

Strength through Weakness: State Executive Power and Federal Reform in Austria

FERDINAND KARLHOFFER AND GÜNTHER PALLAVER
University of Innsbruck

Abstract: *Due to the absence of a strong constitutional veto player, comparative research uses to classify Austria as country with weak federal structures, occasionally even as a “federation without federalism”. From an institutional perspective, the assessment is definitely correct, in particular with regard to the nearly insignificant status of the second chamber Bundesrat. Apart from constitutional provisions, however, there are informal forces at work in decision-making processes. Our thesis is that any approach ignoring the fact that the nominal constitution is paralleled by a real one falls short. Instead, we focus on the Conference of State Governors which, though not established by law, is a strong player in Austria’s multi-layered system qualifying the picture of “weak” federalism. The paper gives an overview of origin and function of the conference and its ambivalent role in making up for the shortcomings of the federal structures. Taking recent attempts of reorganizing fiscal equalization between states and federation as an example, the need of reforming the allocation of rights and duties between the different levels and, at the same time, the obstacles blocking the reform is outlined and analyzed.*

KEYWORDS: Austria, Federalism, Political parties, Consensus Democracy

Introduction

In comparative research Austria is almost consistently regarded as a borderline case between federalism and unitarism. Indeed, given the nearly complete absence of constitutional veto points, and in addition the federation’s prerogative to determine law while, in contrast, the formal competences of subnational units are primarily confined to implementation, the question arises what category the country falls into. In doubt, Austria is positioned close to the edge of, yet still within, the federal “scope”. Starting from that edge position, the article discusses questions arising in connection with the apparent weakness of the country’s federal structures, thereby focusing on the chances and limits of federal reform.

Essentially, federalism is about the distribution of authority between central government and state governments (Bednar 2011, 270). Federal reform is therefore inherently a delicate venture since efficiency considerations usually are an important factor affecting fiscal allocation and spending control (Braun 2008, 4; Benz and Colino 2011, 382). This again implies potential power shifts between the two levels involved. Due to the ever-growing need of reform, Austria, such as other federations in the OECD, has for decades had an increasingly intense debate about redesigning the federal architecture. In fact, none of the countries, neither in the Anglo-Saxon world nor in continental Europe, has missed the target completely – except for Austria which is still in search of an effective balance between resources and responsibilities (Braun 2008, 7).

The fact that all initiatives of restructuring the system have failed so far is puzzling since one would expect exactly the opposite, namely that the constitutional frame of a highly centralized federation provides optimal preconditions for reform efforts (albeit rather in the direction of further centralization than the opposite way): there are on the one hand extensive competencies for the central government, and there is on the other hand a striking lack of veto rights for the provinces¹. Why then are the provinces so successful with demanding concessions from the federal government, the more so when acting jointly? And why have they been able to thwart virtually all reform efforts initiated by the government so easily? Our thesis is that there are a number of factors going beyond the constitutional framework, yet determining the dynamics of vertical as well as of horizontal intergovernmental relations. In adding the issue of informal rules and actors to constitutional considerations we draw upon the concept by Erk who, stating that “formal constitutions alone have little influence on democratic patterns unless they correspond to the underlying real constitutions”, distinguishes between *formal* and *real* constitution (Erk 2007, 634). Including the examination of *uncodified patterns* (ibid., 639; see also Luther 1997, 913–917) into the research design may fall short in explaining the conditions for successful federal reform, yet can help identify hidden mechanisms at work and the informal background of reform resistance and gridlock as is the case with Austria.

In the following, we first describe and analyze the characteristics of the federal system, in particular role of political parties structuring the multi-layered system. In the section about intergovernmental relations and coordination of subnational interests the focus is put on function and influence of the Conference of State Governors (*Landeshauptleutekonferenz* – LHK) which, although to be considered as the key player in Austria’s real constitution (Karlhofer 2010), has been subject of comparative research only marginally, so far. Finally we deal with the back-and-forth negotiations on restructuring the federal architecture, and the prospects of successful change.

With our theoretical approach we draw upon the insights of historical institutionalism which allows for assessing the characteristics and working of institutions with reference to historical origins and path-dependent developments. Following Broschek (2011, 541), historical institutionalism is

- “*historical* in that its proponents employ causal claims stressing timing and sequencing. Past choices, often made under conditions of uncertainty and involving contingent alternatives, are considered to delineate the boundaries within which future choices are made, and it is
- *institutional* in that past legacies manifest themselves most obviously in institutional trajectories. Unveiling the historically constructed ‘grammar’ of institutional configurations can, therefore, illuminate exactly how past events are causally related to future development”.

Aside from the theoretical approach as outlined here, this article benefits from recent works about constitutional reform of federal systems as provided, among others, by Bednar (2012), Benz and Colino (2011), Bolleyer and Thorlakson (2012), Braun (2008), and Lorenz (2011).

¹ In the literature on German-speaking countries the terms *province*, *state* and *Land* are mostly used synonymously. For better readability we make no differences in our article, too – whenever one of the terms is used, it refers to one or more of the nine Austrian *Bundesländer*.

Characteristics and ambiguities of the federal system

Bearing in mind that with regard to the distribution of power between national and sub-national level the constitutional shortcomings of the latter are well-documented through single country studies (e.g., Bußjäger 2010;) as well as through comparative historical and political research (e.g. Erk 2008; Burgess 2006), there is little to add to the current state of knowledge. However, despite Austria's federalism appearing "weak" in the light of comparative research (Obinger 2005), it makes sense to call to mind the relevant key points and findings in order to gain a balanced understanding of origins, actors, and functions.

