SFB 700 GOVERNANCE IN AREAS OF LIMITED STATEHOOD
Matthias Koetter / Gunnar Folke Schuppert
Understandings of the Rule of Law in various Legal Orders of the World
http://wikis.fu-berlin.de/display/SBprojectrol/Home

Rule of Law in Austria

Harald Eberhard/Konrad Lachmayer

If we deal with the Austrian rule of law, we face a number of specific phenomena which only to a certain extent can be identified explicitly in the text of the Federal Constitutional Act or – with regard to the Austrian federal structure – in the constitutions of the Länder. The core element of a formal understanding of the rule of law is the principle of legality (Art 18 para 1 and 2 Federal Constitutional Act[1] [B-VG]). Further elements of a substantive understanding of the rule of law are the system of legal remedies and the effectiveness of the system of legal protection including the existence of independent courts as well as the principle of proportionality deriving from the interpretation of human rights such as the equality clause (Art 7 para 1 B-VG).

I. General remarks

In a comparative law perspective,[2] the Austrian Constitution can be seen as a "flexible constitution".[3] This goes hand in hand with those concepts of constitutional law that qualify this level of law as a kind of a formal rule of the political process ("*Spielregelverfassung*").[4] An extensive use of modifying and thereby fragmenting constitutional law, which describes the status of Austrian constitutional law exactly, challenges the role of constitutional law to give a stable framework for this proc-

[1] The core constitutional document. BGBl (Federal Law Gazette) 1920/1. The B-VG has been modified more than a hundred times until today.

[2] Bernd Wieser, *Vergleichendes Verfassungsrecht* (Vienna, Springer 2005) 85ss.

[3] Anna Gamper, 'Introduction to the Study of the Law of the Austrian Federal Constitution', Vienna Online Journal on International Constitutional Law Vol 2 2/2008, 92 (96).

[4] Robert Walter, Heinz Mayer and Gabriele Kucsko-Stadlmayer, *Grundriss des österreichischen Bundesverfassungsrechts*, 10th edn (Manz, Vienna 2007) para 3 ss, 146.

ess.[5] A lot of so called "constitutional provisions", which do not contain substantive constitutional questions, do in fact add numerous administrative details to the core documents of Austrian constitutional law. This practice of creating constitutional law became very common in Austria and led to more than 1.300 constitutional provisions in ordinary laws. As a result, it is common sense in the scientific community that this situation of constitutional law affects its functioning as a basic order of a society in a very intriguing manner.[6]

Furthermore, we can observe a certain tradition of confronting constitutional law from an administrative perspective. These parts of Austrian constitutional law are very detailed and set up the concrete foundations of administrative acts. As a consequence, many parts of Austrian constitutional law have no specific constitutional contents, which are related to constitutional ideas.

This confirms a two level perspective of Austrian constitutional law in which the basic principles of constitutional law are understood as super-constitutional law and – in a hierarchical perspective (*Stufenbau*) – are ranked higher than "conventional" constitutional law.[7] Thus, constitutional law is divided into "ordinary" constitutional law and basic principles of constitutional law. This distinction between the two levels of constitutional law is legally justified by the different way of the creation of these two levels of constitutional law. The legislative process to enact ordinary constitutional law requires a two thirds consensus in both chambers of the Austrian parliament and the denotation of this specific Act or provision as constitutional law.[8] The level of basic prin-

[5] About this function Theo Öhlinger, ‚Verfassungskern und verfassungsrechtliche Grundordnung', in: Weber/Wimmer (eds.), *Vom Verfassungsstaat am Scheideweg, Festschrift Pernthaler* (Vienna, Springer 2005) 273, 274 ss.

[6] See e.g. Harald Eberhard and Konrad Lachmayer, 'Constitutional Reform 2008 in Austria. Analysis and Perspectives', Vienna Online Journal on International Constitutional Law Vol 2 2/2008, 112 (113 ss) with further references.

[7] Theo Öhlinger, *Verfassungsrecht*, 8th edn (WUV, Vienna 2009) Rz 13 ss, 62 ss.

