

THE AUSTRIAN FEDERALISM: SITUATION AND PERSPECTIVES

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SUMMARY: I. Introduction. II. Development of and changes within the Austrian Federation. III. The Austrian Federation and its constitutional institutions (formal Constitution). IV. Austria's political system (constitutional reality) and the value of federalism. V. Federalism and Europe. VI. Austria's experiences with federalism. Conclusions for the further federalization of regional states? VII. Final remarks. VIII. Select bibliography.

I. INTRODUCTION

1. About the Heuristic Value of Studies Concerning Federalism and the Terms of Federalism

One could ask oneself about the worth of studying different constitutional systems. Isn't it a saying that each federalistic system is a case of its own. Indeed the American, the Canadian, the Australian, the Swiss, the German and the Austrian federalism can be compared only within certain limits. However there are common basics and interesting specifics of the federalistic principle which can be found in each of these systems. Indeed the attraction of deeper scientific research lies in analysing the institutions of each system in connection with the other principles of this political system, with the historical and political background and with the state practice, in order to deduce general conclusions about the value and the potentiality of these institutions within their systematic context. The value of such research therefore lies in the deeper and more sophisticated knowledge of the structures of federalism and also in cer-

tain theories of the comsectionitive constitutional law for the state practice. These theories can not only be helpful as guidance during constitutional reforms (for example as at the moment in Switzerland) or for a new constitution (South Africa *e. g.*). They can also inspire and influence the state practice of related legal systems. That means above all that meanwhile especially between the European constitutional courts a kind of indirect discourse has developed that results in using —unconsciously or consciously, in the latter case either open or hidden— the *comsectionitive method*¹ when similar cases have to be decided. At any rate similar arguments and results can be found in a lot of decisions, what proves that it's worthwhile and useful regarding the legal structure of other states and the decisions of other European supreme courts.

Another important aspect is that especially in the 20th century the secular trend of growing central powers obviously was no longer going on continuously. The centralized state and the “super state” are no longer the everywhere wanted model. After the World War II federalistic concepts were not only kept (Germany, Switzerland, Austria) but one could also watch the development of new federalistic structures (Belgium *e. g.*) though especially the multinational states of the former East Bloc (Soviet Union, Yugoslavia) disappeared because of their totalitarian character. On the other side manifold tendencies for regionalisation and towards the creation of quasi-federalistic constructions were given an increasing impetus. There may be different reasons for the motivation for federalism or for the *strengthening of a federalistic order*: for example to cool down nationalist tendencies in a multi-ethnic political system, the intention to compensate regional differences in development, the attempt to promote democratization and so on. At any case the deeper reason is man's recall of smaller and easy to survey areas within structured orders. Therefore, the further integration of Europe will probably have to be structured in a federalistic way.

¹ Its importance is rightly emphasized by *Stern*, Deutsches Staatsrecht I, 2nd ed. (1984) 34 using the following words: “It analyses similiar regulations from different legal orders and uses the comsectionitive method. As far as public law is concerned it must be used with caution and can exert a certain controlling function”. For the value of comsectionitive studies in federalism cf. also the preface of Schäffer to the very interesting monography of Jaume Vernet, *El sistema federal austriaco* (Barcelona, 1996).

2. Terminology

For clearness in terms one has to distinguish between the following notions:

- a) On the one hand federalism is a term used to describe political systems; in that case it means federations and also asymmetric forms of government with partially autonomous regional structures. On the other hand the term federalism is meant in a more general way which refers to all fields of society and culture, for example also political parties (federalism as political way of life). Supra-national structures will increasingly be judged according to this feature.
- b) Interpreting federalism within state structures there are two main streams. One stream stresses the principle of subsidiarity and the historically based political autonomy of member states. The other stream considers federalism as part of a general organizational principle of decentralization, reaching from the whole state to the member states, to the regions, to the municipalities and even to smaller social groups. These ideas of order sometimes also have a close relation to certain ideologies (conservative-christian social or socialist ideology).
- c) Moreover these models also show analogies with certain legal theories concerning federations. The so-called *Staatenstaatslehre* emphasizes the historic merger of the states (*Länder*) into a (con)federation (*Bund*) and tries to deduce from these historical facts that the state power of the *Länder* cannot be derived from the power of the *Bund*. This theory only fits for some cases of the development of a federation. It cannot explain juridically that in a federation the constitution (of the central state) is the only source of the whole legal order and that there are no exclusive rights of the constituent federal states. On the other hand the *theory of decentralization* (essentially founded by Kelsen) describes the federation as a specifically decentralized legal order, in which the partial legal orders of the *Bund* and of the *Länder* can be derived from the same source—the constitution of the whole state—. According to this explanation the self-governing-bodies are different

from the territorial units only in degree. The advantage of this theory consists in making the irrational idea of a split up-sovereignty (double sovereignty) unnecessary, and in fact —at least for the Austrian legal order— it is a very fitting model of explanation.

II. DEVELOPMENT OF AND CHANGES WITHIN THE AUSTRIAN FEDERATION²

Here one can just sketch the history and development of the Austrian Federation but one has to keep in mind that the fact that a country as small as Austria of today (with about eight million inhabitants) is organised in a federalistic way can only be explained by history.

1. In the ancient German Empire's constitutional law the member states of the Habsburg monarchy first were only linked by a "personal union". Later on (after the so-called Pragmatic Sanction) they formed a unity in the meaning of the dynastic constitutional law ("real union"). The *Länder* never lost their historically formed individuality, because the policy of the Habsburgs tried to reach unity in law and administration only step by step. During the Austro-Hungarian Dual Monarchy (1867-1918) the individual crown-lands of the Austrian part of the Empire, which did not always represent different ethnic groups, had more or less the status of big self-governing bodies (or at the best of "fragments of State"). Just before the end of the World War I plans about the change of the monarchy into a federalistic system were intensively discussed, motivated by the hope to give the dispersing peoples (ethnic groups) of the Austrian multinational state an equivalent representation and possibility to express their interests. But these attempts had come too late.

2. On the territory of the former Austrian-Hungarian monarchy there formed a number of national successor states. The centrifugal forces of nationalism then were stronger and more attractive than the idea of a multi-ethnic Danube Federation, in which all the social and political tensions could have been compensated for everybody's advantage. After the end of the monarchy Austria was more or less a small German speaking state. Nevertheless, after long lasting constitutional debates this new and ethnically quite homogeneous small state gave itself a federalistic structure.

² Cf. Ermacora, *Österreichischer Föderalismus. Vom patrimonialen zum kooperativen Bundesstaat* (1976).

The development and the structure of the Austrian federalism (since 1918) may be of interest seen from the comparative point of view, because with this political construction it worked twice (1918/20, 1945) in order to change a centralized state into a federation in a way of “decentralisation” and, by this means, to establish a permanently stable political order.

The foundation of the Republic took place on October 30th, 1918, when the Provisional National Assembly (centralistic component) passed the necessary resolution. At the same time Provisional assemblies of the *Länder* were established (federalistic component).³ Looking back into history there are different possibilities to explain the beginning of the Austrian Federation:

- a) foundation of a centralized state with subsequent decentralisation; or:
- b) foundation of a new Federal Republic by the member states; or:
- c) a complex process initiated by central and regional authorities.

Since 1920 the legal reason for the union of the *Länder* in terms of constitutional law has been the new Federal Constitution. Today’s shape of the Austrian federation is the product of many draft constitutions, two conferences of the *Länder* and above all of a *compromise between the leading political parties*. These different components have been the reason for some anomalies and centralistic features of the Austrian federation from the very beginning.

