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Between International Standards and Transnational Greed *Providing Transnational Rule of Law in Times of Economic Crisis*

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Abstract The article discusses the process of transnationalisation of the rule of law in times of globalisation. The economic crisis serves as a stage for our analysis, in which the preconditions of the rule of law are challenged. The Austrian case study focuses on the breakdown of the Austrian banking systems and enables us to understand how international standards and European regulation affect the domestic concept of the rule of law, especially in terms of helping to re-establish the rule of law in times of crisis. The example provides insights into how, in the specific interrelation between the domestic rule of law shaped by Austrian legal culture and the implementation of international and European elements of the rule of law, a unique transnational concept of the rule of law is developed. The article concludes that it is necessary to understand the rule of law in a global context in its plurality of transnational rules of law, which depend on the unique interrelation between the respective national legal systems and the international level.

Keywords Transnationalisation, rule of law, Austria, limiting government, independent judiciary, equality

1. The Dislocation of the Rule of Law

Global legal pluralism¹ as an expression of legal globalisation has changed the application of the rule of law.² The rule of law as a principle has to face the transnationalisation of law, which makes the ideas and concepts usually linked to this principle even more difficult to implement. Social developments like the economic crisis of the last few years are challenging not only the rule of law in general, but also the transnationalisation of the rule of law in particular. This

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¹ See Schiff Berman 2013, who stresses the hybridity in a post-sovereign deterritorialised world.

² See Tamanaha 2011, pp. 1-17 in the context of the legal pluralism debate in developing countries. Global legal pluralism makes the implications for the rule of law even more complex.

article analyses how rule of law can be conceptualised transnationally, while the economic crisis serves as a medium of analysis because of its specific challenges towards the rule of law.

The rule of law is a multifaceted concept and an extremely ambiguous notion³ which can be described in terms of a great number of details⁴ or as part of a coherent system.⁵ In the approach presented in this article, the rule of law principle illustrates the field of tension between the individual and the state. Within the more formal and more substantive dimensions⁶ of the rule of law, the article emphasises the following three institutional elements⁷ of the rule of law from an individual perspective:⁸

- limitation of government by law, which enables individual freedom;⁹
- the effectivity of legal protection in a fair trial by an independent judiciary, which enables the individual to assert and achieve its legitimate interests;¹⁰
- substantive equality, which gives the individual the possibility to participate in society (and the legal system).¹¹

These already complex perspectives on the rule of law will, however, be challenged even further by the emergence of global legal pluralism as a phenomenon,¹² which makes it no longer possible to isolate the rule of law as a solely domestic concept. Although the different cultural approaches towards the rule of law as a domestic constitutional principle still exist,¹³ the interrelation between the different legal systems of the states and the links between the inter-/supranational legal systems and the legal systems of the states create new dimensions of the

³ While Peerenboom (2009, p. 7) argues that we should 'give up the quest for a consensus definition or conception of rule of law and to accept that it is', Tamanaha (2004, p. 113) emphasises that the 'rule of law cannot be about everything good that people desire from government' used by many different actors in different ways for different purposes.

⁴ Sobota 1997 lists more than 100 elements of the rule of law from a German perspective.

⁵ Dicey 1982, pp. 179-200 provides one of the most influential and most debated concepts of the rule of law.

⁶ See, with regard to the different philosophical approaches, Krygier 2012, pp. 233-249.

⁷ As Krygier (2008, pp. 68-69) stresses, it is important to focus on the function and not on the form

⁸ The article does not intend to re-negotiate the understanding of the rule of law in general, but rather to evaluate the effects of the economic crises on the different understandings on the rule of law.

⁹ Sajó 1999; see also Tamanaha 2008, p. 4-5.

¹⁰ See Bingham 2011 pp. 90-109.

¹¹ See the discussion on substantive version of the rule of law in Tamanaha, n. 3, pp. 102-113.

¹² For a precise analysis from a constitutional perspective, see Teubner 2012.

¹³ See e.g. Loughlin 2010, pp. 315-324.

rule of law. The discussion on an international rule of law illustrate the different understanding of the rule of law beyond the state.¹⁴

The rule of law is confronted with the question of which law it has to consider and which rule of law has to be applied. The interrelations between the different national and international layers of law have created a separate kind of rule of law, which is extremely unstable and depends on the dynamics of the different legal systems involved.¹⁵ The mechanics of transnationalising the rule of law are challenged by many elements of global legal pluralism:¹⁶

- The role of law production is not centred at a state level; moreover, the exercise of international authority is not focused on domestic governments. The limitation element of the rule of law has to address manifold authorities in the international sphere (including international organisations, NGOs, transnational corporations etc).¹⁷
- The effectivity of international law depends on the compliance of the states.¹⁸
- An international rule of law seems to prefer privileged groups (e.g. transnational companies) and reduces social equality.¹⁹

Transnationalising law makes it more difficult to locate the rule of law within a certain system, and this has to be found in between the different legal systems.²⁰ If one wants to identify a transnational rule of law it can be characterised as a coordinating rule ‘in between’ laws instead of a rule ‘of’ (a singular system of) law. The complex developments of a transnational²¹ rule of law²² shall be analysed in this article only from one particular perspective, which is the interrelation between transnational rules and domestic justice. In that regard the domestic rule of law is changing and is becoming an expression of supranational rule of law in a domestic

¹⁴ See regarding traditional international law e.g. McCorquodale 2016, pp. 277-304 or with regard to informal international law Duquet et al. 2014, pp. 75-95; see also the discussion about defining the rule of law at <http://opiniojuris.org/2016/05/16/defining-the-rule-of-law-symposium/>. Accessed 14 September 2016.

