

RAPPORTS

AUSTRIA

Structure, Objectives, and Results of the Austrian Constitution Convention

Or: How *Not* to Change a Constitution

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1. Introduction

1.1. Function of a Constitution

What is a constitution? Is it a ‘magic parchment’ as an American once idealized his constitution, or are constitutions just ineffective ‘sheets of paper’ as *Ferdinand Lassale* once deflatedly characterized them in view of the Prussian-German circumstances?¹

The constitution of a state lays down its legal principles. It determines a state’s form of government and administration. From the viewpoint of legal dogma, a ‘constitution’, as this term is commonly understood today, is a ‘constitution in the formal sense’, hence legal provisions that were adopted in the form of a constitutional act. The concept of a ‘constitution in the substantive sense’, on the

¹ Vorländer, *Die Verfassung. Idee und Geschichte* (2004) at 1.

other hand simply describes all those legal norms that govern the structure and activities of a community, whether or not they have been adopted as constitutional laws or as ordinary laws.

A comparison of the constitutions of different states shows that many of their provisions are similar. Virtually all constitutions define state objectives, fundamental rights, and democratic principles. More important than these common aspects are, however, their differences: What is the sense of state objectives if an individual citizen cannot rely on these objectives? What is the use of social fundamental rights if the individual is not able to enforce them? And, more importantly, are states democratic just because their constitutions say so or because they grant their citizens an enforceable right to participate in decision-building measures of the state?

The answers are simple: Constitutions which are simply political declarations of intent without granting individual citizens enforceable rights are an illusion; they do not tie down but rather give free rein to state power.

1.2. The Austrian Federal Constitution

The Austrian Federal Constitution is an example of a constitution that wants to be nothing more or less than a collection of principles of a state community on the one part, and wants to vouch for the subjective rights of the individual on the other part.² After the collapse of the Austrian-Hungarian monarchy³ a suitable constitution had to be found for the new republic. This task was assigned to Hans Kelsen. Born as the son of a German-speaking Jewish family in 1881 in Prague, Kelsen habilitated at the law school of the University of Vienna in the field of constitutional law and legal philosophy in 1911.⁴ In 1917 Kelsen was appointed associate professor, and in 1919 full professor, for constitutional and administrative law in Vienna. As a consultant for the development of Austria's definite constitution, he had a greater influence on the Federal Constitutional Act than anyone else; his strictly positivistic legal approach, combined with his ability to devise clear juridical ideas and formulate these in a legal context have led to the emergence of a matter-of-factly, functional⁵ constitution that pointed the way forward for constitutional development

² Federal Constitutional Act dated 1 October 1920 (*B-VG*).

³ On 30 October 1918, the German members of the Austrian Reichstag decided at the 'Provisional National Assembly of German-Austria' to found an independent state German-Austria (*Deutschösterreich*) (see Kelsen, *Österreichisches Staatsrecht* [1923] at 78).

⁴ Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze* (1911).

⁵ There is, for example, the legendary controversy between Kelsen and German-Austrian State Chancellor Karl Renner over the wording of Article 1 of the Federal Constitution 'Austria is a democratic republic. Its law emanates from the people.' Kelsen believed that such purely programmatic provisions were completely inappropriate for a constitution: That Austria is a democracy can be derived from the constitutional provisions governing the elections for the legislative National Council, and that it is a republic from those provisions governing the role of the head of state; therefore, he held that Article 1 was unnecessary. Of course, Kelsen was defeated on this issue by

in many other countries⁶. Today, the Federal Constitution is the oldest republican constitution in Europe.

2. Why a New Constitution?

2.1. EU Convention

In 2001, the heads of state and government of the European Union decided to convene a 'Convention on the Future of Europe' at the summit in Laeken (Netherlands). Within this new institutional framework, the members of which were drawn from representatives of the member countries and candidate countries, the European Parliament and the national parliaments, the fifth major revision of the existing treaty in the history of the European integration was supposed to be prepared. The aim was to adopt a joint European constitution.

