



ISSN: 2036-5438

Sub-national Constitutionalism in Austria: a Historical Institutional Perspective

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Perspectives on Federalism, Vol. 7, issue 1, 2015





Abstract

Austria's federal system is determined by an apparent contrast between *formal* and *real* constitution having its roots in foundational defects shaping the system to the present day. As for the formal dimension, Austria has a rather uneven balance with regard to power-sharing. No wonder that, given the structural bias between central state and substates, informal forces are at work in order to make up for the shortcomings of the federal architecture. In this context, sub-national constitutionalism at first sight appears to be marginal. Astoundingly, though, in recent time a lot of constitutional changes and amendments, quite possibly paving the way for a sustainable redesign of the federation as a whole have taken place.

The article starts with a historical outline of the Austrian federation's origins. In chapter 2, the interplay of formal and informal rules and practices is discussed. Chapter 3 deals with scope, contents and dynamics of sub-national constitutionalism under the given framework. The article concludes with assessing the efficacy of subconstitutional politics in relation to the capacities of the federal constitution.

Key-words

Federalism, Subnational constitutionalism, Austria, Historical institutionalism



Given that federalism is essentially about the distribution of authority between a central government and state governments (Bednar 2011: 270), every two-tiered political system is defined through a “super-constitution” that regulates overlapping control of a single population by a superior state and a group of subordinate states. The latter, as a rule, have their own constitutions, in research referred to under the term “subconstitutionalism” (Ginsburg and Posner 2010: 1).

When dealing with sub-national constitutional politics in Austria, it makes sense to extend the definition by the factor of *informality*, thereby drawing upon Marshfield who defines sub-national constitutionalism “as a series of rules (both formal and informal) that protect and define the authority of sub-national units within a federal system to exercise some degree of independence in structuring and/or limiting the political power reserved to them by the federation” (2011: 1153; cf. also Mueller 2013). Leaving informality out of consideration would inevitably lead to conclusions that cover only part of the story. Quite rightly, due to the absence of strong constitutional veto players, in comparative research Austria mostly is regarded as a borderline case between federalism and unitarism, even, as Erk (2004) put it, “a federation without federalism”. From a merely institutionalist perspective, diagnoses like this are doubtless correct. They fall short, however, by ignoring the fact that the *nominal* constitution is paralleled by a *real* one (*Realverfassung*) with strong informal forces at work. Therefore, what applies to the federal constitution must be taken into consideration with regard to subconstitutions, too.

Being aware of the structural shortcomings, Austria has been in search for a redesigned federal architecture for nearly a quarter-century. Various attempts have been made, most ambitious the so-called *Österreich-Konvent* (“Austria Convention”, 2003-5) which delivered an extensive report with analyses and reform proposals out of which, though, only a small part has been considered so far. Now as before, Austrian federalism suffers from an ill-defined distribution of rights and duties between superstate and substates.

It is noteworthy that the federal constitution leaves little scope of autonomy to the states (*Länder*). Somewhat surprisingly, therefore, it is the *Länder* who, since the late 1970s, have adapted their constitutions in many ways. In many cases the amendments are symbolic only and of little relevance in practice; sometimes, however, they entail far-



reaching substantial changes. As outlined below, sub-national constitutional politics, in contrast to the gridlock at national level, has gained steam and might in the long run play an important role in redesigning the federal systems as a whole.

Bearing in mind that the properties and ambiguities of Austria's federal system have historical roots, the theoretical approach chosen here draws upon the insights of historical institutionalism which allows for assessing the characteristics and the working of institutions with reference to origins and path-dependent developments. In a nutshell, historical institutionalism is

- *historical* in that its proponents employ causal claims stressing timing and sequencing. Past choices, often made under 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 (Broschek 2011: 541).

In what follows I will first outline the origins of the federal republic, thereby focusing on foundational defects shaping the system down to the present day. Subsequently, the institutional and informal framework determining sub-national constitutionalism will be described and analysed. In the chapter on the practice of subconstitutionalism the focus is put on frequency and substance of changes that have been made so far. The paper concludes with a discussion of the potential impact of present reform initiatives on sub-national constitutionalism and the changing relations between *Länder* and central state in the wider European context.

1. The making of the Austrian federation¹

The roots of Austrian federalism trace back to the ancient Habsburg monarchy which, indeed, had not been a federation in a strict sense. Notwithstanding, though, the multinational composition inevitably implied some federal tradition, particularly in the wake of the *Ausgleich* of 1867 through which the Dual Monarchy with Hungary had been fixed (Burgess 2006: 93), and when the regime increasingly had to cope with centrifugal



forces fed by nationalist upheaval across the whole empire. Unsurprisingly, with the empire in disarray as a result of the lost war, these peoples, with the support of the Entente, promptly founded sovereign states of their own.