¹⁵ See Sect. 4.

¹⁶ See also Kleinfeld and Nicolaïdis 2008, pp. 139-170.

¹⁷ See the manifold examples in von Bogdandy et al. 2010.

¹⁸ Bingham argues that the rule of law requires compliance by the state with its obligations in international law as well as in national law (Bingham, n. 10, p. 110).

¹⁹ See Mattei/Nader 2008, who illustrate how the international rule of law fosters inequalities.

²⁰ Thus, the article does not aim to define an international rule of law or to provide comparative analysis if the rule of law domestically, but rather to create an interrelation between the two layers. Peerenboom, n. 3, p. 8 already mentioned that ‘[a]nother area where there needs to be more theoretical and empirical work is in the relationship between international rule of law and domestic rule of law’.

²¹ Noelkaemper 2009, pp. 76-77 is using the notion of an ‘internationalized rule of law’ for this ‘in-between’ element of the rule of law.

²² See e.g. Walker 2008, pp. 119-138; Beaulac 2008, pp. 197-223; Goldston 2009, pp. 38-45.

guise. The ‘in-between’ element of a transnational rule of law has become relevant, which is affecting the rule of law both nationally and internationally.²³

Based on these developments towards the transnationalisation of the rule of law, the article focuses on the effects on the rule of law in times of crises from the perspective of the Austrian case study. The rule of law was challenged by the financial and economic crises of the last few years (2.), while the great upheaval in the international financial markets also had a major effect on the Austrian banking landscape and created diverse challenges for the Austrian legal system to deal with. The article analyses how the domestic rule of law was re-established by the influence of European regulations and international standards (3.). This case study shall finally serve as a further piece in the mosaic of the understanding of the rule of law in its transnational context, where a clear picture has still not been provided. The article concludes that it is necessary to understand the rule of law in a global context in its plurality of transnational rules of law, which depend on the unique interrelation between the respective national legal systems and the international level (4.).

2. The Effects of the Economic Crisis on the Rule of Law

The financial and economic crisis had a major influence on the political and social developments of the last ten years or so. The economic crises moderated the dynamics of globalisation and created pressure on states to find new solutions for structural problems. There are different links between the economic developments of a nation state and its concept of a rule of law. Most prominently, the World Bank Governance indicators²⁴ illustrate how a solid legal system promotes economic welfare. Not only does the legal system influence the economic system, but the economy also has the potential to affect the foundations of law. The collapse of an economy can also lead to a breakdown of the legal system. A prominent example of such a development in the economic crisis was Iceland. The banking system collapsed and the state was no longer able to resolve problems on a financial basis alone. The necessity of the enactment of a new constitutional foundation of the state was the result.²⁵ The example of

²³ Noelkaemper, n. 21, p. 76.

²⁴ See <<http://databank.worldbank.org/data/databases/rule-of-law>>. Accessed 15 March 2016; see also the critics of such an approach, Mattei and Nader 2009.

²⁵ The constitution-making process, however, resulted in other problems. See e.g. Landemore 2015, pp. 166-191; Oddsdóttir 2014, pp. 1207-1220; B. Thorarensen, ‘Why the Making of a Crowd-Sourced Constitution in Iceland Failed’, <<http://constitutional-change.com/why-the-making-of-a-crowd-sourced-constitution-in-iceland-failed/>>. Accessed 15 March 2016.

Argentina shows how economic crises and the constitutional states of emergencies can lead to vicious circles of instability.²⁶

The interrelations of economic and legal systems can be analysed in Luhmannian terms. Both are social systems which are autonomous and per se independent of each other. They can be characterised differently. While legal systems follow the binary code of lawful/unlawful and use the norm as a medium, economic systems are understood with a payment/non-payment code using the medium of money.²⁷ Although these systems are autonomous, they not only irritate each other but are also coupled structurally, which means that one system has a permanent reliance upon the other system.²⁸ An economic crisis has the potential to irritate the legal system and to affect the foundational basis of a legal system, which also involves the rule of law principle.²⁹

Crises tend to reveal the structural problems and deficits of systems, because the pressure created by a crisis leads to the breakdown of already existing weaknesses. The economic crises revealed structural problems and deficits not only of the global economic system, but also of domestic economic structures. The deeper these deficits are, the more they are linked to the legal framework of the affected economy. As the legal system is affected significantly, the domestic rule of law will be submitted to its own endurance test. Thus, economic crises can result in a demanding challenge for a democracy³⁰ and the rule of law in the particular country affected.

