particularly Art 7 B-VG was not designed to establish factual equality among all its subjects, but to guarantee legal equality for all citizens. Its goal is to guarantee 'that the legal system must not differentiate between individuals in an irrational manner when dealing with essentially "equal" situations, i.e., cases that are comparable in terms of the essential elements relevant to the regulatory context'.[61] Its historic purpose was therefore to eliminate the privileges mentioned in its second sentence.[62] In 1997 this provision was amended through a commitment of the federal, provincial, and municipal level to the equality of individuals with disabilities (Art 7 B-VG para 1, third sentence). One year later the Austrian legislature fulfilled the requirements that arose from the ratification of CEDAW in 1982 through another amendment regarding the equality between genders (Art 7 B-VG para 2), which stated that 'measures to promote effective gender equality, particularly by eliminating existing inequalities, are permissible'.[63] Furthermore, Art 13 B-VG was amended regarding the goal of gender budgeting on the federal, provincial, and municipal level.[64]

Besides its effects on legislative processes, the general equality clause can furthermore develop a third-party effect on relationships between individuals. The Austrian Supreme Court acknowledged such effects particularly in employment law, regarding cases of unequal payment of men and women for equivalent work,[65] or regarding collective and workplace agreements.[66] These third-party effects, even though they rarely occur, naturally stand in tension with the constitutionally guaranteed right to private autonomy as both principles limit each other's scope of applicability.

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[60] Hengstschläger, Leeb (n 32) 122.
[61] Berka, Binder, Kneihs (n 8) 521.
[62] ‚Privileges based on birth, gender, social status, class, or religion are excluded.' The importance of this provision as part of Austrian constitutional law was further underlined by the VfGH that stated that the principle of equality before the law is 'a fundamental component of the fundamental rights system and the democratic basic structure, (…) that cannot be amended without a referendum under Article 44(3) B-VG.' Magdalena Pöschl, ‚§ 14 – Gleichheitsrechte' in Detlef Merten, Hans-Jürgen Papier and Gabriele Kucsko-Stadlymayer, Handbuch der Grundrechte in Deutschland und Europa (Heidelberg 2014).
[63] This amendment aimed to implement the provisions set out in Art 4 para 1 CEDAW through which 'temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination', thus allowing for positive discrimination, e.g., regarding women in the workforce.
[64] BGBl I 1/2008.
[65] OGH Arb 7085/1959.
[66] OGH SZ 65/163, SZ 69/31.

Another important aspect, that was already touched upon regarding the equality-orientated design of state benefits, is the fiscal authority of the general equality clause.[67] The prohibition of unobjective discriminations, which can be derived from this authority, particularly include utility services, individual entitlements, and state benefits created by administrative authorities as well as the awarding of subsidies.

2.4. BVG Kinderrechte

While the general equality clause is one of the oldest and most extensive provisions within the Austrian fundamental rights system, the *BVG Kinderrechte* is the youngest addition to this catalogue. Its analysis might therefore not only be of interest regarding the realistic scope and applicability of this 'fresh' constitutionally guaranteed rights, but also because of the fact, that it is one of the few constitutional laws that also develops 'a social dimension in some cases'.[68] Austria ratified the CRC in 1992 and adopted two of the three Optional Protocols to the convention pursuant to Art 50 para 2 B-VG and with reservations.[69] Since then the convention has not been elevated to constitutional rank, its 'effect primarily pertains to the domestic obligation for interpretation in accordance with international law, especially of those regulations that have been enacted in fulfilment of the CRC'.[70] After extensive negotiations and the implementation of specific rights for children through Art 24 CFR, this fulfilment happened through the adoption of a separate Federal Constitutional Law on Children's Rights (*BVG Kinderrechte*).[71] The creation of these independent rights, particularly after the unsuccessful attempts to create a new fundamental rights catalogue by the *Österreich Konvent* five years earlier (see chapter 4.1), can rightfully be seen as a directional decision by the Austrian legislator.

In its design the *BVG Kinderrechte* widely follows the provisions laid out in the CRC and the respective parts of the CFR: It includes the child's entitlement to protection and care and the primary requirement for state and private actors to act in the best interest of the child (Art 1), entitlements to regular personal relationships with both parents and special protections for children removed from parental care (Art 2), and the prohibition of child labour (Art 3).

[67] As Berka et.al. point out, this fiscal authority is today accepted as a central effect of the general equality clause and recognized through longstanding jurisprudence. See Berka, Binder, Kneihs (n 8) 631.
[68] Eberhard (n 51) 519.
[69] BGBl 1993/7, BGBl III 2002/92, BGBl III 2004/93.
Not yet ratified is the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, which Austria signed in 2012.
[70] Sebastian Öhner, 'Jedes fünfte Kind ist von Armut betroffen' in Juridikum 2/2022 (Wien 2022) 187.
[71] BGBl. I 4/2011.

Importantly the *BVG Kinderrechte* also lays out the right to meaningful participation of children in all matters concerning them (Art 4). Furthermore, it guarantees the right to a non-violent upbringing, the prohibition of physical punishment and maltreatment, the protection against economic and sexual exploitation, and a legislative mandate to provide compensation for children who have been victims of violence or exploitation (Art 5) as well as special protections and rights to equal treatment for children with disabilities (Art 6). It can therefore be stated that the *BVG Kinderrechte* contains civil liberties as well as equality rights and certain social provisions.[72] Holders of these rights are all minors up the age of 18.

> The state bears the responsibility for fundamental rights. This includes legislation, execution, as well as actions in the private sphere. The norms contained in the Federal Constitutional Law on Children's Rights are subjectively guaranteed rights. They can be invoked as constitutionally guaranteed rights and also serve as an interpretive framework in proceedings before courts and administrative authorities.[73]

In this sense the *BVG Kinderrechte* not only establishes children as a subjective group with specific fundamental rights but also creates a catalogue of individually enforceable entitlements and far exceeds already existing programmatic statements regarding the protection of children in constitutional provisions on the federal and provincial level.
This difference can also be seen through the 'perhaps somewhat less conscious' decision to create social fundamental rights for children.[74] As Fuchs states, the provisions within the *BVG Kinderrechte* 'exhibit a significant component of solidarity with their focus on the social protection of the child in many respects, which is unparalleled in the constitutional framework'.[75] These provisions do not create absolute entitlements to state benefits but relative rights, which are subject to regulation and limitation by the legislator.[76] But even though the legislator is given certain leeway in the implementation of the provisions laid out in this

[72] Claudia Fuchs, 'Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern. Aktuelle Fragen des öffentlichen Rechts im Jahr 2010' in Jahrbuch Öffentliches Recht 2011 (Wien 2011) 92-93.
Art 7 furthermore contains a legal reservation regarding Art 1, 2, 4 and 6, through which 'measures that may affect the development and well-being of the child are permissible if they are necessary to achieve one of the aforementioned objectives, serving such a purpose and being proportionate'. Those objectives include national security, public order, economic welfare, or the prevention of unlawful acts. Grabenwarter, Frank (n 15) 606.
[73] Öhner (n 70) 187.
[74] Fuchs (n 72) 97.
[75] ibid.
The effect of these social rights created through the B-VG Kinderrechte can e.g. be seen through the impact of the so called child-welfare-priority principle in Art 1. The entitlement to protection and care contained therein found expression in the regulations regarding the effect-oriented impact assessment of the federal government. Öhner (n 70) 188.
[76] Fuchs (n 72) 102.

constitutional law, it implements effective levels of protection as well as defensive rights regarding questions of social security, health care, access to school and training programs, and protection from neglect, violence and poverty.[77]

Since these rights are constitutionally guaranteed rights pursuant to Art 144 B-VG they also allow for individual complaints in front of the VfGH. Child welfare is therefore, pursuant to Art 1 sentence 2 BVG Kinderrechte as well as Art 8 ECHR, not only a constitutional principle that serves as a standard for the assessment of the constitutionality of provisions within the court's norm control pursuant to Art 139 and 140 B-VG.[78] It also creates positive obligations for the legislator and the administration to consider child welfare in all relevant measures, particularly regarding social policies. Even though the *BVG Kinderrechte* as a relatively young fundamental right has not yet produced a vast amount of jurisprudence, its effect regarding the implementation of social rights can clearly be seen in the first judgements of the Constitutional Court.[79]

2.5. Fundamental rights jurisprudence by the VfGH

Any analysis of the jurisprudence of the VfGH, even narrowed down to questions regarding the protection of fundamental rights, is a vast undertaking. This subchapter can therefore only give a brief overview of the developments regarding the VfGH's practice in questions central to the research objectives of this thesis.

In general, the B-VG sets out different ways to judge the constitutionality of state actions and legislation through the VfGH[80]: Art 144 B-VG authorizes the court to rule on individual

[77] Öhner (n 70) 188.
As Öhner further points out, the indefinite and dynamic nature of the concept of child-welfare is a central asset of this provision since its flexibility allows for individual and case-related analyses of possible infringements of these rights.

[78] See e.g., the ruling on the constitutionality of certain provisions regarding the differentiation of entitlements to need-based minimum security based on the duration of residence and the rigid cap on the benefit amount for households with multiple individuals through the *Mindestsicherungs-Gesetz* in Lower Austria (VfSlg 19.941/2014).

[79] In 2019 the VfGH ruled that maximal rates of social assistance, which could cause an endangerment of livelihood and housing needs of affected children, violate Art 1 B-VG Kinderrechte and are thus unconstitutional (VfGH 12.12.2019, G 164/2019-25, G 171/2019-24).

[80] It should be noted as well, that the Supreme Court (*Oberster Gerichtshof*, OGH) plays an additional role in Austria's fundamental rights protection. As Reiter points out, the relationship between the two courts has 'always been fragmented and controversial': Since the VfGH's competences are clearly stated within the B-VG, these constitutional provisions allow the responsibility, 'by way of contraposition, (of) the ordinary courts to safeguard fundamental rights when applying (and interpreting) substantive provisions in individual cases within civil and criminal law contexts'. These differences are of small importance regarding the research questions of this thesis but play an important role regarding possible VfGH reforms and particularly the creation of tools of judgement complaints (see subchapter 5.2.2). See Lukas Reiter, ‚Der österreichische Verfassungsgerichtshof als einheitliches Grundrechtsgericht über den „Umweg" der Gesetzesbeschwerde?' in Zeitschrift für das gesamte Verfahrensrecht – GVRZ (2019) 1-10.

complaints against rulings by administrative tribunals. Individuals who feel that their rights might have been infringed upon have 'to claim either the violation of a constitutionally guaranteed right (Fundamental Rights) through the contested ruling and/or the violation of his/her personal rights through the application of an unconstitutional law or an unlawful regulation'.[81] In cases in which the court finds an infringement of a constitutionally guaranteed right, it can rescind the contested ruling.[82]

Art 140 B-VG furthermore defines one of the 'core tasks of the Constitutional Court', namely to 'pronounce on the constitutionality of laws adopted at federal and provincial levels'. From a procedural perspective such an examination can either be triggered if the court itself is 'concerned that a legal provision to be applied in a case pending with the Court might be unconstitutional' (ex-officio initiative via adoption of a judicial review resolution), if the Administrative Court (*Verwaltungsgerichtshof*, VwGH), an administrative tribunal, or an ordinary court has doubts regarding a legal provision to be applied in a case pending (via application for a repeal of that provision by the respective court or tribunal), or if individual complainants claim that their 'rights have been directly violated' and 'the law has taken effect for the individual concerned in the absence of a court decision or an administrative decision' (via individual application).[83] Additionally certain public bodies are entitled to submit applications for judicial review of laws in the absence of any specific case through an 'abstract review' of legal norms.[84] In each of these cases the VfGH can repeal the provision in question as unconstitutional or respectively declare it to have been unconstitutional, if the provision has already been declared null and void.[85] Regarding the review of the constitutionality of

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[81] Verfassungsgerichtshof, *Functions* <https://www.vfgh.gv.at/kompetenzen-und-verfahren/functions.en.html> accessed 12 August 2023.

[82] As the court points out on its official website, it has the right pursuant to Art 144 para 2 B-VG to dismiss the complaint, if it 'does not have a reasonable chance of success or (it) cannot be expected to result in the clarification of a constitutional issue'. In case of dismissals or rejections, the complaint can upon application by the complainant by transferred to the Administrative Court, which rules on questions of infringement of simple-majority rules. As Art 144 para 3 B-VG clarifies, the Constitutional Court can therefore only rule on infringements of constitutionally guaranteed rights, meaning fundamental rights, while the Administrative Court must decide whether 'any other right was violated'. See ibid.

[83] ibid.

Since 2015 individuals also have the right to address the Constitutional Court in cases in which they claim that their rights as a party to a lawsuit decided in the first instance have been violated and are 'entitled to challenge the constitutionality of a law within the framework of legal remedy sought against that court decision'.

[84] ibid.

These bodies are the Federal Government regarding laws on the provincial level, provincial governments regarding laws on the federal level, one third of either the National Council or the Federal Council regarding federal laws, and one third of the members of a provincial parliament regarding provincial laws (expect members of the provincial parliament of Lower Austria).

[85] In cases of the repeal of a legal provision, this takes effect for the complainant at 24:00 pm on the day of its proclamation. Additionally, the court has the right to set a deadline for repairs to the provisions, giving the legislator a certain amount of time to find new solutions. See ibid.

regulations by administrative bodies, Art 139 B-VG sets out largely identical procedures as in cases regarding the constitutionality of laws.[86]

Even though these procedures and regulations define a vast scope of rights for the VfGH to review and regulate the protection of constitutionally guaranteed rights, this does not mean, that that the significance attributed to these rights by the court remained unchanged throughout its jurisprudence. As was already mentioned, the possibility for individual complaints regarding the constitutionality of laws was only established in 1975.[87] At about the same time, in 1974 and 1977, the court ruled in two important decisions on the character of fundamental rights. In these cases, regarding the impunity of abortions and the constitutionality of the participation of assistants and students in universities, the court emphasised the 'exclusive orientation of fundamental rights towards the state'.[88] The clear legal opinion of the court at that time was that fundamental rights 'protect individuals against state intervention but do not oblige the state to take positive action to protect fundamental rights' – as Öhlinger and Stelzer point out, the 'significance of fundamental rights as criteria for legal review remained low for a long time', with the exception of the general equality clause.[89]

This legal view of the 1970s is difficult to compare to the fundamental rights jurisprudence of the VfGH over the last decades. Rulings regarding marriage equality[90], additional gender entries in official documents[91], or social care legislation[92] have established the court as body that is highly active regarding the protection of fundamental rights – at least in the public eye. This development has not only brought journalists to debate over the increasing politization of the court, but on a more academic level promoted attempts to determine different stages within the development of the fundamental rights jurisprudence of the court.

