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Vienna, 24/25 September 2026 - Presentation on 24 September

The Constitution of Austria as a member of the European Union: Democracy, Rule of Law and Resilience

Preliminary remark

Given that there will be a second presentation tomorrow, covering the issues of „Austrian multi-level governance“, I will today focus on the **overall picture**, in particular on the development of the current Austrian constitution and on the main features of every stage.

Against this full background you will be in an optimal position to assess the current position of Austria within the EU framework.

A. The Overall Constitutional Tradition

Austrian constitution dates from **October 1920** and is thus, in the meantime, **one of the oldest (written) constitutions in Europe (EU)**.

Nevertheless, the constitutional tradition in Austria did not start with this text, but is **rooted much deeper** in history:

- (i) The immediate predecessor had been the **constitution of 1867**, within the so-called Austrian-Hungarian monarchy, consisting of the „Austrian“ part (comprising not only the current Austrian territory, but also what is now Czechia, Slovenia, southern Poland/western Ukraine, northern Italy, southern Croatia).

One element of this constitution, the **fundamental rights catalogue** (RGI 1867/142) has been kept by the Republic and is **still in force**

- (ii) This constitution of 1867 reflects, in essence, previous attempts of constitutional rule, namely the constitutions of 1848 and of 1849, provoked by the revolution of 1848, which were, despite ephemeral cancellation by the emperor end of 1851, continued in 1860/61
- (iii) Although the monarch's rule in the first half of the 19. century had been a true absolutist one (comparable to the French ancien régime), one should not forget, in order to assess the **amount of Austrian constitutional tradition**
 - a) the very strong constitutional traditions in the Kingdom of **Bohemia** as well as, in particular, in the hugh Kingdom of **Hungary** (then comprising also Slovakia and parts of Romania, Croatia and Serbia), both forming part of the Austrian Empire and influencing also the complementary parts of this state

- b) the long-standing tradition of the **Holy Roman Empire** (lasting until 1806, and until then still comprising, apart from Germany, Bohemia, Slovenia, northern parts of Italy and most parts of the current Austrian territory), which had **never known absolutist rule**, but had been a complex system of a multitude of cooperating entities/institutions each of which disposed only of limited powers (I will come back to this legacy tomorrow).

One specific element of this **tradition of**, modernly speaking, **checks and balances** is the fact that the **oldest two constitutional courts** in modern Europe, the Austrian and the Czechoslovakian Constitutional Courts, had been founded **both** already in **1920**, directly institutional successors of the Fundamental Rights Court enshrined in the abovementioned constitution of 1867, but indirectly stemming from the Court of the Holy Roman Empire based in Vienna („Reichshofrat“/“ Consilium imperiale aulicum“) which had already exercised constitutional jurisdiction over members (= federated states) of this Empire

B. The Stages of the Constitutional Development

This Austrian Constitution of October 1920 is, as said, as such still in force, however, we have to mention several stages of development:

- (i) the initial version (1920 – 1929)
- (ii) the version of the so-called second amendment (1929 – 1933)
- (iii) the period of the de facto suspension of the constitution (1933/1934)

- (iv) the replacement by
 - a) a new constitution (of 1 May 1934)
 - b) transitional provisions amounting to the conferral of full legislative powers to the Government
- (v) German occupation (1938 – 1945)
- (vi) the return to a modified version of 1929
 - a) under Allied supreme rule (1945 – 1955)
 - b) after regaining of sovereignty (1955)
- (vii) the overlapping by the **European dimensions**
 - a) accession to the Council of Europe/ratification of the **Human Rights Convention**/according (de facto) domestic constitutional rank to this Convention
 - b) accession to the EU (the effect of EU law, in particular primary law, in the version of the **Treaty of Lisbon** fully accepted by Austria).