When an economic crisis reaches the level of the national economy, this requires governments to react in different forms, which regularly also creates an impact on the national budget. Moreover, the government will develop exemptions or special treatments for certain actors of the economy. In certain cases – as the economic crisis has shown – even the nationalisation of certain organisations (e.g. banks or insurance companies) might be necessary. Moreover, governments have to guarantee adequate transparency and disclosure of criminal behaviour by board members of stock companies or significant failures of regulatory bodies.

In times of economic crises, the different aspects of the rule of law (as described above)³¹ are challenged. The government still has to apply national legislation to resolve situations of

²⁶ The role of the international economic interests shall not be underestimated in the Argentinian context.

²⁷ See Luhmann 2015.

²⁸ Luhmann 2007, 390.

²⁹ Obviously an economic crisis not only affects the legal system of a country, but also other social systems, like the political system or even the academic system. In many countries, universities have come under pressure because of cuts in state funding, the lack of fee-paying students or the limited investments by corporations.

³⁰ See e.g. Cramme and Hobolt 2014.

³¹ See Sect. 1.

financial pressure or to change legislation according to the procedures as provided by the constitution. An independent judiciary has to resolve conflicts between different groups of society (e.g. banks versus creditors). Corruption, criminal offences and other forms of misconduct are usually elements which are revealed in a review of the processes which led to an economic crisis. Thus, an effective public prosecution of the relevant offenders will be necessary. Finally, the government has to guarantee that a balance is achieved between the economic welfare of a country and social justice for the country's people, who are affected by the economic crisis.

These elements of pressure on the rule of law primarily represent a domestic perspective, which does still neglect the transnational dimension. To expand on the transnational dimension it will be necessary to go more into the details of a concrete case study, which in our case involves the effects of the economic crisis on the Austrian banking system.

3. The Austrian Banking System as a Case Study

3.1 Austrian Banking from a post-WWII Narrative to the EU's Eastern Enlargement

The structural problems of the Austrian banking systems, which were revealed by the economic crisis, are rooted in the development of Austrian banks after WWII. The Austrian banking system was structured in small entities following a corporative understanding of society. Over the subsequent 50 years, these smaller banks were re-structured to form medium-size banks. The role of politics in the Austrian banking system was significant. Close personal contact between leading politicians and the top management of the banks influenced the economic development of the country.³² Austrian politics was characterised by the so-called 'social partnership', which refers to the close interrelation between representatives of employers and employees to shape political decision-making.³³ The role of the banking system as the core financing structure of Austrian companies and its ties to the Social Democrat politicians, who were permanently in government between 1970 and 2000 and represented the interests of employees, were significant. The political expression of this development could be observed in the Austrian Chancellor Franz Vranitzky (in office 1986-1997), who was not only Chancellor of the Austrian republic and leader of the Social-Democrat party, but also director-general of

³² See insight to the Austrian banking system in Cordt et al. 2015.

³³ See the rise and fall of the Austrian social partnership in Tálos 2006, pp. 425-442.

an Austrian bank before moving into government. The close cooperation between politicians and top management figures in banks made this system particularly vulnerable to local corruption. With the change of the political elite and the different circumstances in the years after 2000 in particular, this potential was realised and resulted in the Hypo scandal, which had dramatic and long-lasting effects on the country.³⁴

An important characteristic of the Austrian banking system was the so-called ‘bank secrecy’, which was designed to protect individuals against the state having knowledge about their assets.³⁵ The political importance of the bank secrecy was enormous and still holds a kind of sacred value for the Austrian population. Although the Austrian concept of ‘bank secrecy’ could not be compared to that of the Swiss banking system, the lack of transparency of the banking system led to a lack of control and simplified possibilities for misuse with regard to money laundering and other forms of illegal activities.

The 1990s brought many changes to the Austrian banking system. Besides the structural consolidation of the banking system, the new markets in Eastern Europe opened up new potential to Austrian banks. While German banks were much more engaged in the rebuilding of Eastern Germany, Austrian banks had – based on an old monarchic culture – the potential to grow and to earn much more money than would have ever been possible in Austria. However, the enormous investments not only created huge potential, but also a systemic risk to the Austrian banking sector in general.³⁶

Besides these huge investments in Eastern Europe, participation in the global financial markets became much easier because of technological developments and economic globalisation. Participation in complex financial products, e.g. in the US stock exchange, created a temptation to gain huge profits in a short time scale. This kind of high risk concept did not stop at the level of the banks but was also sold to potential borrowers. Individuals, who typically wanted to finance a house, signed consumer credit agreements with so-called foreign currency loans, which have high-risk elements. The consumers were not properly informed about the risks; on the contrary, the impression was created that these kinds of foreign currency loans were a bargain.³⁷ These foreign currency loans were not only sold in Austria, but also all over Eastern Europe, and increased the potential problems of the Austrian banking sector even more.

³⁴ See Sect. 3.2.2.

³⁵ See the traditional understanding of the Austrian bank secrecy in Liebscher 1984, pp. 253-255.

³⁶ See in Cordt et al., n. 32.

³⁷ Foreign Currency Loans are a high-risk banking model which was used by Austrian banks on a regular basis, especially in the context of private financing of houses. There was a significant lack of information about the risks for the consumers.