[8] Art 44 para 1 B-VG: "Constitutional laws or constitutional provisions contained in simple laws can be passed by the National Council only in the presence of at least half the members and by a two thirds majority of the votes cast; they shall be explicitly specified as such ('constitutional law', 'constitutional provision')."

ciples of the constitution can only be amended by a so called total revision (*"Gesamtänderung"*) of the Austrian Constitution. This total revision demands, additionally to the normal requirements of a legislative procedure of an ordinary constitutional law act, a referendum of the Austrian people (Art 44 para 3 B-VG[9]).[10]
The Rule of Law commonly is understood as such a basic principle of Austrian constitutional law (the other basic principles are the principles of democracy, the federal concept of the Austrian state, separation of powers, human rights and the presidential [non monarchic] design of the Austrian government). These basic principles result from a systematic interpretation of the Austrian Constitution and cannot be derived from a single provision of it.

II. The formal dimension of the Rule of Law

The traditional core element of the Rule of Law in a formal dimension is the principle of legality (*Legalitätsprinzip*). According to Art 18 para 1 of the Austrian Constitution (B-VG), the entire public administration has to be based on statutes (Act of Parliament).

This provision establishes – as a first pillar – the supremacy of the law in the way that all administrative acts have to comply with the law ("*Vorrang des Gesetzes*"). As the second pillar of the principle of legality, the "reservation of law" ("*Vorbehalt des Gesetzes*") can be qualified. This means that the entire public administration may only take action on the basis of an explicit legal authorization. The legal power of the administration depends on the legitimized acts of the elected Parliament. Thus, the administration cannot create general statutes but only has to execute these Acts of Parliament. As an exception from this principle, Art 18 para 2 of the Austrian Constitution enables every administrative au-

[9] "Any total revision of the Federal Constitution shall upon conclusion of the procedure pursuant to Art. 42 above but before its authentication by the Federal President be submitted to a referendum by the entire nation, whereas any partial revision requires this only if one third of the members of the National Council or the Federal Council so demands."

[10] Theo Öhlinger, *Verfassungsrecht*, Rz 64 s; Robert Walter / Heinz Mayer / Gabriele Kucsko-Stadlmayer, *Grundriss des österreichischen Bundesverfassungsrechts*, Rz 146.

thority to issue (general) ordinances on the basis of legislative acts within their respective sphere of competence. This power of each administrative body cannot be excluded by a legislative act since it is a competence of the administration granted by the constitution itself.[11] Nevertheless, the right to implement such executive regulations is restricted in the way that these ordinances only have to specify the contents of legislative acts but cannot create new obligations of the citizens not contained in an act of the Parliament.
As a conclusion, the principle of legality has to be seen in its relation between the different levels of law in general and the relation between the legislation and the administration in particular.

III. The substantive dimension of the Rule of Law

Besides this formal understanding of the Rule of Law (as a principle of legality), the judicial and scholarly interpretation developed other elements of the Rule of Law with a substantive dimension. Most of these aspects are the result of the jurisdiction of the Austrian Constitutional Court regarding the basic principle of the *Rechtsstaat* within the last 25 years.[12]

1. Substantive elements of the principle of legality

The first relevant development regarding this issue was the requirement created by the Constitutional Court that the Parliament itself is bound by the principle of legality: legal provisions have to be – in order to this jurisdiction – "sufficiently clear and detailed".[13] However, it is far from being clear, which degree of detailedness is necessary in the single case.

[11] Theo Öhlinger, *Verfassungsrecht*, Rz 580 ss.

[12] For it with further references Martin Hiesel, ‚Die Rechtsstaatsjudikatur des Verfassungsgerichtshofes', Österreichische Juristenzeitung 1999, 522 ss; Martin Hiesel, ‚Die Entfaltung der Rechtsstaatsjudikatur des Verfassungsgerichtshofs', Österreichische Juristenzeitung 2009, 111.

[13] See e.g. Official Collection of the Judgments of the Austrian Constitutional Court (VfSlg) 10.296/1984. The starting point of this jurisdiction lies in the early years of the Austrian system of judicial review: VfSlg 176/1923.