The Austrian federalism is an extraordinary creation in the field of constitutional law. Initially meant to become a part of the bigger Federation of the German Empire, it became autonomous right from the beginning and kept this autonomy even after the World War II by finding an Austrian national identity. This federalistic construction is characterized by a special link with the theory of law and state at the time of the beginning of the Republic, especially with the *Reine Rechtslehre (Pure Theory of Law)* formed above all by Hans Kelsen and Adolf J. Merkl. On the other hand, the Aus-

³ At the beginning there were also centrifugal forces: Vorarlberg wanted to become a canton of Switzerland (and a public hearing showed a strong majority of the people wanting that); in Tyrol one thought by splitting from Austria and founding an autonomous state one could avoid the loss of Southern Tyrol (Südtirol). At the end the idea of staying together was stronger, and the majority of the *Länder* passed explicit declarations of accession to the new federation.

trian federalism found specific historic and political conditions which made this state *a federation of the political parties right from the start*. The consequence were some anomalies of the Austrian federation's construction compared to the ideal of a federation. In practical political life the federalistic structures were partially superposed by party politics which caused changing possibilities for the new federalism to develop: they were less fortunate during the time of the 1st Republic, but became better with the beginning of the 2nd Republic in 1945. A stronger self-confidence of the *Länder* and a cooperative relation to the *Bund* did not develop before 1974.

3. After the World War II, in the so-called Second Republic (since 1945) Austria returned to its former constitutional law, as it was in force before the end of democracy, which also meant that it returned to its federalistic structure. Although in 1918 and also in 1945 the Provisional Constitution was very centralistic, federalism had quite some political energy and played a decisive part for the re-foundation and re-establishing of the Republic.

4. Despite this important role of the *Länder* during the times of the 1st and 2nd Republic's foundation a *weakening of federalism* could be observed in the years after 1945. During the time of the first "big coalition" (of the ÖVP and the SPÖ from 1945 till 1966) a good deal of public tasks have been centralised because of new constitutional provisions and the *Länder* lost competences in favor of the *Bund*.

5. After the end of occupation (1955) the *Länder* started to *oppose the growing centralism*. They were successful in establishing an informal, but very efficient communication among themselves, by holding conferences of the *Landeshauptmänner* (*Land* Governors) and the *Landesamtsdirektoren* (Directors of the *Land*'s Government Office) and by establishing a communication office of the Austrian *Länder*.

Then the *Länder* developed counter-measures for the constitutional federal policy. The most important initiative was the preparation of so-called *Forderungsprogramme* (a list of demands) of the *Länder*. They also published their own drafts concerning a change of the Federal Constitution in order to strengthen federalism. A partial re-orientation took place after 1970 in the spirit of a so-called cooperative federation. Especially the constitutional amendment concerning federalism in 1974 met some of the demands of the *Länder*.

6. Whereas knowledge and value of federalistic ideas was small among the people in 1960, this has changed to a *new federalistic dynamism* during the following decades, which cannot be explained just by remembering the historic roots.

This new federalistic dynamism can be seen above all in the following elements and aspects of the development:

- Recently besides the Austrian national consciousness (grown since the beginning of the 2nd Republic) a new *regional national consciousness* can be observed. This regional national consciousness to some extent has been promoted deliberately by the policy of the *Länder*. There was *e. g.* even a people's initiative in Vorarlberg (1979) demanding a special statute for Vorarlberg or at least a fundamental reform of federalism. The latter idea was supported by resolutions of the Diets (*Landtage*) of Vorarlberg and Tyrol.
- The *Länder* have —within the framework of their economic possibilities— their own *economic policy*.
- The *Länder* have *reformed their constitutions* in order to stimulate democracy.

These elements can be understood as a reaction to the development of the modern state: it seems to be a reaction to the monotony, anonymity, the difficulty to survey and the concentration of power of the central political structures.

Finally the debate concerning the reorganization of the Austrian Federation became a permanent topic. The *Länder* tried to get back lost positions and to realize the federalistic structure in a better way. As consequence a policy has been established, which can be called *a reform policy to reorganize federalism step by step* (and very often according to the political principle “do ut des”).⁴

7. On the contrary, the recent proposals of a so-called “Strukturreformkommission” (1991/92) and of a “Constitutional Convention” (since July 2003) are intended to completely reorganize the allocation of competences between the *Bund* and the *Länder* and to simplify public administration

⁴ Schäffer, “Bestandsaufnahme und weiterer Weg der kooperativen Föderalismusreform (1963-1991)”, in Pernthaler (ed.), *Neue Wege der Föderalismusreform* (1992) 13.

and state structure.⁵ The mentioned commission was composed of four professors (two of Constitutional Law, one of Financial Law, one of Economics) and high officials of the federation and of the states. In this working group the analyses and recommendations of the professors were discussed and after more than two years' work finally accepted. But this attempt of a *fundamental reorganization of the federal structure* failed for the present. What was the intention and what happened finally?

Starting from the described scientific basis a political contract was signed between the *Bund* and the *Länder* in 1992. The basic contents of this agreements were more or less identical with the commission's recommendations and have been the following:

- a reorganization of the allocation of competences between the *Bund* and the *Länder* in order "to create a well-rounded and finished allocation of the competences and with that of the responsibilities of the *Bund* and the *Länder*";
- the elimination of the type of framework-legislation which is too complicated;
- the principle, that federal laws should be executed by the *Länder* in autonomy which means that the "indirect federal administration" shall be replaced by an autonomous administration of the *Länder*;
- the further development of the *Unabhängigen Verwaltungssenate* (independent administrative tribunals) into real administrative courts of the *Länder*; and
- a "fundamental reform of the *Bundesrat*" (second chamber, state house).

Such a *reorganization of the structures of the federation* has been expected and seemed to be realised in connection with the adaptation of the Federal Constitution which was necessary in order to meet the requirements of the European Union. But after long and tough negotiations these efforts failed. The constitutional amendment in 1994 adapted the constitution only as far as absolutely necessary in view of the European integration. The reorganization of the federation has failed after all those forma

⁵ *Neuordnung der Kompetenzverteilung in Österreich. Grundlagen und Ergebnisse der Arbeitsgruppe für Fragen der Neuordnung der bundesstaatlichen Kompetenzverteilung (Strukturreformkommission)*, ed. by Bundeskanzleramt-Verfassungsdienst (1991).

and informal negotiations,⁶ because the centralistic orientated political forces, especially the Social Democratic Party did not want to pass important competences from the *Bund* to the *Länder*, but wanted to keep far-reaching rights of supervision in favour of the *Bund*, which was also a point of interest of the central federal bureaucracy. On the other hand the *Länder* did not want to accept uncalculable financial burdens resulting from the transfer of competences.⁷ Thus the big chance for a

6 Cf. Pernthaler-Schernthanner, *Bundesstaatsreform 1994*, Österreichisches Jahrbuch für Politik, 1994, 572 and Öhlinger, *Das Scheitern der Bundesstaatsreform*, Österreichisches Jahrbuch für Politik, 1994, 543.

7 According to the 19th Report about Federalism (annual reports are prepared by the Institute for Research of Federalism in Innsbruck) the following reasons were decisive for the rejection of the reorganization plan by the *Länder*:

The missing of financial cover for the reform and the uncertain allocation of the costs for the administrative courts of the *Länder* connected with the growing financial burdens for the *Länder* resulting from financing the costs for the EU and the connected compensations.

Introduction of administrative courts of the Länder. The existing “Unabhängige Verwaltungssenate” (independent administrative tribunals) should be replaced by administrative courts of the *Länder*, which would have had reformatory jurisdiction. They would have been tribunals according to article 6 of the EHRC and were meant to decide before the Administrative Court in Vienna and to give a release to this court.

The *Länder* thought that with such a large amount of changes of the Federal Constitution the autonomy of the *Länder* would have been seriously restricted, moreover the financing of the administrative courts was not clear at all. It can be supposed that the negative attitude of some of the *Länder* in respect of the administrative courts has also been a reason for the rejection.

Right to veto for the Ministry of Finance according to Art 98 section 2 of the Federal Constitution against tax laws of the *Länder*. This extraordinary right of the Ministry of Finance in person (after the Federal Government had not come to an agreement about using the right to veto) —a power, which in the view of the *Bund* had already been accepted by the *Länder* during the negotiations— was completely rejected by the *Länder*. This counter-demand of the *Bund* did not change during the negotiations about the draft.

Introduction of a new Bundesumweltanwaltschaft (solicitor of the environment of the Bund).

This would have meant an enlargement of the *Bund*’s supervision of the administration of the *Länder* in respect of environmental affairs.

