Federations

What's new in federalism worldwide

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In this issue

Contributors to this Issue

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The Forum of Federations, an international network, seeks to strengthen democratic governance by promoting dialogue on and understanding of the values, practices, principles, and possibilities of federalism.

From the editors

Historians of science say that both Newton and Leibniz independently "discovered" the branch of mathematics known as differential calculus. Whether such a feat should be called a discovery or an invention is open to debate. Some say mathematical principles are inherent to the fundamental structure of the universe. They were always there and human beings just needed to develop the means to perceive and describe them. Others say that the very language we created to describe mathematical phenomena is an entirely human construct or invention.

We don't intend to resolve that debate here. But it might be interesting to think about political notions in the same way.

Just as Newton and Leibniz each came upon the same mathematical discipline in his own way, so have different countries "discovered" or "invented" federalism on their own. In fact, in many parts of the "federal" world people tend to see their federal systems as something completely unique to their own circumstances and histories.

When it comes to democracy, we tend to take a more global approach. We believe, perhaps instinctively, that there are some universal, democratic principles and unless you live by these principles your claims to democracy are sham. Some regimes may talk the talk of democracy but if they don't walk the walk then we're ready to say they don't make the grade.

But when it comes to federal structures we tend to see them as very specific modes of accommodation and compromise, designed to deal, in each case, with our own distinct, ethnic, regional, linguistic or other characteristics.

The federal countries are all a bit like Leibniz and Newton arriving independently at the same discovery. Of course, we're not talking about objective mathematical principles here. We're dealing with the less calculable and measurable principles of human organization. So the discoveries – or "inventions" – of federalism always take very specific forms and qualities. And once discovered or invented each federation grows and evolves in its own way.

One of the reasons we bring out this publication is to track that process of growth and evolution.

On our web site we post articles from the world's press that deal with news events that relate to federalism. In some countries, such as Canada, the press is always full of stories that focus explicitly on the federal system – federal-provincial disputes over health care funding and the Kyoto accord being the current controversies *de jour* in Canada. In other countries we have to dig harder to find material that has some relevance to the practice of federalism. It is not a top-of-the-mind issue everywhere.

In ***Federations*** we try to put federal systems – the challenges and crises they face and the solutions different groups propose – in the foreground.

We have articles in this issue on Nigeria, India, Canada, Argentina, Yugoslavia and Austria.

The Nigerians are coping with the challenge of serious security issues. The country has a centralized national police force. Is that an appropriate – and more to the point, workable – arrangement for a large, diverse federation?

India has entered a process of potentially major constitutional change. But do the proposed amendments address some of the unresolved conflicts of the world's largest democracy? Many are sceptical.

For Canadians, their public health system is an icon of their national identity and fundamental right of citizenship. Pharmaceutical drugs are not fully part of that system, even as they become more and more important to health care in the 21st Century. Can the provinces and the federal government agree on a way to fully integrate drugs into the system?

From the outside the Argentine crisis has looked like a breakdown in fiscal management exacerbated by political instability. But inside Argentina they know that the crisis is having a profound affect on the functioning of the country's federal structure and on Argentines' sense of belonging to a global community.

The article on Yugoslavia is a part two. Last time we told the story of a proposed EU solution to the growing rift between Montenegro and Serbia. This time we tell you about the prospects for an EU-brokered solution.

In each case there are developments, changes and mooted changes that have will a significant impact on the way federalism is practiced. It is not the sort of information you are likely to find, in one package, elsewhere.

Federations is only one way the Forum of Federations endeavours to keep you informed about matters of a federal nature. Our web site, **www.forumfed.org**, is a source of much valuable information, both about this organization's activities and services and about federalism. It is also where we will post letters to the editor of this publication. We are very interested in your views and will make an effort to post as many comments as possible. Just send your letter to: nerenberg@fourmfed.org

Or, send it by fax or regular mail to the number or address below.

The Forum of Federations has just gone through a busy period, with activities in Mexico, India, Nigeria, Brazil and Canada. You can find out more by checking our web site. Later this summer there is a major international conference in Saint Gallen, Switzerland. We hope to see some of you there and will be bringing out three special issues of ***Federations*** devoted to the themes of the conference. Around that time will also be releasing the ***Handbook of Federal Countries:2002***. This will be a unique and invaluable reference book on federalism that you will want to make sure to order. We will post information on that on our web site in August, and will send an e-mail announcement to many of you at that time. If we don't have an e-mail address for you please send yours to: forum@forumfed.org

Finally, there is a subscription card in this issue. If you do not yet subscribe and want to continue receiving a hard copy of this publication we urge you to do so!

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Law, order and "vigilantes" in Nigeria

Can a single federal authority provide security throughout a vast and diverse federation?

BY *KOFI AKOSAH-SARPONG*

On March 6th 2002 Nigeria's President sacked the country's Inspector General of Police, Musliu Smith. The new Inspector General is Tafa Adebayo Balogun, a 25-year National Police veteran. His task is to deal with a worsening security situation that includes a rash of armed robberies, and ethnic and sectarian violence. One of the most shocking violent incidents was the assassination of the Federal Justice Minister Bola Ige four months ago in his bedroom.

Many Nigerians argue that the situation calls for more than a change of leadership. It requires fundamental structural changes. Tunde Olokun, a member of Nigeria's House of Representatives Committee on Police Affairs, has called for changes to the Police Act to meet "our present day requirements in the 21st century. The Nigerian police force is still operating under the old police act of 1958 left behind by the nation's former colonial masters."

As fresh elections loom next year, one key challenge for politicians will be to set out plans for maintaining law and order in the vast and diverse country of over 100 million.

A matter of jurisdiction

In Nigeria the federal government has virtually exclusive responsibility for the police, unlike such federations as Canada and the United States where there are federal, provincial/state and municipal police systems. This police system has engendered arguments about the structure of Nigerian federalism and its relation to domestic security. At a meeting with state governors and traditional leaders of the Southwest zone on September 6, 2000, President Obasanjo said that despite the nominal federal control, state governments could have influence over the police forces in their areas. He told the leaders that state commissioners of police have no reasons to refuse lawful orders from the state governors.

