Federalism and Recent Political Dynamics in Austria

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ABSTRACT From a comparative perspective, the Austrian Federal Constitution appears rather centralized, given that the majority of legislative competences are allocated at the federal level. However, a closer look indicates that the *Länder* (the federal units) gain considerable political weight by serving as the administrative centre of gravity; namely, the *Länder* execute their own laws and most of the laws based on the federation's subject-matters. Hence, one might speak of "administrative federalism". History shows that Austrian politics resemble a tug-of-war over the federal division of (legislative) competences. The newly elected coalition government's program joins the ranks of long-winded discussions on how to make Austrian federalism more efficient. Even if pro-federal by rhetoric, the actual content of the government program is either conceptually ambivalent or substantially in favour of increased (legislative) centralization, especially in the realm of social and educational policy.

KEYWORDS Administrative Federalism; Austria; Coalition Government; Distribution of Competences; Education; Federal Constitution; Federalism; Federation; Government Program; Parliament; Reform; Government Program; Social Policy.

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A. General Features of Austrian Federalism[1]

1. History and Development of Federalism

The Federal Republic of Austria was created in 1920 and can thus be ranked among the "old "European federal systems. After the breakdown of the Austrian-Hungarian Monarchy in 1918, the federation's constituent units (hereinafter *Länder*) played an important role in building up the new state, as they declared their will to join the new Republic. At that time, seven of today's nine *Länder*, which are mentioned in Art. 2 para. 2 of the Austrian Federal Constitution (hereinafter "*B-VG*"), were territories which had survived as entities of the Austrian-Hungarian Empire. The Burgenland was part of Hungary and only became part of Austria in 1921. The capital, Vienna, was part of Lower Austria and became a separate *Länder* (federal unit) in 1922.

As a consequence of their rather independent position, the *Länder* participated in the drafting of the Federal Constitution within the framework of the so-called *Länd*er conferences (*Länderkonferenzen*). The *Länder* played a crucial role during the drafting process given that the young Austrian Republic seemingly needed the *Länder* to establish itself and implement laws. Yet, as time went by, the federal government managed to consolidate its power and thus, the political influence of the *Länder* decreased. Finally, the *B-VG* was adopted in 1920. It was based on a compromise between the Social Democrats (hereinafter *SPÖ*) and the Christian-Social-Party (hereinafter *ÖVP*). While the former preferred a strong unitary state, the latter supported the formation of a federation similar to Switzerland. These entirely different attitudes towards federalism resulted in the Austrian Federation being a federation by principle, yet a technically rather centralized one. From the outset, the *B-VG* was thus characterized by significant elements of unitarism and a clear imbalance of power in favour of the federal government.

Since its promulgation, the *B-VG*, which had been primarily conceptualized by the famous legal scholar Hans Kelsen, has been amended on numerous

1. Part A of this essay is based on a contribution by Bussjaeger/Schramek for the 3RD edition of the Handbook on Federations. The contribution has not been published yet due to editorial delays.

occasions. These amendments have largely accentuated the *B-VG*'s unitary tendency by transferring additional powers to the federal level. This approach also applies to the two amendment acts of 1925 and 1929, especially with respect to the issue-areas of "security administration" and "police organization". Moreover, the amendment of 1925 is of particular importance because it brought the distribution of competences into force as of October 1, 1925. However, public education was only constitutionally regulated in 1962, given that this issue-area had been the subject of longstanding and severe political disagreement.

After the Second World War, the Federal Constitution of 1920 was reinstated with all its amendments. Once again, *Länder* conferences took place. At the first conference in September 1945, agreement was reached that the *B-VG* should be reestablished and that Austria should become a federal republic once again. In the following years, under the federal government of a grand coalition between the *ÖVP* and the *SPÖ*, a far-reaching process of centralization started, which culminated in the amendment of the 1962 *B-VG*. Through this amendment, several of the *Länder's* competences with regard to "public education" were eliminated while the federation received a residual competence for all respective matters which had not been listed explicitly in favour of the *Länder* (Art.14 para. 1 *B-VG*). The second chamber of the Austrian Federal Parliament, the Federal Council ("*Bundesrat*"), has never been able to counteract any such centralization processes—neither constitutionally nor politically—despite its mandate to represent the interests of the *Länder* at the level of federal legislation.

In response, the *Länder* began to formulate programs to strengthen the principle of federalism. These efforts led to one far-reaching (1974) and several smaller amendments to the Federal Constitution; namely, in 1977, 1983, 1984, 1987, 1988, and 1990. These amendments can be described as amendments in favour of federalism because they equipped the *Länder* with an enlarged sphere of influence, with reservations. However, this development affected the distribution of (legislative) competences: smaller amendments in favour of the *Länder* were then followed by centralizations in significant areas such as "air pollution control" and "waste management" in 1988.[2]

2. Sturm, "Austria", 51.

At the end of the 1980s and in view of Austria's forthcoming accession to the European Union, the *Länder* called for a fundamental redistribution of competences within the federal system. To this end, a political agreement on the reorganization of the federal state was signed in 1992 by the Federal Chancellor and the chairman of the Conference of *Länder* Governors (*Landeshauptleutekonferenz*), the so-called *Perchtoldsdorfer Paktum*. The agreement contained a schedule for a reform bill, which was drafted in June 1994. However, this draft did not address all contents of the agreement. Despite intense efforts, the reform project could not be realized. Partly, the standstill was caused by the fact that the *SPÖ* and the *ÖVP* had lost the necessary two-thirds majority at the general election in October 1994, which would have been necessary to pass legislation, and thus, the two aforementioned parties would have needed the unattainable support of the opposition to pass bills on a broader reform of the federal system. As a result, the initial draft was further downsized into a compromise formula. Subsequently, the *Länder* rejected the new compromise. This result turned the reform project into a wasted chance for more federalism, as hardly any new reform projects have emerged in the following years. However, federalism in Austria witnessed a new spin when the system of administrative justice was amended in 2012. The nine administrative courts of the *Länder* (Art. 129-136 *B-VG*) enable the *Länder* to participate in the federation's power of (administrative) justice.[3]

