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The Austrian Bundesrat – Imperfect and Unreformed

by

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Abstract

According to many legal and political scientists the Austrian Bundesrat is generally considered to be a paradigmatic example of a politically and legally weak second chamber embedded in a strongly centralised federal system. This view is justified. However, there is the need for a more differentiated view with regard to Austria's federal system and its second chamber.

Key-words

bicameralism, Austria, Bundesrat



1. Introduction

According to many legal and political scientists the Austrian Bundesrat is generally considered to be a paradigmatic example of a politically and legally weak second chamber embedded in a strongly centralised federal system (see Schäffer 1999: 38, Fallend 2015: 34). This view is justified. However, as I will explain later throughout this paper, there is the need for a more differentiated view with regard to Austria's federal system and its second chamber.

At first (paragraph 2) I describe the discussions on the Bundesrat in the context of the long and complicated elaboration process of the Federal Constitution (B-VG), which lasted from the beginning of the First Republic in November 1918 to October 1920.

Then I analyse how participation rights in federal legislation and other instruments of the Bundesrat, representing Länder interests at the federal level, have evolved over time (paragraph 3). In paragraph 4 I discuss the impact of this process on the role of the Bundesrat in Austrian politics and federalism.

2. The Austrian Bundesrat in the debate on the Federal Constitution 1918-1920

2.1. The history of the second chamber in Austria before 1918

Federal institutions always have a historical background; their roots sometimes even lie in pre-federal times. This can be illustrated by the example of second chambers functioning as representational bodies of clerical and aristocratic elites during the era of constitutionalism.

The idea of a bicameral parliament in Austria can be traced back to the year 1848. At that time, several constitutions, that were adopted or at least drafted, provided for a second chamber as a representative body of either the Crown Länder or the estates (Gamper 2010: 46).

Based on the Constitution of December 1867, the Austrian part of the Austro-Hungarian Empire had two chambers of Parliament (Reichsrat): On the one hand the Abgeordnetenhaus, with deputies representing people of the various Länder of the empire,



elected by an ever-growing number of (male) people, resulting in a general electoral system in 1907, and on the other hand the Herrenhaus with deputies of the clerical and aristocratical elites, installed by the emperor.

In terms of legislation, both chambers had more or less the same legal position. A law passed by the first chamber needed the consent of both the Herrenhaus and the Emperor; it can thus be said that there was 'perfect bicameralism' in Austria from 1867 to 1918. Notwithstanding this, Austria-Hungary was not a federation in a strict sense, but the empire had rather moved in the direction of a decentralised unitary state (Karlhofer 2017: 12).

After the democratic revolution of 1918, the Herrenhaus was abolished, as the previous system with one chamber of parliament, which was not democratically legitimated, was unacceptable.

In a federal system the second chamber might regain a certain function, namely in representing the interest of the Länder and participating in federal law-making. After the breakdown of 1918, in the course of the debates between the Central Government and the Länder on the future structure of the Republic, the vision of a second chamber, the Bundesrat, was soon under discussion.

2.2. Kelsen's and other experts' views on the Bundesrat as an organ of the Federation

Hans Kelsen is generally considered the author of the Austrian Federal Constitution. A detailed discussion of this thesis, however, would exceed the scope of this paper.

Undoubtedly, *Kelsen* played an important role in the process of developing the Austrian Federal Constitution, namely as an advisor of the Government and Parliament in these matters (Schefbeck 1997: 317).

Across *Kelsen's* drafts (there were about six) the role of the Bundesrat differs significantly. Obviously, he tried to propose several alternatives concerning the degree of Länder participation in federal legislation via a second chamber of Parliament. Regarding the composition of the Bundesrat, it is remarkable that *Kelsen* proposed in Drafts I, II and IV that the members of the Bundesrat should be elected by the Land parliaments, which corresponds with the provision of Art. 34 par. 1 B-VG, which eventually entered into



force;^I whereas in Drafts III, V and VI the Bundesrat was composed of the Land Governors, eventually with participation of other members of the Land Governments.