C. Main Features of these Stages – Selected Remarks

- (i) The **original version of 1920** aimed to mark a **sharp contrast** to the previous constitution (of 1867), mainly by
 - a) stating the principle of **people's sovereignty** (whereas the monarch's legitimacy had been founded in the grace of God)
 - b) explicitly labelling the State a „**democratic** republic“ – then a semantic singularity in Europe

- c) granting **egalitarian vote** to **both** sexes (which had then been by no means already common European standard)
- d) establishing strong **predominance of (the democratically elected) Parliament** , in particular by according to it the competences (formerly prerogatives of the monarch) of
 - deciding on the **legislation** (leaving to the head of State only a notary's role)
 - formally **electing the Government**
 - **disposing of the armed forces**
 - binding the internal deploy of the armed forces on the **call of civilian authorities and under their command**
 - **cancelling any regular emergency competence** formerly having been accorded to the monarch

thus reducing the role of the federal president (= **head of State**) to a ceremonial minimum (consequently, election by Parliament sufficed)

- (ii) Nevertheless, as mentioned, already the original version showed **also a strong continuity to the inherited tradition of rule of law**, by
 - a) adopting the **fundamental rights' catalogue** 1867 (while adding only very few fundamental rights provisions directly in the constitution, such as an enlarged version of the **principle of equal treatment**)
 - b) even enriching the competences of the fundamental rights court of 1867 by establishing a **fully-fledged constitutional court**
 - c) moreover, by inserting a provision that „fundamental changes of the constitution“ needed consent by referendum, the constitution 1920 layed the ground for an understanding of **a two layer**

structure of Austrian constitutional law, thus reducing the competence of the „ordinary“ constitutional legislator

d) In sum, the elements lit b and lit c provided a **strong counter balance** to the predominance of Parliament outlined in 1/d.

(iii) In **1929**, not least against the background of the riots in 1927 when not only the Palace of Justice had been incended by an infuriated mob, but the Police had, while suppressing this riot, caused a veritable massacre, the structure of the constitution was considerably changed (mainly following the model of the then German constitution – which again would serve as a model for the current French constitution of the „V. Republic“):

a) **appointment of the government** as well as **supreme command** of the armed forces was re-conferred to the **head of State** (who, consequently, should be elected directly by the People)

b) conferral of emergency powers to the head of State (however, in order to meet the concerns of the Social Democrats, in a so diluted form that this provision has turned out to be useless, not least in the constitutional crisis of 1933 {see infra [v]})

c) The **role of the armed forces** was strengthened by stating that

➤ if any attack on a military unit occurred during an internal deploy of the armed forces, the command of the civilian authorities would end

➤ **ultimate responsibility for the functioning of the Constitution** lays with the **armed forces** (if still possible, under supreme command of the head of State/the command of the minister of defence, but also, if need be, by the armed forces themselves: now Article 79 [5] of the constitution)

- (iv) In 1929 it was also aimed to reintegrate some elements of organized civil society (the professional organizations) into the ordinary parliamentary system (I will come back to this attempt tomorrow).
- (v) In **1933** the constitution failed on a rather trivial occasion (the withdrawal of all three presidents of Parliament, meant merely tactically in order to secure the president's voting in a very narrow Parliamentary vote/as a political statement), but turned out to be unrepairable without transcending the letter of the constitution (due to the dilution of the emergency clause in 1929 [see supra [iii]/b)
- (vi) After one year's rule of Government without clear constitutional basis,
 - already facing the threat of Nazi Germany aiming at taking over Austria
 - and after an insurrection of the Social Democrats' militia suppressed by mainly the armed forces (in a much more careful way as 1927 [see supra [iii]])

the Government imposed a new **constitution (of 1 May 1934)**, based again (as during the monarchy) on the **grace of God** who was explicitly addressed as „the **source of all law**“, and **avoiding any elections**. In principle, the State should be structured, in continuation to the mentioned intention of the constitutional amendment of 1929, alongside the **professional organizations**.

In fact, however, the constitution of 1934 was never fully implemented. Instead, **Government ruled by extraordinary (transitional) competences** conferred to it in the very same Act by which the constitution 1934 was published.

Two features of this period are worth to be mentioned because they were kept after 1945:

- the establishment of **one single trade union** (instead of several trade unions alongside the political parties; I will come back to it tomorrow)
- the reintroduction of **compusory military service** (which had been prohibited by the Peace Treaty of St Germain 1920, but now tacitly accepted by the Allies of World War I/the League of Nations, against the background of the Nazi-German ambitions).

(vii) In 1945, after the end of German occupation, Austria came back to the constitution in the version in force at the point in time when it had failed (iv), with the only change that the attempt to formally integrate the professional organizations into Parliament was dropped (apparently, it had turned out that implementing this idea – not least inspired by Catholic Social Doctrine – properly was not as easy as thought).

