

New Constitutional Horizons

Conference on Constitutional Reform held in the Austrian Parliament Building

Vienna (PK) “Can Constitutional Reforms Succeed?” This is the question that leading international experts will explore by discussing and comparing experiences at a conference being held today and tomorrow in the Austrian Parliament Building. Invited by the Institut für Föderalismus (Institute for Federalism) at the University of Innsbruck and the Forum of Federations, eminent guest speakers such as the President of South Tyrol, Luis Durnwalder, former Swiss Federal President Arnold Koller and Federal Council Vice-president Jürgen Weiss all presented position papers, which were then heavily debated.

After greeting the speakers, Peter Bussjäger of the Institut für Föderalismus drew attention to the fact that, within Europe, a large number of constitutional law cases are currently being heard and that these can serve as a source of experience. The basic intent of the event is to take the knowledge gained internationally in the area of constitutional reform and to apply it. The conference can be viewed against the backdrop of the work done as part of the Austrian Convention. Bussjäger offered special thanks to the Federal Council as well as the Chancellery, both of which were instrumental in organizing this event.

Wolf Okresek, a member of the Board of the Forum of Federations, outlined the topics covered by the conference and also noted that a comparison of individual systems and related global dialogue could point the way in large measure to individualized solutions.

Lienbacher: From the Austrian Convention to Constitutional Reform

Georg Lienbacher, Director of the Constitutional Affairs Office in the Chancellery, began his remarks by reviewing the current status of and future prospects for state reform in Austria. He made a point of explaining that several attempts at reform had been made, yet these led to hardly any results. Consequently, over the last 40 years, attempts were repeatedly made to amend the Austrian constitution to adapt to changing conditions, for

example, in connection with Austria's entry into the EU, of which the 1992 "Perchtoldsdorfer Agreement" is the only one worth mentioning.

The European Convention also provided an important impetus to the process so that, in the end, an Austrian Convention was set up. In the 19 months that it was active, numerous proposals were developed, however, no consensus could be reached regarding any real reform of the constitution. Lienbacher provided an analysis of the general framework requirements of the time and spelled out concrete reasons that prevented the Convention's work from leading to a positive outcome in his opinion.

Lienbacher continued by explaining that the government program for the 23rd Legislature includes state and constitutional reforms based on the work already done as part of the Austrian Convention, which had also set a goal of establishing an up-to-date domestic constitution. To this end, a corresponding group of experts was formed to develop concrete proposals, at which point the decision was made to move away from the goal of writing a completely new constitution, according to Lienbacher. He then went on to describe the content of the intended reforms and the current status of the work being done.

Caravita: The Italian Road to Federalism

Beniamino Caravita of the University of Rome "La Sapienza" described the impact of the new Italian constitution of 2001 and presented the related series of events underlying the reform process within a historical and legal context. The Italian constitution of 1948 was a rigid document that precluded complete revision. As a result, it became difficult to set the reform process in motion.

In this regard, the professor explained that some elements of the constitution—such as its republican and democratic principles—could not be revised. Article 139 clearly states that the monarchy cannot be installed in Italy on constitutional grounds. The same situation applies to Article 1, which codifies the democratic principle of Italy as well as

the basic rights stipulated in the first 12 articles of the constitution. These basic rights are inviolable; they cannot be modified under constitutional law.

Against this backdrop, Caravita reviewed discussions in Italy involving constitutional law and the question regarding why and how a revision of the constitution should be undertaken. It was also necessary to consider that a significant majority that included the Opposition—with the exception of the Monarchists and the Neofascists— adopted the constitution of 1948, thereby creating the myth that it is the product of a Golden Age. Accordingly, few constitutional amendments were made during the previous century and these would have been selective changes. Only in 1999 did the discussion surrounding reform enter a new phase. From the very beginning, the debate focused on regionalism and, with it, federalism. Another reform approved through a referendum in 2001 followed the one in 1999. According to Caravita, it has been possible since that time to speak of an Italian road to federalism. He then went on to provide a detailed description of the new constitution.

Durnwalder: South Tyrol, A Model for Success

The President of South Tyrol, Luis Durnwalder, emphasized the European dimension of constitutional discussions. It is important to discuss federalism against the backdrop of different types of regional approaches. Regardless whether the difference in mentality in the individual states leads to different rules, and especially in Italy where there is always a need for negotiation in this regard, it always comes back to translating into practical terms the intent referred to by the previous speaker.

Durnwalder described in detail, using concrete examples, the constitutional reality in Italy today, especially with respect to the rights of the ordinary regions and those of the special-status regions: Sicily, Sardinia, Friuli-Venezia Giulia, the Aosta Valley, Trentino and South Tyrol. There is another level to this type of regional autonomy and this one applies to South Tyrol, which originally gained autonomy based on an international agreement. In fact, this agreement led to some intense debate in the 1950s and 1960s. With this so-called package, which includes an interpretation of the initial autonomous

status, the very special status of South Tyrol's autonomy, in which Austria plays a protective role, was generally recognized.

Durnwalder then reviewed the advantages and opportunities of autonomy that, in light of South Tyrol's experience, even ordinary regions could benefit from. Autonomy must be understood in a dynamic way, which means in practical terms that any negotiation of the rules of autonomy must always conform to the current reality. The President illustrated this approach by referring to the economic, transportation and infrastructure policies of South Tyrol. Autonomy has proven to be a success reflected in South Tyrol's impressive key economic indicators. Therefore, autonomy is critical not only for a region's economic development, but also its culture, and, for this reason, it is a model for the future, concluded Durnwalder.

