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Austrian Federalism in Comparative Perspective

Austrian Federalism: History—Properties—Change

Ferdinand Karlhofer

Introduction

In comparative research on federations, Austria ranks among the group of countries which “describe themselves as federations while being so centrally dominated in design and practice as to be little short of unitary states.”¹ It is first and foremost the remarkable power asymmetry between the two houses of parliament that creates doubt as to whether the country should still be considered a federal, or rather a unitary country. The Federal Constitutional Law (*Bundesverfassungsgesetz* = B-VG) provides for supremacy of the *Nationalrat* (National Council) over the *Bundesrat* (Federal Council), markedly expressed in Article 10 which assigns the “exclusive federal competence in both legislation and administration” to the former, thus leaving only residual competences to the second chamber.²

Without question, from a merely institutional perspective the argument is definitely stringent. Closer inspection, though, reveals a more complex picture in that there are not only institutional provisions but also informal mechanisms and forces at work. As pointed out below, any approach disregarding the fact that the formal constitution is paralleled by a real one inevitably falls short in explaining Austrian federalism. Taking this in account, the approach chosen here draws upon the insights of historical institutionalism which allows for the assessment of the characteristics and work of institutions with reference to historical origins and path-dependent developments. Following Jörg Broschek, historical institutionalism is

.... *historical* in that its proponents employ causal claims stressing timing and sequencing. Past choices, often made under

1 Thomas O. Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Toronto: Broadview Press, 2006), 34.

2 Peter Pernthaler, “The Impact of the New Cooperative and Tripartite Federalism on the Traditional Distribution of Competences in Austria,” in *Decentralizing and Re-centralizing Trends in the Distribution of Powers within Federal Countries*, ed. Institut d’Estudis Autònoms (Barcelona: El Tinter, 2010), 111-119, p. 112.

conditions of uncertainty and involving contingent alternatives, are considered to delineate the boundaries within which future choices are made, and it is *institutional* in that past legacies manifest themselves most obviously in institutional trajectories. Unveiling the historically constructed “grammar” of institutional configurations can, therefore, illuminate exactly how past events are causally related to future development.³

Accordingly, the article begins with an outline of the origins of the federal republic, thereby focusing on foundational conditions shaping the system down to the present day. In the subsequent section institutional features and unwritten rules and arrangements that make up for structural shortcomings are described and analyzed. Afterwards, recent constitutional adaptations and amendments at state level are explained and discussed in detail. The article concludes with an examination of continuity and change in *Bund-Länder* relations as mirrored in constitutional politics.

The Making of the Austrian Federation

Until its collapse in 1918, the Habsburg Monarchy had been a multi-ethnic empire. The multinational composition inevitably implied some federal tradition, particularly in the wake of the Austrian-Hungarian *Ausgleich* (“Compromise”) of 1867 through which the Dual Monarchy with Hungary had been fixed.⁴ Notwithstanding, Austria-Hungary was not a federation in a strict sense, rather, the empire had moved in the direction of a decentralized unitary state.⁵ As a matter of fact, though, the Habsburg regime increasingly had to cope with centrifugal forces fed by nationalist upheaval across the whole empire.⁶ Unsurprisingly, with the empire in

3 Jörg Broschek, “Conceptualizing and Theorizing Constitutional Change in Federal Systems: Insights from Historical Institutionalism,” *Regional and Federal Studies* 21, no. 4-5 (2011): 539-559, p. 541.

4 Michael Burgess, *Comparative Federalism: Theory and Practice* (London: Routledge, 2006), 93.

5 Karl Weber, “Die Entwicklung des österreichischen Bundesstaates,” in *Bundesstaat und Bundesrat in Österreich*, ed. Herbert Schambeck (Vienna: Verlag Österreich, 1997), 37-64, p. 39.

6 It is noteworthy that the only political leaders theorizing about ways to federalize the multinational conglomerate came from within the ranks of an explicitly centralist force, namely the Social Democratic Party. Most prominent, though not adopted by the party leadership, was Otto Bauer’s work *Die Nationalitätenfrage und die Sozialdemokratie* (Vienna 1907).

disarray as a result of the lost war, these peoples, with the support of the Entente, promptly founded sovereign states of their own.

What remained from the huge territorial superstate was no more than a small fraction of its original size of 677.000 km². No wonder that scarcely anybody supposed the 84.000 km² rump state would be able to survive unless it joined a larger state. Thus, the founding process took place under two premises: First, as for ethnicity, it was clear that the republic to be established would be confined to the German-speaking part of the former imperium (the expectation, German Bohemia and the Sudetenland would be included, too, soon turned out to have been a mere illusion). Second, not for no reason, the provisional republic established in 1918 called itself “Republic of German-Austria,” hereby expressing its aim to ally with Germany sooner or later.

Reconstructing the process of establishing federalism in Austria is not an easy task to undertake. The abdicated imperial authority had left a political vacuum⁷ with a prevailing mood of disorientation and a striking lack of prospects. At the very beginning, federalism was not on the agenda, on the contrary, the Provisional National Assembly convening in October 1918 aimed at founding a unitary state bound to become part of the German Reich. Soon, however, the debate revolved around the conflict centralism vs. federalism, with the latter targeted by the Christian Social Party, which dominated in the provinces, while the Social Democrats, with their stronghold Vienna, favored the centralist option.⁸ The founding process became tension-filled and, while it should have taken around two years, was not finalized until November 1920 when the new—in the end—federal constitution came into effect.

