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Encyclopedia of Contemporary Constitutionalism

A

Austrian Constitution, The



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History

Fundamentals

The Austrian Constitution, as it is in force today, dates back to October 1, 1920. Its roots, however, go back in many senses to the second half of the nineteenth century when the Austrian state was transformed, step by step, into a constitutional monarchy. This was a difficult process as Austria; in the first half of the century, it was an antidemocratic, authoritarian, and legitimist state intended to defend and impose these visions and ideologies also in other European countries (especially in the “Metternich era,” 1809–1848). Eventually, with the so-called “December Constitution” of 21 December 1867, Austria became a “constitutional monarchy,” still having, however, a monarch with far-reaching prerogatives, veto rights, and the power to proceed with emergency legislation.

The Constitution of 1 October 1920 was the result of a revolutionary development but at the same time the constitutional system created in this context incorporates elements of the constitutional monarchy (D’Orlando 2009; Schmetterer 2021). This is the case, for example, for some

fundamental rights, for the Constitutional Court which finds a predecessor in the “Reichsgericht” of 1869, for the Administrative Court (“Verwaltungsgerichtshof”) which had a predecessor with the same name, created in the years 1867/1876, and for the existence of legally defined and constitutionally recognized countries (“Länder”). In general, it can be said that the historic development of the Austrian Constitution is therefore characterized by elements of revolutions (1918 and 1945), ruptures, continuities, and discontinuities, but also evolutionary development (Jablonec 2020).

Creation and Development of the Austrian Constitution of 1918–1920

The revolutionary events leading to the enactment of the Austrian constitution date back to the final days of World War I when, on 21 October 1918, within the Old Austrian Parliament, the “Reichsrat,” the representatives of the German-speaking areas, took the initiative to form a “Provisional Parliament of the Germans in Austria” (“Provisorische Nationalversammlung der Deutschen Österreichs”). The ensuing constitutive process had been lasting for nearly two years, a period characterized by intense debates and outright conflicts, by a continuous consolidation and extension of the draft’s material content and ending up in a compromise with some pivotal questions remaining unsettled. The Paris peace negotiations which took place partly in parallel

had also considerable repercussion on the outcome of this constitutive process.

On 30 October 1918, the “seceding part of the Austrian Parliament” seized sovereign power for the German-speaking parts of the Empire with the “Decree on the Fundamental Institutions of the State German-Austria” (“Beschluss über die grundlegenden Einrichtungen der Staatsgewalt,” StGBI 1918/1). On 12 November 1918, “German-Austria” (“Deutschösterreich”) was declared a democratic Republic to constitute part of the German Republic. By the Act of 21 October 1919, the prohibition of accession, stipulated by Article 88 of Treaty of Saint Germain of 10 September 1919, was taken into account and this state’s name was officially changed from “Deutschösterreich” to “Österreich.” This “Act on the State form” (“Gesetz über die Staatsform”) continued, however, to deny Austria’s state continuity with the Austrian-Hungarian Empire, while this (partial) state continuity was clearly accepted in Article 177 of the Treaty of Saint Germain on the state responsibility for the War.

In parallel, also on the level of the single regional countries (“Bundesländer”), a constitutive process took place as provisional country parliaments were constituted. Some of these countries issued a declaration of accession to the German-Austrian Republic. On 14 November 1918, a federal act declared the seizure of state sovereignty in the countries. The constitutive process on the level of the single regional countries may have been legally irrelevant or even an absurdity but it sent local political signals to Vienna conveying the message that the new Republic had to be a federal one, a wish heeded by the act of 14 November 1918.

The democratic foundation of this constitutive process was further strengthened by the holding of general elections for a constitutive parliament (“Konstituierende Nationalversammlung”) on 16 February 1919. From then on the constitutive process was driven by parliamentarians of the Republic, elected by the general electorate including, for the first time, also women. The Subcommittee of the Constitutional Committee (“Unterausschuss des Verfassungsausschusses”) elaborated the constitutional draft with Professor

Hans Kelsen as an advisor. The final document was adopted on 1 October 1920 by the constitutive parliament as Constitutional Act N. 1 (BGBl. 1920/1) and entered into force on 10 November 1920.

This constitution was based on the following guiding principles:

- The democratic and the republican principle with an (originally) dominant parliament composed of two chambers, the “National Council” (“Nationalrat”) and the “Federal Council” (“Bundesrat”), representing the federal countries and a president as a head of state, elected for four years by the two chambers of the parliament as Plenary Assembly (“Bundesversammlung”) and having predominantly representative functions.
- The federal principle, implemented by the creation of a Federal Republic composed of nine federal countries with rather limited competences. The dimension of these competences, as definitely defined in 1925, was considered to lie at the “lowest level” possible for a state still to be qualified a “Federal Republic,” with a clear concentration of power in Vienna having been demanded by the Socialist Party and also been favored by the Christian Democrat leader Ignaz Seipel (Adamovich et al. 2020a, p. 79).
- Legal continuity: On the basis of the “Legal Transfer Act” of 1920 all acts and regulations of the Empire and the federal countries, as far as they were compatible with the new constitutional order, were transferred to the Republic. Thereby, the basis was set for the newly created constitutional order to become operative notwithstanding the fact that many details of this order had to be adapted in the aftermath.
- Lack of a new, coherent catalogue of fundamental rights: Due to the strong rivalry between the conservatives and the left characterizing the whole life of the “First Republic” (1918–1938), it was not possible to integrate a new catalogue of fundamental rights into the constitution. Only isolated provisions in the constitution had a fundamental rights character. For the (predominant) rest it had been

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