THE AUSTRIAN CONSTITUTIONAL CONVENTION: CONTINUING THE PATH TO REFORM THE FEDERAL STATE?

Anna Gamper
Associate Professor
Institut für Öffentliches Recht, Staats- und Verwaltungslehre
University of Innsbruck

SUMMARY: 1. The Federal Constitution and the Federal State: An Overview. – 2. The Reform Process until 1995. – 3. Changes to the Federal System in the Aftermath of EU Accession. – 4. The Austrian Constitutional Convention. 4.1. General Remarks. 4.2. The Allocation of Powers. 4.3. The Federal Council. 4.4. Fiscal Federalism. 4.5. Administrative Courts in the *Länder*. – 5. Concluding Remarks. – Bibliography. – *Resum-Abstract.*

1. The Federal Constitution and the Federal State: An Overview

The Republic of Austria, founded in 1918 with the political will of the constituent *Länder*[1] and re-founded in 1945 at the end of the Second World War, belongs to the "classical" European federal systems.[2]

1. See P. Pernthaler, *Die Staatsgründungsakte der österreichischen Bundesländer*, Braumüller, Vienna, 1979; K. Weber, "Die Entwicklung des österreichischen Bundesstaates", in: H. Schambeck (ed.), *Bundesstaat und Bundesrat in Österreich*, Verlag Österreich, Vienna, 1997, 37 ff.; K. Edtstadler, "Das Werden des Bundesstaates", in: H. Schambeck (ed.), *Bundesstaat..., cit.*, 23 ff.; P. Bußjäger, *Landesverfas sung und Landespolitik in Vorarlberg – Die Verfassungsgeschichte Vorarlbergs und ihre Auswirkungen auf die Landespolitik 1848 – 2002*, W. Neugebauer, Graz/Feldkirch, 2004.

2. Together with Germany, Switzerland and, more recently, Belgium. Moreover, strongly decentralized states, such as Spain and Italy, nearly approach the – very vague and controversial – standard of a federal system.

The Federal Constitution comprises the Federal Constitutional Act (*Bundes-Verfassungsgesetz*, hence B-VG), enacted in 1920,[3] a large number of additional federal constitutional laws or constitutional provisions within ordinary federal laws. There are also several laws dating back to the former Austro-Hungarian monarchy, which ended in 1918. Together with certain international treaties, these also have the status of federal constitutional law. Apart from the period of Austro-fascism (1934 - 1938) and the period of occupation (1938 - 1945), the B-VG has been in force since 1920. It was re-enacted after the Second World War in 1945, again with the support of the constituent *Länder*, and has since been amended 93 times.[4]

Constitutional doctrine and jurisprudence recognise certain fundamental constitutional principles: democracy, federalism, the rule of law, republicanism, the separation of powers and human rights.[5] These principles are even better protected than "ordinary" federal constitutional law. Federal constitutional law can be amended by a qualified majority of two-thirds of the votes cast, in the presence of at least half the members.[6] A referendum is compulsory, however, if the fundamental principles are significantly modified or abolished; this is understood as a "total revision" of the constitution within the terms of Art 44 para 3 B-VG. Such a referendum took place when Austria joined the European Union in 1995. EU membership necessitated a range of modifications to the Austrian legal system, including the principle of federalism.

Austria is a strongly unitary and symmetric federal state, being classified among the most centralized federal states worldwide.[7] The

---

3. See F. Ermacora, *Die Entstehung der Bundesverfassung 1920*, 4 vols., Braumüller, Vienna, 1986-1990.

4. An overview of Austrian constitutional law is given by R. Walter/H. Mayer, *Grundriß des österreichischen Bundesverfassungsrechts*[9], Manz, Vienna, 2000; L. Adamovich et alii, *Österreichisches Staatsrecht*, 3 vols., Springer, Vienna/New York, 1997-2003; T. Öhlinger, *Verfassungsrecht*[6], WUV, Vienna, 2005; P. Pernthaler, *Österreichisches Bundesstaatsrecht*, Verlag Österreich, Vienna, 2004; W. Berka, *Lehrbuch Verfassungsrecht*, Springer, Vienna, 2005.

5. Some, but not all of these principles are explicitly proclaimed in the Federal Constitution: For instance, Art 2 B-VG stipulates that "Austria is a federal state" that consists of the nine *Länder*.

6. Art 44 para 1 B-VG.

7. K. Loewenstein, *Verfassungslehre*[3], Mohr, Tübingen, 1975; R. Watts, *Comparing Federal*

nine constituent *Länder* are vested with both legislative and administrative powers, including the residual competence and constitutional autonomy, but they do not partake in the judiciary.[8] They have parliaments and governments of their own and are represented in the second chamber (*Bundesrat* or Federal Council) of the federal parliament which, however, is an excessively inefficient instrument for the representation of their interests.[9] The federation has much stronger powers[10] and is also entitled to supervise[11] the law-making of the *Länder* to a certain extent which makes them appear almost subordinate. The *Länder* are somehow compensated for their lack of strong powers by the system of "indirect federal administration"[12] that obliges the *Land* governors and subordinate *Land* authorities to perform federal administrative matters on behalf of the federation. Although, in this case, the *Land* governors are bound to observe instructions of the federal government and ministers and although they do not execute the laws of their own *Land*, the system of indirect federal administration enlarges the executive sphere of the *Länder*. The power to regulate financial equalisation is confined to the federation,[13] and, although Financial Equalisation Acts are traditionally negotiated by the representatives of the three territorial entities (federation, *Länder*, municipalities),

Systems[2], McGill, Montreal et alii, 1999; A. Gamper, "Österreich – Das Paradoxon des zentralistischen Bundesstaates", in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed.), *Jahrbuch des Föderalismus 2000*, Nomos, Baden-Baden, 2000, 251 ff.; R. Sturm, "Austria", in: A. Griffiths (ed.), *Handbook of Federal Countries*, 2002, McGill, Montreal et alii, 2002, 45 ff.; P. Bußjäger, "Der "zentralistischste aller Bundesstaaten" als (Lehr)Beispiel für Europa? Der Fall Österreich", in: M. Piazolo/J. Weber (eds.), *Föderalismus – Leitbild für die Europäische Union?*, Olzog, Munich, 2004, 128 ff.; P. Pernthaler/A. Gamper, "National federalism within the EU: the Austrian experience", in: S. Ortino et alii (eds.), *The Changing Faces of Federalism*, Manchester University Press, Manchester, 2005, 134 ff.

8. On the allocation of powers and constitutional autonomy see, with more detail, P. Pernthaler, *Österreichisches Bundesstaatsrecht*, *cit*., 313 ff. and 459 ff.

9. See H. Schambeck (ed.), *Bundestaat und Bundesrat in Österreich*, Verlag Österreich, Vienna, 1997; H. Schäffer, "The Austrian Bundesrat: Constitutional Law – Political Reality – Reform Ideas", in: U. Karpen (ed.), *Role and Function of the Second Chamber*, Nomos, Baden-Baden, 1999, 25 ff.

10. Particularly, but not exclusively, those that are enumerated by Art 10 para 1 B-VG.

11. See P. Pernthaler, *Österreichisches Bundesstaatsrecht*, *cit.*, 483 ff.

12. Art 102 B-VG. See also K. Weber, *Die mittelbare Bundesverwaltung*, Braumüller, Vienna, 1987; B. Raschauer, "Artikel 102 B-VG", in: K. Korinek/M. Holoubek (eds.), *Österreichisches Bundesverfassungsrecht*, Springer, Vienna/New York, 2001; P. Bußjäger, "Artikel 102 B-VG", in: H.P. Rill/H. Schäffer (eds.), *Bundesverfassungsrecht*, Verlag Österreich, Vienna, 2002.

13. § 3 Finanz-Verfassungsgesetz.

these federal acts usually allocate the most profitable taxes at the federal level, leaving to the *Länder* hardly any important taxes of their own and making them thus depend on shares in joint federal taxes and on federal subsidies and allotments.[14] A range of intergovernmental instruments, however, improves the weak position of the *Länder*.[15] Their intergovernmental conferences, above all the powerful Conference of *Länder* governors, together with the Liaison Office of the *Länder* prove strong instruments that co-ordinate their interests and in a co-operative spirit represent them vis-à-vis the federation. The *Länder* may also conclude formal treaties[16] with each other and with the federation which is helpful to harmonise legislation despite the fragmented allocation of powers, and they may participate in the process of EU law-making.[17]

2. The Reform Process until 1995

The “decline of federalism” began shortly after the enactment of the B-VG in 1920. A number of federal constitutional amendments transferred *Länder* powers to the federation and restricted the financial and constitutional autonomy of the *Länder*.[18] This development continued in the “Second Republic” after 1945 and even after the State Treaty of Vienna (1955) when Austria regained her full sovereignty. Increasing centralisation of *Länder* powers – in particular matters related to the supervision and steering of economic development – even

---

14. See, comprehensively, P. Pernthaler, *Österreichisches Bundesstaatsrecht*, *cit.*, 391 ff.

15. See K. Weber, “Macht im Schatten? (Landeshauptmänner-, Landesamtsdirektoren und andere Landesreferentenkonferenzen)”, *ÖZP* 1992, 405 ff.; A. Rosner, *Koordinationsinstrumente der österreichischen Länder*, Braumüller, Vienna, 2000; G. Meirer, *Die Verbindungsstelle der Bundesländer oder Die gewerkschaftliche Organisierung der Länder*, Braumüller, Vienna, 2003; P. Bußjäger, “Föderalismus durch Macht im Schatten? – Österreich und die Landeshauptmännerkonferenz”, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed.), *Jahrbuch des Föderalismus 2003*, Nomos, Baden-Baden, 2003, 79 ff.

16. Art 15a B-VG. See also R. Thienel, "Artikel 15a B-VG", in: K. Korinek/M. Holoubek (eds.), *Österreichisches Bundesverfassungsrecht*, Springer, Vienna/New York, 2000.

17. Art 23d B-VG. See also T. Öhlinger, "Artikel 23d", in: K. Korinek/M. Holoubek (eds.), *Österreichisches...*, *cit*.

18. See P. Pernthaler, "Verfassungsentwicklung und Verfassungsreform in Österreich", in: B. Wieser/A. Stolz (eds.), *Verfassungsrecht und Verfassungsgerichtsbarkeit an der Schwelle zum 21. Jahrhundert*, Verlag Österreich, Vienna, 2000, 67 ff. (101).

inspired academics to speak of a "creeping total revision",[19] meaning a process where the constitutional principle of federalism was undermined by a wide range of smaller constitutional amendments that, taken as single measures, did not amount to a "total revision" and therefore did not require a compulsory referendum.

