Climate change law and the Austrian federal system

Maria Bertel
Institute of Public Law and Political Science, University of Graz (Austria)

ABSTRACT Climate change is a challenge for society and the law. Whereas Austrian administrative law is slowly but increasingly establishing regulatory steps for both the mitigation of and adaptation to climate change, constitutional law in Austria seems to be silent on this subject. Since Austria is a federal state, the question arises whether the *Land* (the state) level or the federal level of government is competent to regulate climate change issues. In this paper, this question shall be answered. For that purpose, the Austrian federal system, especially the *Bundesstaat* (the federal state), and the distribution of competences will be explained. Then, the main challenges climate change poses for the federal system will be discussed. Special attention will be paid to the Austrian Climate Protection Act and its deficiencies.

KEYWORDS Austria; constitutional law; distribution of competences; climate change law.

1. Introduction

Climate change is a challenge for society and the law. Whereas administrative law is slowly but increasingly establishing regulatory steps for both the mitigation of and adaptation to climate change, constitutional law in Austria seems to be (rather) silent on this subject up until now. Since Austria is a federal state, the question arises whether the *Land* (the state) level or the federal level of government is competent to regulate climate change issues. In the following, this question shall be answered. Hence, the focus of this article lies on climate change in the Austrian federal system and the challenges and/or advantages regarding the fight against climate change arising from Austria being a federal state. The article addresses neither climate change in public

Article received on 06/03/2023; accepted on 16/05/2023.

The author would like to thank Marlene Mlekusch for assistance with the footnotes.

international or EU law nor the implications public international and EU law have for Austria.[1]

The article is structured as follows: first, different terms linked to climate change are discussed (2). Then, the Austrian federal system, especially the *Bundesstaat* (the federal state), and the distribution of competences must be outlined (3). In the third step, climate change as a challenge for the federal system of Austria will be discussed (4). In the final section, the results shall be summarised (5).

2. Climate change, climate change protection, climate change adaptation and climate change mitigation

Before assessing whether climate change falls into the realm of competences of the federal level or of the *Länder* (the states), the term "climate change" should be defined.

According to Art. 1 para. 2 of the United Nations Framework Convention on Climate Change,[2] climate change "means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods". Climate change, therefore, describes facts. The United Nations Framework Convention on Climate Change calls on its members in Art. 4 para. 1 lit. b to "[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change". Therefore, the United Nations Framework Convention on Climate Change not only refers to climate change but distinguishes between mitigation of climate change and adaptation to climate

1. For public international law, see Soldanski, "Völkerrechtliche Antworten auf den Klimawandel", and Ruppel, "Intersections of Law and Cooperative Global Climate Governance"; for EU law and climate change, see Prettenthaler et al, "Nationale Verpflichtungen auf Grundlage des Pariser Klimaabkommens", 209 f. For the question whether there is a new field of law, climate transition law, arising see Benrath, "Climate Transition Law - Bedeutung undd Potentiale eines neuen Forschungsfeldes".

2. UNTS Vol. 1171, 107.

change. From the point of view of the United Nations Framework Convention on Climate Change, climate change mitigation and adaptation seem to constitute policy objectives.

In the Austrian context, in addition to climate change mitigation and adaptation, the term "climate protection" must be discussed. The Austrian Climate Protection Act (*Klimaschutzgesetz*)[3] defines measures in favour of climate protection as "those that result in a measurable, reportable and verifiable reduction of greenhouse gas emissions or enhancement of carbon sinks that are mapped in the Austrian greenhouse gas inventory in accordance with the applicable reporting obligations under international and Union law. This includes sovereign and private sector measures taken by the federal and state governments" (§ 2 *Klimaschutzgesetz*). Therefore, according to the Austrian Climate Protection Act, climate protection aims at reducing greenhouse gas emissions. According to this understanding, climate protection is part of climate change mitigation.

In the following, both climate change mitigation and climate change adaptation will be addressed. The relevance of climate change adaptation not only for the federal, but also the *Länder* (states) level, as well as the local level, is not only arising from the Austrian federal system but is already recognised by Art. 7 para. 2 of the Paris Agreement.

3. The Austrian federal system

3.1. Overview

According to *Watts*, federal systems are characterised by a distribution of authority between the federal level and the constituent units. Federal systems allow for the participation of the constituent units in federal legislation and there is some form of constitutional autonomy for the constituent units, which have their own financial resources. Moreover, some forms of inter-

3. Klimaschutzgesetz, BGBl I 106/2011, last amended BGBl I 58/2017. Since the Austrian Legal Information System (www.ris.bka.gv.at) does not provide a translation of the Austrian Climate Protection Act, all translations are the author's.

governmental instruments (for coordination or cooperation) are in place.[4] Similarly, as early as 1952, the Austrian Constitutional Court mentioned the distribution of powers, as well as the participation of the constituent units in federal legislation, as essential to the Austrian federal state, manifested in the *Bundesstaat*[5] as outlined in Art. 2 FCA.[6] According to Art. 2 para. 2 of the Federal Constitutional Act, Austria consists of nine *Bundesländer* (*Länder*, constituent units or states).[7]

Following *Watts'* institutional understanding of a federal system, Austria can be classified as a federal state:

The Austrian Constitution entails a distribution of powers in its Art. 10 – 15 FCA in which legislative and executive authorities are distributed. The *Länder* (the constituent units of the Austrian federal state) can participate in law-making at the federal level through the *Bundesrat* (the Federal Council, see Art. 24 and Art. 34 ff FCA), the second chamber of parliament. Art. 99 FCA guarantees some form of constitutional autonomy to the Austrian *Länder*. Based on Art. 99 FCA, the *Länder* have enacted their *Landesverfassungen* (the state constitutions). As long as the state-level constitutions of the *Länder* do not contradict the FCA, they are autonomous in providing regulations regarding the *Land* level.[8] Although the financial resources of the *Länder* cannot be considered very strong, the financial equalisation process guarantees that the *Länder* can count on some financial resources.[9] Lastly, forms of cooperation between the *Länder* and the federal level exist not only as formally set forth in the (federal) Constitution,[10] but also informally, e.g., in the *Landeshauptleutekonferenz* (a regular meeting of the presidents of the

4. Watts, *Comparing Federal Systems*, 9.

5. Constitutional Court VfSlg 2455/1952.

6. Federal Constitutional Act, *Bundes-Verfassungsgesetz* – B-VG, BGBl 1/1930 (last amended BGBl I 222/2022). All translations of acts, unless otherwise stated, are provided by the Austrian Legal Information System RIS, https://ris.bka.gv.at/Englische-Rv/. Please note that the translations regarding the Bundes-Verfassungsgesetz are sometimes referring to it as Federal Constitutional Law and sometimes as Federal Constitutional Act (in the following: FCA).

7. Art. 2 para. 2 FCA reads as follows: "The federal state is formed by the autonomous provinces of Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tirol, Vorarlberg, and Vienna."

8. Öhlinger & Eberhard, *Verfassungsrecht*, 59.

9. Ibid., 131 ff.

10. Ibid., 153 ff.

Länder).[11] Additionally, the role of the Constitutional Court has to be mentioned, as (amongst others) it has the power to decide conflicts arising from the distribution of competences in so-called "concrete" cases (Art. 138 para. 1 no. 3 FCA) when a conflict has already occurred, and in abstract cases in order to determine which legislator has authority to decide upon a particular matter (Art. 138 para. 2 FCA).[12]

In contrast to other constitutions, the Austrian Federal Constitutional Act does not have an incorporation clause, allowing for constitutional acts (and even constitutional provisions in ordinary laws) outside of the core document.[13] The Austrian Constitution, therefore, comprises various documents.[14] The distribution of competences is part of the Austrian Federal Constitutional Act (Art. 10 – 15). Yet, in some cases, constitutional provisions outside the Austrian Federal Constitutional Act can change or supplement the distribution of those competences as laid down in Art. 10-15 of the Federal Constitutional Act.[15]

3.2. The distribution of powers and possibilities for further development

Large parts of the distribution of powers date back to 1925,[16] which, according to the Austrian understanding, refers to the distribution of "state functions".[17] The Austrian Constitution differentiates between the authority to legislate and the authority to execute, and it distributes those competences between the federal level and the nine *Bundesländer*.[18]

Whereas the powers of the federal level are explicitly listed in Art. 10 – 14b FCA, the FCA contains a residuary clause in favour of the *Länder* in Art. 15 para. 1. Since Art. 10 – 14b FCA mentions many important competence

11. For the Landeshauptleutekonferenz see Bußjäger, "Die Landeshauptleutekonferenz".
12. Öhlinger & Eberhard, *Verfassungsrecht*, 491 ff.
13. Ibid., 63; Khakzadeh, *Elements Verfassungsrecht*, 4.
14. Öhlinger & Eberhard, *Verfassungsrecht*, 26.
15. Ibid., 121.
16. Ibid., 46.
17. Ibid., 121.
18. Ibid., 46.

matters, i.e., industry and trade or civil law, amongst others, the matters not mentioned, and therefore falling to the competence realm of the *Länder* (Art. 15 para. 1 FCA, "residuary clause"), are few.[19] If the need for new rules arises and it is unclear as to under whose authority those matters fall, then it must be examined and determined whether these new rules fall within the authority of the federal level or of the *Länder*. Therefore, one must check whether the new rule is covered by one of the powers listed in Art. 10 – 14b FCA.