"There is no earthly reason why a police commissioner should say that he cannot take orders from you," Obasanjo said.

Then the President went so far as to say that that the governors are, in effect, "the chief security officers of their states." Obasanjo wanted to put to rest the argument by some governors that they are constrained by the constitution from protecting lives and properties in their domains (*see box*).

While questions of jurisdiction remain unresolved, the security situation worsens. Police statistics show that between August 2001 and May 2002, criminals killed 273 civilians and 84 police and injured 133 other people. In the three years since Nigeria returned to democracy on May 29, 1999, after almost sixteen years of uninterrupted military dictatorship, more than 10,000 people have been killed in communal or religious clashes.

In an effort to reduce casualties among its men, police authorities have given police officers the authority to shoot robbers on sight. As Lagos police spokesman, Victor Chilaka, put it:

"Since the number of robbers is increasing like ants and they take joy in killing police officers, the National Police has decided to adopt this measure not only to drastically reduce the growing number of robbers but also to save the lives of policemen."

Justice and security in the Nigerian Constitution

Nigeria uses a tripartite system of criminal law and justice: the Criminal Code, based on English Common Law and legal practice; the Penal Code based on Muslim law and justice; and Customary Law, based on the customs and traditions of the people of the south.

Under Section 215(3) of the 1999 Constitution, law enforcement falls on the Nigerian Police, its affairs being the responsibility of the federal government. A squadron of the force is stationed in each of the 36 states under the command of a Commissioner of Police. The Commissioner of Police is subject to the authority of the Inspector-General of Police. The Inspector-General has command over all of the police squadrons in Nigeria and the maintenance and security of public order and safety.

The Inspector-General is accountable to the Minister of Internal Affairs and, ultimately, to the President of Nigeria. The Commissioner of Police in each state is similarly subject to the authority of that state's Governor. The federal Constitution does not authorize the establishment of local government police. Rather, the Commissioner of Police in each state administers the squads at provincial, county, and divisional levels. Reports of police operations are transmitted from the police units in the divisions and counties to provincial headquarters and then to state headquarters. These reports are then sent to the police headquarters in the national capital of Abuja.

The rise of "vigilantes"

As both the security and the economic situations have deteriorated, many ethnic organizations have taken shape to "protect" their groups. Sometimes referred to as "vigilante groups," they include the *Bakassi Boys*, *Egbesu Boys, Oduua Peoples Congress, Arewa Consultative Forum* and *Ohanaeze*. These groups exist in all parts of the country and often function as unofficial security forces for state governments.

The Lagos-based *Post Express* (September 6, 2000) explained how one of these groups came into being:

"Historically, the Bakassi Boys vigilante was formed by the members of Shoemakers Association in Aba (*in southwestern Nigeria*) when they could no longer bear the oppression of criminals who operated in the town with reckless abandon. They 'seasoned' themselves and thereafter embarked on a self-imposed job of flushing out and killing as many criminals as they could catch in Aba. Since then and until now, Aba is said to be very calm and peaceful. What they did in Aba, they also did in Nnewi, a commercial town in Anambra State known, among several other things, as a lucrative place for armed robbery operations. Today, Nnewi is so calm, so peaceful and without any undue fear of robbers that one could leave one's money in the open or one's door unlocked overnight without any fear whatsoever."

Father Hassan Kukah, a leading social commentator in Nigeria, argues that ethnic associations provide umbrellas of protection to various communities that feel estranged from the federal state.

"It is federal and state governments and their policies of alienation that have led to the resuscitation of latent communal identities as a tool for bargaining with a hostile and alien state. It is here we can locate the source of crises that befell our communities across the land," argues Kukah.

The Nigerian constitution specifically constrains the creation of state or regional police. And the nature of the federal structure does not clearly specify how the command of the police in the states should function. Obasanjo's term, "lawful directions", in his address to the state governments, is ambiguous – especially in situations where state laws might conflict with federal laws. This could be the case, for instance, in the mostly northern states that have adopted the Muslim Sharia code.

Religious tensions

The rise in support for the Sharia Law system has aggravated tensions between Muslims and non-Muslims in Nigeria. Muslim vigilante groups have been roaming the streets of Sharia states (nine out of the 36 states) seeking out any transgression of Sharia regulations. On May 1 this year, Muslim leaders introduced Sharia law in a southern state for the first time. In defiance of the authorities in Oyo State, the Supreme Council of Sharia inaugurated a panel to rule on civil matters in the region. Civil rights groups have complained that Sharia laws are archaic and unjust. Community Development and Welfare Agenda, a pressure group, has argued that Sharia court decisions were a "fundamental assault on the sovereignty and legality of the Nigerian state," since they undermine the national, secular legal system.

As the vigilante groups respond to crimes and religious-based groups seek to carry out their own agendas, they also clash with each other. This has led many Nigerians to pressure the Federal Government to ban these groups. In response, the Nigerian government introduced a bill in parliament on April 10 seeking sweeping powers to "proscribe any association of individuals or quasi-military groups anywhere in the country formed for the purposes of furthering the political, religious, ethnic, tribal or cultural interest of any part of the country." In addition it outright banned a number of vigilante groups, including the Bakassi Boys.

Still, many fear that the solution may not go to the root of the problem. As Bola Oyeneye, a political analyst, pointed out:

"The President may be right, but by proposing to ban these groups he would only be trying to deal with the symptoms without touching the disease itself. The problem with Nigeria is that it is a British colonial creation and after more than 40 years of nationhood, many of the component groups are questioning its very basis."