Roots and continuity of regional identity

Other than, for instance, in Germany where most of the *Länder* are post WW II creations (some of them through hyphenation as, e.g., North Rhine-Westphalia or Rhineland-Palatinate), the history of Austria's *Länder* can be traced back to the Habsburg Empire with the former crown lands (Carinthia, Styria, Tyrol, etc.) maintaining their names also after the demise of the Austro-Hungarian Empire. That's far from saying the Empire might have been a federation, though. Clearly, albeit decentralized, it had been, a unitary state (Gamper 2006, 73); yet the *Länder's* historical identity, invigorated through the provincial charters (*Landesordnungen*) of 1861, was strong, and its state building energy unfolded in the course of the foundation of the democratic republic in 1918. While the now rump state lacked any patriotic feelings, regional identity remained intact, thus enabling the *Länder* to oppose successfully the foundation of a unitary state (Burgess 2006, 93–94). Soon, however, federal initiatives were superimposed by the party cleavage expressed in hostile relations between Catholic conservatives who had their strongholds at provincial level, and the social democrats dominating the national capital Vienna. Therefore, federalism became an instrument of the Conservatives in their fight against Red Vienna (Weber 1997, 46–47). In the Western states Vorarlberg and Tyrol it is still today quite popular to activate anti-Vienna resentments in the course of provincial election campaigns – a tongue-in-cheek attitude that pays since regional identity, albeit slightly eroding, is still strong (Bußjäger et al. 2010).

Federal Council: second chamber without authority

In comparative federalism Austria ranks among the group of countries which "describe themselves as federations while being so centrally dominated in design and practice as to be little short of unitary states" (Huegelin and Fenna 2006, 34). It's first and foremost the remarkable power asymmetry between the two houses of parliament that creates doubt whether the country is still to be considered a federal or rather a unitary country. The Federal Constitutional Law (*Bundesverfassungsgesetz* – B-VG) provides for supremacy of the National Council (*Nationalrat*) over the Federal Council (*Bundesrat*), markedly expressed in Article 10 that determines the "exclusive federal competence in both legislation and administration", thus leaving only residual competences to the upper house (Pernthaler 2010, 112). In the federal legislative process the Federal Council possesses merely a suspensive veto that can easily be overruled by the National Council. In the period from 2000–2011, there were only 24 suspensive vetoes (all of them overruled by the federal parliament).² What is more, in none of the (few) cases where the second chamber

² Source: Information provided by Peter Bußjäger, Head of the Institute of Federalism, Innsbruck, 10.06.2012.

enjoys the right of absolute veto – regarding bills affecting legislative or administrative *Länder* competences (Article 44) – the Federal Council has vetoed a bill passed by the National Council (Gamper 2006, 79). The fact that the second chamber does not even exert its modest constitutional rights in full entirety demands further explanation. The answer is to be found in the electoral system for the second chamber, and in the party political background framing Austrian federalism.

The constitution provides that Federal Council members are elected by the state legislatures (*Landtage*) in accordance with proportional party representation after every provincial election; candidates need not necessarily be members of the *Landtag*, but must be eligible to be elected to it. As a matter of fact, in the federal parties' hierarchical scale the Federal Council is subordinate and in practice almost insignificant. The modest prestige of *Bundesrat* office holders is best expressed in the fact that after every national election the government parties, when negotiating the coalition agreement, use to agree upon the voting behaviour not only of the lower house members, but also of their respective members of the upper house – without any consultation with the latter (Weiss 1997, 525). And not least, the inferiority of the second chamber is mirrored in the salary paid to deputies – amounting only half of what a National Council member receives, while even *Landtag* members still obtain 80 percent.

Indirect federal administration

Regarding the division of competencies between federal state and *Länder* the constitution provides four different ways (Art 10–15 B-VG): (1) legislation and implementation exclusively by the federation; (2) legislation by the federation, implementation by the *Länder*; (3) framework legislation by the federation, implementation legislation and execution by the *Länder*; (4) legislation and implementation exclusively by the *Länder* (cf. Gamper 2000, 253). More precisely the competencies are specified in Art 102 B-VG with the distinction between *direct* and *indirect federal administration* (see Weber 1987). While direct administration provides for federal authorities executing law at all levels, indirect administration means that a “significant proportion of federal administration is carried out by the *Länder* on behalf of the federation”, a provision through which the constitution “compensates the *Länder* for their relative lack of power” (Gamper 2006, 82). What at first sight appears to be hardly more than a regulation reducing the states to mere agents of the central government, is in practice the “organizational core” (Öllinger 2010, 21) of Austrian cooperative federalism. By a couple of reasons, indirect federal administration is not, as one would expect, a hierarchical but rather a complex, in parts even stratarchical negotiating system with the states controlling the execution of federal law: “[E]ven competences that are allocated entirely to the federation are principally performed by the *Länder*, although they retain their federal character” (Gamper 2006, 83). Any attempt of changing the rules would almost inevitably be foredoomed to fail since it's difficult to imagine that the *Länder* would give their consent as is required by constitutional law.