Heinz Schäffer therefore defines three phases of systemic changes within the court's decisions: During the first phase, spanning over the duration of the First Republic (1918-1945), the court was established and given the mandate to rule on issues related to fundamental rights, which had already bound the legislator in principle during the late monarchy, as enforceable norms. Nonetheless, the VfGH during this period acted 'cautiously with respect to the constitutionally

[86] A significant difference in these cases is the design of the 'abstract review' of legal norms that can be triggered by the Federal Government regarding provincial regulations, provincial governments regarding federal regulations, but also local authorities, the offices of Ombudspersons and the Federal Minister of Finance (regarding specific regulations by local governments). Art 139a B-VG furthermore gives the Constitutional Court authorities to review the re-promulgation of laws and treaties. See ibid.
[87] BGBl. 1975/94.
[88] VfSlg 7400/1974 and VfSlg 8136/1977.
[89] Öhlinger, Stelzer (n 12) 502-503.
[90] VfGH 4.12.2017 G 258-259/2017-9.
[91] VfGH 15.6.2018 G 77/2018-9.
[92] VfGH 12.12.2019 G 164/2019-25, G 171/2019-24.

guaranteed rights, as described by Art 144 para 1 B-VG'.[93] This paradigm of judicial self-restrained continued during the second phase after World War II, even though the court 'timidly began to show the legislature its boundaries'.[94] As Öhlinger points out, not even five percent of cases in which a law was repealed by the court between 1946 and 1980 were based on their unconstitutionality regarding violations of fundamental rights.[95] It was only in the third phase of this development, according to Schäffer starting in the 1980s, that the court began giving more weight to material fundamental rights concerns and using the principle of proportionality to more actively regulate the legislator.[96]

This development of the courts jurisprudence can be seen exemplary regarding questions of property restrictions and expropriations which are regulated by the StGG: 'The right to property in inviolable'.[97] This norm was supplemented by the simple-law provision that individuals must relinquish full ownership of property if the 'common good' demands it.[98] The question of what exactly constitutes this 'common good' and in how far it restricts the constitutionally guaranteed right to property has been on ongoing debate within the VfGH's jurisprudence. While the court for a long time followed the strictly positivist opinion of Hans Kelsen, who in 1929 deemed it unacceptable to leave this decision to the court, it shifted its analysis and defined tighter rules for expropriations in 1959, before it in 1980 even set rules for restorations in cases in which the goal of the expropriation was not realized.[99]

Similar developments can also be seen regarding other fundamental rights, e.g. the already discussed equality clause:

> In the beginning, the VfGH generally allowed differentiations as long as the legislator did not act arbitrarily, i.e., in "bad faith," and dismissed complaints until the 1970s if the legislator's actions were not excessive. However, starting in the late 1970s and early 1980s, the VfGH took a more proactive approach and linked the principle of equality with a general principle of objectivity. This radical shift in case law was motivated not

[93] Ehs (n 58) 19.
[94] ibid.
[95] Öhlinger, ‚Die Grundrechte in Österreich' (n 10) 244.
[96] Heinz Schäffer, 'Verfassungsgericht und Gesetzgebung' in Walter Berka, Heinz Schäffer and Josef Werndl (eds), Staat – Verfassung – Verwaltung (Wien, New York 1998) 118-119.
As Ehs points out this progress narrative has nonetheless to be questioned, since the Constitutional Court has always acted as a highly political body and not just developed its focus on fundamental rights and political questions in a broader since during the last decades. 'Especially the "Kelsen-VfGH" of the 1920s was aware of its legislative and law-developing component and saw its role as a political mission. It was precisely this left-liberal, politically active-oriented VfGH that led to a conservative reaction and its reconstitution in 1929.' Ehs (n 58) 19.
[97] Art 5 StGG
[98] § 365 AGBG
[99] VfSlg 1123/1928, VfSlg 3666/1959, VfSlg 8981/1980. In 2007 the Constitutional Court finally joined the ECtHR's opinion and ruled that any expropriation created the right for compensation (VfSlg. 18096/2007).

> only by international influences but also by societal changes, reflecting the altered relationship between the state and the individual.[100]

Besides this already discussed requirement of objectivity (see subchapter 2.3), the court also started to derivate the principle of trust-protection from the general equality clause. This principle constitutes a legal 'barrier against sudden and severe encroachments on existing legal positions, not only in the case of social law claims, but it holds (…) particular practical significance in this area'.[101]

Aside from societal changes, and the political shifts that accompanied them, two other reasons might have played an important role in this development in the VfGH's fundamental rights jurisprudence: Firstly, the stronger international cooperation of constitutional courts in Europe, particularly to the German BVerfG (*Bundesverfassungsgericht*). As Holoubek points out, the close relationship between these two German-speaking courts is essential for the development of their jurisprudence after 1945. Nonetheless, his analysis also shows significant differences between them: While the VfGH's focus lies on decisions regarding individual cases, the BVerfG tends more towards general constitutional deductions and a certain pathos.[102]

The second important influence is the VfGH's role in interpreting the ECHR. Since the convention has been elevated to constitutional rank in Austria, its fundamental rights provisions are also an important legal standard for the court. The same can be said for the influence of the European Court of Human Rights (ECtHR) in Strasbourg and its jurisprudence:

> With the increasing volume of Strasbourg jurisprudence in the 1980s and 1990s, fuelled by an additional surge in the past decade, the practice of the ECtHR soon began to

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[100] Ehs (n 58) 21.
Ehs shows two central examples for this new focus in the VfGH's jurisprudence: Firstly, the ruling on the challenge to the Carinthian provincial elections, in which the VfGH for the first time 'departed from the traditional understanding of fundamental rights as mere defensive rights against the state and began to interpret them both formally and substantively' (VfSlg 9.224/1981). Secondly in its decision on the *Schrottlenkungsgesetz* in 1984, in which the court referred to the right to freedom of occupation pursuant to Art 6 StGG to invalid economic control measures because of their disproportionate effect against public interest (VfSlg 10.932/1986). See ibid.

[101] Harald Schäffer and Reinhard Klaushofer, 'Zur Problematik sozialer Grundrechte' in Detlef Merten, Hans-Jürgen Papier and Gabriele Kucsko-Stadlymayer (eds), *Handbuch der Grundrechte in Deutschland und Europa* (Heidelberg 2014) 773.
The court's opinion regarding the trust-protection principle is based in the assessment, that even though the legislative framework has to stay flexible in order to adapt to new social realities, it also has to fulfil the purpose of 'guidance and behavioural control'. In this sense sudden and arbitrarily, particularly retroactive changes to (social) norms are contra productive and potentially unconstitutional. This principle however does not establish a permanent protection of already established norms and privileges, a question often debated regarding the implementation of social rights.

[102] Michael Holoubek, ‚Wechselwirkungen zwischen österreichischer und deutscher Verfassungsrechtsprechung' in Detlef Merten (ed), *Verfassungsgerichtsbarkeit in Österreich und Deutschland* (Berlin 2008) 111.

> influence the jurisprudence of the VfGH. Like few other constitutional courts in Europe, the Constitutional Court consistently cites Strasbourg judgments and follows them in 99% of cases involving comparable circumstances.[103]

Given this background, all future debates over the expansion of Austria's fundamental rights protections and possible additions to its fundamental rights catalogue have to take the changes within the jurisprudence of the VfGH, particularly since the 1980s, into account. Regarding the critique of judicial activism through the court in cases of fundamental rights, Ehs emphasises the court's internationally unique role within the compromise-oriented makeup of the Austrian constitutional system and states that the discussion should not only focus on the court's jurisprudence, 'but rather on the political failure to enact a justiciable catalogue of fundamental rights'.[104]

[103] Christoph Grabenwarter, ‚Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes' in Journal für Rechtspolitik 20 (Wien 2012) 299.
[104] Ehs (n 58) 21.

3. Social fundamental rights in the Austrian constitutional system

The most common point of view regarding social fundamental rights is that 'based on this understanding of fundamental rights, the inevitable conclusion is that there are simply no social rights in Austrian law'.[105] But such a simplified statement may fall short when taking the already discussed multifaceted structure of fundamental rights provisions and the growing jurisprudence in this area into account. Particularly treaties like the ECHR and the (R)ESC as well as rulings by the ECtHR and the VfGH may give social dimensions to the existing fundamental rights in Austrian constitutional law, which make further considerations of this field worthwhile.

3.1 Social dimensions in Austrian constitutional law

As Berka et.al. point out regarding the civil liberties and equality rights within the Austrian system, 'a self-determined life in accordance with human dignity naturally presupposes that individuals can rely on the assurance of their fundamental and existential social needs'.[106] The modern welfare state therefore fulfils a vast number of responsibilities to guarantee social security, health care, support in situations of crises, assistance on the labour market etc. to its citizens. Many modern European constitutions have defined this welfare state mandates as a central mission of the administration and safeguarded relevant social entitlements through legally binding fundamental rights.[107] Principles of social security as fundamental rights can also be seen in these country's jurisprudence.

Within the Austrian system there are hardly any constitutionally guaranteed rights that show an inherent social dimension. Aside from the already discussed and relatively young *BVG Kinderrechte*, only the provisions on the right to education pursuant to Art 2 of Protocol No. 1 ECHR are widely seen as creating social claims.[108] Other provisions, particularly social claims

[105] Öhlinger, Stelzer (n 12) 503.
[106] Berka, Binder, Kneihs (n 8) 876.
[107] The German constitution defines the Federal Republic as a 'democratic and social federal state' (Art 20 para 1 GG). Other countries have added explicit social rights to their constitutional laws, e.g., through a right to social welfare in the Italian constitution (Art 38) or a right to social security in the Portuguese constitution (Art 63).
[108] According to this provision, the state has to take all necessary measures to guarantee that the access to education is open to everyone: 'No person shall be denied the right to education.' It furthermore sets out specific limits regarding these measures, stating that the state must 'respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.' These provisions have constitutional rank in Austria since 1964 (BGBl. 23/1964). The negative formulation 'results in a right to access those educational institutions that exist within a state' which 'includes state schools of all orientations and levels, including state universities and colleges'. This right must be designed without discrimination but allows for unequal treatment on the basis of substantive justifications, such as entrance examinations. Grabenwarter, Frank (n 15) 531-532.

derived from the general equality clause and the assurance dimensions of Austria's civil liberties may in certain cases create a social dimension (see chapter 2.3). Furthermore, the provincial constitutions of Tyrol and Upper Austria include social fundamental rights, their scope however is questionable.[109]

Additionally, to these provisions, special importance regarding the social dimension of fundamental rights protections is attached to the CFR: The rights guaranteed in its chapter IV ('Solidarity') are widely inspired by the RESC. The CFR however consciously differentiates between subjective rights and target provisions or principles.[110] These principles have to implemented through additional 'legislative and executive acts taken by institutions, bodies, offices and agencies of the Union' as well as respectively through 'acts of Member States when they are implementing Union law', and can only be used in the judicial interpretation of these legislative acts.[111] The question of whether any provision within the CFR creates subjective rights has therefore to be determined through judicial review.

The provisions within Chapter IV mainly cover guarantees regarding labour law.[112] The VfGH in 2012 ruled that CFR provisions in general may not only be seen as directly applicable union law but can also be enforced as fundamental rights through the court, when they resemble 'in their formulation and specificity constitutionally guaranteed rights of the Austrian Federal Constitution'.[113] If that is the case depends on the assessment of whether the specific CFR provision narrowly correspond to rights guaranteed by the ECHR or StGG, in which case they can be used in procedures of constitutional norm control. In cases in which CFR provisions exceed the ECHR, 'it is to be distinguished whether the content and formulation correspond to constitutionally guaranteed rights'.[114] The VfGH has rejected acts of enforcement through judicial norm control regarding CFR provisions.[115] The most important quality of the CFR

Art 14 CFR creates additional norms in this area, particularly adding the right 'access to vocational and continuing training' and to 'receive free compulsory education'. Both of these provisions also correspond with the rights laid out in Art 18 StGG: 'Everyone is free to choose their profession and to undergo training for it as they wish and where they wish.'

[109] Berka, Binder, Kneihs (n 8) 877.

[110] ibid 897.

[111] Art 52 para 5 CFR

[112] Particularly important regarding the research question of this thesis is Art 34 CFR which encompasses both the right to social security (para 1 and 2) and the right to social assistance (para 3). As Berka et.al. point out, these rights have to be enjoyed without unobjective discrimination as long as public benefits are affected due to the equality principle laid out by the Charter. Para 2 is inspired by provisions of the ESC (Art 12 para 4 and Art 13 para 4 ESC) and creates enforceable rights regarding social security benefits and social advantages for every EU citizen in every EU country. Para 3 on the other hand is inspired by the ESC as well (Art 13, 30 and 31 ESC) but only establishes a principle regarding the right to social assistance and other benefits. See Berka, Binder, Kneihs (n 8) 903

[113] VfSlg 19.632/2012

[114] Berka, Binder, Kneihs (n 8) 898.

[115] VfSlg 1932.2012

regarding its social dimension is therefore its binding effect on the Union's secondary and tertiary law and the implementation of these union provisions through national law.

Aside from the ECHR and CFR, international treaties protecting social and economic rights are of limited legal importance due to their simple-law status and reservations during their ratification: This concerns the (R)ESC[116] as well as the ICESCR[117] which were both ratified with reservations and not elevated to constitutional rank, thus not creating subjective rights.[118] Particularly the decision regarding the ratification of the ESC stands in direct contrast to the legislator's treatment of the ECHR which raised the critique, that Austria, 'in the 1950s and 1960s, still unchallenged in its "liberal" conception of fundamental rights, has isolated itself from the development of international law.'[119]

Another legal debate around the social dimensions of Austrian constitutional law revolves around the constitution itself and particularly the question if it includes in implicit state objective regarding the welfare state. Even though the ruling legal opinion clearly states that 'a commitment to the principles of a social state (…) cannot be demonstrated at the level of the federal constitution', it is questionable if the B-VG remains absolutely silent regarding social questions:[120]

> There is evidence to suggest that the Austrian Constitution implies a social welfare mission (...). Moreover, the concept of a "democratic society", repeatedly referenced in the ECHR, might indicate that the Austrian constitutional law is fundamentally based on the model of a social democracy. (…)[121]

It must also be stated that while the older VfGH-jurisprudence emphasised the 'economic political neutrality' of the constitution[122], this position has changed not only through Austria's ascension to the European Union, but also through the courts more recent jurisprudence which tends 'to embrace a fundamentally market-oriented perspective in the interaction between the guarantee of property and the freedom to engage in economic activities, at the very least excluding the system of centralized economic management.'[123] The constitution in itself

[116] BGBl. 460/1969, BGBl. III 112/2011
[117] BGBl. 590/1978
[118] As Berka et.al. point out, these provisions in certain cases are nonetheless used by courts 'for the internationally compliant interpretation of domestic norms'. See Berka, Binder, Kneihs (n 8) 877. Furthermore, Austria has ratified three treaties of the International Labor Union with simple-law status.
[119] Öhlinger, Stelzer (n 12) 511,
[120] Berka, Binder, Kneihs (n 8) 877-878.
[121] ibid 878.
[122] See e.g., VfSlg 4753/1964
[123] Schäffer, Klaushofer (n 101) 796.

therefore, according to recent jurisprudence, does not obligate social activities by the state, but offers great leeway regarding its design.

3.2 Social dimensions in Austrian constitutional jurisprudence

It was already touched upon in the previous subchapter how other European constitutions and legal systems have established comprehensive provisions regarding the protection of social and welfare entitlements. The German BVerfG, e.g., regularly uses the social dimensions laid out in the GG to enforce social security standards. It stated inter alia: 'The guarantee of a dignified subsistence minimum must be secured through a statutory entitlement.' The court also defined the constitutionally guaranteed subsistence minimum as 'a unified fundamental rights guarantee, which encompasses both the physical existence of the individual, (…), as well as the assurance of the possibility of nurturing interpersonal relationships and maintaining a minimum level of participation in societal, cultural, and political life, because the individual as a person necessarily exists within social contexts'.[124]
Aside from the analysis of (direct) social guarantees within constitutional law, this German example demonstrates the second important perspective: The analysis of social dimensions derived through constitutional jurisprudence from general fundamental rights provisions.

> According to current status of fundamental rights doctrine, even freedom rights can give rise to claims for state-provided benefits (e.g., protection and fulfilment duties). Therefore, they also require concretization by the ordinary legislature in various ways and, given a constitutional jurisdiction that can generally only act as a "negative legislator", they are similarly faced with the challenge of enforcement.[125]

As Öhlinger and Stelzer point out, the VfGH's jurisprudence has established that 'classical freedom rights and especially the general principle of equality (…) assume the role of protecting the aforementioned realm of social rights' and thus create 'derivative participatory rights (…) at least in specific instances'.[126] Additionally to the general principle of equality a number of other fundamental rights can therefore inhabit social dimensions: The freedom of property (Art 5 StGG, Art 1 Protocol No. 1 to the ECHR), the freedom of occupation (Art 6 StGG), the freedom of vocational training (Art 16 StGG), the freedom of association (Art 12 StGG, Art 11

[124] BVerfG 9.2.2010
[125] Berka, Binder, Kneihs (n 8) 880-881.
[126] Öhlinger, Stelzer (n 12) 515-516.