The details of the Rule of Law implications with regard to the limits of delegation of legislative powers to administrative authorities as well as the quality of determining administrative acts do not offer a single and compact solution. The Constitutional Court developed general formula by distinguishing provisions which are conform with the constitutional requirements from those provisions which have to be seen as so-called *"formalgesetzliche Delegationen"*. The latter provisions which are delegating all parliamentary powers to the administration are qualified as unconstitutional. The limits between such a *"formalgesetzliche Delegation"* and a constitutional legal construction are not very clear. One of the usual formula of the Constitutional Court in this field underlines that one has to apply all conventional methods of interpretation if the constitutionality of a provision is at stake. If the relevant provision cannot be interpreted from the point of view of all these methods it has to be seen as unconstitutional.[14]

To put it in a nutshell, one can say that the jurisdiction has developed a system of differentiated demands of the Rule of Law regarding the degree of detailedness of legislative provisions (*"differenziertes Legalitätsprinzip"*).[15] A special aspect of this jurisdiction can be seen with regard to those areas in which the Parliament only can set up directives for certain aims but no specific regulation of the single details of a provision. As a kind of substitution for this deficit the legislative acts have to focus on the detailedness of the procedure leading to certain results of a provision (*"Legitimation durch Verfahren"*).[16]

Another dimension of this understanding of the Rule of Law relates to the perspective of the citizens: The more the legislative acts contain all relevant contents of the administrative acts, the more the *foreseeability* of these acts is guaranteed. This substantive dimension of the Rule of Law is also enshrined in other aspects of the Austrian Rule of Law.

[14] VfSlg 16.204/2001.

[15] See with further references Theo Öhlinger, *Verfassungsrecht*, Rz 586 ss.

[16] VfSlg 17.854/2006.

2. Further substantive elements of the Rule of Law

Another core element of the jurisdiction of the Austrian Constitutional Court demands that a *system of legal protection has to be effective*. This means that provisions which interfere with the functions of the independent or the administrative system of legal protection are unconstitutional. From a Rule of Law point of view each provision of the legal order – and all state acts based upon this provision – have to be in accordance to higher levels of law, especially constitutional law.[17] It is exactly this requirement which must be under effective control by independent courts, in the last instance by the Supreme Court[18] regarding civil and criminal matters and both the Administrative Court[19] and the Constitutional Court[20] with regard to public law matters.

This requirement of accordance to higher law is also valid with regard to constitutional law itself. The climax of these developments was a judgement of the Austrian Constitutional Court in 2001,[21] when the court declared – for the first time – a constitutional provision itself as unconstitutional. A constitutional provision in the Federal Public Procurement Act contradicted the basic constitutional principles of democracy and the *Rechtsstaat*. The relevant constitutional provision determined that the federal provisions regarding the allocation of powers of public procurement authorities "have to be regarded not as unconstitutional". The Austrian Constitutional Court considered this provision as unconstitutional itself because it withdrew a whole legal area (regarding public procurement) from the constitutional control of the Constitutional Court. Thus, the provision contradicted the Rule of Law principle. Moreover, the People of Austria would lose their position to legitimate a total revision in the sense of Art 44 para 3 B-VG if such a constitutional provision is enacted without a referendum.

[17] Basically VfSlg 11.196/1986.

[18] Art 92 B-VG; see Herbert Hausmaninger, *The Austrian Legal System*3rd edn. (Manz, Vienna 2003) p. 125.

[19] Art 130 ss B-VG; cf Herbert Hausmaninger, *The Austrian Legal System*, pp. 135 ss.

[20] Art 137 ss B-VG; cf Herbert Hausmaninger , *The Austrian Legal System*, pp. 140 ss.

[21] Official Collection of the Judgements of the Austrian Constitutional Court (VfSlg) 16.327/2001.

Another important element of the Rule of Law relates to the *separation of powers*. The controlling system of independent courts and other independent administrative authorities can only be qualified as effective if the competent authority is not linked to the controlling authority in an organisational or functional way.[22] Thus, the system of *checks and balances* between different state authorities (with regard to the administration and the judiciary) is an essential element of the Rule of Law.