The theoretical construction of the Austrian Federation has been the subject of controversial debates for a long time. Basically, three theories exist thereon. According to the monistic decentralization theory, which had been conceptualized by the Viennese School of Legal Positivism, the constituent units are neither federal component units nor sovereign states, but merely decentralized units. The theory of three-circle-federalism by Hans Kelsen differs from the decentralization theory insofar as Kelsen recognizes the legal order of the Republic as the entire state in addition to the legal orders of the federation and its constituent units. By contrast, proponents of the dualistic theory claim that the constituent parts of a federal state are (genuinely sovereign) states themselves. This theory can be ascribed to the so-called "Innsbruck doctrine".[4] Although the 1990s witnessed further legal and political debates over various theories, the scholarly dispute on the nature of

3. See below and additionally: Schramek, Gerichtsbarkeit im Bundesstaat.

4. Pernthaler, Österreichisches Bundesstaatsrecht, 294-298.

federalism in Austria underwent a loss of relevance. At the time of writing, the future of federalism in a small state (such as Austria) in the context of the European multi-level system continues to be discussed, especially within the scheme of "regionalism".

2. Constitutional Provisions Relating to Federalism

Art. 2 *B-VG* explicitly stipulates that Austria is a federal state consisting of nine autonomous constituent units, the so-called *Länder*, namely Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg, and Vienna (Art. 2 para. 2 *B-VG*). The prevailing doctrine regards Art. 2 *B-VG* as a provision of a solely programmatic nature. However, federalism is classified as one of the basic principles of the *B-VG* along with the democratic principle, the republican principle, the liberal principle, the principle of the rule of law, and the principle of the separation of powers. According to Art. 44 para. 3 *B-VG*, an abolishment or a substantial modification of one of these basic principles is considered as a total revision of the federal constitution which needs to be approved by a referendum.[5]

According to the jurisdiction of the Austrian Federal Constitutional Court,[6] the content of the federal principle comprises at least four substantive elements: the distribution of legislative and administrative competences, the participation of the *Länder* in federal legislation, the constitutional autonomy of the *Länder*, and the participation of the *Länder* in the federal administration. However, federal theory suggests that an additional element needs to be taken into account; namely, the autonomy of the *Länder* in budgeting and spending.

Basically, the distribution of competences is entrenched in Art. 10-15 *B-VG*. These Articles differentiate between four types of distribution of legislative and executive powers: exclusive federal legislation and execution (Art. 10 *B-VG*), federal legislation executed by the *Länder* (Art. 11 *B-VG*), framework legislation by the federation which is implemented and executed by the *Länder* (Art. 12 *B-VG*), and exclusive *Länder* legislation and execution

5. Bussjaeger, "Between Europeanization", 12-13.

6. See in this regard: VfSlg 2455/1952; 11.403/1987 and 16.241/2001.

(Art. 15 para 1 *B-VG*). The latter is designed as a residual competence, which means that the *Länder* are responsible for all matters which have not been listed explicitly in favour of the federation. Certainly, the clear majority of competences can be found in Art. 10 *B-VG*. This provision contains fundamental competences such as the Federal Constitution, foreign affairs, civil law affairs, matters pertaining to trade and industry, labour legislation and public health with certain exceptions. Among others, the *Länder* remain competent for the issue-areas of building, nature protection and regional planning. Furthermore, the *Länder* have lost powers in terms of financial matters. According to Art. 13 para. 1 *B-VG*, the competences of the Federation and the *Länder* in the issue-area of taxation are regulated by a separate federal constitutional act; namely, the Financial Constitutional Act. This act defines abstract types of taxes and vests the federal legislator with the power to legislate on the distribution of tax-raising powers which are then incorporated into the Financial Adjustment Act (*Finanzausgleichsgesetz*). The latter is negotiated between the Federation, the *Länder,* and the municipalities. Against this background, the distribution of financial competences is shaped in a largely centralistic way. In fact, the *Länder* own almost no independent tax income. As with the finance sector, competences with regard to legislation on schools and education are regulated separately in Art. 14 and 14(a) *B-VG*.

The Federal Council[7] serves as the most important instrument of the *Länder* to participate in federal legislation. Even though its role as the representative of the interests of the *Länder* at the level of federal legislation is not explicitly anchored in the *B-VG*, the organization and functions of the Federal Council clearly indicate the rationale of representing the federal units. Art. 34-37 *B-VG* contains the provisions governing the organization of the Federal Council. The representatives of the Federal Council are elected by the parliaments of the *Länder*. According to Art. 34 para. 1 *B-VG*, the *Länder* are represented in the Federal Council in proportion to their respective population.

Generally speaking, Austria's Federal Council is perceived as institutionally weak. This assessment stems from its limited function during the legislation process (constitutional weakness) as well as from the fact that the Federal Council rarely uses its existing functions (political weakness). The so-called suspensive veto serves as the most important function of the federal dimen-

7. See in this regard: Gamper, "Imperfect Bicameralism in Austria", 46-65.

sion of national legislation: according to Art. 42 para. 2 *B-VG*, the Federal Council may challenge a bill proposed by the National Council. However, the National Council can override this veto by repeating a vote on the bill. In addition to the option of suspending federal legislation, an absolute veto is granted to the Federal Council for a limited number of cases. First and foremost, Art. 44 para. 2 *B-VG* grants the Federal Council an absolute veto in cases in which the Länder's legislative or executive competences are in danger of being restricted by amendments to the Federal Constitution or constitutional provisions enshrined in ordinary laws.

