

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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State Treaty of Vienna; Article 7 subpara. 3 first sentence represents a special provision in favour of and for the protection of linguistic minorities and provides a subjective right that is grounded in public law.

Austrian Constitutional Court
Judgement of 28th of June 1983, VfSlg. 9744/1983

Circumstances of the case

On the 22nd of April 1981, the administrative authority of first instance (*Bezirkshauptmannschaft*) Klagenfurt imposed an administrative decision in an abridged procedure imposing a fine (*Strafverfügung*) (further: 'administrative decision') on the Austrian citizen M.Z., who is a resident of Fellersdorf/Bilnjovs, the bilingual municipality Ludmannsdorf, in which the Slovenian language is recognized with the German language as an official language.

On the 8th of May 1981, the defendant was served the 'administrative decision' in the German language. He requested, in a letter of the 14th of May 1981, that the authorities issue this 'administrative decision' in the Slovenian language; otherwise he would not be able to take note of the content of the letter.

On the 14th of July 1981, the defendant received another copy of the 'administrative decision' of the 22nd of April in the Slovenian language. He submitted a reasoned complaint against this decision on 23 July 1981. However, the complaint was rejected by the administrative authority of the first instance Klagenfurt with an individual administrative decision (*Bescheid*) of 7th of August 1981 for having been submitted too late. In the reasoning the authority noted that the original administrative decision had been served on the 8th of May 1981 to the defendant. Thus the two-week period available to submit a complaint had expired on the 22nd of May 1981. As a consequence, the 'administrative decision' had entered into force.

M.Z. appealed against this individual administrative decision to the Land Governor (*Landeshauptmann*) of Carinthia, but the appeal was rejected on the merits.

As a consequence, M.Z. appealed to the Constitutional Court pursuant to Art. 144 Federal Constitutional Law. He claimed among other points that § 16 Ethnic Groups' Law violated Art. 7 subpara. 3, first sentence, of the State Treaty of Vienna, because it restricts the use of the Slovenian language as an official language in addition to the German language to specific types of proceedings and parts of proceedings.

Relevant Austrian Law

- Article 8 (2) of the Federal Constitutional Law (B-VG), Federal Law Gazette No. 1/1920
Art. 8 (2) The Republic (the Federation, Laender and municipalities) is committed to its linguistic and cultural diversity which has evolved in the course of time and finds its expression in the autochthonous ethnic groups. The language and culture, continued existence and protection of these ethnic groups shall be respected, safeguarded and promoted.
- Article 83 para. 2 of the Federal Constitutional Law (B-VG), Federal Law Gazette No. 1/1920
Art. 83. (2) No one may be deprived of his lawful judge.
- Article 7 subpara. 3, first sentence, of the State Treaty for the Re-establishment of an Independent and Democratic Austria (State Treaty of Vienna), Federal Law Gazette No. 152/1955
Rights of the Slovene and Croat Minorities
3. (first sentence) In the administrative and judicial districts of Carinthia, Burgenland and Styria, where there are Slovene, Croat or mixed populations, the Slovene or Croat language shall be recognized as an official language in addition to German.
- Article 16 of the Ethnic Groups' Law (Volksgruppengesetz), Federal Law Gazette No. 396/1976
§ 16 Decisions and official orders (Verfügungen) (including the summons) to be served and concerning any applications filed or proceedings already conducted in the language of an ethnic group, shall be issued in such language as well as in German.

Findings of the Court

The Court started by stating that a constitutionally guaranteed right only exists if there is a sufficiently individualized interest of the parties in the observation of an objective constitutional rule.

In addition, the Court stated that Art. 7 subpara. 3, first sentence, of the State Treaty of Vienna represents a special provision in favour of and for the protection of linguistic minorities, which complements Art. 8 of the Federal Constitutional Law. Therefore, the provision of the State Treaty cannot include merely a duty for state bodies; rather, it guarantees Austrian citizens who belong to the Slovenian minority *inter alia* the right to use the Slovenian language when dealing with authorities. As a result, the Court held that Art. 7 subpara 3, first sentence, provides a subjective right that is grounded in public law.