The Nigerian National Police Force is not the only instrument of domestic security. There is also the Nigerian army of 94,500 that has been used periodically to contain civil unrest. Such military usage has sparked heated debate that the army has no business in police duties. But the new police chief, Tafa Balogun, argues that the Nigerian military is empowered by the constitution to fight crime in the country and that the Police Force has no choice but to continue to rely on the military in time of crisis.

"This is by virtue of section 217 of the Constitution," he said, "It provides for the armed forces to assist the Police in the arrest of crisis in an internal security situation that may get out of hand and threaten the stability of the nation."

Awaiting a national debate

The Nigerian Police Force has indeed been overwhelmed by worsening domestic security and undermined by its own internal problems – including indiscipline, poor training, lack of expertise in specialized fields, poor pay, and frequent strikes. Corruption and dishonesty is widespread, endangering the already low level of public confidence and leading to a widespread failure to report crimes. As well, critics point out that the police force is more adept at paramilitary operations and the exercise of force than at community service functions or crime prevention, detection, and investigation. Last month, the size of the Force was increased from 120,000 to 450,000 and a new anti-armed robbery operation called the "Fire-for-Fire" squad was created. There are now more than 1,300 police stations countrywide.

There will be a national political debate on the security issue at the time of the next presidential election. For the time being, observers say that most Nigerians seem to be ready to hand more power and authority over to the police to deal with crime. To do so, however, could become problematic if any of the country's many groups come to believe that the police are specifically singling them out for tough measures. That is perhaps unavoidable in a country so vast and diverse as Nigeria. One of the goals of a federal system is to peacefully accommodate that sort of diversity. In Nigeria, the federal system is still searching for ways to achieve that goal.

Major changes for India's constitution?

A constitutional review commission took more than two years to report, but the critics say its recommendations are merely cosmetic.

BY *PRASENJIT MAITI*

A commission in India has made a sweeping set of proposals to amend the country's constitution – changes that could have major impacts on the Union Parliament, state legislative assemblies and electoral and judicial systems. Former Chief Justice M.N. Venkatachaliah, the head of the Constitution Review Commission, gave the federal government his final report on March 31. Yet before the ink was dry, critics were calling the commission's proposals inadequate.

For parliament, the commission recommended electing the Prime Minister and the Chief Minister of each state on the floors of their legislatures and banning defections from a party or coalition by representatives, individually or *en masse*. To deal with corruption in parliament, the report called for changing parliamentary immunity so it could not cover accepting bribes to vote or speak in parliament, and banning representatives from running for public office for one year if they are charged with an offence carrying a five-year prison term.

On the question of sectarian divisions, the recommendations were to outlaw electoral campaigning on caste or religious lines, to treat Sikhism, Buddhism and Jainism as religions distinct from Hinduism in the constitution, and to create tribunals to enforce the system of job quotas in the public and banking sectors for disadvantaged castes (who number 270 million.)

In the area of economic powers, the commission called for making expropriations by the state legal only for a public purpose, establishing an Inter-State Trade and Commerce Commission, and defining the taxation and fiscal competencies of the Union Government and the state governments.

In all, the commission proposed 249 changes to India's constitution. In many other federal countries, such a list would be unimaginable because of requirements for referenda or for the consent of the states or provinces. But in India, a vote of two-thirds of the members of both houses of the legislature is all that is required, provided that a majority of members of each house is present.

The commission, which started its work in January, 2000, was supposed to report a year later, but was given an eight-month extension to complete its work (*as reported in* ***Federations****, Vol. 1, No. 4, May 2001*.) It actually took seven months longer than that.

Media reports and debates have taken aim at the commission's report, accusing it of opting for cosmetic facelifts instead of drafting a new policy roadmap for India's federal political culture and entrenching the country's networks of decentralized governance.

How to represent the grassroots

India today has a multicultural, multiparty and fractured democracy. A major question in federal politics in India is whether to replace the first-past-the-post election system. Critics have argued that it is more suited to the two-party politics of the USA or Britain, and should be discarded in favour of some form of proportional representation.

So many new actors have made their presence felt in the recent past that it is neither fair nor even-handed to prevent them from entering the marketplace of politics by requiring them to win elections in single-member constituencies. For instance, civil rights and grassroots movements have emerged, among them *Narmada Bachao Andolan* or Save the River Narmada Movement, which has opposed the damming of the Narmada River. Such movements have shifted the initiative to resolve India's problems of development and democracy from the domain of the state to the domain of the civil society. But the commission's report has not addressed the issue of representation.

President's Rule and Emergency rule

The commission has, however, recommended revising the controversial practice called "President's Rule" in India. This is one in a section of nine articles in the Indian constitution authorizing the Union (or central) Government to assume some form of "emergency powers", in case of "war or external aggression or armed rebellion" or "imminent danger thereof" [See Box on Emergency powers]. President's Rule allows the President of India to assume all the powers of a state government himself, or to place the powers of that state under the control of parliament if "the government of the State cannot be carried on in accordance with the provisions of this Constitution".

The commission took aim at the practice of President's Rule:

"President's Rule was imposed in 13 cases even though the Ministry [of the state] enjoyed majority support in the Legislative Assembly. These cover instances where . . .[it] . . . was invoked to deal with intra-party problems or for considerations not relevant for the purpose of that article."

The commission recommended revising the constitution to allow parliament to hold a special session in which it could revoke President's Rule in any case, and that no state legislature should be dissolved by President's Rule until parliament has approved such a move.