In an alternative variant to Drafts I and IV, a bill objected to by the Bundesrat could only enter into force if the Federal Assembly, an organ composed of the Nationalrat and the Bundesrat, repeated the resolution of the first chamber three times, or the bill was approved by the people in a referendum.^{II} In Drafts III and V, in the case of the objection of the Bundesrat the bill only needed the approval of the people.^{III} In the first variants of Drafts I and IV, however, the first chamber was entitled to overrule an objection of the Bundesrat with a resolution repeating the original legislative act.^{IV} In contrary to the later legal situation in the Constitution of 1920, this resolution needed a majority of 3/4 (Draft III) respectively 2/3 (Draft V) of the votes of the members of the Nationalrat (cf. Bußjäger 2004: 5-6).

Similarly, the draft of *Mayr*, a Tyrolean historical scientist, who soon after became federal chancellor of Austria for several months, provided in various options that a resolution of the Nationalrat, repeating its origin bill would need the consent of 3/4 respectively 2/3 in the Nationalrat, respectively. a referendum, if the resolution would find only a simple majority (Kathrein 1983: 17).

2.3. Positions of political parties

During the political negotiations that preceded the enactment of the Federal Constitution of 1920, the question of the second chamber became a crucial issue. Whereas the Social Democrats initially opposed the idea of a representative body of the Länder at the level of federal legislation, the conservative party insistently approved of a strong federal chamber. This might be due to the Länder that had voluntarily agreed to join the new Republic in 1918 (Gamper 2006: 782).

In a draft of the conservative western Länder (the '*Falser*-draft') the Bundesrat had the same legal position as the Nationalrat; as such the perfect bicameralism of the Monarchy would have been transposed to the new federation. Conversely, for the first time the Social Democrats abandoned their former position, that there should be only one chamber of parliament, in the context of the '*Danneberg*-draft' (named after a leading Social Democratic politician).



2.4. The Bundesrat as a compromise and Danneberg's prophecy

The Social Democrats were ultimately successful in the debates in the sub-committee of the constitutional committee of the provisional national assembly. The compromise, that mainly corresponded to the concept of the Social Democrats, established the Bundesrat in the B-VG as a representative body, rather ill-suited to represent Länder interests effectively (Gamper 2006: 783, Fallend 2015: 39). However, without this compromise the Austrian Federal Constitution would not have been established in 1920. Even though the Bundesrat was organised in a way that it could be called a chamber representing interests of the Länder, it could not gain a strong position. This is often (somewhat incorrectly) referred to as the 'congenital defect' of the Bundesrat (Schäffer 1999: 38). It was clear from the beginning that the Bundesrat was an imperfect organ of the federation. *Danneberg*, deputy of the Social Democrats, who was responsible for the compromise, described the competences of the Bundesrat in his speech from September 29 1920 - two days before the Federal Constitution entered into force – as follows:

We still consider the Bundesrat as a totally unnecessary institution. But as it was not possible for us, to prevent it, its competences are reduced to a minimum and its composition will not be able to prevent legislation (of the Nationalrat) from entering into force. (Bußjäger 2004: 6).

3. Evolution of the legal status of the Bundesrat

3.1. Composition of the Bundesrat

In Austria, as well as in many other federal systems, a geometric system prevails: the number of members of Land representatives to the Bundesrat differs according to the population size of each Land. Art. 34 B-VG provides that the Land with the largest population is represented by 12 members and the other Länder proportionally by as many members as reflects their respective proportion size. These provisions have not changed since 1920.

3.2. Rights and Instruments

The Federal Constitution of the 1st Oct 1920 only provided a suspensive veto of the Bundesrat in respect of legislative acts of the Nationalrat : There was no difference



between constitutional and ordinary federal laws. If the Nationalrat repeated its resolution, the veto of the Bundesrat was repealed; as such the Nationalrat could overrule any veto of the Bundesrat.

