

Legislative and Executive Governance in Austria



Anna Gamper

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von
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Preface

Austrian federalism is still little known to the international community of constitutional lawyers and political scientists. This is also due to the fact that relatively few publications on Austrian federalism have been written in English. It is regrettable that many valuable contributions are thus lost to the international public.

The Institut für Föderalismus therefore welcomes the opportunity of making this volume available to a larger public, within the framework of a project that allows world-wide access to the most current and relevant research on federalism: "*A Global Dialogue on Federalism*" is an innovative program of the Forum of Federations and the International Association of Centers for Federal Studies. The Institut für Föderalismus was invited to contribute to its third theme "*Legislative and Executive Governance in Federal Countries*". Its purpose is to examine the range of governing institutions used in twelve very different federal or federal-type countries, to consider their rationale and effectiveness and to explore their interrelationship with federalism.

The Institut für Föderalismus recognizes and appreciates the need to exchange experience. This does not only serve to build an international academic network on federalism, but also the federal countries, undergoing continuous transformation, may benefit by learning from both the successes and failures of other federations.

I am particularly grateful to Anna Gamper whose study provides a valuable insight into the institutional arrangements of Austrian federalism. I would also like to thank the Institute's Secretary, Claudia Zung, for taking care of the technical arrangement of this book.

Innsbruck, October 2004

Peter Bußjäger

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I. INTRODUCTION: LEGAL AND HISTORIC BACKGROUND

The Republic of Austria („*Republik Österreich*“) covers a territory of approximately 83,870 square kilometres and has over 8 million inhabitants. It consists of nine states that are called „*Länder*“ (single form „*Land*“), namely Burgenland, Carinthia (*Kärnten*), Lower Austria (*Niederösterreich*), Salzburg, Styria (*Steiermark*), Tyrol (*Tirol*), Upper Austria (*Oberösterreich*), Vienna (*Wien*) and Vorarlberg. The largest *Land* is Lower Austria, followed by Styria and Upper Austria, whereas the smallest *Land*, Vienna, that is also the capital of Austria, is approximately 45 times smaller than the largest. Despite its small territory, however, Vienna, together with Lower Austria, is inhabited by the largest number of people (approximately 1,5 million people each).¹

The Austrian legalistic, civil law system has a hierarchical structure with the Federal Constitution as its supreme norm.² It does not only consist of the main document, i.e. the Federal Constitutional Act (*Bundes-Verfassungsgesetz, B-VG*),³ but also of a large number of additional federal constitutional acts, single federal constitutional provisions within ordinary federal laws and several laws dating back to the former Austro-Hungarian monarchy (until 1918), which, as well as certain state treaties, were given the status of federal constitutional law. Apart from the period of Austro-fascism (1934 - 1938) and the period of occupation (1938 - 1945), the Federal Constitution has been in force since 1920, being re-enacted after the Second World War in 1945.⁴

Key principles of federal constitutional law are democracy, federalism, the rule of law, republicanism, the separation of powers and human rights. These fundamental principles are even better protected than „ordinary“ components of Austrian federal constitutional law, since, apart from the qualified quorum and majority that are required for the ordinary enactment or amendment of federal constitutional law, a referendum is compulsory if they are considerably modified or abolished (Art 44 para 3 B-VG). Such a referendum took place when Austria joined the European Union in 1995, as EU membership was accompanied by a wide range of modifications to the Austrian legal system, including the fundamental principles.

The Austrian population is basically homogenous regarding ethnicity and culture, and there are only very slight differences regarding language – which is German, although spoken in various dialects – or religion (mainly Roman Catholics). However, six rather small ethnic groups, which mainly live in the South and East of Austria, enjoy particular legal recognition, but they do not affect the structure of Austrian federalism.⁵

Accordingly, the *Länder* boundaries are not drawn along lines demarcating different peoples, but mainly for historical reasons, as they roughly resemble the former German-speaking Crown *Länder* of the Austro-Hungarian monarchy. Their historical identity, which may be traced back to the Middle Ages in most cases, is still remembered by the citizens, although the strong sense of identity felt for the respective constituent unit is perhaps more typical of the *Land* citizens in the west of Austria (as opposed to the capital Vienna in the East). Indeed, most *Länder* had already existed and formed part of the integrative framework of the monarchy a long time before the Republic of Austria was founded.⁶

At the end of the monarchy in 1918, a co-ordinate foundation process took place:⁷ The Republic was proclaimed by the interim National Assembly in Vienna on behalf of the new central power, but its political realisation still needed the *Länder*. Following the proclamation, the *Länder* indeed declared their will to join the embryonic federal state and also participated in the drafting of the B-VG, which ultimately was a compromise between the two great political parties, namely the Social Democrats and the Conservatives.⁸ Not all *Länder*, however, had joined the Republic from its very beginning: Burgenland, after a short period of Hungarian occupation following the First World War, joined Austria in 1921, and Vienna, before it became a *Land* of its own, had been an integrative part of the *Land* of Lower Austria until 1922. Vorarlberg, although it had joined the Republic prior to the enactment of the Federal Constitution, did so only „for the time being“, as the *Land* doubted whether it would permanently remain within the federal state (which it has actually done).⁹

Due to the Southern and Eastern Austrian borders that were drawn after the First World War and re-drawn after the Second World War, certain parts that had formerly belonged to the Crown *Länder* were separated from the new Austrian *Länder* (e.g. South Tyrol which now belongs to Italy), but meanwhile friendly relations have been established between those neighbouring regions that, historically, had been one (e.g. the so-called „*Europaregion Tirol*“)¹⁰.

II. CENTRAL INSTITUTIONS

1. The Central Legislature

a. General Remarks

The central legislature consists of two houses, namely the National Council (*Nationalrat*) and the Federal Council (*Bundesrat*). Both houses together form the Federal Assembly (*Bundesversammlung*), which has some formal rights, most of which have never been exercised (such as the declaration of war or the decision to impeach the federal president). The main function of the central legislature is, of course, legislation, but it has a couple of administrative functions as well (e.g. appointment of certain administrative functionaries or approval of secondary legislation in certain cases) and it also exercises instruments of legal, political and financial control of the executive.

Bills may be introduced by the federal government, by a certain number of members of the National Council or of the Federal Council, or be initiated by a petition that is supported by a certain number of persons belonging to the electorate.¹¹ In practice, however, it is the federal government that introduces draft laws, usually after an informal, non-binding procedure of consultation with representatives of those groups or entities that are possibly concerned by a draft law. As a rule, a coalition government commands a majority in parliament which makes it easy to achieve parliamentary consent. When a coalition government commands a constitutional majority in parliament (which is not the case presently), it is even easy to get constitutional amendments through both houses. Particularly in the 1980s and 1990s this was done very frequently which led to much criticism.¹²

With few exceptions, bills have to pass both houses, starting with the National Council and passing on to the Federal Council.¹³ If both houses give their consent – usually, a third of the members of each house has to be present and half of the number of members has to vote for the bill – the bill will be passed to the federal chancellor who submits it to the federal president. The federal president is also involved in the legislative procedure as he has to sign parliamentary bills, which are then countersigned by the federal chancellor, and as he is appointed by the Federal Assembly (following presidential elections) as well as subject to the possibility of a decision of the Federal Assembly concerning impeachment and dismissal.

The federal president may only refuse to sign the bill on account of formal irregularities in the legislative procedure, except if a bill is clearly and strongly in breach of constitutional law, but in practice no such refusal has ever been made. After the federal president has signed a bill, it will have to be counter-signed by the federal chancellor and then be published in the federal law gazette in order to enter into force.