Increase of the competences of the *Bund* in regard of environmental law, as following:

Enlargement of the competence “air pollution” (*Luftreinhaltung*) to the debit of the *Länder*. The existing restriction of this competence of the *Bund* (Article 10 section 1 c 12 of the Federal Constitution) saying “except the competence of the *Länder* in respect of heating systems“ should have been eliminated.

fundamental reorganization of federalism in Austria had been given away.⁸

Only recently, Austrian politics became inspired by the political work on European level which had led to a Draft European Constitutional Treaty, elaborated by a so-called European Constitutional Convention. In July 2003, an Austrian Constitutional Convention has been convoked: it shall discuss and elaborate a modernization and simplification of Austrian federal constitutional law. This could include also a better federalistic structure, but the political viewpoints of the delegates are very divergent – as it seems, too divergent that they might come to terms for a new federalistic structure.

III. THE AUSTRIAN FEDERATION AND ITS CONSTITUTIONAL INSTITUTIONS (FORMAL CONSTITUTION)

On principle the Austrian Federal Constitution realizes those elements, which can be generally regarded as the basic features of a federation.⁹

The typical structural elements of the Austrian federalism are the following:

Enlargement of the *competence of the Bund* concerning *surveillance of pollution*. The plan was that the *Bund* could take measures to monitor pollution and to get and administrate informations about it.

Enlargement of the subsidiary competences of the Länder:

The instrument of the competence of the responsible Federal Ministry acting in compensation because of the inactivity of the authorities of the *Länder* (regulated in Article 103 of the Federal Constitution) should be enlarged with the case of clearing “grievances, which mean a serious danger for the environment“. This was rejected by the *Länder*.

The *lack of constitutional provisions concerning the Landeshauptmännerkonferenz* (Conference of the *Land* Governors).

Though one would have had a lever because of the accession to the EU —the constitutional amendment needed the consent of the *Bundesrat*—, the Conference of the *Land* Governors refused to block the necessary laws in the *Bundesrat*.

⁸ See the cynical report of a high Vorarlberg official: Bussjäger, “Ist der Bundesstaat noch reformierbar? Streiflichter zum Scheitern der Bundesstaatsreform“, *Journal für Rechtspolitik* 1996, 8.

⁹ Cfr. Adamovich/Funk, *Österreichisches Verfassungsrecht*³ (1985) 123 ff; Altenstätter, *Der Föderalismus in Österreich* (1969); Öhlinger, *Die föderative Verfassung Österreichs*, Die Öffentliche Verwaltung 1978, 879; Schäffer, *Das Föderalismuskonzept der österreichischen Bundesverfassung und seine praktische Entwicklung* (1987); Walter/Mayer, *Grundriß des österreichischen Bundesverfassungsrechts*⁷ (1992).

- The federation is a union of states in the terms of constitutional law. Within this union on principle the *Bund* has the competence-competence (the power to distribute competences).
- The allocation of competences within the federation is complicated and requires a sophisticated interpretation of the constitution. A special peculiarity of the Austrian constitutional law is above all that those actions of the state, which have no sovereign character, are not bound by the distribution of competences. As a result, the *Bund* and also the *Länder* can act in the same areas of competence and develop concurring political activities in as far as they do not act *iure imperii*. Therefore, activities *iure gestionis* or *sine imperio* (so-called *Privatwirtschaftsverwaltung*) can be exercised in a parallel way.
- The Federal Parliament is organised in two chambers. The *Bundesrat* as the second chamber is meant to safeguard the interests of the *Länder*, but because of its construction it hardly fulfills this mandate.
- The *Länder* have a (“relative”) constitutional autonomy, which is rather restricted.
- The Federal Constitution regulates the role of the *Bund* and the role of the *Länder* according to the principle of parity in some respects (to a certain extent there are common authorities and mirror-imaged institutions).
- The “cooperative federalism” has made some progress, but nevertheless the institutions need further change and development.
- Because of Austria’s accession to the European Union the *Bund* and the *Länder* have suffered losses of competences.¹⁰ In order to compensate these losses, complicated procedures for cooperation have been developed, whose application in practice still has not been tested sufficiently.¹¹

¹⁰ Cfr. already Burtscher, *EG-Beitritt und Föderalismus. Folgen einer EG-Mitgliedschaft für die bundesstaatliche Ordnung Österreichs* (1990); later on comprehensively Schäffer, “Europa und die österreichische Bundesstaatlichkeit. Gedanken zur Bewahrung und Weiterentwicklung des Föderalismus im werdenden Europa“, in Tomuschat/Kötz/von Maydell, *Europäische Integration und nationale Rechtskulturen* (1995) 269.

¹¹ See in detail Schäffer, “Österreichs Beteiligung an der Willensbildung in der Europäischen Union, insbesondere an der europäischen Rechtsetzung“, *Zeitschrift für öffentliche Recht*, 50 (1996) 3.

- Informal cooperations play an important part in Austria’s political system and, therefore, also in the federalistic system.

1. *The federation as union of states in terms of constitutional law and the question of the competence-competence*

The Federal Constitution as basis of the Republic and also of the *Länder* describes the federation as a *union in terms of constitutional law* and not as a union in terms of international law.

The question concerning the *competence-competence* is not the question of the *pouvoir constituant*, but the question who allocates the competences within the federation, which also includes the power to change competences. Who has “the last say”? The theory of federations (particularly expressed by *Kelsen* and *Giacometti*) says that one can use the term federation within the meaning of a “general constitution” just if—because of the Federal Constitution—it’s not the normal constitutional legislator, but a special legislator formed by authorities of the *Bund* and the *Länder* that is authorized to perform this competence-competence. This means a function which is superior to the normal constitutional legislation of the *Bund* and of the member states. Such an agreed constitutional legislation is only provided for the change of the borders of the *Länder*.

In Austria the much more important changes of the allocation of competences can be done by the “normal” federal constitutional legislator (pre-dominance of the federation!). A certain restriction has been provided recently saying that changes of the allocation of competences for the debit of the *Länder* are only possible with the agreement of the *Bundesrat*. A protection clause—wanted by the *Länder*—which will provide a direct participation of the *Länder* (change of the allocation of competence only with the agreement of a qualified majority of the *Länder*) has not been realized.

The federalistic principle is a basic principle of the Austrian constitution and can be changed—the same way as all the other basic principles—only in the framework of a so-called “complete change of the Federal Constitution”. Such a total revision requires the form of a constitutional law and an obligatory referendum. An elimination of the federalistic structure is not at all under discussion at the moment. A new shape meeting actual requirements in Europe is under discussion, but has not been found yet.

2. *The federalistic allocation of competences*

a) Compared with foreign legal orders it can be considered as a peculiarity that in Austria the *Länder* do not participate in the three traditional powers of a state. The exclusive competence of the *Bund* for jurisdiction can only be explained by history.

b) The Federal Constitution does not know just one allocation of competences but several different systems of allocation of competences: a general allocation of competences, a special one concerning education (article 14, 14a of the Federal Constitution), a special one for public procurement (article 14b of the Federal Constitution), moreover a particular one for taxes (article 13 of the Federal Constitution refers to the Constitutional Finance Law) and some other special competences.

- When dealing with the *general allocation of competences* the Federal Constitution uses the so-called general types of the allocation of competences (article 10, 11, 12, 15 of the Federal Constitution), by allocating either the legislation or the administration of certain subjects to the *Bund* or to the *Länder* respectively. The distribution of the responsibilities is done by listing all the matters which are allocated to the *Bund* in a catalogue (method of enumeration). All the matters that are not explicitly allocated to the *Bund* “remain(s) within the *Länder*’s autonomous competence” (general clause of article 15 section 1 of the Federal Constitution). This results in the following *arrangement* of the general types of the federalistic allocation of competences:
- Article 10 of the Federal Constitution provides all matters for which the *Bund has the exclusive legislative and the administrative power* (enumeration of the exclusive competences of the *Bund*); there one will find the majority of the most important public responsibilities, especially:
- external affairs, passports, regulation and control of entry into and exit from the federal territory, immigration and emigration, financial affairs of the *Bund*, monetary, credit, stock exchange and banking system, civil law, criminal law, the maintenance of peace, order and security, the right of association and assembly, trade regulations, matters relating to Chambers of Commerce, the traffic system

(railway, aviation, shipping, federal highways and motor traffic), the postal, telegraph and telephone system, mining, forestry, water rights, labour legislation, social and contractual insurance, public health, protection of monuments, statistics of the *Bund*, military affairs, the establishment of federal authorities, public employment regulations applying to federal employees.