The consent of the Bundesrat was only needed if an international treaty touched the autonomous sphere of competences of the Länder according to Art. 50 B-VG. Furthermore, the Bundesrat was entitled to submit bills via the Federal Government to the Nationalrat, which was free to take these bills into consideration or not.

Further, veto-rights of the Bundesrat were provided in two contexts. The first, in Art. 100 par. 1 B-VG, concerning the dissolution of a Landtag by the Federal President, which needs the consent of the Bundesrat. The second, according to Art. 15 par. 2 (now par. 6), was in respect of matters falling into the competence of the federation concerning framework legislation, if the deadline for the implementation of the laws of the Länder set by the Nationalrat was shorter than six months or longer than one year.

Concerning the legal status of the Bundesrat, there was a long status quo of nearly 65 years. In the era of the First Republic, from 1920 to 1934, provisions regarding the Bundesrat were only subject to two minor amendments, in the given context not even worth mentioning.^V Somewhat more important was that in 1929 the Bundesrat indirectly lost its right to elect the Federal President together with the Nationalrat in the so-called Federal Assembly; because from that date the Federal President has been elected by the people (Gamper 2006: 783).

In 1934 the Austrian Bundesrat was abolished by the regime of Austro-fascism and re-established after the breakdown of the Nazi empire in 1945. Two other modifications of the legal status of the Bundesrat in 1979 und 1981 also had minor importance.^{VI}

With the modification of the Federal Constitution in 1984¹ a new Art. 44 par. 2 B-VG was introduced, the former par. 2 changed to par. 3. The new provision stipulated that a modification of the Federal Constitution, which transferred competences from the Länder to the federal level in both legislation and execution, would need the consent of the Bundesrat. With this modification, interventions of the federal level into the autonomous sphere of competences of the Länder could not be realised without the consent of the Bundesrat. Given the complicated and casuistic distribution of competences, this provision



had considerable practical relevance: it can be argued that the Länder's position in federal law-making became strengthened. The justification for this argument will be discussed below.

Another modification concerned Art. 36 par. 4 B-VG, according to which the Länder Governors are entitled to attend all meetings of the Bundesrat and, on their request, to be heard on matters relating to their respective Land according to the provisions of the Bundesrat's Standing Orders (Gamper 2006: 784). Since 1988 the Bundesrat has also been entitled to submit bills directly to the Nationalrat, and not via the Federal Government,^{VII} and international treaties affecting the Land competences have needed the approval of the Bundesrat.

With Austria's accession to the European Union, the Bundesrat gained the right to pass a binding statement towards the Federal Government concerning a project of the European Union, which either requires the passing of Federal Constitutional regulations limiting the autonomous sphere of competences of the Länder or contains regulations which can be only passed by such regulations (Art. 23d par. 3 B-VG). However, this provision is without any practical relevance.

In 2008 another amendment of the Federal Constitution stated that all treaties concerning the basics of the EU would need not only the consent of the first chamber of Parliament, but also of the Bundesrat by a two-third majority (Art. 50 par.1 n. 1 B-VG).

Much more important is the fact that, with the implementation of the Lisbon Treaty in 2009, the Federal Constitution was amended in such a way that the Bundesrat could participate in the new early warning mechanism of the Lisbon Treaty concerning the monitoring of the subsidiarity principle (Art. 23g and 23h B-VG) (see also Fallend 2015: 48). Since then, no further modifications of the instruments and rights of the Bundesrat have taken place.

3.3. Organisational structure

The Länder succeed each other in the chairmanship of the Bundesrat in alphabetical order every six months (Art. 36 par. 1 B-VG). The top-listed representative of the respective Land is designated as the chairman, whose mandate goes to the party having the largest number of seats in the Landtag or, if several parties have an equal number of seats, to the party with the highest number of voters in the most recent elections of the Landtag.