From a religious to a secular society

The report offers few solutions to India's problems in moving from a religious to a secular society. This is now especially relevant, as Gujarat has experienced one of the worst outbreaks of communal violence in the country since independence in1947. After a Muslim mob burned a train carrying Hindu activists in February, killing 60

Emergency powers

Emergency powers that suspend civil liberties and other constitutional rights have been used often in India during the last 30 years:

- **Maintenance of Internal Security Act of 1971** – revamped when Prime Minister Indira Gandhi's Indian National Congress proclaimed the 1975-1977 Emergency; repealed in 1977
- **44th Amendment Act of 1977** – the new Janata Government revised the grounds for an Emergency from "internal disturbance" to "armed rebellion"
- **National Security Act of 1980** – passed by a Congress (Indira) government to allow arrests without warrant on suspicion of endangering national security
- **Essential Services Maintenance Act of 1981** – allowed banning strikes and lockouts in 16 economic sectors that provide critical goods and services
- **National Security Amendment Act of 1984** – a response to the secessionist Khalistan Movement of Punjab; allowed detention of prisoners for up to one year
- **Terrorist Affected Areas (Special Courts) Ordinance of 1984** – extended powers of detention to security forces in Punjab; allowed secret tribunals
- **Terrorist and Disruptive Activities (Prevention) Act of 1987** – allowed police to tap telephones, censor mail and conduct raids in cases of security threats
- **59th Amendment Act of 1988** – for the state of Punjab, added "internal disturbance" as grounds for Emergencies and raised the maximum period of imprisonment from six months to three years
- **Prevention of Terrorism Act of 2002** – BJP government bill passed on March 26; allows the confiscation of property from suspected terrorists and detention for up to 90 days without trial

passengers, a campaign of "religious cleansing" was begun by self-styled Hindu militant activists in which more than 800 people, mostly Muslims, were killed. The Prime Minister and the Union Home Minister have not made any real attempt to dismiss the partisan Chief Minister of Gujarat despite a nationwide demand to do so.

The report is silent on other areas of serious concern such as the scope of federal powers, citizenship, accountability in public affairs, and transparency of the administration. Many believe that these gaps promote the interests of the central government at the cost of the state governments, especially now that the ruling Bharatiya Janata Party happens to rule only a handful of politically insignificant states in the country. In the giant state of Uttar Pradesh the BJP only managed to keep power by allying itself with its ideological opposite, the Bahujan Samaj, a party that seeks to promote the interests of the "backward" classes.

Dealing with corruption

Before their final report, the commission was scathing about corruption. The commission's consultation paper on "Election law, processes and reform options," issued in January, 2001, pulled no punches:

"… There are constant references to 3 MPs, viz. money power, muscle power and mafia power and to 4Cs, viz. criminalisation, corruption, communalism, and casteism.

"Also, majority of our representatives are elected by a minority of votes cast thereby making their representative credentials doubtful. The result is that the legitimacy of our political process gets seriously compromised."

The commission's final recommendations fall far short of these ringing words. Punishment of parliamentarians who accept bribes is a step in the right direction, but it is a remedy for only one part of a much larger problem.

The commission has even revised its original recommendations that intended to restrict "privileges" of High Court and Supreme Court judges. Its report is silent so far as post-retirement judicial appointments are concerned. It has even suggested that the Parliament should amend existing laws to allow High Court judges to retire at 65 and Supreme Court judges at 68. But the government could use this change to employ retired judges in partisan political roles. India's enquiry commissions and fact-finding committees are more often than not chaired by sitting or retired High Court and Supreme Court judges. The commission is itself a case in point. Reports are usually sent to cold storage by the government and further action is seldom taken even if such reports are tabled in the Union Parliament.

Four commission employees charged that someone at the commission made changes to the report after the approval of a supposedly final draft of the report by the staff. One of those changes concerned the appointment of Supreme Court judges. Subhash Kashyap, the Chairman of the Constitution Review Commission Drafting Committee, and ex-Secretary General of the Lok Sabha (House of the People, the Lower House of the Parliament), was one of those four dissenters.

Sumitra Gandhi Kulkarni is another dissenter who has alleged that the commission did not initiate any public dialogue during the course of its deliberations. For instance, there were only 13 seminars sponsored by the commission. There were 67 people who responded to the questionnaires prepared by the commission, and 670 representations by individuals and organizations, out of a population of more than one billion.

Unresolved issues

The commission's report has also bypassed the contentious issue of barring individuals of foreign descent (in particular, Sonia Gandhi of the Indian National Congress, the Opposition leader in the Lower House of the Union Parliament) from holding important constitutional posts in the country. The report has recommended that this issue should only be decided in the course of a national dialogue. This proposal has been criticized by a senior lawyer, Vinod Kanth, of the Patna High Court in Bihar. Some suspect that the ruling BJP may even prefer to have this issue settled on the streets, even if it means risking a conflict of the scale of the Gujarat riots.

Even what critics call the modest constitutional reforms recommended by the Commission may not see the light of day. The ruling BJP has been losing state elections throughout the country and is in a weakened position in parliament. Will it have either the political will or clout to get the two-thirds majority needed for constitutional amendments?

To read the commission's report online, go to **http://lawmin.nic.in/ncrwc/finalreport.htm**

Rising drug costs in Canada

The federal government and the provinces are torn between economic and health concerns.

BY *LOUISE GAGNON*

Canadian spending on prescribed drugs increased on average more than 10% per year from 1997 to 2001 and now tops the $12 billion mark nationally. These figures were revealed in a recent report released by the Canadian Institute for Health Information, an organization that keeps track of health-care delivery data.

In the wake of the results, there are renewed calls in Canada to change pharmaceutical policy and examine ways to limit the soaring expenditures for medications.

Drugs now represent the second largest segment of health spending in Canada after hospital services.

According to the institute's report, the growth in drug expenditures during the past five years was driven primarily by an increase in prescribed drug spending, which has risen by 46% since 1997 (from $8.4 billion to $12.3 billion). The share of prescribed drugs financed by the public sector was 49%, up from 44% in 1999. Private insurers and households finance 51% of the total, a figure on the decline. With the aging of the population, Canadians will increasingly rely on the public purse to buy their medicine.

There are different factors contributing to the incredible rise in pharmaceutical costs. The first is an increase in the money paid to drug companies who hold patents. That increase came because of federal legislation designed to give greater protection to drug patents. Starting in 1987, Canada increased the amount of time before patents lapse first to seven years, then to 10, and now to 20 years. In addition, brand name drug producers use a controversial process called "ever-greening" to effectively extend patent protection beyond the 20-year limit. "Ever-greening" means releasing a slightly modified formulation of a patented drug under the same brand name.