As a matter of fact, on both sides there had been some misunderstanding about who had the real power to determine the country's fate. Eventually, the 1919 Treaty of St. Germain with Article 27 (stating that “[t]he frontiers of Austria shall be fixed as follows”) in conjunction with Article 88 (forbidding Austria “any act which might directly or indirectly compromise her independence”), put an end to any ambition of pan-German unity. It was simply the victorious powers redrawing the boundaries, hereby leaving small Austria in the role of a henceforth minor, if not negligible player in European politics.

As for the envisaged internal structure of Austria the Entente did not care—it simply expected the country to accept the predetermined

⁷ Burgess, *Comparative Federalism*, 93.

⁸ Mandred Stelzer, *The Constitution of the Republic of Austria* (Oxford: Hart Publishing, 2011), 9.

boundaries. Along this line, any regional attempt to change the defined geography was brought to a halt. Bohemia and Sudeten were cut off while Burgenland which heretofore had belonged to Hungary was affiliated to Austria.

The debate on why and how Austria eventually was structured on a federal basis has been controversial up to the present time. One school of thought claims Austria was established in a first step toward a centralist unitary state which, in a second step, devolved competences to the *Länder*. In fact, the process was more challenging, as outlined in a recent historical study emphasizing that the first provisional constitution, adopted in October 1918, merely reconfirmed the imperial *Landesordnungen* (territorial law codes) of 1861 which assigned only rudimentary autonomy to the provinces.⁹ However, within a short time the provinces, while accepting the constitution as kind of an indispensable “joint umbrella,” started a debate around the question of whether the republic should be a federalist or a unitary one. Federalist claims rested upon the so-called *Kronländer* (crown lands), a quasi-federal Habsburg heritage comprising Vorarlberg, Tyrol, Salzburg, Carinthia, Styria, Upper Austria, and Lower Austria, with some of them tracing back as far as the late Middle Ages.¹⁰ In November 1918, “most *Länder* declared their ‘accession’ to the newly created republic in order to demonstrate their original statehood and claim of autonomy.”¹¹ Thus, all *Länder* constituted themselves as autonomous, albeit without arrogating sovereignty in the sense of an independent state but rather expressing the intent of linking to one another in a common state.¹²

What must be added, though, is that what appeared to become kind of a “coming-together federation” was actually orchestrated by Chancellor Karl Renner who provided pre-formulated, textually identical declarations of accession to the *Land* parliaments.¹³ Notwithstanding, the states’ commitment to the new republic remained fragile for a while, as revealed in the form of several attempts of secession: In 1919, Tyrol, in a hopeless effort to reunite with its southern part which had been annexed by Italy, declared itself a free state. In Vorarlberg, a referendum on acceding to Switzerland, held in 1921, was affirmed by ninety-nine percent of the voters. In the same

9 Ewald Wiederin, “Die verfassungspolitische Diskussion über die Einrichtung Österreichs als Bundesstaat,” *Beiträge zur Rechtsgeschichte Österreichs* 1 (2011): 356–373.

10 Rudolf Palme, “Die Länderparlamente als Ausdruck der Identität der Länder,” in *Die Länderparlamente als Ausdruck der Identität der Länder*, ed. Peter Pernthaler (Vienna: Braumüller, 2000), 29–46.

11 Joseph Marko, “Federalism, Sub-national Constitutionalism, and the Protection of Minorities,” at <camlaw.rutgers.edu/statecon/subpapers/marko.pdf> (6 March 2015).

12 Wilhelm Brauneder, *Österreichische Verfassungsgeschichte* (Vienna: Manz, 1998), 202.

13 Wiederin, *Die verfassungspolitische Diskussion*, 361.

year, referenda in Tyrol and Salzburg on joining Germany were supported by strong majorities of voters. None of these initiatives had a reasonable chance of success.¹⁴

In 1945, the situation was quite the same as had been the case after WWI. The Allies definitely had no interest in considering regional interests in their strategic plans. The provisional government in Vienna was the only accepted authoritative interlocutor, albeit at the outset from the viewpoint of the Western forces suspected to be a tool of the Soviets. The fact that immediately after the defeat of the Nazi regime the country was divided into four “zones” (distributed among the U.S., the UK, France, and the Soviet Union) makes explaining the rebuilding of federalism in post-war Austria a bit difficult. For the Allied authorities in the provinces, the *Land* governors (in the beginning provisional only, since not elected) were welcome with regard to administrative matters. Thus, in the initial postwar time, with the central government not even in a position to communicate its decisions nationwide, the *Länder* managed to establish informal political and administrative structures they could build on when, in September 1945, the first *Länderkonferenz* (state conference) was to be held in Vienna.

To sum up, considering its historical development which has been characterized by ruptures and discontinuity, Austrian federalism does not fit into any of the categories of federal state-building as are provided by comparative research. Since, after the Habsburg Empire had fallen apart, virtually all actors, both the *Länder* and the political parties, had assumed the rump state would sooner or later join the German *Reich*, the outcome was not a “coming-together federation”; by the same reason, it wasn’t a “holding-together federation” either.¹⁵ And although state-building both in 1918 and 1945 took place under the control of external actors, a factor underlying the definition of “forced together federalism” given by Nancy Bermeo,¹⁶ not even this latter category is adequate. It does not apply because the victorious powers, other than in Germany after WWII,¹⁷ did not care whether or not Austria became a federation. As a matter of fact, Austrian federalism emerged in a more

14 Franz Fiedler, “Föderalismus als Gestaltungsprinzip,” *IILP Sozialwissenschaftliche Schriftenreihe* 21 (2007): 5-17, p. 7-8.

15 Cf. the typology introduced by Alfred Stepan, “Federalism and Democracy: Beyond the U.S. Model,” *Journal of Democracy* 10, no. 4 (1999): 19-34.

16 Nancy Bermeo, “The Importance of Institutions: A New Look at Federalism,” *Journal of Democracy* 13, no. 2 (2002): 96-110, p. 110.

