Federalism, Sub-national Constitutionalism, and the Protection of Minorities

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1. – 3. The Austrian federal system is a combination of integration and devolution. After the break-down of the Habsburg monarchy after World War I the Austrian Republic was established on the territory of the former German speaking „crownlands“ as a unitary state by a decision of the Provisional National Assembly in October 1918. However, at the same time, the „Länder“, as the subnational units were then called, claimed legislative power on their territories. This was then acknowledged by the Provisional National Assembly in November 1918 and the provisional Länder Assemblies were legitimated as Länder parliaments. Moreover, most Länder declared their „accession“ to the newly created republic in order to demonstrate their original independent statehood and claim for autonomy. These events are interpreted in two different ways until the very day: Whereas the Viennese school of legal positivism is of the opinion that the federal system was created „top-down“ by devolution of the unitary state, the Innsbruck school advocates the conception that the Länder came together to create the federal state „bottom-up.“ With the adoption of the federal constitution in 1920, however, the dominant Viennese school of legal positivism of Hans Kelsen and Adolf Merkl enforced, based on their theory of a hierarchy of legal norms, the conception that all subnational powers are devolved from the federal constitution so that all constitutions of the nine Länder (Burgenland, Carinthia, Upper Austria, Lower Austria, Salzburg, Styria, the Tyrol, Vorarlberg and Vienna) are to be seen as mere delegated law. However, since the seventies of the twentieth century the doctrine was developed by interpretation of Article 99 of the federal constitution, the so-called B-VG, that the Länder constitutions enjoy „relative autonomy“. Hence they are free to regulate in particular all organisational affairs as long as a provision of a Land constitution does not directly contradict a provision of the B-VG.

   On principle, all subnational units have equal status and powers. According to the allocation of powers regulated by the federal constitution in Article 10 through 15, they exercise legislative and executive powers, whereas all judicial power is centralized at the national level. There are basically four types of competences: exclusive federal competences in both legislation and administration. More than 100 important functions belong to this main type, which is enshrined in Art 10 B-VG. Then there is the combination of federal legislation and Länder administration. Only few matters belong to this type according to Article 11 B-VG such as nationality matters or housing. Article 12 B-VG provides for federal framework legislation and Länder implementative legislation and administration in fields such as social welfare, hospitals and land reform. Finally, there are exclusive Länder competences in both legislation and administration according to Article 15 B-VG. All matters not specifically enumerated as federal competences fall into this residuary competence of the Länder. However, only few matters remain within this competence such as building law, general spatial planning, nature protection, hunting, fishing, agricultural matters, youth and children welfare, sport, tourism, local police, laws and acquisition of real estate, etc.

   However, there are also some elements of asymmetric federalism. First of all, according to Article 17 B-VG, the Länder may act under private law and enjoy unlimited „spending power“ without being restricted by the allocation of competences.

Then the Länder have the power to conclude „concordats“ with other Länder or with the federation (Article 15a B-VG), but also to conclude international treaties with neighbouring states or regions (Article 16). As far as minority protection is concerned there is an internationally guaranteed mechanism for the Slovene and Croat national minorities or ethnic groups, as they are called according to the respective federal statutory law, in three of the Länder, namely Carinthia, Styria and Burgenland. According to Article 7 of the Austrian State Treaty 1955 between the Allied powers and Austria, they enjoy equal protection before the law, have guaranteed elementary education in their mother tongue and a proportional share in the institutions of secondary education, and have special rights to use their language before courts and administrative authorities as well as for bilingual topographical signs in certain „districts“ of „mixed settlement.“ According to the size of population, differences are made regarding the Länder´s representation in the Federal Assembly, the upper house of the national parliament, and there is also the special status of the capital Vienna, which is both a Land and the by far largest Austrian city.

4. Subnational constitutions regulate in more or less great detail the functioning of the Länder institutions. In doing so they create a peculiar system of checks and balances between the legislative and executive power.