As well, more and more drugs are being released onto the market. Indeed, there is a backlog of paperwork at Health Canada, the ministry that reviews applications for both brand-name and generic drugs. The medications referred to as "breakthrough" drugs are often highly priced because the pharmaceutical industry argues that much research has been dedicated to their development.

> ***"Any new restrictions on drug spending may require the federal and the provincial governments to come to the table and resolve their differences. Those differences arise in part from a conflict between health policy, aimed at cost constraining, and industrial policy, aimed at job creation and economic growth."***

Canadian provinces have publicly-insured drug plans, called formularies, to which new drugs are periodically added. When a new drug is listed on the formulary, the province picks up the tab for dispensing the drug to seniors and those on social assistance. Some provinces, such as British Columbia, have aggressively attempted to contain drugs costs associated with their formularies. Other provinces, such as Quebec, have favoured prescription of brand-name medications in its formulary, largely because Quebec is home to a large and economically important brand name drug industry.

Unnecessary duplication?

One process that can be made more efficient is the two-step review process: first health Canada must approve a new product, and then the provinces must do so before it is added to a provincial formulary

"A common drug review might help in decision making, in terms of determining what gets listed on the formulary and what does not," argues Ron Corvari, an official with the federal Patented Medicines Review Board, the body that approves the prices of new brand name products.

Canada is not alone in its attempt to cap drug costs. Regulators around the world are watching the consolidation of the pharmaceutical industry to ensure no monopoly is created for a particular therapeutic class of a drug.

But, as for Canada, any new restrictions on drug spending may require the federal and the provincial governments to come to the table and resolve their differences. Those differences arise in part from a conflict between health policy, aimed at cost constraining, and industrial policy, aimed at job creation and economic growth.

As Donald Willison, an assistant professor at Ontario's McMaster University, states in his paper on Canadian pharmaceutical policy, multinational drug companies are seeking concessions such as:

- strong patent laws
- rapid listing of products as insurable benefits
- fewer constraints on subsidizing new drugs through public insurance
- freer pricing of new drug products

Canada, the U.S., and the European Union have introduced incentives to encourage pharmaceutical investments.

"We have to accept that we are bearing the burden of the cost of doing research in our health care budget," said Willison, a member of McMaster's department of clinical epidemiology and biostatistics. "If we want to define ourselves as a knowledge economy, then we have to suffer the consequences that come with that."

Indeed, as a "global animal", the pharmaceutical industry has a presence throughout the world and is regarded as a robust sector in the new knowledge economy that has been touted in the last decade as an engine of economic growth and pride.

Provinces at cross-purposes?

Some Canadian provinces, such as British Columbia, have implemented policies to contain drug costs. Known as reference-based pricing, the policy encourages the prescription of generic drugs. Specifically, the policy reimburses seniors for the less expensive medications in a particular therapeutic category if the medications are deemed as efficacious as their higher-priced, brand name counterparts.

By contrast, the province of Quebec promotes the prescription of brand-name products through a policy whereby products must be listed on the provincial formulary for at least 15 years before the government will then reimburse at the lowest-priced or generic price of the medication.

When medications are on the list less than 15 years, the government will reimburse at the acquisition cost of the brand name or generic medication.

"The Quebec government chooses to subsidize the pharmaceutical brand-name industry," says Jim Keon, president of the Canadian Drug Manufacturers Association, which represents makers of generic drugs. "There are cheaper generic versions that can be prescribed."

Indeed, a study authored by Malcolm Anderson of Queen's University found significant delays in the approval of 34 generic drugs between 1995 and 1999. The same study also found discrepancies in the listing of less expensive generic medications on provincial drug formularies.

For its part, the province of Quebec established a universal drug plan in 1997, aimed at insuring the nearly one million Quebeckers who were not covered by a private plan through their employer or through a public plan for seniors or those on social assistance. The plan has been running a deficit since its inception and has increased co-payments for its beneficiaries, including those on social assistance.

The plan has been criticized for penalizing the more vulnerable segments of the province's society because of the hikes in the co-payments that the individually insured must pay while drug multinationals reap healthy profits.

Quebec to opt out?

The response of the health minister in Ontario, Canada's most populous province, to astronomical growth in the financing of the Ontario Drug Benefit Plan, has been to suggest that universal drug coverage for the elderly may not be necessary.

Dr. Panos Kanavos, a professor of international policy at the London School of Economics, says we just have to face the fact that health policy and industrial policy are sometimes at odds. Kanavos has studied various jurisdictions and come to the conclusion that the presence of a pharmaceutical industry wields influence on health policy.

"It's a highly politicized industry," says Kanavos. "Some countries, such as Australia, have been effective in curbing costs through implementing policies such as reference-based pricing. Australia, however, does not have a pharmaceutical industry. A province like Quebec may react if reference-based pricing was forced onto it through a national system. It would be another reason the Québécois would cite to opt out of the federation."

One solution that has been put forth is to diminish the powers of the provinces in listing or de-listing medications and place that power in the hands of a federal organization that would be responsible for a national formulary. The national formulary would supplant the provincial drug plans and be a step toward a national pharmacare plan.

"If there were a national system, it would be an important step in terms of trying to control costs because there would be a single purchaser," says Kanavos. "Centralizing drug reimbursement and revoking the power of the provinces to administer pharmaceutical care is probably not politically feasible."

Would anyone be able to sell that proposal politically to provinces jealous of their power? Willison offers a made-in-Canada solution: the provinces could harmonize their drug benefit programs while remaining independent of one another. Administrators of the plans would meet to compare notes on what drug is listed on the formulary and what drug is not, resulting in a scenario that would more closely resemble a consensus.

