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**Layout & Design:** Susanne Karner

**Media owner & publisher:** Dr. Konrad Lachmayer, Department of Constitutional and Administrative Law, University of Vienna - Faculty of Law, Schottenbastei 10-16, 1010 Vienna, Austria. Manuscripts may be submitted via e-mail to [journal@internationalconstitutionallaw.net](mailto:journal@internationalconstitutionallaw.net). Manuscripts are peer-reviewed.

Harald Eberhard & Konrad Lachmayer

## Constitutional Reform 2008 in Austria Analysis and Perspectives

### 1. RECENT ATTEMPTS OF A CONSTITUTIONAL REFORM IN AUSTRIA

With a new constitutional amendment<sup>1</sup> (Federal Law Gazette I No. 2/2008), Austrian constitutional law has seen its most comprehensive reform since 1945. In particular, the fragmented structure of Austrian constitutional law had previously been seen as a failure of the constitution<sup>2</sup> in its functional approach as a basic order of a society<sup>3</sup> and led to various attempts to reform Austrian constitutional law. But earlier constitutional amendments resulted only in a further complication of Austrian constitutional law.

Five years ago, a new process to a complete constitutional reform was started. In a first step, the so-called "Austrian Convention" was launched and discussed the main issues of a possible fundamental reform of the Austrian Constitution.<sup>4</sup> Today, it is generally seen that this Convention failed with regard to an *immediate* reform process but its final report of 2005 gave important directives in the way of a "road map" for a constitutional reform within the next few years.<sup>5</sup> After an interim process in a "Special Commission" of the National Council in 2005 and 2006 (which did not produce any innovations that would go beyond the results of the former Austrian Convention), the real political stimulus were the elections to the National Council in October 2006. These elections led to formation of a (grand) coalition between the two traditional old parties, the Austrian Socialist Party (SPÖ) and the Austrian Peoples Party (Christian Democrats, ÖVP) which together possess the necessary two thirds majority to amend the

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1 'Bundesverfassungsgesetz, mit dem das Bundes-Verfassungsgesetz geändert und ein Erstes Bundesverfassungsrechtsbereinigungsgesetz erlassen wird'.

2 The most famous metaphor in this field is that the Austrian Constitution seems to be like a "ruin": Hans R Klecatsky, 'Bundes-Verfassungsgesetz und Bundesverfassungsrecht', in Herbert Schambeck (ed), *Das österreichische Bundes-Verfassungsgesetz und seine Entwicklung* (Duncker & Humblot, Berlin 1980) 83.

3 Cf Peter Pernthaler, *Österreichisches Bundesstaatsrecht* (Verlag Österreich, Vienna 2004) 33s.

4 See for it *Andreas Khol/Christoph Konrath*, 'Der Österreich-Konvent. Ein Beitrag zum Wandel von Verfassungspolitik in Österreich', in Hedwig Kopetz et al (eds), *Soziokultureller Wandel im Verfassungsstaat. Phänomene politischer Transformation, Festschrift Mantl* (Böhlau, Vienna/Graz 2004) 559ss.

5 Harald Eberhard, 'Die Entwicklung des österreichischen Bundesverfassungsrechts zwischen Stabilität und Reformdiskussion', (2005) Vol 17 No 3 *European Review of Public Law/Revue Européenne de Droit Public*, 1165, 1181ss.

constitution.<sup>6</sup> In 2007, a board of six scientific experts in the field of constitutional and administrative law as well as representatives of the political parties were established to discuss the relevant reform issues one more time. The manner, however, was quite different from the Convention which was composed of 70 members to discuss the main issues about amendments to the constitution. The board's first report of July 2007<sup>7</sup> led – with certain modifications – to the above-mentioned amendment.

An essential impetus for these developments was the fundamental revision of the constitution in Switzerland in the 1990s<sup>8</sup> as well as the constitutional process in the European Union,<sup>9</sup> which focused on the European Convention Process and the resulting Constitutional Treaty<sup>10</sup> and the Treaty of Lisbon (Reform Treaty)<sup>11</sup> in their function of deepening the existing constitutional dimension of primary law.

