

BETWEEN EUROPEANIZATION, UNITARISM AND AUTONOMY. REMARKS ON THE CURRENT SITUATION OF FEDERALISM IN AUSTRIA

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1. Introductory Remarks on the Historical Background of Austrian Federalism

After the breakdown of the Austro-Hungarian Monarchy in 1918, the *Länder* played an important role in building up the new Republic of Austria. Historically, the *Länder* have come into existence during the Middle Ages and have later been the constituting entities of the

Habsburg empire. Despite the fact that the *Länder* lost political weight during the long going debates on the new constitution while the central government in Vienna, which was at the beginning of the new republic weak and powerless, got steadily stronger the Austrian constitution of 1920 formed the new state as a federation. The federal system was supposed to prevent tendencies of separation and bring more balance into the political system by reducing the political weight of the capital, the 'red' Vienna. The constitution, however, was a compromise formula between the Social democrats, who supported a strong centralistic state and the Christian social party who preferred a federal system similar to Switzerland.

The Austrian Federal Constitution (*Bundes-Verfassungsgesetz* = B-VG) was mostly drawn up by the famous Austrian jurist Hans Kelsen and was inspired by the spirit of legal positivism. It created a federation with strong unitary elements and a clear overweight of the federal level of government towards the *Länder*.

2. Institutions and Structures of Austrian Federalism

2.1. General remarks

Art. 2 of the Federal Constitution of 1920 (*Bundes-Verfassungsgesetz* = B-VG) explicitly stipulates that Austria is a federal state which consists of nine autonomous *Länder*, namely Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg and Vienna. Federalism is considered to be one of the basic principles of the Austrian Federal Constitution (other basic principles are the principle of rule of law, the democratic principle and the republican principle). According to Art. 44 par 3 of the Federal Constitution, a total revision of the constitution needs to be approved by referendum. Legal theory and jurisdiction hold that a 'total revision' does not only occur if the constitution as a whole is changed but also if one of the basic principles is deleted or considerably modified. Consequently the abolishment of the federal principle requires the consent of the people in a referendum in addition to a two-thirds majority in Parliament. According to the jurisdiction of the federal Constitutional Court the federal principle has three substantive elements:

– participation of the *Länder* in federal legislation and administration (called ‘indirect federal administration’, mainly executed by the state governor);

– constitutional autonomy of the *Länder*.

The treaty of Austria’s accession to the EU was qualified as a total revision of the Austrian Federal Constitution which needed to be approved by referendum in accordance with Art. 44 par 3 B-VG. According to Art. 44 par 2 B-VG modifications of the Federal Constitution which reduce the competencies of the *Länder* also need the consent of the Federal Council (*Bundesrat*).

The original concept of the Federal Constitution, mostly drawn up by the famous jurist Hans Kelsen in 1920, created Austria as a highly centralized federation. Many of the amendments since 1920 modified the division of competencies and transferred additional powers to the federal level. In the main legislative realms as well as in the administration of laws the Federation plays a pivotal role. For example the courts are regulated by federal law and judges and other employees are civil servants of the Federation. Furthermore, matters of internal security are legislated and administered at the federal level.

Austrian federalism is designed in a strictly symmetrical fashion: The nine *Länder* have equal rights concerning their legislative competencies and their constitutional autonomy. The only exceptions can be found with regard to Vienna, the capital, which is both a Land as well as a municipality.

2.2. Institutional Set-up on the Level of the *Länder*

The Federal Constitution basically determines the election, composition and role of the Land parliaments (*Landtage*), but leaves it to the Land Constitutions to regulate them more precisely.¹ Resulting from their autonomous sphere of competencies, the nine *Länder*

1. Anna Gamper, *Legislative und Executive Federalism in Austria*, Vienna, Braumüller Verlag, 2004, p. 16.

have their own legal systems although they are strictly limited by the powers of the federal government. However, apart from some restrictions in the Federal Constitution, the *Länder* enjoy constitutional autonomy.

There is no bicameral system at the *Länder* level. The election of the *Landtage* is based on the same electoral principles as the election of the National Council (Art. 95 B-VG), namely the principle of proportionality. The *Landtage* are responsible for law-making in the *Länder*.

Each Land Constitution contains more detailed supplementary provisions for the selection and composition of the Land legislature which have to conform to the Federal Constitution.

Beginning in the 1980s, after a long standstill since 1920, various institutional reforms of the constitutions of the *Länder* were implemented, bringing about more elements of direct democracy, introducing aims and goals of state activities and enlarging the range of instruments such as public auditing in the constitutions.

Some observers have stated a 'wider self-consciousness' of the *Länder* to use their constitutional autonomy. This movement started in 1984 by the reform of the Land constitution of Vorarlberg which also played a leading role during the reform debates within the 'structural reform of competencies' in the 1990s. Other *Länder*, such as Tyrol, Salzburg and Upper Austria followed with similar modifications of their Land constitutions. Like Vorarlberg in 1923, Salzburg and Tyrol have changed their constitutions in 1998 in order to accommodate the election of their state governments by a majority vote system rather than by proportional representation. These reforms were meant to spur political competition, however, it remains debatable whether this goal was actually achieved. This might be the reason why the other *Länder* stick to their system of proportional representation.