Following a modification of the constitution in 2005, the Landtag can resolve that the chairmanship shall be held by another representative of the Land, whose mandate in the Bundesrat is with the same party (Art. 36 par. 2 B-VG).^{VIII}

The Land Governors are entitled to participate in all proceedings of the Bundesrat. In practice, they make use of this instrument at the beginning of their respective chairmanships in the conference of Land Governors, which lasts six months and usually begins with the chairmanship of the respective Land in the Bundesrat. With one exception, in 1994, they have not made use of this instrument to make statements on legislative acts debated in the Bundesrat, because it would be too late for effective political lobbying.

The chairman is bound to immediately convoke the Bundesrat if at least one quarter of its members or if the Federal Government requests it (Art. 36 par. 3 B-VG).

4. The political role and status of the Bundesrat since 1920

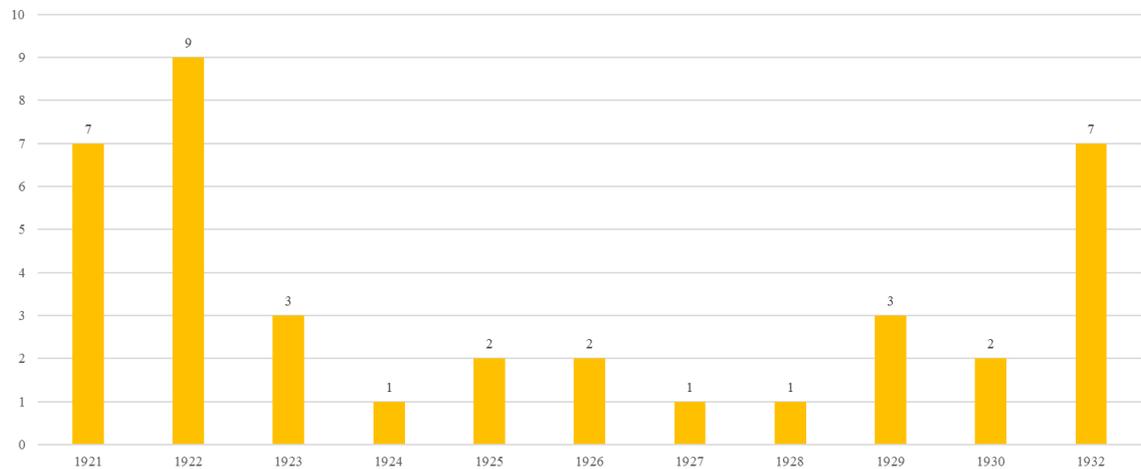
4.1. First Republic 1920-1934: Confirmation of Danneberg's prophecy

The first period of activities of the Bundesrat did not even last 14 years, as the Bundesrat was abolished with the authoritarian Austro-fascist constitution of 1934 (Kathrein 1983: 35).

According to *Rath-Kathrein*, the Bundesrat raised 38 objections during the democratic period of the First Republic from 1920 to 1934. This accounts for a c. 0,4% share of all bills passed by the Nationalrat (Kathrein 1983: 35, Hummer 1997: 374 counts 35 objections). In only 10 cases was the reason behind the objection grounded in the particular interests of the Länder; the Bundesrat mostly objected for formal reasons or arguments concerning the execution of laws (Kathrein 1983: 38). Nevertheless, in 19 cases the Bundesrat was successful and the Nationalrat abstained from overruling the second chamber:



Objections of the Bundesrat: First Republic



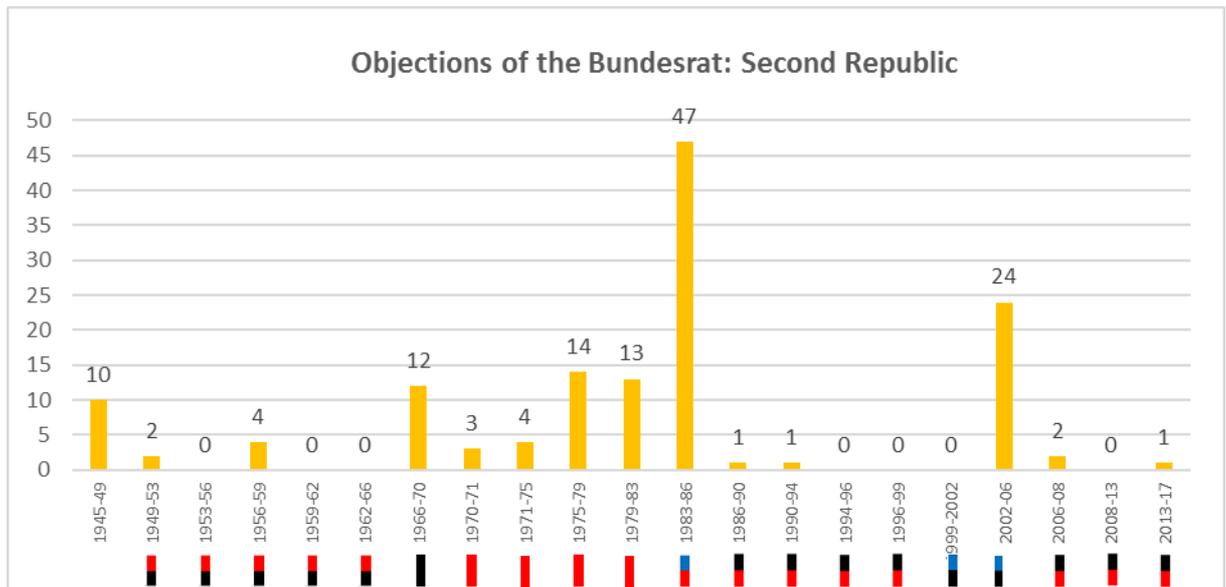
Source: Institute of Federalism based on Hummer 1997: 374

The Nationalrat overruled the veto of the Bundesrat in all cases, which not only confirmed *Danneberg's* prophecy, but also underlined that the Bundesrat was not able to gain any significance in political proceedings.

4.2. Second Republic since 1945: Nothing has changed

Even after the November 1945 re-establishment of the Federal Constitution, and elections at the federal and Land level, the Bundesrat played only a minor role as a weak chamber. In fact, the Bundesrat was rarely recognised as a lawmaker. According to *Gamper*, the Bundesrat objected to a federal law 111 times in the period from 1945 to November 2004 (Gamper 2006: 819, see also Bußjäger 2004: 7). The Nationalrat abstained from overruling the Bundesrat's objections in only 12 cases (Gamper 2006: 819).

From 2005 to November 2017 27 objections were raised by the Bundesrat, whereby the Nationalrat overruled the objections of the Bundesrat in 24 cases. About 14 of them dealt with concrete Länder interests.^{IX}



Source: Institute of Federalism based on Hummer 1997: 375

In the course of this period the Bundesrat represented the interests of the Länder less, but acted more as an organ of correction (see Hummer 1997: 382-398). Table 2 (see above) shows that objections were mostly raised in legislative periods in which the majority in the Bundesrat differed to the governing coalition parties in the Nationalrat.^x This indicates that the majority in the Bundesrat acts primarily in the interest of party politics of the respective parties on federal level and less than an organ of Länder interests (Pernthaler 2004: 355).

Moreover, the Bundesrat has never made use of its Art. 44 par. 2 B-VG absolute veto acquired in 1985, giving its consent in 263 cases, or of its veto under Art. 50 par. 1 B-VG (international treaties) in 236 cases.^{xi}

Until 1970 the Bundesrat had never made use of its right to submit a bill to the first chamber. Since that time this has happened about one or two times a year (Fallend 2015: 46). Since 1999 the Bundesrat submitted 14 bills, three of them were successful.

Objections towards legislative acts of the Nationalrat usually only take place in cases of different majorities between the two houses of Parliament when party competition defines the relations between the Nationalrat and the Bundesrat (Erk 2004: 8).