After the heads of state and government of the 25 EU countries finally agreed on a draft of this European constitution in June 2004, reactions varied. Some claimed that it had shortcomings, others emphasized that the draft was a first major step into the right direction.

On 29 October 2004, the heads of state and government of the EU Member States and of the three candidate countries signed the Treaty establishing a constitution for Europe. Although the ratification process was initiated, it was discontinued in the summer of 2005 after two negative referenda in France and the Netherlands.

2.2. Austrian Convention

In the course of media coverage on the EU Convention, Herwig Hösele, then President of the Austrian Federal Council⁷ suggested in January 2003 to convene such a convention also in Austria with the aim of modernizing the Austrian federal constitution. This proposal was supported by the government, and reference was made to the government's declaration and its relevant commitment to restructure

the State Chancellor, who succeeded in imposing his formulation with the words 'Professor, there also has to be something a bit beautiful in a constitution'.

⁶ Today, every constitution contains standard language on comprehensive powers of the constitutional court that may also repeal laws. This standard was originally invented by Kelsen and was first implemented in the Austrian Constitution.

⁷ The Federal Council, besides the National Council, is the second chamber of the Austrian Parliament. While the 183 members of the National Council are elected every four years in general, equal, and secret elections by the public, the currently 62 members of the Federal Council are delegated by the nine provincial parliaments. The Federal Council is participating in federal legislation in that it may adopt a suspensive veto against laws adopted by the National Council. From a practical point of view, the Federal Council's relevance is rather humble.

the Austrian administrative system. According to authoritative government representatives, this restructuring was possible only if the constitutional principles of administration would be restructured as well.

In the following weeks, talks were held between the government and the opposition parties on how this 'Austrian Convention' on a renewal of the Austrian constitution was supposed to be organized. Eventually, it was agreed to structure the Convention as a commission that is located within the Parliament. All four political parties represented in Parliament unanimously adopted the 'Federal Act on the Financial and Administrative Support of the Austrian Convention'⁸ which formed the legal basis for providing adequate funds to ensure the administrative support of the Convention.

3. Organization and Objectives of the Austrian Convention

3.1. Founding Committee

The founding committee of the Austrian Convention met on 2 May 2004. It consisted of the Federal Chancellor, the Vice-Chancellor, the three Presidents of the National Council, the President of the Federal Council, the chairmen of the political parties represented in Parliament, the chairmen of the Provincial Governors' Conference, the chairman of the Conference of the Presidents of the Provincial Parliaments, and the Presidents of the Association of Cities and Towns and the Association of Municipalities.

This founding committee determined the tasks of the Austrian Convention and appointed its chairman: Franz Fiedler, then President of the Austrian Court of Audit, was appointed as chairman of the Convention. Andreas Kohl, President of the National Council, and Angela Ortner, Chairwoman of the Presidents of the Provincial Parliaments, were appointed as vice-chairmen of the Convention. Other members of the Presidium were the Minister of Justice, a member of the Austrian Constitutional Court, the Vice-President of the National Council, and a member of the National Council. These members of the Presidium were selected in a manner which was to ensure that every political party represented in Parliament was able to nominate at least one member of the Presidium.

3.2. Composition of the Austrian Convention

Subsequently, the composition of the Austrian Convention was determined. It was decided that the members of the Convention should be drawn from representatives

⁸ Federal Law Gazette I 39/2003.

of interest groups and experts; it was not considered necessary that these persons should be legitimized by way of democratic elections to the Austrian Convention.

The Convention consisted of the following members: The members of the Presidium, five members of the federal government, the Presidents of the Austrian Constitutional Court, the Administrative Court, and the Supreme Court, a representative of the *Volksanwaltschaft*, 17 additional representatives from the provinces, two representatives each from the Association of Cities and Towns and the Association of Municipalities, one representative each from the four social partners (Austrian Economic Chamber, Austrian Trade Union Association, Chamber of Agriculture, Chamber of Labour), the Association of Industrialists, the Chamber of the Free Professions, 18 expert personalities proposed by the political parties, and nine virilists from a pool of experts.