Finally, it is important to mention that Austria acceded to the EU in 1995, which led to a significant change to the legal framework. The European influence on the Austrian banking system developed step by step, but changed the framework forever. Examples included anti-money-laundering legislation or provisions to prohibit financing of counter-terrorism. The introduction of the Euro and the EU's eastern enlargement complemented the overall change to the Austrian national banking system and Austrian economics.

When it comes to the effects of the global financial and economic crisis in Austria, the structural struggles were deeply rooted in the Austrian banking system. Three examples illustrate the necessity for change in the banking system and show how the legal and judicial system reacted to these structural deficits. These examples refer to banking secrecy, local corruption and foreign currency loans, which are based on the structural deficits of a lack of transparency, a lack of effective control and a lack of consumer protection, the result of a development over decades in the Austrian banking system.

3.2 Challenging the Rule of Law: Mismanagement, Privileges and Corruption Uncovered

Going back 20 years, the Austrian banking world seemed perfect. Protected by a broad concept of banking secrecy, strengthened by the expansion in Eastern Europe and boosted by the possibilities of global speculative trading, the Austrian banks looked into a bright future. Different banking scandals shall illustrate how mismanagement, privileges and corruption led to a significant 'earthquake' in the Austrian banking landscape, which also affected the Austrian economy and challenged the Austrian rule of law.³⁸

3.2.1 The BAWAG Affair

The first crack in this perfect picture of the 1990s appeared with the BAWAG scandal in 2006. BAWAG was a bank (remarkably) owned by Austrian unions. The bank was the financial backbone of the unions. As already mentioned,³⁹ it was part of a corporative element of the Austrian banking system and illustrates the interrelation between the banking system and Austrian politics. Huge financial losses in the 1990s, which resulted from large-scale speculative trading in international financial markets, were the starting point of the bank's

³⁸ These three scandals are just three examples of significant damages of Austrian banks. But further examples could be found easily. Another remarkable scandal refers to the Meinh bank, which still makes courts busy and led to bizarre legal action by this bank on the basis of a BIT (bilateral investment treaty) between Austria and Malta.

³⁹ See Sect. 3.1.

problems. The top-level management of BAWAG concealed the losses by criminal activities, including breach of trust and balance sheet fraud.⁴⁰

All internal and external methods of control were eliminated. Different layers of external control of the banks, including the Austrian National Bank, the independent financial market authority and the Ministry of Finance, represented by a state commissioner, who is a member of the supervisory board of the respective bank, failed to identify or to pursue the problems. Like the state-related supervision, the auditing system failed, as did all internal mechanisms. The president of the Austrian Trade Union Confederation even provided the strike fund of the union (without following the appropriate procedure) as a financial guarantee to prevent the losses from being revealed. In the end, the bank went bankrupt due to a US banking scandal, which was linked to the BAWAG off-shore activities.⁴¹

BAWAG was granted a state guarantee in 2006, which was approved by the EU, and the state took over the losses. Finally, the former workers' bank was sold to a US Hedge Fund, which is a telling end to the story. The losses of the state were fully compensated by the sale of the bank (for more than three billion euros). Further criminal proceedings and civil lawsuits followed and revealed the whole disaster.⁴²

The BAWAG scandal illustrated significant structural problems of the Austrian banking system even before the financial crisis started in 2007. The lack of effective control by all institutions involved became evident. The government, however, did not react to the structural deficits. The BAWAG scandal is important to help us understand that there had already been significant cracks in the surface of the Austrian banking landscape before the economic crisis, these being mainly related to the legal framework of the banking system in Austria.

3.2.2 The Hypo Scandal

The much bigger Hypo scandal is related to different incidents of corruption in Carinthia, which were revealed by the financial crisis. The irregularities with the Hypo bank seem to have started in the first years of the new century, when Jörg Haider was governor of Carinthia. Although Jörg Haider is internationally much better known as a right-wing populist politician of the

⁴⁰ See <http://diepresse.com/home/wirtschaft/economist/bawag/316119/Chronologie_Der-BawagSkandal>. Accessed 14 September 2016.

⁴¹ See <<http://www.faz.net/aktuell/finanzen/finanzskandale/finanzskandale-3-die-bawag-im-casino-mit-dem-vermoegen-der-genossen-casino-gespielt-1149375.html>>. Accessed 14 September 2016.

⁴² See n. 40.

Freedom Party in Austria,⁴³ the interrelation between the state bank of Carinthia, which was the origin of the Hypo bank, and the Carinthian governor is of great relevance for an understanding of the Hypo scandal. Haider used the Hypo bank as a house bank to finance various economic projects for the region, even if the financial basis of the respective projects was more than doubtful. The top management of the bank, however, did not oppose such activities, but rather supported various projects. In the 1990s, the bank provided debt relief for a politician of the Freedom Party to the tune of more than 2 million euros. Even when the bank was sold in 2007, Haider's political party allegedly gained more than 25 million euros as illegal party funding. The deep link between Carinthian politics and the Carinthian bank reveals systematic corruption and significant criminal activity. In economic terms, the local corruption increased the financial pressure on the bank to gain money quickly from other sources.⁴⁴

The Hypo activities, however, were not limited to Austria, and the bank also expanded to Eastern and particularly South-Eastern Europe. Hypo was especially active in the Balkan region, in particular in Croatia. The analysis of the whole scandal revealed manifold forms of corruption and criminal activities in the context of the Croatian activities. A major result of this huge expansion was bad loans without relevant credit assessment. The estimated overall loss including bad loans in Austria and all other 10 countries in which Hypo was active amounts to more than 10 billion euros.