This article explains the concept and structure of Austrian constitutional law, the attempts of reform in the last decades, the current constitutional amendment and gives an outlook over the further steps of constitutional reform in Austria.

## 2. THE FRAGMENTED STRUCTURE OF AUSTRIAN CONSTITUTION LAW

The starting point in our discussion is to recognize that Austrian Constitutional Law is not incorporated in a single codified document. Although there is a Federal Constitutional Act (Federal Constitution) from the year 1920 (which was drafted by Hans Kelsen), Austrian Constitutional Law encompasses much more. The Federal Constitution (Art. 44<sup>12</sup>) does not demand a unified document like Art. 79 German Basic Law.<sup>13</sup> From the very beginning, it also included older constitutional provisions, some dating from the period of monarchy. The most famous constitutional law from monarchic times is a "Basic Law on the General Rights of Nationals" from the year 1867, which represented a first effective Catalogue of

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6 See Art. 44 para. 1 of the Austrian Constitution: "Constitutional laws or constitutional provisions contained in simple laws can be passed by the National Council only in the presence of at least half the members and by a two thirds majority of the votes cast; they shall be explicitly specified as such ("constitutional law", "constitutional provision").

7 Federal Chancellery of Austria, Expertengruppe Staats- und Verwaltungsreform, Staatsreform/ Allgemeines/Vorlage 26. See [www.bka.gv.at/site/5732/default.aspx](http://www.bka.gv.at/site/5732/default.aspx).

8 See Giovanni Biaggini, 'Erfahrungen mit Projekten der Verfassungsrevision: Die Totalrevision der schweizerischen Bundesverfassung', (2003) *Journal für Rechtspolitik*, 29ss.

9 Waldemar Hummer, 'Die Europäische Union: Vom "Tempel" zur "Verfassung" – "Konstitutionalisierung" der EU durch den "Verfassungsvertrag"?', in Erhard Busek/Waldemar Hummer (eds), *Der Europäische Konvent und sein Ergebnis* (Böhlau, Vienna/Cologne/Weimar 2004) 33ss; Martin Nettesheim, 'EU-Recht und nationales Verfassungsrecht', (2004) *Europarecht Beiheft* 1, 7, 24ss.

10 See Official Journal C 310, 16 December 2004; <http://europa.eu.int/eur-lex/lex/de/treaties/dat/12004V/htm/12004V.html>.

11 See Official Journal C 306, 17 December 2007; [http://europa.eu/lisbon\\_treaty/index\\_de.htm](http://europa.eu/lisbon_treaty/index_de.htm).

12 See supra FN 6.

13 Art 79 German Basic Law: "This Basic Law may be amended only by a law expressly amending or supplementing its text."

Civil Liberties in Austrian Constitutionalism.<sup>14</sup> But the transfer of these older constitutional provisions is not the only example of the fragmentation of Austrian constitutional law.

As there exists no constitutional clause requiring that amendments of constitutional law can only be done "by a law expressly amending or supplementing its text", there are other Federal Constitutional Acts beside the Federal Constitution from 1920. Examples are the Federal Constitutional Act about Broadcasting,<sup>15</sup> the Federal Constitutional Act about Offices/Authorities of State Governments<sup>16</sup> and the limitation of public remuneration of politicians<sup>17</sup>. Another example can be seen in international treaties which are adopted on a constitutional level, like parts of the Treaty of St. Germain (1919)<sup>18</sup> or the Treaty of Vienna (1955)<sup>19</sup> or the European Convention on Human Rights, which was adopted in Austria (1958) and then lifted on to the constitutional level by an act of authentic interpretation (1964)<sup>20</sup>.

These different versions of constitutional law with completely different contents have greatly complicated Austrian constitutional law. But the most significant problem of the fragmented structure of Austrian constitutional law is the possibility of constitutional provisions in ordinary legislative acts. This is a very specific legal tradition in Austrian constitutional law. A particular article or provision in an ordinary act of parliament, like the Motor Vehicle Act, can get constitutional status if the parliament declares this provision as constitutional and the necessary consent to enact a constitutional act in parliament is reached. This is not the same as an 'executive' constitutional act, which specifies constitutional law, but has an equivalent equal level to all other federal constitutional acts.<sup>21</sup>

The specific problem of constitutional provisions in ordinary acts of parliament is that the government and parliament have used this possibility to supplement (amend) the constitution with a lot of ordinary laws that create exemptions to the constitutional system. Constitutional law, in this way, became more and more an instrument of politics and daily policy because of the easy manner in which governing parties could make amendments through a necessary majority.