3.3. Objectives of the Austrian Convention

The task of the Austrian Convention was to elaborate proposals for a fundamental state and administrative reform that was to create the requirements for a more efficient administration. The future constitution was supposed to ensure that the state could carry out its tasks in an efficient, transparent, and citizen-friendly manner. More specifically, the Convention was supposed to analyze thoroughly the state's tasks, the distribution of competences between the Federal government and the provinces, the legality principle, the structures of the state institutions, the financial constitution and financial equalization, the question of control on federal and provincial level, the structure of legal protection, and the adjustment of the Constitution. The Convention was to deliberate particularly on the following issues:

- thorough analysis of the state's tasks;
- the distribution of competences with the aim of creating a clear list of competences categorized according to responsibilities;
- the relationship between legislation and enforcement under the aspect of the legality principle;
- the structure of state institutions, particularly with a view to an efficient application of means, citizen friendliness, and the developments of E-government;
- the principles of the financial constitution, particularly with a view to combining income and expense control, and revenue equalization based on the requirements; and
- the installation of efficient control on federal and provincial level, and the formation of legal protection to ensure rapid and citizen-friendly decisions.

Initially, the Convention's objective was to discuss and find consensual solutions for these defined tasks. Rather than being adopted by majority votes, these solutions should be found consensually after prior deliberations and persuading and convincing. The overall consensus that was achieved was supposed to result in the preparation of a new text of the Constitution that, albeit brief, contained all constitutional provisions, and all this without questioning the principles on which the Constitution was based.⁹

4. Course of the Austrian Convention

4.1. Working groups

On 30 June 2003, the Members of the Austrian Convention met for the first constituent meeting and for a general debate. At its second meeting on 10 July 2003, the Convention adopted the proposal made by the Presidium to install a total of ten working groups. The following working groups were installed:

- Working group I: Tasks and aims of the federal state (extensive analysis of the aims of the state and of the core tasks of the state. Question of a comprehensive list of aims of the state in the Federal Constitution).
- Working group II: Questions of the legal structure (How to incorporate constitutional laws and constitutional provisions in the new Federal Constitution; afterwards settling of the questions of what to do with those constitutional laws and constitutional provisions which will not be incorporated in the new Federal Constitution, and of those provisions of the valid Federal Constitution which will not be included in the new Federal Constitution).
- Working Group III: State Institutions (Structure of the federal state, elections, constitutional autonomy, relation between legislation and administration under the point of view of the principle of legality and EU legislation).
- Working Group IV: List of fundamental rights (Compilation of a list of fundamental rights with consideration of all relevant national, international and European regulations).
- Working Group V: Division of tasks between federal government, provincial diet and municipalities (Compilation of a list of legislative authorities structured according to their services and responsibilities, with consideration of EU legislation).

⁹ Principles on which the Federal Constitution is based are the democratic principle, the republican principle, the federal principle, the rule of law, the liberal principle, and the separation of powers.

- Working Group VI: Administrative reform (Enforcement competencies and structure of the administrative authorities of federal state, provincial diets and municipalities, especially under the point of view of an efficient use of the resources, of transparency, of citizen-friendliness, and of the development of e-government).
- Working Group VII: Structure of special administrative institutions (Regulatory authorities and other independent authorities, self-governance, privatised legal entities and non-sovereign activities of the state).
- Working Group VIII: Democratic control mechanisms (Establishment of an efficient and effective control mechanism for the federal state, the provincial diets and the municipalities: rights of the parliaments, incl. minority rights, courts of audit and Austrian ombudspersons; question of official secrecy, instruments of direct democracy).
- Working Group IX: Legal protection and jurisdiction (Establishment of an efficient and effective legal protection system under the point of view of citizen-friendly decisions: ordinary jurisdiction, public law courts, administrative jurisdiction in the provincial diets, special senates).
- Working Group X: Financial constitution (Reform of the financial constitution, especially under the point of view of the combination of income and expense control and of a revenue equalization based on the requirements).