The Constitutional Court has developed a method to do so. It applies the so-called *Versteinerungstheorie* (petrification theory)[20] to determine whether the federal level or the *Länder* are competent to legislate in a specific matter.[21] When determining the applicable authority, the Court looks back to the date that the competence matter in question came into force, which is, in most cases, 1 October 1925.[22] The competence matter is then interpreted according to the ordinary laws in force when the issue arose. The Court does not rely on the concrete norms in force at that time, but rather on the abstract idea of what was then covered by the competence matter.[23] For example, whether a norm on energy efficiency in production units falls within the competence realm of the federal level or the *Länder* is determined according to whether the (ordinary) *Gewerbeordnung* (Act on Industry and Trade) in force on 1 October 1925 covered such measures or not. The example shows that cases might occur in which it is not possible to determine whether the ordinary law covered certain measures or not. For those cases, the Constitutional Court has developed the "intrasystematic development" of the competence matter.[24] If a new norm can be seen as connected to a competence matter because it is inherent to the system of that matter, then it is seen as covered by the competence matter.[25]

---

19. To give two examples: Art. 10 para. 1 FCA, which allocates legislative and executive powers at the federal level reads as follows: "The Federation has powers of legislation and execution in the following matters […]"; Art. 11 para. 1 FCA which allocates the power of legislation with the federal, the power of execution with the Land level reads as follows: "In the following matters legislation is the business of the Federation, execution that of the provinces: […]".

20. For a critical analysis and further references to literature see Wiederin, "Anmerkungen zur Versteinerungstheorie", 1231 ff.

21. Öhlinger & Eberhard, *Verfassungsrecht*, 138 f.

22. BGBl 268/1925.

23. Öhlinger & Eberhard, *Verfassungsrecht*, 138 f.

24. Ibid., 139.

25. Ibid.

Since the petrification theory and the intrasystematic development of norms are methods of interpreting specific competence matters, the powers listed in Art. 10 – 14b FCA (and not Art. 15 para. 1 FCA)[26] are interpreted. In case a matter is not covered by Art. 10 - 14b FCA, it falls into the competence realm of the *Länder* (Art. 15 para. 1 FCA; "residuary clause").

Since the Austrian Constitution is a flexible[27] constitution that can be changed relatively easily,[28] the distribution of powers can be amended relatively easily as well.

Moreover, the constitutional legislature has the ability to temporarily change the distribution of competences and to enact so-called "competence coverage clauses" (*Kompetenzdeckungsklauseln*),[29] which it regularly makes use of, e.g., when regulating energy laws.[30] "Competence coverage clauses" are paragraphs in ordinary laws that are adopted according to the requirements for adopting constitutional law. An example of such a clause is § 1 *Erneuerbaren-Ausbau-Gesetz* (Renewable Expansion Act): "(Constitutional provision) The enactment, repeal and execution of regulations as contained in this Federal Act shall also be federal matters in respect of which the FCA provides otherwise." Competence coverage clauses, therefore, change the distribution of competences for a certain statute only.[31]

4. Climate change as a challenge for the Austrian federal system

4.1. The role of strategies

In the field of climate change, states strongly rely on strategies.[32] Austria is not an exception. In the Austrian legal system, mere strategies are not

26. Ibid.

27. Gamper, *Staat und Verfassung,* 60.

28. Öhlinger & Eberhard, *Verfassungsrecht*, 25.

29. On the topic of competence coverage clauses, see Neudorfer, "Kompetenzdeckungsklauseln außerhalb des B-VG".

30. Storr, *Energierecht*, 76.

31. Neudorfer, "Kompetenzdeckungsklauseln außerhalb des B-VG", 112 f.

32. Bertel & Cittadino, "Climate Change at Domestic Level", 44.

binding.[33] They set targets, but these are to be implemented by the competent legislature and administrative authorities. Therefore, even ambitious strategies might not lead to an ambitious and powerful climate change law.

The reason for states relying on strategies is linked to the strong predetermination by public international law, as well as EU law. In the field of climate change, Austria is bound (amongst others[34]) by the Paris Agreement.[35] Regarding EU law, climate change-related content which binds Austria is provided amongst others by the EU Climate Law[36] or Directive 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814.[37]

Against this background, it is unsurprising that Austria can rely on several strategical documents in the field of climate change since strategies and plans are required, especially by EU law.[38] Austria has adopted the Integrated

33. Ibid.

34. For an overview of other international treaties, see e.g. Federal Ministry of European and International Affairs, "Environment and Climate Change", accessed May 05, 2023, https://www.bmeia.gv.at/themen/globale-themen/umwelt-und-klimawandel/; see also Schnedl, *Umweltrecht*, 79 f.

35. See the Paris Agreement, BGBl III 197/2016.

36. Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021, p. 1–17.

37. OJ L 76, 19.3.2018, p. 3-27. For the Paris Agreement and EU climate change law in the Austrian context, see Prettenthaler et al, "Nationale Verpflichtungen auf Grundlage des Pariser Klimaabkommens", 209. For an overview regarding climate-relevant norms in public international law see Schnedl, *Umweltrecht*, 79 f, and regarding norms in EU law see Schnedl, *Umweltrecht*, 97 f.

38. Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No. 663/2009 and (EC) No. 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No. 525/2013 of the European Parliament and of the Council, OJ L 328, 21.12.2018, p. 1–77.

National Energy and Climate Plan,[39] as well as the Long-Term Strategy[40] required by Chapter 2 and Chapter 3 of Regulation 2018/1999. Both are based on another strategy dating back to 2018, the "*#mission 2030. Die österreichische Klima- und Energiestrategie*" (#mission 2030. The Austrian Climate and Energy Strategy).[41]

The "#mission 2030" recognises the role of the *Länder* and the municipalities as follows: "Austria's provinces, cities and municipalities are important partners for the transformation of the energy system and climate protection. They have developed their own energy, mobility and/or climate strategies with concrete targets. The Austrian Climate and Energy Strategy is intended to create a framework that supports the provinces, cities and municipalities in their efforts. This applies, in particular, to the preparation and further development of action plans."[42]

The Integrated National Energy and Climate Plan acknowledges that the *Länder* help to reach the national targets and provides an overview of the measures already taken by the *Länder*.[43] Moreover, it points to the specific administrative structures in Austria, which – according to the Integrated National Energy and Climate Plan – lead to a "strong federalisation of the structures of the tasks".[44] Additionally, the Integrated National Energy and Climate Plan points to the involvement of all nine *Bundesländer* in its elaboration.[45]

Comparing the Integrated National Energy and Climate Plan and the Long-Term Strategy, the Long-Term Strategy seems to be almost silent on the

39. Bundesministerium für Nachhaltigkeit und Tourismus, "Integrierter Nationaler Energie- und Klimaplan für Österreich".

40. Bundesministerium für Nachhaltigkeit und Tourismus, "Langfriststrategie 2050 – Österreich".

41. Bundesministerium für Nachhaltigkeit und Tourismus and Bundesministerium für Verkehr, Innovation und Technologie, "#mission2030. Die österreichische Klima- und Energiestrategie".

42. Ibid., 7.

43. Bundesministerium für Nachhaltigkeit und Tourismus, "Integrierter nationaler Energie- und Klimaplan für Österreich", 21.