- Article 11 of the Federal Constitution lists the matters, in which the *Bund has the competence of legislation while the Länder exert the competence of administration* (also enumerated: e. g. regulations relating to nationality, professional associations in so far as they are not regulated by federal law, national housing affairs, highway police, parts of the regulations related to internal navigation).
- Article 12 deals with the matters, in which the *federal legislator (the Bund)* can fix the *principles* that have to be observed by the *Länder* when enacting *implementing statutes*. The *Länder* are bound to enact such regulations, and they will be obliged to execute them. (These matters are also enumerated: public social and welfare establishments; maternity, infant and adolescent welfare, hospitals, health resorts and natural curative resources, soil reform, protection of plants against diseases and pests, matters pertaining to electric power in so far as they do not fall under Article 10, regulations relating to agricultural workers; framework organisation of public compulsory schools is a competence according to Article 14, section 3 of the Federal Constitution which constitutes an analogous type of competence.)
- Article 15 of the Federal Constitution deals with the exclusive competences of the *Länder (legislation and execution as competence of the Länder)* that are essentially described by a general clause. Important competences of the *Länder* allocated by this general clause are: building matters and (important parts) of regulations concerning regional planning, protection of nature and the country-side, hunting and fishing, waste removal, the kindergarten system and nurseries system.

Moreover, it has to be mentioned that there is no rule in the Austrian Federal Constitution, regulating the precedence of the federal law. There is no rule like “federal law takes precedence over the law of the *Länder*”. This fact and the general clause for the competences of the *Länder* gives

the impression of a system very favorable for the *Länder*. Reflecting the scope and the actual importance of the competences of the *Bund* this impression has to be corrected.

c) It is an Austrian particularity with far-reaching consequences that all the administration *sine imperio* (the so-called *Privatwirtschaftsverwaltung*) is not bound by the federalistic allocation of competences (Art 17 of the Federal Constitution). This does not only mean that the *Bund* and the *Länder* can exchange the legal form of administration, but they can also seize concurring competences in as far as they do not act *iure imperii*, but only *iure gestionis* (as the holder of private law positions, as the Constitution says).¹² From the Constitution one only can derive that it is forbidden that one authority hinders (“torpedoes”) the decisions of another authority; but even for that there are no fitting constitutional sanctions. Moreover sometimes the fulfilling of public responsibilities is made dependent on financial assistance from another public body [so-called *grauer Finanzausgleich* (hazy financial adjustment)], to the effect that the financial responsibilities are obscured.

d) A weak point of the Austrian federalism consists in the fact that the allocation of competences relating to taxes is not regulated by the Federal Constitution itself, but outside of it by a special Constitutional Finance Law in connection with the Law regulating the Financial Adjustment. This means that actually the competence-competence in these matters is left to the *Bund's* legislation.¹³

e) Another peculiarity of the Austrian federalism is that the Federal Constitution regulates the *administrative structure* of the *Länder* in a special way. Above all the *Länder* have an important duty in a series of matters that are regulated by federal law. We are talking about the so-called *indirect federal administration* that is executed by the authorities of the local districts (*Bezirksverwaltungsbehörden*) at first instance. The second instance normally is —because of a provision of the Federal Constitution— the *Land* Governor (*Landeshauptmann* = head of state government), who is bound by instructions from the individual Federal Ministers. Thus, he

¹² The recent doctrine speaks about a unbound competence (“Aufgriffskompetenz”) in this field of administration. *Cfr.* Pernthaler, “Die Stellung der Länder in der Bundesverfassung”, in Österreichische Parlamentarische Gesellschaft (ed.), *75 Jahre Bundesverfassung* (1995) 659) (663f).

¹³ Ruppe, *Finanzverfassung im Bundesstaat* (1977).

functionally is a federal authority. As one can see, the *Land* Governor has a double function within the system of the Federation because of the Federal Constitution. He is not only the chairman of the *Land* Government (so to say the Prime Minister of the *Länder*), but also a kind of a federal “governor” for the territory of the *Land* and chief of the indirect federal administration. Because of this system an important responsibility and also real political power is laid into the hands of the political and administrative machine of the *Länder*. The double structure of administration, therefore, has been a point where the “structural reform” of the Federation wanted to make a start.

3. *The Bundesrat (Federal Council)*¹⁴

By its organization this “state house”, “chamber of the *Länder*” of the Austrian Federal Parliament is a partial organ of the federal legislation, politically intended to be an organ for the representation of the *Länder*. The *Bundesrat* has been constructed in a way that it can be called a house of the *Länder*, but could never reach a powerful position. This is more or less the “congenital defect” of this organ. The most populated *Land* delegates 12 members, the other *Länder* are represented in proportion to their population, but even the smaller *Länder* have the right to delegate at least three members. The members of the *Bundesrat* are elected by the *Landtage* (*Land* Diets) in accordance with the principle of proportional representation (in proportion to the seats the different political parties have won in the *Landtag*). The members of the *Bundesrat* need not belong to the *Landtag* which delegates them, however they must be eligible for that *Landtag*. They are not bound by any mandate in the exercise of their function. This construction and the political behaviour have had the consequence that the *Bundesrat* meanwhile is strongly influenced by the political parties. Because of the way of creation of this organ it is evident that within the *Bundesrat* the balance of the political parties is quite similar to that in the *Nationalrat*. The *Bundesrat* shows more or less a mirror image of the power of the political parties of the whole State resulting from the total of the elections to

¹⁴ See especially Walter, “Der Bundesrat (Entwicklung-Rechtsstellung-Wirksamkeit-Reform)”, in *Bundesstaat auf der Waage* (1996) and Schäffer, “El Consejo Federal austriaco. Derecho constitucional, práctica política, planes de reforma”, en Centro de Estudios Constitucionales y Senado (ed.), *La reforma del Senado* (1994), 387.

each of the *Landtage* (Diets). Because the members of the *Bundesrat* do not form a delegation of the *Länder* bound by a mandate, they do not feel responsible to the delegating *Landtage* nor to the *Land* Government, but they feel obliged to their political parties' process of decision-making at the federal level. In most cases the *Bundesrat* only has the right to veto against enactments of the *Nationalrat*; this suspensive veto can be overruled by the *Nationalrat* by passing its original resolution once more ("persisting resolution"). Only since the constitutional amendment *BGBI* (*Federal Law Gazette*) 1984/490 the *Bundesrat* has got the right to declare its consent, if a regulation means constitutional changes of the allocation of competences to the debit of the *Länder*. But this has not meant a crucial increase of the influence of the *Länder* because of the already described influence by the political parties. The importance of the *Bundesrat* also depends on the situation between the strong political camps, whether they find themselves in a situation of conflict or whether they work together in a coalition. In the second case the veto of the *Bundesrat* is more or less inefficient; only in the first case the *Bundesrat* can be a weak instrument for opposition. Its veto delays the resolution of the majority of the *Nationalrat* and keeps discussion open for some time. (If one wants to see it positive, one might say: if the majorities within the *Bundesrat* change because of elections to a *Landtag*, this change will indicate a possible political change at the federal level like a seismograph).

To make an effective representation of the interests of the *Länder* possible by the *Bundesrat*, some fundamental changes would be necessary. Different proposals have been made, for example:

- The direct election of its members in the *Länder*.
- A bound mandate of its members or.
- The right of the *Bundesrat* to declare its consent in particular when the financial adjustment is on the agenda.