2.3. Role of Municipalities

Municipalities are playing an important role in the *Austrian* constitutional system. There are about 2350 municipalities, most of them

with not more than 10.000 inhabitants. According to the general clause of Art 118 B-VG, the municipalities have their own field of action for all matters which exclusively or predominantly deal with interests of the local community and are suited for management by the community within its local borders (for example: local public security police, administration of municipal traffic areas and local traffic police). All in all there are three levels of government in *Austria*, hence one could speak of a "three-level-federalism".²

3. Reforming Debates in the Past

In the past, various commissions have failed to reform and modernise the Austrian federal system. The main reasons for their failure have been the anti-federal attitude of the bureaucratic staff in the ministries and the *Länder's* lack of interest to obtain new competencies and responsibilities which might bear political conflict.³

Two crucial reform projects of the last years should be mentioned:

3.1. "Structural Reform of Competencies" 1989 – 1994

At the end of the 1980s, faced with the possibility of Austria's accession to the EU, the *Länder* called for a fundamental redistribution of competencies within the federal system in order to compensate for their loss of powers and influence in various legislative realms ('Structural Reform of the Distribution of Competencies'). A political pact ('Political Agreement on the Reorganisation of the Federation') was signed in 1992 by the Federal Chancellor (on behalf of the Federal Government) and by the chairman of the Conference of *Land* Governors (on behalf of the *Länder*). It contained an agreement about the timing of a constitutional reform which stipulated that a government bill was to be drafted before the date of the referendum on EU membership so that it could be enacted no later than the constitu-

2. See also Peter Bußjäger, "Local government cooperation in Austria: Options and benefits for the communities", in: de Villiers (ed.), *Crossing the Line: Dealing with Cross-Border Communities*, Johannesburg, Konrad-Adenauer-Stiftung 2009, pp. 81-91.

3. See also Peter Bußjäger, "Experts tackle the Constitution", *Federations* June/July 2007, pp. 30-31.

tional amendment concerning Austria's EU accession. However, though a bill entitled 'Structural Reform of the Federation' was indeed drafted, it proved impossible for the national parliament to enact it. For at the 1994 general election, the incumbent SPÖ/ÖVP grand coalition lost the necessary two-thirds majority in the National Council ('Nationalrat', first chamber of the national parliament) and the *Länder* in the end rejected the compromise formula which the government was obliged to negotiate with the opposition on whose support the bill now depended.⁴ The *Länder* were especially opposed against the compromise concerning the introduction of administrative courts of the *Länder*. The executives of the *Länder* feared the costs of the new courts and the loss of political power.

3.2. Austrian Convention 2003 – 2005

The next project of a structural reform of the Austrian federal system was the Austrian Convention from June 2003 to January 2005. While the initiative for the 'Structural reform of competencies' in the early 1990s was caused by Austria's forthcoming accession to the European Union, the Austrian Convention was an apparent result of Austria's EU membership. Ten working groups were formed which discussed different aspects of the reform agenda.

The Convention's task was to submit proposals for reforming the Austrian political system and constitution. With the future constitution, Austria was supposed to be able to fulfil its tasks in a cost-effective, transparent and citizen-friendly way. Especially the division of competencies between the federal and state levels was to be made compatible with the European Union. The convention finished its work in January 2005 without reaching consent in the most intensively debated matters. These concerned the division of competencies, the restructuring of the financial relationships between federal level, *Länder* and local governments as well as the creation of a new charter of fundamental rights including social guarantees.⁵

4. See also Bußjäger, *Experts*, 2007, p. 31.

5. See also Bußjäger, *Experts*, 2007, p. 31.

Although both reform projects had similar goals, there is one important difference: during the late 1990s and the first years of the 21st century the paradigms of the Austrian discussion about the federal system changed. Reform discussions no longer dealt with the strengthening of the powers of the *Länder* but with the future of the federal system itself. However, this change of paradigms has not yet brought about any legal consequences.

3.3. Expert Group on Reforming State and Administration 2007 – 2008

After the elections of Oct 1 2006 Austria's new chancellor, Alfred Gusenbauer, a Social Democrat, had declared reform of the Austrian federal state and of the administration as "the heart" of the governing agreement between the two parties in his coalition Government. Gusenbauer was sworn in as chancellor in January 2007, after more than three months of difficult negotiations between his party and the conservative People's Party that ended in a coalition agreement.

The national elections had led to a near tie in the number of legislative seats held by the Social Democrats and the People's Party. The choice of federal reform was hailed as a breakthrough, because the conservative People's Party had traditionally favoured a high degree of autonomy of the *Länder*, the equivalent of states or provinces, while the Social Democrats had in the past argued for a strong central government.

In fact, the section of the agreement dealing with the new constitutional reform did not aim to write a new constitution, but rather seemed to achieve other reforms such as:

- establishing administrative courts in the *Länder* which would allow participation of the *Länder* in courts.

- organizing a new system of administration for education, which could enable the *Länder* to play a more important role in Austria's educational system.

- enhancing the constitutional autonomy of the *Länder* and reducing the supervising powers of the federation.

– creating a new distribution of competencies by a so-called “third pillar,” which would allow a certain form of cooperative legislation between the federation and the *Länder*.

This last goal, the creation of a “third pillar,” turned out to be the most difficult. Many observers doubted from the beginning whether there would be any chance of reaching consensus on a new form of power sharing since the Austrian Convention had failed in the same project.

One essential difference with the new constitutional reform under Chancellor Gusenbauer was that the reform proposals had to be fleshed out by a small group of experts who played an important role in the past attempt at reforming Austria’s federal system. The agreement between the Social Democrats and the People’s Party named two experts for each of the parties in the coalition. The experts from the Social Democrats were Theo Öhlinger, professor of constitutional law at the University of Vienna, and Peter Kostelka, former speaker of the Social Democratic party caucus in the Austrian legislature, later named Ombudsman by his party.

The experts from the People’s Party were Andreas Khol, former President of the Austrian legislature, now retired but still one of the most prominent political experts on Austrian federalism, and Franz Fiedler, former President of the Austrian court of audit.

Two experts were delegated by the conference of the state governors. The first was Gabriele Burgstaller, *Land* governor of Salzburg and a member of the Social Democrats; the second is Herbert Sausgruber, *Land* governor of Vorarlberg, from the People’s Party. These two individuals were partly represented by other experts. Georg Lienbacher, head of the Constitutional Service of the Federal Chancellery, acted as Secretary General of the group. The group of experts had until the end of June 2007 to work out its proposals.