In the German-speaking remnants which all together represented no more than a small fraction of the original size of the huge territorial empire, the central authority had left a political vacuum (Burgess 2006: 93) with a prevailing mood of disorientation and a striking lack of prospects. No wonder that scarcely anybody supposed the rump state to be able to survive unless it joined a larger state, namely Germany. Eventually, the 1919 Treaty of St. Germain made clear who had the real power to determine the country's fate. Article 27 ("The 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 ambitions of pan-German unity.

Under these premises the foundational process of the republic was a tedious process, finalized as late as November 1920 when the constitution of the Republic of Austria came into effect. At the very beginning, federalism had not been on the agenda, on the contrary, the Provisional National Assembly convening in October 1918 had aimed at founding a centralist state. 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 thoughts claims Austria to have been established in a first step as a centralist unitary state which, in a second step, devolved competences to the *Länder*. In fact, though, the process was more complex, 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 (Wiederin 2011). 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 the republic's state structure. Federalist claims rested upon the so-called *Kronländer* (Crownlands), 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 (Palme 2000). 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 claiming sovereignty in the sense of



an independent state, but rather expressing the intent of linking to one another in a common federal state (Brauneder 1998: 202).^{III}

In 1945 the situation was quite the same as had been the case after WW I. The Allies had definitely no interest to consider regional interests in their strategic plans. The provisional government in Vienna was formally the only accepted authoritative interlocutor. During the whole occupation period (1945-55) Austria was divided into four “zones” (distributed among USA, UK, France and the Soviet Union), irrespective of the country’s federal division into nine states. Notwithstanding, for the allied authorities in the provinces, the *Land* governors (mostly provisional, since not elected) were welcome with regard to administrative matters. Thus, in the initial post-war time, with the central government not even in a position to communicate its decisions nationwide, the *Länder* accomplished to establish informal political and administrative structures they could build on when, in September 1945, the first *Länderkonferenz* (state conference) could be held in Vienna. Since then, informal rules and practices have been an important factor in Austrian federal affairs.

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 to 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.^{IV} 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 Bermeo (2002: 110), not even this latter category is adequate. It does not apply because the victorious powers, other than in Germany after WW II (cf. Beyme 2010: 368; Swenden 2004: 59), simply did not care whether or not Austria became a federation. Austrian federalism emerged in a more or less chaotic process of putting together what already well before had been under a common roof, albeit now considerably smaller. There was no other option than assembling what had been left over from former hugeness (Wiederin 2011: 371), with a constitutional architecture that has from the outset been subject to conflicting interpretations and claims.



2. Institutional and informal framework: properties and ambiguities^V

In an international perspective 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” (Huegelin and Fenna 2006: 34). This is mainly because the inconsistencies of the foundation process have lived on to the present day. The inherent constitutional shortcomings shaping the distribution of power between national and sub-national level are well-documented through single country studies (e.g. Bußjäger 2010b) as well as through comparative historical and political research (e.g. Burgess 2006; Erk 2008), and there is little to add to the current state of knowledge. However, right when the focus is put on sub-national constitutionalism as a political arena closely depending on the scope of *Länder* autonomy, it makes sense to call to mind the relevant key points and findings in order to gain a balanced understanding of origins, actors, and functions.

2.1. Federal Council: second chamber with little authority

It is first and foremost the remarkable power asymmetry between the two houses of parliament that creates doubt whether the country is still to be considered a federal or rather a unitary country. The Federal Constitutional Law (*Bundesverfassungsgesetz* – B-VG) provides for supremacy of the National Council (*Nationalrat*) over the Federal Council (*Bundesrat*), markedly expressed in Article 10 assigning the “exclusive federal competence in both legislation and administration” to the former, thus leaving only residual competences to the second chamber (Pernthaler 2010: 112). In the federal legislative process the *Bundesrat* possesses merely a suspensive veto (Article 42 B-VG) that can easily be overruled by the National Council. In the time between 2000 and 2014, there were only 24 suspensive vetoes (all of them overruled by the federal parliament). What is more, in none of the (few) cases where the second chamber enjoys the right of absolute veto – regarding bills affecting legislative or administrative *Länder* competences (Article 44 B-VG) – the Federal Council has vetoed a bill passed by the *Nationalrat* (Gamper 2006: 79). The fact that the second chamber does not even exert its modest constitutional rights in full entirety demands further explanation.