The realization of these ideas is quite improbable at the moment, because the political parties do not want effective possibilities to obstruct their policy at the federal level. On the other hand, the *Länder* do not regard the *Bundesrat* as a very effective representation of their interests too. They have learned to assert their interests against the *Bund* outside of Parliament. They do that partially by resolutions of the *Landtage* and by inter-

ventions of politicians of the *Länder*. The most important role is played by the *Land* Governors who take the view of their *Länder* either individually or by using the form of the conference of the *Land* Governors as common organ of opinion of the states' interests.

4. *Financial federalism*

This is a topic which always is crucial within a federative structure.¹⁵ In Austria the financial basic order is dominated by the *Bund*.

a) As far as public expenditures are concerned one has to regard the principle that the territorial authorities (*Bund, Länder* and *Gemeinden*) have to pay the costs that are caused by the execution of their competences (section 2 of the Constitutional Finance Law). This apparently "clean" connection to the competences allocated by the Federal Constitution is pierced in many ways. On the one hand the federal legislation can provide exceptions. Moreover, in practice the relation between the allocation of responsibilities and the duty to pay the costs is destroyed in many ways by financial allocations and extra grants for special purposes, but also by the refund of costs on the basis of agreements (of private law character).

b) The superiority of the *Bund* is even clearer, as far as the revenues are concerned. There the competence-competence is even more withheld from the *Länder*, because it is delegated to the federal legislation by the Constitutional Finance Law and the *Bund* exerts it by enacting the Law concerning the Financial Adjustment. Whereas in other countries normally the constitution provides at least a principal distribution of the actual rights to impose taxes, in Austria this competence is left to the federal legislator. (Indeed section 4 of the Constitutional Finance Law binds the federal legislator to consider the expenses of public administration and the maximum of the financial capacities of the involved territorial authorities. For a long time this provision has been regarded as a non-justiciable program; yet, recently the Constitutional Court has declared a severe infraction of these principles as unconstitutional). State practice has developed the habit, to enter into *negotiations* between the territorial authorities about the distribution of the revenues before enacting the Law concerning the Financial

¹⁵ It is remarkable that *e. g.* the problem of financial federalism is under discussion also in Switzerland. See the reports in: *Neue Züricher Zeitung* (Nr. 64) of March 16/17th, 1996, pp. 25 and 27.

Adjustment. A promise of the *Bund* to enter into negotiations with the political partners before changing this distribution is only regulated by a federal statute law (not by federal constitutional law!) and therefore in the last analysis free of sanctions because of the competence-competence of the *Bund*. The *Bund* has a kind of a “right of anticipation” because of the allocation of the objects of taxation to the types of taxes (exclusive, distributed or common taxes), and only those objects of taxation which are not claimed by the *Bund* can be claimed by the *Länder* and the *Gemeinden* for “their” taxes [that is why one speaks about a *Steuerfindungsrecht* (right to “invent” and introduce taxes) of the *Länder*]. In fact the *Bund* has reserved itself the most important and most paying taxes either completely or partially. The *Bund* imposes the exclusive taxes of the *Bund* but also the taxes which are distributed between the *Bund* and the *Länder*. The *Länder* receive the equivalent shares of the distributed taxes, which are often calculated and distributed by using a complicated ratio formula depending on the kind of tax. Moreover, the *Länder* have the right to finance a part of their need by imposing a so-called apportionment of costs of the *Länder* on the *Gemeinden*. All together one can state that the *Länder* have not been famished financially over the years because of the “negotiated” adjustment of taxes.

c) A special problem results from the fact that in Austria the non-sovereign acting of the territorial authorities is —as already mentioned— not bound to the allocation of competences. Therefore the execution of these tasks can not be regarded as the performance of duties in a narrow sense where the responsibility for financing would follow the regulations of the allocation of competences. State practice has developed the habit —in so far disregarding the Constitutional Finance Law— that the *Bund* considers the fulfilling of some of its duties dependent from financial assistance by the *Länder*. This phenomenon can be found in many parts of the administration of subsidies and also when the procurement of large orders and projects is concerned. Indeed the *Bund* relieves itself by transferring costs; practically this so-called *graue Finanzausgleich* (hazy financial adjustment) denatures and reduces the financial autonomy of the *Länder*.

5. *Constitutional autonomy of the Länder*¹⁶

Article 99 section 1 of the Federal Constitution regulates that the *Land* Constitutional Law must not “affect” the Federal Constitution. Therefrom one deduces that *Land* Constitutional Law needs not only to regard those regulations which are exactly lined out by the Federal Constitution, but it also needs to respect the leading and basic principles of the Federal Constitution. Moreover *Land* Constitutional Law can regulate the typical contents of a constitution for the *Land* independently as far as the constitutional principles are regarded (“relative constitutional autonomy”), *i. e.* the states have to respect a certain degree of “homogeneity” with the principles of the Federal Constitution.¹⁷

Using this scope some *Länder* thoroughly renewed their *Land* Constitutional Law [completely new *Land* Constitutions can be found in Lower Austria (since 1979), Burgenland (since 1981), Vorarlberg (since 1984) and Tirol (since 1989); further reforms have been realized respectively in Carinthia, Upper Austria, Salzburg and Styria]. As new elements of regulation in the *Land* Constitutions the following can be shown off:

- public objectives and fundamental rights as part of the *Land* constitutions;
- audit offices (*Rechnungshöfe*) of the *Länder*;
- an own *Volksanwaltschaft* (people’s attorneyship-kind of ombudsman) in Vorarlberg and in Tirol;
- the elements of direct democracy have been strengthened significantly by using a variety of combinations (besides the referenda and the plebiscites relating to the legislation of the *Land* also official opinion polls have been provided and —for example in Vorarlberg and Styria— rights of initiative of the *Land* citizens have been provided in matters of public administration).

¹⁶ Koja, *Das Verfassungsrecht der österreichischen Bundesländer* (1988).

¹⁷ Therefore, recently the Austrian Constitutional Court declared unconstitutional the veto power of a state-wide referendum against the state diet’s act of legislation (VfSlg 167.241/2001), as the Federal Constitution basically sets down the principle of representative democracy). *Cfr.* Anna Gamper, “The Principle of Homogeneity and Democracy in Austrian Federalism: The Constitutional Court’s Ruling on Direct Democracy in Vorarlberg”, in Bußjäger/Gamper, *The Homogeneity of Democracy, Rights and the Rule of Law in Federal or Confederal Systems* (Wien, 2003) 125 and ss.

6. *Formal Parity of the Bund and the member states*

In the meaning of *Kelsen's* federalistic theory the *Bund* and the *Länder* are formally equal partial legal orders underneath the common roof of a Federal Constitution. This idea of formal parity can be found expressed or realized in some provisions of the Austrian constitutional law:

- There is no principle like “The law of the *Bund* takes precedence over the law of the *Länder*”.
- There is no federal execution versus the *Länder*. Instead of that federalistic power struggles have to be changed into legal cases, which will be decided by the Constitutional Court which really works and serves as a “cramp of the federative state”. The Constitutional Court has jurisdiction over conflicts about competences between administrative authorities of the *Bund* and the *Länder*, but also for the impugnation of a federal law by a *Land* or of a state by the *Bund*.
- The establishing or the existence respectively of organs with doubled functions also corresponds with the idea of parity. Here we are talking about organs which are common to the *Bund* and the *Länder* or which have been created for reciprocal supervision: One has to mention the Administrative High Court and the Constitutional Court, the *Rechnungshof* (Federal Audit Office), the Federal Army, the Federal President and partially also the Federal People's Attorneyship.

d) Corresponding to the idea of mutuality of mechanisms of supervision there is also a mutual influence in the phase of legislation: The right to veto of the *Bundesrat* against enactments of the *Nationalrat* finds its equivalent in the right to veto of the Federal Government against enactments of the *Landtage* (diets). But the formal parity is not corresponding to a practical-political equality in other important questions concerning the federalistic system. The weakness of the *Länder* relating to the question of competence-competence, in the *Bundesrat* and in matters concerning the financial federalism have already been mentioned.