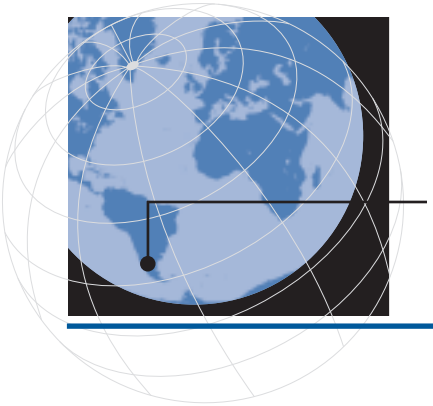
Drug companies and advertising

There is no doubt that pharmaceutical firms devote a healthy chunk of their budgets to marketing of new products. They often tie marketing budgets to those of research and development.

In Canada, Roy Romanow, the head of a commission studying the future of the country's health care system, repeatedly asked the head of pharmaceutical firm Aventis Pasteur to offer a figure on how much his firm spent on research and development of its products as opposed to marketing. Romanow didn't obtain a direct response.

While direct-to-consumer drug advertising is not legal in Canada, Canadian consumers of American media, particularly broadcast television, are subject to advertising that names brands of medications. That pervasiveness of marketing has put implicit pressure on provincial governments to make the latest medications available.

"Many drugs are advertised as being life savers," says Kanavos, referring to the arthritis medications that have come out in the last three years that are touted to avoid bleeding ulcers. "That claim is not true. But when consumers see the advertising, they will expect access to it. You want to limit the effect that an expensive drug will have on your budget. The solution may be to offer only a certain number of medications in a particular class of drugs."



Argentina: a crisis of confidence

Forced austerity measures and political instability have sapped the strength of the Argentine federal system while feeding hopes for "global federalism."

BY *MARIA JOSE LUBERTINO*

The crisis in Argentina has profoundly shaken the confidence of the Argentine people in their political institutions and in international financial institutions such as the IMF. It has weakened the central government's capacity to act independently and nearly crippled the capacity of many of the provincial governments.

Today, 18 of the close to 40 million people in Argentina live below the poverty line. There are some three million unemployed and another three million underemployed, and there is unequal distribution of wealth that affects 80% of the population. The country's productive apparatus has been dismantled, businesses have closed, and bankruptcies are at a record level. Tax revenues have fallen precipitously, and the foreign debt now stands at over $150 billion US. To top it off, over the last eleven years a completely open market in foreign goods and services has stimulated the substitution of local production by foreign production.

Five years of recession and deflation, the destruction of the social security system, and a general state of social upheaval are all products of the application of an economic policy that generated a "crisis of representation" in public management and policy decisions.

Heeding international prescriptions

A succession of democratic governments since 1983 pursued policies that resulted in an unsustainable debt load. They then imposed corrective measures proposed by international financial institutions with the apparent aim of re-integrating Argentina into the global economy.

President Alfonsin, albeit with great reluctance, adopted this course at the end of the 80s. He and his government had at first pursued a different policy. But the economy became unmanageable and he lost popular support for not having made good on promised results. He was pressured by groups both inside and outside the country who wanted to privatize significant segments of the economy (in some cases passing it into foreign hands) as a way of remedying all Argentina's economic problems.

Alfonsin's successor President Menem continued on this course with greater enthusiasm, following it through to its ultimate consequences – even though it completely contradicted everything that he had promised in his electoral campaign. The 90s saw a consolidation of this process, which resulted in the greatest concentration of economic power in Argentina's history.

The main features of this economic policy were:

- the sale of the country's national assets through the privatization of public services and social security
- restructuring the banking system, so that it became increasingly "offshore"
- sharp increases in the foreign debt
- exchange parity with the United States dollar.

All this was enough to get Menem re-elected for 10 years, while the International Monetary Fund, the World Bank, and the United States Secretary of the Treasury hailed Domingo Cavallo, his Minister of Finance.

Dashed hopes for a "third way"

The end of the Menem regime found a large proportion of Argentines impoverished and disenchanted with current policy. The victory of De La Rua and the Alliance party in the election in 1999, although headed by a man known as a traditional conservative, appeared in the then promising dress of a so-called "Third Way" which engendered hopes within the country of an honest and progressive government after the difficulties of Menem's rule.

What happened then is well known. The bubble created during Menem's regime burst. There was the infighting among those economic sectors that had benefited from the concentration of economic power in the 90s. The government tried the same economic remedies as before, once again without any prior taking of inventory. Even the so-called progressive elements supported this course as the "only course possible."

This was followed by the breakdown of the governing coalition and the departure of the Vice-President. Other government officials of the President's own party soon followed.

The public completely lost confidence in the government. Economic and financial matters spun out of control and the country became almost ungovernable. There was a popular uprising and many political and economic groups sought to bring down the government. There was repression, then deaths and the resignation of the President.

The impossibility of any consensus within the ruling bloc resulted in various shifts and changes in the Executive power until, finally, President Duhalde was elected by the Legislative Assembly to complete the presidency term of office. The very person who had lost the 1999 election to De La Rua now replaced him.

When Duhalde was elected by Parliament, his first speech created positive expectations of change, but those hopes lasted barely one week. Under pressure, he gave ground to the various powerful economic groups now

engaged in their own infighting to the detriment of most Argentines.

Still, he continued to have majority support in Parliament, which approved his draft legislation almost without debate. This support comes from his own party members (the *Justicialist* Party) and, with some reservations, from the majority of *Radical* Party members and many of the members of the left leaning *Frepaso* Party.

To a national picture of poverty, unemployment, lack of confidence in the banking system and the national currency, we must now add indiscriminate increases in the prices of goods and services, frozen or reduced salaries, and a lack of basic medicines.