First the expert group focused its energies on issues related to administrative courts in the *Länder*, the organization of the educational administration in Austria and concentrating the administration of social welfare in a one-stop-shop on the regional level. In a second step, in spring 2008, proposals were presented on the division of competencies and the legal status of the Federal Council. Concerning the latter point not even the expert group could reach consent about the new role of the second chamber of Austrian parliament.

3.4. Reforming State and Administration in the Government Program of the coalition of SPÖ and ÖVP 2008

Reforming state and administration is still on the agenda of the present Federal Government. The main goal is strengthening efficiency of state and administration. Some contents are well-known from former projects:

Administrative courts in the *Länder* are once again on the agenda. Another part is strengthening the constitutional autonomy of the *Länder* for example by reducing intervening rights of the Federal Government against laws passed by the *Landtage*.

On the municipal level the Government intends to improve the autonomy of the municipalities and to facilitate inter-municipal cooperation.

The present Federal Government however sets, probably as a result of all failed reform projects of the past, the focus of its reform project not in a fundamental reform of the federal system but in bringing more efficiency in administrative procedures and in improving cooperation between all levels of state.

Once again a working group is established, consisting of experts of two scientific institutes on economics (WIFO and IHS) and the Austrian court of Auditing and representatives of the Federal Government and the *Länder*. The task of the working group is to elaborate proposals of administrative reforms in Austria. Expectations of observers are fairly small: The failure of many reform projects of the past is a heavy burden for the ongoing discussions.

4. Problems and Challenges of Austrian Federalism

4.1. Europeanization and Federalism

Membership to the EU means a challenge for any political system with decentralized legislation on regional level. Not only that European legislation also affects legislative competences on regional level or that European legislation has to be carried out on regional level,

it is also difficult for regional jurisdictions to participate in the decision making process on European level.

According to Art 23 par 5 B-VG, the *Länder* are bound to implement legislation of the European Union provided that it falls into their sphere of competence. Should a *Land* fail to comply with this obligation and should this be confirmed by a court within the framework of the European Union the legislative competence is transferred to the federal level. The law or ordinance that has been issued by the federal level becomes invalid as soon as the *Land* takes action to fulfil its responsibilities.

Today about 20–30 percent of the legislation of the *Länder* is at least partly dealing with EU law, namely the implementation of directives.⁶ Analyses of federal legislation are showing similar results.

Due to the Europeanization of the legislative competencies the parliaments of the *Länder* are faced with obligations of implementing European directives and restrictions resulting from the Treaties. In fact the *Landtage* have lost competencies and autonomy. Nearly all legislative competencies of the *Länder* are in some way affected by EU law. The most prominent matters of regional politics which are 'Europeanized' are agriculture, regulations of the *Länder* concerning acquisition of real estates, nature and landscape protection, town and country planning, energy, working law of civil servants of the *Länder* and local governments.⁷

Administrative competencies of the *Länder* are affected by direct administration of EU law, which means the execution of EU regulations or direct application of provisions of the treaties. With some exceptions direct application of EU directives concerns comparatively few matters (agriculture and administration of structural funds). In other realms, direct application of EU law plays no significant role.

The EU rules of competition have had an important impact on regional politics with regard to the funding of economic projects and

6. See nearer Peter Bußjäger/Daniela Larch, *Europäisierungsgrad und Landesgesetzgebung*, Innsbruck, Institut für Föderalismus, 2004.

7. Bußjäger/Larch, *Europäisierungsgrad und Landesgesetzgebung*, 2004, pp. 9-11.

the EU contracting law for public mandates. These had to be implemented into Austrian law when Austria joined the EU.

In several cases Europeanization has led to a centralisation of powers at the federal level: in the case of animal protection the fact that the *Länder* had to implement numerous directives into their legal systems motivated the federal government in 2004 to introduce a bill which transferred these competencies to the federal level. In 2002, the federation has gained competencies with regard to public procurement law for similar reasons. Furthermore, the *Länder* lost legislative competencies in the field of energy (mainly electricity and power plants). The *Länder*, however, made no objections against these centralisations.

As a countermove the executives of the *Länder* have to a certain extent won political influence vis-à-vis the federal government by being able to pass binding comments (see below).

With regard to legislation, nearly all fields of public policies of the *Länder* have been affected by Europeanization. In the realm of environmental and social politics Europeanization has had an extensive impact: numerous directives concerning country planning (such as the so-called SEA directive)⁸ have had to be implemented into the *Länder's* legal systems. Furthermore, Europeanization affects social politics with regard to non-discrimination.

Until now there are – apart from the provisions of participation of the *Länder* in the European decision-making process (see below) – no specific provisions on subsidiary control mechanisms (according to the protocol on subsidiary and proportionality in the annex of the European Constitutional Treaty). However, the Austrian *Landtage* are demanding institutionalisation of such procedures in order to define the relationship between federal and state parliaments.

Since it became clear that, with Austria's accession to the EU, a number of competencies which were still in the realm of the *Länder* would either be transferred to the EU level or 'Europeanized', the *Länder* demanded not only a structural reform of the competencies but also participation in the decision-making process at the EU level.

8. Directive 2001/42/EC.

Since Austria's accession to the EU needed to be ratified in a referendum and the federal government needed the support of the political elites in the *Länder* in order to promote the campaign for the referendum, the *Länder* were successful in obtaining a role in the decision-making process of the EU. As a result Art. 23d B-VG stipulates that the federal government must inform the *Länder* without delay about all projects within the framework of the European Union which either affect the *Länder's* autonomous sphere of competences or could otherwise be of interest to them. In addition, the federal government must grant the *Länder* the chance to comment on EU decision-making within a reasonable timeframe.

In case the federal government receives an unanimous statement by the *Länder* regarding matters within the sphere of *Länder* competencies, it is bound to adhere to this statement in negotiations at the European level. It may only deviate from this due to compelling foreign and integration policy reasons and has to inform the *Länder* about the reasons for its deviation without delay.