The system of indirect administration mirrors a special kind of *executive federalism* with the governors pulling the strings. It is worth noting that, in terms of personnel, the subnational administration, including district authorities, is considerably strong (Biela et al. 2011, 13). In addition, with respect to indirect administration affairs lower-level authorities are subordinate only to the governor and the Office of the Land Government (*Amt der Landesregierung*) headed by him. Formally the central government has the right to issue instructions directly to a governor – what, however, has been done only once

since 1945, and in this unique case was simply ignored by the addressee (Karlhofer 2011, 322).

With regard to the control of indirect administration the federal constitution is remarkably non-binding. As a result, “a substantial part of *Land* government activities remains without formal state supervision” (Fallend 2003, 23). Given the states being virtually fully autonomous in carrying out indirect federal administration matters, it is no wonder that proposals aiming at a reform of the division of competencies mostly fail to address the issue since this would imply to formally transfer the whole range of tasks from federal to *Länder* level. Apart from the low chances of success, one side-effect of doing so would, by the way, resolve the question of controlling the executive with the *Land* governor and his top officials. Once administration authority was transferred from federal to the state level, the control of government activities without exception would be *Landtag* competence (cf. Pelinka 2007, 21–22).

Land governors: gatekeepers in the federal architecture

The office of a *Land* governor enjoys a special status in Austria’s federal setup. First of all, as outlined above, in the broad field of indirect federal administration it is the governor who has the final say. He/she alone is the central government’s counterpart, and thus responsible neither to the *Landtag* nor to his colleagues in the *Land* government. Since the *Landtag*’s autonomous legislative competencies are limited, and with regard to the dominance of the executive headed by the government, the provincial parliament’s scope of influence is narrow, the more so as even its formal right of creating and controlling the government is considerably restricted in practice. Not only is the governor “government head, head of the bureaucracy, responsible agent for [...] indirect federal administration” (Fallend 2011, 182), and last but not least, in all external relations “head of state” (Weber 2004, 78). Moreover, any candidate for governor is usually leader of his respective party and therefore enjoys strong intra-party authority – as a result, *Landtag* elections are primarily governor elections (Weber 2004, 78–80). The prestige the governor office has in the public, finds its expression in the polls: While only a small minority of 27 percent consider *Landesräte* (government members) to be indispensable, a strong majority of 62 percent is in favour of the governor office (Table 1).

“Partyness” of federalism

In a multi-layered system political parties are kind of integrative agents and, along with interest groups, important vehicles of centralization (v. Beyme 2010, 373). In Austria, due

Table 1: Political institutions and public opinion

	“Institution is dispensable, its tasks could be accomplished by others”	“Institution is indispensable, should be maintained”
Landeshauptmann (governor)	28%	62%
Landtag (parliament)	43%	43%
Landesräte (members of government)	54%	27%

Source: Market, Opinion survey (n = 500), Dispensable Institutions at provincial level [access: 06.08.2012].

to their all-encompassing presence at all levels, political parties represent a pivotal element for cohesion and unification. Moreover, the fact that Austria is a country with “strong parties in a weak federal polity”, as Obinger (2005) put it, makes it a special case of a “party federal state” (*Parteienbundesstaat*, cf. Decker 2011).

The structural architecture of the party federal state leaves little room for establishing regional parties on a permanent basis. As a rule, the array of political parties in the provinces aligns itself with that at national level. The congruence of the party systems nationwide can be regarded an indicator of interest coordination and centralization. Major parties use to match with the federal structures. They form “territorially integrated organisations which are internally subdivided along the federal polity and, at the same time, back the national party’s values and goals” (Benz 2003, 34–35). In addition, vertical integration is fostered by the fact that intra-party careers take place in moves from regions to the centre (centripetal) and in the opposite direction (centrifugal) as well (Stolz 2003)³, thus contributing to make the parties’ structure both homogeneous and adaptable to changing environments. What is more, in a federal system it is the political parties’ primary function to serve as intermediary agencies with regard to interest conflicts between center and regions (v. Beyme 2010, 376).

In the last two or three decades the Austrian party system, along with the international trend, has been changing what has manifested itself, among others, in a decline of the parties’ capacity to reconcile conflicting interests (Niedermayer et al. 2006). Until the 1980s, given the two dominant *Lager* parties SPÖ and ÖVP achieving continuously more than 90 percent of the votes, and the third largest party FPÖ ranging between five and seven percent, Austria had a typical two-and-a-half-party system. Thereafter the hitherto frozen party system entered into a stage of rapid change, with the newly emerging Greens on the one side and the FPÖ transforming into a radical right populist party on the other, and both capturing considerable shares of the *Lager* parties’ electorates. At states level, however, the party systems have proved considerably resistant, with SPÖ and ÖVP having managed to maintain – except for Carinthia – their supremacy. Now as before, as can be gathered from their share of seats in regional parliaments, they are far ahead of the other competing parties: As of mid-2012, SPÖ and ÖVP hold together a total of 316 out of 348 (i.e. 91 percent) *Landtag* seats in the nine provinces, while holding merely 108 out of 183 (59 percent) seats in the National Council,⁴ three states are still governed with absolute majorities of seats. All things considered, the strength of the parties at state level is the “most remarkable feature of real federalism [in Austria]” (Pelinka 2007, 17).