Hueglin: Canadian Singularities

Thomas Hueglin of the University of Waterloo discussed the Canadian way "between failure and constitutional reform and pragmatic solutions". For many years, Canada was of marginal interest, although Hueglin has been explaining for a long time that the EU clearly corresponds more to the Canadian model than the American one. Today, the Canadian federal state is looked at in a new way.

The speaker went on to describe the peculiarities of Canada, not only from the point of view of different economic interests, but, first and foremost, its "bicomunal" nature. Culturally and linguistically, Quebec is like an island of French in the middle of a cultural sea of North American English, which makes the issue of "bicommunality" an especially sensitive one.

The Canadian constitution of 1867 reveals not only a few singularities worth mentioning, but also some anomalies. According to Hueglin, this particular hodgepodge has influenced the constitutional reform process. In 1982, the first major constitutional amendment package was concluded, followed by two additional attempts, one in 1987 and another in 1992, to include Quebec, which did not agree to the 1982 reform. Both

attempts failed, explained the speaker, who then went on to describe the reasons why. From this, it follows that no clear, federal-state rules could exist for all of Canada. Instead, political agreements reached at the executive level within the framework of a bilateral procedure represent the Canadian way to put federalism into practice.

Switzerland: The Successful Building-Block Approach to Constitutional Reform

Former Swiss Federal Council President Arnold Koller opened his discussion of the complete revision of the Swiss constitution with a look back in time: it took 35 years to reform the constitution adopted in 1874, which was confusing and somewhat obsolete after countless partial revisions, as well as full of gaps in the area of basic rights, until ratification of the new Constitution of the Swiss Confederation.

The goal was to “update” written and unwritten constitutional law, to make it more comprehensible, to organize it in a systematic way, and to standardize the language. Following rejection of the EEA Agreement in 1992, a three-point program was developed based on the motto, “Putting Our Own House in Order”. The successful recipe proved to be an approach that combined the updating of federal constitutional law and the introduction of several reform packages like a series of building blocks.

According to Professor Koller, the mandate to update the constitution set by Parliament in 1987 was based on a definition of effective, unwritten constitutional law and the standards worthy of being enshrined in the constitution. Constitutional reality was the guiding principle of a complete revision.

Koller described one of the important parts of the reform process as the completion of the catalogue of basic rights in which achieving transparency played a significant role. Reform of the justice system was also successful: important federal responsibilities were enshrined in the constitution, achieving the standardization of the code of criminal procedure and the code of civil procedure. Less successful was the reform of civil rights, a sensitive issue in the direct democracy of Switzerland.

In summary, Federal Councillor Koller realized that the building-block principle has held up well; without it, there would not be a new constitution today. The unpretentious updating did more for constitutional law than was originally expected. The new constitution was adopted with a clear, popular majority and a slight upper-house majority. It was possible to provide the increasingly emotional and polarized day-to-day politics in Switzerland with the support and direction it needed.

Jürgen Weiss: Expected Significant Reforms

Jürgen Weiss, Vice-president of the Federal Council began his answer to the question, “Will there really be constitutional reform this time?” with a look back at previous Austrian constitutional developments. While he considers the criticism of the improper adoption of constitutional clauses, in particular, through “old-fashioned Grand Coalitions” justified, he also notes that there were good constitutional reforms, for instance when the wishes of the Federation were offset by concessions made to the Länder.

According to Jürgen Weiss, the failure of the Perchtoldsdorf Agreement prior to Austria’s entry into the EU signalled a change in the framework requirements of the federalism discussions in the 1990s at a time when federalism, not centralism, was being criticized. Federalism was portrayed as an impediment to mobility and demands were made for a new Austrian structure.

The constitutional convention, which focused on a new constitutional charter, could not meet the high expectations because the different political interests could not be hidden. However, the Austrian Convention does deserve credit for organizing and laying important groundwork with respect to the issue. In the meantime, the political conditions have changed. The governing parties hold the constitutional majority in the National Council and the Federal Council, and the government program contains very detailed sections concerning constitutional reform. Moreover, a new politically balanced power arrangement currently reigns at the Länder level.

Against this backdrop, the Vice-president ventured to predict that, at any rate, considerable reform will be achieved. For example, some clear solutions would exist for the administrative jurisdiction of the Länder. Whether this will be THE great constitutional reform must be put aside for the moment since, now as always, considerable hurdles must be overcome. Weiss referred to the fundamental criticism of the federal state and cautioned against exaggerated and unrealistic expectations of cost savings. Weiss is convinced that the opportunity to cut costs is, in reality, less than expected since the increased protection of rights, for example, requires investment. The prerequisite for lowering administrative costs is a decrease in responsibilities. Last but not least, it is important to remember that the administrative costs in Austria are already lower than the EU average.

According to the Vice-president, additional hurdles exist in Austria in the widespread idea of vested rights that is hampering a revision of the constitutional text because many organizations consider it important to “appear” in the constitution. Also, the question remains on how to organize the protection of the Länder, something Weiss believes is the responsibility of the Federal Council. Weiss seemed sceptical of the trend towards executive federalism because the controlling influence of the Länder parliaments in relation to the President would be repressed. In Jürgen Weiss’s opinion, one important question is how significant the legislative responsibilities of the Länder parliaments will be in future.

Lastly, he revealed a preference for not following the principle of “all or nothing” in favour of carrying out constitutional reform through compromise on a step-by-step basis. To do this will require the strength to withstand the influence of political interests. When it comes to constitutional politics, what is clear is that no progress can be made without firmly adhering to the goal and to procedures.