In practice, from 1993 until the end of 2008 (the first statements were already submitted during the negotiations between the EU and Austria) the Austrian *Länder* submitted 75 unanimous statements.⁹ The federal government only deviated in a few cases which were of no significant importance to the *Länder*.¹⁰

It seems that the interests of the federal and the regional level in Austria have so far been relatively close to one another. However, it should be mentioned that the statements of the *Länder* are in some cases very vague and imprecise, consequently imposing only few restrictions on the federal government in the negotiations at the European level. The uniform statements of the *Länder* are formulated in a cooperative way. It rarely happens that such statements fail on ground of objections of one or more other *Länder*. This indicates broad common interests of the *Länder*.

9. Source: Institute of Federalism, Innsbruck

10. See Andreas Rosner, "Drei Rechtsfragen der Mitwirkung der Länder in Angelegenheiten der europäischen Integration", in: Bußjäger/Rosner, *Mitwirken und Mitgestalten – Europa und die österreichischen Länder*, Wien, Braumüller Verlag, 2005, pp. 62-67.

Table 1. Unanimous statements of the Austrian *Länder* on projects within the framework of the European Union concerning the types of projects from 1993–2008

| Types of projects | Number |
|--|-----------|
| Proposals of directives of the EU | 31 |
| Comments on administration and implementation of EU law | 11 |
| Comments on planned decisions or measures to be taken of the EU | 15 |
| Negotiations on Austria's accession to the EU | 3 |
| Negotiations on enlargement of the EU | 3 |
| Other projects of the Commission ('green books', 'white books'...) | 3 |
| Proposals of regulations of the EU | 4 |
| Austrian position to conferences of the governments of the EU | 2 |
| Procedures before the Court | 2 |
| Treaties with the EU | 1 |
| Total | 75 |

Table 2. Unanimous statements of the *Länder* on projects within the framework of the EU concerning fields of regional politics

| Agendas | Number |
|--|-----------|
| Environment/waste disposal | 17 |
| Nature protection | 19 |
| Economics, fundings, social services of general interest | 9 |
| Animal protection | 5 |
| Town- and Country-planning | 5 |
| Freedom of residence | 4 |
| Acquisition of real estates | 3 |
| Fundamental positions (e.g. on conferences of the governments of the EU) | 3 |
| Technical regulations (e.g. on fields of building law) | 2 |
| Culture | 2 |
| Social politics | 4 |
| Sports | 1 |
| Tourism | 1 |
| Total | 75 |

The *Länder* can also participate directly in EU negotiations. If issues within their legislative realm are discussed, the government may include a *Länder* nominee in the Austrian delegation. This rep-

representative may, however, only act in cooperation with the responsible member of the government (see Art. 23d par 3 B-VG).

In practice, the participation of a so-called common representative of the *Länder* in the Council has no relevance. The participation of representatives of the *Länder* in the Austrian delegation within working groups of the Council is much more important.

It needs to be mentioned that the statements of the *Länder* regarding EU matters are in most cases elaborated within the governments and without any participation of the state parliaments. We can therefore state that Europeanization in Austria has led to a strengthening of the position of the state governor vis-à-vis the federal government and has weakened the position of the state legislatures. The latter have to implement European law into the state legal system without participating in the European decision-making process in the same way as the state governments. Although the *Landtage* have established committees for European matters they have not been able to gain much influence with regard to European legislation. This is even the case in states in which the state government is obliged to inform the *Landtag* about projects of European integration (Burgenland, Upper Austria, Salzburg, Styria, Tyrol and Vorarlberg).

It is also important to note that until today there are no institutional and only few informal connections to the Federal Council in European matters. The reason is that the Federal Council, contrary to the National Council, disposes of no effective instrument to submit binding comments to the federal government. The Federal Council is allowed to formulate binding comments only if EU law must be implemented by a modification of the Federal Constitution which would reduce the competencies of the *Länder* in legislation or execution.

Another aspect is the question of application and implementation of EU law in the *Länder*. As EU law normally relates to the spheres of competences of both the national level and the regions, problems of application and implementation of supranational law are usually greater for federal states, because in these systems the legislative competencies are divided between the level of the federal government or the state on the one hand and the sub-national units on the other hand.

Given the size of the country, which is smaller than the German state Bavaria, this procedure is considered to be rather expensive and complicated. Additionally, sceptics blamed the federal system for Austria's mediocre implementation results. However, several analyses by the Institute of Federalism have shown that in most cases it was the federal government and not the *Länder* which caused the delay. The same result occurred with regard to judgements of the European Court against Austria: in most of the cases it was bad execution of EU law by federal agencies which caused these legal proceedings. Despite the results that refute the afore-mentioned assumptions, there are a lot of critics who complain about the Austrian federal system in the light of European integration.

Matters in which the *Länder* have lost political influence and powers were mainly the regulatory laws on the real estates, environmental politics, nature and landscape protection or public contracts.

Since 1995 the federal government only deviated from a uniform statement by the *Länder* in EU matters in three cases. In addition, these cases were not very important for regional politics, concerning some aspects of animal protection in zoos, information on environmental matters and waste disposal. This fact indicates that there haven't been any serious conflicts between the federal government and the *Länder* in the past with regard to European matters. We can also say that there have been no cases in which the *Länder* have seen the EU as an ally against the national government.

4.2. Bureaucracy and Federalism

Austria has still as a "heritage" of the Austrian – Hungarian Empire comparatively wide-ranged bureaucratic staffs in the Federal Ministries. Federal execution play also an important role in the *Länder*: There are many federal agencies and authorities in the *Länder*, for example for workers protection, school administration or public security. Also the whole labour market service is task of federal legislation and direct federal administration.

This means not only that also administration in Austria is rather centralized, but also that federal bureaucracy usually objects to projects

of decentralization, in special in respect of transferring more power to the *Länder* and its authorities.