Double loyalties: regional vs. centralist party interests

For long periods of the Second Republic, the “partyness of government” (v. Beyme 2007, 124) with regard to structures and processes in policy-making manifested itself in that *Land* election campaigns frequently were less determined by regional than by national issues, and quite often the outcome was considered as a barometer of public opinion on national politics (Dachs 2006b). With the SPÖ focusing on centralism this has always been beyond dispute; and also the ÖVP, by tradition much more federalist, has emphasized a

³ *Land* governors – what is remarkably, and clearly an indicator for the office being an attractive power base – have always constituted an exception to this pattern. Between 1945 and 2012 only one time a governor moved to Federal Chancellery (former Salzburg governor Josef Klaus was Chancellor from 1966–1970).

⁴ Official data by www.bmi.gv.at/cms/bmi_wahlen/ [access: 10.08.2012].

“dual” party structure, i.e. regional sub-units plus nation-wide “leagues” (*Bünde*) along socio-economic lines) in order to avoid or at least to mitigate centrifugal tendencies. Considerable change, though, has taken place since Austria’s entry into the European Union in the mid-1990s. Since then, regional elections have tended to be more determined by regional issues than in the past. The national government, on its part, tends to emphasize centralism more firmly in order to make up for losses coming along with ongoing Europeanization. With this background, in particular when the need of reallocating competences is at stake, parties tend more and more to oscillate between promoting and blocking changes (Benz 2003).

It is noteworthy in this connection that the intra-party influence of the regional organizations varies strongly with both parties: More than 40 Percent of the ÖVP’s party members come from Lower Austria; more than half of the SPÖ’s members come from Lower Austria and Vienna (Dachs 2006a, 73 and 92). As a matter of fact, the states of Vienna and Lower Austria are the country’s virtual federalist centers of gravity, with regional party leaders being anything but subordinate to their respective national party structures. The two *Länder*’s intra-party weight is best mirrored in the fact that their governors have eminent influence on the central government, let alone that throughout the Second Republic, with only a few exceptions, the Federal Chancellors have been coming from these two states. All things considered, there has always been some kind of “asymmetry-in-symmetry” in Austria’s federal system – symmetry understood as constitutional equality of the national subunits, while asymmetry mirrors the differences of population and wealth affecting the constitutional units’ political power relations with each other as well as their varying degree of influence on federative institutions (Tarlton 1965, 869; Watts 1998, 123).

Austria – an “over-centralized” federation?

Given the striking lack of constitution-based balance of power-sharing between federation and national subunits, there are strong reasons to class Austria as an example of “how far centralization and federal-state interdependence can be taken in the spectrum of federal arrangements” (Watts 2008, 35). This leads to the inspiring concept of “over-centralization” introduced by Braun (2011). Over-centralized federations have a federal constitutional set-up, but “function in many ways like a unitary state and follow the same logic and dynamics” (ibid., 38), with the national subunits “subject to encroaching behaviour by the central government” (ibid., 35). Comparing Australia, Austria, Germany and Switzerland, Braun arrives at the conclusion that only Austria lacks the three “safeguards” against over-centralization defined by him, as there are: (1) subunits do not have veto powers at federal level. (2) Due to the congruence of government coalitions formed by SPÖ and ÖVP at both levels Austria “lacks a strong party opposition that could protect the *Länder*.” (3) Both SPÖ and ÖVP, similar to their counterpart parties in Germany, have adhered to unitarian objectives. “As a consequence, ‘over-centralization’ can unfold” (Braun 2011, 47).

To be sure, Braun does not omit pointing to the role of informal sub-government conferences established in order to coordinate *Länder* positions vis-à-vis the central government. With reference to “safeguard 2”, the national government is assumed to be “usually well protected by party interests in this forum”, though, “because party cleavages often override territorial cleavages” (Braun 2011, 46). Far from denying the assumption we nevertheless believe it needs to be qualified. As pointed out below, there is quite frequently convergence of interests among the states that, in marked contrast to the thesis discussed,

makes them inherently prone to put aside party cleavages in favour of common policy stance (Lorenz 2011, 409). With this in mind, we do not consider Austria to be a case of “over-centralization”. Rather, it appears to be a case of – we take the liberty of coining the term – “under-federalization”, a defect that is compensated through self-coordination of the national subunits on the basis of unwritten rules. As a result, in practice the central government can exploit its legal authority only in cooperation with the *Länder*, and this is right what Austria distinguishes from a unitary state (Öllinger 2010, 20).

Intergovernmental coordination: the Conference of State Governors

In several federal countries the chief executives of the member states have established more or less formalized bodies for the coordination of common interests. An outstanding long tradition has the more than a century old National Governors Association in the USA; further examples are the Meetings of the Provincial Premiers in Canada, Italy’s various standing regional conferences, the German Conference of State Governors, and, called into being only two decades ago, the Swiss Conference of the Cantonal Governments. Apart from national diversity, they all aim at representing “the member states’ collective interests vis-à-vis the central government” (Halberstam and Reiman 2011, 19). The shape of arrangements of this kind differs from country to country – while in Canada interaction occurs on an *ad hoc* basis, in Switzerland relations are highly institutionalized. Anyway, although this form of exchange between subnational governments has intensified considerably, it has been surprisingly little researched, so far (cf. Bolleyer and Bytzek 2009, 371–372).

In Austria, Conferences of State Governors (*Landeshauptleutekonferenz* – LHK) convened at the outset of the First as well as of the Second Republic. In both cases, 1918 and 1945, they played an important, if not decisive role in the founding of the state (Rosner and Gmeiner 2010; Rosner 2011). After the 1945 meeting the governors came together for some time sporadically, and eventually, from 1970 onwards, in an interval of six months (Bußjäger 2003, 82–84). In the course of time, the LHK has established itself as a lasting compensation for the second chamber’s and the state parliaments’ weakness, and, in general, for the lack of an effective institutionalized body for the participation of the states in federal policy-making processes (Bußjäger 2003, 91–92). The effect, however, is that this form of compensation in practice has strengthened the state executive (represented alone by the governor) while the parliamentary level – *Bundesrat* and *Landtage* – have been marginalized still further.

