

## Austria: Failure of Constitutional Convention; No Changes for Federal System

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The Republic of Austria is one of the “old” European federal systems. It was founded in 1918 as the Republic of German-Austria by the Provisory National Assembly, created out and with the political will of the German-speaking *Länder* of the former Austro-Hungarian Empire; it was then re-established in 1945 at the end of the Second World War. The federal Constitution, which dates back to the Constitutional Act of 1920, has been amended many times and also supplemented by numerous, additional federal constitutional acts and provisions. This is one of the reasons why Austria convened a constitutional convention in 2003, consisting of 70 experts and functionaries, including representatives of the nine *Länder*, and chaired by the president of the Federal Court of Auditors. Its task was to draft a new federal constitution and to present it at the beginning of 2005. The intention was not just to create a comprehensive constitutional document, but also to update the substance of the present Constitution and, in particular, to reform the federal system. However, the Constitutional Convention failed to effect a compromise between the political parties and between the federation and the *Länder* so that a broad reform of the federal system seems unlikely at the present time. A parliamentary committee is now expected to tackle some of the reform issues, but the conservative government faces the difficulty that any constitutional reform would need the consent of the main opposition party – the Social Democrats.

Options for change include a modification of the composition and functions of the Federal Council (*Bundesrat*), the upper house of the federal Parliament. The members of the Federal Council are elected by the *Land* parliaments, with a system of proportional representation according to the numbers of *Land* citizens. As a rule, the Federal Council is only entitled to object to a bill that passed the lower house (National Council or *Nationalrat*), but its objection may be overruled by the National Council with a qualified quorum. There are only few cases where the Federal Council enjoys the right of absolute veto, such as a bill that intends to diminish *Länder* powers. This right of absolute veto has not been exercised so far and neither, with very few exceptions, has the right of suspensive veto. This is because the members of the Federal Council are closely linked to their political allies in the National Council, which deters them from withholding their consent to a bill that was approved by a majority of the National Council. The question, therefore, is whether another mode of selection (for example, nominations by *Land* governors or direct elections by the *Land* citizens) or a closer linkage between the *Land* parliaments and their delegates would strengthen the representation of *Länder* interests in the Federal Council.

Another issue is a possible transformation of the system of “indirect federal administration” into direct *Länder* representation. Presently, the *Land* governors – and the independent administrative tribunals – are able to perform the major federal administrative tasks on behalf of the federation. Modifications regarding the allocation of responsibilities could therefore include an extension of *Länder* administrative powers, although this would not compensate for the loss of legislative powers that the *Länder* will probably suffer.

Although legislative and administrative powers are shared between the federation and the *Länder*, the judiciary remains solely the responsibility of the federation. This could change, however, as the Constitutional Convention recommended the establishment of *Land* administrative courts. These courts would replace the present independent administrative

tribunals and put the administrative jurisdiction on a more decentralized footing, rather than being exercised by a central authority, namely the Administrative Court.

The federal Constitution regulates the system of legislative and executive governance in the *Länder*. It determines the selection and role of the *Land* parliaments, the *Land* governments, and *Land* governors, leaving it, however, to the *Länder* constitutions to adopt more detailed or supplementary provisions. In addition to the explicit federal constitutional rules that apply to the *Länder* constitutions, the Constitutional Court has repeatedly applied implicit standards of homogeneity to the *Länder* constitutions. Still, their systems of legislative and executive governance do not completely reflect the system at the federal level. For instance, the *Land* parliaments do not have a bicameral structure, nor are the *Land* governors elected directly (as the federal president is). The *Land* governments, including the *Land* governors, are elected by the *Land* parliaments according to either a proportional or majority election system, whereas the federal government is appointed by the president. The *Land* governors render an affirmation with respect to the federal Constitution to the president before assumption of office.

The *Länder* are directly represented at the level of the federal legislature in the Federal Council. *Land* law-making, in turn, is subject to federal supervision, which, in some cases, may even prevent a *Land* law from entering into force. The federal president is formally involved at the *Länder* level, as he appoints the *Land* Governor and is even empowered to dissolve the *Land* parliaments (which in practice has never happened).

**Clearly, the status of the *Länder* would be much weaker were it not for numerous instruments of intergovernmental cooperation, both legal and informal,** such as *Länder* conferences, a *Länder* liaison office, private law contracts, and public law treaties between the federation and the *Länder*. In the arena of fiscal federalism, where the federation still plays the predominant role, the two orders have developed many instruments of intergovernmental coordination.

Although local government constitutes the third tier in Austria, the municipalities are not constituent units of the federal system. Their basic structure is established by the federal Constitution, but the more detailed law making on local government is left to the *Länder*. Municipal representative associations take part in cooperative fiscal federalism, but that is almost the only sign of a “three-layer-federalism.”

The Constitutional Convention was confronted with a plethora of reform options. It will remain a very difficult task to find a suitable solution, which must combine a federal structure of governance with the challenges of EU membership. In particular, this will have vital importance for the future role of the *Land* parliaments, as any further decrease of their powers would throw into question the federal system as a whole.