44. Ibid., 53.

45. Ibid., 56.

Länder. It points to the involvement of the *Bundesländer* in its explanation[46] and the role of the *Bundesländer* in the phasing out of oil heating systems in newly constructed buildings.[47]

Additionally, other sector-specific strategies of the federal government also cover climate change; for example, "Austria's 2030 Mobility Master Plan"[48] and the "Strategy on Biodiversity"[49] both contribute to climate protection. The Mobility Master Plan explicitly recognises the need to involve the *Länder*, as well as the municipalities.[50] The Biodiversity Strategy was also developed together with stakeholders (one of them being the *Bundesländer*).[51] Both the Mobility Master Plan and the Biodiversity Strategy mention the *Bundesländer* several times.

Therefore, though to differing extents, all strategies mentioned take into account the federal structure of Austria.

When it comes to climate strategies, it is worth mentioning that the *Bundesländer* have issued their own strategies. Tyrol, for example, issued a strategy on sustainability and climate in 2021 entitled "Leben mit Zukunft. Tiroler Nachhaltigkeits- und Klimastrategie" ("Life with a future. Tyrolean Sustainability and Climate Strategy").[52] It clearly illustrates the political nature of strategies when it states that "[w]ith this strategy, the Tyrolean government clarifies the need for action in several areas and formulates fields of action and goals with regard to the long-term challenges for Tyrol".[53] Moreover, it points out that "[o]nce the present strategy has been adopted by the Tyrolean provincial

46. Bundesministerium für Nachhaltigkeit und Tourismus, "Langfriststrategie 2050 – Österreich", 19.

47. Ibid., 68.

48. Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology, "Austria's 2030 Mobility Master Plan".

49. Bundesministerium Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie, "Biodiversitäts-Strategie Österreich 2030+".

50. Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology, "Austria's 2030 Mobility Master Plan", 21.

51. Bundesministerium Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie, "Biodiversitäts-Strategie Österreich 2030+", 3.

52. Amt der Tiroler Landesregierung, "Leben mit Zukunft".

53. Ibid., 7.

government, the formulated objectives must be broken down into concrete implementation measures. The necessary 'packages of measures' will be prepared in a separate 'measures section'. This allows for more flexible and ongoing development of implementation measures. The programmes of measures will begin in 2022 and are geared to three-year periods (2022 to 2024, 2025 to 2027, 2028 to 2030) in the sense of rolling planning."[54] The Tyrolean strategy perfectly reflects that strategies are political documents that must be implemented by the legislature and the administration. Yet the strategy illustrates that the *Bundesländer* are taking climate change seriously and that they are willing to act. The strategy also depicts that public international law, as well as EU law, is taken into account by the *Länder*. Tyrol, at least, commits itself to "work to achieve the goals set out in the Paris Climate Agreement and consistently implement the international, European and national resolutions and targets for the reduction of greenhouse gas emissions".[55] This shall "apply in particular to those sectors in which Tyrol has the competences to act. In the global transition to clean energy, Tyrol should take on a pioneering role."[56] The Tyrolean strategy rests on two pillars: climate change mitigation and climate change adaptation.[57] According to the strategy, "[c]limate protection, on the one hand, and adaptation to climate change, on the other hand, thus create the prerequisite for preserving the economic area in the long term and safeguard quality of life for present and future generations".[58]

Whereas it has to be seen as positive that both the federal government as well as the Austrian *Länder* have developed strategies regarding climate change, their non-binding nature[59] has to be criticised. Against the background that these strategies are binding on neither the legislature nor the administrative authorities, the principal value of these strategies lies in their role as indicating fields of action and setting a path.[60] To know who is authorised (and, therefore, responsible) for implementing the goals and measures laid down in these strategies, the Federal Constitution, as well as the *Länder* constitutions,

54. Ibid.
55. Ibid., 10.
56. Ibid.
57. Ibid.
58. Ibid.
59. Bertel & Cittadino, "Climate Change at Domestic Level", 44.
60. Ibid.

must be analysed. Yet, it is important to note that a duty to make use of the competences does not arise from the distribution of competences.[61] Such a duty to act could eventually arise from the Federal Constitution or the *Länder* constitutions. Therefore, before analysing the distribution of competences, the state objectives on environmental protection as well as climate protection and their legal nature will be examined.

4.2. Climate change in federal constitutional law

Federal constitutional law does not mention climate change or climate protection at all. The federal constitutional law covers so-called state objectives concerning environmental protection and sustainability.[62] "Comprehensive environmental protection" was introduced into federal constitutional law as a state objective as early as 1984.[63] This state objective was significantly expanded in 2013 in the form of the Federal Constitutional Act on Sustainability, Animal Protection, and Comprehensive Environmental Protection, as well as on securing Water and Food Supply and Research (Federal Constitutional Act on State Objectives).[64] In addition to sustainability in the use of resources, the commitments to water supply (§ 4 of the Federal Constitutional Act on State Objectives) and to ensure the supply of food to the population and security of supply in general (§ 5 of the Federal Constitutional Act on State Objectives) also indicate that environmental protection is not about preserving the sustainability of human life for their own sake, but rather about preserving the future of human life. Climate change puts the sustainability of human life in danger. Therefore, the aims laid down in the Federal Constitutional Act on State Objectives encompass the protection of the climate, at least to a certain extent.[65] This is reinforced through § 1of of the Federal Constitutional Act on State Objectives, which points to the

61. Egger, *Untätigkeit im Öffentlichen Recht*, 45 ff; with further references to the literature in footnote 177.

62. For state aims or objectives in general, see Bertel, "Staatszielbestimmungen"; Zahrl, "Gesellschaftliche Herausforderungen und objektives Verfassungsrecht".

63. BGBl 491/1984.

64. BGBl I 111/2013 last amended BGBl I 82/2019.

65. For a slightly different argumentation resulting in a climate protection principle, see Kirchmair and Krempelmeier, "Das Klimaschutzprinzip im BVG Nachhaltigkeit", 74 ff; see also Weber, "Staatsziele – Grundrechte – Umwelt- und Klimaschutz", 514.

"best possible quality of life for future generations". Moreover, in Article 1 of the Federal Constitutional Act on the rights of children (BGBl I 4/2011), intergenerational justice is mentioned with regard to the protection of the interests of children. Additionally, duties of protection arising from human rights can also support the idea that the preservation of the future of human life[66] is an objective of the State. A human right to climate protection is up until now not derived from the Constitution.[67]

Against this background, it is reasonable to assume that soil, water and air, as well as the environment and climate, have to be treated with such care that future generations will find living space in which a dignified life is possible. This also requires climate protection.[68]

Since state objectives are enforceable only in very specific constellations,[69] they have to be considered rather weak provisions. Moreover, in its decision concerning the third runway of the Vienna airport, the Constitutional Court has rather restricted than widened the application of State objectives for the future.[70] Therefore, although being anchored in the Constitution, the degree of protection for the climate deriving from the Constitution is weak. The same holds true for the state objectives in the constitutions of the *Länder*.

4.3. Climate change in the constitutions of the *Länder*

In contrast to the Federal Constitution, almost all constitutions of the *Länder* include state objectives regarding climate change. Art. 7a of the Constitution of Carinthia points to "avoiding measures that bring about a deterioration

66. See Weber, "Grundrecht auf Umweltschutz", 501 ff.

67. Against the introduction of a "climate protection right", Piska, "Grundrecht auf Klimaschutz?", 1149 ff, and Piska, "Warum ein Grundrecht auf Klimaschutz nur als Vision überzeugt", 9 ff. For the limits of climate protection measures arising from human rights, see Wallner and Nigmatullin, "Staatliche Klimaschutzmaßnahmen und deren (grundrechtliche) Grenzen", 424 ff.

68. I have elaborated this idea in more detail here: Bertel, "Von der synchronen zur diachronen Verfassung", 233 ff. For a similar argumentation Kirchmair & Krempelmeier, "Das Klimaschutzprinzip im BVG Nachhaltigkeit", 74 ff.

69. Bertel, "Von der synchronen zur diachronen Verfassung", 236.

70. Constitutional Court VfSlg 20.185/2017.

of the climate".[71] Tyrol commits itself in Art. 7 para. 3 of the Tyrolean Constitution to "sustainable and effective climate protection as a prerequisite for preserving our living space for future generations". The Constitution of Lower Austria mentions "climate protection" in Art. 4 no. 3. Upper Austria combines climate protection with renewable energy. It lays down in Art. 10 para. 3 of its Constitution that Upper Austria "is committed to climate protection, as well as to increasing energy efficiency in order to reduce energy consumption and to gradually switching to renewable energy sources".