17 Cf. Klaus v. Beyme, *Das politische System der Bundesrepublik Deutschland* (Wiesbaden: VS-Verlag, 2010), 368; Burgess, *Comparative Federalism*, 95-97; Wilfried Swenden, *Federalism and Second Chambers* (Brussels: Peter Lang, 2004), 59.

or less chaotic process of cobbling together what already well before had been under a common roof, albeit now considerably smaller. There was no option other than assembling what had been left from former hugeness.¹⁸ The inconsistencies of its foundation process have lived on to the present day in the Austrian federal state in that there is considerable regional identity among the citizens,¹⁹ while at the same time a two-thirds majority of the population would not mind if federalism were to be abandoned, even if merely balancing an annual national budget were at stake.²⁰

Institutional and Informal Framework: Properties and Ambiguities²¹

Basically, as expressed in the previous section, federations are to be regarded as historically constructed.²² In principle, therefore, any change of a multi-layered system has to cope with path-dependency, inevitably generating all kinds of die-hard habits and routines. For historical reasons, in Austria policy-making “to a considerable extent aims at negotiated solutions.”²³ The functional interaction of formal and informal negotiation rules under involvement of strong actors without explicit legal legitimation has, for instance, had a long tradition of cooperative relations between state and interest associations in connection with *Sozialpartnerschaft*, the Austrian version of corporatism.²⁴ The same holds true for the functioning of the federal system in that unwritten rules make up for the shortcomings of institutional provisions. The most characteristic features are:

18 Wiederin, *Die verfassungspolitische Diskussion*, 371.

19 See Peter Bußjäger, Ferdinand Karlhofer and Günther Pallaver, *Föderalistisches Bewusstsein in Österreich: Regionale Identitätsbildung und Einstellung der Bevölkerung zum Föderalismus* (Vienna: Braumüller, 2010).

20 “Zwei Drittel lehnen Föderalismus ab,” opinion poll by Market Institute, in *Der Standard*, 21/22 June 2014, 6.

21 For a more detailed description see Ferdinand Karlhofer and Günther Pallaver, “Strength through Weakness: State Executive Power and Federal Reform in Austria,” *Swiss Political Science Review* 19, no. 1 (2013): 41–59.

22 Broschek, *Conceptualizing and Theorizing*, 539.

23 Gerhard Lehmruch, “Die korporative Verhandlungsdemokratie in Westeuropa,” *Schweizerische Zeitschrift für Politische Wissenschaft* 19, no. 4 (1996): 19–41, p. 19.

24 For a detailed analysis see *Austro-Corporatism: Past—Present—Future*, ed. Günter Bischof and Anton Pelinka (Contemporary Austrian Studies 4) (New Brunswick: Transaction, 1996), and, more recently, *Sozialpartnerschaft: Österreichische und Europäische Perspektiven*, ed. Ferdinand Karlhofer and Emmerich Tálos (Vienna: LIT Verlag, 2005).

Weakness of the Second Chamber²⁵

In the federal legislative process the *Bundesrat* possesses merely a suspensive veto (Article 42 B-VG) that can easily be overruled by the *Nationalrat*. What is more, in none of the (few) cases where the second chamber has an absolute veto—namely regarding bills affecting legislative or administrative *Länder* competences (Article 44 B-VG)—has it blocked a bill passed by the *Nationalrat*.²⁶ As a matter of fact, in the federal parties' hierarchical scale, the *Bundesrat* is subordinate and in practice almost insignificant. The modest prestige of *Bundesrat* deputies is best expressed by the fact that after every national election the government parties, when negotiating the coalition agreement, agree upon the voting behavior not only of the lower house members, but also of their respective members of the upper house—without consulting the latter.²⁷

Indirect Federal Administration²⁸

Regarding the division of competencies between *Bund* (federal state) and *Länder*, the constitution (Art 102 B-VG) distinguishes between direct and indirect federal administration, with the latter providing that a “significant proportion of federal administration is carried out by the *Länder* on behalf of the federation,” a provision through which the constitution “compensates the *Länder* for their relative lack of power.”²⁹ In practice, indirect federal administration (*mittelbare Bundesverwaltung*), other than the term suggests, is not hierarchical but rather a complex, in parts even stratarchical, negotiating system with the *Länder* controlling the execution of federal law. Austria's distinct system of indirect administration mirrors a special kind of “executive federalism” with the governors pulling the strings. With regard to the control of indirect administration through national authorities, the Federal Constitution is remarkably imprecise, with the result that “a substantial part of *Land* government activities remains without formal state supervision.”³⁰

25 For a detailed description and analysis of the *Bundesrat* see the contribution by Fallend to this volume.

26 Anna Gamper, “Republic of Austria,” in *Legislative, Executive, and Judicial Governance in Federal Countries*, ed. Katy Le Roy and Cheryl Saunders (Montreal: McGill-Queen's University Press, 2006), 72–100, p. 79.

27 Jürgen Weiss, “Der Bundesrat und die Bundesstaatsreform,” in *Bundesstaat und Bundesrat in Österreich*, ed. Herbert Schambeck (Vienna: Verlag Österreich, 1997), 497–525, p. 525.