As we could already observe in the context of the BAWAG affair, the Hypo bank also tried to gain money from international highly-speculative investment and multiple speculative transactions on international stock markets. In cooperation with international banks, Hypo participated in transactions which could not be and were not properly handled by the bank. It established a network of off-shore companies and especially used the Principality of Liechtenstein for its international speculations. These investments also involved Icelandic banks as well as the US investment bank, Lehman Brothers. When the US subprime market collapsed and international pressure increased on the global banking sector, the Hypo bank also broke down.

Two important elements have to be added to understand why the problems of the bank became visible earlier. Both are related to the ties between politics and the banking system. First, the bank received state guarantees from Carinthia up to the amount of 24 billion euros. The state guarantee was granted by the government to enable better conditions on the international

⁴³ For the broader picture relating to the effects of Jörg Haider and the Freedom Party in a European context, see Lachmayer 2016.

⁴⁴ See <<http://diepresse.com/layout/diepresse/files/dossiers/hypo/>>. Accessed 14 September 2016.

financial market. The state annual budget, however, was only 2 billion euros a year. Second, between 2000 and 2006, Karl-Heinz Grassler was the finance minister, a former member of Haider's party and himself involved in many corruption scandals, as revealed after the Hypo collapse.

Before the whole disaster started, the story seemed to have a happy ending when Jörg Haider sold the bank to the Bavarian state bank in 2007. The whole deal was also accompanied by many dubious activities of an investor group, which also profited from the sale of the bank. After the breakdown of the bank, the whole disaster was revealed step by step. In this phase of the complete collapse of the Hypo bank, the Bavarian state bank convinced the Austrian federal government to nationalise the bank because of the extensive state guarantees of Carinthia, which would have led to an insolvency of the state of Carinthia. The Austrian government nationalised the bank and the full loss, amounting to more than 20 billion euros, was revealed. Since then, the Austrian government and all other branches of the state have been busy dealing with the various implications of this financial, political and legal disaster.⁴⁵

What followed were many criminal proceedings, civil law suits, rescue packages by the legislation, investigation committees, etc. The true dimension of the scandal and the complex manipulations involved are still not fully clear and the legal and economic recovery from the HYPO scandal will last for many years to come.

3.2.3. Conclusion: Challenges to the Rule of Law

The Hypo scandal described had a tremendous impact on the government's options for economic activities. The national budget and the national economy have been heavily affected by the financial burden. The possibilities to govern in the economic crises have been restricted to an absolute minimum. The effects of the Hypo scandal are not only of an economic nature, but also – since the economic and legal systems are interrelated – significantly relevant to the rule of law in Austria.

Governmental institutions were involved in both scandals mentioned. First, a high level of corruption in the Carinthian state government showed that the informal ties between politics and banks led from the lack of transparency to corruption. Second, the Austrian *Länder* (states) provided excessive state guarantees to support the banking system overall. Third, the government and its authorities lacked adequate control and supervision of the banks although

⁴⁵ See n. 44.

various actors, like the National Bank, state commissioners or the independent financial market authority, were in place. Last but not least, the state intervened after the collapse of the banks in the form of state guarantees or nationalisation, which does not seem to be the right economic decision. The scandals described challenged the state to revise its approach, but this did not take place after the BAWAG affair and thus was followed by the even bigger Hypo scandal. Even today, the government faces a challenge to regain regulatory control over the whole banking system.

The legal reconditioning of these scandals required an effective public prosecution and legal protection by an independent judiciary, which upholds the rule of law, although the economic pressure on the whole country is very high.

Finally, all these scandals call into question substantive equality in the country, because they shift the national budgetary possibilities towards the intervention in the Austrian banking system, while neglecting the stabilisation of the national economy in times of economic crises. Moreover, the huge financial investments in the banking system can only be financed by cuts in other policy fields, from social welfare and the health-care system to the expansion of public transport or the funding of research and universities.⁴⁶

The role of international and European regulation and standards to foster the regulatory regimes in banking system was significant. The European Union set the level for state interventions in the banking sector by (dis)approval of the European Commission. Many new regulations and directives⁴⁷ re-set the legal framework of the banking system in Europe. The possibilities of the national banks were limited by the European Central Bank. New concepts of rescue concepts and stress testing programmes were developed to prohibit similar economic crises.⁴⁸ Finally, international standards like Basel III⁴⁹ increased the conditions which have to be met by the banks.⁵⁰ The Austrian response to the financial and economic crisis in general and the Hypo scandal in particular is framed by the international standards which were integrated by the Austrian government and courts step by step.

3.3 Re-Establishing the Rule of Law

⁴⁶ See regarding the impact of the economic crisis on social welfare in Europe O’Cinneide 2014, pp. 169-201.