Similarly, the Constitution of Salzburg lists "the protection of the climate, in particular through measures to reduce or avoid the emission of climate-relevant gases and to increase energy efficiency and the sustainable use of renewable energies" in Art. 9 as one of many state objectives. The Constitution of Vorarlberg also explicitly refers to the protection of the climate. According to Art. 7 para. 7, "[t]he state [of Vorarlberg] is committed to climate protection. To this end, the state promotes measures to increase energy efficiency and the sustainable use of renewable energies while rejecting the operation of nuclear power plants."

Mentioning climate change protection and similar objectives in the state constitutions does not violate Art. 99 FCA: the *Länder* are allowed to set forth their own state objectives as long as these do not contradict federal constitutional law.[72] This means that even if the Federal Constitution contains similar provisions, the *Länder* can still enact them.[73] None of the provisions presented contain a right that can be enforced. This is unsurprising since no subjective rights can be derived from state objectives.[74] Hence climate protection cannot be enforced by individuals. Moreover, climate protection as a state aim of the *Länder* is limited to the territory of each *Land*.[75]

71. Art. 7a para. 2 no. 2 Constitution of Carinthia.

72. With further references Wallnöfer, "Art. 99 B-VG", 4; Weber, "Zur völkerrechtskonformen Auslegung von Verfassungsrecht", 438.

73. For Tyrol Gamper, "Art. 7 TLO 1989", margin no. 2.

74. Öhlinger & Eberhard, *Verfassungsrecht*, 70.

75. Constitutional Court, VfSlg 20.185/2017.

4.4. Climate change and the distribution of competences: Climate change as a "complex matter?"

Since Austria is established as a federal state,[76] the question is whether the federal government and/or the *Länder* (states) are responsible for legislation and enforcement regarding climate change mitigation and climate change adaptation. In other words: who is competent to implement the objectives laid down in the strategies and the state objectives laid down in constitutional law? As a first step, we can ask whether climate change and/or climate mitigation and climate change adaptation are state tasks or matters that can be distributed between the different levels at all. Yet, before answering this question, a disclaimer has to be made: the distribution of competences only indicates whether the federal level or the *Länder* are competent to legislate and/or administrate in a certain field. A duty to act cannot be derived from it.[77]

We can (as laid down above) distinguish climate change mitigation, climate change adaptation and climate change. Climate change law can be understood as encompassing both climate change mitigation as well as climate change adaptation.[78] As I will show, for the purpose of the question of who is competent to legislate and administrate in Austria in the field of climate change, climate change mitigation and climate change adaptation, it does not make a difference whether reference is made to climate change or climate change adaptation and climate change mitigation.

Arguably, both climate change mitigation and climate change adaptation can be understood as state tasks because these are fields in which state action can be expected. Thus, both issues can also be divided between the federal government and the *Länder*, at least in principle, as matters within the federal distribution of competences. If climate change is considered to encompass both climate change mitigation and climate change adaptation, the same holds true for climate protection. Therefore, it is possible both to consider a

76. Öhlinger & Eberhard, *Verfassungsrecht*, 70.

77. Egger, *Untätigkeit im Öffentlichen Recht*, 45 ff; with further references to the literature in footnote 177.

78. See Bertel & Kohlrausch, ''Der Rechtsrahmen für Mitigation und Adaption in Deutschland und Österreich – ein ungleiches Paar?''; arguing for a narrow understanding of climate change law, e.g., Fitz & Ennöckl, "22. Klimaschutzrecht", 757 (762).

more general competence matter of "climate change" as well as to split it up into "climate change mitigation" and "climate change adaptation".

Because the tasks of climate change mitigation and climate change adaptation arise in different sectors, they are, like environmental protection,[79] so-called "cross-cutting" or "complex issues" (*Querschnittsmaterie*).[80] Cross-cutting issues, or "complex issues", cannot be assigned to either the federal or the *Länder* levels.[81] This is reflected in "ordinary" or "simple" law, as different norms cover climate mitigation and climate change adaptation at the federal level as well as that of the *Länder*.[82]

Complex issues require a certain degree of coordination and cooperation.[83] The Constitutional Court has recognised this need and has developed the so-called duty of consideration or obligation to take into account the powers of the federal government and the *Länder* governments (*Berücksichtigungsprinzip*) when legislating and executing the law.[84]

In the context of the distribution of competences, a specific feature of the Austrian federal system should be mentioned. The federal government, as well as the *Länder,* are both bound by the distribution of competences as long as they act by means of the "sovereign administration" (*Hoheitsverwaltung*). "Sovereign administration" refers to action with *Imperium* (absolute authority) and encompasses enacting ordinances or issuing decisions that bind the individual (*Bescheid*).[85] Yet the administration is free to choose not to act with sovereign power but rather to act by means of private law (*Privatwirtschaftsverwaltung*).[86] According to Art. 17 FCA, the administrations of

79. Schulev-Steindl, "Umweltrecht – eine Disziplin im Zeichen globaler Ressourcenknappheit", 8 f.

80. Schnedl, *Umweltrecht*, 366.

81. Öhlinger & Eberhard, *Verfassungsrecht*, 137 f.

82. Schnedl, *Umweltrecht*, 227.

83. Wieser, *Einführung in das Verfassungs- und Verwaltungsrecht*, 53.

84. Ibid., 141 f.

85. Kahl & Weber, *Allgemeines Verwaltungsrecht*, 232, 235.

86. Ibid., 237 ff; Öhlinger & Eberhard, *Verfassungsrecht*, 123.

both the federal government and the *Länder* are not bound to the distribution of competences when acting by means of private law.[87]

Hence, when acting by means of private law, the *Länder* can also become active regarding climate change protection in areas in which authority lies at the federal level and vice versa. This general feature allows *Länder* to take up a role as forerunners in the field of climate change, if politically wished, and to get active (with means of private law) also in areas where they are not competent to act with the means of the "sovereign administration".

Therefore, measures that impact climate change mitigation or climate change adaptation are scattered over numerous legal acts at the federal level[88] as well as that of the *Länder*.[89] *Schnedl* distinguishes between acts that deal exclusively with climate protection and those that integrate climate protection in other legal contexts.[90] For the first group, apart from the Climate Protection Act, *Schnedl* points to the Emissions Certificate Act 2011 (Emissionszertifikategesetz 2011[91]), the Oil Boiler Installation Prohibition Act (Ölkesseleinbauverbotsgesetz[92]) and the Fluorinated Greenhouse Gases Act (Fluorierte Treibhausgase-Gesetz 2009[93]).[94] Integration of climate protection can be found in fields such as air pollution control, environmental energy law or environmental transport law.[95]

Laws sometimes indirectly support the protection of the climate: for example, § 77 of the Act on Trade and Industry,[96] a federal law, states that "[t]he

87. Kahl & Weber, *Allgemeines Verwaltungsrecht*, 235; Öhlinger & Eberhard, *Verfassungsrecht*, 122 f.

88. For a detailed examination of competence matters at the federal level and the question of whether they can serve as a basis for climate change legislation at the federal level see Horvath, *Klimaschutz und Kompetenzverteilung.*

89. Schnedl, *Umweltrecht*, 227. This is very similar to environmental protection laws, see Graber et al., "Einführung in die Grundlagen des Umweltrechts", 3.