ECHR), the principle of equal access to public schools (Art 14 para 6 B-VG), the right to education (Art 2 Protocol No. 1 to the ECHR), the freedom of science (Art 17 StGG), the freedom of arts (Art 17 a STGG), as well as the already mentioned minority rights pursuant to Art 7 StV Vienna 1995.[127]

While a detailed analysis of the relevant jurisprudence regarding each of these provisions would vastly exceed the scope of this thesis, it is important regarding its research questions to consider how the VfGH's jurisprudence moderates or limits the legislator's ability to restrict social entitlements or to stay generally inactive regarding social questions based on these fundamental rights. It is therefore important to state that even though the Austrian constitutional system does not create a mandate to establish social security systems, 'a multitude of social benefits have effectively been created at the level of ordinary legislation' for which 'the legislature enjoys a relatively broad policy-making discretion when assessing social needs and designing measures that correspond to these needs'.[128]

In this regard particularly the rationality obligation derived from the general equality principle 'serves as a catch-all clause safeguarding against the dismantling of the welfare state'.[129] It creates direct social claims wherever the VfGH 'is able to remedy equality-violating gaps in the system of benefits through analogy', or wherever the court, 'through a likewise constitutionally mandated teleological consideration, can rectify inconsistencies in the system of benefits'.[130] This safeguard can however 'only come into effect when the state voluntarily decides to support the weakest members of society on its own initiative' since 'whether and to what extend it (the state) pursues any regulatory objectives is entirely at its discretion'.[131]

This broad legislative freedom is mainly limited by the current constitutional and EU law framework. While the Austrian law does not know provisions regarding minimum standards for

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[127] ibid 516.

[128] Marina Kaspar, *Mindestsicherung und Migration: Der diskriminierungsfreie Zugang zur Bedarfsorientierten Mindestsicherung für nicht-österreichische Staatsangehörige aus verfassungs-, unions- und völkerrechtlicher Perspektive* (Wien 2021) 145

See e.g., VfSlg 18.885/2009 regarding differentiated increase of pension benefits, or VfSlg. 20.244/2018 regarding existential minimum benefits. In 2018 the court summarized its jurisprudence regarding legislative discretion in the assessment of social needs as follows: 'The legislature enjoys a wide policy-making discretion when evaluating social needs and designing social measures that correspond to these needs (see VfSlg 18.885/2009 concerning the differentiated increase of pension benefits based on pension amount while simultaneously increasing the basic social support allowance, which is not granted to all pension recipients). Therefore, the legislature is not obliged to provide benefits of minimum subsistence security (or social assistance) in an unrestricted manner if it would lead to the promotion of policy objectives that are undesirable from a legal and policy perspective (see VfSlg 5972/1969 and 8541/1979).' See VfGH G136/2017 ua (G136/2017-19 ua).

[129] ibid 146.

[130] Öhlinger, Stelzer (n 12) 531-532.

See e.g., VfSlg 13.486/1993 regarding equality-violating denial of parental leave allowance, and the already mentioned VfSlg 12.839/1991 regarding housing assistance for conscripts.

[131] Magdalena Pöschl, *Gleichheit vor dem Gesetz* (Wien, New York 2008) 717.

human dignity comparable to the GG, the court's jurisprudence primarily limits the subsistence minimum pursuant the prohibition of 'inhuman or degrading treatment' pursuant to Art 3 ECHR.[132] As Kaspar points out, the VfGH in its case law states that 'human dignity constitutes a "general principle of assessment in our legal system" and must therefore be established as a guiding legal principle underlying administrative action'.[133] Particularly regarding social benefits or entitlements a legislative or administrative action therefore violates Art 3 ECHR when it 'inherently involves a flagrant disregard for the individual as a person that seriously impairs human dignity'.[134]

The VfGH's main possibility for intervention regarding social policy provisions therefore occurs when a system for social benefits or entitlements is created by the legislator, in which case the court can rule on the constitutionality of its provisions. But even in cases in which the court finds infringements on the above-mentioned social dimensions of certain fundamental rights, it generally awards the legislator certain freedoms for corrections or expansions:

> When expanding social benefits, the legislator must be granted a reasonable period of time; the fear of an influx of derivative claims should not paralyze the first improvement, which necessarily must start somewhere. Therefore, the violation of equality due to narrowly defined benefits is only to be established when it has been shown that such benefits were not the beginning of an improvement, but simply a privilege. The VfGH also asserts that once granted, social benefits must only be expanded gradually.[135]

Aside from these standards, the VfGH's jurisprudence has also defined another central principle regarding the social dimensions of existing constitutional provisions: The prohibition of regression. Once the state has created a social benefits system it may not cancel it suddenly and without substitution, since 'such a measure, subject to control by the VfGH, would result in treating vulnerable individuals the same as those who do not require such special protection' –

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[132] Schulze (n 6) 189.

[133] Kaspar (n 128) 147. See also VfSlg. 13.635/1993

[134] VfSlg 19.856/2014

As Kaspar points out, both within the ECtHR case law as well as within VfGH and VwGH jurisprudence 'indications can be found regarding the assumption of a positive state duty to ensure dignified living conditions'. At least since the VfGH's ruling on the exclusion of subsidiary protection beneficiaries from minimum social security (VfSlg 20.177/2017) 't can no longer be disputed that Article 3 of the ECHR obligates authorities – provided that the legislator has established a social security system – to grant social assistance benefits in a manner that ensures the essential basic needs for a dignified life are covered'. It must also be mentioned that the VfGH also ruled that a basic care provision that is significantly lower that minimum security benefits covers the minimum standards set out by Art 3 ECHR. See Kaspar (n 128) 148.

[135] Pöschl (131) 729.

Regarding the gradual expansion of social benefits see also: VfSlg 2957/1956, 8419/1978, and 16.485/2002 regarding the state compensations for prisoners of war.

therefore while no direct entitlements can be derived from the constitutional equality principle, 'this is mitigated by the fact that even a partial reduction of the diverse social benefits actually granted by the state is subject to equality scrutiny'.[136]

Furthermore, the already mentioned freedom of property pursuant to Art 5 StGG and Art 1 Protocol No. 1 to the ECHR has also developed a certain importance regarding the social dimensions of fundamental rights through contemporary VfGH jurisdiction. While the court for a long time assessed that the concept of property does no encompass social claims, this assessment has changed through an ECtHR ruling on emergency assistance benefits financed through unemployment insurance and partly through state subsidies in Austria.[137] Based on this connection, the 'ECtHR classified this entitlement as property' and 'the Constitutional Court adopted this classification'.[138]

> It is important to note that limitations on such social legal positions that can be qualified as property are subject to the principle of proportionality. Such restrictions must thus serve a public interest and be suitable, necessary, and appropriate for achieving that interest.[139]

[136] ibid 731.
This however does not mean, that the legislator cannot react to changing economic circumstances that would impact the financial basis of the social benefits system. The equality principle does therefore not prevent the adjustment of social security systems, 'however, any cost-cutting measures must be balanced and must not disproportionately affect the needy'. See ibid.
[137] ECtHR 16.9.1996, Nr. 39/1995/545/631
[138] Öhlinger, Stelzer (n 12) 517.
See also VfSlg 15.129/1997
[139] ibid 517-518.
See also VfSlg 13.963/1994 regarding the creation of company pension funds and subsequent limitations on the freedom to property.

4. Proposals for the expansion of social constitutional guarantees since 1945

As was already mentioned above, the debates regarding the creation of comprehensive catalogue of fundamental rights and particularly the introduction of social rights into the Austrian constitutional system go back to the negotiations about the constitution itself.[140] As early as in March 1919 State Chancellor Karl Renner defined 'the revision of the catalogue of fundamental rights and freedoms of citizens' as one of the main challenges of the early republic, only thereafter the final constitution should be negotiated.[141] During the work of the Constituent National Assembly (1919-1920), the influence of the fundamental rights defined by the German Weimar Constitution grew and was reviewed by most constitutional drafts of the political parties and institutions.[142] Social guarantees were a central focus in these proposals but in the end no consensus among the parties represented in the assembly could be reached and the B-VG was adopted without a newly defined catalogue of fundamental rights and particularly without social guarantees. The debate on possible additions to fill this constitutional gap has been continuing between politicians, scholars, and civil society groups ever since. Even though these discussions were overshadowed by domestic and international crises during the First Republic, they gained new support after World War II:

> Already after the regaining of sovereignty and the consolidation of the Second Republic in 1955, it was recognized that the catalogue of fundamental rights was in need of reform due to its age, its relatively strong orientation towards liberal ideals, the absence of social fundamental rights, and, from a legal-technical perspective, the fragmentation of legal sources. The pressure for reform was further heightened by international legal developments.[143]

[140] Debates regarding social rights go as far back as to the Kremsier Reichstag of 1848. During the discussions on the draft constitutions and the fundamental and civil rights therein, a clause regarding the commitment of the state to promote the material welfare of its citizens was already discussed. Österreichisches Parlament, *Transkript von Günther Schefbach, „Sozusagen in letzter Stunde …": Die Entstehung der österreichischen Bundesverfassung* (Wien 2000) 10.
[141] ibid 17.
[142] Only the christian-social draft did not include a comprehensive catalogue of fundamental rights. Nonetheless, the compromise proposal drafted by the social democrat Karl Renner and his successor as chancellor Michael Mayr was the 'the most extensively negotiated concrete draft, especially in the fundamental rights section'. ibid 23.
[143] Schäffer, 'Die Entwicklung der Grundrechte' (n 24) 44.

During the 1960s, this debate about a reform of the Austrian fundamental rights catalogue gained more traction: On the one hand, it manifested in discussions among scholars and in scientific publications.[144] On the other hand, Chancellor Josef Klaus assembled an expert panel, the Fundamental Rights Reform Commission (*Grundrechtsreformkommission*), including representatives of the political parties as well as experts from legal professions and science.
This commission has, during 87 work sessions between January 1965 and March 1974, 'discussed the current issues of fundamental rights and freedoms, including the European and global human rights developments'.[145] It took until 1983 to distil their results into concrete, but still often contradicting proposals that were presented to the Constitutional Service in the Federal Chancellery but never published. Only two proposals for concrete constitutionally guaranteed rights were publicly discussed but never realized – guarantees in the field of social insurance and regarding a new right to work.[146]
After the end of the chancellorship of Bruno Kreisky, his successor Fred Sinowatz announced the convocation of a political commission regarding the reform of fundamental and freedom rights. This commission began its work in 1985 and laid great emphasis on the initiation of public debate. Regardless of this goal, 'there was only a discussion of drafts within the framework of (limited to a small group of participants) partial "enquetes"'.[147] The results of the work of this commission were published in brochures by the Federal Chancellery until 1992, but did hardly have any further impact neither on relevant legislation nor on public debates:[148] Just the proposal regarding the protection of personal liberties resulted in legislation that in essence created a constitutional law implementing similar provisions from the ECHR.[149] Debates regarding the creation of social rights remained ineffective, 'partly due to persistent doubts about their legal feasibility, but above all due to the lack of a suitable economic basis'.[150]

4.1. Debates during the 'Österreich Konvent'

[144] Rudolf Thienel, 'Soziale Grundrechte in Österreich? Zur Durchsetzung sozialer Garantien in Verfassungsrang' in Österreichische Juristenkommission, *Aktuelle Fragen des Grundrechtsschutzes* (Wien, Graz 2005) 120.
[145] Schäffer, 'Die Entwicklung der Grundrechte' (n 24) 45.
[146] Thienel (n 144) 120.
It should be mentioned that the negotiations of the Fundamental Rights Reform Commission as well as the following redactional work coincided with Austria's ratifications of the ICESCR and the ESC, which both did not have the political support to be implemented as constitutional law. Such majorities regarding a comprehensive addition to the fundamental rights protections seemed highly unlikely given these political circumstances.
[147] Schäffer, 'Die Entwicklung der Grundrechte' (n 24) 45.
[148] These brochures addressed the ‚Protection of personal freedom' (1986), the 'Right on a fair trial' (1986), the 'Right to social security' (1987), 'Economic and social rights, right to work' (1990), and the 'Right to respect for private life' (1992).
[149] BGBl 684/1988
[150] Schäffer, Klaushofer (n 101) 45.

A new push for the expansion of fundamental rights in the Austrian constitutional system came in 2003: Inspired by the European Convention (2001-2003), which worked on the ultimately unsuccessful task of drafting a constitutional treaty for the European Union, the Austrian government created the so called *Österreich Konvent*.[151] From 2003 onwards this political forum brought together representatives of political parties, regional authorities, institutions, and interest groups for debates with external experts and representatives of the civil society. The final report of its plenary was submitted to the Austrian parliament in 2005 and discussed there in a special committee of the National Assembly. The *Österreich Konvent* is widely seen to be without substantive legal consequence, since the political parties could not agree on far-reaching constitutional reforms – nonetheless, as Schäffer points out, 'the preliminary work in ten committees and several plenary sessions produced rich material'.[152]

This analysis is particularly true for the debates in committee IV ('Fundamental rights'). In this committee a 'fundamental political compromise in favour of including social guarantees in a new constitution was becoming evident' in the beginning.[153] Despite its optimistic start and the public perception of broad space for a political compromise in this area, the chances for consensus in the field of social guarantees diminished as the debates progressed into more detail. Even though no comprehensive solution was agreed upon, separate compromises were achieved regarding the formulations of specific rights. Some of these social provisions also found their way in the unsuccessful attempt of the convent's president Franz Fiedler, to combine all provisions capable of consensus, into his draft of a new constitution.[154]

After the dissolution of the *Österreich Konvent* in January 2005, the National Council established the ‚*Besonderer Ausschusses zur Vorberatung des Berichtes des Österreich-Konvents*'. In ten meetings between May 2005 and July 2006 this committee debated the

[151] The *Österreich Konvent* had no direct legal legitimation or electoral mandate. Its creation was based on a political agreement among the major Austrian parties. After its start the legislator established a law regarding its financial and administrative support (BGBl I 2003/39).

[152] Schäffer, 'Die Entwicklung der Grundrechte' (n 24) 46

[153] Thienel (n 144) 122.

[154] The second chapter of Fiedler's draft constitution laid out a comprehensive catalogue of fundamental rights including social rights which were influenced not only by the convent's negotiations but particularly by the social rights within the CFR. These rights included the right to education (Art 60), the right to protection of health (Art 61), the right to services of general interest (Art 62), the right to social security (Art 63), the right to housing (Art 64), the right to secure, healthy, dignified, just and reasonable working conditions (Art 65), the right to free job placement (Art 66), the right to reconciliation of family and working life (Art 67), and the right to public infrastructure (Art 68). See Österreich Konvent, *Bericht des Österreich-Konvents, Band 3, Teil 4B* (Wien 2006).
The recourse to the fundamental rights provisions of the CFR in this draft constitution as well as in other debates surrounding the *Österreich Konvent* must naturally be seen in the light of contemporary developments in European politics: The CFR was at that time part of the Treaty establishing a Constitution for Europe which was signed in 2004 but never went inti force because of failed public referendums in France and the Netherlands. Since the convent took place during the ratification process of this treaty, the idea of basing a new Austrian fundamental rights catalogue on the CFR-provisions widely expected to become European primary law was seen by many proponents as step towards the harmonization of Austrian constitutional law with European law.

convent's final report and the political parties' proposals for constitutional reforms. The subsequent produced and published synopses are part of the committee's final report, through which 'the stance of all parliamentary factions (…) is excellently documented'.[155] Regarding social rights as well as cultural rights the vast differences of opinion between the parties made any further progress towards constitutional reforms unsuccessful. Nonetheless, the documentations of the *Österreich Konvent* and the subsequent work of the legislator remain to this day important additions to the debates around the expansion of fundamental rights protections in Austria.