⁴⁷ See e.g. the Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV) or the Regulation (EU) No. 575/2013 on prudential requirements for credit institutions and investment firms (CRR). See also <http://europa.eu/rapid/press-release_IP-12-570_en.htm?locale=en>. Accessed 14 September 2016.

⁴⁸ <<http://www.eba.europa.eu/risk-analysis-and-data/eu-wide-stress-testing/2009>>. Accessed 14 September 2016.

⁴⁹ <<http://www.bis.org/publ/bcbs164.pdf>>. Accessed 14 September 2016.

⁵⁰ See regarding the role of the rule of law in informal international law making Duquet et al., n. 14, pp. 75-95.

3.3.1 Transnationalising the Austrian Banking System

In the last 20 years the Austrian legal system has been confronted with the implementation of European and international standards with regard to transparency, control and regulation of the Austrian banking system. The Austrian government refused for a long time to reduce the privileges of the Austrian banking system.⁵¹ The ties between top management of the most important banks and the leading politicians of the states contributed to this situation. This protected state of the Austrian banks resulted in transnational greed, which led to a breakdown of certain banks.

The European Union responded to the financial crisis with even higher standards for the banks and national banks in Europe. This intensified regulatory regime also requires stronger supervision and control of the banking system by the relevant authorities. Step by step, these international standards have become part of the Austrian statutory banking law.

An important step towards professional banking on an international level is the abolishment of banking secrecy in Austria. Again the legislative changes developed step by step towards a reduction of banking secrecy, which has still not been fully abolished today. As a first step, the accounts of foreigners were opened up to other countries which have a mutual legal assistance treaty with Austria.⁵² As a second step, Austria agreed to join the OECD/CoE Convention on Mutual Administrative Assistance in Tax Matters.⁵³ As a third step, Austria introduced as an anti-tax-fraud measure the possibility for the highest tax authorities to have easier access to the bank accounts of corporations and citizens.⁵⁴ To summarise, the 'sacred' bank secrecy is very much limited and enables the state on a proportionate basis to investigate tax fraud and other forms of money laundering. Due to European requirements the banks are obliged to cooperate with the police authorities to identify all forms of financing terrorism or money laundering.

As mentioned above,⁵⁵ the granting of consumer credits as foreign currency loans was another huge domestic problem of the Austrian banking system. The courts finally decided that banks were liable for flawed advice regarding foreign currency loans.⁵⁶

⁵¹ See already the Directives 89/646/EC; 2000/12/EC; 2002/87/EC; 2006/48/EC; see also Raschauer 2010, pp. 161-265.

⁵² See Kerres and Pröll 2009, pp. 623-626.

⁵³ <http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters_9789264115606-en#page1>. Accessed 14 September 2016.

⁵⁴ Günther and Jergitsch 2016, pp. 106-118.

⁵⁵ See Sect. 3.1.

⁵⁶ See Abele et al. 2016, pp. 12- 23.

International concepts of the rule of law influenced the Austrian standards of banking regulation. The new banking standards, like Basel III,⁵⁷ require much higher risk prevention by the Austrian banks. While the banks are complaining about the multiple new burdens they face (dealing with the financial crisis, higher standards for the granting of loans, higher equity ratio, etc), the banking system has to stick to tighter concepts of banking regulation to prevent such scandals from happening again so easily. The business of domestic banking has become more challenging, but also more professional. The Austrian rule of law was undermined and partially broke down in the financial crises. The re-establishment of the rule of law was mainly made possible by international pressure and the European response to the financial economic crisis. Without the transnational influence on the Austrian banking system, the response of the Austrian legal system would have been only half-hearted. The structural problems, as characterised, would not have been tackled and – as the BAWAG scandal has shown – only the main problems on the surface would have been addressed. The result is a professionalisation and globalisation of the Austrian banking system, which is now more oriented towards international standards than domestic privileges. This re-establishment of the rule of law will again affect the economics of the banking system, which has to adapt to the new legal framework.

3.3.2 Domestic Reconstruction of the Banking System

Manifold measures on a domestic level were necessary to resurrect the rule of law in the Austrian banking system. Besides these general influences of international standards, all branches of the Austrian state participated to deal in particular with the Hypo Scandal. Only a small sample of reactions can be presented in this article to show how the different institutions representing the rule of law were involved over the last ten years in analysing, reacting, prosecuting, setting new limits and finding new ways to regulate the banking system.

First of all, the government acted, e.g. by nationalising the Hypo bank. This move by the Austrian government, though highly criticised, was still a step to take over control and responsibility. The legislator supported the different efforts of the government to sort things out. Finally, after years of hesitation, a bad bank was established and the government tried to involve the creditors financially in the solutions for the disaster by using a statutory haircut, but this was refused by the creditors.⁵⁸ Nevertheless, the government took the necessary steps in a

⁵⁷ <<http://www.bis.org/publ/bcbs164.pdf>>. Accessed 14 September 2016.

⁵⁸ See n. 44.

way, which were based on the principle of legality. It tried to strike a balance between the rights of the creditors and the financial burden of the population.