In general, it can be noted that the Bundesrat not had the best reputation. As *Gamper* wrote,



on the one hand, the Federal Council is so much less recognized than the National Council that is directly elected by the federal citizens and thus comes to the fore much more. Neither, moreover, is the mode of the Federal Council's selection suited to create identity between the Federal Council's members and the citizens nor is the Federal Council vested with powers that fully deserve the appreciation of the public. The very existence of the Federal Council is therefore hardly known to a large number of citizens or regarded as useless by many (2006: 819).

Thus, it may not be a surprise that the members of the Bundesrat often complain that their political work is frustrating (Fallend 2015: 46).

The roots of the weakness of Austria's second chamber lie both in the nomination procedure and in its limited powers as well as – and above all – in the political system of Austria. The members of the Bundesrat are elected by the Landtage according to the proportional strength of the parties represented in each diet. This institutional construction, and political practice, have led to a Bundesrat that is completely dominated by the political parties (Schäffer 1999: 35).

It is also characteristic that the members of the Bundesrat do not even sit as Länder delegations, but as political groups overlapping Länder boundaries, and that they join their respective political clubs with their counterparts in the Nationalrat. Because of that, the members of the Bundesrat neither feel responsible to the delegating Landtage, nor to the Länder governments (Schäffer 1999: 36). The members of the Bundesrat also lack essential influence on the decisions passed in the meetings of the party divisions of the Austrian parliament. They are only rarely able to exercise effective lobbying for Länder interests in their respective parties.

From a certain point of view, the Bundesrat is partly considered as a preparatory school for young party members or as a place of rest for merited party-veterans (Schäffer 1999: 35). Thus, the relations of power dominating in the Bundesrat are rather similar to those of the Nationalrat.

This failure of the Bundesrat's designated function, as an organ of representation of Länder interests, is one of the most important reasons that the Länder seek to influence federal politics via the conference of Land Governors (Gamper 2006: 820). Over time the conference of the Land Governors has consolidated itself successfully, as a compensation for the weakness of Austria's second chamber, and for the lack of an effective institutionalised body representing Länder interests in federal policymaking processes



(Karlhofer 2017: 23). The evidence for this can be seen in the important role Land Governors play in party politics, even though the conference of Land Governors is not explicitly mentioned in the Federal Constitution (Bußjäger 2015: 19-21).

4.3. The other side of the coin

While some would frankly argue that the bundesrat is worthless from a federal perspective, its veto-right concerning modifications of the Federal Constitution has been sufficient to prevent more severe damage to the Lands' competences. Another point is that the Bundesrat actively participates on the subsidiarity monitoring of projects of the European Commission; here the Austrian Bundesrat is one of the most active chambers of national parliaments of the European Union.

Furthermore, it should be mentioned that the Bundesrat initiated a modification of the Federal Constitution in order to strengthen and facilitate municipal cooperation in 2011. Another initiative concerning the abolishment of various veto-rights of the Federal Government on Land organisation and vice versa will soon be discussed in the parliament.

Finally, it must not be overlooked that in the present situation the Social Democrats and members of the Green Party could make use of the minority right of one-third of the members of the Bundesrat to call for a referendum on modifications of the Federal Constitution. The Social Democratic Party has announced its intent to make use of this instrument, which has never been exercised over nearly a hundred years.

5. Ideas of reform

Even though the deficits of the present system are obvious, ideas for reform of the Bundesrat have, until recent, remained vague. Even a constitutional draft of an overall reform, which was tabled in the Nationalrat in the 1990s, postponed the question of the Bundesrat. Many recommendations for reform only included the relatively vague demands of either strengthening or abolishing the Bundesrat. The government program of the present ÖVP-/FPÖ-coalition at the federal level does not contain a single mention of a reform of the Bundesrat. On the other hand, it has been the practice for many years that the party discipline of the government parties is exercised not only in the Nationalrat but also in the Bundesrat.