Transparency and democratic legitimation in comparative perspective

Although different in some respects, in comparative federalism Austria is considered to be a variation of the German model (cf. Hueglin and Fenna, 2006, 77). Particularly with regard to intergovernmental coordination the Austrian LHK resembles most of all the German Conference of State Governors (*Ministerpräsidentenkonferenz* – MPK), both forming the core of cooperative federalism in their respective country (Bußjäger 2007, 213). The MPK therefore is taken as point of reference in this section.

In Germany, as a rule, prior to conferences separate talks among A-states and B-states (i.e. states under social-democratic resp. Christian Democratic rule) take place. Wherever common issues are at stake (e.g. taxes, education, role of the *Länder* in the federal state), A- and B-states strive for minimizing party competition and acting in concert, instead. It’s

kind of an agreement bridging varying interests and party majorities in the states involved for which the term *Dritte Ebene* (“third level” between federation and states) has been adopted – by the way, a term in principle quite suitable for Austria, too (Hartmann 2004, 154–155). Origin, organization and *modus operandi* for the coordination of state interests in Germany correspond astoundingly closely with informal practices in Austria. Such as the LHK having its date of founding in the state conferences convened in order to foster and support the rebuilding of a free united republic (see Fallend 2003, 26–28), the MPK started with a state conference of the (West-) German prime ministers aiming at the founding of a federal republic. Neither of the two bodies is based on constitutional law, the legal basis is confined to *en passant* entries in several acts.⁵

Since both bodies operate on a voluntary basis, meetings have primarily the purpose of formally concluding agreements negotiated consensually in advance and worked out by the state administrations directly subordinated to the governments. As of voting procedures in the conferences, LHK and MPK differ from each other: LHK resolutions require unanimity, while in the MPK unanimity applies to decisions on common facilities and on budgets only (in all remaining cases it takes 13 out of 16 votes).

Other than the federal councils, both LHK and MPK are informal bodies and therefore not subject to constitutional rules. In Germany as well as in Austria federal council sessions must be open to the public, the minutes of meetings are to be publicly accessible. By contrast, LHK and MPK are not open to the public, the minutes of meetings confidential.

Regarding accountability to the second chamber, however, the two clubs of states heads differ significantly from each other: In Austria the communication between LHK and upper house is generally restricted to the governors who make use of their right to speak in that house, yet without any obligation to report about the LHK’s agenda and decisions. In Germany, due to the intertwining of *Bundesrat* and *Land* governments with the former being subject to directives by the latter, the question of transparency in decision-making by the MPK does not arise *a priori*. Concerning the *Land* parliaments, though, they neither in Germany nor in Austria have the right to demand reports by their respective governors about the activities of the conference of governors.⁶

Constellations of interests and negotiating structures

Federalism, as is well-known, is a *constitutional-legal* system allocating a clearly defined degree of autonomy to each level. Beyond that, in order to work, federalism in practice is a *bargaining* system (Engelmann and Schwartz 1981, 81). “[P]olitics”, as Benz (2009, 17–18) puts it, “both in its intra- and intergovernmental dimension, is determined not alone by formal institutions and rules of procedure but by the way how actors cooperate and how they apply the rules. Even if different levels stand in a relation of super- and subordination, interdependencies frequently are handled by negotiations or mutual adjustment [...]” Thus, treating federalism merely as a system covering more or less autonomously governed territorial units would fall short unless taking the pressure for coordination through negotiation into consideration, too.

With regard to Austria’s state governors as individual actors, and their joint action as LHK, six patterns of interest constellation and of collective action can be identified:⁷

⁵ An overview with regard to Austria is given by Rosner and Gmeiner 2009, 49–63.

⁶ For a detailed overview see Karlhofer 2011, 315–318.

⁷ For detailed empirical evidence see Karlhofer 2011.

- 1 The states have „natural” common interests vis-à-vis the federation with regard to the allocation of resources (Thöni 2008).
- 2 The states have „natural” common interests vis-à-vis the federation with regard to the allocation of costs (ibid.).
- 3 The LHK less frequently takes the initiative in pursuing a goal rather than in resisting unwelcome government action (Bußjäger 2007, 210).
- 4 LHK resolutions require unanimous vote, thus finding a maximum of acceptance with the federal government. On the downside, though, joint resolutions tend to be nothing more than the lowest common denominator since just one single vote against can quash a proposal (Luther 1997, 824; Weber 1992, 417).
- 5 The common base of interests of regional actors vis-à-vis national authorities occasionally (particularly in the run-up to elections) tends to interfere with party loyalties (Pelinka 2007, 16–18; more generally, see Lorenz 2011, 409).
- 6 Last but not least asymmetry between strong and less strong states, as outlined above, is of relevance. It makes a difference whether the governor of a dominant or a smaller *Land* raises his voice in favour or against an issue at stake.