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14 See also Act of the Protection of the Sanctity of the Home from 27. October 1862, RGBI 1862/ Nr. 88.

15 See the Federal Constitutional Act to protect the independence of public broadcasting, Federal Law Gazette No. 396/1974

16 Federal Constitutional Act regarding the principles of the establishment of the offices of the state governments, Federal Law Gazette No. 289/1925

17 Federal Constitutional Act regarding the limitation of the public remuneration of politicians, Federal Law Gazette I No. 64/1997

18 Treaty of Saint-Germain-en-Laye from the September 10, 1919. StGBI. Nr. 303/1920.

19 Treaty regarding the re-establishment of an independent and democratic Austria, Federal Law Gazette No. 152/1955.

20 European Convention on Human Rights, Federal Law Gazette I No. 210/1958 and the Constitutional Provision which grants constitutional rank to the European Convention on Human Rights, Federal Law Gazette I No. 59/1964.

21 Theo Öhlinger, 'Stil der Verfassungsgesetzgebung – Stil der Verfassungsinterpretation', in Bernd-Christian Funk et al (eds), '*Staatsrecht und Staatswissenschaften in Zeiten des Wandels, Festschrift Adamovich*' (Springer, Vienna 1992) 502, 503.

Austrian Constitutional Law, in a comparative law perspective,<sup>22</sup> can thus be seen as a very 'flexible constitution'. This fact goes hand in hand with those concepts of constitutional law that qualify this level of law as a formal rule of the political process ("*Spielregelverfassung*"). But the extensive use of modifying and thereby fragmenting constitutional law challenges the role of constitutional law to give a framework for this process.<sup>23</sup>

These exemptions have touched many different constitutional concepts, like the allocation of powers, the principle of hierarchy in administration, even civil liberties or human rights guarantees. Many other constitutional provisions are adding administrative details to constitutional law, some of which do not contain typical constitutional questions. This process of dealing with constitutional law became very common in Austria and led to more than 1,300 constitutional provisions in ordinary laws. This affects the function of constitutional law as a basic order of a society in a very intriguing manner.<sup>24</sup> Furthermore, we can observe a certain tradition of dealing with constitutional law from the point of view of the administration. Constitutional law, in this way, sets the base for administrative action and must be more detailed to comply with this function. As a consequence, many parts of constitutional law have no specific constitutional contents. This confirms a two-level perspective of constitutional law in which the basic principles<sup>25</sup> of constitutional law – in a *Stufenbau* perspective – stand over the conventional functions of a constitution.

If we sum up the different possibilities for enactment of Austrian constitutional law, therefore, we can see its complex structure:

- Federal Constitution (Basic Document)
- Various Federal Constitutional Acts, having – in a material perspective – typical constitutional, but, in the majority of cases, also non-constitutional contents
- Old monarchic constitutional provisions
- International Treaties and constitutional provisions in International Treaties
- Constitutional Provisions in ordinary legislative acts, having in the majority cases a non-constitutional material dimension.

As can easily be seen, the quantity of constitutional law and the different possibilities of enacting constitutional law, combined with the lack of a list of constitutional law, lead to a confusing and unclear situation. This is consistent with the lack of constitutional ideals of one basic document.

As an interesting and representative example for this fragmented structure, one can consider constitutionally guaranteed rights, civil liberties and human rights. These important individual rights are not listed in a catalogue of constitutional rights. They can be found in all the different types of constitutional law. In the Federal Constitution only a few rights are specifically guaranteed, e.g. the principle of equality in Art 7 of the Federal constitution. The substantive

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22 Bernd Wieser, *Vergleichendes Verfassungsrecht* (Springer, Vienna 2005) 85ss.

23 About this function Theo Öhlinger, 'Verfassungskern und verfassungsrechtliche Grundordnung', in Karl Weber/Norbert Wimmer (eds), *Vom Verfassungsstaat am Scheideweg, Festschrift Perenthaler* (Springer, Vienna 2005) 273, 274ss.