The answer is to be found in the electoral system for the second chamber, and in the party political background framing Austrian federalism. The constitution provides that



Bundesrat members are elected by the state legislatures (*Landtage*) in accordance with proportional party representation after every provincial election; candidates need not necessarily be members of the *Landtag*, but must be eligible to be elected to it. As a matter of fact, in the federal parties' hierarchical scale the *Bundesrat* is subordinate and in practice almost insignificant.^{VI}

2.2. Indirect federal administration

Regarding the division of competencies between federal state and *Länder* the constitution provides four different ways (Art 10-15 B-VG): (1) legislation and implementation exclusively by the federation; (2) legislation by the federation, implementation by the *Länder*; (3) framework legislation by the federation, implementation legislation and execution by the *Länder*; (4) legislation and implementation exclusively by the *Länder*. More precisely the competencies are specified in Art 102 B-VG with the distinction between *direct* and *indirect federal administration* (see Weber 1987). While direct administration provides for federal authorities executing law at all levels, indirect administration means 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” (Gamper 2006, 82). What at first sight appears to be hardly more than a regulation reducing the states to mere agents of the central government, is in practice the “organizational core” (Öllinger 2010: 21) of Austrian cooperative federalism. By a couple of reasons, indirect federal administration is not, as one would expect, a hierarchical but rather a complex, in parts even stratarchical negotiating system with the *Länder* controlling the execution of federal law: “[E]ven competences that are allocated entirely to the federation are principally performed by the *Länder*, although they retain their federal character” (Gamper 2006: 83). For any attempt of changing the rules the consent of the *Länder* is required by constitutional law. Given the states being virtually fully autonomous in carrying out indirect federal administration matters, it is no wonder that proposals aiming at a reform of the division of competencies mostly fail to address the issue since this would imply to formally transfer the whole range of tasks from federal to *Länder* level.

Austria's distinct system of indirect administration mirrors a special kind of *executive federalism* with the governors pulling the strings. Formally the central government has the



right to issue instructions directly to a governor – what, however, has been done only once since 1945, and in this unique case was simply ignored by the addressee (Karlhofer 2011: 322). With regard to the control of indirect administration the federal constitution is remarkably restrictive. As a result, “a substantial part of *Land* government activities remains without formal state supervision” (Fallend 2003: 23).

Given these ambiguous properties of the administrative system, the office of a *Land* governor enjoys the special status of a gatekeeper in Austria’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/her cabinet mates in the *Land* government. Since the *Landtag*’s autonomous legislative competencies are limited and with regard to the dominance of the executive headed by the government, the provincial parliament’s scope of influence is narrow, the more so as even its formal right of creating and controlling the government is considerably restricted in practice. Not only is the governor “government head, head of the bureaucracy, responsible agent for [...] indirect federal administration” (Fallend 2011: 182), and last but not least, in all external relations “head of state” (Weber 2004: 78). Moreover, any candidate for governor is usually leader of his respective party and therefore enjoys strong intra-party authority – as a result, *Landtag* elections are primarily governor elections (Weber 2004: 78-80).

2.3. “Partyness” of federalism

In a multi-layered system political parties are a kind of integrative agents and, along with interest groups, important vehicles of centralization (Beyme 2010: 373). 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”, as Obinger (2005) put it, makes it a special case of a “party federal state” (*Parteienbundesstaat*, cf. Decker 2011).

For a long time, the structural architecture of the party federal state left little room for establishing regional parties on a permanent basis with the array of political parties in the provinces aligning itself with that at national level. The congruence of the party systems nationwide can be regarded an indicator of interest coordination and centralization with the parties functioning as intermediary agencies between center and periphery (Beyme



2010: 376).

In the last two or three decades the Austrian party system, along with the international trend, has been changing what has manifested itself, among others, in a decline of the parties' capacity to reconcile conflicting interests (Niedermayer et al. 2006). Until the 1980s, given the two dominant *Lager* parties SPÖ and ÖVP achieving continuously more than 90 percent of the votes, and the third largest party FPÖ ranging 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 states level, however, the party systems have proved considerably resistant, with SPÖ and ÖVP having managed to maintain – except for Carinthia – their supremacy. Now as before, as can be gathered from their share of seats in regional parliaments, they are far ahead of the other competing parties: As of end-2014, SPÖ and ÖVP hold together a total of 302 out of 448 (i.e. 67 percent) *Landtag* seats in the nine provinces, while holding merely 99 out of 183 (54 percent) seats in the National Council.^{vii} All things considered, the strength of the parties at state level appears to be the “most remarkable feature of real federalism [in Austria]” (Pelinka 2007: 17). Looked at more closely, though, things are changing there, too, as to be outlined below.