28 See also the more detailed contribution by Bußjäger to this volume.

29 Gamper, “Republic of Austria,” 82.

30 Franz Fallend, “Föderalismus—eine Domäne der Exekutiven?,” in *Der Bund und die*

Land Governors: Gatekeepers in the Federal Architecture³¹

The office of a *Land* governor enjoys a special status in the country's federal setup. First of all, as outlined above, in the broad field of indirect federal administration it is the governor who has the final say. He/she alone is the central government's counterpart, and thus responsible neither to the *Landtag* nor to his cabinet. With the administrative apparatus directly subordinated to the governor and parliamentary decision-making to a high extent predetermined by the executive branch, the scope of influence of a *Landtag* is narrow, the more so as even as its formal right of creating and controlling the government is considerably restricted in practice. Not only is the governor head of the government, head of the bureaucracy, in charge with indirect federal administration and, last but not least, in all external relations "head of state." What is more, any candidate for governor is usually leader of his or her respective party and therefore enjoys strong intra-party authority—as a result, *Landtag* elections are primarily governor elections.³²

"Partyness" of Federalism

In a multi-layered system, political parties are kind of integrative agents and, along with interest groups, important vehicles of centralization.³³ In Austria, due to their all-encompassing presence at all levels, political parties have represented a pivotal element for cohesion and unification. Being a country with "strong parties in a weak federal polity,"³⁴ makes it a special case of *Parteienbundesstaat* (party federal state).³⁵

For a long time, the structural architecture of the party federal state left little room for regional parties on a permanent basis. Until very recently, the

Länder: Über Dominanz, Kooperation und Konflikte im österreichischen Bundesstaat, ed. Herbert Dachs (Vienna: Böhlau, 2003), 17–68, p. 23.

31 Cf. Ferdinand Karlhofer, "Gestaltungskraft und Vetomacht: Funktion und Praxis der Landeshauptleutekonferenz," in *Im Dienste der Länder—im Interesse des Gesamtstaates: Festschrift 60 Jahre Verbindungsstelle der Bundesländer*, ed. Peter Rosner and Peter Bußjäger (Vienna: Braumüller, 2011), 311–326.

32 Karl Weber, "Politik und Verwaltung," in *Politik in Tirol*, ed. Ferdinand Karlhofer and Anton Pelinka (Innsbruck: StudienVerlag, 2004), 73–96, p. 78–80.

33 Klaus v. Beyme, *Das politische System der Bundesrepublik Deutschland* (Wiesbaden: VS-Verlag, 2010), 373.

34 Herbert Obinger, "Austria: Strong Parties in a Weak Federal Polity," in *Federalism and the Welfare State: New World and European Experiences*, ed. idem, Stephan Leibfried and Francis Castles (Cambridge: Cambridge University Press, 2005), 181–221.

35 Cf. Frank Decker, *Regieren im "Parteienbundesstaat": Zur Architektur der deutschen Politik* (Wiesbaden: VS-Verlag, 2011).

congruence of the party systems at national and provincial levels provided a welcome basis for policy coordination with the two dominant parties, the Social Democratic Party (SPÖ) and People's Party (ÖVP), which functioned as intermediary agencies between center and periphery.³⁶

In the last two or three decades the Austrian party system, in accordance with international trends, has changed in a way that, among other issues, has manifested itself in a decline of the parties' capacity to reconcile conflicting interests.³⁷ Until the 1980s, given that the two dominant *Lager* parties SPÖ and ÖVP continuously received more than ninety percent of the votes, and the third largest Freedom Party (FPÖ) received between five and seven percent, Austria had a typical two-and-a-half-party system. Thereafter, the hitherto frozen party system entered into a stage of rapid change, with the newly emerging Greens on the one side and the FPÖ transforming into a radical right populist party on the other, and both capturing considerable shares of the *Lager* parties' electorates. At *Länder* level, however, the party systems have proved considerably resistant, with SPÖ and ÖVP having managed to maintain their supremacy. As of end-2014, SPÖ and ÖVP together hold a total of 302 out of 448 (i.e. sixty-seven percent) *Landtag* seats in the nine provinces, while holding merely ninety-nine out of 183 (fifty-four percent) seats in the National Council.³⁸ All things considered, the strength of the parties at state level appears to be the "most remarkable feature of real federalism [in Austria]."³⁹

Conflicting Loyalties: Regional vs. Centralist Party Interests

For long periods of the Second Republic, the "partyness of government"⁴⁰ with regard to structures and processes in policy-making manifested itself in that *Land* election campaigns frequently were less determined by regional than by national issues, and quite often the outcome was considered a barometer of public opinion on national politics. For the SPÖ which focuses on centralism, this has always been beyond dispute;

36 v. Beyme, *Deutschland*, 376.

37 Cf. *Die Parteiensysteme Westeuropas*, ed. Oskar Niedermayer, Richard Stöss and Melanie Haas (Wiesbaden: VS-Verlag, 2006).

38 Official data by <www.bmi.gv.at/cms/bmi_wahlen> (1 February 2015).

39 Anton Pelinka, "Föderalismus für das 21. Jahrhundert: Perspektiven der Weiterentwicklung des politischen Systems Österreichs im Spannungsfeld zwischen Legitimität und Effizienz," in *Baustelle Bundesstaat: Perspektiven der Weiterentwicklung des politischen Systems Österreich*, ed. Friedrich Steger (Vienna: Braumüller, 2007), 119-154, p. 141.