Besides the Federal Council and its representative functions, the *Länder's* right of consent (Art. 3 para. 2, 14(b) para. 4, 94 para. 2, 102 para. 1 and 4, 131 para. 4, and 135 para. 4 *B-VG*) represents an additional instrument of participation in federal legislation. Art. 42(a) *B-VG* contains the proceeding through which the *Länder* can issue (or withhold) their consent to a federal bill.

The constitutional autonomy of the *Länder*[8] adds a third substantive building block to the federal principle. According to Art. 99 para. 1 *B-VG*, the *Länder's* constitutions can be amended by *Länder* constitutional law provided the *B-VG* is not affected thereby. In the past, the meaning of this provision and the word "affected" were debated extensively. The Federal Constitutional Court has clarified this matter by stating that subnational constitutions must not contradict the Federal Constitution.[9] This implies that the constitutions of the *Länder* may codify anything provided they do not contradict federal constitutional law. Therefore, scholars have characterized the constitutional autonomy of the Austrian *Länder* as a "relative" constitutional autonomy.[10]

The so-called "indirect federal administration" constitutes the last substantive element. This form of administration is characterized by the *Länder's* execution of federal affairs even though they remain a matter of federal legislative competence. The authorities competent in this regard are the *Länder* Governors who must follow through the directives of the respective federal minister, in their role as indirect federal administrators. Art. 102 para. 1 *B-VG* stipulates the indirect federal administration as a general rule. However, Art.

8. Bussjäger, "Sub-national Constitutions and the Federal Constitution in Austria", 88-106.

9. For example: VfSlg 16.241/2001.

10. Compare in this regard: Koja, *Das Verfassungsrecht der österreichischen Bundesländer*, 17.

102 para. 2 *B-VG* contains an extensive catalogue of exceptions which can be directly executed by federal authorities. Given that a number of federal laws are based on Art. 102 para. *2 B-VG*, the impact of the indirect federal administration is considered to have been outweighed. Beside these four provisions of substantive elements of federalism, the *B-VG* contains several other provisions which directly affect the *Länder*:

In general, formal and informal cooperation play an important role in Austrian federalism.[11] In particular, this applies to agreements concluded pursuant to Art. 15(a) *B-VG*, which are probably the most far-reaching instruments of cooperative federalism in Austria. These agreements may be concluded either between the *Länder* or between the Federation and all or only selected *Länder,* to the extent that the agreements are covered by respective competences. According to the Federal Constitutional Court, agreements based on Art. 15(a) *B-VG* are not directly applicable. In fact, they require an act of implementation by the respective legislative or executive body. Furthermore, contracts between the Federation and the *Länder* may be based on private law because Art. 17 *B-VG* determines that the distribution of competences does not affect the ability of the federation and the *Länder* to act under private law.

Informal cooperation works alongside the Conference of *Länder* Governors. This horizontal mode of cooperation functions as a relatively efficient counterbalance to the weight of the federal government. Indeed, despite a continuous process of centralization of legislative powers, the Conference of the *Länder* Governors has developed into an important platform of the *Länder*, especially with regard to financial equalization and negotiations concerning cost-sharing for the execution of federal law by the *Länder* and municipalities.

In its first chapter, the *B-VG* contains a separate section with provisions regarding the European Union (Art. 23(a)-23(k) *B-VG*). These provisions were implemented with a federal constitutional act prior to Austria's accession to the European Union. For the *Länder,* Art. 23(d) *B-VG* is of particular importance as it entails rules regulating the participation of the *Länder* and municipalities in the decision-making process of the European Union. This provision states that the Federation must inform the *Länder* without delay

11. See in this regard: Bussjäger, "Austria's Cooperative Federalism", 11-33.

about all projects within the framework of the European Union which affect the autonomous sphere of *Länder* competences or could otherwise be of interest to them. Furthermore, the Federation must give the *Länder* the opportunity to present their views within a reasonable timeframe. Similar proceedings are envisioned by Art. 23(g) para. 3 *B-VG* with regard to subsidiarity monitoring. According to this provision, the Federal Council must inform the *Länder* parliaments without delay about all drafts proposed by the European Union and must provide them with an opportunity to state their opinions. Furthermore, Art. 23(a)-23(k) *B-VG* contains several rights of participation for the Federal Council.

Provisions of fundamental importance with respect to legislation and execution by the *Länder* are embodied in chapter 4 of the *B-VG*. The provisions of Art. 95-Art. 112 *B-VG* are formulated in a fairly detailed manner. They contain regulations concerning the *Länder* parliaments (*Landtag*), which affect the legislation of the *Länder* (Art. 95 *B-VG*), the constitution and the *Länder's* governments (*Landesregierung*). These governments exercise executive powers in each of the nine *Länder* (Art. 101 *B-VG*). The federal capital, Vienna, is governed by separate provisions of Art. 108-Art. 112 *B-VG*. Vienna is both a municipality (a town with its own charter according to Art. 116 para. 3 *B-VG*) and a *Länd*. Therefore, the municipal council also functions as a *Länd* parliament, the city senate as a *Länd* government, and the mayor as a *Länd* Governor. In addition to the aforementioned provisions in chapter 4 of the *B-VG*, the Federal Constitutional Act of 1925 concerning the Principles for the Establishment and Operation of the Offices of the *Länder* governments except Vienna serves as a legal basis for the executive measures implemented by the *Länder*.

