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Austrian Multi-Level Governance

I. Semantics

A. „Governance“: „Government“

This semantic juxtaposition (pun) became popular in the eighties of last century, the wider term „governance“ meaning „cooperation of governments, international institutions and networks, transnational organizations and specialized interest groups in civil society“; as may be inferred from the famous title of *Roderick Rhodes'* contribution „The New Governance: Governing *without Government*“ (1996), it was in particular this **focus on civil society**, with the eschatological aim of **replacing the State** altogether, which met the then Western „zeitgeist“.

B. „Multi-Level“

Also this term „multi-level“ – combined with the term „governance“ - was coined at the same time, by *Gary Marks*, and with specific regard to the governance structure of European integration, in particular what 1992 was labelled „European Union“.

When assessing the appropriateness of these semantics in this specific context, we should take into account that

- „European Union“ as such still has not yet transformed to a European (Super-)State
- but its main central institution, the European Commission, intended, in particular at this time, to downsize the role of its member states, trying even to bypassing them by establishing direct contact to subnational entities as well as to civil society (these tendencies of „participatory democracy“ being having been outlined in the „White Paper on European Governance“ 2001, but also enshrined in the current version of the TEU in Article 11 [1] and ²2], as well as in Article 17 TFEU).

II. Substance

In substance, however, neither „multi-level“ nor „governance“ are new phenomena in Europe, but deeply rooted in history.

In particular the structure of the Holy Roman Empire (and, hence, the territories covered for centuries by this political umbrella, i.e. namely what is now Germany, Be/Ne/Lux, parts of France, Switzerland, Czechia, Austria, Slovenia, parts of Poland and Italy) was – **horizontally and vertically – manyfold**, and without a clear separation between „res publica“ and „res privata“.

This background is still discernable in the „Social doctrine“ of Roman Catholic Church developed since late 19. Century.

Also in Great Britain, however, the idea of local and civil society self-government has always played an important role, influencing still Karl Marx and thus reimporting the idea of even fully replacing the State by mere self-administration of society to the European continent and beyond.

In sharp contrast the French political thought as well as practice aimed, before and after the Revolution, at a uniform and centralistic State, governed by a strong Government (in extremis to absolutist powers of the head of State, expressed in the famous „L'Etat c'est moi“ of Louis XIV.)

III. The Austrian Case

The territory of what is now the Republic of Austria has been mainly influenced by the tradition of the Holy Roman Empire, although also the opposite French tradition left traces.

A. Federalism

1. *Fundamental Status of the federated states*

- This **ambiguity** is already visible in the two very first Articles of the constitution, where Article 1 states: „Austria is a democratic republic the source of its law is the people“, while it is only Article 2 which states that Austria is „federal state“ composed of nine autonomous federated states“:

Because in a very fundamental sense stating at the same time that there is only ONE People as THE source of ALL law of THE democratic republic

and, on the other hand, that there are nine independent federated states which together form the federal state seems to be a **contradiction**.

- This normative finding is aggravated by the historical finding that
 - most of the federated states had been in fact separate members of the Holy Roman Empire
 - which had kept their legal status – in particular their separate parliamentary representation („Estates“) even after centuries of common rule by the same dynasty (whereas, i.e. the neighbour, Bavaria, had integrated all her territories in one common constitutional structure)
 - whereas the territory of what is now the Republic had, before, NEVER formed a constitutional unit.
- Not surprisingly, this ambiguity is reflected at the very beginning of forming the republic:
 - On the one hand, the provisional central government indeed asked the provisional authorities of the former „crown lands“ (the future federated states) – which had constituted themselves independently – for accession to the federation.
 - On the other hand, the constitution is NOT based on these accession declarations, but construed as an emanation of the ONE Austrian People (it is particular here where the French tradition, adopted by the central Austrian imperial government, influenced still the emerging republic#s attitude.
- Consequently, even now still **even the abolition** of some federated states or the abolition **of the federalist founding principle as such** (Article 2 of the federal constitution) does **NOT need the consent of the federated states concerned**, at least not when accomplished in the **procedure foreseen for a fundamental change of the constitution**

(which only needs the consent of 2/3 of both houses of Parliament and the consent by referendum).

- Hence, it is no surprise that also the **fiscal system** is in essence a uniform system on federal level, where the huge amount of state revenues is collected under federal law by federal authorities, and only in a second step distributed, again on the basis of federal legislation, to the federated states (and beyond).