5. The Austrian federal system is – unlike Germany, Switzerland, and the US – characterized by the fact that the federal constitution provides for a detailed regulation of the structure and operation of the subnational units. For instance, Art 95 B-VG provides for the legislative power of the Länder to be exercised by a unicameral parliament, the Landtag. All representatives have to be elected on the basis of proportional representation. Article 101 B-VG regulates the executive body, the Land government, which has to be elected by the Land parliament and has to consist of the Governor, his representatives and other members. Detailed regulation concerns the status of the parliamentary representatives and the procedure how a bill becomes a law. Moreover, there are also regulations for the capital Vienna due to its dual status as a Land and as a municipality as well as detailed regulations for the institutional structure and operation of the municipalities. According to Article 117 B-VG there must be a municipial council to be elected on the basis of proportionate vote, a mayor who may – according to the respective Land constitution – be elected directly by the people, and an executive body, the Gemeindevorstand. Moreover the federal constitution delegates the authority to the respective Land legislations to provide for instruments of direct democracy such as initiatives and referenda on the municipial level. Article 118 para 2 B-VG includes a definition of local self-government along the lines of the subsidiarity principle and para 3 enumerates the matters in which local self-government is guaranteed.

6. As a rule Land constitutions have to be adopted and amended by a two thirds majority in the Land parliament. Only the constitution of Salzburg prescribes an additional referendum in case of a total revision of the constitution and the constitution of Vorarlberg in case that the status of Vorarlberg as an „independent“ Land will be eliminated, the territory reduced, or the direct and equal right to vote as well as instruments of direct democracy abolished.

7. – 10. As far as the regulation of institutional structures and procedures are concerned, subnational constitutions are quite similar. All of them regulate the internal structures of the Land parliament, i.e. party factions, standing committees and instruments of

political and financial control of the executive such as the right to interpellation, to install investigative committees, or the vote of no-confidence as well as more or less independent audit offices. One of the most important elements of all constitutions is also the election of the Land government by the Land parliament which is regulated, due to its political importance, in great detail. Moreover, all constitutions regulate various instruments of direct democracy and they make also use of „authorizations" of the federal constitution. For instance one third of the representatives of a Land parliament can request the judicial review of Land legislation before the federal Constitutional Court (Article 140 para 1, alinea 3 B-VG) or the Länder parliaments have to be informed on all EU matters which fall into the competence of the Länder and have the right to adopt a binding opinion (Art 23d B-VG). The constitutions also repeat provisions of the federal constitution such as the right to conclude international treaties.

However, there are also striking differences in structure and substance. The constitution of Burgenland, unlike any other constitution, declares this Land a democratic welfare state based on the rule of law. This constitution together with the constitutions of Lower Austria, Upper Austria, the Tyrol and Vorarlberg contain a catalogue of „state goals", i.e. of political, economic and social principles which are binding for any state action, but do not grant subjective rights to individuals. Such state goals are, for instance, the liberal principle of the free development of every individual which has to be fostered. As far as community related principles are concerned again subsidiarity and solidarity have to be fostered. Moreover, the constitutions of the Tyrol and Vorarlberg say that any state action has to respect human dignity, equal protection before the law, and proportionality of the means applied. They also contain provisions that the Land has to protect and to foster marriage and family. Several Land constitutions also contain provisions for the protection of the environment. In contrast, the constitutions of Carinthia, Salzburg, Styria and Vienna do not contain such „state goals." The reason for this is the still dominant approach of legal positivism that constitutions are merely a legal framework for the political process, but should not contain promises which cannot be fulfilled. Only two constitutions contain specific human rights, namely that of the Tyrol and Vorarlberg which provide for the right to property and proportionate compensation in case of expropriation which is not guaranteed under federal law. In contrast to the federal constitution which is supplemented by two human rights catalogues, the Basic Law on the Rights of Citizens, adopted already in 1867, and the European Convention on Human Rights which was incorporated into Austrian law in constitutional rank, the Länder constitutions do not have human rights catalogues.