A closer analysis of the convent's proposals and the committee's negotiations regarding the implementation of social rights therefore gives an important overview regarding the state and the core themes of this discussion during the 2000s. Bernd-Christian Funk, the chairperson of the convent's committee IV, stated in its report that a new catalogue of fundamental rights 'cannot be limited to "classical" human rights and fundamental freedoms' but must provide answers to questions arising in the context of the highly complex tasks of a welfare state'.[156] In its 16th session in April 2004 the committee the committee debated the 'general principles of a catalogue of social rights', this discussion was continued in its 18th session in May 2004.[157]

The final report of the committee listed six field of fundamental rights, including social rights.[158] The opinions of the legal experts and the political representatives within the committee, as documented in its report, give important insights into the considerations and positions of the different stakeholders regarding the challenges and possibilities of social rights within the Austrian constitutional system:

On the side of the proponents of comprehensive social rights guarantees, Cerny, who was already a member of the Fundamental Rights Reform Commission of the 1960s, argued for 'short, concise, understandable, and enforceable provisions with a direct entitlement to enforcement in courts, not just legislative mandates to the state'. The fundamental rights catalogue could additionally include programmatic clauses or principles which could serve as additional interpretive and normative guidelines. Furthermore, Cerny argued for the expansion of legal protection methods, e.g. through collective complaints or 'claims for state liability as

[155] Schäffer, Klaushofer (n 101) 46.

[156] Österreich Konvent, Bericht des Ausschusses 4, Grundrechtskatalog (2006) 5.

[157] With Dr. Josef Cerny, Dr. Michael Holoubek, Dr. Franz Marhold, Dr. Walter Schrammel und Dr. Gottfried Winkler a number of Austria's most prominent fundamental rights scholars were present as experts during the 16. session according to the report of the committee. In its 18. session a position paper by Dr. Funk was debated. Despite these discussions, the committee's report stated in its introduction that the question of 'Social fundamental rights and other forms of performance-based guarantees' could 'not be discussed in the necessary breadth and depth and therefore remain completely or largely unresolved'. See ibid 11-14.

[158] The other areas proposed by the commitee were fundamental guarantees, equality rights, freedom rights, political rights, and procedural rights. A seventh section included general considerations.

per the case law of the ECJ', since individual complaints may not apply to all social rights under consideration – all of these legal pathways should remain within the jurisdiction of the VfGH. He also stated that the creation of social rights 'does not constitute an endorsement of a particular economic or social system', a clear suggestion of compromise towards the conservative opponents.[159]

He was supported by Holoubek who additionally proposed a 'seamless transitions between social and liberal fundamental rights'. The reform of the fundamental rights system should therefore begin with the creation of a narrow set of individual social rights.[160]

On the side of the opponents of comprehensive social rights, Marhold raised the concern, that fundamental rights have to be subjective, individually, or collectively enforceable provisions. Therefore, the creation of social fundamental rights 'could narrow down the scope for social policy at the constitutional level and shift simply legislative social policy matters to the constitutional level'. The credibility of the constitution could be questioned if fiscal problems stood in the way of constitutionally guaranteed rights, social rights could in such cases 'lead to a material distribution conflict at the constitutional level'. Additionally, Marhold argued for an integration of the Austrian fundamental rights reform process into the European developments, thus preferring non-subjective state target provisions in addition the provisions of the CFR.[161]

Winkler supported Marhold's warnings regarding the elevation of social laws to constitutional rank through individual applicability. Social rights were not equipped to securing the status quo or codifying specific social policies, therefore they 'should not be formulated as subjectively enforceable rights, but rather as obligations of the state or as mandates for the ordinary legislator, or as constitutional goals'. He therefore proposed several social policy objectives, among these were the protection of individuals from social crises, material support in emergencies, the protection of individual work through humane working conditions including working time protections. The VfGH should 'should exercise control over the compliance with the design mandates.'[162]

The positions of these four experts provides a valuable summary of the different positions regarding social fundamental rights in the Austrian discourse and can also be seen as exemplary

[159] ibid 49.
[160] ibid 50.
Holoubek argued for precise and short formulations, stating that the CFR e.g., does not create a broad right to work but a narrow 'right of access to a free placement service' (Art 29 CFR). This would, in his opinion, 'allow for the elimination of prejudices often raised against the establishment of social fundamental rights, especially regarding enforceability (an appropriate design would be possible) and cost consequences (this does not distinguish social fundamental rights from other fundamental rights)'.
[161] ibid.
[162] ibid.

for other negotiations about fundamental rights reforms: Their proponents support individually enforceable, subjectively rights, including general clauses, as well as the possibility for collective complaints. They additionally evoke arguments about the contemporary significance of these 'modern rights' and the shortcomings of Austrian fundamental rights protections in an international context.

Opponents of such rights argue for state objectives or constitutional principles. Subjective rights, so their common narrative, would both limit the scope of political decisions and create unrealistic, because hardly enforceable constitutional provisions. Their central argument in this regard seems to be the question of the necessary financial resources to fulfil such constitutional guarantees. It should be added nonetheless, that opponents and proponents in this case agree on the role of the VfGH as the central judicial authority to settle claims over possible social rights or provisions.

The discursive gap that can be seen between the legal experts was also present among the political representatives within the committee, which's negotiations were 'marked by opposing views'. While some members 'advocated for constitutionally secured claims with directly derivable subjective rights', the other group 'argued that social rights should be enshrined in the form of legislative mandates to the ordinary legislator'.[163] Given this divide, the committee was able to create consensus on ten 'General Considerations and Proposals for their Inclusion in a New Catalogue of Fundamental Rights'. These included: The general commitment to social welfare guarantees in the Austrian constitution (1). Such rights should primarily be created as 'individually enforceable guarantees' even though no consensus has been reached regarding 'concrete proposals for a combination of social welfare objectives and tasks with individual rights' (2). Given the different opinions of the legal experts, the consensus was that none of them rejected the creation of social rights all together, but all of them referred to the CFR as an important point of reference for both opposing sides of the debate (3). Any developments behind the provisions of the CFR should be avoided (6). Social and welfare constitutional guarantees 'should be introduced in a differentiated and combined form', possible ways are 'constitutional objectives, legislative mandates, institutional guarantees, and individual and collective rights guarantees' (7). Short and precise formulations of any new social rights are preferrable in accordance with Holoubek's suggestions (8). The legal enforcement framework for any new guarantees should be 'as diverse as the incorporation of such guarantees itself' (9).[164]

[163] ibid 52.
[164] ibid 53-54.

Given these considerations, the committee published proposals regarding 8 social fundamental rights in synopsis form – a general consensus on their formulation was not reached: The right to education, the right to protection of health and the environment, the right to social security, the right to consumer protection, the right to housing, the right to work, the right to a balance of work and private life and the right to protection of marriage and family, and the right to access to services of general interest.
Even though the committee reached minimal consensus on certain proposals, the central political divide regarding social fundamental rights could not be solved:

> The central disagreement in the deliberations revolved around whether social guarantees: A. should be guaranteed only in a mediated form through legislation from the outset, or B. should be directly enforceable subjective rights guaranteed by the constitution, which could also be applicable without the intervention of a law.[165]

This divide can also be seen during the final debate on the committee's report in the National Council's plenary session in September 2006. While the committee's rapporteur, Ulrike Baumgartner-Gabitzer (*ÖVP*), stated that the implementation of catalogue of fundamental rights, 'which also includes social fundamental rights and is oriented on international standards', was one of three main objectives of the conservative *ÖVP* during the *Österreich Konvent*, the party's main focus was to 'emphasize the personal responsibility of the rights holders, meaning no state paternalism and no control'.[166] Her colleague, Reinhold Lopatka (*ÖVP*), introduced another central discourse point of the opponents of subjective social rights. He stated that individuals 'wouldn't benefit from it (…) the state promises something and enshrines it in a constitution, because it cannot fulfil it', even arguing that the most progressive example for social rights within the constitution was the German DDR, where 'all these social fundamental rights were enshrined in the constitution there (…) we know the outcome of such a system'.[167]
On the side of the opposition parties, Peter Wittmann (*SPÖ*), proclaimed a statement that would often be repeated in the debates of the following years, pointing out that even though the

[165] Thienel (n 144) 122.
[166] Stenographisches Protokoll des Nationalrats, 163. Sitzung, XXII. GP (21.9.2006), 36-37.
Baumgartner-Gabitzer also introduced a resolution, urging the next government to be formed after the election a few weeks later, to continue the work of the Österreich Konvent and, among other objectives, to realize a comprehensive and contemporary fundamental rights catalogue including social fundamental rights 'after the example of the European Charter of Fundamental Rights'. This focus on the CFR was later in the debate repeated by Secretary of State Frank Morak (ÖVP).
[167] ibid 56.

convent did not create immediate results, it laid the groundwork for future reforms, because 'it was important to know what everyone wants'.[168] He was supported by Eva Glawischnig (*Grüne*) who contradicted any suggestions of near-compromises regarding fundamental rights: 'Here, contrary to previous statements, opinions have diverged significantly regarding the actual modernization of fundamental rights, a modern catalogue of fundamental rights, and especially their enforcement.'[169]

The political side of the debate was emphasized by Herbert Scheibner (*Freiheitliche – BZÖ*) who criticized social democrats for stopping any reforms regarding fundamental rights, to prevent a success for the government, stating that 'we would have had a comprehensive package, which would have meant that we could have also developed a catalogue of fundamental rights here, instead of relying on our fundamental rights being based on a law from 1867'.[170]

A central theme in all statements by both proponents and opponents as subjectively enforceable social rights remained the question of their legal enforceability. Even though it is obvious that political considerations and interests stood in the way of meaningful fundamental rights reforms on the basis of the *Österreich Konvent*'s work, this question remains of central importance for any further debates on the creation of social constitutionally guaranteed rights. Chapter 5 will therefore address the different legislative models and designs of such social rights.

4.2. From the 'Staatsreformkommission' to the 'Armutskonferenz'

The 2006 National Council elections were the formal end of the discussions about the results of the *Österreich Konvent*. After tense negotiations, the new grand coalition of *SPÖ* and *ÖVP* was sworn in and assembled a seven-person expert panel, the State Reform Commission, that was tasked in 2007 with preparing negotiations on a 'state reform' that was a central piece of the coalition program. Due to political differences hardly any of the three 'packages' of discussion led to considerable reforms.[171]

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[168] ibid 40

It must nonetheless be stated that SPÖ-representatives in this final debate regarding the *Österreich Konvent* hardly ever mentioned the question of fundamental rights. Their focus during the discussion, most likely due to the near election, lay on questions like the creation of a federal prosecutor, party finances, and the reduction of the voting age to 16.

[169] ibid 48.

[170] ibid 46.

[171] The proposed federalism reform could not be realized due to a lack of consensus between the different institutions and stakeholders. The proposed legislative changes regarding constitutional consolidation and reform of the control institutions only led to minor reforms (BGBl I 2008/2), but as Schäffer points out, through 'the

The package 'fundamental rights reform' again led to an optimistic start, but it was clear that fundamental differences between the political parties continued. Regarding the protection of social rights, the State Reform Commission introduced the idea of guarantee-lawsuits before the VfGH to enforce social claims against an inactive legislator. Nonetheless the dominant disputes between *SPÖ* and *ÖVP* remained on the ideological level: The safeguarding of the *Fristenlösung* regarding the impunity of abortions through a fundamental rights catalogue, the status and rights of national minorities, the expansion of the equality clause, and possible reserve clauses to some or all fundamental rights remained obstacles that could not be solved during the short duration of the government.

After the 2008 election the debate on fundamental rights and particularly social rights moved to the background of the public and political debate. Its first reoccurrence was in the government program of the new *ÖVP-Grüne* coalition in 2020, where both parties agreed to 'resume the all-party-negotiations for the development of a comprehensive Austrian fundamental rights catalogue and examination of a possible extension of the fundamental rights protection'.[172] After the beginning of the Covid-19-pandemic the NGOs *Armutskonferenz* and *Amnesty International Österreich* used this announcement to propose a constitutional law for social security ('*Bundesverfassungsgesetz soziale Sicherheit'*) including among others the right to healthcare, the right to housing, the right to minimum subsistence, and provisions regarding the right to social security and existential minimum security.[173]

This proposal also laid the groundwork for a new initiative by the *Volksanwaltschaft*, the organisation defined as the national human rights institution in Austria according to the UN Paris Principles, which in 2022 organised a conference with NGOs and experts regarding social fundamental rights. In its published protocol, Bernhard Achitz, one of the three Ombudspersons of the *Volksanwaltschaft*, laid out the objective of this NGO forum as a contribution to the goal defined in the government program. The *Volksanwaltschaft* directly attached the renewal of the debate on social rights to the pandemic, stating that 'COVID-19 pandemic once again mercilessly highlighted the weaknesses of the welfare state and arguing that the 'VfGH should control social cuts'.[174] The report furthermore makes direct attempts to counter arguments which stood in the way of earlier reforms, particularly during the 2000s:

introduction of comprehensive administrative jurisdiction, it triggered perhaps the most significant transformation of public law protection' (BGBl I 2012/51). Schäffer, 'Die Entwicklung der Grundrechte' (n 24) 47

[172] Bundeskanzleramt Österreich (n 3) 14.

[173] Armutskonferenz, *Soziale Menschenrechte in die Verfassung* (n 2).

[174] Volksanwaltschaft (n 4) 17-20.

> While it may be challenging to make social rights individually enforceable, their inclusion in the constitution is meaningful. This wouldn't set specific benefits, let alone their amounts, in stone. Once the right to retirement security is constitutionally established, it doesn't exempt us from discussing when and to what extent this security should be provided.[175]

As a scientific expert, Walter Pfeil (Universität Salzburg) also addressed arguments on the legal enforceability of social rights and the distinction between subjective rights and state target provisions. He proposed that 'there could be various levels of transition between mere programmatic statements and directly enforceable subjective-public rights in the realm of social rights protection' and subjective rights could 'be guaranteed in those areas that belong to individuals based on the level of program implementation at any given time'.[176]

The *Volksanwaltschaft's* NGO forum used six working groups to propose concrete measures regarding poverty prevention, health, social security, housing, basic needs provisions, and education. Its published results were submitted to the National Council and in 2023 debated both in its respective committee and its plenary session. In its final debate in April 2023 Bettina Rausch (*ÖVP*) acknowledged the need for social rights but rejected their implementation of subjective fundamental rights. She stated that the Austrian constitutional system is focused on 'fundamental rights of the first generation', meaning civil and political rights, while second-generation rights, meaning inter alia social rights, 'are simply not normative enough to be justiciable in the constitution' and asked regarding the proposal of a right to work: 'What is the standard of assessment? (…) Can I sue someone if I haven't found a job after two years or five months?' Her political party would therefore focus on a 'catalogue of state objectives.[177]

Johannes Margreiter (*NEOS*) saw the pressing problems of social security in Austria as situated in federalism as well as a lack of innovation on the federal level. It would therefore 'not really benefit us to (…) say that we have to constitutionally anchor social rights in a feat of legislative effort'. He also raised the question of 'who is the recipient or debtor of these social rights',

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[175] ibid 19.

[176] ibid 32.

Pfeil in his analysis referred to the program laid out by the European Union in 2021 regarding the implementation of the first three goals of the 20 principles European Pillar of Social Rights (EPSR). This action plan urged the member states to implement national measures and legislation for reforms of the European labour markets and social systems – Pfeil's suggestion, even though it is not echoed in the later work of the *Volksanwaltschaft*, was therefore to use these reforms for a step-by-step creation of social rights through subjective rights, state targets, and simple-law provisions.