7. *New dynamics and cooperative federalism*

The most important aspect of the newer constitutional developments was the stress on the “*cooperative federalism*”. For that reason *agreements under public law according to Article 15a of the Federal Constitution* have been introduced. Such agreements can be concluded between the *Länder* among each other, but also between the *Bund* and the *Länder* about matters of their competences: so-called “horizontal” (agreements between member states) and “vertical” agreements. Indeed there has already been a competence of the *Länder* to make agreements among each other (Article 107 of the Federal Constitution),¹⁸ but so to say under supervision of the *Bund*. “Special alliances” directed against the *Bund* should obviously be avoided by providing an obligation of the *Länder* to notify each agreement to the Federal Government. Since 1974 an instrument for coordination also fitting for complex matters has been created with Article 15a of the Federal Constitution. It has to be mentioned that there have been problems concerning procedure with this type of agreement and that the legal form of the agreement under public law turned out to be rather inflexible for certain purposes.

Nevertheless, the agreements according to Article 15a of the Federal Constitution can be qualified as an important instrument of cooperation on the whole, which has also strengthened the bargaining position of the *Länder*.

From a theoretical viewpoint it meant a noticeable innovation when (in 1988) the *Länder* were granted a relative *autonomy to conclude international treaties* fulfilling thus an old demand. According to Article 16 of the Federal Constitution the *Länder* can conclude international treaties relating to matters falling into their autonomous competence with the states neighbouring to Austria and their member states (resp. regions). To retain the responsibility of the *Bund* for the external affairs of the whole state, it is provided that the highest federal organs have the competence to participate with the conclusion of such treaties. Therefore, this competence of the *Länder* is only decorative. In practice no such treaty has been concluded up to now because of the complexity of the procedure.

¹⁸ Original version, meanwhile abolished, which at the beginning of the Republic was inspired by the Swiss constitution.

But the formal parity, which is expressed in the aforementioned constitutional provisions, says nothing about arrangements made for a federalistic cooperation as partners in political reality.

IV. AUSTRIA'S POLITICAL SYSTEM (CONSTITUTIONAL REALITY) AND THE VALUE OF FEDERALISM¹⁹

Three characteristics of Austria's political system have to be mentioned at least briefly at the beginning if one tries to describe the working of this system and the value of federalism in the political practice of our country properly.

- One of the basic elements of Austria's political culture is the willingness to negotiate with the partners on different political levels and in different political camps. The strong wish to reach a consensus (urge for peace) is typical for the general political climate ("*consensus democracy*") and also for the economic policy [just remember the famous Austrian "*Sozialpartnerschaft*" (social partnership between the representatives of the employers, of the employees and of the agricultural sector)].²⁰
- Essential for the working or not-working of public institutions is always the social and political sub-structure, especially the party structure. As far as Austria is concerned, one basically can note that the "party state" has superposed the federative structure ("*Federative Party State*"). But it is also true that the parties can find different fields of activities and promoting themselves in public in the federation.
- Though the Austrian federalism knows quite some (emotional, economic and political) tensions between the different regions and *Länder* (for example the traditional conflict between the west and the east of Austria, the dislike of the *Länder* for the "Viennese centralism" and so on), the post-World War II Austria shows not only an

¹⁹ See e. g. Kostelka/Unkart, "Vom Stellenwert des Föderalismus in Österreich", in Fischer (ed.), *Das politische System Österreichs* (1982) 337.

²⁰ Ultimately (appr. since 2000) the willingness to search political consensus is going down, and controversies between rivaling political parties are increasing: "competition democracy".

ethnic but also a far-reaching *political coherence*, in which neither the idea of becoming a part of Germany nor separatist desires of some regions have a real chance (the idea of an “Austrian identity” has meanwhile become firmly rooted).

1. *Institutions and strategies for co-operation*

To accomplish this description —besides the already mentioned possibility of “treaties” public law agreements within the federative state existing since 1974— one has to remind that an efficient co-ordination and co-operation between the territorial authorities needs not necessarily depend on legal agreements. Just the opposite: in Austria it has been common practice since a long time that the *co-operation* —even when it happens in a practically institutionalized way— takes place *without a special legal basis*. It has its reason just in *political gentlemen’s agreements* and in the permanent willingness to discuss and negotiate. The following “institutions” of importance for the policy concerning federalism and the co-existence in the federative state have to be allocated there:

1. Since 1951 there exists the *liaison office of the Austrian Länder*. That’s a small civil service machinery which is organizationally sited at the Office of the *Land Government of Lower Austria* and creates a communication service between the *Länder*. It is in charge especially with the preparing and the administrative support of the conferences between politicians and officials of the *Länder*. The officials of the liaison office also play a very important practical role for the negotiations concerning the adjustment of taxes.

2. The *Conference of the Land Governors* is the interlocutor and the *vis-à-vis* of the *Bund* at the political level. It co-ordinates the policy of the *Länder* one with another and above all in relation to the *Bund*. This association of top politicians of the *Länder* is supported and prepared particularly by the *Conference of the Land Government Offices’ Directors*; this is a regularly happening conference of the top officials of the *Länder*. There are also regularly meetings on the level of the officials, for instance those of the officials of the *Länder* in charge of finance or service regulations. Meanwhile there also exists a conference of the Presidents of the *Landtage* (Diets) and the permanently appointed Directors of the *Landtage*.

3. To co-ordinate the policy concerning regional planning in the whole state an *Austrian Conference on Regional Planning*²¹ (ÖROK) has been working for many years. It consists of different levels. Once a year the political leaders come together (Federal Chancellor, Federal Ministers, *Land* Governors, Presidents of the representations of interests). Routine work is regularly done by top officials and experts in committees for co-ordination and co-operation arranged by analogy. Up to now this Conference has not achieved more than scientific studies and concepts. Recently, it collaborates in drafting the national part for the grants' programs of the European Union.

4. Since some time the *Länder* have tried to do their own “*small external policy*” on an *informal basis*. They have formed an alliance without a legal basis and without international treaties to so-called *ARGES* (*Arbeitsgemeinschaften*, working associations) in border-crossing regions. In this connection the working association *Alpenländer* (countries of the Alps), the working association *Alpen-Adria* and the working association *Donaustaaten* (states of the Danube) are important for Austria. There the *Länder* co-ordinate their interests with foreign partners and discuss which intra-state initiatives they can take against or in direction to the central authorities.²²

For all those committees which exceed the spheres of competence of the individual territorial authorities there does not exist a constitutional basis. Therefore, they are deliberately constructed and practiced as “conferences” by state practice. They are somehow organisations in the meaning of sociology and political science, but not in legal terms. This qualification, by no means, should exclude or degrade their practical significance.

2. *The Government in the Länder*

1. According to the Federal Constitution the *Land* Government as a board, is formally, the highest organ in matters concerning the state admin-

²¹ In this Conference not only the Bund and the *Länder* work together, but also the *Städtebund* and the *Gemeindebund* (associations of the municipalities in an advisory capacity) and the representations of professional interests take part in it.

²² *Cfr.* for the Italian experience with such working groups Buglione/Desideri/Ferrara/Meloni, “Politiche Ambientali Sopranazionali, regionalismo e federalismo”, *Rivista Giuridica dell’Ambiente*, anno X, fasc.1-1995, 1 (14f).

istration. But it is also permitted, to distribute the competences between the individual members of the *Land* Government departmentally. In practice all *Länder* have introduced the departmental system and only important matters have been reserved for resolutions of the board.