Stringent conditions, especially on provinces

In response to the request for fresh funds, the International Monetary Fund is imposing a series of legislative and economic policy reforms. It is demanding as *sine qua non* conditions:

- repeal of the bankruptcy act and the law on "economic subversion"
- adjustment of the National Budget plus similar adjustments in the provinces
- removal from circulation of provincial bonds which have come to constitute 50% of the country's legal tender since the majority of provinces began issuing them

It is true that the majority of provincial governments in the 1990s increased public spending, even as tax revenues were falling. The rise in public expenditures was due to the drop in productive activities as some provinces were left with deserted factories and wanted to replace the lost jobs with increases in public employment. The provinces also suffered a great decline in local tax revenues causing large deficits, rising expectations and increasing dependence on remittances from the federal government – which, in any case, accounts for 70% of the nation's tax burden.

The federal government is the sole party authorized to deal with the international lending agencies. It is, in effect, coercing governors of the provinces into agreeing with the political reforms and adjustments requiredby the IMF.

The governor of San Luis is the only provincial head who has refused to sign the federal agreement on political reform that would change the electoral systems and reduce "political" costs. Meanwhile, only 6 of the 24 governors have signed bilateral, national–provincial agreements on fiscal adjustments: 4 from the *Justicialist* Party and 2 belonging to the *Radical* Party.

Apart from the leftist opposition, only a few national legislators of two or three provinces belonging to the government coalition are turning up the heat – without noticeable effect on the current administration's position.

Public confidence and "global federalism"

The main task for all governments now in Argentina is to re-establish public confidence in the ability of governments to resolve economic crises. That will take years and will not be achieved by simply holding new elections, overhauling the electoral system, creating new rules of the game for financing political activity, or by guaranteeing an independent judiciary. These are necessary conditions, but they are not sufficient.

Confidence in the political process will only be re-established through concrete results; namely, those that change people's daily lives, that reactivate the economy, create employment, and provide once again the basic services of education, public health and social security.

Many argue that this will only be possible through a redistribution of wealth. According to this view, the fight against poverty should be a primary objective. Guaranteeing job security and training subsidies for all those who now find themselves shut out and a guaranteed minimum income for every child or senior would, beyond satisfying social justice, stimulate demand, thus kick starting the economy.

But many are posing more complicated questions – questions about a sovereign and independent nation and its relations with the wider world.

The market directs the global economy. And while that market is subject to few rules on a global scale, successful countries have never failed to impose rules of the game on their own marketplaces.

Other countries have experienced situations similar to Argentina's before, even though the solutions have been different. Now, as they look to the world around them, many Argentines are calling for an international coalition that would work to balance the overwhelming influence of "the economy" on the international order.

The establishment of rules of the game for the global economy presupposes more democratic methods of global decision-making. Argentines look to such bodies as the United Nations to play a more assertive role. What if the United Nations were structured on something that more closely resembles a federal model? A "federal" UN would have some form of "majority governance" while maintaining respect for minorities. It would no longer reserve a veto for the great powers. Nor would it allow a few members of a permanent elite to control most decisions.

Perhaps the current crisis might motivate Argentina and other Latin American countries to initiate a movement for global institutional reform. The bitter experience of globalization has led a good many Argentines to look for institutions that emphasize equilibrium and harmony between local, national and international interests.

The anti-globalization movements are important in this regard. They are a sign of the need for change – as are the citizens' movements, the "potbangers" and the neighbourhood assemblies in Argentina. These may be forms of social protest but they are sometimes capable of proposing viable alternatives.

But neither in Argentina nor in the world are these enough. Argentina lacks an emergent new leadership which, responding to and interpreting such protest, combines honesty and imagination to set a course towards political and economic solutions.

On the international scene, many Latin Americans hope for new leadership capable of articulating these reforms. A significant proportion of Argentines hope that their pain will contribute to the global search for a new, more just social order and a new leadership with vision, all aimed at creating a more democratic and *federalist* form of globalization.

Federal system clings to life in Yugoslavia

The EU is satisfied with the accord it brokered to preserve the federation, but are Serbia and Montenegro?

BY *MIHAILO CRNOBRNJA*

On March 15th, 2002, just a day before the Barcelona summit of the European Union, Serbia and Montenegro signed the **Accord on Principles of their Future Relations** (see box)**.** Thus ended a four-month period of intensive shuttle diplomacy and just as intensive pressure by the EU for some kind of settlement that would prevent the break-up of yet another state in the Balkans.

At the EU summit in Barcelona the signing of the Belgrade Accord was hailed as a major triumph of EU foreign and security policy. The Yugoslav and Montenegrin presidents were invited to share the limelight and the glory.

The jubilation of the EU heads of governments was in stark contrast with the reception that the Belgrade Accord received in Serbia and in Montenegro. Instead of bringing relief and a new momentum to redesigning and redefining relations with Serbia, the signing of the Belgrade Accord brought about the crisis of the Government in Montenegro. At the time of this writing, the crisis is seven weeks long and no end is in sight. General elections are emerging as the most likely resolution to the crisis, unless some kind of a deal is struck between the three parties currently in power. Two smaller and die-hard sovereignist parties walked out of the Government claiming betrayal of their coalition deal by President Djukanovic, who is also the leader of the third and largest party within the coalition.

Nationalism on the rise

In Serbia, the Belgrade Accord caused the resurgence of Serbian nationalism. It is now expressed as a desire for an independent state. There is an obvious increase of impatience with tiny Montenegro. Most ordinary Serbs feel that they are held hostage by a clique within this tiny state. Current polls show that almost 60 per cent of the population is against the Belgrade Accord with only 30 per cent being in support.

One of the more important parties in the 18-party coalition that rules Serbia is collecting the 100,000 signatures necessary to force a referendum on the issue of Serbian independence. Even the most liberal and open minded politicians in Serbia could not come up with better assessments of the Belgrade Accord than: "This is the best that could be achieved under the circumstances" and "the Accord has the *potential* to solidify the relations between Serbia and Montenegro".