[177] Österreichisches Parlament, Stenographisches Protokoll des Nationalrats, 209. Sitzung, XXVII. GP (21.9.2006).

stating that ‘private individuals can never be the recipients, it must always be the public authorities’.[178]

Support for the proposals of the *Volksanwaltschaft* came from representatives of the *FPÖ*, the *Grüne*, and the *SPÖ*. Mario Lindner (*SPÖ*) tied social fundamental rights to the Covid-19-pandemic and stated that ‘having fundamental rights and human rights enshrined in the constitutional hierarchy would have facilitated many discussions and provided more security for many people’.[179]

This most recent parliamentary debate on the creation of social fundamental rights in Austria ended with the unanimous approval of all parties to accept the results of the *Volksanwaltschaft's* report. Further parliamentary steps, like a parliamentary conference as suggested by the *Volksanwaltschaft*, are neither planed nor is a political majority therefore likely. But this debate can nonetheless be an important example for the resurgence of a political movement in the question of social rights improvements after the pandemic.

Given these circumstances, the Austrian League for Human Rights stated in its Human Rights Report 2022: ‘It is important to seize the momentum to strengthen and make the welfare state more inclusive.’[180]

[178] ibid.
[179] ibid.
[180] Österreichische Liga für Menschenrechte, *Befund 2022* (Wien 2023) 35. Interestingly in this report, Heinrich Neisser, the former Second President of the National Council of the *ÖVP*, presented a strong endorsement of social fundamental rights, stating that ‘the incorporation of social rights into the Austrian Federal Constitution is a pressing need’ and ‘continued inaction would cast doubt on Austria's commitment to human rights policy’.

5. Legal models for constitutional social guarantees

The discussions and arguments presented in chapter 4 showcase the central political and legal disputes regarding the implementation and particularly the design of any social rights, provisions, or state objectives in the Austrian constitutional system. The question if and how such rights could at any point in the future be designed therefore becomes a 'constitutional political problem'.[181] Thus, the following analysis aims to provide an overview over possible models for constitutional social guarantees, their enforceability, and the theoretical and legal discussions surrounding them. These considerations lay the necessary groundwork for an in-depth analysis of any proposals regarding the social rights discussed in the research questions of this thesis.

The central problem regarding any social fundamental right, as was already touched upon, is their departure from the *status negativus* provisions at the core of civil and political rights. Social rights are inherently concerned with the 'safeguarding of benefits or standards and living conditions (*status positivus*) that are deemed fundamental and indispensable in today's perspective'.[182] It should nonetheless be mentioned at the beginning of this analysis that the strict difference between (negative) liberal, meaning civil and political, and (positive) social rights cannot be substantiated through a sharp legal distinction according to contemporary doctrines. As Thienel pointed out at the *Österreichische Juristenkommission*'s conference on fundamental rights as early as 2005, the 'contrasting distinction between liberal defensive rights and social entitlement rights, (…) has been significantly attenuated over the past twenty years'. According to him, it is 'common knowledge that traditional liberal fundamental rights exhibit various dimensions and, in addition to their defensive content, also convey claims for guarantees, protective duties, and establishment guarantees'.[183]

Nonetheless, the introduction of such rights would necessarily require the 'transformation of the legal protection system', since according to the 'constitutional principle of the rule of law, it must be ensured that subjective rights can be effectively enforced'.[184] It is important therefore to reiterate that fundamental rights within the Austrian constitutional system are, since the StGG 1867 but definitely since the B-VG 1920 and the introduction of judicial norm control through the VfGH, designed as constitutionally guaranteed, meaning directly applicable and 'enforceable rights through (constitutional) judicial protection, not just programmatic

[181] Öhlinger, Stelzer (n 12) 503.
[182] Schäffer, Klaushofer (n 101) 762.
[183] Thienel (n 144) 124.
[184] ibid 123.

demands'.[185] The creation of social guarantees through constitutional state objectives or similar methods would therefore not create a fundamental right in the nearer sense of the Austrian constitution. Given the inherent political nature of any debate about fundamental rights reforms and to provide a broad perspective, the term ‚social rights' will in the following analysis not be used in this narrow definition but as a description of any social constitutional guarantees.

5.1. Normative requirements of social fundamental rights

Subjective fundamental rights within the Austrian constitutional framework generally apply to all individuals within the state's jurisdiction. Any social rights to be created in the future would therefore necessarily not differentiate between Austrian citizens, citizens of EU member states and those of non-EU countries.

As was already mentioned, the StGG 1867 originally only created rights for citizens. The general equality clause, the right to freedom of employment, the freedom of association, and constitutional rights of minorities only applied to citizens as well. Regarding the freedom of association, the ECHR already expanded the area of protection to non-citizens.[186]

From 1995 onwards, Austrian equality provisions were further expanded through the prohibition of discrimination between non-Austrian citizens pursuant to the *BVG zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung*.[187] While the general equality principle pursuant to Art 7 B-VG and Art 2 StGG still only creates equality obligations between Austrian citizens, its applicability was further expanded regarding union law due to Austria's accession to the European Union. Furthermore, the CFR through its constitutional rank as part of the EU's primary law also prohibits against discrimination based on the nationality of individuals. Art 21 of the charter states, that 'within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'.[188]

[185] Schäffer, Klaushofer (n 101) 763.
[186] Öhlinger, Stelzer (n 12) 522.
[187] BGBl. 1973/390.
See also the VfGH's jurisprudence: VfSlg 14.393/1995 and VfSlg 14.448/1996.
[188] Art 21 CFR.

Fundamental rights generally also apply to legal entities; 'unless this is inherently contradictory in substance'.[189] This area of protection also encompasses local authorities, legal entities under public law, and associations.[190]

Besides subjective rights holder any justiciable fundamental right also requires both an addressee and the specific object, entitlement, or claim it regulates.[191] This opens questions about the legal interpretation of certain norms, the creation of third-party effects, and the scope of application of certain rights towards. The different possible designs of these requirements will be discussed in subchapter 5.2.

5.2. Normative Design of social fundamental rights

During the *Österreich Konvent*, committee IV was not able to find consensus regarding the design of social fundamental rights. This question therefore lies at the core of any debate on the future expansion of fundamental rights protections. The committee's report summarized the discussions regarding the different models of the 'interpretation of constitutional guarantees and their implementation with regard to different regulatory techniques in state-benefits-guarantees'.[192]

> Pattern One: Positive formulation of a constitutionally guaranteed subjective right in the form of a general clause ("Every person has the right to ...") in conjunction with an enumeration of specific guarantees that place an obligation on the state, often demonstratively formulated, elaborating on the general clause ("The state ensures this right [particularly by ...]")
>
> Pattern Two: Guaranteeing rights from the outset in the form of legislation ("It shall be ensured by law ...")[193]

While the second pattern would only create subjective rights through the combination of constitutional guarantees and simple-law provisions, the first pattern could be regulated in two ways: Either in the sense of the 'mediatization of claims through legal provisions' (not dissimilar to pattern two) including general clauses as basis for further legal interpretation, or

[189] Öhlinger, Stelzer (n 12) 522
[190] As an example, VfSlg 13.429/1993 can be mentioned. In this ruling, the VfGH acknowledged that the equality of all citizens (!) of the *Wirtschaftsuniversität Wien* had been infringed through a federal regulation, thus stating that the protection of subjective fundamental rights also applied to legal entities under public law.
[191] Schäffer, Klaushofer (n 101) 801.
[192] Österreich Konvent, Bericht des Österreich-Konvents, Band 1, Teil 3 (Wien 2006) 97.
[193] ibid.

meaning the creation of a directly applicable basis for subjective rights binding every level of the state and particularly also enforceable in horizontal, private relationships.[194]
Given this background the following analysis shall provide the necessary overview over the different models for the design of social fundamental rights and their legal enforceability.

5.2.1. State objective provisions

The implementation of social guarantees in the form of state objective provisions is one of the most common and most critiqued suggestions regarding fundamental rights reforms. Their opponent's central criticism of such objectives is grounded in their lack of enforceability. Their proponents on the other hand argue that state objectives, even though they do not create subjective claims for individuals, bind the legislator and the government while not restricting the political leeway of how such provisions are fulfilled.
State objective provisions can have various forms and formulations and often overlap with similar provisions like programmatic constitutional statements or competence provisions. Since the 1980s, Austria has implemented a number of such provisions in constitutional rank, and particularly over the last two decades the creation of new state objectives often led to intense political debates.[195] These current state objectives include the equality of men and women (Art 7 para 2 B-VG), protection of minorities (Art 8 para 2 B-VG), comprehensive national defence (Art 9a B-VG), the social partnership (Art 120a para 2 B-VG), education (Art 17 StGG and Art 2 Protocol No. 1 to the ECHR), sustainability (§ 1 *BVG Nachhaltigkeit*), or the perpetual neutrality (*BVG über die Neutralität Österreichs*).
State objectives are legally binding through their creation of obligations for state organs. They must be 'considered when enacting new laws and interpreting existing laws by courts and administrative authorities' but do not create subjective rights that can be individually

[194] ibid.
[195] During the *Österreich Konvent*, committee I ('State Tasks and State Objectives') debated the harmonisation and expansion of a comprehensive catalogue of state objective. While these discussions did not lead to the creation of new provisions, they laid the groundwork for a number of legislative proposals and new state targets in the following years. In 2013 these developments led to the summarization of some of these provisions through the *BVG über die Nachhaltigkeit, den Tierschutz, den umfassenden Umweltschutz, die Sicherstellung der Wasser- und Lebensmittelversorgung und die Forschung* (BGBl. I 111/2013).

enforced[196] – thus 'the state objective of environmental protection does not give rise to an individual fundamental right to a clean environment'.[197]

Their central legal effect is therefore their normative significance regarding the examination of the constitutionality of laws and regulations, the interpretation of laws, and in 'balancing and discretionary decisions, especially when it comes to justifying interferences with "classic" liberal fundamental rights'.[198] While state objectives therefore have a political effect on decisions of the legislator and the government, their normative effect as 'soft law' on the jurisprudence is of central importance.[199]

5.2.2. Fundamental rights subject to regulatory revision and legislative mandates

Constitutionally secured legislative mandates describe social guarantees in constitutional rank creating obligations for the legislator to enact these provisions through specific laws. Such mandates were one of the two main options discussed during the *Österreich Konvent* and are most commonly supported by the opponents of subjectively enforceable guarantees.

While such legislative mandates do not create individually enforceable claims, they are equipped to create protective obligations in horizontal relationships (e.g. relationships within the labour market), and obligations for the state to guarantee certain services as well as benefits.[200]

The simple-law enactment of such provisions can be subject to review regarding possible inadequate legislative implementation through courts of the second instance. These courts can challenge respective laws pursuant to Art 140 para 1 and Art 89 B-VG before the VfGH.[201]

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[196] As Thienel points out, one limited way of individual enforceability of state objectives regarding administrative decisions, can be located in complaints before the *Volksanwaltschaft* 'to support within existing legal frameworks the consideration of social state requirements'. See Thienel (n 144) 129.

[197] Österreichisches Parlament, Fachinfos-Fachdossiers: Welche Staatsziele gibt es in Österreich und was können sie bewirken? <https://www.parlament.gv.at/fachinfos/rlw/Welche-Staatsziele-gibt-es-in-Oesterreich-und-was-koennen-sie-bewirken> accessed 10 July 2023.
The VfGH therefore considers state objectives in its jurisprudence but has on many occasions, e.g., regarding the state objective regarding environmental protection, stated that this 'state objective does not imply an absolute priority of environmental protection interests over other decision criteria that the administration must consider'. See VfSlg. 20.185/2017.

[198] Thienel (n 144) 128.

[199] The political significance of state objectives can also be seen in the practice of reporting requirements on specific objectives. The creation of such provisions can include the obligation for regular reviews and reports, particularly to the legislator on the state or provincial level. Such practices are most commonly seen in objectives laid out by international treaties.

[200] Such state obligations are not individually enforceable based on the constitutional provisions. Individuals only have the right to enforce subjective claims regarding the simple-law enactment of the provision.

[201] Art 89 B-VG regulates that courts of justice shall file an application with the VfGH to repeal the legislation, should they 'have concerns regarding the application of an ordinance on the ground of its lack of a basis in law, regarding a proclamation of the republication of a law (treaty) on the ground of its lack of a basis in law, regarding a law on the ground of its being unconstitutional or regarding a treaty on the ground of its being unlawful'. Since

Should the simple-law enactment require implementation through administrative bodies, their decrees could after the exhaustion of the instance proceedings additionally be challenged pursuant to Art 144 para 1 B-VG. In both cases the VfGH has to evaluate the unconstitutionality of the simple-law provision as well as the possibility of the infringement of a constitutionally guaranteed right.[202] Similar procedures apply regarding government ordinances concretizing the simple-law enactments as well as individual complaints pursuant to Art 139 and Art 140 B-VG.

Additionally social fundamental rights can also be created through constitutional provisions subject to regulatory reservations. While both pathways would yield mostly similar legal effects and a functional balance exists between both approaches, certain distinctions should be considered. Even though subjective rights under regulatory reservations would create a factual equivalence to other constitutionally guaranteed rights, this would also have procedural implications compared to legislative mandates: In these cases, the VfGH could qualify violations of rights under regulatory reservation nonetheless as infringement of constitutionally guaranteed rights. Pursuant to Art 133 para 5 B-VG the VwGH is not competent in legal questions within the jurisdiction of the VfGH. The creation of constitutional social rights subject to regulatory reservation would therefore be interpreted as encompassing vast parts of social legislation and making the VfGH the only competent court to rule on the constitutionality of these laws and ordinances. This additional burden could, as Öhlinger and Stelzer point out, be limited 'by revising the jurisprudence of the VfGH regarding the varying implications of intervention and design reservations to the effect that the competence of the VwGH in cases involving design reservations would be recognized and the competence of the VfGH would be restricted to a "superficial" assessment'.[203]

A central legal problem regarding social guarantees of this design are cases in which the legislator simply fails to fully enact the constitutionally required simple-law provisions or ordinances. Both current jurisprudence and legal doctrine assume, that the judicial tool or 'constitutional gap filling' is not a viable solution for full legislative inaction to implement constitutional guarantees.[204]

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the inadequate simple-law enactment of constitutional provisions, or the lack therefore, would violate the respective provision, the reason concerns regarding the unconstitutionality of this law would be fulfilled.

[202] Thienel (n 144) 130.

[203] ibid 131-132.

Social guarantees of such a design would obligate the legislator to create subjective rights either via direct simple-law provisions which could be challenged through the regular judicial hierarchy taking into consideration the 'constitutional provisions as interpretation, balancing, and discretionary criteria applied when implementing ordinary laws'.

[204] The act of constitutional gap filling is, e.g., used by the VfGH to rule on derivative performance rights based on the general equality clause. See also the VfGH's rulings regarding housing support for conscripted soldiers

In cases of partial legislative inaction, the provisions constitutionality is subject to evaluation by the VfGH. The court can either be addressed pursuant to Art 144 para 1 B-VG if the provision is enforced through administrative bodies, or in cases regarding pecuniary claims against territorial authorities pursuant to Art 137 B-VG triggering an ex-officio examination by the court.

