



the Practitioner's page

Ludwig Adamovich, President, Constitutional Court of Austria Minority rights in a federal system

Ludwig Adamovich, Jr. is President of the Austrian Constitutional Court, a post he has held since 1984. The Austrian Constitutional Court is the highest court in Austria for cases that involve constitutional issues. One of the most controversial of its decisions was one in December 2001 that allowed road signs in both Slovenian and German in the province of Carinthia, where more than 10 per cent of the population is Slovenian – a decision opposed by Jörg Haider, the Governor of the Carinthia.

Forum staff member David MacDonald interviewed Chief Justice Adamovich in Vienna for *Federations* this March. They discussed the role of the Constitutional Court of Austria and his experiences on the bench.

Federations: The Austrian Constitutional Court is one of the oldest courts in the world. Is the Court the core of Austrian federalism?

Adamovich: Yes, the Court must decide questions that are related to federalism. The Constitution provides each *Land* (Austrian province) the ability to challenge the constitutionality of federal law before the Constitutional Court. *Vice versa*, the Federal Government can challenge each parliamentary statute of the *Länder*. The Court also deals with issues concerning the distribution of powers between the Federation and the *Länder*.

Can you provide our readers with an example of such a case that you have dealt with?

The latest one of general interest concerned the construction of a tunnel

on a railway route, which goes from Vienna to Lower Austria and over the Semmering pass to the *Länder* of Styria and Carinthia (and on to Italy, Slovenia and Croatia). There was a constitutional dispute between the Federation and Lower Austria as to whether a legal statute of the *Land* on nature protection could prohibit the

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Federation’s construction of a tunnel extending the efficiency of an important railroad. The Constitutional Court reviewed the law statute in question and ruled that such a statute on nature and environmental protection of a *Land* must allow the weighing of different interests, namely the Federation’s interest to plan, construct and run the railways. This dispute has not come to an end: although the provincial parliament of Lower Austria has meanwhile amended the statute, the allowance to construct this tunnel was denied again. I think it’s only a question of time before the Court will have to decide this matter once more.

Austria entered the European Union very recently, on January 1, 1995. How has this affected Austrian federalism and your Court?

We only had to deal with the questions of who is responsible to decide matters related to European Union law. If it is a matter within the jurisdiction of the ordinary courts, there is no doubt that the Supreme Court must decide, especially cases concerning the relationship between EU law and domestic law. But it was questionable whether a matter, which comes under the jurisdiction of the administrative bodies and raises the question of EU and domestic law’s relationship, must be decided by the Administrative Court or by the Constitutional Court. Four or five years ago, the Constitutional Court ruled that it is primarily for the Administrative Court to decide such questions. Only some special cases come within the jurisdiction of the Constitutional Court.

As a rule, most of these questions are not to be decided by the Constitutional Court because EU law does not have the same rank as constitutional law, according to our legal order. Austria’s accession to the EU in 1994 was regarded as a total revision of the Constitution because Community law affected most of the basic principles of the Constitution, namely democracy, federalism, separation (sharing) of powers and the rule of law. The delegation of the legislative powers to the EU affected both the democratic principle (legislative acts are issued by

the European Council in which executive organs of the Member States are represented) and the federal principle (diminishing the sovereignty of the *Länder*; their legislative and executive powers).

Your Court has made decisions on individual rights, human rights and minority rights. Can you give us an example of a decision on minority rights?

Yes, many of the Court's rulings are related to human rights. The European Convention for the Protection of Human Rights has the rank of constitutional law in Austria and is directly applied. It therefore serves as the basis for

numerous decisions. Recently the Court issued a decision on minority rights, which has been of great interest,

having impact on the position of the Slovene minority in Carinthia. According to a (constitutional) provision of the Austrian State Treaty of 1955, it is a minority right to have bilingual city signs and road signs posted. The question was to which extent the right to have such signs posted must be granted - a controversial item - which the Court decided in favor of the minority. The judgment has not been well received, especially in Carinthia, due to the particular history of the German-speaking majority and the Slovene minority. There was some fighting in this area after the First World War, and the newly constituted state of Yugoslavia wanted to add the southern part of Carinthia to its territory. However, a referendum was held and resulted in favor of Austria. After World War II, Yugoslavia again insisted on getting a part of southern Carinthia. Yugoslavia was supported for a short time by the Soviet Union until the break between Stalin and Tito. In 1955, when the draft of the State Treaty was discussed, the Soviets wanted the adoption of a special clause to protect the Slovene minority in Carinthia. Up to today, there is disagreement between

Vienna and Carinthia as to what extent this minority right is to be granted, so we will see what happens. It's a very sensitive topic.

Do you feel there is danger when there are vicious attacks on the Court by some politicians?

Although attacks against the court are not new, the style of the attacks is new.

Do you think this is something that will repeat itself often in the future?

No, I don't think so because this problem is a very peculiar one, specific to Carinthia. You won't find a problem of this sort in any other place in

Austria. In Carinthia,

almost every family has somehow been involved in the conflict between the German-speaking and the Slovene people. As long as the Republic of Yugoslavia existed there was an ideological problem because it was a communist state. One has to consider that what is left today is a

proper state of Slovenia with about two million inhabitants, a candidate for joining the European Union. I think some solution has to be found. But in the same way as I told you that it is a Carinthian-specific problem, there are also Slovenians with a national and nationalistic mindset.

Our decision was, as I mentioned earlier, highly in favor of the minority and most people in Carinthia did not understand why it was made such a long time after the conclusion of the State Treaty and in a time of - as they say - peaceful co-existence. Additionally the case was connected with some special problems concerning the Court's jurisdiction and how its procedure to review parliamentary statutes can be started. In this case, a gentleman who is a well-known member of the Slovene minority passed through a village in Carinthia, exceeding the speed limit. He got a speeding ticket and complained to the Constitutional Court that the legal basis for the ticket was not correct because the name of the village should have been written in two languages.

So the Court is at the centre of diversity management, the respect for all human differences?

Yes, and this is why we have many cases which are related to human rights. I think more than half of our cases deal with human rights.

In Canada, legislators often do not act on controversial questions such as abortion or euthanasia. They wait for cases to go to the courts. But Canadian courts are now sending the ball back to the politicians, saying these are political questions on which they have to legislate. Is that something that's also happening in Austria?

No, we don't send the ball back because in some cases it's not possible. I will give you an example: homosexuality. Homosexual acts between a minor (under 18) and a person the age of majority (over 19) is still a criminal offence - but for male persons only, not for female. The constitutionality of this law statute was already once challenged unsuccessfully because the Court found then that the arguments of the legislator were reasonable and not unconstitutional. Another application had to be rejected by the Court (*res judicata*). Now a third application was filed by a court of second instance, and in this case the Court will have to decide on the question of equality itself.

To conclude, what do you see as the biggest challenges that will be coming up for the Court?

The cases that come to the Court always reflect the general political situation. The protection of social rights will be a very important item. Taking into account new legal developments after September 11, 2001, which do not play a very great role in Austria but to some extent they do, the question of human rights protection arises in the context of the new techniques the police forces are now empowered to use. This is an important constitutional question, which will be brought to the Court sooner or later. Another difficult and delicate topic will be the status of foreigners: although it's quite impossible to give foreigners the same status as citizens, they cannot be regarded as being subject to each and every restriction. That will also evoke questions of human rights protection. (6)