24 See e.g. Theo Öhlinger, 'Braucht Österreich eine neue Verfassung?', (2003) *Journal für Rechtspolitik*, 1ss.

25 See below.

part of civil liberties are found in the 'old' monarchic catalogue from 1867 and in the international treaty of the European Convention of Human Rights, which is part of constitutional law in Austria. The Right to Data Protection is fixed as a constitutional provision (Art. 1) in the ordinary Data Protection Act 2000. The substantive constitutional guarantees of human rights are broad,<sup>26</sup> but the formal situation with regard to a human rights catalogue is not positive. Thus, there are different guarantees of the right to religious freedom in the old monarchic civil liberties catalogue and the European Human Rights Convention. This reflects the general situation of the fragmented structure of Austrian constitutional law.

### 3. THE TWO LEVELS OF AUSTRIAN CONSTITUTIONAL LAW

Another important aspect of Austrian constitutional law is its two-level-structure. Constitutional law is divided into ordinary constitutional law and basic principles of constitutional law. First, the distinction between these two levels is related to conditions for the creation of specific constitutional law. The legislative process to enact ordinary constitutional law requires a two-thirds consensus in both chambers of the Austrian parliament and the denotation of the specific Act or provision as constitutional law.<sup>27</sup> This level of basic principles can only be amended by a so-called total revision ("*Gesamtänderung*") of the Austrian Constitution. This total revision demands a referendum of the Austrian population, in addition to the normal requirements of a legislative procedure for an ordinary constitutional law (Art. 44 para. 3 Austrian Constitution<sup>28</sup>).

The basic principles of Austrian constitutional law are democracy, the federal concept of the state, *Rechtsstaat* (*rule of law*), separation of powers, human rights and the presidential (non monarchic) design of the constitution. This results from a systematic interpretation of the Austrian Constitution and cannot be derived from single provision of it. A plebiscite is necessary to change the core elements of these constitutional principles, as was the case with adhesion to the European Union in June 1994. The pragmatic tradition of enacting constitutional law led to increased conflict between the constitutional provisions in ordinary legislative acts and other constitutional principles which could not be seen in a harmonic interaction. As a consequence, a spirited discussion took place – mainly in the 1980s and 1990s – about the fact of a "creeping total revision" ("*Schleichende Gesamtänderung*") which was not realized in a single act of legislation but rather in a series of respective acts touching basic principles in a certain manner.<sup>29</sup> The main part of this discussion concerned whether various constitutional

26 But consider the focus on civil liberties and the missing of social rights in the Austrian constitution.

27 See supra FN 6.

28 "Any total revision of the Federal Constitution shall upon conclusion of the procedure pursuant to Art. 42 above but before its authentication by the Federal President be submitted to a referendum by the entire nation, whereas any partial revision requires this only if one third of the members of the National Council or the Federal Council so demands."

29 Theo Öhlinger, *Verfassungsrecht* (7<sup>th</sup> edition, Vienna 2007) 59.

provisions in the ordinary laws were simply change in constitutional principles or, instead, a total revision of the Austrian constitution.

The climax of these developments was a judgement of the Austrian Constitutional Court in 2001, decision VfGH 11 October 2001, G 12/00 et al,<sup>30</sup> when it declared for the first time that a constitutional provision was unconstitutional. According to the Court, a constitutional provision in the Federal Public Procurement Act was in contradiction to the basic constitutional principle of democracy as well as of that of the *Rechtsstaat* (rule of law). The Court determined that the relevant constitutional provision declared unconstitutional federal provisions regarding organisation and allocation of powers among authorities with regulated public procurement powers as constitutional. The Austrian Constitutional Court considered this provision as unconstitutional itself because it withdrew a whole part of law (regarding public procurement) from the legal control of the constitutional court. Thus, the provision contradicted the principle of the *Rechtsstaat*. In the same manner, the People of Austria would lose their position to legitimate a total revision in the sense of Art. 44 para. 3 of the Constitution without a referendum.