Second, public prosecution was soon occupied by the various criminal activities involved in the bank scandals, starting with BAWAG and Hypo, but also including other related cases of corruption (e.g. the *Meinl Bank* case⁵⁹ or the different Grasser affairs⁶⁰). Public prosecution started many proceedings, which led to different convictions in the BAWAG affair as well as in the Hypo scandal. In many parts of the complex *Hypo* cases, the proceedings are still pending. Moreover, many civil lawsuits have still not been decided. The analysis of the existing cases remains ambivalent as the overall impression is that certain main players are already convicted but in many proceedings the complexity of the procedures is overburdening the judicial system. Certain proceedings have had to be repeated because of procedural errors by the judges involved. Other proceedings have not even started because the body of evidence is still not prepared. Finally, the complexity of the scandal created the overall impression that many criminal activities are still not known. The reaction to the various criminal proceedings has also led to statutory reforms of commercial criminal law. New economic offences have been established and others re-formulated (e.g. breach of trust or criminal law in the context of accounting).

The parliament also introduced a bank levy, which is based on the non-consolidated combined balance sheet total and speculative derivative transactions.⁶¹ Since 2011, the Austrian banks all together have paid more than half a billion euros each year.⁶² Remarkably, this money is used for the general national budget and does not serve any further purpose, e.g. the compensation of banking clients or the creation of a stability fund. This bank levy means that the Austrian banks are contributing half a billion euros to deal with the overall financial burden of the state that was caused by the deficits within the Austrian banking system. Without this specific tax, the overall state budget, which depends mainly on income/value added/corporate taxes, would have to solely compensate for these huge losses. If the rule of law is understood to involve social equality, the bank levy could be used to contribute to a better balance of the financial burden caused by the bank scandals. The greater proportion of the 20 billion euros, however, will still remain part of the national debt, which results in financial cuts to other government

⁵⁹ <<http://www.faz.net/aktuell/finanzen/finanzskandale/finanzskandale-13-julius-meinl-die-schmach-der-ehrwuerdigen-haendlerfamilie-1760114.html>>. Accessed 14 September 2016.

⁶⁰ <<http://derstandard.at/r1253596534288/Causa-Grasser>>. Accessed 14 September 2016.

⁶¹ Stability Fee Act, Federal Law Gazette I 2010/111.

⁶² There was an academic discussion about the constitutionality of the bank levy in Austria (see e.g. Hofko 2011, pp. 936-941). The Austrian Constitutional Court, however, confirmed the constitutionality of the bank levy (see Austrian Constitutional Court 14. 12. 2011, B 886/11).

services in health, education, science etc. The overall political margin for manoeuvre has been extremely limited over the years.

3.3.3 Constitutional Effects

It is remarkable that the Austrian banking crisis had different effects relating to the Austrian constitution. Two examples can illustrate these effects: the parliamentary oversight mechanisms were reformed and the Austrian constitutional court was involved in the haircut applied in the case of the Hypo bank creditors.

The constitutional system of inquiry committees by the parliament granted only the parliamentary majority to establish such an inquiry committee. For years, however, the government prohibited the establishment of an inquiry committee in the *Hypo* case. The Ministry of Finance established an internal investigatory committee, presided over by the president of the Austrian Supreme Court.⁶³ Finally, the government agreed to a constitutional amendment and opened up the establishment of inquiry committees in general to opposition parties.⁶⁴ The Hypo inquiry committee was established immediately and brought many insights to the collective institutional failure.⁶⁵

The second example refers to the haircut for creditors with which the government tried to reduce the financial impact of the huge losses. The Constitutional Court had to decide on the constitutionality of the respective statutory act. In a remarkable judgement, the Court decided that the provisions contained an unequal treatment of different groups of creditors and declared the Hypo Reorganization Act as null and void.⁶⁶ The Constitutional Court upheld the rule of law and accepted that the financial impact of its decision would cost the Austrian state many billions of euros. The financial dimension makes this judgment remarkable and shows that independent judiciary remains effective. The constitutional judges granted constitutional rights even though this meant that the state had to shoulder (financial) responsibility.

When it comes to constitutionalisation in the context of economic crisis, it could be observed around Europe that European budgetary constraints with regard to the so-called ‘golden rule’

⁶³ See the report: <<http://cdn.untersuchungskommission.at/pdf/BerichtHypo-Untersuchungskommission.pdf>>. Accessed 14 September 2016.

⁶⁴ See Article 53 Austrian Constitution, amended by Federal Law Gazette I 2014/101.

⁶⁵ <https://www.parlament.gv.at/PAKT/VHG/XXV/A-USA/A-USA_00002_00383/index.shtml>. Accessed 14 September 2016.

⁶⁶ Austrian Constitutional Court 28.7.2015, G 239/2015, see also Raschauer 2015, pp. 928-930, Wutscher 2015, pp. 586-592; Potacs and Wutscher 2014, pp. 248-259.

were constitutionalised.⁶⁷ Interestingly enough, this was not the case in Austria. The ‘golden rule’ is, however, provided in the National Budget Act and the federation and the states concluded a specific intra-national agreement on the topic.⁶⁸

The impact on the Austrian constitution was thus significant and contributed to the re-establishment of the rule of law in the Austrian banking system. The constitutional framework supported the effective review of governmental actions and strengthened parliamentary supervision and the review competences of the constitutional court.