The *Länder* developed their own strategies against this process of centralisation: They strove for co-operation and solutions through negotiation, seeking to move the federal government to accept step-by-step reform bills that were, however, submitted by the *Länder* with the view towards overall reform. In 1964, 1970 and 1976 the *Länder* Governors presented comprehensive reform programs that were followed by a "catalogue of demands" in 1985.[20] Several *Länder* parliaments also passed resolutions that demanded a reform of the Austrian federal system. In addition to these official statements, citizens' initiatives in the *Länder* Tyrol and Vorarlberg claimed more rights for the *Länder*, and in Vorarlberg even a referendum took place on this issue. The federal government, on its part, presented "counterclaims" part of which, however, were dropped even before negotiations.[21]

The *Länder* succeeded to trigger off a couple of constitutional amendments in their favour. The first of these constitutional amendments that became law in 1974 was probably the most sweeping: It vested the *Länder* with the right to conclude formal treaties with each other and with the federation respectively, and strengthened their powers and organisational autonomy as well as the system of indirect federal administration. Further amendments (1977, 1981, 1983/84, 1987/88, 1990 - 1994) improved the position of the *Länder* in certain aspects, such as granting some additional powers and constitutional autonomy, the (very limited) right to conclude international treaties

19. See, for example, F. Ermacora, *Der Verfassungsgerichtshof*, Styria, Graz et alii, 1956; L. Adamovich/H. Spanner, H*andbuch des österreichischen Verfassungsrechts*[5], Springer, Vienna/New York, 1957; P. Pernthaler, Der *Verfassungskern*, Manz, Vienna, 1998, 70 ff.

20. See P. Pernthaler, *Das Forderungsprogramm der österreichischen Bundesländer*, Braumüller, Vienna, 1980; K. Berchtold, *Die Verhandlungen zum Forderungsprogramm der Bundesländer seit 1956*, Braumüller, Vienna, 1988; T. Thanner, "Bundesstaatsreform und Forderungsprogramme der Bundesländer", in: H. Schambeck (ed.), *Bundesstaat und Bundesrat in Österreich*, Verlag Österreich, Vienna, 1997, 275 ff.

21. See P. Pernthaler, *Verfassungsentwicklung*..., *cit.*, 103.

and the Federal Council's absolute veto in the case of further loss of Länder powers. Although the federation also gained some new powers in exchange for *Länder* powers, the process of centralisation and increasing federal interference in the organisational affairs of the *Länder* could be basically brought to a halt. At the same time, the *Länder* revived their constitutional autonomy by creating new *Land* constitutional provisions concerning human rights, citizen participation, state aims and the political system of the *Länder*. Co-operative federalism increasingly gained more and more importance, which was facilitated by the establishment of a liaison office for the *Länder* as well as a wide range of interregional conferences – with the conference of the *Land* governors as the politically most relevant, though informal body.

A couple of years before Austria joined the European Union – which happened in 1995 – a reform of the system of Austrian federalism had been inseparably linked to the discussion on an accession to the EU.[22] Facing loss of competences in areas that were to be mainly regulated by the EU instead of the *Land* parliaments in the future, the *Länder* demanded to be compensated by an internal reform of federalism, a co-operative accession process and the establishment of an effective *Länder* participation procedure in EU matters. The federal government agreed to a "minor" reform that comprised a treaty between the federation and the *Länder* in EU matters[23] (that was supplemented by another EU-related treaty concluded "horizontally" by the *Länder*[24]), the constitutional enactment of the EU participation procedure of the *Länder*[25] and the establishment of certain co-operative advisory bodies[26] as well as the new *Land* (hitherto federal) power

22. See, for example, W. Burtscher, *EG-Beitritt und Föderalismus*, Braumüller, Vienna, 1990; F. Staudigl, "Zur Rolle der österreichischen Länder im europäischen Integrationsprozess", *ZÖR* 46 (1993), 41 ff.; P. Pernthaler (ed.), *Auswirkungen eines EG-Beitrittes auf die föderalistische Struktur Österreichs*, Braumüller, Vienna, 1989; P. Pernthaler (ed.), *Bundesstaatsreform als Instrument der Verwaltungsreform und des europäischen Föderalismus*, Braumüller, Vienna, 1997.

23. *Vereinbarung zwischen dem Bund und den Ländern gemäß Art 15a B-VG über die Mitwirkungsrechte der Länder und Gemeinden in Angelegenheiten der europäischen Integration*.

24. *Vereinbarung zwischen den Ländern gemäß Art 15a B-VG über die gemeinsame Willensbildung der Länder in Angelegenheiten der europäischen Integration*.

25. See, in particular, Art 23d B-VG.

26. Namely, *Rat für Fragen der österreichischen Integrations- und Außenpolitik* and *Arbeitsgruppe für Integrationsfragen*.

to regulate the transfer of building plots.[27] A more comprehensive ("structural") reform of federalism was theoretically prepared by a joint commission at the Federal Chancellor's Office[28] and politically agreed in 1992 ("pact of Perchtoldsdorf"), even tabled in the Federal Parliament (three times altogether), but in the end without succeeding to become law, due to ultimate political unanimity on single reform issues and the loss of the constitutional majority of the coalition government.[29] The *Länder*, however, consented to join the European Union and have since suffered from the dreaded loss of policy-making power, the erosion of power of *Land* parliaments and the predominance of the executives. Moreover, the federal government exerts a new supervisory role as it represents the Republic externally, provides information and co-ordinates joint implementation in those new "complex matters" that have a homogeneous basis in EU law but are confronted by the fragmented Austrian distribution of powers so that both the federation and the *Länder* may be responsible for the implementation of the respective aspects of an EU directive.[30]

3. Changes to the Federal System in the Aftermath of EU Accession

Since EU accession, a couple of minor federal constitutional amendments have been enacted, most of them favouring the central government, some favouring the *Länder*.

Amidst those that were of advantage to central government, one ought to mention the continued process of centralising powers. In 2002, a new Article 14b was inserted into the B-VG that redistribu-

27. BGBl 1992/276.

28. See the reports delivered in Bundeskanzerlamt (ed.), *Neuordnung der Kompetenzverteilung in Österreich*, Vienna.

29. See P. Pernthaler/G. Schernthanner, "Bundesstaatsreform 1994", in: A. Khol et alii (eds.), *Österreichisches Jahrbuch für Politik 1994, Geschichte und Politik*, R. Oldenbourg, Vienna/Munich, 1995, 559 ff.; T. Öhlinger, "Das Scheitern der Bundesstaatsreform", in: A. Khol et alii (eds.), Österreichisches..., *cit.*, 543 ff.; W. Brandtner, "Die Bundesstaatsreform aus der Sicht der Länder", in: P. Pernthaler (ed.), *Bundesstaatsreform als Instrument der Verwaltungsreform und des europäischen Föderalismus*, Braumüller, Vienna, 1997, 55 ff. (57 ff.).

30. See, with more detail, C. Ranacher, *Die Funktion des Bundes bei der Umsetzung des EU-Rechts durch die Länder*, Braumüller, Vienna, 2002.

tes power regarding public procurement.[31] Formerly, legislation and administration of this subject-matter had been split between the federation and the *Länder.* According to the new provision, the federation is almost exclusively responsible for procurement legislation – with a very minor exception that allows the *Länder* to enact law on legal remedies with regard to awards of contract that fall under the *Länder* administrative jurisdiction.[32] As regards the administration of public procurement, the authority is still split between the federation and the *Länder*, each being responsible for the execution of procurement matters within its own sphere (comprising also related enterprises, funds, self-governing bodies etc). Centralisation of the legislative power, however, seemed inevitable, not the least on account of EU procurement law that suggests homogeneous implementation.

More recently, the *Länder* have been deprived of another power that was transferred to the federation: Namely, their former authority regarding animal protection which is now enumerated by Art 11 para 1 no. 8 B-VG.[33] Art 11 para 1 B-VG enumerates those matters that fall into the federal sphere concerning legislation, and into the *Länder's* sphere concerning their execution. On the basis of the new authority, a federal Animal Protection Act was enacted, but one doubts that it realizes the intentions that accompanied the transfer of power, namely that a uniform federal act would establish better standards for the protection of animals than nine different *Land* acts. Although it is true that the former *Land* animal protection acts stipulated different protection standards, due perhaps also to the influence of farms and agricultural enterprises in the respective *Land*, these differences also demonstrated how competitive federalism could work: To offer a variety of different legal solutions, at least some of which may be better than a uniform minimum solution.

The maintenance of homogeneity within the federal system was

---

31. BGBl I 2002/99. See also R. Klaushofer, "Art 14b B-VG", *ZfV* 2003, 630 ff.; C. Kleiser, "Die neue Kompetenzverteilung im Vergaberecht", *ÖJZ* 2003, 449 ff. and M. Holoubek, "Das Bundesvergabegesetz 2002: Kompetenzgrundlagen – Geltungsbereich – Vergabeverfahren", in: Österreichische Juristenkommission (ed.), *Vergaberecht 2002*, NWV, Vienna/Graz, 2003, 18 ff.; H. P. Rill, "Art 14b B-VG", in: H. P. Rill/H. Schäffer (eds.), *Bundesverfassungsrecht*, Verlag Österreich, Vienna, 2004.

32. Art 14b para 3 B-VG.

33. BGBl I 2004/118.

another relevant issue in the last few years. In 1999, the "principle of homogeneity" that had applied to *Land* law concerning public employees of the *Länder* and municipalities was abolished.[34] Formerly, the respective *Land* laws had not been allowed to deviate fundamentally from the respective federal law concerning federal employees, at least not to an extent that would have made it difficult for *Land* or municipal employees to move to the federal civil service. This was one of the rather few examples where *Land* legislation had been bound to observe the rules set by ordinary federal laws;[35] usually, it is only bound to observe the Federal Constitution and the respective *Land* constitution. Although the *Länder* are now free to regulate the law concerning their own and municipal employees without these restrictions, Art 21 para 4 B-VG still requires both the federation and the *Länder* to inform each other about relevant reforms in order to provide for an adequate development of the law regulating public employees and their interest groups. Moreover, public employees are still allowed to move from one public employer (federation, *Länder*, municipalities, municipal associations) to another. Finally, Art 21 para 4 B-VG prohibits laws that would assess the terms of service differently according to the tier where the public employee had worked.