Provisions regarding the Federal Constitutional Court (*Verfassungsgerichtshof*) are found in Art. 137-148 *B-VG*. The Federal Constitutional Court has a wide range of jurisdictional responsibilities, some of which also affect the *Länder*. Thus, one might argue that the Court has been established as a joint institution of the federation and the *Länder*. First and foremost, the Federal Constitutional Court reviews and repeals laws promulgated by the federal or sub-national parliament(s). Furthermore, the Federal Constitutional Court may overrule administrative acts, both of the federal and *Länder* executives. According to Art. 138 para. 2 *B-VG*, the Federal Constitutional Court is also responsible for deciding upon competence disputes. Finally, the Court decides

whether an agreement according to Art. 15(a) para. 1 or 2 *B-VG* is valid and whether the obligations arising from such an agreement have been fulfilled.

3. Reform Projects

After a structural reform of competences had failed in the 1990s, a new attempt to achieve structural reform took place between June 2003 and January 2005, namely the Austrian Convention. This convention was commissioned to submit proposals and draft bills for a reform of the Austrian political system and its federal constitution. Whereas the aims of the project were ambitious, the convention finished its work without reaching consent over the most intensively debated matters. These contentious matters concerned the division of competences, the restructuring of the financial relationships between the federal level, the *Länder,* and municipalities, as well as the creation of a new charter of fundamental rights including social guarantees.

In the following years, further attempts to reform the complicated division of competences also failed. Nevertheless, the *Länder* have lost further legislative competences, for example with regard to "animal protection" in 2004.

After more than twenty years of reform discussions, a completely reorganized system of administrative legal review was enacted in 2012 and 2013, when Austria's federal legislator adopted a so-called "9+2 model" with which a Federal Administrative Court (*Bundesverwaltungsgericht*), a Federal Fiscal Court (*Bundesfinanzgericht*), and nine Administrative Courts of the *Länder* (*Landesverwaltungsgerichte*) were established. Generally, these courts decide upon administrative matters at the second stage, i.e. if decisions by administrative authorities are impugned. From the perspective of federal theory, the reform is of interest insofar as the *Länder* have become endowed with their own (administrative) courts and thus not only participate in legislating or administrating on behalf of the Republic, but also within the Republic's judiciary branch. In view of the fact that the *B-VG* created a highly centralized federation, the nine administrative Courts of the *Länder* can be considered as a substantive move of federalization. This reform became comprehensively effective on January 1, 2014.

B. Recent Political Dynamics—Federalism and the Subsidiarity Principle within the Government Program 2017-2022

1. Introduction

"We will judge the new Austrian government by their deeds", said German Chancellor Angela Merkel when Austria's Chancellor Sebastian Kurz visited her in Berlin on January 17, 2018. Earlier, the latter had remarked himself that his government should be judged by their actions.

Both statements stem from the undeniable scepticism with which the current Austrian government was met, especially by international spectators. Yet, the statements do undoubtedly contain general views since every government needs to be held against their actions. Thus, if the programmatic outlines on federal reforms, as envisioned by the program of the coalition government, are analyzed, it shall not be forgotten that programs need to be implemented. The analysis hereinafter shall scrutinize the feasibility of the announced amendments.

2. Welcome Gifts

When the 25TH legislative period ended prematurely in 2017, the departing government rolled up their sleeves and passed a number of resolutions, some of which had rather far-reaching consequences for Austrian federalism. These legislative acts became political "welcome gifts" for the new coalition government.

The Federal Act on Education Reform (*Bildungsreformgesetz 2017*)[12] established a completely new structure for the administration of schools. Whereas the past system had been characterized by a dualist arrangement of federal and state authorities, the new law envisions educational directorates (*Bildungsdirektionen*) which function as concurrent federal and state authorities. Given

12. BGBl I 138/2017.

that Austrian federal constitutional law has not foreseen any such administrative authority, one can expect a number of practical as well as theoretical questions within the process of implementing[13] the educational directorates, especially given that they will become part of Austria's federal constitutional law (Art. 113 *B-VG*).

The abolition of the nursing and care clawback (*Pflegeregress*) entered into force by January 1, 2018[14] and is considered to be even more problematic. The nursing and care clawback was a social policy tool which allowed the *Länder* to claw back from income and/or property of those in need of care or from third parties (relatives) in order to disburden social security agencies. The abolition was cemented into Austrian federal constitutional law by so-called constitutional norms within ordinary laws: Sec. 330(a) of the Federal Act on General Social Security (hereinafter *ASVG*) prohibits social security agencies to access property of hospitalized persons, their relatives, heirs, and legatees in order to cover nursing fees. Sec. 707(a) *ASVG* stipulates that any such ongoing proceedings were to be closed and the respective legislations by the *Länder* were thereby overruled. As a compensatory means, transfer payments were planned. Yet, it was clear from the outset that those transfer payments would never cover the actual amount of the expenses. Needless to say, the new regulations were heavily criticized by the *Länder*;[15] and the latter attempted to counterbalance the regulations.[16] As a consequence, the respective debates also bothered the new coalition government.[17] In May 2018, an agreement was reached at the conference of *Länder* Governors: the federation shall cover fixed and variable costs up to EUR 340 million throughout 2018, while the *Länder* undertake to refrain from using the consultation mecha-

13. The educational directorates will replace the existing school boards of the Austrian *Länder* and the federation by January 2019 (Sec. 32 para. 1 Federal Act on the Establishment of Educational Directorates in the *Länder*).