2.4. Double loyalties: regional vs. centralist party interests

For long periods of the Second Republic, the “partyiness of government” (Beyme 2007: 124) 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 as a barometer of public opinion on national politics (Dachs 2006b). With the SPÖ focusing on centralism this has always been beyond dispute; and also the ÖVP, by tradition much more federalist, has emphasized a “dual” party structure, i.e. regional sub-units plus nation-wide “leagues” (*Bünde* 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 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” (Detterbeck 2011: 249). 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 the need of reallocating competences is at stake, parties tend more and more to oscillate between promoting and blocking changes (Benz 2003).

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 regional party leaders being anything but subordinate to their respective national party structures. 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 (Tarlton 1965: 869; Watts 1998: 123).

3. The practice of sub-national constitutionalism

3.1. Types, modes and traditions

With regard to the historical development of sub-national constitutionalism since the founding of the First Republic, Koja (1998: 11f.) distinguishes three phases:

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 (Funk 1988: 71). The legal doctrine elaborated in this context, drew on the insight that state constitutions are not simply subordinated to the federal constitution, basically confined to implement federal law. Rather, notwithstanding the rule that state constitutions may in principle not affect the federal constitution^{VIII}, there has always been some “relative” constitutional autonomy largely neglected so far (Koja 1988/1967: 19-29). 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 of the two decades that followed did not really result in substantial changes, albeit did not preclude important settings for 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 constitutional rules is on the agenda, were excluded from the talks – once again, a prime example of constitutional reality superimposing *formal* federalism (Fallend 2003: 28).

The change in the relations between superstate and substates caused by the new doctrine of a “relative” *Länder* autonomy has persisted down to the present day, naturally circling around the question of how to define 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-national constitutional provisions and arrangements (Tarr 2011: 1133), identifying and analysing scope, activities and substance of subconstitutionalism is both exciting and difficult.

In the case of Austria, though, measuring the space, and to what extent it is filled through *Land* legislation, is particularly complicated in that any claim of accuracy would disregard the fact that there is some ambiguity around the terms *constitution* and *constitutional law*.^{IX} What is more, there are not only constitutional amendments and revisions to be considered, but also single laws entailing constitution-related provisions. Stocktaking of subconstitutionalism in Austria therefore has to take into account that there are three rather than two meanings of the term. Distinguishing between

1. state constitutions (of which there are 9),
2. state constitutional laws (70), and
3. single law clauses elevated to constitutional status (roughly 400),

helps understand terminological confusion in connection with constitutionalism. Thus, it is no wonder that constitutional experts, in order to overcome the scattered ensemble of



constitutional provisions, call for recodification in terms of mandatory incorporation of constitutional law in its entirety into the constitutional corpus. However, although there is, aside from content-related changes, urgent need of a structural recodification of *Länder* constitutions, no fundamental change is in sight (Wieser 2008: 177-181). As a consequence, the status quo leaves a lot of room for interpretation, whilst at the same time hampering (but not rendering impossible) structured comparative assessment. Apart from this, however, it is quite revealing to examine how and to what extent the substates make use of the scope preset by the national constitution (Williams 2012: III).

In search of patterns of subconstitutionalism in federal countries Dinan (2008: 841) highlights four crucial institutional features: (1) constitutional amendment and revision procedures, (2) opportunities for direct democratic participation, (3) the choice of a presidential versus a parliamentary system, and (4) the adoption of bicameralism versus unicameralism:

- ad 1: Sub-national constitutions are, as Dinan states, “invariably easier to amend than their national counterparts” (ibid.). As for Austria, the hurdle to be cleared is even lower than in most of the other federal countries: while the national constitution can be amended only by a two-thirds majority in parliament to be followed by an obligatory referendum, changes of a *Land* constitution require only a two-third majority of the *Land* parliament, without popular approval. It is worth bearing in mind, though, that in Austria the scope for sub-national constitutionalism is in general rather narrow (cf. Gardner 2008: 333).
- ad 2: Other than at national level, instruments of direct democracy, as to be outlined below, can be adopted extensively in state constitutions, albeit in practice with some variety. For instance, Vorarlberg has always put emphasis on extending direct democracy (occasionally even at the risk that a law is repealed by the constitutional court) while some other states show themselves remarkably reluctant about this matter.
- ad 3: Strictly speaking, in the case of Austria there is no choice between presidentialism and parliamentarism since the federal constitution allows for the latter option only. Yet, on second sight, there is a kind of a quasi-presidentialism at substate level. As already mentioned, in the federal constitution the office of a *Land* governor is



allotted the role of a “head of state”, and not by chance state parliament elections are frequently regarded as being actually state governor elections.