Finally, the Rule of Law is also enshrined in the system of *human rights*. Human rights commonly are seen as a pillar of the liberal basic principle[23] of the Austrian Constitution, but we have to perceive that the effectiveness of the system of legal protection also and foremost implies the effectiveness of the human rights system.[24] In fact, the jurisdiction of the Constitutional Court developed important aspects of the Rule of Law with regard to the *principle of proportionality* and the so called "*allgemeines Sachlichkeitsgebot*" (general principle of reasonableness) derived from the equality clause (Art 7 para 1 Austrian Constitution[25]) which means that every provision has to be justified by reasonable grounds.[26] In a substantive perspective, the Rule of Law only seems to be realized if the whole legal order is not only based on legislative acts but also if these acts comply with other constitutional directives such as an effective control over them and the principle of proportionality which means that they don´t restrict the legal position of affected individuals all to much.

[22] Theo Öhlinger, *Verfassungsrecht*, Rz 598 ss.

[23] Theo Öhlinger, *Verfassungsrecht*, Rz 75 ss.

[24] For it Rudolf Machacek, *Austrian Contributions to the Rule of Law* (Engel, Kehl 1994) 22 ss.

[25] „All nationals (Austrian citizens) are equal before the law."

[26] With further references Theo Öhlinger, *Verfassungsrecht*, Rz 765 ss; Manfred Stelzer, *An Introduction to Austrian Constitutional Law* 2nd edn (LexisNexis, Vienna 2009) pp 100 s.

IV. Conclusion

The Austrian Rule of Law has to be seen in its – for a long time dominant – formal dimension realized in special in the *principle of legality* (Art 18 para 1 and 2 B-VG) but more and more in its substantive dimension in which there are enshrined material directives for the single provisions throughout the legal order but in special for those provisions which restrict individual rights in an intensive manner. There are also aspects of the effectiveness of the system of legal protection as well as the system of human rights which have to be seen in their Rule of Law dimension.

Today, the Austrian Rule of Law finds itself in a network of different systems which – in their entirety – are collected in the "European Rule of Law" as part of the European constitutional network *("Verfassungsverbund", Pernice*) consisting of the national constitutional systems as well as the European Constitutional level.[27] In this way, the term of the "European rule of law" also has the function of connecting the levels of Community law and domestic law with regard to the application of law. The value of this principle can be seen in the integration of several levels which have no legal context of delegation but cannot be completely separated with regard to their application. In this way, the European rule of law makes an important contribution to the construction of a European multi level system in its dimension of multi level law making.

V. Short list of further reading

See in general regarding Constitutional Developments in Austria:
Vienna Online Journal on International Constitutional Law – www.icl-journal.com.

[27] Harald Eberhard, ‚Das Legalitätsprinzip im Spannungsfeld von Gemeinschaftsrecht und nationalem Recht. Stand und Perspektiven eines "europäischen Legalitätsprinzips"', 63 Zeitschrift für öffentliches Recht (Austrian Journal of Public Law (Springer, Vienna New York 2008), 49 (58 ss).

Harald Eberhard, ‚Das Legalitätsprinzip im Spannungsfeld von Gemeinschaftsrecht und nationalem Recht. Stand und Perspektiven eines "europäischen Legalitätsprinzips"', Zeitschrift für Öffentliches Recht (Austrian Journal of Public Law) (2008) 49.
Harald Eberhard/Konrad Lachmayer, ‚Constitutional Reform 2008 in Austria. Analysis and Perspectives', Vienna Online Journal on International Constitutional Law Vol 2 2/2008, 112 (www.icl-journal.com).
Anna Gamper, 'Introduction to the Study of the Law of the Austrian Federal Constitution', Vienna Online Journal on International Constitutional Law Vol 2 2/2008, 92 (www.icl-journal.com).
Herbert Hausmaninger, *The Austrian Legal System* 3rd edn (Manz, Vienna 2003) pp 123 ss, 129 ss, 139 ss.
Rudolf Machacek, *Austrian Contributions to the Rule of Law* (Manz, Vienna 1994).
Theo Öhlinger, *Verfassungsrecht* 8th edn (facultas.wuv, Vienna 2009).
Manfred Stelzer, *An Introduction to Austrian Constitutional Law* 2nd edn. (LexisNexis, Vienna 2009).
Robert Walter/Heinz Mayer/Gabriele Kucsko-Stadlmayer, *Grundriss des österreichischen Bundesverfassungsrechts* 10th edn. (Manz, Vienna 2007).