14. BGBl I 125/2017.

15. "Pflegeregress-Aus: Ersatzfinanzierung ‚zu gering'", salzburg.orf.at, 29-06-2018; "Pflegeregress: Verzicht kostet Vorarlberg 60 Millionen Euro", der Standard, 01-07-2017; "Pflegeregress-Abschaffung kommt Land teuer", vorarlberg.orf.at, 03-08-2017; "Pflegeregress: Die abenteuerliche Kostenschätzung des Sozialministeriums", OÖNachrichten, 19-10-2017;"Wir fühlen uns nur als Ausfallshafter", Wiener Zeitung, 04-11-2017.

16. Decision by the Conference of the *Land* Governors, November 10, 2017 (VSt-7714/4).

17. "Stelzer zu Pflegeregress: 'Da gibt es nichts zu verhandeln'", kurier.at, 16-05-2018.

nism. From 2019 onwards, payments shall be calculated on the basis of the data collected in 2018.[18]

One could argue that the *Länder* would have easily achieved a reimbursement of costs by the federation if proceedings before the Austrian Federal Constitutional Court had been initiated. Against this background, it becomes apparent that the new coalition government needed to be willing to compromise with the *Länder*. In any event, the agreement of May 18, 2018 can be seen as an acid test for Austria's "cooperative federalism" which is often described as particularly characterized by financial arrangements.[19]

3. Election Campaign and Election to the National Council 2017

Federalism did not play an important role during the election campaign. On the contrary, election manifestos were characterized by vague statements such as "let's envision a new distribution of competences", "clear distribution of competences and financial responsibilities". Furthermore, increased tax autonomy for the *Länder* and communities was portrayed as necessary to amplify their room for manoeuvre and responsibilities towards citizens.[20] Likewise, the strengthening of regional development was demanded.[21]

Nevertheless, discussions did not reach beyond the level of commonplace statements. From the perspective of political psychology, the federation was portrayed as in need of reform and reduced influence by the *Länder*. In this context, the fact that the new chairman of the *ÖVP* and later Chancellor, Sebastian Kurz, had been vested with a sort of general power over party-matters was interpreted as a debilitation of the *Länder* which are traditionally dominated by the *ÖVP*.

18. "Länder bekommen heuer 340 Millionen Euro für Pflegeregress-Aus", Die Presse, 18-05-2018.

19. Bussjäger, "Austria's Cooperative Federalism", 11-35. Fallend, *Vom Konsens zum Konflikt?*, 6.

20. See in this regard: <www.sebastian-kurz.at/programm/artikel/kompetenzverteilung-in-oesterreich> [Consulted: 22-05-2018].

21. *Ibid*.

4. The Government Program 2017-2022

4.1. Overview

The government program was presented on December 16, 2017 and includes 182 pages. The program is named "Together for our Austria" (*Zusammen für unser Österreich*).[22] With regard to the federal agenda, Chapter I "State and Europe" is of particular importance, as well as the sub-chapters "administrative reform and [federal] constitution"[23] and "modern federal state".[24] However, other chapters contain further provisions of importance to the *Länder*. Thus, the program is characterized by unclear statements which are open to interpretation. As mentioned earlier, the federal government will be judged by its deeds.

In sum, tendencies in favour of centralization overweigh commitments to subsidiarity which can most often be found in the context of the European Union.[25] With respect to Austrian federalism, the subsidiarity principle is named along with the re-distribution of competences (p. 17), as well as in the context of legal frameworks for civil protection (p. 35). The rhetoric of the program does not value federal arrangements; on the contrary, one can read that outdated structures need to be overcome.[26]

As with earlier federal government programs, the cooperative nature of Austrian federalism and the envisioned understanding between the federation and the *Länder* is accentuated. In this regard, the program suggests that the *Länder* need to be integrated into the policy/law-making process and that the federation and the *Länder* need to customize their actions mutually. Furthermore, the need to evaluate planned measures is pointed out.[27] However, these provisions can be considered as fairly typical of the

22. "Zusammen. Für unser Österreich. Regierungsprogramm 2017 bis 2022", available at <www.bundeskanzleramt.gv.at/regierungsdokumente> [Consulted: 22-05-2018].

23. Regierungsprogramm, 13-16.

24. Regierungsprogramm, 17.

25. See Chapter 4.2.

26. Regierungsprogramm, 13, 17.

27. Bussjäger, "'Change' auf Österreichisch", 144-145.

cooperative dynamic of unitary federations and thus taste of new wine in old skins. Various issue areas have already been detailed by follow-up positions by the federal government—hence, the nature and form of the respective actions can be imagined.

4.2. The Subsidiarity Principle in the Government Program 2017-2022

The federation's coalition government submits itself to the European Union and promises to contribute as a "reliable and active partner in the development of the European Union". In doing so, the subsidiarity principle will prevail. Subsidiarity is defined as "the primacy of self-responsibility and smaller units" (p. 9). This definition contradicts the interpretation of subsidiarity in the context of the division of competences (p. 17), according to which tasks should be carried out at the level of the federal government to "ensure that the regulation enfolds efficiency in terms of the citizens". Certainly, the latter interpretation of subsidiarity does not coincide with the definition of subsidiarity as envisioned by Art. 5 *TEU*; namely, the stated negative criterion (insufficient implementation on the level of member states, their units, and communities) and positive criterion (added value by implementation on the EU level).[28]

The future development of the European Union should follow the 4TH scenario of the White Book on the Future of Europe ("less, but more efficient").[29] In addition, the federal government program emphasizes that the presidency of the European Council should be used as a change to actively shape future developments.[30]

28. Schröder, *Grundkurs Europarecht*, Munich, 121.

29. European Commission, White Paper on the Future of Europe, COM (2017) 2025, 01-03-2017.

30. Regierungsprogramm, 22-23.

4.3. The Government Program 2017-2022 under the Federal Perspective

4.3.1. Framework Legislation

Set against the backdrop of the envisioned re-distribution of competences, the federal government program envisions the abolition of the framework legislation of Art. 12 *B-VG*.[31] Notably, one can read on page 18 of the program that the normative regulation of social welfare (guaranteed minimum income) shall be completed through framework legislations. This obvious contradiction will be discussed below.