The members of the Convention could report for one or several working group. Members regularly participated in several working groups.

4.2. Results

The Convention met between 30 June 2003 and 28 January 2005. After a total of 19 months of work, 44 meetings of the Presidium, 17 plenary sessions, and a total of 172 meetings of working groups, the results of the Austrian Convention were made available in the form of a 1,200-page final report.

The Convention was able to achieve the hoped for consensus in some few areas. The members agreed that more than one thousand constitutional norms that existed outside the Constitution should be incorporated;¹⁰ they also agreed

¹⁰ Contrary to other constitutions, the Austrian Constitution does not provide that every constitutional law must be incorporated into the Federal Constitution. As a result, there exist not only other constitutional laws (such as the 'Federal Constitutional Act dated 26 October 1955 on the Neutrality of Austria' Federal Law Gazette 211/1955) besides the Federal Constitution, but there are frequently provisions that are part of ordinary federal laws that have been issued as constitutional laws, for example because they permit a limitation of constitutional rights.

that a list of fundamental rights should be incorporated into the Constitution,¹¹ that administrative courts should be installed on provincial level, that the Federal Council as second chamber of Parliament should not be abolished, and that the rights of Austria's Federal President should be adjusted.

However, many important issues, for example the distribution of competences on federal and provincial level, the combination of income and expense control, the elimination of expensive double-barreled administrative responsibilities, the easing of the legality principle, and the precise determination of state objectives and fundamental rights remained controversial. Also, the members of the Conventions could not agree on the question whether the Constitution should have a preamble.

Since the Convention could not agree on a consensual draft Constitution, the main section of the final report reflects the results of the deliberations of the Convention's ten working groups and in part also those of the Presidium, considering both consensual and non-consensual proposals. Another part of the report contains various specific text proposals that were made by individual members, the political parties, the working groups, the Presidium, and other parties that have worked for the Convention. In the fields of fundamental rights and security policy, text proposals are compared with existing legislation. The results of the deliberations and text proposals together comprise almost 630 pages. Proposals include the introduction of a three-pillar model for the distribution of tasks on federal and provincial level as well as various ideas for a reform of the administrative system and a reorganization of the court system; an extension of the control rights of the parliaments; a reduction of the complexity of the financial constitution; and a new revenue equalization system. Detailed proposals include the ban on collective laws; the rephrasing of the legality principle; new school administration and security administration models; the extension of the audit powers of the ombudspersons; a proposal for extended constitutional efficiency and transparency; a right of citizens to inspect laws; the people's right to dissolve the National Council; the principle of a balanced budget as a state objective; and the possibility of global budgeting.

Since the members of the Convention were not able to agree on major issues, no consensual draft text for a new Constitution was elaborated. Considering the task of the Austrian Convention, its President nevertheless elaborated a draft Constitution on the basis of the existing proposals. For this purpose, he was using the consensually reached results and also opinions adopted by broad majorities as well as language and texts of the existing Federal Constitution. This so-called 'Fiedler Draft' is also part of the Austrian Convention's final report, although no

¹¹ Since the political parties were not able to agree on a new list of fundamental rights in 1920, the highly liberal list of fundamental rights that was set up during the monarchy was maintained. Thus, many of the fundamental rights applicable in Austria today are still incorporated into the 'Basic Law dated 21 December 1867 on the General Rights of Nationals of Kingdoms and Countries represented in the Reich's Congress' that has the rank of a constitutional law (State Law Gazette 142/1867).

consent was reached on that draft in the Austrian Convention. Some members of the Convention even heavily criticised that draft.