On the other hand there are Land bureaucracies which are usually not interested in more federalization, because it would need more responsibility and accountability of their taken actions. As a result of this situation, in which no one is really interested in change, bureaucracy in Austria tends to preserve existing institutions and works as an obstacle towards far-reaching of reforms of Austrian federalism.

4.3. Attitudes of Austrian Society towards Federalism

In contrast to other federal systems (notably Canada, Switzerland or the USA), Austria is usually described as a homogenous society in the comparative literature, where there are no permanent ethnic, religious or other cleavages on a regional basis.¹¹ The former polarization between the centre and the states as well as between the states has meanwhile given way to folkloristic stereotypes, and due to social and economic modernization regional sub-cultures, local life styles and milieus have largely eroded.

Because of the federal character of the political system the political elites at the state level – more so than the economic elites – support regional self-government, all the more as the formal competencies of the *Länder* are rather weak compared to other federal systems. However, their permanent demands to get more competencies is usually not supported by federal politicians, and this holds true for the Austrian People's Party (*Österreichische Volkspartei*, *ÖVP*), which claims to be the most federally-oriented of all the major parties, as well.

4.4. Structures of the Party System

In Austria, no distinct party systems exist at the state level. With three exceptions (1945 in Carinthia, 1954 in Lower Austria and 1969

in Vienna), only the state organizations of national parties have won seats in the state parliaments (*Landtage*) so far. A comparative study of five federal systems (Australia, Belgium, Germany, Canada and Austria) came to the conclusion that in Austria the adaptation of sub-national parties and party systems to the structures of the federal system was the least intensive.¹²

In general, the state party organizations enjoy a relatively large organizational autonomy versus their national headquarters. Public financing of parties at the state level (if we add together all nine states) is even higher than at the national level. In case of government participation, the state parties also have access to the administrative resources of the state governments.¹³ The exact degree of autonomy of the sub-national units depends on the type of party, though. In the more federalized Austrian People's Party (*Österreichische Volkspartei, ÖVP*) intra-party power has been decentralized from 1945 onwards, with the state organizations with the highest membership (above all Lower Austria with about 40 percent, but also Upper Austria and Styria) playing leading roles. In the more centralized Social Democratic Party of Austria (*Sozialdemokratische Partei Österreichs, SPÖ*), the Viennese party organization, with a long tradition of ruling the capital and comprising about 26 percent of the members of the party, is the dominant intra-party group. The Freedom Party of Austria (*Freiheitliche Partei Österreichs, FPÖ*) was organized in a decentralized way until the 1980s, with the organizations of Upper Austria, Carinthia and Styria being most powerful. After Jörg Haider had been elected party chairman in 1986, however, the state party organizations lost influence dramatically. In the Green party, it is the parliamentary faction which dominates intra-party decision-making, but especially the Viennese party organization has to be taken into account (in 2003, e.g., it was able to stifle the rather promising coalition negotiations with the ÖVP).

The party systems at the national and state level form joint arenas. The 'national' trend in voter attitudes since the mid-1980s, char-

12. See nearer Peter Bußjäger/Franz Fallend, *Country Report Austria, Project of Bertelsmann Foundation "Optimizing multi-level-Governance*. Publication in preparation for 2010 by Bertelsmann Foundation.

13. Franz Fallend, "Bund-Länder-Beziehungen ". In Herbert Dachs (ed.) *Politik in Österreich: Das Handbuch*, Vienna, Manz Verlag, 2006, p. 1036.

acterized by rising political disaffection and protest against the 'collusion' and corruption of the SPÖ-ÖVP coalition government (between 1987 and 2000), affected the states, too. Similar to the federal level, the former two-party systems in the *Länder* were transformed into multi-party systems. However, there still exist distinct voting patterns at the state level. At present, in four *Länder*, the ÖVP dominates (Lower Austria, Upper Austria, Tyrol, Vorarlberg), in four the SPÖ (Vienna, Burgenland, Salzburg, Styria), and in one (Carinthia) the FPÖ.

In the *Länder* of Burgenland, Carinthia, Lower Austria, Upper Austria and Styria, the governments are composed according to the *Proporz* principle, i.e., they are not based on free majority-building in parliament.

Office-holding in the states is rather popular, which is indicated by the rather low percentage of members of state governments who move up into the federal government. In the period between 1945 and 1987 only 14 percent of federal government members were recruited from state governments. In 2008 for example the Federal Minister for internal affairs Günther Platter resigned from this function to take over the office as Land Governor of Tyrol.

4.5. Constitutional Autonomy of the *Länder*

Articles 10-15 of the Federal Constitution regulate the separation of legislative and executive powers between the Federation and the members. Because Federal and *Länder* statutes have the same rank, if one legislature enacts a statute that contradicts the constitutional distribution of powers, it remains valid until annulled by the Constitutional Court. In terms of the distribution of powers, four possibilities exist: (1) exclusive *Bund* (Federal) legislation and execution, (2) *Bund* legislation and *Länder* execution, (3) fundamental legislation by the *Bund*, with enabling legislation and execution by the *Länder*, and (4) exclusive *Länder* legislation and execution. Although the *Länder* enjoy residual powers in areas not expressly assigned to the Federation, the latter exercises the most important powers as enumerated in article 10 of the Constitution.

Because constitutional autonomy is one of the central elements of the Federal principle, each of the nine *Länder* has its own constitu-

tion. Yet although the nine *Länder* have their own legal systems and enjoy relative constitutional autonomy, this autonomy is of course limited by the powers of the Federal government. In addition, there is some pressure toward homogeneity among the *Länder* constitutions, because they are supposed to harmonize with the Federal Constitution and commonalities among the *Länder* constitutions facilitate such harmonization.