Special rules apply should the Federal Council withhold its consent: Usually, this objection may be overruled by the National Council with a qualified quorum.¹⁴ Only in certain cases does the Federal Council enjoy the right of absolute veto, for example if *Länder* competences would be turned into federal competences.¹⁵ However, neither the right of veto nor, with very few exceptions, the right of objection have been exercised so far, as the members of the Federal Council are closely linked to their political allies in the National Council which makes them refrain from withholding their consent to a bill that was approved by a majority of the National Council. In recent years, coalition pacts even included the provision that the Federal Council's members, which belonged to the political parties that formed the government, ought not to vote against a resolution passed by the National Council.¹⁶

The Standing Orders of both Houses provide the detailed rules as to how bills are treated, how many readings and committee stages there are and which parliamentary rights are granted to members or certain groups of members. The Standing Orders of the National Council,¹⁷ however, do not demand a specific consideration of *Länder* representatives within committees or with regard to the exercise of rights of parliamentary control.

b. *The National Council*

The National Council consists of 183 members and is chaired by a president and two vice-presidents. According to Art 26 B-VG, the electoral procedure has to be general, free, proportional, secret, personal, equal and direct. These electoral principles have to be observed by the Electoral Rules of the National Council, which are laid down in a very detailed (ordinary) federal law.¹⁸ The members of the National Council (all of whom must have completed their 19th year by the day of the election) are elected directly by those federal citizens whose 18th year is completed by the day of the election and who are not excluded from the right to vote because of certain convictions. For the purpose of the election, the federal territory is divided into nine *Länder* constituencies (being identical with the respective *Länder* territories), which, again, are split into regional election districts (43 in total). In

principle, the 183 Mandates are distributed among the *Länder* constituencies, and those of each *Land* constituency among its regional election districts, according to the *Hare* system. The complicated procedure of counting votes and allocating them according to the number of available mandates consists of three stages, namely at the level of the regional election districts, that of the *Länder* and, finally, at the federal level. The electoral authorities of all levels are constituted according to criteria of objectivity and, moreover, the Constitutional Court is competent to review irregularities of the electoral procedure.

The rationale for the manner in which the National Council is elected, therefore, is the direct representation of the federal citizens and not the representation of the constituent units. However, the territorial division into *Länder* constituencies and the allocation of mandates in accordance with a system that is based on proportions between the respective numbers of *Land* citizens imply that *Länder* constituencies with larger populations have more mandates and that their citizens are therefore represented by a larger number of delegates in the National Council. Nevertheless, this offers no particular channel of influence, since its members do not represent their respective *Länder*, but the federal citizens in general, even though the election districts have a territorial basis.

The National Council is elected for a four-year term, i.e. four sessions (with recess in the summer). Early termination is possible either if the federal president decides to do so (which he may only do once for the same reason and which does not happen practically) or if the National Council itself passes a law of termination.

c. *The Federal Council*

The Federal Council is constituted quite differently.¹⁹ Its members represent the *Länder* and are not elected directly by the federal citizens. Neither are they directly elected by the citizens of the respective *Länder* (which would be a possible method of selection of the second chamber as worldwide comparison shows)²⁰. Instead, the parliament of each *Land* elects its delegates, who do not themselves have to be members of the *Land* parliament, but have to be eligible to it. The representatives of each *Land* therefore reflect the proportion of the political parties as represented in the respective *Land* parliament. This linkage between *Land* parliament and Federal Council also is the reason for the permanency of the Federal Council's term. After the election of a new *Land* parliament (usually every 5 or 6 years, depending on the respective *Land* Constitution), this *Land*'s delegates are elected by the new *Land* parliament. After expiry of the

legislative period of the *Land* parliament or after its dissolution the delegates remain in office until such time as the new *Land* parliament has held the election to the Federal Council.

There is a longstanding theoretical question as to whether the constituent units are entitled to equal representation („arithmetic equality“) or whether differences according to their size, population etc may be made („geometric equality“).²¹ In Austria, as in some other federal systems, a „geometric system“ prevails, which means that the numbers of representatives to the Federal Council differ according to the *Land* population. Art 34 B-VG provides that the *Land* with the largest population is to be represented by 12 members and the other *Länder* by as many members as reflects the proportion between their respective population and that of the *Land* with the largest. As population numbers change from time to time, provision is made in the Federal Constitution that the number of representatives of each *Land* is determined by an order of the federal president in conformity with the national census every ten years. Currently, the Federal Council consists of 62 members, i.e. 12 members from Lower Austria, 11 from Vienna, 11 from Upper Austria, 9 from Styria, 5 from the Tyrol, 4 from Carinthia, 4 from Salzburg, 3 from Vorarlberg and 3 from Burgenland.

With good reasons, the question may be raised whether a proportional system of representation does not in truth resemble the composition of the National Council and whether the principle of federalism would not rather demand a system of equal (i.e. „arithmetic“) representation. It is inherent in the concept of classical federalism that the constituent units of a federal system are basically equal, irrespective of their population, and that it is the rationale of a federal chamber – in comparison to the national chamber of a federal parliament – that the constituent units and not the federal citizens (in the shape of the citizens of the nine *Länder*) are represented therein. A purely „arithmetic“ model is somewhat closer to the confederalistic concept behind which stands the idea of equality of independent states that must not be represented differently, even though they largely differ regarding size, population or other criteria. Within a federal system, however, even the „arithmetic“ model must suffer the possibility that, although the constituent units are represented by equal numbers of representatives, the representatives of a constituent unit may be overruled by a majority of those of the others.

On the other hand, also a „geometric“ system may be compatible with the concept of federal equality, since, even though the system of selection is based on proportionality, it is up to the rules determining the procedure of voting in the Federal Council whether voting relies on a

majority of representatives or rather on majorities of the *Länder*. The Austrian Federal Constitution seeks to combine the „geometric“ model with the „arithmetic“ equality of the *Länder*. Although the prevailing model is the „geometric“ one, as the *Länder* are represented by different numbers of delegates and as usually a majority of representatives is sufficient, irrespective of the number of *Länder* represented by them, Art 35 para 4 B-VG provides that Art 34 and 35 B-VG – which determine the selection and composition of the Federal Council – must not be amended without the consent of the majority of the representatives of at least four *Länder*. In this latter case, therefore, it is not sufficient that just a majority of representatives votes for the bill, but also that the bill is supported by a majority of representatives that are delegates from a certain number of *Länder*. In other words, these particular amendments indirectly need the consent of a certain number of *Länder*, which is given via the *Länder* representatives in the Federal Council.

The direct consent of the *Länder* is only required for those federal bills according to which an Independent Administrative Tribunal²² is to serve as a second administrative instance in those matters which fall into the administrative competence of the *Länder* or which have to be executed by them on behalf of the federation or if a federal administrative task is to be performed directly²³ by a federal agency without explicit authorisation in the Federal Constitution.

As mentioned already, the Federal Council is usually only entitled to object to a bill that was passed by the National Council, which, in its turn, may overrule this objection – and thereby prevent a possible deadlock – with a quorum of half of its members (Art 42 B-VG). In a few cases, however, the Federal Council enjoys the right of absolute veto, which means that the bill cannot be overruled by a second decision of the National Council and therefore not become a law:²⁴ The most prominent scenario of this kind is Art 44 para 2 B-VG according to which the consent of the Federal Council (with a quorum of half of its members and a majority of two thirds) is required if legislative or administrative competences of the *Länder* are curtailed by a federal constitutional law. So far, however, the Federal Council has never withheld its consent, i.e. never vetoed a bill that reduced *Länder* powers. From a constitutional standpoint, no legal instrument could force the Federal Council to approve of such a bill as long as Art 44 para 2 B-VG is in force. Politically, instead, it is nearly impossible to imagine such severe blocking measures on behalf of the Federal Council. Further to Art 44 para 2 B-VG, there are other cases where the Federal Constitution provides for an absolute veto, namely if *Länder* competences would be affected by a state treaty that requires parliamentary consent or if a state treaty would

reduce *Länder* competences (Art 50 para 1 and 3 B-VG); moreover, if a *Land* parliament is to be dissolved by the federal president according to Art 100 B-VG (which has never happened in practice); furthermore, if a federal framework law obliges the *Länder* to enact implementation laws before the expiry of a period of 6 months or later than a year (Art 15 para 6 B-VG). Finally, the Federal Council is entitled to veto a bill that would alter the constitutional rules regarding the selection and composition of the Federal Council (Art 35 para 4 B-VG).²⁵

The Federal Council is neither allowed to object to nor veto bills that concern the federal budget and assets or the Standing Orders of the National Council. In these cases, the Federal Council's involvement in the federal law-making-procedure is restricted to the right of being informed about those laws. The National Council, in its turn, is excluded from resolving the Standing Orders of the Federal Council, which may be done solely by the latter with a qualified quorum and majority.²⁶

It is interesting to find that the Federal Constitution nowhere makes explicit provision as to whether the Federal Council is to act as a „federal house“. Considering, however, that its members are representatives of the *Länder* parliaments and that its functions, at least those of an absolute veto, are clearly based on the idea of protecting the *Länder* from various kinds of federal interference, the Federal Council certainly is a „federal house“. Or rather at least, this is its constitutional intention, whereas practice turns out to be rather different. Usually, the coalition governments have a majority both in the National Council and the Federal Council which means that the members of the Federal Council are more concerned with the interests of their political parties than with *Länder* interests. Presently, although the traditional predominance of the conservative People's Party in the Federal Council has been somewhat weakened due to recent elections to several *Länder* parliaments, the same party, which is now supported by a more right-wing-party in the federal government, still commands a majority of seats in the Federal Council.²⁷ This is not a recent phenomenon, however, but has always been a characteristic of the Federal Council, irrespective of the composition of the federal government, i.e. even if the Social Democratic Party was senior partner in a coalition government due to its (relative) majority in the National Council.