90. Schnedl, *Umweltrecht*, 227.

91. BGBl I 118/2011, last amended BGBl I 142/2020.

92. BGBl I 6/2020.

93. BGBl I 103/2009, last amended BGBl I 140/2020.

94. Schnedl, *Umweltrecht*, 227.

95. Ibid.

96. BGBl 194/1944, last amended BGBl I 204/2022.

administrative authority shall limit emissions of air pollutants in any case in accordance with the state of the art (§ 71a)". § 77 sets forth the criteria for operating facilities. Though the duty to limit air pollution is climate-effective, the rationale of § 77 is not climate protection, but the protection of affected neighbours. Therefore, § 77 is first and foremost about protecting the health and property of affected neighbours.[97]

Similarly, construction laws and related laws on products for construction in the *Länder* encompass provisions concerning which materials can be used in buildings. These laws mainly transpose EU law.[98] Though these provisions do have a large impact on the climate, they are backed by the authority of the *Länder* over construction and rules on construction.[99]

The examples of the Act on Trade and Industry, as well as of construction law, clearly show the effects of a complex matter: regulation of a complex matter can be found in different laws of the different legislators. When the *Länder* want to become active and legislate regarding climate change mitigation or climate change adaptation, they have two options: either their actions must be covered by a matter that falls within their realm of competence, or they must act by means of private law (*Privatwirtschaftsverwaltung*).[100]

The same holds true for the federal level. Yet since the most important competence matters fall within the competence of the federal level,[101] and since the federal level can also enact competence coverage clauses,[102] the possibilities of the federal government to legislate in the field of climate change are much higher. This is not necessarily problematic, but common for the Austrian federal state.[103] In a complex field such as climate change, this could be even an advantage, as there are possibilities of regulation at the federal level. Yet, this situation can inhibit the *Länder* to take over a role as a forerunner.

97. Reithmayer-Ebner, "§ 77 GewO", 3.
98. Especially Directive 2009/125/EG.
99. Strejcek, "Baurecht", 646.
100. Öhlinger & Eberhard, *Verfassungsrecht*, 122 ff.
101. Ibid., 128.
102. See, in general, Neudorfer, "Kompetenzdeckungsklauseln außerhalb des B-VG".
103. Öhlinger & Eberhard, *Verfassungsrecht*, 128.

One of the latest examples of a competence coverage clause and its application in the field of climate change law can be found in the Oil Boiler Installation Prohibition Act. It depicts the (temporary) centralising effect of competence coverage clauses. § 1 of the Oil Boiler Installation Prohibition Act[104] is a constitutional provision stating that "[t]he enactment, amendment and repeal of regulations as contained in this Federal Act shall also be a federal matter in those matters in respect of which the FCA provides otherwise". § 2 is enacted as an ordinary law (and not as a constitutional provision), stating that "[t] he installation and assembly of boilers of central heating systems for liquid fossil fuels or for solid fossil fuels in newly constructed buildings is prohibited. This shall be implemented in the procedures that have as their object such installations. The regulation does not apply to pending proceedings as of 31 December 2019." The parliamentary materials explain the reasons for enacting the federal law: "The decarbonisation of the building sector is an essential pillar of the energy turnaround, which became binding under international law with the Paris Agreement and manifested in European and national climate and energy targets, including the related legal acts."[105] Moreover, the reasoning behind the bill refers to strategy #mission30, which sets the goal "that the installation of fossil oil boilers in new buildings should no longer be possible across the board in all *Länder* by 2020 at the latest".[106] This is justified by the fact that "[s]ufficient, cost-effective, climate-friendly alternatives to these systems are available in the heating sector" and that "the package of measures in the buildings sector listed in #mission2030 is intended to reduce greenhouse gas emissions by around 3 million metric tons by 2030 and to initiate the target path for complete decarbonisation of the building sector by 2050".[107] In addition, the reasons point to binding international and EU law targets.[108]

The problem that arose was that only a few *Bundesländer* had enacted an installation ban until 2019. Therefore, the federal government decided to implement "a nationwide ban on the installation of fossil-fuelled oil-fired

104. BGBl I 6/2020.
105. 965/A XXVI. GP 2.
106. 965/A XXVI. GP 2.
107. 965/A XXVI. GP 2.
108. Ibid.

condensing boilers".[109] Because enactment of a constitutional provision like § 1 of the Oil Boiler Installation Prohibition Act necessitates a constitutional majority,[110] at least with the current balance of powers,[111] negotiations with the opposition parties are necessary and, therefore, the enactment of constitutional provisions can be time-consuming.

Since complex matters make coordination necessary, the federal government has enacted a law for coordination regarding climate protection: the Climate Protection Act.[112]

4.5. Climate Protection Act

The only legal act directly addressing climate change is the Climate Protection Act.[113] The Climate Protection Act is a federal law. It aims to coordinate actions at the federal and *Länder* levels regarding climate change. § 1 states that the objective of the Climate Protection Act is "to facilitate the coordinated implementation of effective climate protection actions".

§ 2 sets forth the scope of climate protection actions: climate protection actions addressed by the Climate Protection Act "are those that result in a measurable, reportable and verifiable reduction of greenhouse gas emissions or enhancement of carbon sinks that are mapped in the Austrian greenhouse gas inventory, in accordance with the applicable reporting obligations under international and Union law". § 2 contains a link to both public international and EU law since the emissions addressed by the law are those addressed by public international as well as EU law. § 2 furthermore clarifies that not only are measures falling within the so-called "sovereign administration" (*Hoheitsverwaltung*) encompassed by the Climate Protection Act, but also those of "administration by means of private law" (*Privatwirtschaftsverwaltung*).

109. Ibid.

110. Öhlinger & Eberhard, *Verfassungsrecht*, 26.

111. For the current repartition of mandates see https://www.parlament.gv.at/recherchieren/personen/nationalrat/sitzplan, accessed May 08, 2023. Amending the Constitution requires the quorums laid down in Art. 44 para. 1 FCA, cf Wieser, *Einführung in das Verfassungs- und Verwaltungsrecht*, 19 f.

112. BGBl I 106/2011, last amended BGBl I 58/2017.

113. Ibid.

The legislation's specific character as a coordinating law is also manifested in the following paragraphs of the Act: § 3 stipulates the main objective of the Act. In line with its coordinating character, it does not outline concrete goals or actions but rather lays down the procedure of how to develop those actions. § 3 also refers to the greenhouse gas emission ceilings pursuant to public international and EU law applicable to Austria. For the allocation of the ceilings, § 3 para. 1 points to an annexe to the Climate Protection Act in which the ceilings might also be allocated according to sectors. Starting in 2013 and based on a proposal of the applicable federal minister, the allocation of the greenhouse gas ceilings shall be elaborated, submitted to the National Climate Protection Committee (which is further explained in § 4) and the final allocation shall be recorded in an annexe to the Climate Protection Act.

It is evident that the different articles of the Climate Protection Act do not directly provide for a binding allocation of greenhouse gas emissions. § 3 para. 2 clarifies that negotiations must take place in order to define measures that secure compliance with the ceilings for the different sectors. § 3 para. 2 defines areas that shall be considered in those negotiations: increasing energy efficiency, increasing the share of renewable energy sources in final energy consumption, increasing overall energy efficiency in the building sector, integrating climate protection into spatial planning, mobility management, waste prevention, protecting and expanding natural carbon sinks and economic incentives for climate protection. It also points to the possibility of multi-annual and joint measures between the federal government, the *Länder* and the municipalities (§ 3 para. 2). The competent federal minister is again responsible for conducting those negotiations (§ 3 para. 2). Negotiations must be concluded nine months before the start of a commitment period, which for the 2013 to 2020 commitment period is 31 March 2012 (§ 3 para. 2). In the case of the greenhouse gas emission ceilings exceeding the obligations under international or EU law, further negotiations on the strengthening of existing measures or the introduction of additional measures shall be conducted without delay based on an evaluation of the measures taken. These negotiations shall be concluded within six months (§ 3 para. 2). The federal minister must then inform the National Climate Protection Committee about the results of such negotiations (§ 3 para. 4).

Moreover, § 6 states that the Federal Minister of Agriculture, Forestry, Environment and Water Management shall submit an annual written report to the National Council and the National Climate Protection Committee on the progress made in complying with the maximum quantities of greenhouse gas emissions established pursuant to § 3 para. 1.

§ 4 para. 1 provides for the creation of the National Climate Protection Committee. According to § 4 para. 2, this Committee deliberates on fundamental issues concerning Austrian climate policy in light of the targets of the Paris Agreement, in particular on the long-term reduction of greenhouse gas emissions towards a low-carbon society, adaptation to unavoidable consequences of climate change and long-term scenarios for increasing energy efficiency and the share of renewable energy sources in final energy consumption.