This decision of the constitutional court shows the two levels of constitutional law in Austria and the problems of its fragmented structure. The constitutional legislation tried to exempt simple law in a broad range from the area of constitutional law. This can be seen as the climax of a long development, which led to the above-mentioned number of 1,300 constitutional provisions. The Constitutional Court decided in a clear manner that there are limits within this political self-understanding and, as a consequence, for "simple" constitutional law not created in the process of Art. 44 para. 3 of the Federal Constitution.

#### 4. THE FAILURE OF A GENERAL CONSTITUTIONAL REFORM IN AUSTRIA

The attempts to reform the Austrian Constitution go back to the 1950s. The fragmented structure and the historical problems of Austrian constitutional law, like the lack of a catalogue of civil liberties and the problems of allocation of powers, date back to the establishment of the Austrian Constitution in the 1920s and lead to attempts to reform the constitution more often. These undertakings always led to new constitutional acts which failed to consolidate the constitution but, instead, create new constitutional law which made the structure of Austrian constitutional law even more complex.<sup>31</sup> In the 1990s different widespread scientific studies which were produced in cooperation with the Austrian Federal Chancellery suggested the simplification of the Austrian Constitution.<sup>32</sup> But the political will to change the deep-rooted problems always failed.

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30 Official Collection of the Judgments of the Austrian Constitutional Court (VfSlg) 16.327/2001.

31 See for example a constitutional reform in the 1980ies which resulted in the codification of personal liberty, see the Federal Constitutional Act to protect personal liberty Federal Law Gazette I No. 684/1988. This reform was started to establish a catalogue of civil liberties and ended in the codification of one human right in a new constitutional act.

32 Robert Walter, *Überlegungen zu einer Neukodifikation des österreichischen Bundesverfassungsrechts*, Bd 1 und 2 (Verlag Österreich, Vienna 1994), Novak, Funk



In the last five years (since 2003), a new process of constitutional reform has been started.<sup>33</sup> All relevant political players, the political parties, the representatives of the parliament, the government and the states, decided to establish a so-called "Austrian Convention"<sup>34</sup>, which should lead to a constitutional reform process similar to developments on the European level. In the next year and a half, ten committees of the Austrian Convention worked in an enormous effort on political compromises to the important questions of constitutional reform. The problem of the Austrian Convention was that legal specialists, like university professors or civil servants, represented the politicians. In the end, the major political decision makers became involved too late and could not find a compromise to the crucial questions.<sup>35</sup> Finally, the Austrian Convention did not produce a general proposal of a new Austrian Constitution (there was published only a draft from the president of the Convention, the former President of the Austrian Court of Audit, Franz Fiedler), but a significant quantity of materials. In effect, this was not enough to find the necessary broad political consensus for profound constitutional reform. The Federal Chancellery then established – as described above – an internal board to continue the political and substantive process to reform the Austrian constitution. This new effort demonstrates the fact that the creation of a new constitution would be a long-term process.

The board decided to split the Constitutional Reform in different steps. On the basis of the results of the Austrian convention, the less problematic parts should be accepted in a first Constitutional Amendment. Afterwards, the more relevant and difficult parts of Austrian constitutional law should be enacted step by step.

## 5. THE CONSTITUTIONAL AMENDMENT 2008 – RESTRUCTURING THE CONSTITUTIONAL DESIGN

### *a. General Observations*

The present Constitutional Amendment 2008 represented the first part of this constitutional reform. The last six months, from the presentation of the draft of constitutional reform until approval by the parliament, showed general problems of constitutional reform in Austria. Although there was an overwhelming consensus on the substance of this first constitutional amendment, in the last six months one of the big reform issues, the establishment of administrative courts of first instance (instead of the current Independent Administrative Tribunals), was abolished for unclear (but probably financial) reasons. The discussion about topics of everyday policy started to influence the constitutional amendment. The creation of the Asylum Court is an example of this fact.<sup>36</sup>

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33 Harald Eberhard, 'Der Österreich-Konvent: was kann er leisten?', (2003) *Journal für Rechtspolitik*, 123ss.