Since the early 1980's, after a long period of inactivity, various reforms of the *Länder* constitutions have been introduced. Reform efforts began with deep reaching changes in the constitution of Vorarlberg in 1984 and with debates about constitutional reform in Styria at the same time. Other *Länder*, including Tyrol, Salzburg, and Upper Austria, followed within 15 years with important modifications of their constitutions. But also in the other *Länder* various modernizations of the *Länder* constitutions took place. These amendments have included the establishment of more mechanisms for direct democracy, the introduction of goals for state activity, and an expansion of the range of instruments, such as public auditing, for supervision of the operation of government. Some observers¹⁴ have also noted a "wider self-consciousness" among the *Länder* to make use of the constitutional space available to them. Coinciding with this was a change in the common understanding of the role of *Länder* constitutions among legal scholars and practitioners. *Länder* constitutions were no longer seen as subservient to the Federal Constitution but instead seen as the basic law within the various *Länder*. This changed understanding, however, raised a new question about the scope of constitutional autonomy for the *Länder*.

According to Art. 99 B-VG, the *Länder* constitutions may not "affect" the Federal Constitution. This provision safeguards homogeneity between Federal and *Land* constitutional law. In the past, there was extensive debate about the meaning of this provision. However,

14. Friedrich Koja, *Das Verfassungsrecht der österreichischen Länder*, Vienna, 1988, p. 23; Joseph Marko/Klaus Poier, *Die Verfassungssysteme der Bundesländer: Institutionen und Verfahren repräsentativer und direkter Demokratie*, in : Dachs (ed.), *Politik in Österreich*. Das Handbuch, Vienna, Manz Verlag, 2006, p. 943-958. Richard Novak, *Die relative Verfassungsautonomie der Länder*, in: Rack (ed.), *Landesverfassungsreform (1982)*, pp. 35-49; Peter Pernthaler, *Österreichisches Bundesstaatsrecht*, Wien, Verlag Österreich, 2004, pp. 459-482.

the Constitutional Court has clarified matters, for many years ruling that “affect” means that subnational constitutions may not contradict the Federal Constitution.¹⁵ This means that the constitutional autonomy of the *Länder* resulting from Art. 15 para. 1 B-VG, in that all competencies in legislation or administration that are not explicitly transferred to the federation remain within the autonomous field of the *Länder*, has its limits in the fundamental principles of the Federal constitution on the one hand and in explicit provisions of the Federal Constitution on the other. This implies that the *Länder* constitutions may codify anything insofar as it does not contradict Federal constitutional law.

The Federal Constitution provides a general framework that is applicable to both the Federation and the nine *Länder*. This framework is not only based on the fundamental constitutional principles such as democracy, republicanism, the rule of law, and human rights, but also on certain constitutional provisions of a more general character, such as the duties of administrative bodies or the structure of state organization.¹⁶ Therefore scholars have characterized the constitutional autonomy of the Austrian *Länder* as a “relative constitutional autonomy.” Consequently, Art. 99 B-VG serves as a specific rule for the homogeneous relationship between Federal and *Länder* constitutional law.¹⁷ On ground of this rule a certain standard of fundamental rights or democratic instruments is guaranteed.

The Austrian Federal Constitution – unlike those in Germany, Switzerland, and the United States, for example – regulates in detail the structure and operation of subnational governments. Art. 95 B-VG mandates the same principles for state parliamentary elections as for elections on the Federal level (principles of common, equal, secret, and direct elections). Art. 96 B-VG states that the status of the deputies of the *Landtage* may not deviate from the status of the deputies to the National Council. Other provisions prescribe legislative procedure in the *Länder* (e.g., Art. 97 B-VG).

15. See VfSlg 5676/1968; 9547/1982.

16. See also Anna Gamper, “The Principle of Homogeneity and Democracy in Austrian Federalism: The Constitutional Court’s Ruling on Direct Democracy in Vorarlberg”, in: Peter Bußjäger/Anna Gamper (eds.), *The homogeneity of Democracy, Rights and the Rule of Law in Federal or Confederal Systems*, Vienna, Braumüller Verlag, 2003, p. 126.

17. Gamper, *Principle*, 2003, p. 134.

Art. 101 B-VG requires that the *Land* government has to be elected by the Land parliament and consist of a governor, his representatives, and other members. The Federal Constitution also contains special regulations for the capital Vienna, due to its dual status as state and municipality, as well as detailed regulations for the institutional structure and operation of municipalities. According to Art. 117 B-VG, there must be a municipal council that is elected on the basis of proportional representation, a mayor who may – depending on the respective *Land* constitution – be elected directly by the people, and an executive body, the *Gemeindevorstand*. The Federal Constitution authorizes the *Länder* to allow municipalities to make use of direct democracy, such as initiatives and referenda, to the municipal level. Art. 118 par. 2 B-VG includes a definition of local self-government along the lines of the subsidiary principle. Par. 3 enumerates those matters for which local self-government is guaranteed.

Austria's subnational constitutions are quite uniform in their regulation of the structure of *Land* governments and the procedures by which they operate. This is hardly surprising, because these provisions largely predate the recent reforms of *Länder* constitutions discussed above. There are no bicameral systems on the *Länder* level, and the election of the *Landtage* is based on the same electoral principles as the election of the National Council (Art. 95 B-VG). The Federal Constitution basically determines the selection, composition, and role of the *Länder* parliaments, but the *Länder* constitutions supply detailed provisions for the selection and composition of the legislature that supplement those found in the Federal Constitution. *Länder* constitutions also regulate the internal structures of the *Länder* parliaments, i.e. party factions, standing committees, and instruments of political and financial control of the executive (e.g., the right of interpellation, the appointment of investigative committees, and the vote of no-confidence, as well as audit offices of the *Länder*). Because of its obvious political importance, *Länder* constitutions address in great detail the election of the government by the *Land* parliament. *Länder* constitutions also provide for various instruments of direct democracy, and they regulate the use of "authorizations" of the Federal Constitution. For instance, one-third of the deputies of a state parliament may request judicial review of *Land* legislation before the Constitutional Court (Art. 140 para. 1 und 3 B-VG). Furthermore, *Land* parliaments have to be informed on all EU matters

that fall into the competence of the *Länder* and have the right to adopt binding opinions on those matters. The constitutions also repeat provisions of the Federal Constitution, such as the right to conclude international treaties.¹⁸