The most important difference as far as governmental structures are concerned are the rules on the composition of the executive body, the Land government. After 1945 seven of the nine Land constitutions with the exception of Vorarlberg and Vienna did provide for a system of proportional representation so that these Länder constitutions were based on a power-sharing mechanism. Hence, the political parties, in particular the conservative People´s Party, the Social Democratic Party and the national-liberal Freedom party, had a right to elect as many ministers for the Land government as their share was in the election results for the Land parliament. Moreover, in Burgenland, Carinthia, Lower Austria, Upper Austria and Styria the parties „secured" the right that only the candidates nominated by them are elected insofar as only they have the right for nomination and only those votes cast are valid which are cast for this candidate (so-called „Fraktionswahl"). This mechanism which is in effect no longer an election

but an appointment through the respective party was, nevertheless, accepted by the Federal Constitutional Court (VfSlg 12.229/1989). An important element of competition, however, remains with the election of the governor which is, according to all Länder constitutions, based on majority vote. Moreover, in the nineties, two other Länder, namely Salzburg and the Tyrol, amended their constitution and introduced the system of majoritarian government which now allows for coalition governments with the other parties remaining in opposition. This was also the rule on the national level with varying coalition governments since 1945 and one party cabinets between 1966 and 1983.

Finally, despite the fact that all Länder constitutions contain instruments of direct democracy, there are major differences. Only Salzburg follows more or less the model of the federal constitution with the initiative, an obligatory and facultative referendum as well as a consultative referendum („Volksbefragung“) if the majority, or in case of a partial revision of the constitution and the consultative referendum, one third of the representatives of the Land parliament so decide. All constitutions contain the initiative so that the Land parliament has to deliberate on it if it is supported by a certain number of voters. Salzburg and Styria provide for the combination of the initiative with the referendum with the same effect. All constitutions also provide for a referendum if the Land parliament so decides, whereas Burgenland, Lower Austria, Upper Austria, Styria, the Tyrol and Vorarlberg also provide for a referendum on bills adopted by the Land parliament if this is requested by a certain number of voters and what is called a „veto-referendum.“ Only Upper Austria and Vorarlberg did contain the combination of initiative and referendum with the effect that the initiative becomes law if the majority decides so in the referendum. However, the provision in the constitution of Vorarlberg was declared unconstitutional by the Federal Constitutional Court, VfSlg 16241/2001, whereas the Land parliament of Upper Austria can – after the referendum – prevent by a two thirds majority that the result of the referendum becomes law. Finally all Länder constitutions provide for the consultative referendum for legislative and executive matters in one way or the other, i.e. if the Land parliament or the Land government decides so or if it is requested by a certain number of voters.

Finally, only Vorarlberg and the Tyrol have made use of the „authorization“ of the federal constitution (Article 148i para 2 B-VG) to provide for their own ombudsman institution. All other Länder declared the federal ombudsman institution competent also for their Land.

11. Subnational constitutions can authoritatively be interpreted only by the judicial review procedure before the Federal Constitutional Court. Due to the centralization of the judiciary as mentioned above, there are no ordinary courts nor constitutional courts of the Länder.

12. As far as the term „federal constitution“ is concerned, the Austrian system of federal constitutional law is different from the German system. Whereas the German constitution prescribes (Article 79 GG) that all federal constitutional law has to be part of the constitutional document, the Basic Law, the Austrian constitutional document, the B-VG, does not contain such a provision. In effect there are also special constitutional laws and provisions in statutes with constitutional rank. Hence, Austrian federal constitutional law is amended quite frequently. Whereas the system with the constitutional document, constitutional laws and statutory provisions with constitutional rank is the same for the Land level changes are less frequently.