34 See [www.konvent.gv.at](http://www.konvent.gv.at).

35 Georg Lienbacher, 'Verfassungsreform durch Konventsmethode?', (2005) *Journal für Rechtspolitik*, 42ss.

36 See Art 129c-f Federal Constitutional Act

One of the main focuses in the constitutional amendment was a start to the revision of the constitutional provision in ordinary laws. About 1,000 constitutional provisions would be declared void, obsolete or as ordinary law. Most of them had only historical importance or were in relation to others parts of constitutional reform. This part of the process was treated as a kind of technical cleaning of the constitution although some provisions had substantive content. The more crucial problem is that the substantial part of the constitutional provisions remained untouched. The remaining 300 constitutional provisions had to be integrated into other constitutional texts. The political dimension of these provisions does not make this process very easy and will show if it is possible to remove the concept of constitutional provisions in ordinary law. The political tradition still remains.

In 2007 and 2008, new constitutional provisions were enacted.<sup>37</sup> Besides the attempt to unify the Austrian Constitution, the other major constitutional changes performed by the recent amendments to the Constitution are related to international law and organisational changes.

### ***b. The new opening clause towards International Law***

The existing opening clause of the Austrian Constitution towards international law in Art. 9 para. 2 Federal Constitution was extended. In the old provision the transfer of sovereign rights to international organisations was already allowed, if an Act of Parliament determined the transfer. It also admitted the action of domestic authorities abroad and the foreign authorities in Austria. The new provision extended the possibilities with the transfer of specific foreign or international sovereign powers to Austrian authorities and with the action of international organisation in Austria.

The new concept of the adoption (transformation) of international law into domestic law was revised. Art. 50 of the Federal Constitution introduced a new and easier way to amend an international treaty. In the perspective of the fragmented structure of Austrian constitutional law, the Constitutional amendment stopped the possibility of adopting international treaties on a constitutional level. In the future, a constitutional amendment will have to transform the substantive matters of the international treaty into Austrian constitutional law, which makes it necessary to adopt the treaty and to enact a constitutional amendment. Therefore, it is necessary to include the Parliament in this process – a fact that was not the rule in the past.

### ***c. Reform of the Austrian administrative structure***

The new provision about Independent Administrative Tribunals (e.g. special administrative tribunals) in Austrian constitutional law signifies a new concept of Austrian administrative organization. A central constitutional principle of Austrian

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37 See e.g. Federal Act regarding oil supply, Federal Law Gazette I No. 2008/58; Federal Act regarding the Austrian Development Agency, Federal Law Gazette I No. 2008/32; 2nd Federal Criminal Prosecution Reform Act, Federal Law Gazette I No. 2007/112.

administration is the principle of hierarchy. The highest authorities of the Federal Administration, like the Government or the President, are empowered to give instruction to all other administrative authorities. In this way, the democratic legitimacy and accountability of administrative action is guaranteed. Only as an exemption of this principle of hierarchy will the constitution allow the establishment of special independent administrative authorities including at least a judge (so called "*Kollegialbehörden mit richterlichem Einschlag*", Art. 20 para. 2 and Art. 133 No 4 Federal Constitution). Nevertheless, the amount of such independent authorities was increasing steadily in the last two decades. The Constitutional Court<sup>38</sup> determined specific constitutional limits regarding the establishment of independent authorities.

However, the new provision regarding Art. 20 para. 2 of the Federal Constitution creates a very broad legitimation of independent administrative authorities. The principle of administrative hierarchy is substituted by a new principle of control and supervision. The hierarchical structure of the Austrian administrative organisation will be more and more changed into an administration with different strong relations of interdependence. The challenges of democratic legitimation and accountability will increase and serious doubts exist about whether the new concept of Art. 20 Federal Constitution will comply with these challenges. A starting point is to make the broad range of independent authorities conform to the above-mentioned constitutional principles in the new Art. 52 para. 1a Federal Constitution which give the powers to parliamentary commissions to postulate the presence of the heads of such authorities and get relevant information from them.

In particular, one will have to raise the question of how far the principle of hierarchy in Art. 20 para. 1 of the Constitution will become devaluated and replaced by other principles, such as the fact that European Community Law touches many parts of Austrian Law, postulating mainly independent authorities and replacing traditional democratic concepts which focus on the hierarchical construction of the national public administration.<sup>39</sup> The questions of transparency are also deeply connected to democratic legitimation as a core principle which should be realized by a hierarchical structure of administration and confirmed by further reform steps.