According to the constitutions of the in five of the *Länder* (but not in Vorarlberg, Tyrol, Salzburg and in Vienna) the members of the *Land Government are elected by the Landtag* according to the *system of proportional representation*. But the governmental system of the *Länder* can not so easily be compared with the system of consent in Switzerland or with the model of the big coalition at the level of the *Bund* in Austria, because the *Land Government* decides with majority. Normally the major party (even it does not dispose of absolute majority) determines the big frame-lines of policy. The price the smaller party or parties have to pay for taking part in the *Land Government* is their obligation for consent; this restricts their possibility to present themselves as an opposing alternative. This is probably one of the most important reasons for the stability of the political ratios which one can observe in the *Länder*. The relative strength of the political parties stayed more or less unchanged over many years. Just in the recent political development (developing poly-centric system of political parties, some small parties getting seats in the *Landtage*, no clear majorities) the “mandatory coalition” provided by the state constitution does not work only in the meaning of a specific control (cross control) but more and more as a blockade of the *Land’s* policy. Therefore, some *Länder* meanwhile have changed towards a pure parliamentary system (government - opposition).²³

2. In this system the *Land Governor* has a particular function. Formally he is only the chairman of the board *Land Government*, at the same time he is the chief of the indirect federal administration, therefore more or less the “governor” of the *Bund* for the territory of his *Land*. This accumulation of responsibilities gives him quite some power. In most cases the *Land Governor* is the chairman of the strongest political party of the *Land*. Seen from a constitutional and political point of view he is the representative of the *Land*, a fact that also provides him special importance in questions of the federal policy. He actually is the *central political figure* of the *Land*. The *strong regional embodiment* of important political personages often prevents

²³ Only some years ago, Salzburg and The Tyrol have introduced the “Westminster system”. The majority (or a coalition with majority) forms the state government.

them from going into the political centre (to the capital Vienna). There is also no circulation of the political élites between the *Länder*.

3. *The federalistic structure of the political parties and their influence on the federal policy*²⁴

Austria's division in *Länder* is not only of importance for the economy and the administration, but also plays a particular role in the elections at the level of the *Bund*, because the *Länder* are electoral districts and therefore of some importance for the political parties. In their programs all political parties of relevance declare themselves for the federative state without restrictions; in practice there are actually significant differences. The *ÖVP* (Austrian People's Party) is based on different associations and strong instances in the *Länder* that uphold the federal party. Therefore the *ÖVP* can actually be qualified as a party based on the federalistic principle. For a long time the *SPÖ* (Austrian Social Democrats) has been the typical example of a centralistic party (with intensive care for the members in local groups and sections); but since the 1970s one can observe a development of increasing federalism within the party. During the past years the *FPÖ* (former Liberal Party, meanwhile quite nationalistic) has tried (under the leadership of its very demagogically acting chairman) to become an alternative to the parties established at the level of the *Länder* and to gain increasing influence on the federal policy by this means. Most parties have local and district organisations as basis. The parties in the *Länder* are the middle instance in the hierarchy of the party that guarantees a balance of interests within the *Länder* and presents the candidates for the elections at the level of the *Land* and also of the *Bund*. As far as the federal elections are concerned the federal party centres exert their influence according to their statutes by adding and modifying the list of candidates. By this means also federal politicians reach a promising position (an "eligible" position) on the list of candidates, even when they have no local or regional predominance, as long as they are considered to be "central necessities for the *Bund*" by the party leadership (centralistic component).

When the choice of persons for the function of a Federal Minister and the forming of the Federal Government are on the agenda, naturally the profes-

²⁴ Nick, "Die Bundesländer und das österreichische Parteiensystem", in Pelinka-Plasser (ed.), *Das österreichische Parteiensystem* (1988) 401.

sional qualification is of importance, but beyond that also the provenance from different sub-organisations (*Bünde*, associations) or *Land* organisations of a party. The principle of provenance from certain regions or associations is traditionally stronger considered in the *ÖVP* than in the *SPÖ*.

In as far new developments in the *Land* politics can be regarded as indicator for the forming of the Federal Government cannot be said without doubts at the moment. Abroad it has been regarded with interest when some years ago the populist opposition politician and chairman of the *FPÖ* was elected *Land* Governor of Carinthia in consequence of an electoral alliance of his *FPÖ* with the *ÖVP* (and against the *SPÖ*) for a period of time.

4. *Achievements and chances of federalism in Austria*

Which autonomous role do the *Länder* play in the Austrian policy at the moment and which role will they play in the future?

1. During the time of the First Republic (the time between the two world wars) the Austrian domestic politics were characterized by a front position between the “red Vienna” and the “black” *Länder*. This *political confrontation* has not disappeared in the time of the Second Republic, but has been *moderated* because of social changes. Especially the *SPÖ* could gain more influence in the *Länder* and it has moderated its centralism within the party; altogether the *SPÖ* reached a less grim relation towards federalism. Changes in the structure of the party system first could be watched at the local elections (in the medium-sized and the big cities), but soon also at the level of the *Länder*. After having reached seats in some *Landtage* the Green/Alternatives could establish themselves in the *Nationalrat*. For a short period (after the split off of the *Liberales Forum* from the *FPÖ*) even five different parties were represented in the *Nationalrat*. At any rate, a poly-centric party system sometimes does not ease the governability of the country, but has to be accepted as a political reality.

2. The *Länder* have used their not very extensive competences actively and in a useful manner. The (not very far reaching) constitutional autonomy has been applied deliberately for developing the instruments of direct democracy during the past years. So far federalism has worked for more democracy in competition with the *Bund*. It is also considered to be an advantage of the *Land* politics that problems are dealt with more pragmatically and with less ideologic reservations than the federal policy does.

As far as their responsibilities are concerned the *Länder* have proven to be able to act rapidly and effectively because of their easy to survey dimension. Altogether the *Länder* have used their competences in the fields of regional planning, non-federal highways, protection of the environment and removal of waste in a satisfactory way, which means that the cry for centralism would not be justified. That's true also for the regional promotion of the economy (settlement of industry, support for the stabilizing of companies, establishment of technological centres as impulse for the modernization of the economy and as a stimulus for private economic initiatives), though in these fields a clearer allocation of responsibilities would be desirable.

3. Although the "big reform" of Austrian federalism has failed because of political reasons and because of the interests of the central federal bureaucracy, with regard to the efforts for a new reform of the federative state one can say the following. It could and should take place and it should realize two basic ideas: first one should manage to simplify the very complicated *allocation of competences*; this would only be politically possible by an exchange of responsibilities that can be managed in a decentralized way with those responsibilities which should be exercised centrally because the development illustrates the necessity to do so. At the same time the *organization of the administration* should be fundamentally rebuilt and simplified.

On an informal basis the *Länder* have developed a "*small external policy*". The informal character of the foreign affairs of the *Länder* will probably stay important also in the future, because the conclusion of formal international treaties is certainly possible, but in many cases it seems to be a too heavy and inflexible instrument.

V. FEDERALISM AND EUROPE

1. The organisation originally founded as EEC meanwhile developed into the European Union. European legislation covers more and more areas of life and this regardless of the principle of subsidiarity in the Maastricht treaty. The responsibilities of the EC are objective-pursuing "policies", which has the consequence that there is no (and there cannot be any) clear border of competences between the member states and the EC. In most cases we find concurring competences of the EC; this means: the EC only regulates specific aspects while the member states can preserve their com-

petence, but have to enact their laws in accordance with the European Community law (that is true for all measures intended to realize the Common Market, for example concerning the freedom of movement and residence of the union citizens, the approval of diplomas, competition, public procurement, assurance, traffic, taxes, environment). In fact this means a loss of competences of the member states of the Union because they must not (or at least no longer) regulate independently the matters regulated by the EC because of the precedence of the communitarian law (EC regulations are directly applicable, EC directives have to be implemented). This loss of competences also hits the member regions (*Länder*, states and the autonomous regions) of those members states which have a federalistic structure. This loss is grave because the international representation and responsibility stays with the central state.²⁵

2. The consequence was the justified demand for compensation: the *Länder* want to participate in the formation of the Community will at the domestic level. Indeed such *procedures concerning the participation of the Länder* have been developed to let the *Länder* take part as the federal organs present the national viewpoint within the framework of the supranational community, especially within the Council. In Germany the procedure of participation takes place in the *Bundesrat* and shall bind the Federal Government in matters concerning the *Länder*. In Austria a system of direct participation of the *Länder* in matters relating to the European integration has (already 1992) been introduced. According to the Austrian model the point of view of the *Länder* shall be formulated in a so-called *Länder Conference about Integration* (composed of the heads of the Land Governments plus the Presidents of the Land Diets²⁶). An unanimous viewpoint of the *Länder* is on principle binding the Federal Government when negotiating (about competences of the *Länder*) at the European level. It is

²⁵ On January 1st, 1995 Austria became member state of the European Union. In 1994 the Austrian federal parliament had passed a special constitutional law enabling the executive (government and federal president) to ratify the already negotiated treaty of accession of Austria to the EU. This constitutional law got an overwhelming (nearly 2/3) majority of the population in a referendum which was necessary, because the accession meant a total revision of the Austrian constitution. A constitutional amendment “accompanying the accession” (BGBl 1994/1013) created rules for the nomination of Austrian representatives in EU organs. Moreover it provides for an ample participation of the states and of the federal parliament in the formation of legal intent at the European level.