In practice, Austria’s “real constitution” (cf. Erk 2004; 2007) works along one or more of these interest patterns. A difficult problem, though, arises when the constitutional architecture as a whole is on the agenda. In this case the very different views of actors tend to accumulate and, in the end, to water down the initiative. Paradoxically, it is of all things the “weakness” (the term here defined as low degree of constitutional rights) of subnational competencies that renders federal reform in Austria. Constitutional weakness, as to be outlined below, is under certain circumstances a welcome source of power and influence, in that factual action is taken while formal accountability does not apply. In view of the development of federalism since 1945, the never ending debate about a recalibration of both “written” and “unwritten” rules gives rise for shining a light on the paradox of “strength through weakness”, as is done in the following section.

Federal reform: initiatives and resistance

In need of reform

Concerning the distribution of competences between the different levels in the federal state, virtually all political actors involved are well aware that reforming the allocation of rights and duties is urgently needed. Nevertheless, since 1945, Austrian federalism has not developed consistently in a certain direction, neither clearly towards (over-)centralization nor towards decentralization. Broadly speaking, four different periods can be identified (Bußjäger 2012, 67):

- 1945–1974: creeping centralization
- 1974–1988: moderate federalization
- as from 1988: uneven development
- since 1995: despite many attempts little progress with federal state reform

The *Baustelle Bundesstaat* (which is to say “building site federal state”), as a book on the topic is entitled (Steger 2007), appears to have no completion date. Despite innumerable reform attempts the system is still suffering from a marked degree of fragmented competences inherently causing demarcation disputes. Given the interweaving of competences in policy making and policy implementation, exacerbated by claims of actors exploiting

uncertainties coming along with what Scharpf (2009) has identified as *joint decision trap*, efforts aiming at a thorough reform appear to have no prospect of success.

The history of attempts aiming at federal reform is well-documented (cf. the overview by Weiss 2011), and therefore in the following is sketched with reference to exceptional stages only: In 1964, the LHK addressed the federal government with a catalogue of claims including even taxing authority to be granted to the states in several areas. After a short phase of constructive negotiations, the reform drive faded away. In the aftermath, some progress in restructuring federal and state competencies was achieved, most notably, in 1974, the introduction of an Article 15a into the federal constitution henceforth allowing for autonomous agreements between the states as well as between states and federal government (Gamper 2006). On the scale of things, though, the results were modest.

A particularly noteworthy event was the *Perchtoldsdorf* framework agreement⁸ concluded in 1992 which generally was expected to become *the* big reform project – ranging from minor adjustments through to substantial changes in state-federation relations, including even indirect federal administration as one of the most crucial obstacles for recalibrating the distribution of competences. Rather soon, however, the actors of all levels involved, while rhetorically showing commitment and good will, began to ignore and, in doubt, even thwart any initiative aiming at a change of the status quo. The final failure of the federal state reform in 1993/94 was not necessarily the result of a lack of unity among states, also not of a lack of readiness to accept federal responsibility, but simply that the momentum for change already had begun to wane. Under these circumstances, inhibiting forces in state and ministerial bureaucracies successfully opposed the reform (Bußjäger 2005b, 313). It was a rare case making evident that not the executive, not to speak of the legislative, but rather the administrative apparatus obstructed a reform process.

Reform resistance finally peaked in the disappointing outcome of the so-called *Österreich-Konvent* (Austrian Convention) of 2003/04. The convention, established in 2003 and comprising, among others, delegates of interest associations, civil society, and (most prominently) of state governments, was entrusted with the task of elaborating a new federal constitution allowing for “future-oriented, cost-efficient, transparent and citizen-oriented public policy”.⁹

The convention started working under adverse conditions. Since the then ruling government consisted of a coalition made up of the conservative ÖVP and the right-wing populist FPÖ, the country’s political climate was conflictual and polarized. SPÖ and Greens, both in opposition, suspected the government’s motives to be dishonest and opportunistic. That the convention was doomed to fail from the outset was to be seen from “the paradox of the convention’s politicization coming along with notorious absenteeism of the political elites”.¹⁰

Again, just as in the 1990s, the nine state governors, despite being members (actually key players) of the convention, did not even occasionally attend the meetings (Lienbacher 2008, 7). Notwithstanding, the LHK reacted promptly with a proposal of its own to the draft constitution presented by the president of the convention after its work was finished. (Eventually, not even the LHK itself persisted with its own counterproposal – it was simply a demonstration of disregard of the convention’s work result.) Since that time, apart

⁸ Abkommen von Perchtoldsdorf, named after the meeting place, a small market town in Lower Austria.

⁹ Cf. www.parlament.gv.at/PAKT/VHG/XXII/I/I_01584/fnameorig_066692.html [access: 11.07.2012].

¹⁰ Bußjäger 2005a, 406; see also Grotz and Poier 2010.

from minor adjustments in 2007, the rejected convention report has been subject to a parliamentary subcommittee with no end in sight (Watts 2008, 35).

Another initiative was undertaken in the first half of 2007 by the (social democratic) governor of Salzburg as half-year rotation chair of the LHK. Pointing out in a speech to the Federal Council that right at this time the national government was being formed by a grand coalition of SPÖ and ÖVP, coinciding with roughly balanced majorities of the two parties in state governments, she emphasized the “historically unique opportunity” to overcome shortcomings in the federal architecture.

The governor made her diagnosis under the impression of the coalition negotiations taking place at that time. In the very same year, however, the window of opportunity – such as in 1994 – began to close again.¹¹ It’s not just that the SPÖ suffered heavy losses in several state elections; what is more, in 2008, a severe government crisis led to a snap election in which SPÖ und ÖVP (which formed a coalition again) lost their former two-thirds majority (which is a *sine qua non* for any constitutional change).