Additionally, one of the few relevant reforms since the *Österreich Konvent* was the amendment of Art 140 B-VG effective since 2015 giving individuals who are party to first-instance trials before an ordinary court the right to address the VfGH. The court therefore rules on the unconstitutionality of laws 'on application by a person who, as a party in a legal matter that has been decided by a court of justice of first instance, alleges infringement of his rights because of the application of an unconstitutional law, on the occasion of an appeal filed against that decision'.[205] This reform is based in discussions during the convent and the respective parliamentary committee and has effectively created a 'law complaint' within the Austrian judicial system. Its goal was to ensure 'that no one can be convicted or judged in a civil proceeding based on an unconstitutional law'.[206]

What this reform however did not achieve was the possibility of a 'judgement complaint' against last-instance judgements. The central argument in debates regarding the creation of such a legal instrument is the creation of a superior authority of the VfGH over the VwGH and OGH.[207] As Reiter points out, the competences regarding fundamental rights between Austria's highest courts, 'especially the relationship between the OGH and the VfGH, have always been fragmented and controversial'.[208] While the reform of Art 140 B-VG in 2013 did not formally

(VfSlg. 12.839/1991), or unjust denial of parental leave payments (VfSlg. 13.486/1993). It allows the court to intervene in cases in which the simple-law provision is incomplete regarding the fulfilment of the constitutional obligation and it is recognizable that the legislation is not intended to be a conclusive regulation. The court can therefore derive solutions from similar provisions to fill the constitutional gap. Are the simple-law provisions however either designed as a conclusive regulation or no provision is implemented at all, this solution is not a viable way. See Thienel (n 144) 132.

[205] Art 140 para 1 d. B-VG, BGBl. I 114/2013.

[206] Österreichisches Parlament, *Parlamentskorrespondenz Nr. 527 vom 13.06.2013: Gesetzesbeschwerde passiert Nationalrat einstimmig* <https://www.parlament.gv.at/aktuelles/pk/jahr_2013/pk0527> accessed 11 July 2023.

[207] The question of ‚judgement complaints' was already intensely discussed during the *Österreich Konvent*. The Association of Austrian judges stated in its resolution to the convent that 'it will be difficult to explain why (…) while the appeal to the Supreme Court (OGH) is excluded (due to cost reasons and expediency), the option of a 'constitutional complaint' to the Constitutional Court (VfGH) should still be available'. Österreich Konvent, Beschluss der Sektion Höchstgerichte der Vereinigung der österreichischen Richter Verhältnis VfGH – VwGH – OGH <http://www.konvent.gv.at/K/DE/AVORL-K/AVORL-K_00800/fnameorig_064134.html> accessed 11 July 2023.

During the parliamentary debate on the creation of 'law complaint' provisions in 2015, Wolfgang Gerstl (ÖVP), pointed out as well that 'the possibility of a so-called judgment appeal and thus the superior authority of the Constitutional Court over the Supreme Court could be ruled out'. Österreichisches Parlament, Fachinfos-Fachdossiers: Welche Staatsziele gibt es in Österreich und was können sie bewirken? <https://www.parlament.gv.at/fachinfos/rlw/Welche-Staatsziele-gibt-es-in-Oesterreich-und-was-koennen-sie-bewirken> accessed 10 July 2023.

[208] Reiter (n 80) 9.

change their relationship, the introduction of judgement complaints would establish the factual superiority of the VfGH. In 2013 the legislator did therefore not establish 'a centralized constitutional judicial review authority, responsible for the final (domestic) examination of the constitutionality and especially the compatibility with fundamental rights of individual administrative decisions'.[209] Such a step would effectively transform the VfGH into a 'fourth instance of jurisdiction' which could also lead to problems regarding the right to a fair trial as defined in Art 6 ECHR.[210] Nonetheless, the call for an expansion of the VfGH's responsibilities and the creation of judgement complaints against second-instance judgements has accompanied the debates regarding social constitutional guarantees and particularly about legislative mandates. One of the proponents of such measures therefore stated that the 'absence of a judgement complaint against final decisions of the ordinary courts or administrative courts in Austria is a true anomaly and leads to significant deficiencies in legal protection that are simply no longer tolerable in a modern rule-of-law state'.[211]

A further problem occurs nonetheless in cases of not just partial but absolute legislative inaction regarding the simple-law implementation of constitutional provisions (see also subchapter 2.3). The VfGH's competences regarding negative legislation would hardly be an adequate tool to address such situations.[212] Regarding any social constitutional guarantees the question must therefore be asked how the VfGH's competences to intervene in cases of absolute legislative inaction could be designed.

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[209] ibid.
The complicated relationship between VfGH and OGH regarding fundamental rights can also be seen within the B-VG. While 'the jurisdiction of the Constitutional Court (VfGH) to review individual acts, including violations of constitutionally guaranteed rights within the scope of public jurisdiction, is directly stipulated (Art 144 B-VG)' it is notable that such provisions are absent regarding the ordinary jurisdiction. The competences of ordinary courts and particularly the OGH 'to safeguard fundamental rights when applying (and interpreting) substantive provisions in individual cases within civil and criminal law contexts' can only be determined through was of contraposition regarding the exhaustively enumerated responsibilities of the VfGH (Art 137 B-VG ff.). See ibid 10.

[210] Thienel (n 144) 134.
The VfGH has already acknowledged such problems regarding the distribution of competences between the courts and the provisions of Art 6 ECHR. See Reiter (n 80) 5.

[211] Peter Hilpold, ‚Der Verfassungsgerichtshof und die Trägheit des Überlieferten' in Der Standard <https://www.derstandard.at/story/2000114167332/der-verfassungsgerichtshof-und-die-traegheit-des-ueberlieferten> accessed 12 August 2023.

[212] The centrale requirement for actions by the VfGH is the existence of legal provisions, laws or ordinances. Regarding legislative mandates or subjective rights under regulatory reservations there only exists partial legal protection: While the VfGH could expand the scope of certain entitlements through revoking unconstitutional restriction on them or revoking the abolition of such claims, thus restoring the earlier provision, it cannot provide adequate protection, if it 'is not possible to reach a constitutional legal situation through such a – partial – revocation'. The current competences of the VfGH do therefore not provide sufficient relief for possible complainants since 'in the case of unconstitutional inaction by the legislator, the unconstitutionality lies in the absence of a statutory regulation; this deficiency cannot be remedied by repealing an inadequate law'. Additionally, a partial revocation could even hurt possible complainants due to the elimination of 'the legal basis for a - albeit insufficient but still existing – entitlement'. See Thienel (n 144) 135.

Any suggestions to expand the VfGH's competences to include positive legislation has been rejected by both jurisprudence and legal doctrine: Acts of replacement regulations implemented by the VfGH would not only vastly exceed the court's resources but also violate the democratic principle and the separation of power laid out in the constitution. The basis for a possible reform can therefore only be to expand the VfGH's power regarding the ascertainment of possible unconstitutional inactivities by the legislator.[213]

Such declarations of unconstitutional inactivity might primarily create political pressure on the legislator.[214] To provide adequate legal protection for complainants additional measures, like the possibility for claims for damages through constitutional legislative inaction might be necessary.[215] The factual creation of state liability and subsequent claims for damages through the violation of constitutional guarantees due to legislative inaction has already been discussed during the *Österreich Konvent*. A proposal regarding state liability drafted by representatives of the social partnership was reflected in the draft constitution published by the convent's president.[216] This differentiated proposal would naturally not only apply in cases of infringements of social constitutional rights but to all cases of unconstitutional legislative inaction.

Regarding any future discussion of this specific proposal, Thienel correctly points out that it would not only protect the state against most claims for damages, but also could 'provoke mass complaints before the VfGH'.[217] Furthermore the question about the height of the amount of all

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[213] As Thienel points out, such a competence 'would not structurally differ from the authority to repeal a law and is therefore consistent with the role of the VfGH'. See ibid 136.
It must also be added that in cases of inactivity regarding government ordinance, violations of constitutional guarantees can be addressed as cases of possible official liability pursuant to Art 23 B-VG and § 1 para 1 AHG.

[214] It must be added that such political pressure has historically not always led to quick legislative or administrative solutions. See e.g., the implementation of the VfGH's rulings regarding place-name signs in Corinthia (VfSlg. 16.404/2001).

[215] Such a model is effectively used by the ECtHR, where pursuant to Art 41 ECHR just satisfaction claims can be issued when the national law does not allow for comprehensive reparations for infringements of the guarantees of the convention. Additionally, the ECJ's jurisprudence makes use of reparations through the tool of state liability for breaches of union law.

[216] Art 240 of Fiedler's draft constitution reflected the consensus of the convent's presidium and aimed to regulate legal protection in the absence of a statutory guarantee ('*Rechtsschutz bei Fehlen einer gesetzlichen Gewährleistung*'). This provision would have given individuals the right to address the VfGH regarding the infringement of their constitutionally guaranteed rights through legislative inaction (Art 1). Should the court determine that the legislative inaction was unconstitutional, it could obligate the legislator to implement the necessary provisions within up to 18 months (Art 2). Should the required provision not be implemented within this period, the respective federal or provincial government would be liable under public law (Art 3). The VfGH could further award claims for damages regardless of fault determinations, delegate this question to ordinary courts of law, and reward such claims to all similar cases before courts or administrative tribunals (Art 4). Österreich Konvent, *Bericht des Österreich-Konvents, Band 3, Teil 4B* (Wien 2006) 104.

[217] Thienel (n 144) 139.
Debateable regarding this concrete proposal is nonetheless the vague formulations regarding any claims for damages both regardless of fault determination and regarding possible violations of constitutional guarantees. A more precise formulation of Art 3 including guaranteed claims for successful complainants in combination with a stricter formulation (or omission) of Art 4 could create a more comprehensive legal protection.

material claims for damages and their determination must be subject for further discussions, since these would be of particular importance regarding social guarantees.

As shown in this chapter, the questions of judgement complaints, state liability, and claims for damage are of political importance regarding the implementation of social guarantees through subjective rights under regulatory revision or legislative mandates. The same must be said regarding open questions about the organizational structure and resources of a future VfGH with added competences.[218]

5.2.3 Directly applicable social rights

Directly applicable social rights, meaning subjective social rights in a narrow sense, are a complicated and intensely discussed model. The primary debate regarding such rights revolves around their horizontal effect. Regarding the applicability of social rights in private relationships the already discussed question of third-party effects (see chapter 2.3) therefore has to be at the centre of all considerations.

According to contemporary jurisprudence and legal doctrine such third-party effects only exist, when they are explicitly stated in the respective constitutional provision.[219] During the *Österreich Konvent*, the consensus proposal of representatives of the social partnership rejected direct third-party effects of fundamental rights.[220] According to Thienel, this consensus shows that a directly applicable model of fundamental (social) rights 'is hardly conceivable (…) as constitutional guarantees are generally relatively general and vague, so that from them alone it is not sufficiently clear which specific protective mechanisms and legal consequences should apply in the relationship between private parties'.[221]

Aside from specific provisions regarding the prohibition of discriminations or equality regulations[222], any social guarantees on the constitutional level will therefore need further simple-law implementation regarding their effects on horizontal relationships.[223]

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[218] Additionally, two points often raised in public debates regarding the future of the court should be mentioned: A possible reform of the appointment of its members under the light of accusations of party-political influence and untransparent procedures. Furthermore, the question of possible restrictions on other professional activities by the VfGH's judges, thus making an appointment on the court a full-time provision including the legal on additional professions.

[219] See e.g., § 1 DSG.

[220] The proposal further stated that 'entitlements through fundamental rights (…) must consider the competitiveness of Austria's economy and the needs of the individual'. Only the fundamental right to data protection should constitute directly applicable rights in private relationships. Österreich Konvent, *Bericht des Österreich-Konvents, Band 3, Teil 4B* (Wien 2006) 108.

[221] Thienel (n 144) 142.

[222] See e.g., Art 141 para 1 EGV regarding the obligation for equal payment of men and women.

[223] Social guarantees whose third-party effects depend on simple-law implementation would also require jurisdictional authority regarding legislative inactions, similar to the problem discussed in subchapter 5.2.2.

> Directly applicable rights are therefore primarily conceivable only insofar as they are directed against the state; these could include specific equal treatment claims, participation rights, as well as claims for benefits against public legal entities. To the extent that such directly enforceable social fundamental rights are not feasible, only 'law-mediated' guarantees can be anchored; thus, a legal protection framework for these cannot be avoided.[224]

Such directly applicable fundamental rights are not a novel instrument in certain European constitutions.[225] Additionally to specific rights, social claims can also be designed as derivative rights: In countries like Germany or Switzerland a defensive right against state interventions into those resources necessary to guarantee livelihood security (e.g. taxes) is derived from the constitutionally guaranteed right to social security – such claims do however not create subjective social rights in a narrow sense.[226] Nonetheless the Austrian constitutional system only knows directly applicable guarantees regarding imprisonment-compensation.[227]

Since the legislator is the primary addressee of social rights it must be assumed that in most cases these rights would not address a legal vacuum. All social rights discussed in the *Österreich Konvent* or by the *Volksanwaltschaft* address a vast number of already existing laws, regulations, or ordinances. Furthermore, such rights would act in relationship to international provisions, particularly those in the ECHR and the CFR. These circumstances create a more differentiated meaning of the term 'directly applicable'. While it might be questionable if the existing provisions sufficiently implement a respective social right, all existing laws stay in place until they are either amended or their unconstitutionality is addressed by the VfGH.[228] Any existing law or ordinance must therefore be addressed before the constitutional guarantee is directly applicable. This means, as Thienel states, that any social fundamental right can only be directly applicable in three cases:

Firstly, 'if there no simple-law regulation yet' in which (rare) case the constitutional guarantee could led to a more efficient legal protection as in the above discussed proposals regarding claims for damages. Secondly, 'after the annulment of an inadequate simple-law provision by

[224] Thienel (n 144) 143.
[225] See e.g., entitlements to support in crises-situation (Art 12 Swiss constitution).
[226] Thienel (n 144) 143.
[227] See Art 5 para 5 ECHR, Art 7 PersFrG.
[228] The Austrian constitutional system depends on a 'positive legal error calculation', meaning that a law or ordinance, as long as it provides a 'externally effective and finalized regulation' of a social claim, would stay intact even when it lags behind the constitutional guarantee.

the VfGH': A direct benefit for complainants could occur, if the VfGH declares a simple-law provision unconstitutional and neither the court sets a previous regulation into effect, nor the legislator takes corrective actions.

Additionally, the court could pursuant to Art 140 para 7 B-VG retroactively declare a law unconstitutional for the benefit of the complainant. Thirdly, 'if a provision does not have a finalized character' in which case the above discussed tool of constitutional gap filling could be applied. But even in these cases, the direct applicability of a social right might be vague and bound to other provisions.[229]

Two general problems arising from directly applicable social guarantees are furthermore their concrete addressee and the preciseness of their formulation.[230] It can be stated that social rights particularly depend on some form of simple-law implementation – even a provision as small as precisely defining the current subsistence level to implement a possible fundament right to social security would be required. While such provisions might seem easy, others, like the often criticized right to housing, might be significantly more difficult to interpret before courts, thus needing extensive additional legislation.

5.2.4. Tools of collective action and collective lawsuits

Besides the already mentioned models, the possibility of collective lawsuits is an additional design for the implementation of social fundamental rights often discussed in legal and political debates.[231] Similar procedures are already existent in Austria's legal system and required through international obligations, particularly through European provisions.[232] Their main

[229] Thienel (n 144) 144-145.

[230] Regarding the addressee, Thienel addresses the question of the different courts' competences, exemplary using Fiedler's proposal of a social right for services of a general interest and the provisions regarding 'food, clothing, shelter, health care and those resources necessary for a decent existence'. While the infringement of these specific provisions through a hospital might clearly create applicable claims before ordinary courts due to the patient-hospital relationship being within the realm of public law, the implementation of these claims through administrative actions lacks a clear addressee and would therefore not be enforceable before ordinary courts but only through complaints before the VfGH. See ibid 147-148.

[231] During the *Österreich Konvent*, the expansion of collective lawsuits was evaluated negatively, and no consensus could be reached: 'The representatives of the social partners explained in the committee that the rejection of group lawsuits against a general constitutional institutionalization of the authorization of organizations for abstract complaint procedures in fundamental rights matters is aimed at safeguarding the objective legality'. Österreich Konvent, *Bericht des Österreich-Konvents, Band 1, Teil 3* (Wien 2006) 108.