In recent years several reform ideas have been presented (Wittmann 2012: 417-529), in which various different types can be distinguished:

The first type refers to those proposals that seek to organisationally reform the Bundesrat, for example to bind members to instructions of the Länder parliaments, or to instructions of the Länder governments (Gamper 2006: 823; see also Schäffer 2007: 20).

Another idea was that the citizens of the Länder should be entitled to elect their delegates directly. Nevertheless, this would probably not bring about any change in the context of representing Länder interests on the federal level. Finally, it was proposed that the Bundesrat should be composed of the Land Governors or delegations of the respective Länder including the Land governors, the presidents of the Landtage and one additional member of the Landtag concerned.^{XII}

The second type of proposals focused on the functions of the Bundesrat. Irrespective of organisational problems, the Bundesrat could operate more efficiently if it had more and stronger powers, or at least more specific and at the same time more powerful competences (Gamper 2006: 823). One proposal was to give the Bundesrat a veto-right over all modifications of the Federal Constitution, as well as over all bills passed by the Nationalrat which have to be executed by organs of the Länder, or which would impose costs on the Landtage (see e.g. Prior 2004: 97).

These ideas for the reform of the power of the Bundesrat are insufficient. As long the members of the Bundesrat do not act as representatives of the Länder, instead of following party discipline, the strengthening of the rights and instruments of the Bundesrat will be insufficient. Thus, a reform of the Bundesrat must have both aspects in mind: Composition and organisational structure of the Bundesrat on the one side and powers and rights of the Bundesrat on the other side.

6. Conclusion

The Austrian Bundesrat was a historical compromise between two parties with profound disagreement on the necessity of a second chamber of parliament. All deputies who took part in the decision on the Federal Constitution in September 1920 were aware of the fact that the Bundesrat would never be able to play an essential role in lawmaking.



Since 1920 the Austrian Bundesrat has remained a legally and politically weak institution. The Bundesrat has self-restricted the exercise of its rights and instruments, and was not able to emancipate itself from the Nationalrat.

On the other hand, there is proof of a slight movement into the direction of the legal strengthening of the Bundesrat since 1984. Nevertheless, the Bundesrat remains under the dominance of the First Chamber. A greater role, reasonably independent from influences from the Nationalrat and party discipline, could only be reached through subsidiarity monitoring in European context. Over the past years many reform ideas have been formulated. The present Federal Government and the political parties, however, seem to have lost any vision for the future of the Bundesrat.

The Austrian Federal Constitution will celebrate its hundredth anniversary in two years. At least until then the situation will remain unchanged.

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^I Art. XXVI, resp 23 and XXVI. See Ermacora 1990: 78-79.

^{II} Art. XXXI; see Ermacora 1990: 92.

^{III} Art. 34; see Ermacora 1990: 90.

^{IV} Art. XXXI; see Ermacora 1990: 92 and 93.

^V See Gamper 2006: 783 for more details. These amendments concerned the right of the Bundesrat to elect members of the joint committee pursuant § 9 Fiscal Constitutional Act in 1922 and to take part in the appointment procedure of judges belonging to the Administrative Court.

^{VI} See Gamper 2006: 784. These modifications concerned the establishment of a Parliamentary Administration in 1973 also competent for the Bundesrat and new provisions in 1981 facilitating interaction between the two chambers of Austrian parliament.

^{VII} BGBl. Nr. 341/1988.

^{VIII} BGBl. I Nr. 54/2005.

^{IX} Source: Institute of Federalism.

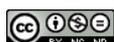
^X See also Ennser-Jedenastik, who shows that 81 percent of the objections were raised in periods in which the ruling government parties had no majority in the Bundesrat. <https://derstandard.at/2000079047574/Bundesrat-Parteipraeferenzen-dominieren-gegenueber-Laenderinteressen?blogGroup=1>.

^{XI} Source: Institute of Federalism; Fallend 2015: 46.

^{XII} The draft paper of an expert group, established by the Federal Government in 2007, proposed such a composition of the Bundesrat (see Institut für Föderalismus 2009: 12).

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