Politically, therefore, the Federal Council does not operate as a federal house would be supposed to do. In 2003, a very controversial bill was passed to the Federal Council after approval by the National Council, but neither found sufficient members that supported it nor sufficient members that supported the motion to object to it. A dispute²⁸ arose as to

whether a bill could become a law under these circumstances, but in the end the Constitutional Court's answer was in the affirmative.²⁹ The behaviour of the Federal Council, however, was met with harsh criticism, and, once again, the institution itself was challenged. This was not the first time that the very existence of the Federal Council was under discussion and the question is again being posed currently.³⁰ So far, no unanimity has been achieved: Some want to abolish the Federal Council because it does not seem to represent *Länder* interests, others want to dispose of it together with the federal system as a whole, whereas some only want to replace the method of its selection and composition by another that is more suitable for the representation of *Länder* interests (e.g. *Länder* governors as members of the Federal Council). One point at least seems to be clear, namely that, unless the *Länder* would be compensated by overall rights of direct consent, a federal system must not lack a „federal house“ since the constituent units need to participate at the level of federal legislation. Without a „federal house“ the federal system could not be maintained, which would be regarded as a „total revision“ of the Austrian Federal Constitution and therefore require a referendum. It is unlikely, however, that such an extreme step will be taken.

2. The Central Executive

a. Federal President and Federal Government

From 1920 to 1929, Austria was a radically parliamentary Republic with even the federal president being elected by parliament. With the Constitutional Amendment of 1929,³¹ however, this system was transformed into a moderately presidential form. The federal president has since been vested with a range of important executive powers, also in relation to the National Council, and been elected directly by the federal citizens.

The central executive, however, does not only consist of the federal president, but also of the federal government (as a whole) and individual federal ministers and state secretaries respectively. It is selected in a way that clearly admits no influence of federalism:³² The federal president, who is elected by the federal citizens, appoints the federal chancellor and, following the proposal of the federal chancellor, the federal ministers (and state secretaries). Again, it is the federal president that dismisses the federal chancellor or the federal government (as a whole), whereas the dismissal of an individual member of the federal government needs the proposal of the federal chancellor. Apart from the federal chancellor's

right of proposal in the described cases, the federal president is not liable to any legal restraint when he decides who is to be appointed or dismissed. Theoretically, this confers great discretionary power to the federal president. Practically, the federal president always seeks to appoint the government in conformity with the results of the preceding elections to the National Council and has never yet dismissed a government on his own account. The federal president himself can be divested of his office if a referendum takes place following a decision of the Federal Assembly.³³ In this case, the Federal Assembly must be summoned by the federal chancellor at the proposal of the National Council (with a qualified quorum and majority), but there has never yet been occasion for such proceedings. Moreover, the federal president may be accused of violating the Federal Constitution before the Constitutional Court. The decision to accuse the federal president – which may lead to his dismissal – is taken by the Federal Assembly with a qualified quorum and majority.

It is easy to discern, therefore, that federalism has no influence on the design of the executive and that there are no power-sharing or consociational elements that would require the central executive to represent the constituent units or their interests. The only – informal – channel of influence that the *Länder* may use is if their governments belong to the same party as the federal government, although this may also open the path for possible centralization since the *Länder* governments will in this case be less likely to oppose the federal government.

Nor does federalism have any influence on the selection or role of the federal president who is directly elected by the federal citizens. The role of the federal president includes a wide range of functions that concern all spheres of government: He controls the armed forces, represents the state internationally, appoints and dismisses the federal chancellor and the federal government, dissolves the National Council, issues emergency decrees, signs bills, appoints civil servants and other functionaries, grants certain titles, legitimizes illegitimate children and pardons criminals. Some of these rights resemble those that are typical of the „royal prerogative“. As regards the federal president's more substantive powers, however, their exercise is restricted either by various participatory functions of other authorities or by certain instruments of control which make the federal president abstain from exercising them, at least without strong reasons. Whereas none of these rights have a particular relation to federalism, there is one other more or less theoretical right which indeed relates to the *Länder* parliaments, namely that they may be dissolved by the federal president (Art 100 B-VG).

Again, this right has never been exercised yet, but were it to be exercised, the dissolution would have to be proposed by the federal government and approved by the Federal Council with a qualified quorum and majority (right of absolute veto). Moreover, the *Land* parliament must not be dissolved twice for the same reason. This means that, irrespective of the practical improbability of such a case, the federal president would essentially depend on the will of other bodies and thus play a minor role in the dissolution of a *Land* parliament. Quite similarly, the federal president could not legally prevent a bill with a centralistic purport from becoming a law by refusing to sign it, unless the preceding law-making procedure had been incorrect.

b. Central Administration

It is characteristic of a federal system that both legislative and administrative powers are shared between the central and the constituent units. The distribution of competences, as enshrined in the Austrian Federal Constitution,³⁴ realizes this key element of federalism, although the vast majority of competences belong to the federation. In principle, there are four main types of distribution: According to the predominant type the federation is competent both regarding legislation and administration of the same matter.³⁵ Fewer matters are those in which the federation is responsible for legislation, and the *Länder* for administration.³⁶ Another minor type entitles the federation to enact framework laws, whereas the *Länder* are responsible for implementing laws and their administration.³⁷ The fourth type stands for the residual competence of the *Länder*, which means that they are fully competent for all matters that are not explicitly enumerated as a federal competence.³⁸ There are relatively few matters, however, that fall into the residual competence, since most matters are federal matters, in particular according to the first type. The Federal Constitution somehow compensates the *Länder* by providing for a system of „indirect federal administration“.³⁹ Federal administrative matters are not thereby transformed into *Länder* administrative matters, but remain federal. However, the *Länder* are competent to perform them on behalf of the federation. Art 102 para 2 B-VG enlists those federal competences which could be directly exercised by the federation, whereas the approval of the *Länder* would be required were the federation to exercise directly those of its competences which are not listed. In practice, the major part of federal administrative matters is performed by the *Länder*, namely the *Länder* governors who, in this very special context only, are subject to the instructions of the federal government as a whole or of individual federal ministers.

The scope of central administration thus mirrors only part of the central legislative responsibilities. On the one hand, several legislative responsibilities of the federation are administrative responsibilities of the *Länder*. On the other hand, even those competences that fall into the responsibility of both federal legislation and administration are mostly performed by the *Länder*, even though they remain federal matters. Vice versa, there are only very exceptional cases where the federation performs *Länder* administrative functions on their behalf.

Whereas the *Länder* have certain legislative and administrative competences, they do not take part in the judicial power. There has been much discussion⁴⁰ on the question whether *Länder* administrative courts should be established in order to strengthen *Länder* powers and to relieve the Administrative Court of its burden to decide on all administrative appeals after the administrative channels were passed through. An important step in this direction was taken in 1988 when so-called Independent Administrative Senates (*Unabhängige Verwaltungs-senate*) were established in each *Land* in accordance with a federal constitutional amendment. These tribunals are *Länder* agencies from the organisational viewpoint, but still, even though they meet the requirements of Art 6 of the European Convention on Human Rights, they are no courts. They are vested with a number of important functions, namely to decide as a second instance in administrative penalty procedures and on appeals against the application of administrative compulsion. Since 2002, moreover, they have had to decide on appeals against administrative rulings in many matters pertaining to the aforementioned „indirect federal administration“ of the *Länder*.⁴¹ Since the *Länder* governors had traditionally performed these functions, there was controversy over whether the Independent Administrative Senates could be entitled to, if only partially, replace them.⁴² As the Federal Constitution itself authorizes an extension of their functions and as the *Länder* governors continue to play an important role with regard to indirect federal administration, the law was ultimately found to be constitutional. Moreover, the district administrative agencies that issue the ruling against which the appeal may be lodged, are allowed to object to any substantive decision of the Independent Administrative Senates other than the mere repeal of a ruling, which certainly grants them – and the *Land* governor, to whom they are liable – some influence. After the repeal of a ruling, the case will be referred back to the district administrative agencies that must take a new decision which, however, has to follow the reasons on which the repeal was founded.