And so the only truly happy party is the European Union. After a decade of fumbling in the Balkans and playing

The Accord of 15 March, 2002

- The new state would be called *Serbia and Montenegro.* It would have a Parliament, a President, a Council of Ministers and a Court.
- The highest legal act of the new state is to be a *Constitutional Charter* that will be drawn up by a tripartite constitutional commission (appointees from the Federal, Serbian and Montenegrin Parliaments) and adopted first in the parliaments of the two entities before being adopted by the Federal Parliament. The Charter will be submitted to the parliaments for debate by the end of June.
- The *Parliament* would be unicameral with certain positive discrimination to deputies from Montenegro.
- The *President* would be chosen by the parliament, would propose the Council of Ministers and preside over its work.
- The *Council of Ministers* covers only five areas: foreign affairs, defense, international economic affairs, internal economic affairs, and protection of human and minority rights.
- The *Court* would have the responsibility of maintaining harmony between the judiciary systems and would overlook the judicial acts of ministries. It would have no trial authority.
- The *existing levels of economic reform* in the member-states provide the basis for regulating mutual economic relations.
- Elections for the Parliament will be held after the adoption of the Charter and the President and the Council of Ministers will be appointed. Member states will modify their constitutions according to the Charter by the end of 2002.
- After a three-year period member states would have the right to initiate procedures for leaving the common state. If Monenegro leaves, Serbia is the sole successor in international documents pertaining to the FR Yugoslavia, in particular the UN Security Council Resolution 1244 on Kosovo.
- The European Union will assist in the realization of the Accord and offers guarantees that the slowness in the fulfillment of association criteria of one member-state will not bear negatively on the other.

second fiddle to American initiatives, the EU had to demonstrate the capacity to resolve at least one crisis in the Balkans. Until this agreement, the US had been taking the lead role in the region in all situations that involved armed conflicts. That includes Bosnia-Herzegovina, Kosovo and finally Macedonia.

The crisis of relations within what remains of Yugoslavia appeared less urgent since at no time did it seem likely that Serbia and Montenegro would attempt to determine their future relations through fighting. Also, both parties proclaimed as their strategic goal association and ultimately membership in the European Union. That was the key leverage that the European Union brought to the negotiations, the one that made the signing of the Accord possible. The fact that the US backed the EU strongly in its initiative was also very important.

The will to stay together?

The Belgrade Accord is clearly an endorsement of the *status quo.* It is a pragmatic agreement between the two parties, under the pressure of a third that leaves both sides unhappy in some important matters.

The immediate objective of the EU, to stop the secession of Montenegro, has not been fully accomplished, only postponed for three years. To achieve this, the Belgrade Accord accepted more elements from the Montenegrin negotiating position, which made many Serbs unhappy. The hope of the European Union is that within those three years the political mood in Montenegro will swing away from separatism and toward acceptance of a common state with Serbia.

But the EU assumed that Serbia will continue to desire a common state with Montenegro – and that might prove to be an incorrect assumption.

The good news is that, for the moment, the life of the ordinary citizen in the two republics will not change much: they will be able to travel freely within the Union and will travel outside of Serbia and Montenegro with one passport; the property of Serbs in Montenegro, and *vice versa*, will be protected; many Montenegrins will continue to study at the Belgrade university; and many Serbs will continue to spend their vacation in Montenegro.

The bad news is that the importance of the Belgrade Accord has been inflated out of proportion by the EU, and that there is much more work ahead for all parties concerned.

Federalists vs. separatists

The Accord is for the moment a statement of political intentions and has yet to be implemented, that is, converted into a new state structure. Already it is evident that the projected timetable will not be met. That is the lesser of the two problems facing those who will have to draw up the Constitutional Charter. The main problem will be in the conflicting aspirations of the federalists and separatists that were glossed over in the political accord but will have to come to a head once the Charter is designed.

The federalists argued for a model of a state that could function independently in its internal and external responsibilities, defined by the two republics. The Montenegrin sovereignists argued for a union that would be fully under the control of sovereign states that comprise it. The Accord mentions both but the key question remains: *Will the Constitutional Charter produce a functional state?*

For a state to function it must have legal, organizational and financial independence. The future state cannot be just a matter of negotiated settlements between the two republics. And that is a key principle that will have to be adequately spelled out in the Constitutional Charter.

There are a number of very difficult questions that have to be translated from a vague political Accord to a binding state Charter.

- Will the elections for the joint parliament be direct (Serbian position) or indirect (Montenegro)?
- How will the Charter define the division of power, mutual relations and responsibilities of the legal and executive branch of the Government?
- Can the Charter anticipate the political arrangement by which a parliamentary majority will be determined and a Government formed?
- There is not a word about the financial autonomy of the joint state in the Belgrade Accord. Will it be financed by the member states – the weak solution suggested by Montenegro – or will it be financed through an independent fiscal source, a value added tax, for example?

One country, two currencies?

Furthermore, the new state will continue to have two currencies: the dinar in Serbia and the Euro in Montenegro. Such a bizarre arrangement currently exists only in China and Hong Kong. Thus, there will be two central banks. Also, at the time of formation of the new state, the existing customs and tariff system will remain in force, with the tariffs in Montenegro being way below the average of the European Union while tariffs in Serbia remain about 50 percent above the EU average. Freedom of movement of goods will thus be impaired, at least in the beginning.

The European Union suggests that the matter of a common market will eventually be resolved through the negotiation of a "Stabilization and Association Agreement" between the EU and the new state. But at best it means several years of a dual system and, at worst, the possibility of prolonging the process of accession to the European Union.

The European Union has offered assistance and guarantees within the Accord. Most of its work, in the longer term, will have to be directed toward overcoming the major economic gap that now exists between the two republics. However, in the short to medium term, there will be a lot of political work in store for the EU emissaries in bringing their creation to life through the Constitutional Charter.

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 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.

> ***"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."***

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.

"The European Convention for the Protection of Human Rights has the rank of constitutional law in Austria…"

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.