The most important differences as far as governmental structures are concerned are the rules on the composition of the executive body, the state government. After 1945, seven of the nine *Länder* constitutions – all but those of Vorarlberg and Vienna – provided for proportional representation. These constitutions were based on a power-sharing model under which the political parties – in particular the conservative People's Party, the Social Democratic Party, the national-liberal Freedom Party, and the Greens – could appoint members of the government based on their share of the popular vote. Moreover, in Burgenland, Carinthia, Lower Austria, Upper Austria, and Styria, the parties secured the right that only the candidates nominated by them are elected insofar as only they have the right for nomination and only those votes cast are valid that are cast for their nominees (the so-called "*Fraktionswahl*"). This mechanism, which in practice has transformed the election into an appointment process for the various parties, has nonetheless been accepted by the Constitutional Court (VfSlg 12.229/1989). An important element of competition does remain in the election of the governor which is, under all *Länder* constitutions, based on a majority vote.

Like Vienna in 1921 and Vorarlberg in 1923, Salzburg and Tyrol modified their constitutions at the end of the 1990s in order to accommodate the election of their state governments by a majority rather than a proportional voting system. Thus, since 1998 there are four *Länder* with majority governments: Vorarlberg (since 1923), Vienna (since 1921), Salzburg and Tyrol. These reforms were meant to spur political competition, but it is debatable whether this goal was actually achieved. This might be why other *Länder* have thus far retained their systems of proportional representation.

This survey of constitutional developments in the Austrian Federal system has demonstrated the increasing importance of

Länder constitutions. While these constitutions only played a minor role for many years, this began to change in the early 1980s, with the recognition that *Länder* constitutions could be venues for innovation and policy or institutional experimentation. The effects of changes in *Länder* constitutions have been felt within the borders of the various *Länder*, beyond the borders of individual *Länder* as innovation in one *Länd* has encouraged emulation and experiment through the processes of horizontal federalism, and – to some extent – even at the Federal level. For example, the decision to lower the voting age to 16, whereby nearly every citizen has the right to vote in all elections and referenda on the Federal, Land or municipal level, was enshrined in the Federal constitution as a result of learning from experiments undertaken in various *Länder* since the 1990s.

However, reforms on the *Länder* level should not be overestimated. The Federation still plays the dominant role in the Austrian political system, and the Federal constitution's restrictions on state constitutional space do not allow for deep-rooted reforms such as the change from proportional to majority voting in elections to *Länder* parliaments. To sum up, in recent decades reform has proceeded at the *Länder* level on a step-by-step basis, while at the Federal level efforts at constitutional reform have failed. One reason is that the Federal reform projects are very general and aim to realize deep structural changes in the Federal system. Another reason is the fact that Austria is what Jan Erk has called "a Federation without federalism".¹⁹ The Austrian citizens want to have both strong regional entities and a uniform legal system. While the first is an essential element of federalism, the latter is incompatible with the concept of federalism. As long as Austrian politics and society are unable to overcome this paradox, all deep reaching reform projects are likely to fail. Only reform projects in specific matters, such as administration of education or administrative courts in the *Länder* seem to have a certain chance to get realized.

19. Jan Erk, "Austria: A Federation without Federalism", *Publius: The Journal of Federalism*, Volume 34, No. 1 (2004), pp.1-20.

5. Summary: Perspectives of Austrian Federalism

5.1. Capacity to Redress the Territorial Balance

After Austria's accession to the EU and the failure of the 'Structural reform of competencies' in the years 1993 and 1994 there have been no attempts to compensate the *Länder* for their loss of competencies. Since then the paradigm has changed. Various competencies have been transferred to the federal level, but in turn the *Länder* have not been compensated. None of the *Länder* was successful in exercising influence on the federal government.

In the last years there have not been any significant conflicts between the *Länder* and the federal government in EU-matters. The procedure for the participation of the *Länder* in the European decision-making process works well. In case of conflicts, however, the federal government would be in the stronger position for there are no judicial procedures for the resolution of such conflicts.

5.2. Capacity to Reconcile Regional Diversity and National Coherence

As stated above, the procedure of regional participation in EU decision-making works well with the exception of that the possibility to send a common representative of the *Länder* into the debates and negotiations in the Council, who would also represent the Republic as a whole, has never got effective. There are informal instruments of coordination within the executives of the *Länder* which allow them to react in time and to represent the *Länder's* position in the working groups on the European level (in practice, the *Landtage* are excluded from the decision-making process).

In the ranking of EU law implementation among EU member states, Austria is presently occupying an average position. In the past Austria was sometimes located at the bottom of the list. Sceptics blamed the federal system for Austria's mediocre implementation results. Several analyses of the Institute of Federalism have shown, however, that the delay was caused by the federal government and not by the *Länder*. The same is true with respect to judgements by the European Court of Justice: in most of the cases it was bad execu-

tion of EU law by Austrian federal agencies which caused the legal proceedings.

5.3. Adaptiveness of the Distribution of Powers

The failure of the structural reform of the federal state in 1994 has led to a standstill in reforms of Austria's federal system. In the following years, the *Länder* have only succeeded to improve their position with regard to the Pact of Consultation and the Pact of Stability. In addition, the restrictions concerning the competencies for civil servants of the *Länder* and the municipalities were lifted in 1999, paving the way for bureaucratic reform in the *Länder*. The leaders of the reform endeavors have been the states of Vorarlberg and Upper Austria.

On the other side, the *Länder* lost their legislative competencies for contracting law for public mandates in 2002 and for animal protection (with the exception of hunting and fishing) in 2004. The federal government argued that these matters had been heavily Europeanized and therefore needed to be transferred to the national level. However, the federal laws that have been passed ever since do not seem to be more efficient.