A major step towards co-operative fiscal federalism was set in 1999, when the treaties on a so-called "consultation mechanism"[36] and the "Austrian stability pact"[37] were concluded. Both treaties were

---

34. BGBl I 1999/8. See also P. Bußjäger, "Bemerkungen zur Neuregelung der Kompetenzverteilung auf dem Gebiet des Dienstrechtes der öffentlich Bediensteten", *JBl* 1999, 773 ff.

35. Another example is Art 12 B-VG that enumerates a couple of matters where the federation is responsible for the enactment of federal framework laws, and the *Länder* for the enactment of implementation laws and their execution. The difference, however, was that the *Länder* laws regulating Land and municipal civil service had not only to observe federal framework laws, but detailed federal laws that regulated the federal civil service.

36. *Vereinbarung zwischen dem Bund, den Ländern und den Gemeinden über einen Konsultationsmechanismus und einen künftigen Stabilitätspakt der Gebietskörperschaften* (see, e.g., BGBl I 1999/35). See also J. Weiss, "Der Konsultationsmechanismus als Instrument zur Reduzierung der Folgekosten gesetzgeberischer Maßnahmen", *JRP* 1997, 153 ff.; P. Bußjäger, "Rechtsfragen zum Konsultationsmechanismus", *ÖJZ* 2000, 581 ff.; K. Weber, "BVG Gemeindebund", in: K. Korinek/M. Holoubek (eds.), *Österreichisches Bundesverfassungsrecht*, Springer, Vienna/New York, 2000; H. Schäffer, "Konsultationsmechanismus und innerstaatlicher Stabilitätspakt", *ZÖR* 56 (2001), 145 ff.; P. Oberndorfer/B. Leitl, "Die Kostentragungsregeln nach Art 4 Konsultationsmechanismus im System der Finanzverfassung", *FS Adamovich*, Verlag Österreich, Vienna, 2002, 553 ff.

37. *Vereinbarung zwischen dem Bund, den Ländern und den Gemeinden betreffend die Koordination der Haushaltsführung von Bund, Ländern und Gemeinden (Österreichischer*

concluded under Art 15a B-VG between the federation and the *Länder*, but, exceptionally, also by the representative associations of the Austrian municipalities on behalf of the municipalities. Art 15a B-VG itself entitles only the federation and the *Länder* to conclude vertical and horizontal treaties with each other, but excludes the municipalities from these treaties. This is due to the classical concept of federalism that considers local government as a non-constituent unit of the federal system.[38] Only in exceptional cases, therefore, are municipalities allowed to join the federation and the *Länder* as a third partner – primarily, this concerns fiscal relations where the Austrian municipalities are traditionally represented in the political negotiations preceding the enactment of the Financial Equalisation Act. In order to entitle them to conclude the two treaties with the federation and the *Länder*, a Federal Constitutional Act of Authorisation was enacted that allowed the Austrian Association of Municipalities and the Austrian Association of Towns to conclude the treaties on behalf of the municipalities.[39] On this basis, the treaty on a "consultation mechanism" was concluded in 1999, whilst the treaty on an "Austrian stability pact", has meanwhile been re-enacted as the Austrian Stability Pact 2005.

The consultation mechanism provides that if the federation or a *Land* intends to enact a law or regulation that would have a financial impact on another territorial unit (except certain acts, such as the Financial Equalisation Act), the other partners may comment on the planned act within certain periods, and a consultation committee, where the federation as well as the *Länder* and municipalities are represented equally, may consider the issue and seek to find a solution.

Stabilitätspakt, BGBl I 1999/101). See also E. Primosch, *Stabilitätspakt*, Verlag Österreich, Vienna, 2000; A. Gamper, "Der Stabilitätspakt 2001 im Spannungsfeld von Budgetkonsolidierung und Finanzausgleichsgerechtigkeit", *JRP* 2002, 240 ff.

38. See, however, K. Weber, "Zwei- oder dreigliedriger Bundesstaat? Bemerkungen zur Stellung der Gemeinden in einer möglichen künftigen Bundesverfassung", *FS Pernthaler*, Springer, Vienna/New York, 2005, 413 ff.

39. These two associations are associations under private law, but mentioned also in Art 115 para 3 B-VG according to which the two associations represent the interests of all municipalities. In principle, there is just one type of Austrian municipality, irrespective of its size or number of inhabitants ("principle of the abstract and uniform municipality"), although there are some differences mainly concerning the position of Vienna and that of towns with their own statutes. Politically, however, the Austrian Association of Towns rather represents the interests of towns and larger municipalities, whereas the Austrian Association of Municipalities represents the interests of smaller municipalities.

If the committee fails to effect such a solution, the federation or *Land* that wants to enact the respective law or ordinance will have to bear the additional financial burden. In practice, the consultation mechanism improves mutual transparency as regards the expenses arising from planned legal measures, although the formal procedure is rarely applied. In some cases, statements are delivered too late, whereas in other cases informal negotiation may lead to the withdrawal of negative comments.

The Austrian Stability Pact 2001 and 2005, however, treats the three tiers much less equally. Whilst a deficit is to a certain extent allowed to the federation, the *Länder* have to achieve a budgetary surplus and the municipalities at least a balanced budget. If they do not meet these standards, a mediation committee that consists of equal numbers of representatives of all tiers will decide whether the defaulting partner will have to pay certain damages. The Stability Pact thus seeks to co-ordinate the budgets of the three territorial tiers, to make them more transparent and more predictable. Indeed, all EU member states that are federal systems need to harmonize their budgets internally so that the EU convergence criteria may be met. The Austrian Stability Pact, however, clearly discriminates against the *Länder* to the advantage of the federation and is in truth no co-operative instrument although this was suggested by a concordat under Art 15a B-VG. It is thus not surprising that the *Länder* did not volunteer to sign the treaty. Rather, they were forced to do so, since the Financial Equalisation Act 2005 provides that revenues of the *Länder* that they normally receive from shared federal taxes under the Financial Equalisation Act would be shortened to an extent identical with those amounts that they would have to achieve as a surplus under the concordat unless they ratified the Stability Pact.[40] Co-operation is thus perverted into coercion, allowing the *Länder* to choose between either the loss of revenues or the narrowing of their budgets. Their influence on the determination of the respective provision during the negotiations preceding the Financial Equalisation Act was very little, since the federation has a notorious reputation for dominating the other partners in the negotiations so that even the informal agreement that is signed afterwards, even though it may express the general consent of all partners to the purpose that the federation should follow the

40. See § 25 para 6 Finanzausgleichsgesetz 2005.

negotiations when enacting the Financial Equalisation Act, results under some political constraint. If, however, the agreement on a new Financial Equalisation Act is reached and signed (usually, every four years a new act is negotiated), the Constitutional Court will restrict its review of this law, assuming that no partner may feel seriously discriminated by a law that was agreed by all partners.[41] This means that the *Länder* would probably not succeed to challenge the respective provision of the Financial Equalisation Act before the Constitutional Court on grounds of discrimination and breach of the allocation of powers, since the Court would be disinclined to examine the law as thoroughly as would be the case had the *Länder* not themselves signed the financial equalisation agreement.

As regards the Constitutional Court's more recent adjudication concerning Austrian federalism, the "homogeneity" cases must be mentioned in the first place. In 1993, the Constitutional Court had repealed a provision of the Tyrolean Local Government Election Act that had provided for the direct election of mayors, due to lacking explicit provisions in the Federal Constitution.[42] The Court, however, held that the democratic principle on which the Federal Constitution was founded demanded a system of representative democracy with only minor direct democratic exceptions. Even though the Federal Constitution did not explicitly regulate the election of mayors, it was to be derived from the abstract constitutional principle of democracy that mayors should not be elected directly by the local citizens entitled to vote, but by the local council. Although the repealed provision had the rank of an ordinary *Land* law and not a *Land* constitutional law, one may assume that even a *Land* constitutional provision would have been in breach of the constitutional principle of (representative) democracy according to the Court's opinion. Thus, one could argue that also the constitutional autonomy of the *Länder* which is deemed to be a fundamental element of the principle of federalism would have been interpreted restrictively. Only after a federal constitutional amendment[43] had explicitly allowed *Land* constitutions to provide for the direct election of mayors, did the Constitutional Court decide that this exception to the predominant system of direct democracy

41. See, e.g., VfSlg 12.500/1990; 12.784/1991; 16.457/2002.

42. VfSlg 13.500/1993.

43. BGBl 1994/504. See Art 117 para 6 B-VG.

was constitutional. In other words, the mere silence of the Federal Constitution – that normally indicates to the *Länder* their right to create their own constitutional rules instead – was not deemed a sufficient basis for the direct election of mayors, since the lack of explicit federal constitutional rules did not prevent the application of implicit constitutional principles, even though this might reduce the scope of *Land* constitutional autonomy and thus also belittle the principle of federalism, whereas the explicit federal constitutional authorisation obviously entitled the *Land* constitutions to provide a system of direct mayoral elections without violation of the principle of democracy.

This view is maintained by a more recent judgment[44] in which the Constitutional Court repealed a provision of the Constitution of the *Land* Vorarlberg that had obliged the *Land* parliament to adopt laws if these were demanded by a citizens' initiative and confirmed by a referendum. Again, the Court held this to be a violation of the constitutional principle of representative democracy although the Federal Constitution did not contain any explicit provision regarding direct democracy in the *Länder*. Instead, the Federal Constitution explicitly establishes the *Land* parliaments as the general representative bodies of the *Land* citizens[45] and explicitly provides direct democratic elements at the *federal* level, though not in the same way as the Vorarlberg Constitution did. The constitutional autonomy of the *Länder*, which is their supreme legislative power and which therefore clearly belongs to the essential elements of Austrian federalism,[46] was thus

44. VfSlg 16.241/2001. See also U. Willi, *Die Bundesverfassungskonformität der Vorarlberger "Volksgesetzgebung"*, Braumüller, Vienna, 2005; P. Pernthaler, "Demokratische Identität oder bundesstaatliche Homogenität der Demokratiesysteme in Bund und Ländern", *JBl* 2000, 808 ff.; T. Öhlinger, "Bundesverfassungsgesetzliche Grenzen der Volksgesetzgebung", Montfort 2000, 402 ff.; A. Gamper, "Direkte Demokratie und bundesstaatliches Homogenitätsprinzip", *ÖJZ* 2003, 441 ff.; A. Gamper, "Homogeneity and Democracy in Austrian Federalism: The Constitutional Court's Ruling on Direct Democracy in Vorarlberg", *Publius – The Journal of Federalism* 33 (2003), 45 ff.; J. Marko, "Direkte Demokratie zwischen Parlamentarismus und Verfassungsautonomie", *FS Mantl*, Böhlau, Vienna et alii, 2004, 335 ff.; P. Bußjäger, "Plebiszitäre Demokratie im Mehrebenensystem? Zur Theorie direkter Demokratie in föderalen und konföderalen Systemen", *FS Pernthaler*, Springer, Vienna/New York, 2005, 85 ff.