Nevertheless, no real *Länder* administrative courts exist at present, although this has been proposed for many years. It is likely, however, that the Constitutional Convention⁴³ will recommend their establishment.

All administrative authorities in Austria – be they local authorities, district administrative agencies, certain agencies responsible for „direct“ federal administration or even *Länder* governors in the case of indirect federal administration (as far as these matters were left to them) – are bound by the instructions of superior administrative authorities and, lastly, by the supreme administrative bodies, which are the *Land* government or the *Land* governor at the *Länder* level, and the federal government as a whole, individual federal ministers or the federal president at the federal level. The Indirect Administrative Senates and other independent tribunals do not, however, belong to this classical hierarchy and are not subject to any instructions given by the supreme administrative bodies. Apart from certain acts of political „governance“, the supreme administrative bodies are responsible for administrative matters, being also entitled to give instructions to lower administrative authorities and to serve as a last administrative instance.

All administrative authorities, including also the independent administrative authorities, are strictly bound to observe the laws.⁴⁴ With few exceptions, all administrative acts need to be based on a parliamentary law which they must not violate. Laws, in their turn, need to be adequately precise in order to predetermine administrative action in a foreseeable way. This standard is to be observed by all parliamentary bodies, i.e. the federal parliament and the nine *Länder* parliaments.

3. The Central Judicature

As mentioned already, legislative and administrative powers are shared between the federation and the *Länder*. The judicature, however, is reserved to the federation which means that the *Länder* do not have courts of their own (neither administrative law courts nor civil or criminal law courts).⁴⁵ Civil and criminal cases are decided by federal law courts that are located in the *Länder*, whereas administrative cases are dealt with by the administrative authorities, including the Independent Administrative Senates and other independent collegial bodies. As a last instance, the Supreme Court in Vienna decides civil and criminal law cases. Regarding administrative cases, appellants may lodge a complaint either before the Constitutional Court (*Verfassungsgerichtshof*) or the Administrative Court (*Verwaltungsgerichtshof*), but only after the exhaustion of all possible administrative remedies. Both Courts are

supreme courts of their own (so-called „public-law jurisdiction“). The Federal Constitution determines their selection, composition and functions in general, which are more precisely defined by two ordinary federal laws.⁴⁶

It is important to point out that the right to review and repeal laws, both of the central and the *Länder* legislatures, is reserved to the Constitutional Court, which, together with the Administrative Court, is also responsible for reviewing and repealing administrative acts, both of the central and *Länder* executives. The „ordinary“ courts, i.e. the civil and criminal law courts, as well as the Independent Administrative Tribunals are not entitled to the judicial review of laws or ordinances. If, in a pending case, an ordinary court (of second instance), the Supreme Court or an Independent Administrative Senate doubts whether a law is constitutional this court or tribunal must ask the Constitutional Court to review the law and continue its proceedings after the Constitutional Court has taken a decision on this question.⁴⁷ Similarly, all (ordinary) courts as well as the Independent Administrative Senates are obliged to ask the Constitutional Court to review an ordinance if doubts arise in a pending case whether this ordinance is illegal and continue their proceedings after the Constitutional Court has taken the decision.⁴⁸

The Constitutional Court is situated in Vienna and consists of a president, a vice-president, twelve members and six deputy members. All members must be lawyers and have worked for at least ten years either as judges, administrative officials or law professors. Whereas the president, vice-president, six members and three deputy members are appointed by the federal president on the proposal of the federal government and three members and two deputy members on the proposal of the National Council, three members and one deputy member are appointed by the federal president on the proposal of the Federal Council. *Länder* influence on the selection of the Constitutional Court is therefore granted, if only to a limited extent, and further strengthened by the provision that three members and two deputy members must have their permanent residence in any Austrian municipality but Vienna.⁴⁹ Although the great majority of members may thus be residents of the capital, at least an attempt is made to select members on a decentralized basis. As regards the Administrative Court, its president, vice-presidents and all other members are appointed by the federal president on the proposal of the federal government and have to be lawyers with at least ten years of professional practice. Art 134 para 3 B-VG provides, however, that at least one quarter of the members ought to have worked as administrative officials in the *Länder*, which has a slightly decentring effect on the selection of the judges. The idea to establish

administrative courts in the *Länder* would certainly imply a wholly different dimension of decentralization.⁵⁰

In particular, the Administrative Court is responsible for reviewing and repealing administrative rulings if appellants claim that rights granted to them by an ordinary law have been violated. There is no distinction as to whether the ruling was issued by a federal or *Land* authority and whether a federal or *Land* law was violated. Under certain conditions, moreover, federal ministers may lodge a complaint against administrative rulings of *Länder* authorities and, as an exception, the *Länder* governments against rulings of federal ministers, both for reasons of illegality.

The Constitutional Court has a wider range of responsibilities, among which the following should be mentioned, as they relate to issues of federalism: As mentioned already, the Court reviews those (federal or *Länder*) laws regarding which an appeal is made by a court or tribunal. The Court also reviews a *Land* law if the federal government demands it, or a federal law if the *Land* government demands it, which demonstrates a symmetry in the treatment of both levels that is inherent in the concept of parity in a federal system, but is by no means characteristic of all features of Austrian federalism. Art 140 B-VG also empowers the *Länder* constitutions to determine whether the political opposition in the *Länder* parliaments should be allowed to lodge an appeal against *Länder* laws that they believe to be unconstitutional. Decrees that were issued by a (federal or *Land*) administrative authority may be reviewed and repealed by the Constitutional Court not only if an (ordinary) court or tribunal asks the Court to do so, but also – among other possibilities – if the federal government believes a *Land* decree to be illegal or, vice versa, if a *Land* government believes a federal decree to be illegal.⁵¹

On the appeal of a private person the Constitutional Court may also repeal administrative rulings (of federal or *Länder* administrative authorities) that violate fundamental, constitutionally guaranteed rights of the person.⁵² The appeal may only be lodged within a period of six weeks after the person received the ruling, and all administrative remedies against these rulings must have been exhausted. If the Constitutional Court holds the ruling to be unconstitutional, it will be repealed. Moreover, if the Court doubts whether the ruling is based on a law that may itself be unconstitutional, the Court may *ex officio* initiate proceedings in order to review the law. Under certain, highly restricted conditions, a private person may also lodge a direct appeal against an unconstitutional law or ordinance before the Court, but these cases are much rarer than those of complaints against administrative rulings.

The Constitutional Court is also responsible for deciding competence disputes: Both the federal government and the *Länder* governments may ask the Court to decide whether a draft law (to be resolved by the parliamentary body of their own level) would be *ultra vires*.⁵³ If the drafted law, in spite of the Court ruling that it would be *ultra vires*, is enacted afterwards and is made object of post-enactment judicial review, the Court will hold this law to be unconstitutional. The first decision, which usually includes an interpretation of the concerned federal or *Land* competence („authentic interpretation“), is considered binding.

Furthermore, the Constitutional Court also decides financial disputes⁵⁴ between the federation and the *Länder*, as far as they are not subject-matter of the ordinary law courts or administrative authorities, and disputes⁵⁵ arising from concordats concluded under Art 15a B-VG⁵⁶.