40 Klaus v. Beyme, *Föderalismus und regionales Bewusstsein: Ein internationaler Vergleich* (Munich: Beck, 2007), 124.

and also the more federal-oriented ÖVP has emphasized a “dual” party structure, i.e. regional sub-units plus nation-wide *Bünde* (“leagues”) along socio-economic lines in order to avoid or at least to mitigate centrifugal tendencies. Considerable change, though, has taken place since Austria’s entry into the European Union (EU) in the mid-1990s. Since then, regional elections have tended to be more determined by regional issues than in the past. Inextricably, “vertical integration may become a burden” and “[r]egional politicians may tend to dissociate themselves from unpopular ‘party friends’ at the federal level.”⁴¹ The national government, on its part, tends to emphasize centralism more firmly in order to make up for losses coming along with ongoing Europeanization. With this background, in particular when reallocating competences is at stake, parties tend more and more to oscillate between promoting and blocking changes.⁴²

It is noteworthy in this connection that the intra-party influence of the regional organizations varies strongly with both *Lager* parties: Vienna and Lower Austria have always been the centers of gravity, with power-conscious governors considering themselves anything but subordinate to their respective national party leadership. There has always been some kind of “asymmetry-in-symmetry” in Austria’s federal system—symmetry understood as constitutional equality of the national subunits, while asymmetry mirrors the differences of population and wealth affecting the constitutional units’ political power relations with each other as well as their varying degree of influence on federative institutions.⁴³

Traditions and Modes of *Bund-Länder* Relations as Mirrored in Constitutional and Sub-Constitutional Politics

With regard to the historical development of the relations between *Bund* and *Länder* since the founding of the First Republic, three periods can be distinguished:⁴⁴

41 Klaus Detterbeck, “Party Careers in Federal Systems: Vertical Linkages within Austrian, German, Canadian and Australian Parties,” *Regional and Federal Studies* 21, no. 2 (2011): 245-270, p. 249.

42 See Arthur Benz, “Reformpromotoren oder Reformblockierer? Die Rolle der Parteien im Bundesstaat,” *Aus Politik und Zeitgeschichte*, no. 29-30 (2003): 32-38.

43 Charles D. Tarlton, “Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation,” *The Journal of Politics* 27, no. 4 (1965): 861-874, p. 869; Ronald Watts, *Comparing Federal Systems* (Montreal: McGill Queen’s University Press, 3rd ed. 2008), 123.

44 Friedrich Kojas, *Das Verfassungsrecht der österreichischen Bundesländer* (Vienna: Springer, 2nd ed. 1988).

1) adjustment of state constitutions to the national constitution (a temporally uneven process, starting with Styria in 1918, and completed as late as 1930 when Upper Austria adopted its own constitution);

2) refoundation of the republic in 1945, followed by a long period of stagnation in which the *Länder* were essentially confined to replicating federal constitutional law with striking passiveness that did not change until the late 1960s;

3) significantly increased self-confidence of the *Länder* after the release of a constitutionalist's legal opinion attributing considerably more autonomy to the substates than initially thought.

As for phase three, it started in 1964 with a joint initiative of the *Länder* in which they claimed a strengthening of their competences in return for granting aid to the federation in a financially precarious situation.⁴⁵ The legal doctrine elaborated in this context, was drawing on the insight that state constitutions are not simply subordinated to the federal constitution,⁴⁶ but basically confined to implement federal law. Rather, notwithstanding the rule that state constitutions may in principle not affect the Federal Constitution, there has always been some "relative" constitutional autonomy largely neglected so far.⁴⁷ The opinion paved the way for a paradigm shift in constitutional politics, encouraging the *Länder* to address the federal government with further demands. The negotiations that followed did not really result in substantial changes but may provide an opening for significant revisions in times to come. Remarkably, by the way, the negotiations were conducted between federal government and state governors. The parliaments of both levels, though directly concerned when changing the rules is on the agenda, were not involved in the talks—a prime example of constitutional reality superimposing formal federalism.⁴⁸

The change in the relations caused by the new doctrine of a relative autonomy has persisted down to the present day, naturally circling around the question of how to define the scope and limits of relative autonomy. Given that most federal systems provide just an "incomplete" framework, leaving more or less "space" for the federal architecture to be filled by sub-

45 Bernd-Christian Funk, "Die Bedeutung gliedstaatlichen Verfassungsrechts in der Gegenwart," *Veröffentlichungen der Vereinigung der Deutschen Staatslehrer* 46 (1988): 58-91, p. 71.

46 "The *Land* Constitution to be enacted by a *Land* constitutional law can, inasmuch as the Federal Constitution is not affected thereby, be amended by *Land* constitutional law" (Article 99 (1), Federal Constitutional Law).

47 Friedrich Koja, *Das Verfassungsrecht der österreichischen Bundesländer* (Vienna: Springer, 1st ed. 1967), 19-29.

48 Cf. Fallend, *Domäne der Exekutiven*, 28.

national provisions and arrangements,⁴⁹ identifying and analyzing scope, activities, and substance is both exciting and difficult.

Bearing in mind that filling the space is to a considerable extent not just a matter of options but also a matter of political culture, in some of the *Länder* regional identity is strong, underpinned with historical heritage, traditionalism, and patriotic sentiments, while in others citizens have a more rational view of the *Land* they live in. Comparative studies show that there is a difference between the Western and the Eastern *Länder*: in Vorarlberg, Tyrol, and Salzburg, emotional attachment to the *Land* is significantly higher than in the national average.⁵⁰ Obviously, there is a close correlation between regional identity and the attitude towards federalism: the citizens of Vorarlberg and Tyrol rank highest (seventy-five percent resp. seventy-four percent compared to fifty-nine percent nation-wide) in desiring a stronger role for the *Länder* in federal politics.⁵¹

Given the relevance of historical and cultural aspects, it makes sense to put them into consideration when comparing constitutions. In a recent empirically based thesis, Austria's nine *Land* constitutions are grouped in three categories:⁵²

1) Styria and Vienna are states with pronounced positivistic constitutions which are decidedly confined to positive law provisions and abstain from inexact norms and promises that cannot be fulfilled, e.g., protecting and fostering marriage and family.⁵³

2) Burgenland, Carinthia, and Lower and Upper Austria have constitutions with a mix of legal positivism and natural law, in part

49 Alan G. Tarr, "Explaining Sub-national Constitutional Space," *Penn State Law Review* 115, no. 4 (2011): 1133–1149, p. 1133.