[232] See e.g. Art 7 para 2 *AntirassismusRL*, Art 6 para 3 *Gleichbehandlungsrichtlinie*, or Art 9 para 2 *Gleichbehandlungs-RahmenRL*

objective is to allows for the 'the enforcement of supra-individual interests, especially when multiple individuals are affected'.[233]

Regarding the relevance of such instruments in the context of fundamental rights, collective action mandates must be evaluated concerning their possible legal and organisational effect, In this regard it must be stated, that the Austrian legal system gives individual complainants the final decision regarding the enforcement of their constitutionally guaranteed rights. Interest groups and other actors have no direct role in such legal proceedings but can support complainants in different ways. The question therefore remains, what additional benefit for the protection of social guarantees the awarding of party status before courts for such groups might bring.[234]

The protection of social constitutional rights, however, brings an additional factor into consideration: Since such rights are mostly directed towards the legislator, partial or full legislative inaction is an important concern – 'in this situation, it is no longer solely about the interests of individual persons but rather about those of entire groups'.[235] In this context, tools of collective action must be seen within the wider framework of additional ways of norm review through the VfGH. The possibility of collective action in cases of legislative inaction could supplement the suggestions presented in subchapter 5.2.2.[236]

Since it would not be arguable to restrict collective actions just on social rights, they must in any case be designed for all constitutionally guaranteed rights – probably even for all cases of unconstitutionality since 'a violation of a fundamental right often cannot be easily separated from other violations of the constitution'.[237]

An additional question is therefore, which groups can use such forms of collective actions and start collective lawsuits. Besides the legally established professional associations this right must also be open to other advocacy and interest groups, which could in itself lead to a drastic expansion of the VfGH's workload. Furthermore, the risk of 'instrumentalizing the VfGH to resolve political disagreements' must be taken into account.[238]

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[233] As Thienel points out, Austrian legal system knows a number of related legal tools with similar objectives, particularly 'the concept of granting party status to specific associations, rights of complaint to the VwGH, and "legal protection representatives"'. See Thienel (n 144) 148.

[234] The VfGH has answered this question inter alia in 2004 when it articulated the position that the legislator can define groups of individuals as actors with subjective rights in administrative proceedings regarding environmental compatibility. See VfGH 1.12.2004, V 124/03.

[235] Thienel (n 144) 150.

[236] Thienel also points out, that forms of collective 'preventive' actions could protect the VfGH from an overload of separate cases through individual complaints. See ibid 151.

[237] ibid.

[238] ibid 152.

Any model of collective action towards the protection of constitutionally guaranteed and particularly social rights therefore depends on both the confinement of the group of possible applicants and the specific protections against a politization of the VfGH against the legislator's rightful broad space of implementation.

5.3. Additional perspectives and central considerations regarding the design of social rights

As was shown above, the different models for the implementation of social guarantees within the Austrian constitutional system address a number of shared problems and overlap in various areas, e.g. regarding the procedures against legislative inactiveness. Any future proposals towards the creation of such rights will therefore necessarily have to contain a combination of different models, use various legal tools, and draw from the legal and political debates of the last four decades.

It therefore is important to consider the bigger picture of international standards of human rights protections. Many of the questions raised above, particularly the imminent conflict between negative and positive obligations, can also be seen in the light of Austria's international obligations towards the protection of social, economic, and cultural rights. Even though relevant treaties in this area like the ESC or the ICESCR do not have constitutional rank in Austria, they are nonetheless ratified (with reservations) and can help in the interpretation of the different questions in this area – after all their universal validity, at least as soft law, has enabled similar processes in other countries around the world.

In a fact sheet published by the Office of the UN High Commissioner for Human Rights the challenges regarding the domestic implementation of social rights are described, using the standard terminology of international human rights law, as the obligations 'to respect, to protect and to fulfil economic, social and cultural rights': Respecting therefore means to 'refrain from interfering with the enjoyment of the right', protecting to 'prevent others from interfering with the enjoyment of the right', and fulfilling to 'adopt appropriate measures towards the full realization of the right'.[239]

[239] Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights. Fact sheet No. 33.* (Geneva 2008) 11.
The High Commissioner's office elaborates on this distinction using examples like the social right to work: 'Respect: the State must not use forced labour or deny political opponents work opportunities. Protect: the State must ensure that employers, both in the public and in the private sectors, pay the minimum wage. Fulfil: the State must promote the enjoyment of the right to work by, for instance, undertaking educational and informational programmes to instil public awareness of it.' See ibid 12.

Amnesty International Österreich and the *Armutskonferenz* referenced this distinction in a recent policy paper supporting the proposals laid out in their *Bundesverfassungsgesetz soziale Sicherheit*.[240] Therein they differentiate between the dimensions of social rights accordingly as obligations of respect ('*Achtungspflichten'*), obligations of protection ('*Schutzpflichten'*), and obligations of fulfilment ('*Erfüllungspflichten'*), stating that each social constitutional guarantee would naturally have to encompass all three of these dimensions.[241] They also emphasize the importance of judicial review regarding the implementation of social rights, raising the already mentioned example of the German BVerfG's ruling on minimal standards for a decent existence of Hartz IV recipients as a possible perspective for Austria.[242]

Such considerations naturally open the debate about one of the most controversially discussed aspects of social fundamental rights: Their economic and financial impact on the state. Even though the implications of human rights obligations on public expenditures are a commonly discussed topic among political and legal analysists[243] and several European constitutions have regulations regarding the state's obligations for fair taxation[244], the question of how social guarantees limit or influence the legislator's budgetary autonomy are highly relevant.

A possible solution for this problem would be the expansion of third-party effects on private individuals, since 'after all, it would be possible to elevate a social fundamental right to the status of a subjective right in the constitutional hierarchy for specific situations, as long as the state has a discretionary power over the opposing party of the claim'.[245] Since such a method would not be a viable option for all social rights, due to its interference with other fundamental rights (e.g. regarding property or occupation), the legal doctrine only accepts it as a possible solution to safeguard regarding 'certain minimum standards, such as the basic needs, free

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[240] The importance of international obligations is also emphasized in within this proposal: Therein Art 12 (*Internationale Menschenrechte*) states that 'Human rights, particularly international legal obligations, are decisive for the fulfilment and interpretation of this law'. See Armutskonferenz, *Soziale Menschenrechte in die Verfassung* (n 2).

[241] Amnesty International Österreich, *Hintergrundpapier: Rechtsdurchsetzung von wirtschaftlichen, sozialen und kulturellen Menschenrechten* <https://www.amnesty.at/media/8792/rechtsdurchsetzung-von-wirtschaftlichen-sozialen-und-kulturellen-rechten.pdf> accessed 10 August 2023.
Regarding the social right to health care they elaborate on this distinction and differentiate between the negative obligations (obligations of respect, in this case to refrain from any infringement and discrimination regarding the access to health care) and positive obligations (obligations regarding the protection from negative acts of private individuals through controls, general standards etc. to secure the best possible health care for everyone, and obligations regarding the creation of public services like vaccination campaigns).

[242] Amnesty International Österreich, *Häufig gestellte Fragen zu wirtschaftlichen, sozialen und kulturellen Menschenrechten* <https://www.amnesty.at/media/8792/rechtsdurchsetzung-von-wirtschaftlichen-sozialen-und-kulturellen-rechten.pdf> accessed 10 August 2023.

[243] See debates about human-rights-based budget policy, e.g., Office of the United Nationals High Commisioner for Human Rights (ECHR), Realizing Human Rights through Government Budgets < https://www.ohchr.org/sites/default/files/Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf > accessed 11 August 2023.

[244] Art 24 of the constitution of Liechtenstein and Art 51 of the constitution of Croatia.

[245] Schäffer, Klaushofer (n 101) 798-799.

medical treatment, support for the unemployed – in other words, a kind of substitute rights'.[246] Another solution would be the implementation of a constitutional 'affordability clause', as proposed by Grabenwarter during the *Österreich Konvent*.

These considerations regarding the financial impact of fundamental rights must nonetheless be analysed critically and under the light of the already described rarity of cases in which even subjective constitutional guarantees are directly applicable (see subchapter 5.2.2). The central financial effect of social rights can therefore also be seen from a different perspective:

> A constitutional anchoring does not aim to block financially necessary cuts and reductions, but rather to burden the 'dismantling of protection with a justification burden'. However, even with such 'relative' guarantees, a resource reservation is unnecessary, as the limitation of public resources must always be considered in the case of balancing-open guarantees.[247]

Furthermore, *Amnesty* and the *Armutskonferenz* reference the concept of the 'progressive realization' of social rights that ensures 'that states, using all available means, take measures to achieve the full realization' of such rights.[248] This principle is derived from international human rights treaties like the ICESCR, the CRC, and the CRPD and clarifies that although the realization of social rights 'may require resources and thus may be delayed, it by no means implies that states can remain inactive; on the contrary, they must demonstrate, especially in challenging situations such as a pandemic, that they continue to pursue the full realization of ESCR, particularly based on the principle of non-discrimination'.[249] The strengthening of such principle of progressive realisation within the Austrian constitutional framework could be seen as an additional tool for a reliable but realistic design of any future social rights:

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[246] ibid 799.

[247] ibid.

Regarding this debate a different BVerfG decision should be mentioned: In 1972 the German court ruled on the constitutionality of restrictions on places in universities and acknowledged that the fundamental right to freedom of occupation only allowed for such restrictions in cases of financial and resource scarcity. While the ruling therefore created subjective claims for students to access a university, it also allowed for generalized restrictions ('Numerus Clausus') when the state could not reasonably provide those to all individuals (BVferG 33, 303).

[248] Amnesty International Österreich (n 242).

[249] ibid.

This principle is inter alia spelled out in Art 2 (1) ICESCR stating that states is obliged to 'take steps (…) especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized' in the treaty. Art 4 (2) CRPD references this objective regarding economic, social and cultural rights stating that 'each State Party undertakes to take measures to the maximum of its available resources (…) with a view to achieving progressively the full realization of these rights'.

> The reference to 'resource availability' reflects a recognition that the realization of these rights can be hampered by a lack of resources and can be achieved only over a period of time. Equally, it means that a State's compliance with its obligation to take appropriate measures is assessed in the light of the resources—financial and others—available to it.[250]

Additionally, general clauses, like an expressed 'right to social security' would therefore provide general scopes of judicial interpretation on the constitutionality of the administration's fulfilment of the progressive realization of the social right. The social guarantee itself would nonetheless be in need of further implemented through additional legislation. As long as no legislative inaction occurs, all individual entitlements would not be directly based on the constitutional right, but on state services 'based on secondary rights that do not actually establish an individual's legal status, but rather denote a system – a detailed network of norms'.[251]

[250] Office of the United Nationals High Commisioner for Human Rights (ECHR), Realizing Human Rights through Government Budgets < https://www.ohchr.org/sites/default/files/Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf > accessed 11 August 2023.
[251] Schäffer, Klaushofer (n 101) 802.

6. Proposals for fundamental rights to social security and to existential minimum security

As described in chapter 4 the right to social security was a central part of every discussion regarding the expansion of social fundamental rights over the last decade. Given the described discursive background (chapter 4) and models (chapter 5) this chapter will analyse the different proposals regarding such a fundamental right to social security as well as the corresponding proposals for a fundamental right to existential minimum security. Therefore, firstly the different proposals and respective discourses during the *Österreich Konvent*, the following parliamentary committee, and the draft constitution by Fiedler will be analysed. Secondly, the current proposals by *Armutskonferenz, Amnesty* and the *Volksanwaltschaft* will be analysed regarding their implications and possible consequences. Earlier proposals, e.g. from the Fundamental Rights Reform Commission, will be excluded from this consideration since their significance has diminished due to the vast amount of domestic and international reforms since their creation and their still relevant parts have found entrance into the discussions since the 2000s.

6.1. 'Österreich Konvent', draft constitution and parliamentary committee

Both the right to social security and the right to existential minimum security were discussed in committee IV ('Grundrechtekatalog') of the *Österreich Konvent*. Even though no final consensus regarding the formulation of these rights was reached during the negotiations, the different proposals laid out in the convent's protocol as well as the open questions presented in the committee's report, provide important insights into these debates and possible perspectives. Regarding the right to social security, there was consensus in the convent's presidency 'on enshrining the right to social security as a human right', however 'no agreement on the wording of this fundamental right' was reached.[252] The presidency was also in favour of enshrining a right to existential minimum care, 'based on the social partnership's proposal', but no consensus regarding its formulation was found either.[253]

The committee's debates on these rights were based on the provisions regarding 'Social security and social assistance' in Art 34 CFR. Additionally, a proposal by the *SPÖ*, a proposal by

[252] Österreich Konvent, *Bericht des Österreich-Konvents, Band 1, Teil 3 (Wien 2006)* 101.
[253] ibid 100.

Grabenwarter (widely referenced as the *ÖVP*-proposal), a proposal by the social partnership, a proposal by the *Grüne*, as well as several other proposals were entered into the committee.[254]

The *SPÖ* suggested a fundamental right guaranteeing that 'Every person has the right to a life in dignity' (Art 32 *SPÖ*-proposal)[255], and one guaranteeing that 'Every person has the right to social security' (Art 33 *SPÖ*-proposal)[256]. Both rights would obligate the state to take appropriate measures to secure these rights. Even though the *SPÖ*-proposal did not aim to create directly applicable rights, it would enshrine strong state obligations regarding measures against poverty and social exclusion, minimum social security and the securing of basic needs (including health care), public insurance systems (including the solidarity principle), and pensions (including their regular increase). Furthermore, the formulations regarding the individuals' right to a life in dignity, to social security, and social participation closely resemble the already mentioned provisions in the German GG which were the basis for the BVerfG's decision on the minimal standards for a dignified existence.[257] Such formulations could provide the VfGH with a strong base for its interpretation of the constitutionality of a vast number of simple-law social provisions.

Grabenwarter, who's proposal is commonly referenced as close to the *ÖVP*, proposed significantly smaller provisions for 'Guarantee obligations in labour and social law' lacking any general clauses: According to his suggestion, 'the law must guarantee' both the 'claim of persons with a rightful residency in Austria' to social benefits and insurance, and the 'right to social support and support for housing' for all individuals without the necessary means for a dignified existence.[258] Notably this proposal framed social security as a claim and existential minimal security as right, both designed as legislative mandates. It also introduces a distinction regarding social security just being available for individuals with residency, which suggests the exclusion of certain groups like e.g. migrants or refugees without residence permits.

The social partnerships' proposal can be seen as a consensus programme. It proposed a right to existential minimum security (para 7) and a right to social security (para 8). Both provisions

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[254] Additional proposals were suggested by the *Ökumenische Expertengruppe*, and by Mader/Rack. Österreichisches Parlament, *Synopse der Gesamtvorschläge und Positionen der parlamentarischen Klubs zum Themenbereich „Grundrechte"* (Wien 2006) 47-49.

[255] According to the SPÖ-proposal this right should be ensured by the state 'through measures to prevent and combat poverty and social exclusion' (para 2), while 'Every person is entitled to the necessary benefits for social minimum security, especially for food, clothing, housing, medical care, and social participation' (para 3). The SPÖ also submitted a different variation of para 3 guaranteeing the rights therein as well as the right to social assistance to 'those who are unable to provide for themselves and their dependents'. See ibid.

[256] According to the SPÖ-proposal this right should be ensured 'by establishing a public-law compulsory insurance system based on income and risk solidarity, which provides adequate coverage in case of illness, maternity, accidents, reduced work capacity, unemployment, care dependency, and old age`(para 2) as well as through measures to ensure that 'pensions are secure and increase to an appropriate extent' (para 3). See ibid.

