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Austria's Struggle to Respond to Climate Change

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Cancelling the planned construction of a highway tunnel beneath a Viennese national park in December 2021, the Green Minister for Climate Action Leonore Gewessler left local politicians outraged. Stopping infrastructure projects in favour of climate change is a highly contested topic in Austrian law and politics. Although the Austrian Constitution provides different links to sustainability and climate change, the Austrian Constitutional Court decided in a landmark case five years ago to interpret the constitutional provisions on climate change in a restrictive manner leading (bottom-up) ambitions to strengthen climate change litigation into a constitutional deadlock. The recent decision of Mrs. Gewessler opens up new (top-down) approaches towards an ecological executive.

The Constitutional Deadlock in Environmental Policy

In June 2017, the Austrian Constitutional Court overturned a pro-climate change law decision by the Federal Administrative Court regarding the dispute about a huge infrastructure project dating back to 1998, the planned construction of a third runway at Vienna Airport. It argued that multiple errors had led the lower court to give undue weight to climate change and land use considerations in the balancing test it had used to consider the public's interest in a third runway. The Constitutional Court's main argument was that the Air Traffic Act should not give undue consideration to environmental protection by factoring in environmental impacts beyond those directly attributable to airport traffic, wrongly including aircraft emissions attributable to flight segments other than landing and take-off in emissions projections.

The Court rejected the consideration of the Kyoto Protocol and the Paris Agreement, explaining that, while these form the basis of Austria's international obligations, they are not generally applicable in the domestic legal context. Thereby, itdismissed the constitutional state goals of comprehensive environmental protection and sustainability. This leading

decision by the Austrian Constitutional Court created a deadlock regarding a constitutional argumentation in favour of climate and environmental protection.

A mere five years ago, the Constitutional Court did not consider the dramatic developments of the global climate and ignored European environmental law, especially the role and relevance of environmental impact assessment by deciding that climate change does not qualify as a relevant public interest to be considered in the context of the Aviation Act and qualified the judgment of the lower court as arbitrary. This decision stands in direct contrast to that of the German Constitutional Court on climate change in March 2021.

Undoubtedly, the Austrian Constitutional Court needs to end the deadlock and develop a new constitutional approach to climate change and other environmental problems.

Overcoming the Constitutional Deadlock by Unleashing Executive Power

In contrast to this constitutional situation, the Austrian Minister for Climate Action Leonore Gewessler announced on 1 December 2021, the cancellation of a number of high-profile highway projects, including the construction of a tunnel in Vienna which had been planned for almost 20 years. The 2021 re-evaluation of the highway tunnel project had highlighted environmental concerns, since the proposed tunnel was supposed to run beneath the Lobau, a unique nature reserve in Vienna. Mrs Gewessler argued that the tunnel project would lead to even more traffic and significantly increase land consumption.

The outer ring highway around Vienna, which includes the planned Lobau Tunnel, is the most controversial road construction project in recent years and has long been a target for criticism by environmentalists. Mrs. Gewessler announced last June that the Austrian Highway Financing Corporation's (ASFiNAG) entire highway construction programme would be re-evaluated with regard to the goals set out in the government's programme for the 2020-2024 legislative period (titled 'Out of a Sense of Responsibility for Austria').

Since 2019, the Austrian Federal Government is composed of a coalition between the People's Party and the Green Party. They merged the environment ministry and the transport ministry into a huge department responsible for climate action, environment, energy, mobility, innovation and technology, led by Mrs Gewessler from the Green Party. For the Greens, it is beyond doubt that the threat posed by climate change requires fundamental changes to government action, policies and investments.

A Crucial Infrastructure Project?

Nevertheless, the minister's move regarding the Lobau Tunnel has sparked plenty of opposition from politicians and stakeholders. Just two hours passed before Vienna's mayor Michael Ludwig (Social Democratic Party) called it a "blow to the quality of life of people in Vienna and the eastern region" and announced that he would examine "legal measures" and „the last word has not yet been spoken". Ludwig also criticised the evaluation process that had been carried out over many years as "not transparent". He said that the Lobau Tunnel project had been checked several times by experts, adjusted according to environmental criteria and only then decided. From Lower Austria it was said during Ludwig's press conference that they wanted to support legal steps. The Chamber of Commerce (WKO) and the Federation of Austrian Industries (IV) have also voiced criticism, saying that reducing infrastructure does not solve a single challenge, neither in terms of safety nor with regard to the flow of traffic.

Environmental NGOs see things completely differently. Greenpeace declared: "The cancellation gives the starting signal for a genuine traffic turnaround in Austria. The end of the Lobau Tunnel secures the unique habitat of the Danube Floodplain National Park for future generations." The Austrian Transport Club (VCÖ) praised the "smart decision", stating that road expansion leads to more traffic and thus more traffic jams in the long run.

Ecological Executive Power: A Paradigm shift?

The Austrian Constitutional Court is yet to take progressive action. The possibilities of a bottom-up approach via climate change litigation are, for the time being, very much limited. The responsibility for a different (top-down) approach towards climate change ultimately lies with the Federal Government in Austria. In line with its 2020-2024 programme, the government aims to take the necessary steps to meet the targets of the Paris Climate Agreement. Although Austria currently emits the same amount of greenhouse gases as in 1990, the government is aiming for the country to be climate-neutral by 2040 at the latest, an extremely ambitious target.

In that regard, the government wants to introduce an obligatory, independent climate review for all new and existing legal provisions, regulations and agreements between the government and the federal states, as well as for funding directives and investments. The climate review will assess provisions and agreements with regard of their impact on climate protection, with criteria including their positive or negative impact on greenhouse gas emissions (both within and beyond Austria) and land use. If significant negative effects are

likely, an independent body will carry out a detailed assessment with a mechanism in place to implement any steps recommended by the climate review.

Leonore Gewessler's approach to pull the plug on an important infrastructure project due to its significant negative impact on the environment represents a paradigm shift in the Austrian legal landscape. An unwilling Constitutional Court failing to take the lead in climate change litigation is being substituted by ecological executive power. Upcoming legal proceedings regarding the highway tunnel will show if the Austria judiciary, especially the Austrian Constitutional Court, is ready to take climate change seriously from a legal and constitutional perspective.

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