§ 4 para. 3 sets the composition of the Committee, which consists of: one representative from each of the political parties represented in the National Council; one high-ranking representative from each of the Federal Ministry of Agriculture, Forestry, Environment and Water Management, the Federal Ministry of Finance, the Federal Chancellery, the Federal Ministry of Justice, the Federal Ministry of Transport, Innovation and Technology, the Federal Ministry of Science, Research and Economy, the Federal Ministry of Labour, Social Affairs and Consumer Protection and the Federal Ministry of Health and Women; a representative of each of the nine federal provinces; a representative of each of the Austrian Federal Economic Chamber, the Federal Chamber of Labour, the Presidential Conference of the Chambers of Agriculture, the Austrian Federation of Trade Unions, the Federation of Austrian Industry, the Association for Consumer Information, the Austrian Association of Cities and Towns, the Austrian Association of Municipalities, the Federal Environment Agency, Austria's Energy ("*Österreichs Energie*") and the Austrian Renewable Energy Association; a representative of the scientific community; and three representatives of Austrian environmental protection organisations.

The Committee can, therefore, be characterised as bringing together not only government representatives but all relevant stakeholders. The National Climate Protection Committee meets at least once a year (§ 4 para. 6) and can issue recommendations by a three-quarters majority vote at which at

least half of the representatives are present (§ 4 para. 5). Recommendations refer to the results of those meetings as being non-binding.

Finally, § 7 of the Climate Protection Act provides for the establishment of a Climate Protection Accountability Mechanism. Instead of providing a binding mechanism, yet still in line with the coordinative nature of the Climate Protection Act, § 7 points to a separate agreement for responsibilities in case the maximum quantities of greenhouse gas emissions are exceeded. Moreover, § 7 stipulates that, for the commitment period from 2008 to 2012, the *Länder* shall not incur any financial obligations in the event that the maximum quantities of greenhouse gases specified in Annex I are exceeded and that any obligations of the federal government in that event shall be covered in compliance with the applicable federal financial framework law.

Annex I of the Climate Protection Act sets forth the greenhouse gas emission ceilings by sector for the commitment period from 2008 to 2012; Annex II of the Climate Protection Act does the same for the commitment period from 2013 to 2020. It has been criticised that the Climate Protection Act neither provides for ceilings for the *Länder*,[114] nor encourages them to reduce their emissions.[115] Yet, since nothing has happened since the last commitment period ended, the problem of the Climate Protection Act in force is at least for now primarily a different one. The Climate Protection Act and the allocation of greenhouse gas emissions have expired without fixing a new allocation. The reason for the government's silence lies in a missing consensus between the parties represented in government.[116] Therefore, in the realm of non-emission trading, there are currently no ceilings for greenhouse gas emissions. Since the Climate Protection Act does not provide a possibility of enforcement,[117] further development depends on the government and/or parliament.

---

114. This has been criticised from the beginning by Habjan, "Das österreichische Klimaschutzgesetz", 101, among others.

115. Geretschläger, "Klimaschutzgesetz", 232.

116. Tempfer, "Warum das Klimaschutzgesetz auf Eis liegt", accessed May 03, 2023, https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2158850-Warum-das-Klimaschutzgesetz-auf-Eis-liegt.html.

117. This has been criticised by Krömer, "Mit Recht gegen das Rechtsschutzdefizit im Klimaschutz", 179, among others.

4.6. Climate change or climate protection laws of the *Länder*

As detailed above, the *Länder* have two possibilities when they want to legislate in the field of climate change law: either they take climate-effective measures within one of their competence fields, according to Art. 15 para. 1 FCA, or they act by means of private law. Comparing Austria with Germany, where some *Länder* have enacted their own climate change laws,[118] the question arises whether the Austrian *Länder* could also enact their own climate change laws. Until now, none of the *Länder* has established its own Climate Protection Act. Against the background of the constitutional distribution of competences, such Climate Protection Acts by the *Länder* are not per se unconstitutional. As long as they are backed by authority granted according to Art. 15 para. 1 FCA or when they prescribe actions to be taken by means of private law (*Privatwirtschaftsverwaltung*), they do not contradict federal constitutional law. It is unsurprising, therefore, that in October 2022, the city of Vienna announced that it was working on its own Climate Protection Act.[119] While a first draft is not yet available, according to the homepage for the city of Vienna,[120] the Vienna Climate Protection Act will reunite all climate protection measures taken by the government: "In the fight against climate change, the Progressive Coalition is bundling all its measures, objectives, tools and bodies in the new Vienna Climate Protection Act. This is intended to make climate protection even more efficient, effective and binding at all decision-making levels and in all relevant areas. Strong political anchoring is ensured via the newly-created, high-level political steering committee. This will enable the comprehensive implementation of measures and a secure and efficient actualisation of climate protection targets. Furthermore, a Climate Protection Department will be entrusted with the relevant agendas. The climate budget and the Climate Council will be established as central pillars

118. See, e.g., Schilderoth & Papke, "Strukturelemente der Landesklimaschutzgesetze", *Würzburger Berichte zum Umweltrecht*.

119. *Der Standard,* "Wien arbeitet an eigenem Klimaschutzgesetz – und kritisiert Bund", accessed May 03, 2023, https://www.derstandard.at/story/2000139985683/wien-arbeitet-an-eigenem-klimaschutzgesetz-und-kritisiert-bund.

120. Stadt Wien, "Der Wiener Klimapakt", accessed May 03, 2023, https://www.wien.gv.at/regierungsabkommen2020/lebenswerte-klimamuster-stadt/der-wiener-klimapakt/.

of Vienna's path to becoming a CO2-neutral city."[121] The new act is set to go into effect in 2023.[122]

4.7. Trends in *Länder* legislation

Regarding the legislation of the *Länder*, specific trends can be observed: climate change adaptation seems to be gaining significance. In particular, the spatial planning acts of the *Länder* now include references to climate change and/or green energy. This can be illustrated with a few examples:

§ 1 para. 2 lit. d of the Tyrolean Spatial Planning Act of 2022[123] stipulates that "the protection of the living space, particularly of the settlement areas and the important traffic routes, against natural hazards with special consideration of the effects of climate change" is an objective of regional spatial planning. The Styrian Spatial Planning Act of 2010[124] states that, in the context of spatial planning principles, when applying the various objectives, the goal of the development of the settlement structure must "take into account climate protection goals and measures, in particular for the reduction of greenhouse gas emissions and for adaptation to climate change" (§ 3 para. 2 Z 2 lit. i). § 11 para. 1 no. 7 of the Spatial Planning Act of Vorarlberg[125] also mentions climate change in the context of the development of settlements. Similar to the other examples, climate change is one of the various interests that must be taken into account by the authorities: within the field of settlement development "in particular, settlement centres, densification zones, open spaces for local recreation, as well as the structuring of building areas, including the chronological sequence of development, are to be taken into account, considering the requirements of infrastructure, protection against natural

121. Stadt Wien, "Der Wiener Klimapakt".

122. *Der Standard,* "Wien arbeitet an eigenem Klimaschutzgesetz – und kritisiert Bund".

123. Tiroler Raumordnungsgesetz 2022 – TROG 2022 (LGBl 43/2022 last amended LGBl 62/2022).

124. Steiermärkisches Raumordnungsgesetz 2010 – StROG (LGBl 49/2010 last amended LGBl 84/2022).

125. Vbg Gesetz über die Raumplanung (LGBl 39/1996 last amended LGBI 4/2022).

hazards, climate change and energy efficiency". Other spatial planning acts have similar provisions.[126]

These trends hold true in the current construction legislation of the *Länder*.

4.8. Climate change and municipalities

Lastly, municipalities must be mentioned. Municipalities do not partake in the distribution of competences between the federal and *Land* level. Nevertheless, municipalities are – according to Art. 115 ff FCA – autonomous and they are guaranteed the right to self-administration.[127] Especially regarding local spatial planning, municipalities are, therefore, able to shape their local climate change policies.[128] A promising sector in that regard is mobility, particularly the mobility of pedestrians and cyclists. The Mobility Masterplan lists several actions that municipalities and/or the *Länder* (states) could take or encourage, such as "'[c]reating 'cities' with short travel distances ('15-minute cities')', '[r]eallocating public space', '[m]aking town centres and public space more attractive', '[u]sing forward-looking forms of traffic relief (such as superblocks)', '[m]anaging parking region-wide', '[b]anning or restricting entry to certain areas or implementing entry requirements', '[i]mplementing measures to adapt to climate change (such as more green spaces, removing impervious surfaces, shaded pavements and arcades)', '[r]eplacing monomodal requirements to create parking spaces by implementing multimodal climate-friendly mobility management', and

126. § 2 Abs 2 Z 4 Salzburger Raumordnungsgesetz 2009 – ROG 2009 (LGBl 30/2009 last amended LGBl 103/2022); § 2 Abs 1 Z 1 Oö. Raumordnungsgesetz 1994 – Oö. ROG 1994 (LGBl 114/1993 last amended LGBl 111/2022); § 1 Abs 2 lit. b 6. Spiegelstrich NÖ Raumordnungsgesetz 2014 (NÖ ROG 2014) (LGBl 3/2015 last amended LGBl 99/2022); § 1 Abs 2 Z 4 Bauordnung für Wien – BO für Wien (LGBl 11/1930 last amended LGBl 70/2021).