45. Art 95 B-VG.

46. See F. Koja, *Das Verfassungsrecht der österreichischen Bundesländer*[2], Springer, Vienna/New York, 1988; R. Novak, "Bundes-Verfassungsgesetz und Landesverfassungsrecht",

restricted in favour of the principle of representative democracy. Although the Constitutional Court did not expressly state that the principle of representative democracy was superior to the principle of federalism, its views regarding the irrelevance of direct democracy at the federal level – which can be doubted with good reasons –[47] and the overwhelming importance that is given to implied standards of democratic homogeneity encountered some academic resistance.[48] This case is surely one of those, particularly in recent times, where the Court showed a highly centralistic attitude. The question whether other implied criteria of homogeneity might be found in other cases in the future, perhaps also under other constitutional principles than democracy, gives rise to some scepticism. Jurisdiction of that kind is methodically almost unpredictable and rather tends to disavow the idea of the constitutional autonomy of the *Länder* – which is more than merely "secondary" (or implementing) constitutional legislation – even though this very idea was co-developed by the Constitutional Court over the last decades.[49]

in: H. Schambeck (ed.), *Das österreichische Bundes-Verfassungsgesetz und seine Entwicklung*, Duncker & Humblot, Berlin, 1980, 111 ff.; R. Novak, "Die relative Verfassungsautonomie der Länder", in: R. Rack (ed.), *Landesverfassungsreform*, Böhlau, Vienna et alii, 1982, 35 ff.; R. Novak, "Landesgesetzgebung und Verfassungsrecht", in: H. Schambeck (ed.), *Föderalismus und Parlamentarismus in Österreich*, Österreichische Staatsdruckerei, Vienna, 1992, 53 ff.; R. Novak, "Art 99 B-VG", in: K. Korinek/M. Holoubek (eds.), *Österreichisches Bundesverfassungsrecht*, Springer, Vienna/New York, 1999; P. Pernthaler, "Die Verfassungsautonomie der österreichischen Bundesländer", *JBl* 1986, 477 ff.; P. Pernthaler, *Österreichisches Bundesstaatsrecht*, *cit.*; W. Pesendorfer, "Art 99 B-VG", in: H. P. Rill/H. Schäffer (eds.), *Bundesverfassungsrecht*, Verlag Österreich, Vienna, 2002.

47. Art 44 para 3 B-VG that requires a referendum in case of a "total revision" of the Federal Constitution is unanimously agreed to be a norm the serious amendment or abolition of which would constitute a "total revision". A provision that essentially involves the citizens when it comes to the ultimate decision on the Federal Constitution's continuity surely cannot be numbered among other "marginal" elements of direct democracy.

48. See, e.g., P. Pernthaler, "Demokratische Identität...", *cit.*, 808 ff.; P. Pernthaler, *Österreichisches Bundesstaatsrecht*, *cit.*, 464; T. Öhlinger, *Bundesverfassungsgesetzliche Grenzen...*, *cit.*, 402 ff.; R. Novak, "Demokratisches Prinzip und Verfassungswandel", *FS Mantl*, Böhlau, Vienna et al, 2004, 117 ff. (124 f.); A. Gamper, "Direkte Demokratie...", *cit.*, 441 ff.; H. P. Rill / H. Schäffer, "Art 1 B-VG", in: H. P. Rill / H. Schäffer (eds.), *Bundesverfassungsrecht...*, *cit.*, Rz 29; P. Bußjäger, "Plebiszitäre Demokratie...", *cit.*, 107 ff.

49. Beginning with VfSlg 6783/1972, following the impetus given by F. Koja, "Das Verfassungsrecht... ", *cit.*, 17 ff., 23. See, for a summary, R. Novak, "Art 99 B-VG", *cit.*, Rz 13 ff.

In 2004, the Constitutional Court reinforced the case-law on homogeneity by another decision[50] that repealed provisions of the (ordinary) Vienna Local Government Elections Act that had admitted non-Austrian (and non-EU) nationals to take part in the Viennese district elections after being resident for 5 years. Again, it would have made no difference if the repealed provisions had been enacted as *Land* constitutional laws since the Court applied the principle of democracy as an overall standard of homogeneity. The district councils were seen as general representative bodies (such as, e.g., the parliaments or local councils) the election of which is reserved to Austrian citizens. The Court concluded that the right of non-Austrian nationals to elect general representative bodies such as the district councils was not compatible with the principle of homogeneous elections that emanated from the principle of representative democracy, although the Federal Constitution did not at all explicitly regulate the district councils or their elections.

In all cases, the Constitutional Court restricted the principle of federalism according to a wide understanding of homogeneous representative democracy. Moreover, the Court increasingly develops standards of implied homogeneity which is *per se* a methodical problem and does not only expose the principle of federalism and its constituent elements to a highly unpredictable style of interpretation.

Quite recently, another judgment has been of some relevance to the Austrian federal system.[51] The Constitutional Court dismissed the application of the *Land* government of Salzburg to repeal certain federal constitutional provisions. The *Land* government argued that these provisions that regulated the administration and maintenance of the federal forests by a private company whilst the federation remained the "owner" of the forests endangered the position of the *Land*. In the aftermath of the Austro-Hungarian monarchy that was followed by the new Republic, however, section 11 of the Transitory Constitutional Law of 1920 had, apart from more specific provisions, reserved the "ultimate apportionment" of assets of the federation

50. VfSlg 17.264/2004. See also P. Pernthaler, "Volk, Demokratie und Menschenrechte in den Wiener Gemeindebezirken", *JBl* 2005, 195 ff.

51. VfSlg 16.587/2002. See also M. Holoubek/M. Lang, "Bundesforste und Vermögensaufteilung im Bundesstaat", *ZfV* 2001, 738 ff.

and the *Länder* to the enactment of a future federal constitutional law (that hitherto has not been enacted). Since the new provisions that regulated the relationship between the forest company and the federation had the rank of a federal constitutional law and since they defined the federation as the "owner", the *Länder* were afraid that this implied "ultimate apportionment" of the forests with the federation as future owner of the Austrian forests and that this would violate the principle of federalism. The Constitutional Court, however, held that the challenged provisions did not refer to the federation as an "external owner", but only in its relationship to the private forest company that should just be responsible for maintaining the forests without owning them. Without undertaking "ultimate apportionment", the provisions rather sought to maintain the substance of the forests – also to the advantage of the *Länder* should "ultimate apportionment" actually be realized in the future. This implies, at least, that the Constitutional Court recognizes that the *Länder* have not as yet lost all their assets, but that this remains to be solved in the future.

4. The Austrian Constitutional Convention

4.1. General Remarks

Clearly, a basic reform of Austrian federalism has not been realized yet. Step-by-step reform as undertaken in the last years has only dealt with selected aspects of the federal system, and not always to the advantage of the *Länder*. The crucial reform issues, however, remain unsolved: This primarily concerns the allocation of powers which is strongly criticised in various aspects and from different political viewpoints: Too centralistic, too fragmented, too little in accordance with the principle of subsidiarity, inflexible, unsuited to the implementation of EU law and the homogeneous normative treatment of certain coherent matters. The focus of reform is also set on the Federal Council since its powers are very limited and since it does not represent the political interests of the *Länder* properly. Whereas some demand the abolition of the Federal Council, others argue for strengthening the legal influence that the *Länder* have on the Federal Council. However, the future of the Federal Council's functions seems to depend on the future allocation of powers: An option, for example, is to curtail *Länder* powers, but to entitle the Federal Council to an absolute veto regarding those federal laws that would be based on

a new federal power instead of a former *Land* power. Clearly, moreover, financial equalisation is inseparably connected to a general reform of the allocation of powers. This, in its turn, concerns the issue of co-operative federalism where the municipal representations claim a status of more parity with the federation and the *Länder*.

Facing not only the deficiencies of the federal system, but also the deficiencies, fragmentation and lack of clarity of Austrian federal constitutional law in general, a Constitutional Convention was set up on 2 May 2003.[52] The Constitutional Convention consisted of 70 experts and functionaries – politicians, representatives of all territorial units, lobbyists, and constitutional lawyers – and was headed by the Former President of the Federal Court of Auditors. According to its mandate, the Convention's task was to discuss a reform of the Federal Constitution under various aspects and to draft a new constitution which, however, would have to observe the limits set by the principles of the recent Constitution (republicanism, democracy, rule of law, federalism, human rights, separation of powers). Thus, from the very beginning, it was clear that the enactment of a new constitution should not require a total revision under Art 44 para 3 B-VG, which meant that also the principle of federalism should not be abolished or amended seriously.

The Convention consisted of ten committees that had to deal with single reform issues more specifically and profoundly. The reform of the federal system as one of the most crucial issues was dealt with by most committees to a larger or smaller extent. Committee no. 3 "State Institutions", for instance, discussed possible reform options concerning the Federal Council, the institutions of the *Länder* (*Land* parliaments, *Land* executives), the constitutional autonomy of the

52. For further information, including the Convention's final report and an exhaustive list of literature, see www.konvent.gv.at. See, most lately and comprehensively, Österreichische Juristenkommission (ed.), *Der Österreich-Konvent: Zwischenbilanz und Perspektiven*, Vienna/Graz, NWV, 2004.; W. Berka et alii (eds.), *Verfassungsreform*, Vienna/Graz, NWV, 2004; P. Bußjäger/D. Larch (eds.), *Die Neugestaltung des föderalen Systems vor dem Hintergrund des Österreich-Konvents*, Institut für Föderalismus, Innsbruck, 2004; P. Bußjäger/R. Hrbek (eds.), *Projekte der Föderalismusreform – Österreich-Konvent und Föderalismuskommission im Vergleich*, Braumüller, Vienna, 2005; P. Bußjäger, "Klippen einer Föderalismusreform – Die Inszenierung Österreich-Konvent zwischen Innovationsresistenz und Neojosephinismus", in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed.), *Jahrbuch des Föderalismus 2005*, Nomos, Baden-Baden, 2005, 403 ff.; T. Olechowski (ed.), *Der Wert der Verfassung – Werte in der Verfassung*, Manz, Vienna, 2005.