Austria had followed suit a reform initiative of the German grand coalition government (2005–2009) which had hoped to take advantage of its strong majority in parliament and thus be able to reorganize the fiscal equalization scheme. Clearly, a grand coalition’s chances to successfully resolve a problem are considerably higher than those of a smaller one (Behnke 2010, 52; see also Czada 2000, 15). In the end, with the national election of 2009 approaching and the involved actors’ willingness to cooperate decreasing, the reform in Germany was only partially successful. In Austria, with regard to the snap election of 2008 and aside from the fact that constitutional reforms are hardly to be accomplished under time pressure, even a swift procedure would have had little chance of success. Still worse, the Salzburg governor’s effort met with no response even from her own fellow leaders (in particular those belonging to the ÖVP).

The LHK: pushing forward while preserving the status quo

Other than Anglo-Saxon countries where federal reform rarely requires constitutional change, but primarily addresses the mode of interaction between territorial governments, and therefore leads to success sooner, in the European type of power-sharing constitutional aspects are much more relevant. Here, federal reform inevitably is about competences, resources, and participation rights, implying a redistribution of power between levels, institutions, and actors (Braun 2008, 7). At the same time, the actors going to be affected by changes are themselves involved in a decision process in which they possess veto power (Benz 2009, 198). Hence it needs a critical juncture where actors find themselves no longer able to cope with dilemma situations in multi-layered policy-making, and the question how to change the institutional framework takes the centre stage of public discourse (*ibid.*).

In Austria, a critical juncture was already reached in the run-up to the country’s EU accession. As soon as 1987, the LHK passed a resolution in this matter, followed by claims for federal reform in order to prevent potential disadvantages for the *Länder* coming along with EU membership (Luther 1997, 916; Weiss 2012, 290–293). An important innovation was the Integration Conference of the States (*Integrationskonferenz der Länder – IKL*) provided for as an instrument for balancing interests in EU affairs. Established in 1992 at the request of the LHK, the IKL consists of the governors and the speakers of parliament of

¹¹ A general reflection about windows of opportunity closing rapidly unless the chance for constitutional reform is taken at the precise moment is provided by Scharpf (2005, 6–8).

the nine *Länder*. Yet, since only the governors have a vote in the conference, they soon got into the habit of discussing the agenda in the LHK rather than in the IKL which, as a result, has not been convened since 1997 (Konrath 2005, 363). Once again it is the factual power of governors respectively the LHK that makes them the federal government's preferred negotiating partners, even so if the involvement of further actors is provided for by statute.

The role the LHK played as a driving force in EU affairs indicated the governors' willingness to get down to reforming the federal system. In this regard, as pointed out above, Austria was far from being alone. The findings of comparative studies on extensive reform processes initiated at about the same time in Switzerland (1987–2008), Germany (2003–2009), and Austria (1992 to present) differ insofar as the reform in Switzerland is regarded as a success, if not an ideal case, while the outcome in Germany is considered to be modest, in Austria even a failure (Behnke 2010; Grotz and Poier 2010). So, given that federal reform is manageable as has been demonstrated by other countries (cf. Braun 2008) – why have all the attempts remained fruitless in Austria? In the following, referring to the title of our article, we try to show that it is an ambivalent mix of constitutional weakness and, at the same time, informal strength of *Länder* executives that makes any change difficult, if not impossible.

Constitutional reform ordinarily has two central targets: demerger and efficiency increase. In Austria, under the title “demerger and transparent regulation of financial transfers among and between territorial authorities”, both these targets were part of the coalition agreement concluded in 2008.¹² Once again, though, apart from some progress in adapting (medium-term) fiscal equalization (cf. Biwald et al. 2011), the period ended without breakthrough. Among others, the principle of connectivity (i.e., responsibility for revenues, expenditures and administration in certain policy fields to be combined at one and the same level) was a non-issue.

Looked at more closely, constitutional reform in Austria is not simply a matter between *Länder* and *Bund* but, as pointed out, between state governors and federal government; parliaments, be they provincial or national, play a marginal role. Once the governors and their joint club LHK are identified as key players, the question arises as to how far they are prepared to get *not less but even more* constitutional accountability than they have at present. Empirical evidence suggests that state executives have a significant interest to deliberately keep state competencies modest:

- The second chamber *Bundesrat* is generally perceived as a “toothless instrument” for representing state interests (Ermacora 1976), not least because the delegates are grouped along party rather than state lines. Many proposals have been made to strengthen the chamber, e.g., modelled after the German system – without success.
- Already in its present state the federal constitution in principle would allow for delegating members of state governments to the House. Up to now, however, none of the states has made use of this right (Weiss 1999, 122).
- Likewise, the state governors unanimously reject proposals aiming at transforming the LHK into a constitutional body which would be a powerful substitute for the *Bundesrat* in its present state (Lienbacher 2011, 160).