50 Fritz Plasser and Peter Ulram, "Regionale Mentalitätsdifferenzen in Österreich," in *Der Bund und die Länder: Über Dominanz, Kooperation und Konflikte im österreichischen Bundesstaat*, ed. Herbert Dachs (Vienna: Böhlau, 2003), 421–440, p. 433.

51 Bußjäger et al., *Föderalistisches Bewusstsein*, 38.

52 Moritz Moser, "Die Verfassungen der österreichischen Länder und ihre Autonomie im Vergleich," PhD diss., Vienna University 2010, 69–72, at <http://othes.univie.ac.at/9739/1/2010-05-17_0502171.pdf> (6 March 2015). Although not addressing the political-cultural dimension directly, the study provides a valuable classification for comparative analysis drawing on key questions as outlined by Tarr: identifying differences and similarities of substate constitutions and, still more important, explaining the reasons for differences, i.e. "why sub-national units have made more or less use of the constitutional space available to them." Cf. Alan G. Tarr, Sub-national Constitutional Space: An Agenda for Research, prepared delivered at the *World Congress of the International Association of Constitutional Law in Athens* (2007), at <<http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Tarr.pdf>> (6 March 2015).

53 Peter Häberle, "Textstufen in österreichischen Landesverfassungen—ein Vergleich," in *Jahrbuch des öffentlichen Rechts der Gegenwart* 54 (Tübingen: Mohr Siebeck, 2006), 367–514, p. 381. See also Marko, *Federalism*, 3.

including provisions with imprecise norms, e.g., state goals, basic/civil rights, and the like.

3) Salzburg, Tyrol, and Vorarlberg have constitutions that are distinctly natural law oriented, i.e. expressing broad commitment to (vaguely defined) values such as human dignity, freedom, independence etc.

In the last three decades, all *Länder*, albeit much of the content of their constitutions is predetermined in detail by the Federal Constitution, have extensively adapted their constitutions. Recent studies even identify “contours of distinct Austrian constitutional profiles at member state level” which find expression in “spirited innovations.”⁵⁴ It must be noted, though, that with regard to substance not every constitutional change earns the attribute “spirited.” *Land* constitutions tend to focus on (nonbinding, because unenforceable) fundamental rights and “state goals” (*Staatsziele*) such as commitments to “family, marriage, equal treatment of housework and gainful employment, Sundays and legal holidays, regional patriotism, and subsidiarity.”⁵⁵ For instance, the preamble of the Tyrolean constitution affirms, among other things, “trust in God,” “spiritual and cultural unity of the whole *Land* [South Tyrol implied]” and the “well-ordered family as the basic element of people and state” (not entirely coincidental, Tyrol ranks among the group of *Länder* with natural law oriented constitutions). And all *Länder* have incorporated symbols into their basic laws in order to underline cultural identity and the claim of (regional) autonomy. As a rule, every *Land* has an anthem of its own, a flag, a patron saint celebrated at a feast day, and the like.⁵⁶

While many changes fall primarily in the category of symbolic politics, others lead to far-reaching alterations of single elements of the political system. With regard to the topics such as direct democracy and lowering the voting age, the *Länder* are clearly forerunners compared to the federal level. As for direct democracy, Austria at national level has always been reluctant to extending participation rights. By contrast, it was the *Länder* which, in the 1970s, opened up for revisions of their constitutions in order to enhance civic participation. The new spirit was influenced by two factors: For one thing, the new legal doctrine of relative autonomy fostered an understanding of sub-national self-reliance. And for another thing, policymakers were increasingly faced with civil society activities, such as local initiatives and action groups which more or less explicitly put the enhancement of civic involvement on the agenda. Within a short time,

54 Author's translation.

55 Anna Gamper, “Allgemeine Bestimmungen des Landesverfassungsrechts,” in *Das Recht der Länder*, ed. Erich Pürgy (Vienna: Jan Sramek, 2012), 61–85, p. 70.

56 Häberle, “Textstufen,” 371–372.

broadening the scope for direct democracy became a nationwide topic, and none of the *Länder* could ignore the demand for more direct democracy. By the end of the 1990s virtually all *Länder* had amended their constitutions in this direction.⁵⁷ Today, there is both at *Land* and at local level a broad spectrum of provisions for citizen participation.

Regarding the voting age, Austria at present is the only EU member state, in fact the only developed democracy worldwide, that provides voter rights to its sixteen-year-old citizens.

What was introduced in 2007 in Austria nationwide, had been practiced in some of the *Länder* for a couple of years already. After in the 1990s in several German *Länder* the voting age for local elections had been lowered to sixteen years, Carinthia and Burgenland made a start in Austria by introducing “vote at 16” for municipalities in 2000, Burgenland extended the reform also to *Landtag* elections. By 2005, five *Länder* had lowered the voting age for local elections and three, additionally, for *Landtag* elections. Eventually, in 2007, the newly elected federal government, formed by SPÖ and ÖVP, followed suit and lowered the voting age for *Nationalrat* elections, too. As a consequence, due to the constitutional *Homogenitätsprinzip* (homogeneity rule) which provides that at no level the voting age may be higher than for the *Nationalrat*, all election laws—including not only the four remaining *Länder* but also referenda, the election of the federal president and even elections to the European Parliament—had to be adapted.