3.3.4. Austrian Rule of Law as Part of European and International Standards

In conclusion, the Austrian bank scandals of recent years illustrated the effects of the financial and economic crises of the last 10 years in Austria. The crisis revealed privileged, corrupt and unprofessional structures in the Austrian banking system, lacking of transparency, control and legality. The legal system had to be improved to international standards and the courts had to prove that they are able to uphold constitutional rights and statutory provisions. The rule of law was challenged but finally strengthened in these financially difficult times. The cracks in the rule of law in the Austrian banking system became visible and the rule of law principle was challenged in general.

The legal recovery of the economic crisis also ended the old framework of the Austrian banking system. Overcoming the old traditional system was only possible by the involvement of international standards. The last 15 years also led to the professionalisation of the banking system, because many banks were sold to international banking corporations. These developments caused the traditional ties between leading politicians and top management of banks to become looser. The government was also not very successful as a ‘manager’ of nationalised banks. On the one hand, a stronger independence of the bank sector from Austrian politics will improve the possibilities of the government to review and supervise banks more properly. On the other hand, the banking system can act more independently of Austrian politics.

While re-adjusting the legal system, the judiciary provided necessary resilience, but also showed the limits of the court for dealing with complex criminal law cases. Too many cases

⁶⁷ See Adams et al. 2014.

⁶⁸ See Sec. 2 para. 4 Federal Budget Act and Article 2 of the Agreement of the Federation, the states and the municipalities on the Austrian Stability Mechanism 2012, Federal Law Gazette I 2013/30.

have still not been brought in an action by the public prosecutor. The Austrian case exemplified how the judicial confrontation led from criminal justice to constitutional justice.

The Austrian example also confirmed that legal justice fails to deliver social justice. Although the impacts of the bank scandals are reduced by the bank levy, the Austrian population still has to pay the price for an opaque, greedy and corrupt banking system. The government failed to provide an effective review mechanism, and this was dramatically revealed by the economic crisis. The long-term effects on society will limit further developments of the country in times in which major commitment by the state would be necessary to improve economic power.

The strengthening of the rule of law in the Austrian banking system will remain a major result of the economic crises. It only became possible by the changing of the Austrian rule of law as a transnationalising process towards European and international standards.

This positive evaluation shall, however, not ignore the fact that other Austrian banks also experienced huge losses⁶⁹ and that there are still significant remaining risks taken by Austrian banks in Eastern Europe, which have the potential to create a new financial crisis in Austria. Financially speaking, the government would not be able to handle another collapse of a systemic bank.

4. The Plurality of Transnational Rules of Law

The Austrian example illustrated how a very particular domestic situation is linked to the development of transnationalisation of the rule of law. The domestic rule of law becomes more and more dependent on the inter- and supranational legal framework. International and European legal systems, however, can only be realised in a particular domestic context. The mutual interdependence makes it clear that a transnational rule of law has to involve the national and the international level. The national level, however, always depends on the specific legal, political, economic and cultural circumstances in a specific country. Although international concepts of a rule of law might be formulated from a universal perspective,⁷⁰ the concrete implementation depends on the domestic preconditions.

Thus, a singular transnational rule of law does not exist,⁷¹ but can only be characterised as a concrete interrelation between a specific international legal framework and a specified domestic legal system. The particular transnational rule of law describes the unique interrelation between

⁶⁹ These developments especially refer to Raiffeisen International Bank and the Erste Group.

⁷⁰ See the theoretical concept of an international rule of law by Beaulac, n. 22, pp. 197-223.

⁷¹ Noellkaemper, n. 21, pp. 76-77 identifies certain contents of an internationalised rule of law, but does not focus on the different domestic concepts of the rule of law.

international and concrete national settings. In the case of Austria, international standards and European regulation had very specific effects and led to original adjustments which depended on the manifestation of the rule of law in Austria. The very same international provisions might have led to completely different effects in other European countries which are affected by the very same provisions. The individual and unique interrelation between international and national legal systems creates a specific expression of the transnational rule of law in the particular legal interrelation.

The result of this insight is that there is not just one transnational rule of law, but a plurality of unique, transnational rules of law, which depend on the specific interrelations between the international and the concrete national level. The concept of a rule of law cannot therefore be unified or harmonised in just one chart or a one-dimensional approach, but has to accept the networks of expressions of the rule of law in the transnational sphere.

The European countries, especially in the European Union, are struggling with the rule of law principle in many contexts. The financial and economic crisis is just one example⁷² and can be supplemented by a political crisis of right-wing populist parties, a migration crisis regarding the treatment of refugees or a security crisis to approach counter-terrorism⁷³ in a constitutional framework. It seems that the upholding of the rule of law is becoming more and more difficult each year. The only chance to further enable limited government, effective legal protection and social justice from an international perspective is to consider the plurality of transnational rules of law.⁷⁴

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⁷² See the comprehensive analysis by Cramme and Hobolt 2014.

⁷³ See in this context from a UK perspective e.g. Ewing 2010.

⁷⁴ See regarding an even stronger approach towards pluralism in the European context Avbelj 2012, pp. 400-409.

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