- ad 4: Given that unicameralism is increasingly the norm in sub-national constitutions (Dinan 2008: 841), Austria is in line with the mainstream. There is a kind of – defect (as outlined above) – parallelism of chambers at the national level while unicameralism at substate level has been an invariable rule stipulated by the national constitution.

Going beyond Dinan’s useful list of features, it is important to regard that subconstitutionalism is to a considerable extent not just a matter of options but also a matter of political culture. In some of the Austrian *Länder* regional identity (note: other than, e.g., in Germany, in Austria there is no difference made between the terms *Land* and region) is strong, underpinned with historical heritage, traditionalism and patriotic sentiments. In others, again, 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 (36%), Tyrol (32%) and Salzburg (39%) emotional attachment to the *Land* is significantly higher than in the national average (25%), while citizens in the eastern states consider themselves to a higher degree as “Austrians” (Plasser and Ulram 2003: 433). Obviously, there is a close correlation between regional identity and the attitude towards federalism: the citizens of Vorarlberg and Tyrol rank highest (75% resp. 74% compared to 59% nation-wide) with requesting a stronger role for the *Länder* in federal politics (Bußjäger et al. 2010: 38).

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 (Moser 2010: 69-72):

- 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.
- Burgenland, Carinthia, Lower and Upper Austria have constitutions with a *mix of legal positivism and natural law*, in part including provisions with imprecise norms, e.g., state goals, basic/civil rights and the like.



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

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” (Tarr 2007: 15).^X

3.2. Comparing constitutional profiles

3.2.1. Contents and properties

To say in advance, much of the contents of sub-national constitutions is predetermined in detail by the federal constitution having left little scope for flexible interpretation so far. For instance, with the principle of indirect federal administration the constitution explicitly stipulates national government policy decisions to be implemented by *Land* executive authorities.^{XI} In view of that, Gardner (2008: 333) concludes that

[a]lthough the reality [...] may be more complex than the constitutional text alone reveals, there provisions on their face seem to contemplate Land government as agents of the central government in areas of national competence, an arrangement that is largely incompatible with sub-national constitutionalism and overtly antithetical to contestatory federalism.

At least to some extent the verdict needs to be qualified, the more so as it does not take into account recent developments. As a matter of fact, concerning the distribution of competences between central state and substates, virtually all political actors involved have been well aware that reforming the allocation of rights and duties is urgently needed. For a long time, though, Austrian federalism did not develop consistently in a certain direction, neither clearly towards (over-)centralization nor towards decentralization. In a long-term study, Bußjäger (2012: 67) distinguishes four periods:

- 1945-1974: creeping centralization
- 1974-1988: moderate federalization
- as from 1988: uneven development



- since 1995: various attempts of federal reform, including a broadly based convention assigned with the task of elaborating a modern federal convention.

As for the last-mentioned convention, the report submitted to the national parliament is not really stunning, and only a small number of the proposals has been implemented so far, yet it expresses a new stage in constitutional affairs. The same is true for the substates which in the last three decades all have extensively adapted their constitutions in accordance with the above-mentioned new legal doctrine which attributes “relative” autonomy to the *Länder*.

Compared to the national level, sub-national constitutionalism has been characterized by a considerably more dynamic development resulting in a wide range of changes regarding scope and substance, recent studies even identify “contours of distinct Austrian constitutional profiles at member state level” finding expression in “spirited innovations” (Häberle 2006: 381).^{XII}

Before dealing in detail with sub-national constitutionalism in Austria, it must be noted that with regard to substance not every constitutional change earns the attribute “spirited innovation”. Some of them fall primarily in the category of symbolic politics; others again lead to far-reaching alterations of single elements of the political system. With good reason, therefore, in this section symbols and general provisions are dealt with briefly while the latter category is examined more broadly, particularly changes of government creation procedures (i.e. proportional vs. majoritarian rule) and patterns of direct democracy.