Already in the 19<sup>th</sup> century, self-governing bodies were established in the Austrian administration. In the field of social security, the chambers of commerce and the chamber of labour (worker's chamber) as well as chambers of different professions like medical doctors, lawyers, accountants or notaries are self-governed under state control. In the Austrian jurisprudence, there has been a long-term debate about the legitimacy of these organisations because there was no explicit exception from the above-mentioned principle of hierarchy. The only form in this field that was never questioned was the self-governing structure of the Municipalities which has explicit regulation in the Federal Constitution.<sup>40</sup> The integration of self-governing bodies into the Federal Constitution (Art. 120a –

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38 See for it Official Collection of the Judgments of the Austrian Constitutional Court (VfSlg) 15.427/1999, 16.048/2000.

39 See Art. 20 para. 2 No. 8 Federal Constitution.

40 See Art. 115-120 Federal Constitution.

120c), which was realized with the current constitutional amendment, established a constitutional basis of these historical well-established and politically-influential chambers and institutions. In the main constitutional question regarding these bodies – their right to set up general provisions such as regulations – this amendment allows significant autonomy going beyond the status quo,<sup>41</sup> thereby making a correction to the traditional jurisdiction of the Constitutional Court which had strongly restricted this right.

Instead of the establishment of administrative courts of first instance on the federal and state levels, the government suddenly decided to establish a Court for Asylum Affairs (Art. 129c Federal Constitution) which will replace the Independent Tribunal for Asylum Affairs which had been created in 1997. This significant modification can only be understood if the political dimension of constitutional amendments is considered. This Court is an enhancement of the ("old") independent federal asylum tribunal but modifies its status toward judicial autonomy. The establishment of the Asylum Court was part of a significant political discussion in the weeks before the enactment of the constitutional amendment. The reason for the public debate was the lack of regular and effective legal protection against the decisions of the new asylum court before the Administrative Court because access to this court is prohibited for the individual person. The additional project of a fundamental reform of legal protection including Administrative Courts of first instance which replace the internal administrative legal protection remains an important issue for the future.

The integration of universities in the Federal Constitutional Act is more or less a symbolic provision (Art. 81c Federal Constitutional Act) and can be seen as a revision of those provisions with constitutional content outside from the Federal Constitutional Act. It gives to the universities in general a constitutional guarantee which already was part of the interpretation of the existing fundamental right of the freedom of science and arts and the existing constitutional provision regarding universities. However, the systematic approach shows a clear distinction from self-governing institutions which have found their place in another chapter of the Federal Constitution.<sup>42</sup>

An important political step is the constitutional provision about the Public Prosecutor's Office. In Austria, the Ministry of Justice can give instructions to the public prosecutor's office (following the general rule of Art. 20 para 1 Federal Constitutional Act). In politically sensitive cases, this can lead to heated public discussions if the political influence on prosecution is in conformity with constitutional principles such as the autonomy of the courts as well as the independence of criminal prosecution. The constitutional establishment of the Public Prosecutor's Office in the Federal Constitutional Act (Art. 90a) is a first step towards a more legitimate and (perhaps sometimes) more independent public prosecution in Austria.

The constitutional establishment of the Federal President's Office (Art. 67a Federal Constitutional) – realized in principal by an amendment of the last year<sup>43</sup>

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41 Art. 120b para. 1 Federal Constitution.

42 See above.

43 Federal Law Gazette I No. 5/2007.

and modified by the recent amendment – is also a more symbolic statement. The detailed provision to different administrative authorities is – seen it from a comparative law perspective – a general characteristic of the Austrian constitution. The new organisational guarantees are generally symbolic of the power of specific pressure groups and political powers in Austria. A vivid example is the constitutional reference to the traditional self-governing chambers (commerce, workers, agriculture) which – initially – had foreseen that these chambers could not be abolished or replaced by other institutions. The Austrian solution was to mention the social partners as a whole with a commitment to their encouragement by the state.<sup>44</sup>