Länder and new forms of co-operation between the federation and the *Länder*. Committee no. 5 "Allocation of Powers between the Federation, the *Länder* and the Municipalities" strove to find solutions for a new distribution of powers. Committee no. 6 "Administrative Reform" also dealt with the co-ordination of the federal and *Land* administrations, with new forms of administration and with the future of the system of indirect federal administration. Among other tasks, Committee no. 8 "Democratic Forms of Control" treated the question of direct democracy at federal, *Land* and municipal level. Committee no. 9 "Legal protection, the Courts" discussed the influence of the *Länder* on the courts and, particularly, the future establishment of administrative courts of the *Länder*. Finally, Committee no. 10 "Financial Constitution" was concerned with a reform of the financial constitution and the system of financial equalisation as well as the agreements on a consultation mechanism and the stability pact. Very different suggestions were made by the political parties, the representatives of the federation, *Länder*, municipalities, social and economic interest groups and constitutional experts, with even cross-cutting cleavages such as between the left-wing parties (Social Democrats, Greens) and the Austrian Federal Economic Chamber that both advocated a more centralistic allocation of powers.

It is not surprising, therefore, that the Constitutional Convention failed to effect a broad political compromise at the end of its term (January 2005). Neither did it present a draft for a new Federal Constitution, even though the chairman submitted a private draft in January 2005, which, however, was not accepted. Instead, the Convention presented a highly comprehensive Final Report[53] that, following some general remarks, consists of the individual final reports of the ten committees and of certain drafts and statements submitted by individuals or groups that, however, were not accepted by the Convention as a whole. The final reports are a collection of documents that reflect the discussions within the committees, which, in most cases, rather present a variety of different opinions than general consensus.

On the basis of these reports, however, a new initiative was set to revive the reform project. The Federal Chancellor submitted the

53. 1/ENDB-K of 31 January 2005.

Convention's Final Report to the National Council that established a select committee "concerned with the pre-deliberation of the Convention's report" on 31 March 2005. The select committee commenced its work on 5 July 2005 and is expected to deal with all crucial reform issues in its sessions until summer 2006. It seems unlikely, however, that the long-expected reform of the federal system will now be realised in such relatively short time. The political attitudes towards reform differ largely, but the government will need the support of the opposition in order to get a constitutional amendment through parliament which is the more improbable since the next elections of the National Council will take place in autumn 2006.

Since the discussion on a reform of the federal system is thus going to continue, the committee reports that were submitted under the auspices of the Constitutional Convention will at least offer a framework of possible solutions. It is therefore worth tracing the respective debates, analyzing the different reform options and elaborating their possible outcome from a constitutional perspective. In the following, this will involve the allocation of powers, reform of the Federal Council, financial equalisation and the establishment of administrative courts in the *Länder*.

4.2. The Allocation of Powers

The future allocation of powers[54] probably constitutes the key reform issue, being closely connected to all other issues tangent to the reform of Austrian federalism, and it is not surprising that the opinions presented by the members of Committee no. 5 were highly controversial.

Consensus went as far as to suggest a reduction of the number of types of competences, to incorporate the presently scattered allocation of powers into the new Federal Constitution, to simplify the system, to make it more flexible as well as to consider the impact of EU law-making. However, the committee members could neither agree as to the method of realizing these aims nor to the more substantive details.

54. See 1/ENDB-K of 31 January 2005, part 3, page 110 ff.

Generally, the discussion put focus on two possible models of attributing powers – namely, a "two-column model" and a "three-column model". Whilst a "two-column model" would provide exclusive fields of authority for the federation on the one hand and for the *Länder* on the other, a "three-column model" would add a third field of "shared/joint authority". Presently, the federation and the *Länder* are both vested with exclusive powers and, to a minor extent, shared/joint powers (e.g. federal framework legislation – *Länder* implementing legislation,[55] federal legislation according to "necessity of uniformity").[56] Moreover, the *Länder* execute federal laws in a number of fields autonomously, whilst the system of indirect federal administration, even though the subject-matter remains federal, allows them to execute federal matters at least on behalf of the federation. A "three-column model" would thus not be utterly new to the Austrian federal system. In principle, it was supported by the Committee since it would allow more flexibility than the more rigid "two-column model" and would be particularly useful for the implementation of EU law.

However, whereas some members expected that an extension of shared/joint matters would confer more powers on the *Länder*, others argued that they should only exercise these powers if the federation did not so that it was uncertain whether they would profit from an extensive "third column". Moreover, too much flexibility would probably slow down the legislative process and make the actual exercise of power unpredictable.

As regards shared/joint legislative authority, opinions very much differed as to who should control the exercise of these powers – the federation, the Federal Council or the *Länder* themselves – or whether the exercise should rather depend on objective criteria (e.g. equivalent living conditions, legal and economic unity, principle of subsidiarity). It was suggested that, if the federation claimed a competence due to these criteria, the *Länder* should be involved in the federal legislative process via the Federal Council and that, if mediation between their interests and those of the federation failed, they could sue before the Constitutional Court in order to oblige the federation to

55. Art 12 B-VG.

56. In particular, Art 11 para 2 B-VG.

adhere to the objective criteria (either as pre- or post-enactment scrutiny). Most members, however, argued that the actual exercise of powers should not be determined by rigid objective criteria, but rather by a political process. Another idea was to split the "third column" into two different fields, namely *Länder* powers that should be exercised by the federation with the consent of the *Länder* and *Länder* powers that should be assigned to the federation if the Federal Council deemed this to be necessary. As an alternative, it was suggested that a *Land* power should only be transformed into a federal power if both the Federal Council and the *Länder* agreed (or unless a certain number of *Länder* disagreed). This model was criticised as being too *Länder*-friendly, since the *Länder* would then be able to frustate a federal power even though the Federal Council might not. Nor was the suggestion to entitle the Federal Council to enact "uniform *Land* laws" supported, since uniform law-making, if at all required, should result in a federal law and not in "uniform" law-making of the *Länder* that in truth would not leave to them any individual law-making within the "third column".

If a "three-column" model would at all be realized, the committee members agreed that the federation should be allowed to restrict its law-making to framework legislation "voluntarily".

Another task of the committee was to reduce the highly fragmented list of enumerated subject-matters and to create a list of 50 – 60 "subject fields" instead. There was some consensus that the following fields should belong to the federation: Federal constitution, foreign affairs, defence, federal finances, financial equalisation, money and capital, economic steering and common issues of agricultural policy, internal security, federal employees, organisation of the federation, federal statistics, data protection, nationality, registration and immigration issues, civil law and civil law jurisdiction, traffic, labour law, competition and trust law, social insurance, media and information transfer, churches and religious communities, cultural institutions of the federation, standardization and adjustment measures, administrative procedural law, general provisions of the law on administrative offences and procedural law before the Administrative Court. The *Länder*, in their turn, should be responsible for their own constitutions, organisation and finances, *Land* employees, organisation of the municipalities and municipal employees, *Land* statistics, events, local safety, emergency aid, fire brigades, rescue issues, building law, regional

and local health services and sepulture, nurseries, day care centres and kindergarten, roads and public lanes (with the exception of federal roads), housing and housing subsidies, nature and landscape protection, sport, tourism, cultural affairs, spatial law and soil protection. It was moreover suggested that the federation should be allowed to delegate its law-making powers to the *Länder* in all of its fields[57] and that the *Länder* should be allowed to enact their own civil law,[58] if required for the exercise of their competences, as well as specific company law for their own privatised entities.

However, the future allocation of powers was particularly controversial regarding the following issues: Public procurement, electronic government, the administrative officials' duty to give information, schools, health, economy, professional associations, facility sites, environmental law, water, forestry, mountain law, waste disposal, energy, animal and plants protection, agriculture, labour law pertaining to employees in the fields of agriculture and forestry, cultural assets and external affairs of the *Länder*, social welfare, youth protection and adult education. Despite a plethora of suggestions made by the committee's constitutional experts and political representatives, no compromise could be effected as to whether these "competence fields" should rather belong to the exclusive powers of the federation or the *Länder* or be split between them or rather belong to a possible "third column".

Clearly, a reduction of the long list of detailed subject-matters and their transformation into large "competence fields" would require a guideline to allow the attribution of former matters to a new "competence field". It remained unsolved whether this should be done by a more or less flexible Competence Transformation Act, by an agreement between the federation and the *Länder* or rather left in more detail to the explanatory notes that would accompany the new Federal Constitution. Another question related to this issue concerns the interpretation of powers. It is true that the system that presently un-

57. Presently, the possibility to enact "delegated legislation" is restricted to certain fields, such as e.g. mountain, forestry and water law, according to Art 10 para 2 B-VG.

58. Presently, the *Länder* may, within their fields of legislative competences, enact civil and criminal law (which are both federal subject-matters) as far as this is essentially required for the exercise of their own competences (Art 15 para 9 B-VG).

derlies the allocation of powers is only responsible for part of the problem, but that the problem is also due to the Constitutional Court's method of interpreting powers – mainly, according to the "petrification theory" which is a specific form of an objective-historic interpretation method.[59] Larger "competence fields" should effect more clarity in this regard, and on the whole interpretation should have a more coherent and contextual basis, although this should not exclude the application of a historic method. Most committee members agreed that the interpretation methods should not be formally embodied in the Federal Constitution, but that they should be defined in the explanatory notes.