2. *Political Impact of the federated states*

In sharp contrast, the political influence of the federated states in the overall political and administrative system is a quite considerable one:

- regarding sovereign administration, the federated states **operate most of federal administration**, since 2014 also on **administrative court level of first instance**.
- even more important is the amount of activities of federated states* administration under **private law** (although, since some decades, EU public procurement provisions impede to use this instrument as a tool of regional policy, by supporting regional enterprises
- the current electoral system gives **major influence to the regional organizations of political parties**, with the effect that not only the second house of federal Parliament is composed of members elected by the regional assemblies, but also vast majority of the members of the first house is selected on regional level
- so in practice an **informal institution** not foreseen in the current constitution: the **board of regionals heads of government** – plays an important role setting limits to the range of manoeuvre of the federal government.

3. *Selected features*

Due to the political impact just mentioned the federated states have been able during the last decades to strengthen even their constitutional competences:

- (i) since 1975, the federation may conclude treaties with the federated states, as well as federated states among themselves. In particular the vertical formate strengthens the position of the federated states, being able to negotiating on an equal footing with the feration rather than being bound unilaterally by federal legislation
- (ii) since 1985 constitutional provisions restricting competences of federated states need the consent of 2/3 of the second house of Parliament (= the house composed of members elected by the federal assemblies)
- (iii) since 1988 federated states may conclude international treaties with neighbour states of Austria
- (iv) since 2003, an increasing number of provisions of the federal constitution requires the consent of – each, i.e. normally of all – federated states concerned.
- (v) since 2008 modifications of the size and number of federated states needs their consent

It has, however, to be reminded that all these provisions have not been adopted by referendum and, thus, may, from a constitutional law point of view, all be cancelled again, as said, by an constitutional amendment ranking above, i.e. by a fundamental change of the constitutional order. Hence, in particular the amendments (i), (iii) – (v) are at stake, whereas the amendment (ii) would have to be applied even in the fundamental change procedure.

4. *Additional remarks*

a) *Judiciary*

In the original version, there had been a considerable impact of the second house of Parliament on the composition of as well the (supreme, then only) Administrative Court and of the Constitutional court. This impact had already been reduced in 1929, cancelling the impact on the Administrative Court altogether, while halving the one on the Constitutional Court (from six members to three).

In a way, the establishment of administrative courts of first instance in the responsibility of the federated states may be seen as a reinforcement of their impact to the administrative judiciary.

b) *Court of Auditors; Ombudsman*

- Whereas the original version of the federal constitution only provided one federal court of auditors, in 1982 the federated state Styria and in 1984 the federated state Salzburg established on federated state level separate courts of auditors (in the meantime all other federated states followed and their existence has been reflected by Article 127c of the federal constitution).
- In contrast, the institution of an ombudsman is much younger, not dating back before 1977. Also here, however, the federated states have been allowed from the beginning to establish additional ombudsmen by their own.

B. Local government

Municipal autonomy had a long tradition in all parts of the Holy Roman Empire, at all levels:

- some cities having even been members of the Imperial Diet (= Parliament);, thus disposing of the same rank as principalities. However, no city of the current Austrian territory ever reached this rank, with the sole – and very ephemeral - exception of Vienna (1237 – 1239)
- much more cities having formed part of the lower diets, as a considerable amount of Austrian cities did
- but even the towns under seignorial rule enjoyed some internal autonomy, mainly based on the participation of professional organizations (inns/guilds).

In addition, in the western parts of what is now Austria even peasants' communities enjoyed self-government and, consequently, representation at the regional diets.

In the aftermath of the revolution 1848 the concept of local autonomy was generalized and established as the bottom layer of the State.

Some cities even got a qualified autonomy (by conferral of tasks normally performed by State authorities of first instance).

In 1920/1922, the Austrian capital Vienna even reached the status of a fully-fledged federated state.

When drafting the Austrian constitution, there had been a vision of future municipal self-government of several stages , a vision

- eventually meant to replace the federated states altogether
- but never implemented, although still enshrined in the federal constitution.

Instead, since 1985 cooperation among municipalities, since 2011 even across the borders of the respective federated states, has been allowed.

In the same way as regional government also local government is twofold, comprising

- on the one hand full self-government within the limits set by federal/regional legislation
- on the other hand being entrusted the implementation of regional/federal administration.