[257] BVerfG 9.2.2010

[258] Österreichisches Parlament (n 254) 47-49.

excluded general clauses as proposed by the *SPÖ*. Para 7 referenced most parts of the *SPÖ*-proposals second alternative, thus restricting the 'claim' for minimum security to those 'who cannot provide for themselves and do not have the necessary resources' while also limiting the state's obligations to providing measures only 'to the extent necessary'. Para 8 proposed a 'right to social security ensured through the state by establishing a self-administered public-law compulsory insurance system' and 'appropriate care in cases of long-term care needs'.[259]

The comparison between these three proposals makes clear, that there was no consensus during the *Österreich Konvent* for a broad definition of these social rights and particularly for formulations that could open a broader interpretation by the VfGH. A minimal consensus could only be found in provisions regarding public insurance and minimal assistance for those in need.[260] The committee further raised two debates regarding these proposals: Firstly, regarding the definition of individual circumstances as the basis for existential minimum security.[261] Secondly, the question of legal protection and enforceability was raised.[262] Both questions could not be resolved during the committee's tenure.

Subsequently, Fiedler's draft constitution referenced the previous work of the committee and suggested the introduction of a right to provisions of existence (Art 62) and a right to social security (Art 63). This proposal was identical to the social partner's suggestions but expanded their provisions through adding a general clause – 'Every person has the right to social security' – in Art 63 para 1.[263]

During the following discussion within the special committee of the National Council, both *ÖVP* and *SPÖ* generally proposed largely the same provisions to those they suggested by them during the convent. The *BZÖ* ('*Freiheitlicher Parlamentsklub – BZÖ*') only proposed one provision similar to the social partner's consensus on existential minimum security and abstained from suggesting any provisions regarding social security. The *Grüne* vastly oriented their proposal on Fiedler's draft constitution but notably added the statement that the right to existential minimum security 'did not prohibit any more far-reaching basic security benefits'.[264]

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[259] ibid.

[260] The committee finally proposed three variations of a right to existential minimum care and two variations of a rights to social security without reaching consensus. The different variations reflected the two main political parties within the committee.

[261] The question of self-inflicted need (‚selbstverschuldete Not') can, as the committee's report points out, be 'resolved through the reservation of helplessness' since 'state obligations are to be considered based on proportionality and the reservation of statutory regulatory possibilities'. Österreich Konvent, *Bericht des Ausschusses 4, Grundrechtskatalog* (2006) 59.

[262] Since the proposed provisions would not take effect in a legal vacuum, similar actions as regarding already guaranteed 'rights in the field of social assistance that can be asserted through public law or private law legal protection' could be taken. Furthermore, the committee also discussed possibilities of state liability provisions in cases of legislative inaction. See ibid.

[263] Österreich Konvent, *Bericht des Österreich-Konvents, Band 3, Teil 4B* (Wien 2006) 27.

[264] Österreichisches Parlament (n 254), 47.

5.2. 'Armutskonferenz' und 'Volksanwaltschaft'

As was already mentioned, the *Armutskonferenz* proposal for a 'Bundesverfassungsgesetz soziale Sicherheit', published with the support of *Amnesty International Österreich* in 2020, restarted public debates about the implementation of social fundamental rights. This proposal was modelled after the provisions of the *BVG Kinderrechte* and therefore combined directly applicable rights with legislative mandates. Based on the debates of 2000s, its aim was to 'transport fundamental rights protection into the 21st century and help secure social peace' while also tackling common opposing arguments and claiming to 'strengthen the national economy'.[265]

Art 1 ('Social security') of this proposal declares that every person 'has the right to state benefits from the system of social security', while also prohibiting any form of discrimination, guaranteeing increased support under certain conditions, and laying out detailed principles regarding the state's obligations for the preparation of these rights.[266] Notable regarding these principles – 'non-discrimination, availability, accessibility, appropriateness, participation, solidarity, transparency, and accountability' – is their applicability not only for individual but also common needs.[267]

Art 2 ('Minimum care') of this proposal expands on the *SPÖ*-proposal of the *Österreich Konvent*: It would guarantee every person the right to minimum security as basis for a dignified life, particularly guaranteeing 'material security, social and socio-political participation' including 'support to ensure dignified housing, including basic energy supply; clothing that enables freedom from stigma; freedom from hunger and access to adequate food and water, as well as access to healthcare'.[268]

Both provisions would not only create directly applicable rights that could be the basis for the evaluation of nearly all simple-law provisions regarding social policy in Austria: The

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[265] Schulze (n 6) 197.

[266] While the provisions regarding situations of increased support are mostly structured after earlier proposals (situations of illness, care work, joblessness, parenthood etc.), the most consequential part of this provision would be the lengthy list of prohibitions on discriminations: 'Any form of discrimination, especially based on birth, gender, status, class, belief, disabilities, ethnicity, place of birth, political or ideological views, skin colour, faith and religious convictions, ethnic and social background, wealth, sexual identity, age, nationality, family and marital status, health condition, residential address, economic and social situation, genetic characteristics, experiences of violence, as well as multiple or aggravated forms or any other grounds, is prohibited'. Armutskonferenz, *Soziale Menschenrechte in die Verfassung* (n 2).
Prohibitions on discrimination based on categories like residential address, genetic characteristics, experiences of violence etc. have not yet been proposed regarding social fundamental rights and would not only need a number of additional simple-law implementations but also be open to extensive revision by the VfGH.

[267] This extensive list is partially modelled after Art 34 of the Ecuadorian constitution. See Schulze (n 6) 197.

[268] Armutskonferenz, *Soziale Menschenrechte in die Verfassung* (n 2).

Armutskonferenz proposal furthermore references the applicability of its standards as third-party effects (Art 10), would bind public expanses to human rights concerns (Art 11), and emphasises the applicability of international obligations (Art 12).[269]

Even though this extensive proposal has nearly no chance of gaining the necessary political majorities and an in-depth legal analysis of all possible ramifications of its broad provisions would be the necessary basis for any debate on it, the *Armutskonferenz* initiative must be seen as what it is: An attempt to restart public and political debates, create political pressure during a time of crises, showcase the many possible fields of action within the Austrian legal system, and strengthen the importance of international perspectives in the Austrian fundamental rights debates. Its presentation at the hight of the Covid-19-pandemic must also be seen as an important factor in these considerations.

The *Volksanwaltschaft*'s decision to not only engage in this debate but directly use the *Armutskonferenz*-proposal as the basis for further actions can be seen as a sign of the NGO's success. Thus, the *Volksanwaltschaft* did not publish its own proposal for fundamental rights regarding social security and existential minimum security but debated the *Armutskonferenz*-proposal as well as general needs for action regarding the fundamental rights protections in this area.

In its report to the Austrian parliament it therefore added further perspectives regarding the fundamental right to social security: Regarding the prevention of poverty, constitutionally guaranteed social rights could be play an important part through creating 'legal entitlements to advanced benefits' in situations of crises, helping to combat child poverty (particularly through creating a model of 'basic security for children'), and providing faster trials and settlements for social disputes of individuals. Additionally, the implementation of collective action forms was supported by the participants of the *Volksanwaltschaft*'s NGO forum.[270] Regarding social security, the importance of the RESC was emphasised. Constitutional rights to social security would, according to the *Volksanwaltschaft*, not only support individuals affected from poverty or crises, but particularly people with disabilities, third-country citizens, seniors, and other marginalized groups.[271] Additionally, the NGO forum reiterated the effect of provisions, as proposed by the *Armutskonferenz*, for people in situations of bogus self-employment, needing psychosocial support, or people without occupation.[272]

[269] ibid.
[270] Volksanwaltschaft (n 4) 13.
[271] ibid 14.
[272] ibid 50.

After the discussion of this report in the National Council, the *Volksanwaltschaft* publicly expressed its plans to continue the discussion about social fundamental rights, e.g., through a parliamentary expert panel and public pressure campaigns.

7. Conclusion and perspective

This thesis has laid out an extensive overview over the mechanisms of fundamental rights protections within the Austrian constitutional systems, requirements, and proposals for the design of social constitutional guarantees, and central discursive lines of contemporary debates about the implementation of social rights. It was shown how social rights are currently protected under Austrian law and which political and legal arguments prevented their further implementation until now. These analyses have also shown the vast amount of already existing proposals for social rights, particularly rights regarding social security and minimum care.

It is clear from the presented data that while serious legal questions have to be addressed by any future attempt to expand the constitutional fundamental rights provisions, the central obstacles for such a reform have been of political nature in the last two decades. Both the jurisprudence laid out in subchapter 2.5 and international developments regarding the ECHR and CFR have rendered many central arguments against a comprehensive fundamental rights reform fully or partially invalid. Additionally, it has become clear, that a strict distinction between social rights and political rights hardly reflects the constitutional reality, both regarding existing and future rights. This development has become more through ongoing VfGH jurisprudence that, as laid out in subchapter 3.2, recognises certain social dimensions derived from already existing fundamental rights. While such already existing standards enable the court to establish safeguards against unobjective regressive measures against social securities and offers certain protective mechanisms for the most marginalized groups in our society, it has also become clear that the VfGH's existing legal repertoire is designed to regulate legislative actions but remains not fully equipped to act against legislative inaction regarding future social fundamental rights.

This jurisprudence as well as developments in other European countries have illustrated that social fundamental rights in combination with international human rights obligations are neither ineffective nor lead to an extensive reduction of the legislative leeway regarding social and economic policies. The same can be said regarding the argument of excessive financial burdens through social guarantees (see, inter alia, subchapter 5.3). It can even be stated that the impact of the discussed constitutional guarantees might not have significant short-term effects on the Austrian political system – particularly through their slow effect on already existing comprehensive social legislation. Their central impact might rather lie in long-term moderating and guiding effects that would be established through both legislative consideration of these rights and individual interventions of the judiciary.

Given the multifaceted crises facing the European society at the moment it can be assumed that calls for better protection of social rights, particularly for constitutional guarantees, will not grow weaker in the future. In this perspective, this thesis has shown that one of the primary purposes of social rights within the Austrian constitutional system would be their political impact both towards the legislator against excessive interventions in existing welfare programs, and towards those groups in our society who are not adequately supported by already existing legislation. As the *Volksanwaltschaft* has shown in its report, marginalized groups might be most directly affected by the expansion of social constitutional guarantees due to current lack of obligations for state authorities to create specific social security systems as well as the lack of VfGH authority to act against an inactivity by the legislator.

In this context a number of central findings must be mentioned: Firstly, it has to be stated, that besides international obligations the *BVG Kinderrechte* already offers an important example for the possible design of future subjective rights combined with clear mandates for further legislation by the state. This provision not only shows how precisely formulated, individually applicable rights can be embedded in larger provisions primarily targeting the administration, it also illustrates that attempts towards the implementation of social guarantees through simple state objectives would be insufficient in comparison.

Regarding the possible designs of future social rights, the focus should therefore lie on a combination of directly applicable rights subject to (mostly already existing) simple-law implementations as well as legislative mandates. Of central importance for the effectiveness of such provisions will nonetheless be the use of general clauses. These instruments not only strengthen the individual's sense of their own rights and create political pressure towards the legislator but are also a necessary tool to enable the jurisdictional control of the implementation of such rights through laws, regulations, or ordinances.

The described combination of different normative models for social rights was not only discussed in several proposals at the *Österreich Konvent* (see e.g. the *SPÖ*-proposal) but is also reflected in the current suggestions by the *Armutskonferenz* and *Volkshilfe*. In this context this thesis also shows signs of near consensus regarding certain parts of social rights to social security and minimum care that could be the basis for further debates. Even though the areas showing the highest likelihood for consensus, e.g. provisions regarding solidarity-based insurance, might likely have the least actual impact on legislation and jurisprudence due to their already existing political and legislative anchoring, they could act as a starting point for future proposals. The same can be said for general clauses like the 'right to social security' of every individual, that was also reflected in Fiedler's compromise proposal.

Additionally, this thesis has shown that a number of supporting measures must be discussed. The creation of social constitutional guarantees would most likely be effectless without an expansion of the VfGH's competence, particularly the introduction of mechanisms to enforce social claims against an inactive legislator. Effective tools for this purpose that would not violate the constitutional principles of legislative autonomy and the separation of power do exist as shown particularly in subchapter 5.2.2. Besides giving the VfGH the competence to rule on the unconstitutionality of inaction by the state and provisions regarding state liability, additional measures regarding claims for damages and judgement complaints must be seriously discussed. Even though the last instrument would alter the power structure of the Austrian legal system, it was one of the few points of consensus during the *Österreich Konvent*, that the VfGH should have central authority regarding human rights protections. Such an authority would both need the constitutional mandate of superiority (at least in cases of special significance) and sensible models to further ensure the effective instance procedures of ordinary courts, particularly the OGH. In any case it can be stated that the expansion of social guarantees would need a VfGH equipped with additional resources to handle a potentially increased workload and reforms regarding its structure (e.g. regarding side-professions of its judges).

Finally, this thesis has also shown the importance of international recourses to already established international standards. This not only applies regarding constitutional provisions in other states, but also regarding principles like the progressive realisation of social rights (see subchapter 5.3). Austria's hesitancy regarding international obligations, aside from the ECHR and the CFR, and their consideration as mostly insignificant soft law can be seen as a real obstacle fpr the protection of fundamental rights. The *Armutskonferenz*'s proposal to strengthen international human rights considerations in the application of domestic (social) fundamental rights, therefore opens up an important debate that could not only provide solutions to contemporary discussions and fears about additional constitutional guarantees but also create the basis for domestic legislation to better ensure social rights while also protecting the state against excessive claims and restrictions.

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Abstract

This thesis sets current proposals for the expansion of fundamental rights protections within the Austrian constitutional system in the perspective of earlier attempts. It therefore analysis the already existing mechanisms for the protection of constitutionally guaranteed rights with a special focus on those provisions regarding social dimensions. The thesis furthermore highlights the political and legal negotiations of the *Österreich Konvent* and current proposals by NGOs, particularly regarding proposals for constitutional guarantees for rights to social security and minimum care. These proposals are analysed regarding different normative and legal models for the implementation of fundamental rights as well as necessary additional measures regarding the competences of constitutional jurisdiction. Conclusively, the thesis argues for a new perspective in future discussions about the implementation of social constitutional guarantees through a combined and differentiated use of different normative models, a stronger focus on international human rights obligations, and the reform of the competences of the Constitutional Court. Through such steps, social guarantees would particularly benefit the human rights protection of marginalized groups in Austria.

Abstrakt

Diese Arbeit betrachtet aktuelle Vorschläge zur Erweiterung des Schutzes von Grundrechten im österreichischen Verfassungssystem im Kontext früherer Versuche. Sie analysiert daher die bereits vorhandenen Mechanismen zum Schutz verfassungsgarantierter Rechte, wobei ein besonderer Schwerpunkt auf jenen Bestimmungen liegt, die soziale Dimensionen betreffen. Weiterhin hebt die Arbeit die politischen und rechtlichen Verhandlungen des Österreich Konvents sowie aktuelle Vorschläge von NGOs hervor, insbesondere in Bezug auf Vorschläge für verfassungsrechtliche Garantien für das Recht auf soziale Sicherheit und Mindestbetreuung. Diese Vorschläge werden im Hinblick auf verschiedene normative und rechtliche Modelle zur Umsetzung von Grundrechten sowie notwendige zusätzliche Maßnahmen im Bereich der Kompetenzen der verfassungsgerichtlichen Rechtsprechung analysiert. Abschließend plädiert die Arbeit für eine neue Perspektive in zukünftigen Diskussionen über die Umsetzung sozialer verfassungsrechtlicher Garantien durch die kombinierte und differenzierte Nutzung verschiedener normativer Modelle, ein stärkeres Augenmerk auf internationale Menschenrechtsverpflichtungen und die Reform der Kompetenzen des Verfassungsgerichtshofs. Durch solche Schritte würden soziale Garantien insbesondere den Schutz der Menschenrechte marginalisierter Gruppen in Österreich stärken.