3.2.2. *Preambles, symbols and general provisions*

Preambles to a constitution are widely used as introductory statements without any legal binding. Unsurprisingly, only a single of the *Länder* has one: Tyrol whose preamble 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). While there is only one constitution with a preamble, 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 (Häberle 2006: 371 f.)



General constitutional provisions refer to a broad range of principles for specific government action and tasks to be fulfilled. In large part, at substate level it is primarily a matter of replicating federal constitution regulations. Given the narrow limits set by national law, *Land* constitutions tend to focus on (nonbinding, because unenforceable) fundamental rights and “state goals” (*Staatsziele*) as there are, for instance, committing to “family, marriage, equal treatment of housework and gainful employment, Sundays and legal holidays, regional patriotism, and subsidiarity” (Gamper 2012: 70). Notwithstanding, with respect to general provisions, there is increasing heterogeneity among the *Land* constitutions simply because it allows for producing a specific constitutional style (ibid., 84 f.).

3.2.3. Government creation: 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* as laid down in the seminal works by Lehmbruch and Lijphart defining it as a societal arrangement typically for countries which in their historical development were unable or only insufficiently able to establish a viable, non-destructive system based on the ideal of competitive democracy (Schmidt 2010: 306-335). 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 organised virtually the whole society in two big “camps” (therefore the term *Lagerparteien*). 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 WW-II arrangement of mutual control had had a prelude already at the cradle of the democratic republic to be founded after 1918. After long disputes revolved 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 to be excluded from government permanently.

However, although enshrined in provincial constitutions drafted in the First Republic already, the system of *Proporz* government could fulfil 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 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 (Luther 1990: 16).

With shares of votes gradually shrinking and finally falling under the 50 percent mark, though, formerly power-conscious parties have lost ground. As of 2015, there is only one party at 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 (Schausberger 1999: 258). 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 (ibid.).



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, coalsing informally within the stipulated all-party government, are pronounced proponents of changing the rule but are lacking 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. Since 1945, in several *Länder* with *Proporz* system repeatedly, in some of them even for decades, there was virtually no opposition because all parties were in government.^{xiii} 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 *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 either of his own party or of the total of MPs (Fallend 2011: 181). The same had been the case in Salzburg and Tyrol before *Proporz* had been abandoned; now, under majoritarian system, it requires a simple majority only to force a cabinet member to resign (Karlhofer 2013: 17).

3.2.4. *Direct democracy*

In a comparative study evaluating the scope and procedures for direct democracy in Europe, Austria is midfield in a group of countries labelled *The Cautious*, defined as a category in which “the electorate does have practical experience of popular initiatives and/or national referendums. But these procedures are essentially plebiscitary in nature i.e. they are not protected or controlled by the citizens themselves or by the law, but are controlled ‘from above’ by parliament (political parties) or by the executive” (Gross and Kaufmann 2002: 14). As a matter of fact, in Austria pure democracy has been put in second place since the foundation of the republic (Welan 2013: 58f.). More recently, in 2011, a ruling by the constitutional court once again reconfirmed the supremacy of the principle of representational democracy in that it repealed an amendment to the constitution of the *Land* Vorarlberg which had provided for ‘popular legislation’ (Gamper



2014: 30-32). As of recently, though, a sea change seems to be under way: in December 2014, the National Council, in responding to increasing demands, appointed a commission which was entrusted with elaborating proposals for an “enhancement of direct democratic instruments”.^{XIV}

Apart from the fact that in Austria direct democracy at national level is relatively underdevelopment, we can draw upon Dinan’s finding that sub-national constitutions generally provide more opportunities for direct democracy (2008: 841) when turning to respective provisions at *Länder* level.

As already pointed out, some of the *Länder* made extensive use of direct democracy instruments as early as the formation phase of the republic, some of them even before their respective sub-national constitution had been drafted. We just need to recall the referendum of 1919 in Vorarlberg (which, by the way, aimed at accession to Switzerland) and the referenda held two years later in Salzburg and Tyrol (both, aiming at Germany, in the same way secessionist). Beyond these spectacular cases, the three Western *Länder* incorporated popular vote provisions into their constitutions soon afterwards. In practice, however, with no single case of initiative reported, direct democracy was quote immaterial in the First Republic (Poier 2010: 32f.). The same applies for the immediate post-war decades where direct democracy was hardly more than dead letter. As late as the 1970s, several *Länder* 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 in general an understanding of sub-national self-reliance. And for another thing, with the background of societal change policymakers were increasingly faced with civil society activities, such as local initiatives and action groups which more or less explicitly put an enhancement of civic involvement on the agenda. Within a short time, 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 *Land* constitutions had amended their constitutions in this direction (ibid., 34).