The most momentous change taking place at *Land* level, though, is the abandonment of *Proporz* as outlined in the following section.⁵⁸

Reluctant Farewell to *Proporz* Rule

With regard to Austria’s political system, the term *Proporz* has an ambivalent meaning: In an informal sense it is a well-established term inextricably linked with the concept of “consociationalism” defined as a societal arrangement typical for countries which in their historical development were unable or only insufficiently able to establish a viable,

57 Klaus Poier, “Sachunmittelbare Demokratie in Österreichs Ländern und Gemeinden: Rechtslage und empirische Erfahrungen im Überblick,” in *Sachunmittelbare Demokratie im interdisziplinären und internationalen Kontext 2008/2009: Deutschland, Österreich, Schweiz*, ed. Peter Neumann and Denise Renger (Baden-Baden: Nomos, 2010), 31–56, p. 34.

58 For a detailed analysis see Ferdinand Karlhofer, “Wahlen mit 16—Österreich als Vorreiter in Europa?,” in *Entwicklungen des Wahlrechts am europäischen Fallbeispiel*, ed. Anna Gamper (Vienna: Springer, 2010), 175–193.

non-destructive system based on the ideal of competitive democracy.⁵⁹ The Austrian version of *Proporz* democracy is to be traced back to the late 19th, early 20th century when the Social Democratic Party and the Christian Social Party organized virtually the whole society in two big “camps” (therefore the term *Lagerparteien*). As is well known, the First Republic ended with civil war and the abolition of democracy. The Second Republic, then, was founded on the insight that none of the two forces was able to prevail. As a consequence the now renamed parties SPÖ and ÖVP established a system of proportional representation finding its expression in a long series of grand coalitions characterized by comprehensive mutual control and almost excessive clientilism in political, economic, social, and cultural affairs.

The informal post-WWII arrangement of mutual control had had a prelude already at the cradle of the democratic republic which was founded after 1918. After long disputes revolving around the question whether to establish a federation or a central state, a compromise was found in that the outcome was a federation with strong centralist elements. The crucial point was that Vienna and several industrial areas were clear domains of the Socialist while rural areas were controlled by the Christian Social party. The solution was that all *Land* constitutions, except for Vorarlberg and Vienna, drafted constitutions which provided for the composition of the *Land* government along the parties' vote shares in *Landtag* elections with executive positions to be filled proportionally. Thus, neither of the two *Lager* parties had to fear being excluded from government permanently.

However, although enshrined in provincial constitutions drafted in the First Republic already, the system of *Proporz* government could fulfill its purpose not before 1945. Only from then on, the two *Lager* parties in office could rely on a balance of power both at national and substate level.

Beginning with the late 1970s, and accelerating with economic crisis in the 1980s, the essentials of Austrian consociationalism based on two-party dualism increasingly eroded. At national level, entering a grand coalition had meanwhile become a risky game, and similar changes took place at *Länder* level as well. And as far as *Proporz* rule was concerned: It seemed, the Moor had done his duty, the Moor might go.

Proporz had not only become a burden for central parties, it had also become an ever-growing problem right for those parties that had been used to put majorities in proportionally composed *Land* governments. As long as a predominant party can easily push through its will vis-à-vis its junior

59 Cf. Manfred G. Schmidt, *Demokratiethorien: Eine Einführung* (Opladen: Leske+Budrich, 2010), 306-335.

partners, all's right with the world. And it can make use of its right that the *Land* bureaucracy is directly and exclusively subordinated to the *Land* governor—a privilege that frequently has caused criticism.⁶⁰ With shares of votes gradually shrinking and finally falling under the fifty percent mark, though, formerly power-conscious parties have lost ground. As of 2015, there is only one party at the provincial level left (the ÖVP in Lower Austria) still holding an absolute majority in parliament. As soon as the early 1990s, the *Land* Salzburg took the lead and started considering a change from proportional to majoritarian rule for government election. After years of fruitless negotiations, though, there was no end in sight.⁶¹ Notwithstanding, in 1998, due to a political scandal—the FPÖ, holding a seat in government, had made public confidential computer data—all the other parties came to an agreement on changing the system at the very earliest. As a result, already in 1999, when provincial elections were to be held, the new government was built on the basis of majority rule. Simultaneously, in Tyrol following the example of Salzburg, the government was elected along the same pattern.⁶²

For several years, no other *Land* got ready to follow suit and make a move in this direction. Most recently, however, Styria and Burgenland introduced majority rule, Carinthia is supposed to adapt the system by the end of 2015 while in Upper Austria ÖVP and Greens, building a coalition informally within the stipulated all-party government, are pronounced proponents of changing the rule but lack the required two-thirds majority in parliament.

Concluding this section, it must be noted that in connection with the shift from proportional to majority rule the parliamentary control rights had to be adapted. The reason for that was that in the relationship between government and opposition the logic of action is different. During the Second Republic, several *Länder* with *Proporz* system repeatedly lacked opposition in parliament due to the fact that all parties were in government.⁶³ The dominance of the leading party/parties in government has been secured through high thresholds for the use of parliamentary control instruments, thus inevitably resulting in a lack of accountability. For instance, in four

60 Kurt R. Luther, "Dimensions of Party System Change: The Case of Austria," in *Understanding Party System Change in Western Europe*, ed. Peter Mair and Gordon Smith, (Abingdon: Frank Cass, 1990), 3-27, p. 16.

61 Franz Schausberger, "Die Abschaffung des Proporzsystems in den Bundesländern Salzburg und Tirol," in *Österreichisches Jahrbuch für Politik 1998* (Vienna: Verlag für Geschichte und Politik, 1999), 257-270, p. 258.

62 Ibid.

63 In practice, though, frequently two or three of the parties conclude unofficial coalitions with the consequence that important portfolios are distributed among the contract partners while the others are restricted to minor spheres of influence.