²⁶ The Presidents of the Land Diets have only consultative vote, the decisive vote can only be cast by the Land Governor on behalf of his state.

noteworthy that such an “unanimous” viewpoint will also be reached if a majority of five *Länder* votes for a viewpoint and no *Land* votes explicitly against. These procedures are a little bit heavy and slow, but nevertheless useful and effective.

3. Furthermore, it has to be stressed that the Europe of the future will consist of a “multi-level” federalistic structure. There will not only be a union of unitary nation-states but also different regional structures. The treaty of Maastricht took this objective partially into account, though the “Committee of the Regions” is just a consulting organ and not (or not yet) a regional parliament. Another problem is caused by the lack of a common idea about the future size, the status and the competences of the regions.

VI. AUSTRIA’S EXPERIENCES WITH FEDERALISM. CONCLUSIONS FOR THE FURTHER FEDERALIZATION OF REGIONAL STATES?

1. At the moment two European nations show a *quasi-federal* structure: Spain with its autonomous regions and the idea of changing the Senate to a kind of a Federal Council; and Italy with its (partially asymmetric) regional structure that according to some opinions should be changed to a “real” federalism .

A starting point for a real Italian federalism consists definitely in the present regional structure and the unchanged historic-cultural tradition of the *stati preunitari* though the total of member states should not be too high in a federation. The differing economic power of the individual regions could cause tensions. However one has to keep in mind that in other states with a federalistic structure there also exists a significant economic difference between the different regions of the country (for example in re-united Germany and even in Switzerland; even more significant tensions can be observed in Canada and Spain) which nevertheless does not lead to the effect that the state would fall apart. The danger of secession will never appear because of economic problems or because of economic interests, but only if there are profound emotional differences. Only deep historic or ethnic differences will —under special historic conditions— lead to secession or to the disintegration of federations respectively (*cf.* for example the suppression of small ethnic groups in the former Soviet Union

and the inability to forget historic guilt and the thirst for revenge in former Yugoslavia).

2. In contrast to unitarian states the Austrian experience shows:

- Federalism allows a life with “contradiction”. It is not necessary that everything is subordinated to one centre and it is not necessary that everything is decided by a central authority.
- The political parties and the political trends have different regional centres, they can appear at different levels and realize competing political ideas.
- The central administration should on the whole be restricted to the preselection of bills.
- If the different territorial levels are not completely separated from each other but have to co-operate because of the financial adjustment and because of a system of joint public finances no part of a country will become extremely destitute (gradual reduction of disparities).
- The system will stay financially tolerable and open for political changes because of permanent negotiations and adapting.
- Apart from these more general observations, one even can draw some direct conclusions from the Austrian model of federalism and its special features, where it works well and what—in the case of imitation—one clearly should avoid:

a) The distribution of competences between federation and states should not only be theoretically clear, it must not be too complicated in order not to create even more bureaucracy. On the other hand one should not be too shy to concede real public tasks of their own responsibility to the lower units.

b) Regional or state power (in the legal meaning) creates political self-consciousness, and thus with time even an economic basis. Also poorer states within a federation will find appropriate economic options and policies (as it was between nation states on the basis of “comparative cost advantages”). Nevertheless, it is very important to find an appropriate mechanism of financial adjustment. A system of dotation clearly is contrary to the idea of federalism, but a system of sovereign taxation by the states also is only applicable in a mature and experienced federation.

Therefore, a mixed system would be the best to avoid tensions and disintegration, and in this case, moreover, a mechanism of steadily working consultation and coordination between the federal and state level is needed for smooth adjustment.

c) What clearly cannot be recommended, would be a second chamber of Austrian style. If one really wants to create a new federal system, one should avoid the congenital defects of the Austrian *Bundesrat*. Such an organ requires either direct election of the deputies in the states or an imperative mandate bound to the state governments.

d) One of the most positive elements of Austrian federalistic experiences is the working of the Constitutional Court as a highly respected instance also for constitutional quarrels in federalistic conflicts.

e) What concerns the administrative structure, we are nowadays thinking about to abolish the double function of the *Landeshauptmann* (“Land Governor”), in order to eliminate a “double structure of administration“. But on the other hand one has to be aware, that this “indirect federal administration” for decades has served very well, and that it originally had caused the transformation of a decentralized unitarian state into a federation.

3. If one finally tries to abstract from the specific Austrian institutions and experiences and to come to conclusions for the *value of federalism* in the present political life, one shall regard the following:

The historically based autonomy of member states supports the self-confidence of these political units, but nowadays this is not considered to be the only legitimation. (But nevertheless one should not forget that this aspect is more important for Austria than for Germany, where the historically grown units had been shattered, but where the reconstituted *Länder* were not formed without following some historic ideas). The economic aspect provides further arguments for regional or federal structures respectively.

It is quite normal that party politics superpose the structures between the *Bund* and the *Länder*. That is a danger for federalism, because it could become just one component in the antagonistic process between the Government and the opposition. Particularly in regard of this circumstance federalism as a vertical element has an important function in the meaning of a new and comprehensive division of powers. Partially it even provides a compensation for some malfunctions of the division of powers between the legislative and the executive power in the parliamentary system.

This function as a balance of powers in the modern mass democracy dominated by the political parties of course depends on the chance for a change of the leading powers in the *Länder*. At the same time federalism offers the chance for an “ease of tensions between the political parties”, because the political groups find changing prospects to take responsibility or co-responsibility at different political levels, so that the danger of polarization and radicalisation because of being kept away from exerting power, is not very great in a federalistic system.

Besides a federalistic community offers the chance to loosen up the inner structure of the party and causes —as each regional structure— a distinguishing and disleveling tendency.

Because of decentralisation in particular because of federalism makes the exerting of the state power easier to survey and easier to the decide for the citizen. The increase of the safety feeling and of liberty and the necessity of a willingness for consent which is required by federalistic institutions finally serve for the democratic principle.

Altogether *federalism* has proven *more viable* in Austria and some other states as one thought some decades ago. It has even proven to be an important instrument to give regional interests of different origins (ethnic, historic and political origins) a *form of life*. Of course this will only work, if there are social, cultural, political and economic conditions, in which historic tensions will not grow to irrational hatred but will be considered as “variety in unity”.

Beyond that it will be necessary that nationalism recedes and that the member states and the regions get an effective and institutionalized representation of their interests also at the European level, so that they can “survive” in a united Europe (“common European house”).

VII. FINAL REMARKS

In the political discussion of the last years federalism and the federalistic structure have come under pressure. The reason is a globally wide-spread tendency to question traditional structures of the state (and its administration) from an economic and budgetary viewpoint. There are many politicians and political advisors who —leaving aside non monetary values— are pronouncing themselves in favour of “lean state” or “lean ad-

ministration” structures and, therefore, want to reduce or even to abolish federalistic structures.

Nevertheless, one can state that in Austria the type of “*negotiated federalism*”²⁷ has its value and success, taking into account that the latest steps of administrative reforms even strengthened the “*executive federalism*” (i. e. the indirect administration by the *Länder*/states). Of course, the formation of a new European Constitution (Treaty) could open the chance and the possibility to reorganize the distribution of powers and competences between federation (*Bund*) and states (*Länder*) in a more rational (modernized, simplified and more efficient) way.

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²⁷ Cfr. Bussjäger, “Österreich: Verhandlungsföderalismus im Banne von Budgetsanierung und Verwaltungsreform”, in Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed.) *Jahrbuch des Föderalismus 2002*, pp. 330 y ss.

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