
SUBMISSION TO THE EXPERT PANEL ON CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

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Should local government be recognised in the Constitution? And would such recognition make a practical difference?

International experience suggests that constitutional recognition alone does not determine the practical power and influence that local government authorities can exert. A comparison of the legal situation in Germany and Switzerland provides a good illustration.

In both Germany and Switzerland there are constitutional provisions for local government in the respective constitutions. Article 28 (2) of Germany's Basic Law (*Grundgesetz der Bundesrepublik Deutschland*) states:

Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.

In comparison, the Swiss Federal Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft*) remains much more vague in Article 50:

- (1) The autonomy of the Municipalities is guaranteed within the limits fixed by cantonal law.
- (2) In its activity, the Federation takes into account the possible consequences for the Municipalities.
- (3) In particular, it takes into account the special situation of cities, agglomerations, and mountainous regions.

The wording of these constitutions at first sight suggests that local government in Germany should be in a much stronger position than local government in Switzerland. Whereas the German Constitution contains specific guarantees for adequate local government funding and self-government, the Swiss Constitution only mentions municipal 'autonomy' without explaining what this autonomy actually extends to. Financial aspects are missing in the Swiss Constitution.

In practice however, Swiss councils are much more powerful than their German counterparts. In particular, their financial situation and their ability to raise local taxes are far more developed than in Germany.

German towns and cities are facing severe funding difficulties, as the German Association of Cities (*Deutscher Städtetag*) regularly laments in its publications. On the other hand, Swiss municipalities have the freedom to determine their own income tax rates, which are an important lever in local government finance and regional competition. In a direct comparison of the German and the Swiss

political systems, there cannot be any doubt which of the two systems has the more powerful actors at the local level.

What this brief comparison shows is that constitutional recognition on its own does not determine practical outcomes. What matters at least as much are historically grown governance structures. Switzerland can look back to centuries of non-centralisation in which municipalities have defended their independence against cantons and the Swiss confederation.¹ Germany, on the other hand, is also constituted as a federation of states but with more power assigned to state and federal institutions. The drive towards German centralism is clearly visible at least since the time of Germany's first unification in 1871.

Constitutional declarations of the kinds mentioned above can do very little on their own to reverse historical developments if they are not accompanied by political will to bring about such change. This is a lesson that Australians should keep in mind when discussing constitutional recognition of local government in Australia.

Of the tiers of government in Australia, local government is clearly the weakest. The reasons for this weakness can be found in the way in which Australia was settled and governed after 1788. Australia's European history is one that was initially determined by top-down control, not by bottom-up localism. It started with a penal colony run by governors with quasi-dictatorial powers, not by communities of free men organising their own affairs.

Circumstances since have obviously changed, and yet it would be foolish to overlook the long-term impact that this initial development had on the standing of local government.

This is not to say that a strengthening of local government would not be desirable—far from it. There are good reasons to believe that Australia would be better served if it had councils with greater autonomy, more clearly defined functions, more secure funding arrangements and enhanced democratic accountability to local electorates. But it is doubtful that constitutional recognition could achieve such a change towards a more localist Australia.

For these reasons, a mere cosmetic amendment to the Constitution recognising local government will not do. If local government were only to be mentioned in passing, be it within a yet to-be-written preamble or somewhere in those articles defining the structure of governance of Australia, it would amount to little more than legal prose without any real, palpable impact.

Even if local government received a much stronger recognition such as a version of the German Constitution's Article 28, it would be still be unlikely to change the practice of Australian governance. It would probably have the same impact as it has had in Germany—and for very much the same historical reasons.

Such amendments to the Constitution would, in effect, be symbolic.²

¹ Robert Nef, *In Praise of Non-centralism* (Berlin: liberal Verlag, 2004).

² Oliver Marc Hartwich, *Beyond Symbolism: Finding a Place for Local Government in Australia's Constitution* (Sydney: The Centre for Independent Studies, 2009).

If strengthening local government is the aim of constitutional recognition, it would not help either if, for example, provisions were made that enabled the Commonwealth to deal with local government directly. The problem of local government is not that it cannot deal with other tiers of government.

The real Australian local government problem is that it can do too little on its own.

Australian local government in particular suffers from a lack of funding to support the necessary infrastructure for a fast growing population. A survey of mayors and chief executives of Australian councils revealed the deep-seated frustration with existing local government finance arrangements. Almost all respondents (94 per cent) stated that the current system was either partially or completely inadequate for dealing with population growth.³

Constitutional reform would be a good opportunity to deal with these issues in a more than symbolic way. In order to achieve this, it would thus be desirable if constitutional recognition of local government clearly spelt out local government's role, responsibilities and sources of funding.

Ideally, such a reform should be part of a wider reform package. The Centre for Independent Studies has been consistent in its calls for a restructuring and strengthening of Australian federalism.⁴

The arguments in favour of a revived federalism are consistent with the call for more localism. Both are about handing back power to the lowest possible tier of government at which the tasks in question can be dealt with effectively. This principle of subsidiarity should be enshrined in the Australian Constitution (as indeed it is in Article 5a of the Swiss Constitution).

Local government in Australia deserves a better deal than just finely crafted motherhood statements, even if they were given constitutional rank. It is at the local level where citizens can best experience the values of a free democratic society. As Alexis de Tocqueville wrote:

The strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it.⁵

Any constitutional recognition of local government in Australia would be pointless if it did not lead Australia towards this Tocquevillian vision of a free people organising its own local affairs in autonomy. In contrast, mere symbolism will achieve nothing.

³ Adam Creighton and Oliver Marc Hartwich, *Australia's Angry Mayors—How Population Growth Frustrates Local Councils* (Sydney: The Centre for Independent Studies, 2011).

⁴ Wolfgang Kasper, 'Competitive Federalism: May the Best State Win,' in Geoffrey de Q. Walker, Suri Ratnapala, and Wolfgang Kasper (eds.), *Restoring the True Republic* (Sydney: The Centre for Independent Studies, 1993), 53–72; Geoffrey de Q. Walker, *Ten Advantages of a Federal Constitution—And How to Make the Most of Them* (Sydney: The Centre for Independent Studies, 2001); Robert Carling (ed.), *Where to for Australian Federalism?* (Sydney: The Centre for Independent Studies, 2008).

⁵ Alexis de Tocqueville, *Democracy in America* (Indianapolis, IN: Hackett Publishing, 2000), 49.

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