Instead, representatives of the professional organizations were elected as prominent nominees of the political parties, one representative of the chamber of economics even raising to the position of federal chancellor (Julius Raab), and one representative of the single trade union to that of first president of Parliament (Anton Benya)

(viii) **After the end** of the Allied occupation in 1955 began the period when Austria was mainly left to herself.

- a) One political precondition for the end of occupation having been the acceptance of the status as a neutral country, Austria was **barred from integration** in what is now EU, although she was able to join as early as

1948, albeit not without strong Soviet protest, OECD, and also joined Council of Europe, with the main effect that the **Convention on Human Rights** was accorded de facto **constitutional rank** (thus enabling the Austrian Constitutional Court to apply not only the domestic yardstick, but also, in loyal cooperation with the ECtHR, the Convention).

- b) During most of these years, two political parties (the People's Party with Catholic roots) and the Socialist Party (with marxist roots; before 1934 and again since 1991: „Social Democrats“) dominated the country, not only the State's institutions but also society. Hence, **the written constitution did not matter to much with regard to legislation**, because these two parties (from 1945 – 1966 in formal coalition) were always able to **bypass any constitutional obstacle** to the common political will by amending the constitution - which they excessively did, even after the end of formal coalition, when Government was formed subsequently by both parties (1966 – 1970 by the People's Party, 1970 – 1983 by the Socialist Party), and of course again after reestablishment of the formal coalition (1987 – 1998).
- c) It was against this background that the Constitutional Court **activated the idea of two layers of constitutional law** (founded already in the original version, as mentioned in [ii/c]), thus aiming at **setting some limits to the political will**, mainly with regard to the **federalist** principle (safeguarding the core competences of the federated states), but also with

regard to the principle of **rule of law**, in particular to the requirements of the principle of **equal treatment**.

- d) Also the formation of Government was mainly left to the political parties, although, at second sight, the **head of State's role** (based on the competences conferred to him in 1929) was not unimportant, because he (since 1945 until 1986 always a socialist or at least a candidate supported by and loyal to the Socialist Party) guaranteed that the Socialists were kept in the government, or, at least, that there was no political cooperation of the People's Party with the third Party to the detriment of the Socialists).
 - e) As already mentioned, Austria introduced still in 1955 **compulsory military service** (although it was not until 1975 that this institute was enshrined in the constitution). Against the same background of her standing alone due to her neutral status, also the concept of a **militia army** was developed (formally enshrined in the constitution in 1988).
 - f) Likewise in 1975, Austria developed, at least on constitutional paper, the very wise concept of a „comprehensive defence“, supporting the military dimension by other dimensions, namely the „civilian“, „economic“ and the „economic“ dimension.
- (ix) It was not before 1995 that Austria was – after the decline of the Soviet empire (the „Eastern bloc“) - able **to join the EU** which herself, subsequently, underwent some constitutional changes (by mainly the treaties of Amsterdam, Nice, Lisbon).
- a) This accession was considered to amount to a **fundamental change** of the Austrian constitution and

thus confirmed by a referendum (the only one ever conducted under the current constitution – which is, even after this referendum, still in force as such, albeit in the fundamentally modified version, not an overall new constitution, and, thus, without any revolutionary discontinuity).

b) It goes without saying that membership in EU meant

- a **significant decrease of competence of the national legislators**, also and in particular to legislation on constitutional level
- an effect at least somewhat mitigated/partly compensated, at least in theory, by
 - the principles of identity, of subsidiarity, of specific conferral, and also by the (double) statement that Union citizenship shall not replace national citizenship (Article 9 TEU; Article 20 [1] TFEU)
 - the competences of (both houses of) the national Parliament to **participate in EU legislation**
 - the **participation** offered to the **federated states** as well as to the **professional organizations** in the two advisory bodies (CoR and ESC; I will come back to this issue tomorrow, only stating here that the model of ESC stems, historically speaking, from the very same root as the former Austrian intentions of integrating

these professional organizations into Parliament)

- a significant **increase of competence of the national Government** as member of the European Council/Council of the European Union (I will come back to it tomorrow)
- a significant **decrease** of the role of the **federal president** (due to the decrease of national legislation as well as of the amount of external policy/conclusion of international treaties left to a member state, given the competences of the EU common foreign and security policy), the more so **denying his participation on the level of European Council**
- while the effects on the different branches of the **judiciary** are more complex. Current EU primary law contains, in its **Article 2 TEU**,
- a set of **values**: „human dignity“, „freedom“, „democracy“, „equality“, „rule of law“, „respect for human rights“, including the rights of persons belonging to minorities“ (first sentence)
- a set of common **societal features**: „pluralism“, „non-discrimination“, „tolerance“, „justice“, „solidarity“, „equality between women and men“.