Table 1: Facultative referendum – required number of signatures or resolutions of municipalities

Land	Number of signatures*	Number of municipalities	Exceptions to the rule
Burgenland	12.000 (5%)	–	Bills passed in emergency situations; fixed-time implementation laws; tax laws
Carinthia	–	–	–
Lower Austria	50.000 (4%)	80	Bills passed in emergency situations; fixed-time implementation laws; tax laws
Salzburg	–	–	–
Styria	50.000 (5%)	50	Implementation laws; implementation of Community Law; bills declared urgent
Tyrol	7.500 (1%)	40	Bills passed in emergency situations; implementation laws
Upper Austria	–	–	–
Vorarlberg	10.000 (4%)	10	Bills declared urgent
Vienna	–	–	–

* In brackets share of electorate

Source: Poier 2010: 37 (updated).

Today, there is both at *Land* and at local level a broad spectrum of provisions for citizen participation. Most frequently to be found are *Volksbefragung* (consultative referendum), *Volksbegehren* (agenda initiative) and *Referendum* (which is either binding or non-binding to policymakers). At a closer look only the referendum can be regarded as being effective in the sense of a policy-decision by the people. Obligatory referenda are stipulated only in Salzburg and Vorarlberg in connection with essential changes of the constitution (in both cases under certain circumstances only). Without exception, though, all *Länder* have constitutionally enshrined provisions for facultative referenda (i.e. veto-referenda) which can be initialized top-down by the *Land* parliaments, and in most of them also through bottom-up initiatives by citizens resp. municipalities concerned – as is the case with Burgenland, Lower Austria, Styria, Tyrol and Vorarlberg. Without exception, though, subject to the vote of the people can only be laws passed by parliament and before coming into effect (Table 1).

When including also municipalities, as the lowest level of a federal system, remarkable differences can be identified: At national level the attribute “cautious” is apposite while at *Land* level, with some variation, direct democracy instruments are slightly broader developed. At local level, by contrast, openness to civic participation is considerably higher.



Given that the legal framework for municipal politics is determined by *Land* legislation (therefore, it is a matter of sub-national constitutionalism), the commitment to granting direct rights to the “sovereign” is more far-reaching: three of the nine *Länder* provide for binding referenda based on initiatives supported by at least 20 (Vorarlberg) resp. 25 (Burgenland, Styria) percent of citizens (Karlhofer 2012: 150).

4. Dynamics and efficiency of subconstitutional politics

As set out above, during 1918 to 1920, along with the tension-filled, contradicting, and to a considerable extent chaotic, 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 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 constitutionalism gives a different picture, all the more so as it is anything but static or unidirectional. A flash back to the first post-war decades seems to corroborate the assessment of Austria being a comparably “weak” federation. Leaving aside the distinction between more positivistic and more natural law oriented constitutions (see section 3.1.) what in practice has little relevance, the *Länder* exhibited little individuality. For a long time, sub-national constitutionalism more or less mirrored the logic of national constitutionalism. Not for no reason, the fact that federal law was mostly replicated one-to-one by state legislators was sarcastically labelled as “Rank-Xerox federalism” (Öhlinger 2009: 52).

As from the late 1970s, with the new doctrine of “relative autonomy” unfolding, the culture of subordination to centralist policy-making has increasingly been challenged (Bußjäger 2012). Particularly with government creation rules and direct democracy, both regarded as the most important issues to be tackled, the *Länder* (with varying commitment) have become proactive in adapting their constitutions. It must be noted that the principle



of homogeneity (*Homogenitätsprinzip*)^{XV} derived from the federal constitutions still sets limits to overarching ambitions. Notwithstanding, despite restrictions due to homogeneity, one can agree with Tarr stating with regard 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“ (Tarr 2011: 1139).^{XVI}

Indeed, and beyond the two examples outlined more broadly in this article, the Austrian *Länder* have adapted their constitutions in many other aspects, too. In the early 1980s, all of them, except for Vienna, established a *Landesrechnungsbhof* (audit office); since the mid-1980s, Tyrol and Vorarlberg have a *Landesvolksanwalt* (public ombudsman) who can be consulted by citizens in case they feel unjustly treated by public authorities.