C. Non-territorial self-governance of professional organizations

After the revolution 1848, the main element of municipal autonomy: self-government by professional organizations – was revived and generalized, by the establishment of „chambers“,

- of commerce/Industry (which were even given formal Parliamentary representation on regional level)
- but also of academic professions, as lawyers, physicians, engineers, ...
- eventually, this system was completed by the establishment also of a „chamber of employees“ (1920) and of agriculture (1922 onwards).

This very comprehensive (although not complete) system allowed

- the State to confer the execution of some of its administrative tasks to these self-governance bodies (following the model of regions and municipalities)
- to leave major elements of economic bargaining to the „social partners“
- in particular the whole sector of administering social insurance (health, unemployment, pension).

In addition, these professional organizations (of compulsory membership, only complemented by like-minded volunteer organizations, like, since the 1930ies, the single trade union or the association of industrialists) were able to represent the interests of their members on an **advanced level of aggregation**, thus facilitating the task of the Government to strive for sufficient acceptance of its political programme.

As mentioned yesterday, this effect was completed by integrating, on most prominent place, representatives of these „social partners“, on a personal basis, into the very top of the political system, as exponents of the leading political parties

This is exactly why, even up to now, social conflicts, in particular strikes and riots, have been very rare at least in modern Austria (after world war II).

D. Religious civil society

While until 1782, in the Austrian territories, it was only the Roman Catholic Church which was present in the public sector, growing tolerance also of other religious communities did not amount to a separation of the spheres of secular state and the religious sphere, but rather to enlarging the privileged status of the Catholic Church also to all other formally recognized denominations.

So the overall influence of religious communities, in particular in the field of education, health care and charity, has remained a considerable one.

IV. The European Level

Although it are the national states which are members of the Council of Europe and of the European Union, both institutions of European integration

have, as already briefly mentioned yesterday, strengthened the overall importance of

- the federated states
- the municipalities
- civil society, religious communities included.

A. Council of Europe

With regard to the Council of Europe, one has to mention one of its institutions; the **Congress of Local and Regional Authorities** which

- adopted, in 2014, the „Multi-Level governance Charter“
- provides an **international floor for politicians of local and regional level**, thus not only broadening their insight in international developments, but also increasing their political weight on national and subnational level.

B. European Union

On EU level,

- first one has to mention that, since the Treaty of Lisbon, national Parliament has been given direct advisory participation in the EU legislation process (**Article 12 TEU**), a competence which has given new importance in particular to the second house of the Austrian Parliament, dedicated to the representation of the interests of the federated states.
- In addition, it is already since Maastricht 1992 the **Committee of the Regions**, an advisory body to the EU institutions, which plays a similar role as the CoE Congress (although not a mere duplication, because, as far as can be seen, in the CoR mainly heads of regional governments are

represented, while in the CLRA it is, in the chamber of the Regions, mainly members of regional assemblies)

As a major effect of this regional influence on EU central institutions can be seen the adoption of EU secondary legislation (following a similar idea grown in the Council of Europe) on a „European Grouping of Territorial cooperation“, enabling regions even to cooperation across member states# boundaries (a tool used in Austria and Italy to mitigate the effects of splitting the land of Tyrol after World War I, but also alongside the frontiers of France/Germany od Germany/Poland).

- the older advisory body, however, is the **Economic and Social Committee**, assembling representatives of **organized civil society**, mainly of professional organizations – it is exactly here where Austrian non-territorial self-governance has found a very effective additional field of activity beyond the traditional field of lobbying in Brussels.
- This picture has been completed by the Treaty of Lisbon, establishing a horizontal and vertical „**dialogue**“ among (Article 11 [1] TEU) „citizens and representative associations“ and between them and the institutions (Article 11 {2} TEU).

Although this novelty of organizing democratic participation is not meant to replace traditional representative democracy (cf Article 10 [1] TEU), it is nevertheless an instrument to bring civil society closer to the political process, thus somewhat reducing the role of the political parties.

Lastly, Article 17 TFEU has to be mentioned, establishing a specific format of dialogue for Churches, other religious communities and, likewise, of „philosophical and non-confessional organisations“.

Also by this tool the **religious element has gained new importance** – fully consistent with the reference made in the second recital to the preamble of the TEU to, i.a., the European **religious** inheritance as the source of the **values**.

C. Final Assessment

By strengthening the role of

- regions (federated states),
- non-territorial self-governance as well as of
- other forms of civil society, religious communities included,

current EU seems to be **fully in line with many features of the traditional Austrian political system**, even to the detriment of what is still preponderant in the (spirit and text of) national constitution.