III. INSTITUTIONAL ARRANGEMENTS OF THE CONSTITUENT UNITS

1. The *Länder* Legislatures

Since the *Länder* have legislative functions of their own, they also have their own parliamentary bodies which are called *Landtage*.⁵⁷ The Federal Constitution basically determines the selection, composition and role of the *Länder* parliaments, but leaves it to the *Länder* Constitutions to regulate them more precisely.⁵⁸ The *Länder* parliaments and their relations with the respective *Land* executive branch do but partly resemble their counterpart at the federal level, not only because each *Land* Constitution differs from the other, but also because the Federal Constitution does not construe the *Länder* parliaments as perfectly homogenous copies of the federal parliament. The most striking organizational difference between the federal parliament and the *Länder* parliaments perhaps is the lack of a bicameral system at the *Land* level. A strong similarity, however, is shown in the way of electing the *Länder* parliaments, which is based on the same electoral principles as those that apply to elections to the National Council, leaving it to the respective *Land* Electoral Rules to determine whether those entitled to vote and those eligible to election may be selected also from those that are not eligible or entitled to vote under the Electoral Rules of the National Council.⁵⁹ The Federal Constitution also expressly applies the provisions concerning the immunity of members of the National Council and the public character of parliamentary meetings to the *Länder* parliaments.⁶⁰

Each *Land* Constitution contains more detailed or supplementary provisions concerning the selection and composition of the *Land* legislature, which, of course, have to be in conformity with the federal constitutional provisions, and usually leaves it to the respective *Land* parliament's Standing Orders and Electoral Rules to determine these issues even more minutely. For instance, it is up to the *Länder* to determine the number of members to the *Länder* parliaments, whereas they are not allowed to introduce a bicameral system or to provide specific representation for minority groups without a federal constitutional basis (which has been lacking so far)⁶¹.

The Federal Constitution also provides that the *Länder* parliaments are responsible for law-making in the *Länder*. The law-making procedure, too, is roughly outlined by the Federal Constitution:⁶² A bill needs to pass the *Land* parliament, must be signed and counter-signed (which may be determined more precisely by the *Land* Constitution) and then be published in the *Land* law gazette by the *Land* governor. It is up to the *Länder* to decide which parliamentary quorum and majority are necessary for the legislative procedure of ordinary laws, but Art 99 para 2 B-VG provides that a *Land* Constitutional Act or a single constitutional provision within an ordinary *Land* act needs a quorum of half of the members and a two-thirds majority. The law-making procedure, however, is not free from federal influence, since Art 98 B-VG provides that all bills have to be communicated to the Office of the Federal Chancellor before being published in the federal law gazette. Within eight weeks after the communication was made the federal government may object to the bill if it endangers federal interests but must in this case explain its reasons. If the federal government had been consulted before the *Land* parliament passed this bill, an objection may only be made if the bill is considered to be *ultra vires*. Unless the assistance of federal administrative organs is required by a bill, any veto of the federal government may be overruled by the *Land* parliament with a quorum of half of its members. On the whole, federal supervision⁶³ is stronger in Austria than in many other federal countries and altogether more typical of regionalized countries.⁶⁴

The federal president, though he does not play any role in the *Land* law-making procedure, has one at least theoretically important function with regard to the *Länder* legislatures: He may dissolve a *Land* parliament on the proposal of the federal government. This power, however, is restricted, since a *Land* parliament must not be dissolved more than once on account of the same reason (which may be any reason whatsoever). Moreover, the Federal Council's consent (with a qualified quorum and majority) is required for the *Land* parliament's dissolution, which makes dissolution even more unlikely, although the

representatives of the concerned *Land* are not allowed to vote in this decision.

2. The *Länder* Executives

The *Land* government is responsible for *Land* administration.⁶⁵ According to Art 101 B-VG, it consists of the *Land* governor, its deputies and other members. All members of the *Land* government are elected by the *Länder* parliaments, whereas they are appointed by other organs, namely the federal president (who otherwise does not play a role within this sphere of government) in the case of the *Land* governor, and by the *Land* governor in the case of the other members. They need not themselves be members of the *Land* parliament, but must be eligible to the *Land* parliament. Further to the B-VG, the Federal Constitutional Act of 1925 concerning the Principles for the Establishment and Operation of the Offices of the *Länder* Governments except Vienna⁶⁶ applies to the *Länder* executive. Accordingly, each *Land* government is assisted by the Office of the *Land* government consisting of several groups and departments that have to deal with both indirect federal and *Land* administrative tasks. If the Office performs *Land* administration⁶⁷ the officials are directed by the *Land* government or its individual members, whereas, in the case of indirectly performing federal administration,⁶⁸ they are directed by the *Land* governor. The latter also presides the Office and supervises the Office's Director, who is a lawyer and responsible for the internal management of the Office's work.

Within this framework, as provided by the Federal Constitution, the *Länder* Constitutions have authority to regulate the *Länder* executives. Again, however, the basic rules are given by the Federal Constitution and must not be changed by the *Land* Constitutions. Moreover, the Constitutional Court applies a rigorous standard of federal homogeneity, namely not only rules that are explicitly determined by the Federal Constitution, but also implicit standards of homogeneity.⁶⁹

3. Local Government

In addition to the federation and the *Länder*, local government constitutes the third territorial tier in Austria. Municipalities, although forming the substructure of each state (Art 116 para 1 B-VG), are not constituent units of the federal system. Nevertheless, they perform a large number of administrative tasks and thus play an important role as well.⁷⁰

Art 115 – Art 120 B-VG mainly determine the establishment of municipalities, local bodies, local responsibilities and the relations between local government and the federation or the *Länder* respectively. Art 115 para 2 B-VG generally entitles (and obliges) *Land* legislation to set up more detailed rules pertaining to municipalities, save as competence on the part of the federation is expressly stipulated. *Länder* legislation pertaining to municipalities must be in accordance with the principles set by the Federal Constitution.

Municipalities are not merely administrative units, but also autonomous bodies with the right to self-administration. Self-administration means that administrative tasks are performed by legal bodies under public law that are different from the entities between which competences are divided (i.e. the federation and the constituent *Länder*). It is a characteristic of self-administrative bodies to have their own (autonomous) as well as a delegated sphere of functions. If they perform tasks within their own sphere of functions they must not be given instructions by federal or *Land* authorities, although they are subject to their supervision, which allows the municipalities more liberty of action. If they perform tasks within their delegated sphere of functions, however, they are even bound by instructions given by federal or *Land* authorities.

According to the Federal Constitution, there are three main local bodies, namely the mayor, the local assembly and the local board. The local assembly is directly elected by the local citizens, according to the same electoral principles that apply to elections of the National Council and the *Länder* parliaments. The local board is a collegial body elected by the local assembly. The Federal Constitution basically provides that the mayor is elected by the local assembly, but, since 1995,⁷¹ it has empowered the *Land* Constitutions to deviate from this provision (Art 117 para 6 B-VG). So far, 6 *Länder* have adopted constitutional provisions that allow for a direct election of the mayor. Population diversity, therefore, is reflected in the institutional structure as far as representation goes according to the electoral principles mentioned above.

Within their autonomous sphere, local authorities are not liable to instructions of federal or *Land* agencies. However, a number of supervisory instruments (e.g. right of information, right of repeal of illegal local orders, in certain cases right of approval of local ordinances and even dissolution of the local assembly) is available for the federation and the *Länder* in order to ensure that municipalities do not violate their laws. The federation is competent to exercise these supervisory rights with regard to the performance of federal administrative tasks that are carried out by the municipalities autonomously, and the *Länder* are competent to

exercise them with regard to *Land* administrative matters that are carried out by the municipalities autonomously. The *Länder* are moreover competent to examine the local budget according to the criteria of economy, profitability and expediency.

In principle, the mayor is responsible for performing all tasks that fall into the local delegated sphere and is, in this case, subject to instructions of either federal or *Land* organs – depending on whether the task is a federal competence or a *Land* competence. As a consequence of illegal behavior, the mayor may be dismissed by the *Land* government on behalf of the *Land* or by the *Land* governor on behalf of the federation.

It follows that local government does not enjoy a status that could be called equal to that of the federation and the *Länder*. Being without any legislative powers or sovereignty of their own, municipalities have to carry out federal or *Land* legislation. Even their „autonomous“ tasks derive from either a federal or a *Land* law, which, in their turn, however, are bound by the Federal Constitution to allocate these tasks to the local autonomous sphere according to the principle of subsidiarity.⁷² The idea of a „three-layered-federalism“, even though it becomes more and more manifest as regards fiscal relations, thus seems to be far from its realization.