A particular problem emerges from the obligation to implement EU directives. The present allocation of powers frequently demands implementation both by the federation and the *Länder* – each according to its own sphere of authority. "Complex" matters that are regulated by an EU directive may affect a variety of legal aspects and therefore a variety of issues that, under the highly fragmented Austrian system, may fall under different powers of both tiers which slows down the process of implementation. Co-operation is needed between the federation and the *Länder*, and particularly the *Länder* may suffer from lack of information or the federation's delays in informing them in time. The committee held, however, that the general principle – implementation of EU directives according to the internal allocation of powers – should be maintained and that the federation should not be vested with an overall implementation authority. The present provision entitles the federation to implement a directive when the *Länder* default the date set for their implementation if this is recognized by one of the European Courts.[60] Whilst some suggested that the fed-

59. See also P. Pernthaler, *Kompetenzverteilung in der Krise*, Braumüller, Vienna, 1989, 79 ff.; P. Pernthaler, *Österreichisches Bundesstaatsrecht*, *cit.*, 332 ff.; B.-C. Funk, *Das System der bundesstaatlichen Kompetenzverteilung im Lichte der Verfassungsrechtsprechung*, Braumüller, Vienna, 1980, 69 ff.; B.-C. Funk, "Reform der Gesetzgebungskompetenzen im Bundesstaat", *FS Pernthaler*, Springer, Vienna/New York, 2005, 127 ff.; H. Schäffer, *Verfassungsinterpretation in Österreich*, Springer, Vienna/New York, 1971, 97 ff.; G. Thurner, *Der Bundesstaat in der neueren Rechtsprechung des Verfassungsgerichtshofes unter besonderer Berücksichtigung der Kompetenzverteilung*, Braumüller, Vienna/New York, 1994, 24 ff.; E. Wiederin, "Anmerkungen zur Versteinerungstheorie", *FS Winkler*, Springer, Vienna, 1997, 1231 ff.; E. Wiederin, *Bundesrecht und Landesrecht*, Springer, Vienna/New York, 1995, 179 ff.; C. Grabenwarter, "Verfassungsinterpretation, Verfassungswandel und Rechtsfortbildung", *FS Mantl*, Böhlau, Vienna et alii, 2004, 35 ff., (45 ff.).

60. Art 23d para 5 B-VG.

eration should become responsible automatically after the expiry of the implementation term, others argued that there might be cases of doubt if a directive was implemented properly and that the federation should not be allowed to prejudice such a scenario.

4.3. The Federal Council

The members of Committee no. 3[61] agreed that a reform of the Federal Council would be particularly indispensable, but that the *Länder* should continue to participate in the federal law-making procedure via the Federal Council. This is, of course, due to the necessity to represent the *Länder* within the process of federal law-making, since the direct consent of the *Länder* is typically required only in a minor number of cases.[62]

The Committee was aware that only part of the Federal Council's recent failure was due to the Federal Constitution, but that the lack of strong legal powers was accompanied by a traditional dislike of exercising those powers that exist in order to protect Länder interests.[63] According to the predominant opinion, the Federal Council should be integrated into the federal law-making procedure at an earlier stage. One option could be to table a bill before the National Council and the Federal Council simultaneously or to allow the Federal Council's delegates to participate in committee meetings of the National Council. As regards the Federal Council's functions, the suggestions were particularly controversial: Clearly, the recent situation where the Federal Council is mainly entitled to a suspensive veto that may be overruled by another decision of the National Council (with a qualified quorum) does not satisfy the *Länder*. However, neither did the idea to transform the suspensive into an absolute veto find much

61. See 1/ENDB-K of 31 January 2005, part 3, page 63 ff.

62. See Art 14b para 4, Art 102 para 1, Art 129a para 2 B-VG.

63. Since autumn 2005, when parliamentary elections took place in several *Länder*, followed by new elections of delegates to the Federal Council, the Social Democrats and Greens have commanded a slight majority in the Federal Council and already exerted the Federal Council's suspensive veto in a number of cases. However, this is obviously not done in order to defend the *Länder* from the impact of bills passed by the National Council, but in order to oppose bills that were initiated by the Conservative government.

support, nor the proposal to allow the Federal Council to co-ordinate the legislation of the *Länder*. Committee members agreed that the Federal Council should keep its absolute veto in case of constitutional amendments that curtailed *Länder* powers or amended the provisions concerning the Federal Council's composition, which could in both cases be accompanied by a double majority.[64] Some members suggested an additional absolute veto against all kinds of constitutional amendments, whilst others – instead of applying the consultation mechanism – proposed an absolute veto against all federal laws to execute which would impose serious financial burdens on the *Länder*. Another controversial issue was the kind of veto that should be given to the Federal Council with regard to "third column" matters. An absolute veto could compensate the *Länder* for an eventual loss of power, but might also disavow the very rationale of the "third column", namely competence flexibility.

Another controversial suggestion was to entitle the Federal Council to a "partial veto", namely to veto only part of a bill instead of the whole bill, which is not possible under the present Federal Constitution, and to appoint the Federal Council as the body generally responsible to represent the *Länder* in all procedures where, so far, the Länder have participated directly.

As regards the future organisation of the Federal Council, proposals were made either to elect not only persons that are eligible to the *Land* parliaments, but rather members of the *Land* parliaments themselves that could be bound by the parliaments' instructions (loss of "free mandate"), to include the *Land* governors and other members of the *Land* governments, to elect delegates on an adhoc-basis, to provide for the direct election of delegates by the *Länd* citizens or to leave it to the *Land* constitutions to provide their own selection methods. Neither could unanimity be reached regarding these suggestions nor regarding the idea to transform the Federal Council into a representative body of both the *Länder* and the municipalities which would constitute a big step towards the creation of a tri-level federal system. Another question was whether the asymmetric composition

64. Namely, this would require the agreement of delegates representing a majority of *Länder* and the agreement of the majority of delegates as a whole.

of delegates – different numbers according to the population figures of the *Länder* – should be made more symmetric, which is also touching on theoretical controversy,[65] but a majority argued for the maintenance of the asymmetric system of representation (no "Senate model").

Apart from the future role of the Federal Council, Committee no. 5[66] discussed *Länder* participation in federal law-making in general. The new Federal Constitution should contain a mutual duty of the federation and the *Länder* respectively to inform each other of new legislative projects. This could go hand in hand with a constitutional embodiment of the present consultation mechanism, although the consultation mechanism should not obstruct the law-making procedure. If the Federal Council should be involved in the federal law-making process at an earlier stage – which was generally supported –, this would not need a federal constitutional law, but could be regulated by the Standing Orders. Most committee members held that the present system of submitting *Land* bills to the federal government was dispensable. However, the consent of the government should remain necessary if the *Land* bill stipulated the assistance of federal executive bodies for its execution.

Finally, no consensus could be reached as to the future legal nature of agreements under Art 15a B-VG. Whilst some committee members suggested direct applicability of these agreements so that no transformation should be necessary, the majority dismissed the idea of direct applicability and held that parliaments should remain responsible for implementing the agreements if legislative powers were affected. As regards international treaties between the *Länder* and neighbouring states or their constituent units – which are not concluded in practice – committee members agreed that the treaty-making power of the *Länder* should be extended in as far as they should be able to conclude treaties with all states or their constituent units worldwide and as they should not depend on the Federal President to initiate treaty negotiations and to conclude treaties, but that

65. A. Gamper, "«Arithmetische» und «geometrische» Gleichheit im Bundesstaat", *FS Pernthaler*, Springer, Vienna/New York, 2005, 143 ff.; M. Pleyer, *Föderative Gleichheit*, Duncker & Humblot, Berlin, 2005.

66. See 1/ENDB-K of 31 January 2005, part 3, page 129 ff.

the conclusion of *Länder* treaties should remain under the supervising authority of the federation.

4.4. Fiscal Federalism

Committee no. 10[67] dealt with a variety of issues related to the financial constitution and financial equalisation. No consensus was reached regarding the crucial questions, namely the parity of the federation, *Länder* and municipalities within the system of financial equalisation, the authority to enact the Financial Equalisation Act, the "principle of connectivity" and the future of the consultation mechanism and stability pact.

Whereas some members demanded that the Financial Equalisation Act should not just depend on the federal law-maker, but, due to a future principle of parity of all three tiers, also on the agreement of the *Länder* and municipalities, others preferred the present system of political negotiations where the legal competence to decide on the Financial Equalisation Act remains with the federal legislature (with or without an absolute veto of the Federal Council), possibly after the failure of a mediation process. The *Länder* were partly criticised for not using their tax-raising powers sufficiently in order to finance their own tasks, but asking the federation to grant them more revenues instead. According to the *Länder*, however, an intensive use of *Land* tax-raising powers – presently, these powers are very limited – would endanger the homogeneity of the Austrian economic area *Land*, be detri-mental to the mutual solidarity between the *Länder* as well as to EU endeavours to create a homogeneous European taxing area. Moreover, the "principle of connectivity" would need a revision of the whole system of tasks, revenues and expenditure, so that the issue of *Länder* finances could not be divided from the future allocation of *Länder* powers.

It was highly controversial whether the consultation mechanism should be made applicable within the framework of financial equalisation – which is not the case presently – or whether the informal

67. See 1/ENDB-K of 31 January 2005, part 3, page 224 ff.

"financial equalisation pact" that usually emanates from political negotiations should be concluded as an agreement under Art 15a B-VG or as a legal source of its own kind to which ordinary laws should adhere under all circumstances. This was opposed with the argument that deadlocks and blockades in the process of enacting financial equalisation should be prevented.

In principle, committee members agreed that financial equalisation should have a three-tier-basis, namely to relate to the federation, *Länder* and municipalities respectively. It was agreed that financial equalisation should have a vertical and a horizontal dimension, but dispute arose as to the criteria according to which horizontal equalisation should be arranged.

Although there was unanimity that the three tiers should co-ordinate their budgets in order to allow for a macroeconomic balance, it was unclear whether the principles that governed the recent stability pact should be incorporated into the Federal Constitution, leaving the conclusion of new stability pacts to a co-operative process between the tiers, or whether just the authorisation to conclude stability pacts should become part of the Federal Constitution. A similar discussion arose as to the future embodiment of the consultation mechanism and its extended application.

Despite the necessity to simplify the current system of financial transfers, the future method and criteria of subsidiary allotments ("secondary financial equalisation") remained contentious.

4.5. Administrative Courts in the *Länder*

One of the reform options likeliest to be realized concerns the establishment of administrative courts in the *Länder*, which was agreed by Committee no. 9.[68] As yet, the *Länder* do not take part in the judiciary, and although various branches of civil and criminal courts are located in the *Länder*, the latter are not responsible for them, whilst the Supreme Court, Constitutional Court and Administrative Court are located in Vienna.