4.3. Further Parliamentary Work

The Federal Chancellor submitted this 'Report of the Austrian Convention' to the National Council, and the latter elected a 'Special Committee for Preliminary Deliberations on the Report of the Austrian Convention' on 31 March 2005. This Committee started work on 5 July 2005. The National Council will now deliberate on the further course of a state and administrative reform. Some of the compromises reached in the Convention might be implemented in 2006, but probably not until after the new elections to the National Council (scheduled for autumn 2006) by way of an amendment of the Federal Constitution¹².

5. Conclusion

The question of the results, that the Austrian Convention has yielded, is not easy to answer. The only clear item is what it did *not* achieve: Kelsen's 1920 Constitution will not be replaced by a new constitution in 2006; his constitution – albeit cautiously amended – will continue to apply.

This fact is not only due to the absence of clear willingness of the various interest groups represented in the Convention to reach a consent. They have been concerned with the Federal Constitution for many months and have become aware during that time how *well* the current Constitution actually works. Intensive discussions have shown that, against the backdrop of the social conditions prevailing in Austria, many areas cannot be regulated otherwise. Every democratic constitution is based on a compromise that is reached between different social interest groups. The Federal Constitution reflects this compromise. Since these conflicting interests are settled today using means that are completely different from those used in the year 1920, a new Federal Constitution would look completely different than today's Federal Constitution. For example, the major interest groups were not able to agree on enforceable social fundamental rights at the Austrian Convention; the pros and cons were generally the same as in 1919/1920. As a result, it is not the worst solution to maintain a list of fundamental rights that is highly liberal, the scope and range of which has already been clarified by decades of case law.

Intensive discussions about Austria's constitutional principles have also reminded us that many a criticized decision that was made in 1920, was then made for quite rational reasons. For example, in the absence of a rule that requires the legislator

¹² More specifically, it is intended to search through and reduce the uncontrolled number of constitutional provisions and to reorganize the Independent Administrative Senates into first-instance provincial administrative courts.

to incorporate all constitutional provisions into the Federal Constitutional Act, other constitutional laws or ordinary laws contain more than 1000 constitutional provisions that are not part of the Constitution. Already decades ago, critics have argued that Austrian constitutional law consists only of fragments. Certainly, this legistic practice makes the Austrian constitutional law rather complex. However, Austrian law is putting up with this complexity of constitutional law, because this ensures the conciseness of the other fields of law. Since constitutional legislators are not required to incorporate all constitutional provisions into the Federal Constitution, they may incorporate them into those laws to which they systematically belong. The possibility to draw blood from an apparently drunk driver in order to determine his or her alcohol level, a possibility safeguarded by a constitutional provision, can therefore be correctly found in Section 5 (10) of the Road Traffic Regulations, rather than the Federal Constitution. Certainly, this system decision may be revised; it is certainly questionable whether this would really be advantageous for those applying the law as well as legal subjects.

It is therefore not the few changes on which the members of the Convention have agreed that constitute the true outcome of the Austrian Convention. We have known since 1920 that it may be desirable to order legislators to incorporate constitutional provisions into the Federal Constitution. Since 1988, the year in which the Independent Administrative Senates were incorporated into the system of the Austrian Federal Constitution, it has been discussed whether it would be useful to transform these Independent Administrative Senates into first-instance administrative courts. The true outcome of the Austrian Convention is the fact that it has made us aware of how important a constitution is for a state's structure and its economic development and how well Kelsen's Constitution fulfils this task.

Shortly after the idea of installing an Austrian Convention with the political aim of elaborating a new constitution that is modern and easily comprehensible and should not contain more than 150 Articles, a judge of the Austrian Administrative Court commented on this proposal. Rather pointedly, he suggested to realize this political objective by eliminating all amendments from Kelsen's Constitution that have been adopted since 1920; in his opinion, the remnants constituted a modern, easily comprehensible text that did not comprise more than 150 Articles. Against this backdrop, the Austrian Convention did in fact achieve the best possible results; not only did it not change the Federal Constitution, it has also reminded us that this Constitution is an extraordinary achievement.