Both values and features bind all Member States, also beyond application of EU law (arg „these values are **common to the Member States ...**“).

From a **systemic** point of view, this insertion of overall values **reminds of the Austrian twofold structure of constitutional law** ([ii]/c and [vii]c)

From a **substantive** point of view If compared with the Austrian tradition set out before, we might assess that

- whereas the obligation to respect the values of „democracy“ as well as to „rule of law“ & „human rights“ should pose no problems at all for the State
- the obligations for respecting **in general** „freedom“, „human dignity“ as well as „rights of persons belonging to minorities“ **make explicit** what had, at best, on national level been before an implicit element of the „rule of law“, the principle of equality and the fundamental rights catalogues.
- Particular importance should, however, be given to the second sentence: in my view, this sentence (arg „... **in a society in which ... prevail**“) strengthens tendencies of according **horizontal effect**, to these features, but also, in the same way as to the freedoms of the single market, to **all the values** of the first sentence, **including fundamental rights**, a concept by no means already fully accepted in Austria

Of particular importance is, however, that the second recital of the preamble to the TEU states that

- „the universal values of the inviolable rights of the human person, freedom, democracy, equality and the rule of law“ – i.e. the essence of the values enshrined in Article 2 TEU – „ have developed from“

„the cultural, **religious** and humanist **inheritance** of Europe“

- The TEU had drawn „inspiration“ from this inheritance.

Because this reference to – among others – the „religious inheritance of Europe“ implies that the interpretation of at least these values mentioned in this recital has to take proper account of this heritage, which, in turn, is of a **transcendent nature** and, thus, **independent of popular will**.

Against the background of Austrian constitutional tradition, this is a **major step towards the line of thinking having underlied the constitution of 1934** (see supra [v]) – the only difference being that this religious inheritance is not construed as binding directly by the heteronomous authority of God, but by a – always revokable (cf Article 50 TEU) and thus autonomous – **self-commitment** of the respective member State.

- (x) Lastly, a glance to „**Resilience**“:

EU primary law contains two solidarity clauses,

- Article 222 TFEU (with regard to internal threats, including terrorist attacks)
- Article 42 (7) TEU (with regard to an foreign aggression against the territory of a member state).

It is exactly with regard to the second provision where Austria's political milieu has still almost **unsurmountable difficulties** to fully comply:

- Although **Article 23j** of the Constitution, when implementing on national level the Treaty of Lisbon, committed Austria already in 2010 to provide **full cooperation** within the framework of the common Security and Defence Policy, thus waiving the option granted by the Treaty of Lisbon to invoke a „specific character“ of the national „security and defence policy“,
- the current electorate as well as the vast majority of current politicians are apparently of the opinion that an opting out (by referring to Austria's „neutrality“) is still legally possible (with regard to politicians, it might, however, also be true that they simply do not dare to openly contradict popular opinion).
- The consequence is that even now when armed attacks of Russian forces already do occur on Union territory there is **no preparation whatsoever** not even within the Austrian armed forces as to the quality/quantity of the Austrian contribution which could be offered if need be.
- This unsatisfying situation is, however, **not an Austrian particularity**: in fact, since the Western European Union was dissolved in 2011, we lack **any institutional framework**, not to speak of **any operational** planning to implement Article 42 (7) TEU among EU member states.
- Of course, when drafted/ratified, the communis opinio had been that the technical issues would be implemented by NATO, so that Article 42 (7) TEU was only meant as a political statement. But, as we have seen, the future commitment of the USA, and, also, of Turkey, cannot be taken for granted any more, in particular not with regard to defending EU against Russia.

- So **external military resilience** of Austria, as a member of the EU, as well as of the whole EU, is **more shaky than ever**.
- Having said that I would only like to add that, due to these flaws, also attempts of developing what, in Austrian constitutional terminology, is called „**economic defence** policy“, have, on EU level, not yet passed the **embryonic** stage.