5.4. Reform of Financial Responsibilities

In summary the professionals are in the opinion that the Financial Constitution and the Fiscal Equalisation between Federation, *Länder* and Municipalities needs a bottom-up reform. The main reasons are that the existing rules got quite complex in the course of time. The primary goal of the current Fiscal Equalisation is the distribution and not the optimal allocation.

The *Länder* are reliant on the transfer payments of the federal level, but it would be better to place the responsibility to the *Länder*. Fiscal federalism could be an option, but this would need a far-reaching reform of the financial constitution bringing more autonomy for the Land jurisdictions and more differences into Austrian federalism. Until now there we cannot recognize any real drive for reforms in this direction.

5.5. Empowerment of *Landtage*

The *Landtage* are obliged to implement European law into the legal systems of the *Länder*. Their autonomy is strictly limited in case the framework setting of the EU is very narrow. In addition, the *Landtage* have no capacity to emancipate themselves from the dominance of the executives thus turning law-making of the parliaments into an exclusively procedural act. In case EU regulations, which are directly binding on the member states, conflict with the legal systems of the states, the law is basically changed without the participation of the state parliaments.

Although the *Landtage* have established specialised committees for European matters these committees and even the state parliaments were not able to gain influence with regard to European matters. This is also true for those states in which the government is obliged to inform the *Landtag* about European matters (Burgenland, Upper Austria, Salzburg, Styria, Tyrol and Vorarlberg). This is because the state parliaments do not dispose of financial and human resources in order to compete with the state executives.

In this context it is interesting to note that there is neither an institutional nor an informal connection between the state parliaments (or the state governments) and the Federal Council with regard to European matters. In contrast to the National Council the Federal Council cannot submit binding statements to the federal government and can therefore be ruled out as cooperation partner of the states.

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ABSTRACT

The following article describes current challenges of Austrian federalism. On ground of the Federal Constitution from 1920 Austria is a federation with nine autonomous *Länder*. Federalism is one of the basic principles of the constitution. Nevertheless the *Länder* are faced with centralizing drive due to Europeanization and unitarism. On the other hand the *Länder* have a strong regional identity. The *Länder* are emotionally deeply rooted in the Austrian population. The *Länder* also participate well in the decision making process on European level.

Nevertheless the division of competencies both in legislation and administration between Federation and *Länder* is complicated and needs to be modernised. In the past various reform projects on federal level had failed while various reforms in the *Land* constitutions have led to more innovation on *Land* level. Despite these facts paradigms of reform debates on Austria's federal system have changed: Until the early nineties of 20th century constitutional reforms aimed to strengthen the role of the *Länder*. Since Austria's accession to the EU reform projects the efficiency of the federal structures of Austria are doubted. Economical and financial crisis probably will increase the pressure for structural reforms.

Key words: Europeanization; Federal Constitution; constitutional autonomy; financial constitution; National Council; Federal Council; Landtage; Municipalities.

RESUM

Aquest article descriu els problemes actuals del federalisme a Àustria. D'acord amb la Constitució federal de 1920, Àustria és una federació amb nou *Länder* (comunitats autònomes), i el federalisme és un dels principis bàsics d'aquesta constitució. Tanmateix, els *Länder* afronten ara tendències centralitzadores, a causa de l'eupeïtzació i l'unitarisme. D'altra banda, tenen una forta identitat regional i estan sentimentalment molt arrelats en la població austríaca. A més, és important la participació dels *Länder* en el procés de presa de decisions en l'àmbit europeu.

Tot i això, la divisió de competències entre la federació i els *Länder* quant a legislació i administració és complicada i cal que es modernitzi. En el passat, hi ha hagut diversos projectes de reformes en l'àmbit federal que han fracassat, mentre que diverses reformes en les constitucions dels *Länder* han dut més innovacions en el marc dels mateixos. Tanmateix, els paradigmes del debat de reforma del sistema federal austríac han canviat: fins a principis de

la dècada dels noranta del segle XX, les reformes constitucionals pretenien reforçar el paper dels *Länder*; des de l'entrada d'Àustria als projectes de reforma de la UE, es posa en dubte l'eficàcia de les estructures federals austríaques. Segurament, la crisi econòmica i financera augmentarà la pressió per endegar reformes estructurals.

Paraules clau: europeïtzació; constitució federal; autonomia constitucional; constitució financera, consell nacional; consell federal; parlaments autonòmics (*Landtage*), municipis.

RESUMEN

El presente artículo describe las dificultades actuales del federalismo en Austria. De acuerdo con la Constitución Federal de 1920, Austria es una federación de nueve *Länder* (comunidades autónomas), y el federalismo es uno de los principios básicos de esta constitución. Sin embargo, los *Länder* afrontan ahora tendencias hacia el centralismo, a causa de la europeización y el unitarismo. Asimismo, los *Länder* representan una fuerte identidad regional y están muy arraigados sentimentalmente en la población austríaca. Además, tienen un papel importante en la toma de decisiones en el ámbito europeo.

No obstante, la división de competencias entre la federación y los *Länder* en lo referente a la legislación y la administración es complicada y necesita ser modernizada. En el pasado, han fracasado varios proyectos de reforma en el ámbito federal, mientras que varias reformas en las constituciones de los *Länder* han propulsado más innovaciones en el marco de los propios *Länder*. Sin embargo, los paradigmas de los debates de reforma en el sistema federal austríaco han cambiado: hasta principios de los años noventa del siglo xx, las reformas constitucionales pretendían reforzar el papel de los *Länder*; desde la entrada de Austria en los proyectos de reforma de la UE, se duda de la eficacia de estas estructuras federales austríacas. Asimismo, la crisis económica y financiera probablemente aumentará la presión para reformas estructurales.

Palabras clave: europeización, constitución federal, autonomía constitucional, constitución financiera, consejo nacional, consejo federal, parlamento autonómico (*Landtage*), municipios.