Länder with *Proporz* governments (Burgenland, Carinthia, Lower and Upper Austria) a vote of no-confidence against a cabinet member requires either a two-thirds majority of his own party or of the total of MPs.⁶⁴ The same had been the case in Salzburg and Tyrol before *Proporz* had been abandoned; now, under majoritarian system, it requires merely simple majority of votes to force a cabinet member to resign.⁶⁵

Conclusion: Federal Dynamics between Continuity and Change

During 1918 to 1920, as set out in the beginning of this chapter, along with the tension-filled formation of the democratic republic, a federal architecture developed whose shortcomings have persisted to the present day. The striking lack of constitutionally entrenched balance of power-sharing, markedly expressed in the relative insignificance of the *Bundesrat*, has even caused doubt whether Austria is to be seen as a federation or rather a unitary state. However, as has been argued in this article, a comprehensive analysis of Austrian federalism deserves closer attention to informal rules and power relations beyond the institutional framework. Moreover, in the long run, perceptions, interpretations and practice may be subject to change even if institutions remain unaltered.

Drawing on this consideration, the analysis of Austrian sub-national constitutional politics gives a different picture, all the more so as it is anything but static or unidirectional. A flash back to the immediate post-war decades seems to corroborate the assessment of Austria as a comparably “weak” federation. The *Länder* exhibited little individuality or distinct political cultures. For a long time, they more or less mirrored the logic of the national development. Not for no reason, the fact that federal law was mostly replicated one-to-one by state legislators was sarcastically labelled “rank-xerox federalism.”⁶⁶

From the late 1970s, with the new doctrine of “relative autonomy” unfolding, *Länder* politics have undergone major changes. Particularly with regard to government creation rules and direct democracy, both considered important issues to tackle, the *Länder* (with varying commitment) have become proactive in adapting their constitutions. It must be noted that the Federal Constitution still sets limits to overarching ambitions.

64 Franz Fallend, “Austria: From Consensus to Competition and Participation?,” in *Local and Regional Democracy in Europe*, ed. John Loughlin, Frank Hendriks and Anders Lidström (Oxford: Oxford University Press, 2011), 173–195, p. 181.

65 Ferdinand Karlhofer, “Bruch, Kontinuität und neue Dynamik: Der Tiroler Landtag 2008–2013,” in *Politik in Tirol: Jahrbuch 2013* (Vienna: StudienVerlag, 2013), 11–28, p. 17.

66 Theo Öhlinger, *Verfassungsrecht* (Vienna: Facultas, 8th ed. 2009), 52.

Notwithstanding, despite restrictions due to the *Homogenitätsprinzip*, one can agree with Tarr stating with reference to Germany and Austria that, although their constitutions “have limited constitutional experimentation in the *Länder*, they have not foreclosed it,” such as generally the system of cooperative federalism “does not necessarily preclude significant use of sub-national constitutional space.”⁶⁷ Taken as a whole, recent experience has shown that sub-national self-reliance has gained steam, and frequently changes in one *Land* serve as a model for others.

All things considered, sub-national as well as national adaptation to a changing environment is inherently a step-by-step process. Therefore, with good reason, the dynamics should not be overestimated.⁶⁸ Anyway, right at the substate level there is some potential of change: In course of the recalibration of the party systems at *Länder* level, coming along with the decline of the formerly predominant catch-all parties SPÖ and ÖVP, the “partyiness” of federalism is withering. Heretofore, the stability of Austria’s cooperative federalism has been seen in close connection with government congruence at national and sub-national level.⁶⁹ Long-term studies, though, suggest qualifying the assessment since congruence is no longer “a function of government formation at the national level.”⁷⁰ As of early 2015, in six of the nine *Länder* governments there are coalitions formed between SPÖ resp. ÖVP and the Green Party—the latter not really prone to the logic of *Proporz* politics as has been characteristic for the Second Republic. The traditional pattern of government congruence has obviously already begun to disintegrate, thereby inextricably affecting top-down policy implementation and the premise of *Land* authorities being in the role of “agents” of the central government as identified by James Gardner.⁷¹ Against this backdrop, change (albeit gradual) at sub-national level may eventually turn out to be more effective than the nationwide federal reform which has not really made progress in the past quarter-century. However, one should not overlook the fact that it is the same *Land* governors who,

67 Tarr, “Explaining Sub-national Constitutional Space,” 1139.

68 Peter Bußjäger, “Between Europeanization, Unitarism and Autonomy: Remarks on the Current Situation of Federalism in Austria,” in *Revista d’Estudis Autònomic i Federals*, n. 10 (2010): 11–39, p. 33, at <http://www10.gencat.cat/drep/binaris/_reaf10_Bussjager_tcm112-124464.pdf> (6 March 2015).

69 Nicole Bolleyer and Evelyn Bytzek, “Government Congruence and Intergovernmental Relations in Federal Systems,” *Regional and Federal Studies* 19, no. 3 (2009): 371–397, p. 381.

70 Marcelo Jenny, “Austria: Regional Elections in the Shadow of National Politics,” in *Regional and National Elections in Western Europe*, ed. Regis Dandoy and Arjan H. Schakel (Basingstoke: Palgrave Macmillan, 2013), 27–46, p. 44.

71 James A. Gardner, “In Search of Sub-National Constitutionalism,” *European Constitutional Law Review* 4, no. 2 (2008): 325–343.

while reform-minded with regard to “domestic” politics, in their role of key players in Austria’s real constitution apply the same skills when it comes to thwart initiatives aiming at changing the distribution of rights and duties between federation and states.⁷²

⁷² Regarding the gridlock in federal reform see, among others: Fiedler, “Föderalismus als Gestaltungsprinzip”; Karlhofer and Pallaver, “Strength Through Weakness”; Steger, *Baustelle Bundesstaat*.