127. Art. 115 and 116 FCA.

128. Energy Transition 2050, "Klimawandelanpassung in Städten", accessed May 03, 2023, https://energytransition.klimafonds.gv.at/timeline/klimawandelanpassung-in-staedten/; Umweltbundesamt GmbH Wien, "Ihre Gemeinde Im Klimawandel - Was können Sie tun?" accessed May 03, 2023, https://ccact.umweltbundesamt.at/downloads/CC-Act-Broschuere.pdf, 5.

'[c]onsistently implementing sustainable urban mobility and logistics plans (SUMP/SULP)'".[129]

Furthermore, part of the municipalities' autonomy is their potential to act as entrepreneurs.[130] Municipalities, therefore, become active, especially with regard to the supply of services.[131] Moreover, municipalities can participate in renewable (and citizens') energy communities, as provided by Directives (EU) 2018/2001 and (EU) 2019/944. Both Directives were implemented in Austria.[132] Reality demonstrates that municipalities have become active in this area.[133]

4.9. Climate change and the Constitutional Court

While the Constitutional Court regularly applies the above-mentioned state objective of environmental protection in its case law,[134] the Court has so far been very silent on climate change issues. In its decision on the third runway at Vienna airport,[135] the Court held that the state objective of climate protection, as laid down in the Constitution of Lower Austria, could not be applied to the case. Other cases, such as a case in which the taxation of kerosene, on the one hand, and train tickets, on the other hand, was claimed to violate the right to equality of the Austrian Constitution, were deemed

129. Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology, "Austria's 2030 Mobility Master Plan", 33.

130. Öhlinger & Eberhard, *Verfassungsrecht*, 247 f.

131. Schmid, "Daseinsvorsorge im Konnex der Europäischen Diskussion", in *Kommunale Infrastrukturbetriebe erfolgreich führen*, Biwald et al., eds., 83.

132. The citizens' energy community with §§ 16c et seq. Electricity Trade and Organisation Act (Elektrizitätswirtschafts- und -organisationsgesetz 2010, BGBl I 110/2010, last amended BGBl I 5/2023) and the renewable energy community with §§ 79 and 80 Renewables Expansion Act (Erneuerbaren-Ausbau-Gesetz, BGBl I 150/2021, last amended BGBl I 233/2022); see Storr, *Energierecht*, 155 ff, and Pirstner-Ebner, *European Energy Law*, 137 ff.

133. See, e.g., the example of the municipality of Schnifis, where the municipality is taking part in a renewable energy community, accessed May 03, 2023, https://www.vkw.at/erneuerbare-energiegemeinschaft.htm#_=_.

134. See, i.e., Constitutional Court VfSlg 12.009/1989; VfSlg 13.102/1992; VfSlg 19.548/2011.

135. Constitutional Court VfSlg 20.185/2017.

inadmissible.[136] Unlike the German Constitutional Court,[137] therefore, the Austrian Constitutional Court has not yet been an active player in the field of climate change. As the European Convention on Human Rights is part of the Austrian Constitution,[138] this could change quickly if the European Court of Human Rights interprets the rights enshrined in the ECHR[139] in a more progressive way. Moreover, in February 2023, a new climate case was filed,[140] and it remains to be seen whether this time the Court will use this case to change its jurisprudence on climate issues.

5. Conclusion

Climate change law and the question of who is competent to take action in the Austrian federal system is currently not an issue of debate, neither in practice nor in literature. Although a rather new task of the state, practice shows that climate change can be integrated into the Austrian federal system. Yet, as shown herein, the topic is complex. Whereas climate change mitigation is allocated to the federal level, climate change adaptation is a matter for which not only the federal and *Länder* levels are competent, but in which the municipalities have the potential to act (within the limits of municipal autonomy) as well. Therefore, all three levels of government may take action. This is not a peculiarity of climate change but is also true for environmental protection, for example. This makes coordination necessary and leads to a fragmentation of climate laws. Since the Austrian federal level, as well as the *Länder,* are used to handle complex matters, the problems arising from climate change are only partly linked to the distribution of competences. This is also reflected in the case law of the Constitutional Court: whereas the distribution of competences has not given rise to climate actions, the

136. Constitutional Court VfGH 30.09.2020, G144/2020; a more detailed description of the case can be found here, Krömer, "Mit Recht gegen das Rechtsschutzdefizit im Klimaschutz", 178.

137. German Constitutional Court BVerfG, Beschluss vom 24.03.2021, BVerfGE 157, 30. For a comparison of climate cases between the German Constitutional Court and the Austrian Constitutional Court see Saiger, "The Road Not Taken", 94.

138. Öhlinger & Eberhard, *Verfassungsrecht*, 304.

139. Pending cases ECHR, Verein KlimaSeniorinnen Schweiz and Others v. Switzland, 53600/20; and ECHR, Duarte Agostinho and Others v. Portugal and Others, 39371/20.

140. https://fridaysforfuture.at/klimaklage, accessed May 08, 2023.

biggest problem regarding Austrian climate change law is the legislator not taking action. In this light, the complexity of the distribution of competences in Austria might even be an advantage: at least regarding climate change adaptation, the *Länder* do have possibilities of acting and are, as shown, also willing to act. This might lead to "climate adaptation champions" motivating other *Länder*, as well as the federal level, to follow suit and take action.

In the midst of the climate crisis, this is probably one of the few realities in which predictions are easy to undertake: climate change mitigation, and especially climate change adaptation, can only succeed when all state powers work together.

Bibliography

Amt der Tiroler Landesregierung. "Leben Mit Zukunft. Tiroler Nachhaltigkeits- und Klimastrategie". 2021. https://www.tirol.gv.at/fileadmin/themen/landesentwicklung/raumordnung/Nachhaltigkeit/Nachhaltigkeits-_und_Klimakoordination/Publikationen/Nachhaltigkeits-und-Klimastrategie_2021.pdf.

Benrath, Daniel. "Climate Transition Law - Bedeutung und Potentiale eines neuen Forschungsfeldes". KlimR 6 (2023):130.

Bertel, Maria. "Erhaltung der natürlichen Lebensgrundlagen als Herausforderung – Von der synchronen zur diachronen Verfassung". *Journal für Rechtspolitik* 30, no. 3 (2022): 232. https://doi.org/10.33196/jrp202203023201.

———. "Staatszielbestimmungen. Bedeutung und Funktion im Österreichischen Verfassungsrecht". In Josef Breitenlechner, Michael Kalteis, Julia Kolar, Gisela Kristoferitsch, Matthias Lukan, Emmanuel Manolas, Yvonne Rogatsch, and Kerstin Tobisch, *Sicherung von Stabilität und Nachhaltigkeit durch Recht*, 139. Österreichische Assistentinnen und Assistenten Öffentliches Recht Band 5. Wien: Jan Sramek Verlag, 2015.

Bertel, Maria, and Federica Cittadino. "Climate Change at Domestic Level". In Federica Cittadino, Louisa Parks, Peter Bußjäger, and Francesca Rosignoli, *Climate Change Integration in the Multilevel Governance of Italy and Austria*, 44–67. Leiden; Boston: Brill; Nijhoff, 2023.

Bertel, Maria, and Lena Kohlrausch. "Der Rechtsrahmen für Mitigation und Adaption in Deutschland und Österreich – ein ungleiches Paar?" (In print).

Bundesministerium für Nachhaltigkeit und Tourismus. "Integrierter Nationaler Energie-und Klimaplan für Österreich: Periode 2021 - 2030 gemäß Verordnung (EU) 2018/1999 des Europäischen Parlaments und des Rates über das Governance-System für die Energieunion und den Klimaschutz". Wien, December 18, 2019. https://www.bmk.gv.at/themen/klima_umwelt/klimaschutz/nat_klimapolitik/energie_klimaplan.html.