## 6. PERSPECTIVES OF THE CONSTITUTIONAL REFORM

The important constitutional reform shall continue. Further amendments are planned. The two big challenges will show if a real constitutional reform is possible in Austria. One point is the establishment of a catalogue of fundamental rights<sup>45</sup> and the reorganisation of the allocation of powers (between the Federation and the States<sup>46</sup>). Both aspects of Austrian constitutional law are controversial between the different parties since a long term. It would take significant political will to reach a consensus. With regard to fundamental rights, especially the establishment of social rights or the equality of homosexual partnerships, the different political parties will have to find a compromise. Within the Austrian concept of the Federal State, which is already very centralized, a new political arrangement between the Federation and the States has to reconsider the allocation of powers, to give the states a reasonable set of powers. The challenge is to find a good mixture between a functional separation of powers in a small country like Austria.

A general condition of all relevant reforms is to integrate all postulates which derive from the European Integration. The Austrian Constitution participates in a network of constitutions (*Verfassungsverbund*) existing in the European Constitution, and set up by the primary law of treaty and with other national constitutions of the member states.<sup>47</sup> These levels influence each other. In the same way as European constitutionalism gives a stimulus to the Austrian discussion, we can see direct influences regarding certain contents of the recent amendment of the Federal Constitution (especially the provisions about independent authorities<sup>48</sup>).

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44 Art. 120a para. 2 Federal Constitution.

45 Cf Christoph Grabenwarter, 'Die Grundrechtsdiskussion im Österreich-Konvent', in Daniela Graf/Franz Breiner (eds), *Projekt Österreich – In welcher Verfassung ist die Republik?* (Czernin, Vienna 2005) 38ss.

46 See Anna Gamper, 'The Austrian Constitutional Convention: Continuing the Path to Reform the Federal State?', (2006) *Revista d'Estudis Autònoms i Federals*, No 2, 9ss.

47 Ingolf Pernice, 'Europäisches und nationales Verfassungsrecht', (2001) 60 *VVDStRL* (Proceedings of the Annual Meeting of German Constitutional Lawyers) 148, 163ss.

48 See above.

Regarding the enhancing of the formal concept of the Austrian constitution, the chance to establish a singular, codified constitution is still very limited. It is not only the very fragmented structure of the Austrian constitution, but also a question of the political culture about how to deal with constitutional law in Austria. In past decades Austrian politicians used to create constitutional provisions in individual cases to deal with specific political problems. Constitutional law, in this way, had often the function to constitute political compromises and agreements between the traditional parties SPÖ and ÖVP. This political tradition is so strong that governments, which did not have a constitutional majority in parliament, were able to establish constitutional provisions with the consent of the opposition parties. In this way, other political constellations beside the cooperation of these "big" parties can trigger a new comprehensive understanding of constitutional law. On the other hand, the lack of a constitutional majority makes it – in a more political perspective – difficult to reach a consensus in the matter of a fundamental reform.

The recent Constitutional Amendment 2008 which invalidated about 1,000 constitutional provisions does not prohibit the parliament to establish new constitutional provisions where certain constitutional problems would occur. This means that new constitutional provisions are created in the same way as in the past. The necessary next step of prohibition to create constitutional law outside from the Federal Constitutional Act must be done in the future. Instead of developing Acts which matches the constitutional standards, the government and the parliament continue to solve their constitutional problems with constitutional provisions. This continuing problem of Austrian constitutional culture shows that the fragmented structure of Austrian constitutional law will not be modified soon. Finally, this aspect confirms the view that a real constitutional reform will have to deal mainly with the common understanding of constitutional law in Austria,<sup>49</sup> and to a lesser extent, with other aspects.

- *Harald Eberhard is scientific assistant at the Austrian Constitutional Court.*
- *Konrad Lachmayer is a lecturer and post-doc researcher at the University of Vienna, Faculty of Law.*
- *For comments please send an email to [h.eberhard@vfgg.gv.at](mailto:h.eberhard@vfgg.gv.at) or [konrad.lachmayer@univie.ac.at](mailto:konrad.lachmayer@univie.ac.at)*

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49 Theo Öhlinger, 'Braucht Österreich eine neue Verfassung?', (2003) *Journal für Rechtspolitik*, 1, 5s.