As for EU affairs, Austria’s access in 1995 entailed substantial changes for the *Länder*. The foreseeable loss of influence through integration effects was in part alleviated through state treaties. At the same time, *Land* constitutions were adapted in different ways; while Carinthia, Lower Austria and Vienna abstained from any changes, the others established integration committees and the like on the basis of constitutional law (Moser 2010: 89-102).

Taken as a whole, recent experience has shown that subconstitutionalism has gained steam, and frequently changes in one *Land* serve as a model for others. In at least one case subconstitutionalism has caused a thorough reform at national level: In the 1990s, in several German *Länder* the voting age for local elections had been lowered to 16 years. In Austria, Carinthia and Burgenland made a start by introducing “vote at 16” in 2000, whereby Burgenland extended the reform also to *Landtag* elections. By 2005, five *Länder* had lowered the voting age for local elections and three in addition for *Landtag* elections. Eventually, in 2007, the newly elected federal government (formed by SPÖ and ÖVP) followed suit and lowered the voting age for National Council elections, too. According to a constitutional homogeneity rule providing 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. Since then, Austria has been the only EU member, in a broader sense worldwide the only developed democracy providing for voting at 16 (Karlhofer 2010).



All things considered, apart from the election reform which notabene had started as a bottom-up process gaining national attention only later, Austrian sub-national constitutionalism is inherently a step-by-step story and therefore should not be overestimated (Bußjäger 2010a: 33). On the other hand, right at the substate level there is some potential of change that should not be underestimated. Along with the recalibration of party systems at substate 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 (Bolleyer and Bytzek 2009: 381). Long-term studies, though, suggest qualifying the assessment since congruence is no longer “a function of government formation at the national level” (Jenny 2013: 44). 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 logics 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 Gardner (2008). Against this backdrop, gradual constitutional change at sub-national level may eventually turn out to be more effective than the big nationwide federal reform which has not really made progress in the past quarter-century.

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^I For a more detailed description of the origins of Austrian federalism see Karlhofer 2015.

^{II} Joseph Marko: Federalism, Sub-national Constitutionalism, and the Protection of Minorities, undated, p. 1 (<http://camlaw.rutgers.edu/statecon/subpapers/marko.pdf>).

^{III} What must be added, though, is that this process was actually orchestrated by chancellor Karl Renner who provided pre-formulated, textually identical declarations of accession to the Land parliaments (Wiederin 2011: 361). Notwithstanding, the states’ commitment to the new republic remained fragile for a while, as demonstrated by several attempts of secession: In 1919, Tyrol, in a hopeless attempt 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 99 percent of the voters. In the same 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 (Fiedler 2007: 7-8).

^{IV} Cf. the typology introduced by Stepan (1999).

^V For a more detailed description see Karlhofer and Pallaver 2013.

^{VI} The modest prestige of *Bundesrat* office holders is best expressed in the fact that after every national election the government parties, when negotiating the coalition agreement, use to agree upon the voting behaviour not only of the lower house members, but also of their respective members of the upper house – without any consultation with the latter (Weiss 1997: 525).



^{VII} Official data by www.bmi.gv.at/cms/bmi_wahlen/ [access: 01.02.2015].

^{VIII} “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).

^{IX} It should be noted that also the name of the national constitution – in full length “Federal Constitutional Law” – is in a sense misleading.

^X In addition, this paper will also refer to aspects addressed by Tarr in a recent work: elite entrenchment, outsider groups, ordinary politics, constitutional modernization, and external political forces (Tarr 2014).

^{XI} “In matters of the indirect Federal administration the Governor is bound by instructions from the Federal Government and individual Federal Ministers (Art. 20) and he is obliged, in order to effect the implementation of such instructions, also to employ the powers available to him in his capacity as a functionary of the Land's autonomous sphere of competence” (Article 103 (1) Federal Constitutional Law).

^{XII} Translated from German – FK.

^{XIII} 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.

^{XIV} Cf. Republik Österreich, Parlament, “Enquete-Kommission zur Stärkung der Demokratie” (<http://www.parlament.gv.at/PERK/NRBRBV/NR/PARLENQU/PEKDEMO/index.shtml>).

^{XV} Although explicitly entrenched in the federal constitution with regard to *Landtag* elections only (Art 95, para 2, B-VG), the Constitutional Court's ruling tends to interpret homogeneity rather strictly in that “federal supervision is stronger in Austria than in many other federal countries and altogether more typical of regionalized countries” (Gamper 2006: 88, footnotes deleted).

^{XVI} Concerning the German case, see the in-depth analyses provided by Lorenz and Reutter (2012) and Reutter (2014).

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