IV. INTERGOVERNMENTAL RELATIONS

Whereas in other federal systems co-operative federalism has been the main instrument to overcome the strong legal position of the constituent states and to create an informal, but very efficient centralism, in Austria co-operative federalism has been important in order to unite the political power of the *Länder* and to co-ordinate their policies in order to prevent centralization, thus creating a strong political counterpart against the federal government's overwhelming legal powers.⁷³

Co-operation may take a legal, even constitutional form, but may also be informal. Legal co-operation, in its turn, may be based on private law, namely contracts between the federation and the *Länder*. Their capacity to act under private law is not affected by the distribution of competences,⁷⁴ which means that their contracts may concern any subject-matter as far as this may be done under private law. Otherwise, the federation and the *Länder* conclude concordats under public law as provided by Art 15a B-VG. This provision was inserted into the Federal Constitution in 1974 and may be regarded as the probably most far-reaching legal instrument of co-operative federalism.⁷⁵ According to Art 15a B-VG the *Länder* may conclude these concordats with each other,

but also with the federation, as far as their own competences are concerned. This turns out to be very useful with regard to complex matters (e.g. environmental protection, spatial planning) that are extremely split between different law-making authorities and cannot be resolved just by the law-making of one competent authority, but need to be harmonized with the law-making of the other. Concordats are concluded between the federal government or an individual federal minister and, according to the *Länder* Constitutions, the *Länder* governors. If the matter that is dealt with in the concordat affects the law-making of either the federation or the *Länder*, the respective parliamentary body must give its consent after the concordat was ratified. Further to that, the concordats that concern legislative matters need to be implemented by laws on both sides, which bears another similarity to the implementation process of international law.

Two rather recent and specific concordats should be explicitly mentioned in this context, namely the Concordat on a Consultation Mechanism⁷⁶ and the Concordat on an Austrian Stability Pact⁷⁷. Both concordats were not just concluded by the federation and the *Länder*, but also by the municipalities (represented by the Austrian Association of Towns and the Austrian Association of Municipalities). According to Art 15a B-VG that entitles only the federation and the *Länder* to conclude such concordats, this would not have been possible. A Constitutional Act of Authorization⁷⁸ had therefore to be passed in order to empower the municipalities to take part in these two concordats. This new type of parity, which includes the municipalities as well, allows some discussion on a possible development towards a „three-layered-federalism“. ⁷⁹ Since the classical concept of federalism does not recognize municipalities as constituent parts of the federal state and as long as this new dimension is limited to the question of financial equality, however, local government still is not an integral element of the federal system as a whole.

The Consultation Mechanism⁸⁰ obliges the federation, *Länder* and municipalities to consult each other if a draft law or an ordinance of one entity would impose financial burdens on the others. In this case, the matter is discussed by the consultation committee which consists of representatives of all three territorial entities. If the committee fails to reach an agreement on the matter, the entity that intends to pass the law will be responsible for any additional costs. This mechanism protects the *Länder* from federal laws that would have a financial impact on them; on the other hand, the *Länder* themselves will run the risk of bearing additional costs if they enact laws against the will of the others.

The concordat on the Austrian Stability Pact 2001 was concluded under the rigorous pressure of the EU convergence criteria.⁸¹ According to this Pact the *Länder* must achieve an annual budgetary surplus, whereas, to a certain extent, a deficit is possible on part of the federation and at least a balanced budget on part of the municipalities. The means to force the *Länder* into this concordat was a provision in the recent Tax Equalisation Act⁸² which threatened them with considerable financial sanctions if they refused to sign the concordat. This example clearly shows that political and also legal force may be used even in what is called „co-operative federalism“, although it has to be admitted that this was the most outstanding case of its kind.

On an informal basis of co-operation, the *Länder* governors, other members of the *Länder* governments, the presiding officers of the *Länder* parliaments and senior civil servants respectively meet very frequently.⁸³ Representatives of the federation may be allowed to attend the meetings as observers. These inter-state conferences are regularly organized by the „liaison office“ of the *Länder*, which is an informal agency that renders all necessary information to the *Länder*, co-ordinates joint activities and communicates them to the federation.⁸⁴ The most important political body of *Länder* co-operation is the Conference of the *Länder* Governors (*Landeshauptmännerkonferenz*) which is usually summoned four times a year, but also for special purposes.⁸⁵

In Austria, co-operative federalism is of great political importance. In practice, all major changes in the legal, political or financial arena are negotiated and usually not carried out without consultation of the *Länder* and municipalities. Nevertheless, the predominant role of the federal government and the dependence of all other governments on its planning and policies still remains the principal feature of Austrian federalism.

V. ANALYSIS AND CONCLUSIONS

As far as the current status goes, legislative and executive governance have a solid written basis in federal constitutional law. These basic provisions are elaborated by the *Land* Constitutions and ordinary *Land* legislation or, as far as federal governance is concerned, by ordinary federal legislation. Due to the codified system of Austrian law, the institutions and functions of the federal system are provided on a relatively precise basis, which, however, does not preclude the Constitutional Court from interpreting constitutional law in a manner which is not always foreseeable or favorable to the concept of federalism. Convention or practice plays a minor role in the legalistic system of

Austrian law. Nevertheless, informal interaction and co-operation are highly important for the practical functioning of Austrian federalism, despite the predominance of the central unit.

When the B-VG was enacted in 1920, the federal system was not complete. It took several stages to develop Austrian federalism to its modern shape and even now it is unclear where the road will lead to. More than a decade ago, it had seemed as if a great reform of the federal system could be achieved. For political reasons, however, this attempt failed and was replaced by a number of smaller amendments.⁸⁶

In June 2003, a Constitutional Convention, consisting of 70 members (constitutional lawyers, politicians and lobbyists) and chaired by the President of the Austrian Court of Auditors, was created in order to allow expert discussion on a new constitution and a new federal system in particular. The Convention is to present a constitutional draft at the end of 2004, but, considering the very different political approaches, does currently not seem likely to realize this aim on a broad basis, although a more optimistic view might be adopted towards the end of its working period.⁸⁷

Still, institutional reform seems to be inevitable if federalism is to operate effectively in the future and to remain accepted as a legitimate system by the people. Options include the modification of the composition and functions of the Federal Council in order to make it better suited for representing *Länder* interests, the transformation of the system of indirect federal administration into direct *Land* administration, the introduction of *Land* administrative courts and modifications regarding the allocation of competences. Moreover, a reform must also not neglect the EU context: Although the EU is said to be „blind“ as regards the internal (federal or unitary) structure of its member states,⁸⁸ it has clearly accelerated the dynamics of „executive federalism“.⁸⁹ If the essence of a federal system, namely a dual order of legislative governance is to be maintained, the *Länder* parliaments that mainly suffer from this phenomenon must be protected from a further loss of competences.

1 For further statistical data see www.statistik.at.

2 Due to EU membership, EU law enjoys a higher rank than domestic constitutional law, but this view is generally not taken regarding the fundamental principles of the Austrian constitution (as modified by the accession).

3 The B-VG was first enacted in 1920, re-published in 1930 and amended 85 times so far.

4 An overview on Austrian constitutional law is given by Robert Walter and Heinz Mayer, *Grundriß des österreichischen Bundesverfassungsrechts*, 9th ed. (Vienna: Manz, 2000); Ludwig K. Adamovich, Bernd-Christian Funk, and Gerhart Holzinger,