However, there were total revisions of the constitutional documents of the majority of the Länder from the late seventies to the middle of the nineties. At the very moment there is, after the model of the EU-convention for the adoption of an EU-constitution, also an „Austrian convention“ which shall propose a draft for the total revision of the federal constitution until the end of 2004.

13. Subnational constitutions are less detailed than the federal constitution and do not, in principle, include provisions ordinarily associated with mere statutory law.

14. A weakness of the subnational constitutions results from the detailed regulations of the federal constitution which limit the possibilities of the subnational constitutions to an extraordinary extent. This may be changed with the draft federal constitution of the Austrian convention. However, the perspectives are not very stimulating so far since only few representatives for a truly federal system sit in the convention. A strength of the subnational constitutions are the state goals since the provide for „institutional guarantees“ in the economic and social field. After the adoption of new subnational constitutions in the majority of the Länder in the past 20 years, there is no movement for major changes.

15. Minority protection was, according to a decision of the Constitutional Court in 1958 (VfSlg 3314), an exclusively federal competence until the year 2000. Therefore the respective legal sources were all federal law. There is the already mentioned Article 7 of the Austrian State Treaty 1955 for the Slovene and Croat minorities in Burgenland, Styria and Carinthia, whose paragraphs 2, 3 and 4 enjoy constitutional rank, whereas for the other recognized so-called „autochthonous“ minorities, Hungarians, Czechs, Slovaks, Roma and Sinti the respective provisions of Article 66 through 68 of the Peace Treaty of St. Germain 1919 are still in force. Whether Article 19 of the Basic Law of the Rights of Citizens 1867 providing for language and educational rights is still in force or was derogated by the above mentioned provisions is contested. Finally, there are, besides a federal „Ethnic Group Law“ implementing the constitutionally guaranteed language rights and providing for „consultative bodies“ of the autochthonous ethnic groups for the federal and Länder governments, two federal educational laws which are valid only for the territory of the Länder Carinthia and Burgenland with some provisions enjoying constitutional rank providing for bilingual elementary education in both Länder and secondary education in the mother tongue in Carinthia opposite to bilingual secondary education in Burgenland. In 2000, however, a new paragraph 2 of Article 8 B-VG was adopted which entails a state goal for linguistic and cultural pluralism which is represented by the autochthonous ethnic groups. Therefore it is the task of the federation, the Länder, and the municipalities to respect, protect and to foster ethnic groups, their language and culture. This enables now the Länder constitutions and statutory law to complete the level of minority protection granted by federal law. The suggestion to reserve one or more seats in the Land parliament to elected representatives of the ethnic groups of a Land could serve as a politically significant example how minorities could be considered by the Land constitutions within the overall legal framework after the Constitutional Court had denied such a right to ethnic representation following from federal constitutional law in VfSlg 9224/1982. Moreover, within the existing system of allocation of competencies, it is up to Land legislation to foster folklore or to regulate kindergartens and day nurseries. On the basis of these competences the Länder could safeguard the minorities´position by specific provisions. Even before that the Länder could foster minorities on the basis of Art 17 B-VG, the so-called „private sector administration“.

Thus, for instance, Carinthia did finance the Carinthian Institute for Ethnic Minorities (CIFEM) which is a practical example of how a Land can allocate funds for minority related issues. The Carinthian Culture Promotion Act 2001 explicitly includes promotion granted in order to preserve cultural pluralism in Carinthia, „which is based on a variety of ethnic influences, including the influence of the Carinthian Slovenes." Similarly the Burgenland Youth Promotion Act includes promotion for youth activities which help to preserve and strengthen the culture and language of the Burgenland ethnic groups.

To sum up, the Länder will be able to adopt minority protection law if it is in conformity with Article 8 B-VG and other relevant federal constitutional provisions and if it is further in conformity with federal statutory law which was enacted on the basis of the federation´s general minority protection competence. This means that the Länder could protect minorities when making use of their relative constitutional autonomy and own competences, but only in the form of complementary law and with the intention to strengthen the minority protection law passed by the federation.