68. See 1/ENDB-K of 31 January 2005, part 3, page 212 ff.

The Administrative Court currently consists of one instance, which is also one of the reasons why the Court's decisions take such a long time. For many years, a discussion has been led as to whether the Administrative Court should be released from part of its tasks by the establishment of administrative courts in the *Länder*. On the one hand, such a solution could benefit those that sought legal protection, since their appeals could be dealt with much more rapidly. On the other hand, this would strengthen the principle of federalism, as the *Länder* would for the first time be entitled to exercise judicial functions. In 1988, so-called Independent Administrative Senates were established in the *Länder*, being responsible for a number of tasks, such as deciding on appeals against administrative penalties or coercive measures or against appeals made against the decisions of district administrative authorities in certain fields that belong to the indirect federal administration of the *Länder*.[69] These Senates that are neither real courts nor classical administrative authorities were set up in order to meet the standards appertaining to a tribunal under Art 6 of the European Convention on Human Rights. Clearly, this system could be enhanced by replacing the Independent Administrative Senates by real administrative courts in the *Länder*.

Committee no. 9 agreed that such courts should be established: Namely, 9 *Länder* administrative courts and 1 federal administrative court. Normally, there should be one stage of appeal after the decision taken by an administrative authority, and, instead of another (superior) administrative authority, this appeal should be lodged either at the *Land* administrative court or at the federal administrative court in those cases where an administrative matter (e.g. the law concerning foreigners) specifically demands a central instance. Committee members also agreed that the administrative courts should be entitled to replace administrative rulings by their own decisions provided that the *Länder* governments could lodge appeals against these decisions before the Administrative Court in Vienna. The Administrative Court in its turn should adjudicate upon the decisions made by the administrative courts of first instance, but only in case of "relevant legal questions", which would reduce the number of cases before the Administrative Court.

69. Art 129a para 1 B-VG.

5. Concluding Remarks

For many years, a reform of Austrian federalism has been discussed with much fervour. Over the last 15 years, two opportunities for a comprehensive "reform package" that had seemed to be within reach ultimately proved to be a failure. Firstly, Austria joined the European Union with the consent of the *Länder* whose claims were satisfied mainly in as far as their participation within EU law making is adequately provided by the Federal Constitution, but not as regards an internal or structural reform of federalism. Secondly, the appointment of the Austrian Constitutional Convention – that in a way may have been inspired by the European Convention, but also resumed previous discussion on the Austrian Constitution – offered an opportunity of discussing the future of the federal system on a very broad basis. Indeed, all crucial problems of Austrian federalism were dealt with by the various committees and proved to be strongly interconnected with many other issues of constitutional reform. Within the limits set by the Convention's mandate – namely, not to seriously amend or abolish the federal system –, the committee papers and final report display the whole variety of possible reform options that, however, are frequently incompatible with each other. For a long time, the reform project has suffered from political inflexibility and inability to compromise that, eventually, not even the Convention was able to overcome. Nevertheless, the report proves a valuable document for the ongoing discussion under the auspices of the constitutional reform select committee. Whether a parliamentary committee, as a more classically democratic, but also more restricted forum, will be able to smooth out the difficulty to find a solution, facing such highly different views, remains to be seen.

Bibliography

ADAMOVICH, L.; SPANNER, H. *Handbuch des österreichischen Verfassungsrechts*[5]. Vienna/New York: Springer, 1957.

ADAMOVICH, L. et alii, *Österreichisches Staatsrecht*. Vienna/New York: Springer, 1997-2003, 3 vols.

BERCHTOLD, K. *Die Verhandlungen zum Forderungsprogramm der Bundesländer seit 1956*. Vienna: Braumüller, 1988.

BERKA, W. et alii (eds.), *Verfassungsreform*. Vienna/Graz: NWV, 2004.

———. *Lehrbuch Verfassungsrecht*. Vienna: Springer, 2005.

BRANDTNER, W. «Die Bundesstaatsreform aus der Sicht der Länder». In P. Pernthaler (ed.). *Bundesstaatsreform als Instrument der Verwaltungsreform und des europäischen Föderalismus*. Vienna: Braumüller, 1997, 55 ff.

BUNDESKANZLERLAMT (ed.). *Neuordnung der Kompetenzverteilung in Österreich*. Vienna.

BURTSCHER, W. *EG-Beitritt und Föderalismus*. Vienna: Braumüller, 1990.

BUßJÄGER, P. «Bemerkungen zur Neuregelung der Kompetenzverteilung auf dem Gebiet des Dienstrechtes der öffentlich Bediensteten». In *JBl* 1999, 773 ff.

———. «Rechtsfragen zum Konsultationsmechanismus». In *ÖJZ* 2000, 581 ff.

———. «Artikel 102 B-VG». In H.P. Rill / H. Schäffer (eds.). *Bundesverfassungsrecht*. Vienna: Verlag Österreich, 2002.

———. «Föderalismus durch Macht im Schatten? – Österreich und die Landeshauptmännerkonferenz». In Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed.). *Jahrbuch des Föderalismus* 2003. Nomos: Baden-Baden, 2003, 79 ff.

———. «Der "zentralistischste aller Bundesstaaten" als (Lehr)Beispiel für Europa? Der Fall Österreich». In M. Piazolo / J. Weber (eds.). *Föderalismus – Leitbild für die Europäische Union?* Munich: Olzog, 2004, 128 ff.

———. *Landesverfassung und Landespolitik in Vorarlberg – Die Verfassungsgeschichte Vorarlbergs und ihre Auswirkungen auf die Landespolitik 1848 – 2002.* Graz/Feldkirch: W. Neugebauer, 2004.

--------. «Klippen einer Föderalismusreform – Die Inszenierung Österreich-Konvent zwischen Innovationsresistenz und Neojosephinismus». In Europäisches

Zentrum für Föderalismus-Forschung Tübingen (ed.). *Jahrbuch des Föderalismus* 2005. Baden-Baden: Nomos, 2005, 403 ff.

——. «Plebiszitäre Demokratie im Mehrebenensystem? Zur Theorie direkter Demokratie in föderalen und konföderalen Systemen». *In FS Pernthaler.* Vienna/New York: Springer, 2005, 85 ff.

BUßJÄGER, P.; HRBEK, R. (eds.). *Projekte der Föderalismusreform – Österreich-Konvent und Föderalismuskommission im Vergleich*. Vienna: Braumüller, 2005.

BUßJÄGER, P.; LARCH, D. (eds.). *Die Neugestaltung des föderalen Systems vor dem Hintergrund des Österreich-Konvents*. Innsbruck: Institut für Föderalismus, 2004.

EDTSTADLER, K. «Das Werden des Bundesstaates». In H. Schambeck (ed.). *Bundesstaat und Bundesrat in Österreich*. Vienna: Verlag Österreich, 1997, 23 ff.

ERMACORA, F. *Der Verfassungsgerichtshof*. Graz et alii: Styria, 1956.

——. *Die Entstehung der Bundesverfassung 1920*. Vienna: Braumüller, 1986-1990, 4 vols.

FUNK, B.-C. *Das System der bundesstaatlichen Kompetenzverteilung im Lichte der Verfassungsrechtsprechung*. Vienna: Braumüller, 1980.

——. «Reform der Gesetzgebungskompetenzen im Bundesstaat». In *FS Pernthaler*. Vienna/New York: Springer, 2005.

GAMPER, A. «Österreich – Das Paradoxon des zentralistischen Bundesstaates». In Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed.). *Jahrbuch des Föderalismus* 2000. Baden-Baden: Nomos, 2000, 251 ff.

——. «Der Stabilitätspakt 2001 im Spannungsfeld von Budgetkonsolidierung und Finanzausgleichsgerechtigkeit». In *JRP* 2002, 240 ff.

——. «Direkte Demokratie und bundesstaatliches Homogenitätsprinzip». In *ÖJZ* 2003, 441 ff.

——. «Homogeneity and Democracy in Austrian Federalism: The Constitutional Court's Ruling on Direct Democracy in Vorarlberg». In *Publius – The Journal of Federalism* 33 (2003), 45 ff.

——. «"Arithmetische" und "geometrische" Gleichheit im Bundesstaat». In *FS Pernthaler*. Vienna/New York: Springer, 2005, 143 ff.

GRABENWARTER, C. «Verfassungsinterpretation, Verfassungswandel und Rechtsfortbildung». In *FS Mantl*. Vienna et alii: Böhlau, 2004, 35 ff.

HOLOUBEK, M. «Das Bundesvergabegesetz 2002: Kompetenzgrundlagen – Geltungsbereich – Vergabeverfahren». In Österreichische Juristenkommission (ed.). *Vergaberecht* 2002. Vienna/Graz: NWV, 2003, 18 ff.

HOLOUBEK, M.; LANG, M. «Bundesforste und Vermögensaufteilung im Bundesstaat». In *ZfV* 2001, 738 ff.

KLAUSHOFER, R. «Art 14b B-VG». In *ZfV* 2003, 630 ff.

KLEISER, C. «Die neue Kompetenzverteilung im Vergaberecht». In *ÖJZ* 2003, 449 ff.

KOJA, F. *Das Verfassungsrecht der österreichischen Bundesländer*. Vienna/New York: Springer, 1967.

———. *Das Verfassungsrecht der österreichischen Bundesländer*[2]. Vienna/New York: Springer, 1988.

LOEWENSTEIN, K. *Verfassungslehre*[3]. Tübingen: Mohr, 1975.

MARKO, J. «Direkte Demokratie zwischen Parlamentarismus und Verfassungsautonomie». In *FS Mantl*. Vienna et alii: Böhlau, 2004, 335 ff.

MEIRER, G. *Die Verbindungsstelle der Bundesländer oder Die gewerkschaftliche Organisierung der Länder*. Vienna: Braumüller, 2003.

NOVAK, R. «Bundes-Verfassungsgesetz und Landesverfassungsrecht». In H. Schambeck (ed.). *Das österreichische Bundes-Verfassungsgesetz und seine Entwicklung*. Berlin: Duncker & Humblot, 1980, 111 ff.

———. «Die relative Verfassungsautonomie der Länder». In R. Rack (ed.). *Landesverfassungsreform*. Vienna et alii: Böhlau, 1982, 35 ff.

———. «Landesgesetzgebung und Verfassungsrecht». In H. Schambeck (ed.). *Föderalismus und Parlamentarismus in Österreich*. Vienna: Österreichische Staatsdruckerei, 1992, 53 ff.

———. «Art 99 B-VG». In K. Korinek/M. Holoubek (eds.). *Österreichisches Bundesverfassungsrecht*. Vienna/New York: Springer, 1999.

———. «Demokratisches Prinzip und Verfassungswandel». In *FS Mantl.* Vienna et alii: Böhlau, 2004, 117 ff.