The fact that the states, represented by their governors, deliberately do without enhancing their competencies, appears to be amazing if not irrational. The explanation is to be found

¹² Regierungsprogramm 2008–2013, p. 269 (<http://www.austria.gv.at/DocView.axd?CobId=32965> – access: 07.08.2012).

in two interconnected facts: Firstly in the principle of connectivity: any enhancement of rights would inextricably be linked with an enhancement of responsibility. Since in practice, though, the – rather Austria-specific – system of indirect federal administration provides a wide field of autonomy (selection of personnel, allocation of resources, etc.), the states have no need for more formal rights. Secondly, governors and LHK prefer to act in an extra-constitutional sphere while formal responsibility is passed to federal constitutional bodies (Lienbacher 2011, 161); in other words, they are “not willing to pay the price for more decentralization of competencies” (Braun 2008, 22).

Conclusion and outlook

It goes without saying that not only in Austria the barriers for substantial constitutional changes are high. Requiring broad support from a multitude of actors, reform initiatives frequently end up with adaptations in subareas while the basic architecture remains untouched. With regard to Germany which, as outlined out above, is in many respects similar to Austria, Scharpf points out that there have been a lot of proposals for federal reform, however, “due to the requirement of two-third majority for constitutional change [such as in Austria – FK/GP] there is no Archimedean point beyond the joint decision system” (2009, 44). What is more, since from an historical institutionalist perspective federal systems are to be seen as historically constructed (Broscheck 2011, 549–552; see also the ground-breaking works by Lehmbruch 1996, and Scharpf 2009), any institutional reform of a multi-layered system has, in principle, to cope with path-dependency, thereby inevitably affecting die-hard habits and routines.

For historical reasons policy-making in Austria “to a considerable extent aims at negotiated solutions” (Lehmbruch 1996, 19). The functional interaction of formal and informal negotiation rules under involvement of strong actors without explicit legal legitimation has for instance had a long tradition of cooperative relations between state and interest associations in connection with social partnership (*Sozialpartnerschaft*), the Austrian version of corporatism. The same holds true for the federal state’s real constitution.

As we have argued in this paper, in Austria’s federal system the *Länder* are weak with regard to legislative competencies, but they are strong with regard to administration (cf. Fallend 2003, 19–23). And it is the state governors and their joint body LHK effectively balancing out the states’ weak constitutional status, and being in the role of a gatekeeper in federal reform matters. Thus, one might assume, the most promising approach of changing the system would be if the state governors entered into an intergovernmental dialogue reflecting on their own Janus-faced role of being both a driving force and a veto power in the federal system. However, it would be rather naïve to expect a strong actor acting against his own interests.

On these grounds, a reasonable chance of success for federal reform will always require the relevant actors’ readiness for barter and package deals as has been stated with regard to Austria: “Just to reduce the states’ power without offering something in return will inevitably reach the political impasse into which the protagonists have been maneuvering themselves for decades.”¹³ More specific, “[p]olicies must be (re-) defined in a way allowing each side to win in a matter essential to it, while making concessions in a less important matter” (Benz 2009, 113). Indispensable in this connection is that party competition and

¹³ Anton Pelinka: Republik der Verhinderer. *Die Zeit*, 09.12.2010, 12.

majority rule stand back in favour of decision-making through bargaining (Czada 2003, 178).

With regard to the three (potential) conflict lines – namely the front between governing coalition and opposition at national level, the front between federation and states, and the front between economically stronger and weaker states – there are no clear winners nor losers at the end of reform processes, but at the utmost only win-win solutions (Scharpf 2005, 5), achieved through “a sequence of bargaining and arguing” (Lorenz 2011, 407). But even in case a negotiation result is ratified, there still remains “a significant gap between goals and outcomes” (Benz 2009, 203; see also Sturm 2005, 200).

Recent theorizing on constitutional change in federations provides a lot of insights for understanding successes and failures of reform initiatives.¹⁴ Yet, none of the modes and mechanisms discussed to overcome reform gridlock seems to be applicable to the Austrian paradox of strength through weakness. The big breakthrough, even if modelled after the Swiss reform which highly effectively had focused on an integrative organization of the process involving all actors concerned (Behnke 2010, 38), can hardly be reached. Austria’s most unique institution of indirect federal administration providing *Land* governors a wide sphere of influence is a property they are not prepared to give up. Thus, change can at best be achieved gradually and incrementally, a procedure of step-by-step approaching that, if any, can lead to success only in the course of fiscal reform. Fiscal equalization is part and parcel of any federal reform in Austria: “Federal reform [...] is a precondition for demerger and efficiency increase; otherwise readjustment will be severely restricted by the current inefficient system of allocation of competences” (Bröthaler et al. 2011, 46). Hence managing fiscal and federal reform is a test for the ability and readiness of the actors involved in the negotiation system to overcome the shortcomings of the status quo – a big challenge taken into account that the policymakers are at the same time addressees of their own decisions. Clearly, the same way an unexpected critical juncture might change the framework of action at very sudden. For the time being, however, Austria remains at the edge of the federal scope.

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¹⁴ See, e.g., Bednar 2011 and 2012; Benz and Colino 2011; Bolleyer and Thorlakson 2012; Broschek 2011.

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Ferdinand Karlhofer is professor and director of the Department of Political Science of the University of Innsbruck. His main research focus is on Austrian politics. *Address for Correspondance*: Department of Political Science, Universitaetsstrasse 15, 6020 Innsbruck, Austria. *E-mail*: ferdinand.karlhofer@uibk.ac.at

Günther Pallaver is professor of Political Science at the University of Innsbruck. His main research focus is on Italian politics and (ethno) regional parties. *Address for Correspondence*: Department of Political Science, Universitaetsstrasse 15, 6020 Innsbruck, Austria. *Email*: guenther.pallaver@uibk.ac.at