The framework legislation allows the federation to outline general principles and provisions which shall be specified by the *Länder* through implementation laws (*Ausführungsgesetze*). Therefore, the Austrian Federal Constitutional Court has ruled that the federation is compelled to restrict itself to principles, but must not legislate on details. The *Länder* must be endowed with a certain content-based design scope.[32] Thus, framework legislation is characterized by a "restrained determination of the content of states' law".[33] On the other hand, the *Länder's* implementation laws must not contradict the framework legislation and/or change and/or impede their effectiveness.[34]

In theory, any such legislation could be an effective instrument for the federal distribution of power.[35] Specifically, this type of distribution of competences could help to decrease the federation's overweight vis-à-vis the *Länder*. In other words, the idea of combining regional differences with centralized minimum standards would be equivalent to the federal principle of "unity in diversity". [36]

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31. Regierungsprogramm, 17

32. VfSlg 2087/1951, VfSlg 3853/1960, and recently VfSlg 17.232/2004.

33. Kröll, "Grundsatzgesetzgebung und Richtlinienrechtsetzung", 115.

34. Compare in this regard VfSlg 19.658/2012 and Kröll, *Grundsatzgesetzgebung*, 116-123.

35. Hierzu schon Bussjäger/Schramek, "Catch22: Das föderalistische Paradoxon in Österreich", 336.

36. Pernthaler/Esterbauer, "Der Föderalismus", 325. Wallnöfer, "Bundesstaatlicher Wert und Unwert von", 287.

Up to now, legislative practice in Austria does not match up with the theory. This situation stems from the fact that no justifiable criteria for the required degree of definition by framework legislation exist. Furthermore, many of the laws passed under framework legislation appear rather too detailed; and finally, the *Länder* are reluctant to use the theoretical scope of formative capacity.[37]

The situation in Austria seems to be paralleled by similar constellations abroad: the arrangement of Spanish framework legislation faces similar impediments,[38] while the respective constellation (Art. 75 Basic Law) was abolished in Germany[39] or was scheduled for abolishment as in Italy (the abolishment did not work out due to a negative vote at a referendum on December 4, 2016). As a consequence, the literature does not foresee a promising future for framework legislation.

If the Austrian arrangement of framework legislation was abolished, the respective subject-matters would have to be transferred to the competences of the federation (Art. 10 or 11 *B-VG*) or to the competences of the *Länder* (the residual clause of Art. 15 para. 1 *B-VG*). Subject-matters such as "poverty welfare", "nursing care institutions" and "electricity" are regarded as critical subjects if such a federal constitutional transformation took place. Thus, a draft assessment on constitutional amendments, which was published on May 30, 2018,[40] foresees an entanglement of Art. 12 *B-VG*, but disregards the controversial topics of social security, nursing care, and electricity. At the time of writing, a respective bill scheduled by the government[41] has been submitted to the National Assembly. The bill involves a transfer of subject-matters from Art. 12 *B-VG* to Art. 10, 11,[42] and 15 para. 1 *B-VG*.

37. Pürgy, "Bundesverfassungsrecht und Landesrecht", 293-294.

38. Colino/Hombrado, "Machtteilung in Spanien", 349.

39. Bussjäger, "Schlussfolgerungen und Handlungsempfehlungen", 807.

40. 57/ME 26. GP.

41. The government bill "RV 301 BlgNR 26. GP" is available at <https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00301/> [Consulted: 06-11-2018].

42. Art. 11 *B-VG* stipulates the legislation by the federation and administrative implementation by the *Länder*. Compared to Art. 11 *B-VG*, Art. 12 *B-VG* contains substantial benefits for federalism to prevail, namely the prevention of over-regulation and the competence of the *Länder* to pass executive decrees ("*Durchführungsverordnungen*").

4.3.2. Guaranteed Minimum Income and Social Welfare

The so-called "guaranteed minimum income" is considered to be the Austrian variant of social welfare and is based on Art. 12 para. 1 clause 1 *B-VG*. Given that the federation had not made use of the competence to legislate guiding principles, the *Länder* enjoyed considerable freedom to establish their own social welfare programs. Over time, the diverse programs were criticized and led to a 2010 agreement between the federation and the *Länder*: Under the provisions of Art. 15(a) *B-VG*, a respective harmonization was agreed upon.[43] The agreement ceased to be in force on December 31, 2016, and a new agreement had not yet been reached.

As a consequence, the *Länder* once again started to establish programs on social welfare autonomously.[44] Burgenland,[45] Lower[46] and Upper[47] Austria established a maximum amount of EUR 1,500 with an additional qualifying period of five years of lawful residence in Austria within six years.

Hence, the government program (p. 118) announces the remittal of a framework legislation on social welfare in accordance with Art. 12 *B-VG*. Whereas this plan contradicts the aforementioned idea to abolish Art. 12 *B-VG*, it is clear that any such framework legislation on social welfare would seek to curb the rocketing costs of social security and is thus directed against the social-democratic government of the city of Vienna.

The Austrian Federal Constitutional Court has recently annulled parts of Lower Austria's social security model.[48] The ceiling which limited payments to EUR 1,500 for multi-person households and the requirement to account for five years of permanent residence in Austria were regarded as anti-constitutional. As a consequence, the Austrian federation's coalition government could not model their framework bill on social welfare on the Lower Austri-

43. The agreement was extended in 2013 and 2014 for another year each time. See in this regard: Institut für Föderalismus, 41. Bericht über den Föderalismus in Österreich 2016, 56.