———. "Langfriststrategie 2050 - Österreich: Periode bis 2050 gemäß Verordnung (EU) 2018/1999 des Europäischen Parlaments und des Rates über das Governance-System für die Energieunion und den Klimaschutz gemäß Entscheidung 1/CP.21, Paragraph 35 in Übereinstimmung mit Artikel 4, Paragraph 19 des Übereinkommens von Paris". Wien, 2019. https://www.bmk.gv.at/themen/klima_umwelt/klimaschutz/aktives-handeln/lts2050.html.

Bundesministerium für Nachhaltigkeit und Tourismus, and Bundesministerium für Verkehr, Innovation und Technologie. "#mission2030. Die Österreichische Klima- und Energiestrategie". Wien, Mai 2018. www.mission2030.bmnt.gv.at.

Bundesministerium Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie. "Biodiversitäts-Strategie Österreich 2030+". Wien, 2022. https://www.bmk.gv.at/themen/klima_umwelt/naturschutz/biol_vielfalt/biodiversitaetsstrategie_2030.html.

Bußjäger, Peter. "Die Landeshauptleutekonferenz: Vom Schatten in die Sonne?" In *Jahrbuch Des Föderalismus 2012*. Europäisches Zentrum für Föderalismus-Forschung Tübingen, 310–19. Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2012.

Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology. "Austria's 2030 Mobility Master Plan", 2021. https://www.bmk.gv.at/themen/mobilitaet/mobilitaetsmasterplan/mmp2030.html.

Fitz, Judith, and Daniel Ennöckl. "22. Klimaschutzrecht". In Daniel Ennöckl, Nicolas Raschauer, and Wolfgang Wessely, eds. *Handbuch Umweltrecht*. 3rd margin. Wien: Facultas, 2019.

Gamper, Anna. "Art. 7 TLO 1989". In Peter Bußjäger, Anna Gamper, and Christian Ranacher, *Tiroler Landesverfassungsrecht*. Stand 1.1.2020. Wien: Verlag Österreich, 2020.

———. *Staat und Verfassung: Einführung in die Allgemeine Staatslehre*. 4th edition. Wien: Facultas, 2018.

Geretschläger, Beate. "Klimaschutzgesetz". In Reinhold Christian, Ferdinand Kerschner, and Erika M. Wagner, *Rechtsrahmen für eine Energiewende Österreichs*. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung GmbH, 2016.

Habjan, Teresa. "Das österreichische Klimaschutzgesetz". In Gottfried Kirchengast, Eva Schulev-Steindl, and Gerhard Schnedl, *Klimaschutzrecht zwischen Wunsch und Wirklichkeit*. Wien Köln Weimar: Böhlau Verlag, 2018.

Horvath, Thomas. *Klimaschutz und Kompetenzverteilung. Ausgewählte kompetenzrechtliche Fragen der Bekämpfung des Klimawandels*. Wien: Jan Sramek Verlag, 2014.

Khakzadeh, Lamiss. *Elements Verfassungsrecht*. Wien: Verlag Österreich, 2022.

Kirchmair, Lando, and Sebastian Krempelmeier. "Das Klimaschutzprinzip im BVG Nachhaltigkeit: Ein schlafender Riese". *JRP* 31 (2023): 74.

Krömer, Michaela. "Mit Recht gegen das Rechtsschutzdefizit im Klimaschutz". *NR* 1 (2021): 178.

Neudorfer, Sonja. "Kompetenzdeckungsklauseln außerhalb Des B-VG". In Sebastian Schmid, Veronika C. Tiefenthaler, Klaus Wallnöfer, and Andreas W Wimmer, *Auf dem Weg zum Hypermodernen Rechtsstaat?*, 111–50. Wien: Sramek, 2011.

Öhlinger, Theo, and Harald Eberhard. *Verfassungsrecht*. 13th edition. Wien: Facultas, 2022.

Pirstner-Ebner, Renate. *European Energy Law*. Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2022.

Piska, Christian M. "Grundrecht auf Klimaschutz? Hands off!". *Ecolex* 12 (2021): 1149.

———. "Warum ein Grundrecht auf Klimaschutz nur als Vision überzeugt". *ZTR* 1 (2022): 9.

Prettenthaler, Franz, Andrea Damm, Stefan Gössling, Christoph Neger, Stephan Schwarzinger, and Willi Haas. "Nationale Verpflichtungen auf Grundlage des Pariser Klimaabkommens". In Ulrike Pröbstl-Haider, Marc Olefs Dagmar Lund-Durlacher, and Franz Prettenthaler, *Tourismus und Klimawandel*. Heidelberg: Springer Spektrum, 2021.

Ruppel, Oliver C. "Intersections of Law and Cooperative Global Climate Governance – Challenges in the Anthropocene". In Oliver C. Ruppel, Christian Roschmann, and Katharina Ruppel-Schlichting, *Climate Change: International Law and Global Governance.* Vol. I, Legal Responses and Global Responsibility. Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2013.

Saiger, Anna-Julia. "The Road Not Taken. Wie Bundesverfassungsgericht und Verfassungsgerichtshof das Klima in der Verfassung verorten". *Juridikum* 1 (2022): 94.

Schnedl, Gerhard. *Umweltrecht*. Wien: Facultas, 2020.

Schulev-Steindl, Eva. "Umweltrecht – eine Disziplin im Zeichen globaler Ressourcenknappheit". *RdU* 2 (2010): 4.

Soldanski, Christina. "Völkerrechtliche Antworten auf den Klimawandel – Die Schwächen des Übereinkommens von Paris und die daraus resultierenden Umsetzungsprobleme". *Humanitäres Völkerrecht: Journal of International Law of Peace and Armed Conflict* 2, no. 3/4 (2019): 301-20.

Storr, Stefan. *Energierecht: Eine Einführung für Ausbildung und Praxis*. Wien: MANZ Verlag Wien, 2022.

Wallner, Julia, and Emil Nigmatullin. "Staatliche Klimaschutzmaßnahmen und deren (grundrechtliche) Grenzen". *NR* 2 (2022): 424.

Wallnöfer, Klaus. "Art. 99 B-VG". In Arno Kahl, Lamiss Khakzadeh, and Sebastian Schmid, *Kommentar zum Bundes-Verfassungsgesetz und zu den Grundrechten*. Wien: Jan Sramek Verlag KG, 2020.

Watts, Ronald L. *Comparing Federal Systems*. 3rd edition. Montréal & Kingston, London, Ithaca: McGill-Queen's University Press, 2008.

Weber, Karl. "Grundrecht auf Umweltschutz". In Gregor Heißl, *Handbuch Menschenrechte: Allgemeine Grundlagen, Grundrechte in Österreich, Entwicklungen, Rechtsschutz*. Wien: Facultas, 2009.

Weber, Teresa. "Staatsziele – Grundrechte – Umwelt- und Klimaschutz. Spielräume des Gesetzgebers". *Juridikum* 4 (2019): 514.

———. "Zur völkerrechtskonformen Auslegung von Verfassungsrecht". In Clemens Jabloner, Andras Jakab, Lando Kirchmair, Otto Pfersmann, Ewald Wiederin,

Scharfsinn im Recht: Liber Amicorum Michael Thaler zum 70. Geburtstag. Wien: Jan Sramek Verlag, 2019.

Wiederin, Ewald. "Anmerkungen zur Versteinerungstheorie". In Herbert Haller, Christian Kopetzki, Richard Novak, Stanley L Paulson, Bernhard Raschauer, Georg Ress, and Ewald Wiederin, *Festschrift für Günther Winkler*. Wien: Springer Verlag, 1997.

Wieser, Bernd. *Einführung in das Verfassungs- und Verwaltungsrecht*. 4th edition. Wien: Verlag Österreich, 2022.

Zahrl, Thomas. "Gesellschaftliche Herausforderungen und objektives Verfassungsrecht". In Myriam Becker, Miriam Hofer, Elisabeth Paar, Christa Helene Pail, Lukas Reiter, Christoph Romirer, Sandra Saywald-Wedl, and David Schneeberger, *Gesellschaftliche Herausforderungen - Öffentlich-Rechtliche Möglichkeiten*. Österreichische Assistentinnen und Assistenten Öffentliches Recht 10. Wien: Jan Sramek Verlag KG, 2020.