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- Österreichisches Staatsrecht, 3 vols. (Vienna, New York: Springer, 1997-2003); Theo Othlinger, Verfassungsrecht, 5th ed. (Vienna: WUV, 2003) and Peter Pernthaler, Österreichisches Bundesstaatsrecht (Vienna: Verlag Österreich, 2004).
- 5 According to the nation-wide census of 2001 the Slovenian minority consisted of 17,953 Austrian nationals, the Burgenland Croatian minority of 19,374 nationals, the Hungarian minority of 25,884 nationals, the Roma minority of 4,348 nationals, the Czech minority of 11,035 nationals and the Slovakian minority of 3,343 nationals. See Anna Gamper, „Austrian Federalism and the Protection of Minorities,” Federalism, Subnational Constitutions, and Minority Rights, eds. G. Alan Tarr, Robert F. Williams, and Josef Marko (Westport/London: Praeger 2004), pp. 55-72.
 - 6 See, for example, Felix Ermacora, Österreichischer Föderalismus: Vom patrimonialen zum kooperativen Bundesstaat (Vienna: Braumüller, 1976), pp. 25-39 (with further references).
 - 7 See Peter Pernthaler, Die Staatsgründungsakte der österreichischen Bundesländer (Vienna: Braumüller, 1979), Karl Weber, „Die Entwicklung des österreichischen Bundesstaates,” Bundesstaat und Bundesrat in Österreich, ed. Herbert Schambeck (Vienna: Verlag Österreich, 1997), pp. 37-65 and Karl W. Edtstadler, „Das Werden des Bundesstaates,” Bundesstaat und Bundesrat in Österreich, ed. Herbert Schambeck (Vienna: Verlag Österreich, 1997), pp. 23-35.
 - 8 See Felix Ermacora, Die Entstehung der Bundesverfassung 1920, 4 vols. (Vienna: Braumüller, 1986-1990).
 - 9 See Peter Bußjäger, Landesverfassung und Landespolitik in Vorarlberg – Die Verfassungsgeschichte Vorarlbergs und ihre Auswirkungen auf die Landespolitik 1848 – 2002 (n. p.: W. Neugebauer, 2004). The history of the *Länder* after 1945 is illustrated by Herbert Dachs, ed. Der Bund und die Länder (Vienna: Böhlau, 2003).
 - 10 See Peter Pernthaler and Sergio Ortino, Rechtliche Voraussetzungen und Schranken der Institutionalisierung – Europaregion Tirol (Bolzano: n. p., 1997).
 - 11 Art 41 B-VG.
 - 12 See e.g. Martin Hiesel, Verfassungsgesetzgeber und Verfassungsgerichtshof (Vienna: Manz, 1995) and, most recently, Heinz Peter Rill and Heinz Schäffer, „Art 44 B-VG,” Bundesverfassungsrecht, eds. Heinz Peter Rill and Heinz Schäffer (Vienna: Verlag Österreich, 2001).
 - 13 The federal law-making procedure is basically regulated by Art 41 – 49 B-VG.
 - 14 Art 42 B-VG.
 - 15 Art 44 para 2 B-VG.
 - 16 See Pernthaler, Österreichisches Bundesstaatsrecht, p. 435.
 - 17 Geschäftsordnungsgesetz 1975 (BGBl 1975/410 as amended by BGBl I 1999/194).
 - 18 Nationalrats-Wahlordnung 1992 (BGBl 1992/471 as amended by BGBl I 2003/90).
 - 19 Art 34 – 37 B-VG. See Robert Walter, „Der Bundesrat,” Föderative Ordnung I: Bundesstaat auf der Waage, eds. Ernst C. Hellbling, Theo Mayer-Maly, and Herbert Miehsler (Salzburg - Munich: Anton Pustet - Europa Verlag, 1969), pp. 199-290; Irmgard Kathrein, Der Bundesrat in der Ersten Republik (Vienna: Braumüller, 1983); Irmgard Kathrein, „Der Bundesrat,” Österreichs Parlamentarismus, ed. Herbert Schambeck (Berlin: Duncker & Humblot, 1986), pp. 337-401; Robert Walter, „Der Bundesrat zwischen Bewährung und Neugestaltung,” Reformbestrebungen im österreichischen Bundesstaatssystem, eds. Heinz Schäffer and Harald Stolzlechner (Vienna: Braumüller, 1993), pp. 41-50; Heinz Schäffer, „The Austrian Bundesrat: Constitutional Law – Political Reality – Reform Ideas,” Role and Function of the Second Chamber, ed. Ulrich Karpen (Baden-Baden: Nomos, 1999), pp. 25-55; Herbert Schambeck, „Föderalismus und Parlamentarismus in Österreich,” Die

Stellung der Landesparlamente aus deutscher, österreichischer und spanischer Sicht, ed. Detlef Merten (Berlin: Duncker & Humblot, 1997), pp. 15-32 and Herbert Schambeck, ed. Bundesstaat und Bundesrat in Österreich (Vienna: Verlag Österreich, 1997).

- 20 See Ronald L. Watts, Comparing Federal Systems, 2nd ed. (Montreal et al.: McGill-Queen's University Press, 2002), p. 93.
- 21 See Anna Gamper, Die Regionen mit Gesetzgebungshoheit (Frankfurt et al.: Peter Lang, 2004), pp. 432 – 436. The distinction between „arithmetic“ and „geometric“ system touches also the issue of „asymmetric federalism“: See Peter Pernthaler, „Asymmetric Federalism as a Comprehensive Framework of Regional Autonomy,“ Handbook of Federal Countries, 2002, ed. Ann L. Griffiths (Montreal et al.: McGill-Queen's University Press, 2002), pp. 472-493. Regarding Austria cf. Peter Pernthaler, Der differenzierte Bundesstaat (Vienna: Braumüller, 1993).
- 22 See below.
- 23 See below.
- 24 See Peter Bußjäger, Die Zustimmungsrechte des Bundesrates (Vienna: Braumüller, 2001).
- 25 See above.
- 26 Art 37 para 2 B-VG.
- 27 27 seats for the People's Party, 25 for the Social Democratic Party, 6 for the Freedom Party and 4 for the Greens.
- 28 BGBl I 2003/71. See also Christoph Grabenwarter, „Bundesrat: Wenn Anträge keine Mehrheit finden,“ Journal für Rechtspolitik (2003): 155-160, Theo Öhlinger, „Die Selbstblockade des Bundesrates,“ Journal für Rechtspolitik (2004): 11-12 and Christoph Grabenwarter, „Anträge ohne Mehrheit - keine Selbstblockade des Bundesrates,“ Journal für Rechtspolitik (2004): 13-14.
- 29 Constitutional Court, 13 March 2004, G 211/03, G 212/03.
- 30 See below. Future perspectives are shown by Peter Bußjäger and Jürgen Weiss, eds. Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung (Vienna: Braumüller, 2004).
- 31 BGBl 1929/392.
- 32 Art 70-72 B-VG.
- 33 Art 60 para 6 B-VG.
- 34 Cf. mainly Art 10-15 B-VG. See, for example, Bernd-Christian Funk, Das System der bundesstaatlichen Kompetenzverteilung im Lichte der Verfassungsrechtsprechung (Vienna: Braumüller, 1980), Josef Werndl, Die Kompetenzverteilung zwischen Bund und Ländern (Vienna: Braumüller, 1984), Peter Pernthaler, Kompetenzverteilung in der Krise (Vienna: Braumüller, 1989), Heinz Schäffer, „Die Kompetenzverteilung im Bundesstaat,“ Bundesstaat und Bundesrat in Österreich, ed. Herbert Schambeck (Vienna: Verlag Österreich, 1997), pp. 65-88 and, most recently, Gamper, Die Regionen mit Gesetzgebungshoheit, pp. 362-404.
- 35 Art 10 B-VG.
- 36 Art 11 B-VG.
- 37 Art 12 B-VG.
- 38 Art 15 B-VG.
- 39 See Karl Weber, Die mittelbare Bundesverwaltung (Vienna: Braumüller, 1987), Bernhard Raschauer, „Artikel 102,“ Österreichisches Bundesverfassungsrecht, eds.

Karl Korinek and Michael Holoubek (Vienna, New York: Springer, 2001), Peter Bußjäger, „Artikel 102,“ Bundesverfassungsrecht, eds. Heinz Peter Rill and Heinz Schäfer (Vienna: Verlag Österreich, 2002).