44. This is the case for Tyrol (LGBl 52/2017) and Vorarlberg (LGBl 37/2017).

45. Sec. 10(b) Social Security Act of Burgenland (LGBl 20/2017, Bgld. MSG).

46. Sec. 11(b) Social Security Act of Lower Austria (LGBl 103/20169), (Nö. MSG).

47. Sec 13(a) Social Security Act of Lower Austria (LGBl 41/2017), (Oö MSG).

48. Constitutional Court, G136/2017, March 7, 2018. As a consequence, Sec. 10 para 4, 11(a), and 11(b) of the Social Security Act of Lower Austria were abolished by LGBl 19/2018.

an model, but presented a different model at the end of May 2018: EUR 863 are programmed as federation-wide unified guaranteed minimum income combined with a leeway for the *Länder* to adjust subsidies for housing costs. The maximum sum of EUR 863 contains a so-called "work-qualifying bonus" which will be granted if the applicant can verify mandatory school-leaving qualification, or sufficient knowledge of German or English.

4.3.3. Reduction of Blockades?

P. 17 of the government program announces an elimination of mutual blockades between the federation and the *Länder*. The respective text passage refers to a motion by the Federal Council which was raised during the 25TH legislative period.[49] According to the principle of discontinuity, any such motion is regarded as invalid and thus needs to be raised again.[50] The respective motion called for a withdrawal of the state governments' rights of approval over decisions by the federal government on how to adapt the district courts' parishes.[51] These rights of approval have succeeded in hindering reforms on court organization given that state governments were pressured by local communities to sustain their district courts.

In return, the motion foresaw the omission of the federation's rights of approval on a number of subject-matters which are programmed by the Federal Constitution as subject-matters of the *Länder* (such as adaptation of the boundaries of political parishes, the organization of the state governments and the appointment of the state chancellor's deputy [*Landesamtsdirektor*]).

In line with federal theory, the initiative by the Federal Council appeared to be desirable: first of all, a respective implementation could have entangled administrative interdependencies (which are considerably high compared to international standards). Secondly, motions for legislation by the Federal Council contain a scarcity value and are thus of particular (political) interest. However, it remains to be seen whether the aforementioned text passage of

49. "Regierung einigt sich auf Mindestsicherung neu: Maximal 863 Euro und Nachteile für Ausländer", in: der Standard, 28-05-2018.

50. 869 BlgNR 25. GP.

51. Id. See also: *Institut für Föderalismus*, 16

the government program will be used only to entangle interdependences in the respective issue-areas, or if entanglement will be expanded to other provisions of mutual rights of approval between the federation and the *Länder*. In other words, as far as the *Länder* are concerned, the rights of approval gained prominence with the 2012 Federal Act on Administrative Courts[52] (*Verwaltungsgerichtsbarkeitsnovelle 2012*) and the recent educational reform.[53]

The aforementioned government bill (RV 301, BlgNr. 26. GP) does not foresee any further entanglements than those presented in the motion issued earlier by the Federal Council. An overall analysis suggests that the bill's content—also with regard to the envisioned changes of Art. 12 *B-VG*'s distribution of competences—might be seen as a slight improvement in favour of federalism.

If all circumstances are taken into account and arguments are built in accordance with the federalist point of view, one might assess the bill's content as acceptable. At least the bill addresses several dispensable rights of approval with regard to the organization of the *Länder's* administrations. It remains to be seen whether the bill is approved by the necessary majorities in both chambers of the Austrian Parliament.

Nonetheless, the government program's description of the rights of approval as "blocking powers" does not capture the significance of the rights of approval. In fact, the required approval by the *Länder* for certain bills passed at the federal level depicts an important form of direct participation in federal law-making.[54] Thereby, the *Länder* compensate the political weakness of the Federal Council. From a functionalist perspective, the rights of approval can be classified as acts of federal legislation. Furthermore, these rights serve as instruments of preventive judicial review.[55] Up until now, the *Länder* have not shown any significant intention to block legislative endeavours. If entanglement of the competences exceeded the proposals by the Federal Council

52. Art. 94 . 2, 130 para. 2, 131 para. 4 clause 1, clause 2 lit b, and 135 para. 1 *B-VG*.

53. Art. 113 para. 10 *B-VG* (applicable as of 01-01-2019).

54. Bussjäger, "Art 42(a) *B-VG*".
Lienbacher/Pürgy, "Kooperativer Bundesstaat", 561.

55. Sonntag, *Präventive Normenkontrolle in Österreich*, 159-162.

and the current government bill, they would cause a far-reaching dilution of the *Länder's* participatory rights.

Of equal importance is the right of approval of the Federal Council as provided by Art. 44 para. 2 *B-VG*. This provision allows the *Länder* to participate indirectly in the so-called competence-competence.[56] Even though this instrument was only introduced in 1984, the literature has qualified the latter's abolition as an overall change/amendment of the Federal Constitution.[57]

4.3.4. Merger of Social Security Agents

Ironically, the reform of the social security agents which would be targeted only by federal law is of considerable significance for Austrian federalism.[58]

Currently, Austria has 21 social security agents, which cover the medical, casualty and retirement insurance of diverse policy holders. Due to their modus operandi of self-government, the nine regional (one per federal unit) health insurance funds play a key role within regional healthcare, even though they have been established by federal law (Art. 10 para. 1 clause 11 *B-VG*).