OBERNDORFER, P.; LEITL, B. «Die Kostentragungsregeln nach Art 4 Konsultationsmechanismus im System der Finanzverfassung». In *FS Adamovich*. Vienna: Verlag Österreich, 2002, 553 ff.

OLECHOWSKI, T. (ed.). *Der Wert der Verfassung – Werte in der Verfassung*. Vienna: Manz, 2005.

ÖHLINGER, T. «Das Scheitern der Bundesstaatsreform». In A. Khol et alii (eds.). *Österreichisches Jahrbuch für Politik* 1994. Vienna/Munich: Geschichte und Politik/R. Oldenbourg, 1995, 543 ff.

———. «Artikel 23d». In K. Korinek / M. Holoubek (eds.). *Österreichisches Bundesverfassungsrecht*. Vienna/New York: Springer, 1999.

———. «Bundesverfassungsgesetzliche Grenzen der Volksgesetzgebung». In *Montfort* 2000, 402 ff.

———. *Verfassungsrecht*[5]. Vienna: WUV, 2006.

ÖSTERREICHISCHE JURISTENKOMMISSION (ed.). Der Österreich-Konvent: Zwischenbilanz und Perspektiven. Vienna/Graz: NWV, 2004.

PERNTHALER, P. *Die Staatsgründungsakte der österreichischen Bundesländer*. Vienna: Braumüller, 1979.

———. *Das Forderungsprogramm der österreichischen Bundesländer*. Vienna: Braumüller, 1980.

———. «Die Verfassungsautonomie der österreichischen Bundesländer». In *JBl* 1986, 477 ff.

———. *Kompetenzverteilung in der Krise*. Vienna: Braumüller, 1989.

———. *Der Verfassungskern*. Vienna: Manz, 1998.

———. «Demokratische Identität oder bundesstaatliche Homogenität der Demokratiesysteme in Bund und Ländern». In *JBl* 2000, 808 ff.

———. «Verfassungsentwicklung und Verfassungsreform in Österreich». In B. Wieser / A. Stolz (eds.). *Verfassungsrecht und Verfassungsgerichtsbarkeit an der Schwelle zum 21. Jahrhundert*. Verlag Österreich, 2000, 67 ff.

———. *Österreichisches Bundesstaatsrecht*. Vienna: Verlag Österreich, 2004.

———. «Volk, Demokratie und Menschenrechte in den Wiener Gemeindebezirken». In *JBl* 2005, 195 ff.

PERNTHALER, P.; GAMPER, A. «National federalism within the EU: the Austrian experience». In S. Ortino et alii (eds.). *The Changing Faces of Federalism*. Manchester: Manchester University Press, 2005, 134 ff.

PERNTHALER, P.; SCHERNTHANNER, G. «Bundesstaatsreform 1994». In A. Khol et alii (eds.). *Österreichisches Jahrbuch für Politik 1994*. Vienna/Munich: Geschichte und Politik/R. Oldenbourg, 1995, 559 ff.

PERNTHALER, P. (ed.). *Auswirkungen eines EG-Beitrittes auf die föderalistische Struktur Österreichs*. Vienna: Braumüller, 1989.

———. *Bundesstaatsreform als Instrument der Verwaltungsreform und des europäischen Föderalismus*. Vienna: Braumüller, 1997.

PESENDORFER, W. «Art 99 B-VG». In H. P. Rill / H. Schäffer (eds.). *Bundesverfassungsrecht*. Vienna: Verlag Österreich, 2002.

PLEYER, M. *Föderative Gleichheit*. Berlin: Duncker & Humblot, 2005.

PRIMOSCH, E. *Stabilitätspakt*. Vienna: Verlag Österreich, 2000.

RANACHER, C. *Die Funktion des Bundes bei der Umsetzung des EU-Rechts durch die Länder*. Vienna: Braumüller, 2002.

RASCHAUER, B. «Artikel 102 B-VG». In K. Korinek / M. Holoubek (eds.). *Österreichisches Bundesverfassungsrecht*. Vienna/New York: Springer, 2001.

RILL, H. P. «Art 14b B-VG». In H. P. Rill / H. Schäffer (eds.). *Bundesverfassungsrecht.* Vienna: Verlag Österreich, 2004.

RILL, H. P.; SCHÄFFER, H. «Art 1 B-VG». In H. P. Rill / H. Schäffer (eds.). *Bundesverfassungsrecht*. Vienna: Verlag Österreich, 2001.

ROSNER, A. *Koordinationsinstrumente der österreichischen Länder*. Vienna: Braumüller, 2000.

SCHAMBECK, H. (ed.). *Bundesstaat und Bundesrat in Österreich*. Vienna: Verlag Österreich, 1997.

SCHÄFFER, H. «Konsultationsmechanismus und innerstaatlicher Stabilitätspakt». In *ZÖR* 56 (2001), 145 ff.

———. *Verfassungsinterpretation in Österreich*. Vienna/New York: Springer, 1971.

———. «The Austrian Bundesrat: Constitutional Law – Political Reality – Reform Ideas». In U. Karpen (ed.). *Role and Function of the Second Chamber*. Baden-Baden: Nomos, 1999, 25 ff.

STAUDIGL, F. «Zur Rolle der österreichischen Länder im europäischen Integrationsprozess». In *ZÖR* 46 (1993), 41 ff.

STURM, R. «Austria». In A. Griffiths (ed.). *Handbook of Federal Countries, 2002*. Montreal et alii: McGill, 2002, 45 ff.

THANNER, T. «Bundesstaatsreform und Forderungsprogramme der Bundesländer». In H. Schambeck (ed.). *Bundesstaat und Bundesrat in Österreich*. Vienna: Verlag Österreich, 1997, 275 ff.

THIENEL, R. «Artikel 15a B-VG». In K. Korinek / M. Holoubek (eds.). *Österrei-*

chisches Bundesverfassungsrecht. Vienna/New York: Springer, 2000.

THURNER, G. *Der Bundesstaat in der neueren Rechtsprechung des Verfassungsgerichtshofes unter besonderer Berücksichtigung der Kompetenzverteilung*. Vienna: Braumüller, 1994.

WALTER, R.;MAYER, H. *Grundriß des österreichischen Bundesverfassungsrechts*[9]. Vienna: Manz, 2000.

WATTS, R. *Comparing Federal Systems*[2]. Montreal et alii: McGill, 1999.

WEBER, K. «Die Entwicklung des österreichischen Bundesstaates». In H. Schambeck (ed.). *Bundesstaat und Bundesrat in Österreich.* Vienna: Verlag Österreich, 1997, 37 ff.

———. *Die mittelbare Bundesverwaltung*. Vienna: Braumüller, 1987.

———. «Macht im Schatten? (Landeshauptmänner-, Landesamtsdirektoren und andere Landesreferentenkonferenzen)». In *ÖZP* 1992, 405 ff.

———. «BVG Gemeindebund». In K. Korinek / M. Holoubek (eds.). *Österreichisches Bundesverfassungsrecht*. Vienna/New York: Springer, 2000.

———. «Zwei-oder dreigliedriger Bundesstaat? Bemerkungen zur Stellung der Gemeinden in einer möglichen künftigen Bundesverfassung». In *FS Pernthaler*. Vienna/New York: Springer, 2005, 413 ff.

WEISS, J. «Der Konsultationsmechanismus als Instrument zur Reduzierung der Folgekosten gesetzgeberischer Maßnahmen». In *JRP* 1997, 153 ff.

WIEDERIN, E. *Bundesrecht und Landesrecht*. Vienna/New York: Springer, 1995.

———. «Anmerkungen zur Versteinerungstheorie», In *FS Winkler.* Vienna: Springer, 1997, 1231 ff.

WILLI, U. *Die Bundesverfassungskonformität der Vorarlberger «Volksgesetzgebung»*. Vienna: Braumüller, 2005.

RESUM

Aquest article tracta els diferents debats i intents de reforma del sistema federal austríac dels darrers quinze anys. L'article parteix d'una perspectiva històrica que descriu els desenvolupaments més rellevants del federalisme austríac en el decurs del segle XX, i destaca la importància del procés de centralització a través de la constant transferència de competències des dels *Länder* al Govern federal, així com els diversos debats en aquest sentit. Segons l'autora, des de 1995, any de l'accés d'Àustria a la Unió Europea, s'han perdut dues grans oportunitats per dur a terme una reforma general del sistema federal que pogués contribuir a compensar el procés de centralització.

La primera oportunitat perduda té referència directa amb la Unió Europea. Els *Länder* van accedir a l'adhesió amb la condició que la Constitució federal preveiés des de diverses dimensions la seva participació en els processos europeus de presa de decisions, tot deixant de banda l'oportunitat d'aprofitar el debat i pressionar per a una reforma estructural del sistema federal. La segona oportunitat perduda té a veure amb la dispersió de propostes resultants dels treballs de la Convenció Constitucional Austríaca. La Convenció, creada el 2003, tenia la missió de discutir la reforma de la Constitució en els aspectes que regulen l'estructura federal del país i, en conseqüència, elaborar-ne un primer esborrany. La incapacitat d'establir i definir eixos comuns de reforma, juntament amb la manca de flexibilitat i de cerca de compromís polític, van desdibuixar el paper de la Convenció.

ABSTRACT

This article discusses the different debates and attempts to reform the Austrian federal system over the last fifteen years. The article is based on a historical perspective that describes the most relevant developments of Austrian federalism during the 20th century, highlighting the importance of the centralisation process through the constant transfer of powers from the *Länder* to the Federal Government, as well as various debates in this regard. According to the author, since 1995, the year of Austrian adhesion to the European Union, two opportunities have been missed to carry out a general reform of the federal system which could contribute to compensating the centralisation process.

The first missed opportunity is directly related to the Austrian adhesion to the European Union. The *Länder* agreed to the adhesion under the condition that the Federal Constitution would include their participation in European decision-making processes. By focussing on this point, the *Länder* set

aside the opportunity to take advantage of the debate and, as a consequence, press for structural reform of the federal system. The second missed opportunity was related to the dispersion of proposals resulting from the work of the Austrian Constitutional Convention. The Convention, created in 2003, had the mission of discussing those aspects of the reform of the Constitution that regulated the federal structure of the country and, as a consequence, of making a first draft reform. The incapability of establishing and defining common ground for reform, together with the lack of flexibility and of seeking political commitment, weakened the role of the Convention and, thus, any possibility to carry on with the reform.