- 40 See, for example, Peter Pernthaler and Imgard Rath-Kathrein, „Die Einführung von Landesverwaltungsgerichten – eine Alternative zu den 'unabhängigen Verwaltungs-senaten in den Ländern',“ Juristische Blätter (1989): 609-614, Christoph Graben-warter, „Auf dem Weg zur Landesverwaltungsgerichtsbarkeit,“ Journal für Rechts-politik (1998): 269-286 and Christian Marteschin, „Der Einbau von Landesver-waltungsgerichten in das System des österreichischen Verwaltungsrechtsschutzes,“ Zeitschrift für Verwaltung (1999): 2-11. Currently, the establishment of *Länder* administrative courts belongs to those suggestions within the framework of the Constitutional Convention that are most likely to be realized.
- 41 BGBl I 2002/65.
- 42 See, for example, Wolfgang Pesendorfer, „Rechtsschutz im Verwaltungsrecht“, Österreichische Juristen-Zeitung (2002): 521-531.
- 43 See below.
- 44 So-called „principle of legality“ (Art 18 B-VG).
- 45 Art 82 para 1 B-VG.
- 46 Regarding the Administrative Court see Art 130-136 B-VG and the Administrative Court Act (BGBl 1985/10 as amended by BGBl I 2002/124), regarding the Constitutional Court see Art 137-148 B-VG and the Constitutional Court Act (BGBl 1953/85 as amended by BGBl I 2003/100).
- 47 Art 89 and Art 129a para 3 B-VG.
- 48 Art 89 and Art 129a para 3 B-VG.
- 49 Art 147 para 2 B-VG.
- 50 The relationship between the two Courts and the federal system is analyzed by Clemens Jabloner, „Der Bundesstaat und die Gerichtsbarkeit des öffentlichen Rechts,“ Bundesstaat und Bundesrat in Österreich, ed. Herbert Schambeck (Vienna: Verlag Österreich, 1997), pp. 135-154.
- 51 Art 139 B-VG.
- 52 Art 144 B-VG.
- 53 Art 138 para 2 B-VG.
- 54 Art 137 B-VG.
- 55 Art 138a B-VG.
- 56 See below.
- 57 See Herbert Schambeck, ed. Föderalismus und Parlamentarismus in Österreich (Vienna: Österreichische Staatsdruckerei, 1992) and Peter Pernthaler and Helmut Schreiner, eds. Die Landesparlamente als Ausdruck der Identität der Länder (Vienna: Braumüller, 2000).
- 58 Art 95-106 B-VG. Specific provisions apply to Vienna (Art 108 – 112 B-VG). See also Gamper, Die Regionen mit Gesetzgebungshoheit, pp. 404-419.
- 59 Art 95 para 2 B-VG.
- 60 Art 96 B-VG.
- 61 Theo Öhlinger and Peter Pernthaler, Projekt eines Volksgruppenmandats im Kärntner Landtag (Vienna: Braumüller, 1997).

- 62 Art 97 B-VG.
- 63 See Peter Pernthaler and Karl Weber, Theorie und Praxis der Bundesaufsicht in Österreich (Vienna: Braumüller, 1979), Clemens Jabloner, Die Mitwirkung der Bundesregierung an der Landesgesetzgebung (Vienna: Österreichische Staatsdruckerei, 1989), Clemens Jabloner, „Landesgesetzgebung und Bundesregierung," Föderalismus und Parlamentarismus in Österreich, ed. Herbert Schambeck (Vienna: Österreichische Staatsdruckerei, 1992), pp. 75-96 and Peter Bußjäger, „Die rechtliche und politische Kontrolle der Länder und ihrer Organe im System der österreichischen Bundesverfassung," Vollzug von Bundesrecht durch die Länder, ed. Peter Bußjäger (Vienna: Braumüller, 2002), pp. 5-22.
- 64 See Peter Häberle, „Föderalismus und Regionalismus in Europa," European Review of Public Law 10/2 (1998): 299-326.
- 65 The relationship between Land legislature and Land executive is analyzed by Karl Weber, „Landesgesetzgebung und Landesregierung," Föderalismus und Parlamentarismus in Österreich, ed. Herbert Schambeck (Vienna: Österreichische Staatsdruckerei, 1992), pp. 97-124.
- 66 BGBl 1925/289.
- 67 These matters comprise all matters of direct *Land* administration, irrespective of whether legislation in these matters is made by the federation or the *Länder* themselves.
- 68 See above.
- 69 See Anna Gamper, „The Principle of Homogeneity and Democracy in Austrian Federalism: The Constitutional Court's Ruling on Direct Democracy in Vorarlberg," Publius - The Journal of Federalism 33 (Winter 2003): 45-57.
- 70 An overview is given by Hans Neuhofer, Gemeinderecht, 2nd ed. (Vienna, New York: Springer, 1998). See also Österreichischer Gemeindebund and Österreichischer Städtebund, eds. 40 Jahre Gemeindeverfassungsnovelle 1962 (Vienna: Manz, 2002).
- 71 Following the Constitutional Court's decision VfSlg 13.500/1993, according to which *Länder* legislation allowing for the direct elections of the mayor had been unconstitutional.
- 72 See Karl Weber, „Art 118 B-VG," Österreichisches Bundesverfassungsrecht, eds. Karl Korinek and Michael Holoubek (Vienna, New York: Springer, 1999), pp. 6-10.
- 73 See Ermacora, Österreichischer Föderalismus, pp. 148-155, Peter Pernthaler, „Zusammenarbeit der Gliedstaaten im Bundesstaat: Landesbericht Österreich," Zusammenarbeit der Gliedstaaten im Bundesstaat, ed. Christian Starck (Baden-Baden: Nomos, 1988), pp. 77-123 and Karl Weber, „Österreichs kooperativer Föderalismus am Weg in die Europäische Integration," Festschrift Herbert Schambeck, ed. Johannes Hengstschläger et al. (Berlin: Duncker & Humblot, 1994), pp. 1041-1062.
- 74 Art 17 B-VG. See Karl Korinek and Michael Holoubek, Grundlagen staatlicher Privatwirtschaftsverwaltung (Graz: Leykam, 1993).
- 75 See Heinz Peter Rill, Gliedstaatsverträge (Vienna, New York: Springer, 1972), Theo Öhlinger, Verträge im Bundesstaat (Vienna: Braumüller, 1979), Theo Öhlinger, Die Anwendung des Völkerrechts auf Verträge im Bundesstaat (Vienna: Braumüller, 1982), Clemens Jabloner, „Gliedstaatsverträge in der österreichischen Rechtsordnung," Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht 40 (1989): 225-255, Peter Pernthaler, Raumordnung und Verfassung, vol. 3, (Vienna: Braumüller, 1990), pp. 227-287 and Rudolf Thienel, „Artikel 15a B-VG," Österreichisches Bundesverfassungsrecht, eds. Karl Korinek and Michael Holoubek (Vienna, New York: Springer, 2000).

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- 77 Österreichischer Stabilitätspakt 2001 (BGBl I 2002/39).
- 78 BGBl I 1998/61.
- 79 See Karl Weber, „BVG Gemeindebund,“ Österreichisches Bundesverfassungsrecht, eds. Karl Korinek and Michael Holoubek (Vienna, New York: Springer, 2000), pp. 4-5.
- 80 See Peter Bußjäger, „Rechtsfragen zum Konsultationsmechanismus,“ Österreichische Juristen-Zeitung (2000): 581-591, Weber, „BVG Gemeindebund“, Heinz Schäfer, „Konsultationsmechanismus und innerstaatlicher Stabilitätspakt,“ Zeitschrift für öffentliches Recht 56 (2001): 145-226.
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- 82 Finanzausgleichsgesetz 2001 (BGBl I 2001/3 as amended by BGBl I 2003/71).
- 83 See Andreas Rosner, Koordinationsinstrumente der österreichischen Länder (Vienna: Braumüller, 2000).
- 84 See Gernot Meirer, Die Verbindungsstelle der Bundesländer oder Die gewerkschaftliche Organisation der Länder (Vienna: Braumüller, 2003).
- 85 See Karl Weber, „Macht im Schatten? (Landeshauptmänner-, Landesamtsdirektoren und andere Landesreferentenkonferenzen),“ Österreichische Zeitschrift für Politikwissenschaft (1992): 405-418, Rosner, Koordinationsinstrumente der österreichischen Länder, pp. 15-34 and Peter Bußjäger, „Föderalismus durch Macht im Schatten? – Österreich und die Landeshauptmännerkonferenz,“ Jahrbuch des Föderalismus 2003, ed. Europäisches Zentrum für Föderalismus-Forschung Tübingen (Baden-Baden: Nomos, 2003), pp. 79-99.
- 86 See, for example, Peter Pernthaler, „Verfassungsentwicklung und Verfassungsreform in Österreich,“ Verfassungsrecht und Verfassungsgerichtsbarkeit an der Schwelle zum 21. Jahrhundert, eds. Bernd Wieser and Armin Stolz (Vienna: Verlag Österreich, 2000), pp. 67-116.
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