The federation's coalition government plans to merge these regional health insurance funds into one single and unified Austrian insurance fund.[59] With regard to Art. 10 para. 1 clause 11 *B-VG*, the *Länder* might only opt for a limitation of damage by demanding that each of the field offices of the future insurance fund would be endowed with fairly far-reaching competences of self-government. Specifically, a certain degree of budget autonomy and the competence of conclusion of general contracts with the regional branches of the medical associations are needed in order to ensure the medical care of (remote) regions.

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56. Bussjäger, *Die Zustimmungsrechte des Bundesrates*, 3.

57. Bussjäger, *Zustimmungsrechte*, 71-74.

58. Bussjäger, "Unterlage zum Positionspapier über die Reform der Sozialversicherungen (2017)", available at <www.foederalismus.at/contentit4/uploads/Reform%20der%20Sozialversicherungen.pdf> [Consulted: 08-08-2018].

59. See in this regard the government bill "RV 329 BlgNR 26. GP", as available at <https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00301/> [Consulted: 06-11-2018].

4.3.5. Further Demands by the Länder

An entanglement of competences is not only mentioned with regard to Art. 12 *B-VG*, but generally promised throughout the government program.[60] These announcements resemble programs which have already been introduced by the current financial compensation agreement.[61] Thus, a recent trend seems to have been prolonged.[62]

The government program's concrete proposals contain shifts of competences in favour of the federation. Examples thereof include a "unification of the law of construction technology (p. 17, 47), a "unified youth protection" (p.17, 103), an "arrangement of competences for cross-state civil protection" (p.17, 35), an "adjustment of competences in the subject-matter of gambling" (p. 18), and a "federal legislative competence on matters of energy law" (p. 179).

The program's most conspicuous proposals are the ideas promulgated under the chapter "efficiency gains within the indirect federal administration" on p. 17: certain tasks of federal administrative authorities should be incorporated into the administrative apparatus of the *Länder*, but they might remain under the supervision and control of the federation (indirect federal administration). Eligible matters are the Federal Monuments Office, the Federal Social Office, as well as torrent control and spatial planning. On the other hand, one might question the severity of the suggestions in view of the program's other provisions: the labour inspectorate which would be taken into consideration for any such transfer is named on p. 17 to be incorporated into an agency. Moreover, one can read on p. 95 that the Federal Monuments Office shall be adapted—any dissolution of the latter is thus unlikely.

In addition, the program envisions the establishment of subordinated federal administrative authorities in rural areas; the respective proceedings shall take place in accordance with the *Länder* (p. 163). However, it remains questionable if this quest for decentralization of federal administrative authorities will be implemented.

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60. *Regierungsprogramm*, 17.

61. On page 17, the agreement names the entanglement of competences as an interim goal.

62. Bussjäger/Schramek, *Catch22*, 338.

4.3.6. Deregulation and Adjustment of Laws

Since the Austria Convent, the process of deregulation and adjustment of federal acts[63] is considered relevant for federal theory only if the respective matters are federal matters.[64] This initiative was widely covered by the media at the beginning of the federation's coalition government's tenure.[65] The publication of a draft federal act at the end of April 2018 served as a first implementation step.[66] The Second Federal Legislation Adjustment Act enters into force on January 1, 2019.[67] In addition, the often-mentioned over-fulfilment of EU regulations ("golden plating") has been tackled in November 2018 (100/ME 26.GP).[68]

5. Conclusions

Austria's federal system is commonly described as highly centralized with a dominant role played by the federation and restricted fields of legislative competences exercised by the *Länder*. Moreover, participation of the *Länder* in federal lawmaking is—officially—weak because the second chamber has limited competences.

This description, which refers to the legal basis of the *B-VG*, seems to contradict the prominent role of certain instruments of informal cooperation within the Austrian federation, specifically the Conference of the *Länder* Governors. Obviously, there is a discrepancy between the provisions of the *B-VG* and the country's political reality. In fact, cooperative federalism, with its long tradition, shapes the practical operation of the Austrian federal system, thereby acting as a counterweight to centralizing forces.

In general, Austrian federalism is characterized by a high degree of entanglement between the *Länder* and the federal order, as well as by a certain

63. Bussjäger/Schramek, "Föderalismus durch Behördendezentralisierung?", 172-183.

64. Regierungsprogramm, p. 21.

65. "Moser pocht auf großflächige Gesetzesaufhebung", in: kurier.at, 08-01-2018.

66. Entwurf eines Zweiten Bundesrechtsbereinigungsgesetzes, 42/ME 26. GP.

67. BGBl I 61/2018.

68. See Schröder, "Der Abbau von 'Goldplating' durch nationale Deregulierung und das Europäische Unionsrecht", ÖGfE Policy Brief No. 22, 2018, available at https://oegfe.at/2018/10/konkrete-faelle-von-gold-plating/ [Consulted: 06-11-2018].

subordination of the *Länder* under the auspices of the federation. Several factors explain this fact: first of all, the complexity of the division of competences needs to be mentioned. Another circumstance is the role played by the Federal Council. Thirdly, one should take into account the fact that *Länder* Governors are responsible for executing federal legislation. Finally, cooperation and hierarchical relations derive from party politics because Austria's party system is largely integrated across jurisdictional lines, and party politics at the federal level may influence politics at the *Länder* level, and vice versa.

From the perspective of federal theory, the program of the current Federal Government includes a number of interesting passages. Overall, the program does not suggest that federalism will be strengthened, but rather the opposite scenario is evoked. Demands for more subsidiarity are directed towards the European Union rather than towards Austria's internal policy. Even though the federation's coalition government has not yet faced serious conflicts with the *Länder*, such conflicts of interests are likely to arise, especially if the envisioned reform of the social security agents is to be implemented throughout 2019.

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