The Court was not of the opinion of the applicant, who had claimed a violation of rights through the application of an unconstitutional legal provision, namely § 16 Ethnic Groups' Law.

The Court was of the opinion that § 16 Ethnic Groups' Law does not include situations in which, such as the case at hand, the authority was not in a position to know that the person concerned intended to use the Slovenian language at the time the 'administrative decision' was issued.

However, this legal gap needs to be filled, considering the goal and purpose of the protection provision of Art. 7 subpara. 1 of the State Treaty of Vienna, so that the right to use the language of the ethnic group is guaranteed with the same efficiency to all members of the ethnic group.

If the defendant can exercise his constitutionally guaranteed right to use the Slovenian language for the first time after the 'administrative decision' is delivered, he can declare his intention to use the Slovenian language to the authority in this stage of the proceedings. Only if the 'administrative decision' is served in both languages, i.e. in the state language as well as in the language of the ethnic group, has it been duly served pursuant to the Ethnic Groups' Law, which triggers the beginning of the legal time period to submit a remedy.

The Court did not share the legal concerns raised by the applicant against § 16 Ethnic Groups' Law, if interpreted in conformity with the Constitution. However, the Court held that the defendant's right to a lawful judge pursuant to Art. 83 para. 2 Federal Constitutional Law had been violated.

Only when the copy of the 'administrative decision' was served in the Slovenian language, did the legal time period to submit remedies start. The applicant submitted the complaint within this time period. According to § 49 para. 3 Administrative Penal Law 1950 an 'administrative decision' is considered to be ineffective if the complaint has been submitted in due time and the regular procedure is instituted. Therefore, the administrative authority of the first instance acted against the law in rejecting the complaint and in requesting the defendant to pay the fine. That the appeal body upheld the rejection was also against the law.

By rejecting the complaint, the authority denied the institution of the regular procedure; this was against the law and violated the defendant's right to a proceeding before the lawful judge pursuant to Art. 83 para. 2 Federal Constitutional Law.

Comments

The decision of the Constitutional Court of 1983 is a positive continuation of the Court's jurisprudence in respect to minority protection, which started with the decision VfSlg. 9224/1981.

In this decision the Court held that in Austria all the constitutional provisions regarding minority protection reflect a value judgement of the legislator embedded in constitutional law (*verfassungsrechtliche Wertentscheidung*) in favor of minority protection. According to this the Court held that, depending on the issue to be determined, the protection of members of a minority *vis-à-vis* members of other social groups may – from a functional point of view – justify or even require more favorable treatment of that minority in certain cases.

Thus the Court determined that legislative measures which could otherwise seem problematic under the aspect of the equality principle are considered to be in conformity with this principle.

The most important provisions for the protection of the Slovene and Croat minority in Austria are contained in Article 7 of the State Treaty of Vienna 1955; subparas. 2 – 4 are of constitutional rank.

Art. 7 subpara. 3, first sentence, of the State Treaty of Vienna 1955 allows the use of the Slovenian and Croatian languages in addition to German as official languages in administrative and judicial districts with a Slovenian, Croatian or a mixed population in Carinthia, Burgenland and Styria.

Because of the general transformation of the State Treaty of Vienna, the question of the direct applicability of Art. 7 arose from the very beginning.

Based on earlier decisions, according to which a constitutionally guaranteed right only exists if there is a sufficiently individualized interest of the parties in the observation of an objective constitutional rule, the Court noted in the present decision VfSlg. 9744/1983 that Art. 7 subpara. 3, first sentence, of the State Treaty "guarantees Austrian citizens, who belong to the Slovene minority, ... the right to use the Slovene language when dealing with authorities".

The Court argued that the provision represents a "special provision in favor and for the protection of linguistic minorities" and especially the heading of Article 7 "Rights of the Slovene and Croatian Minorities" shows that these phrases cannot include merely a duty for state bodies. As a result a subjective right that is grounded in public law is guaranteed.

The Constitutional Court repeated this view nearly verbatim in its decisions VfSlg. 9752/1983 und 9801/1983.

Nevertheless, the Federal Government contested the direct applicability of Art. 7 subpara. 3, first sentence. In its ruling of 1987, VfSlg. 11.585/1987, the Constitutional Court held that for those areas for which there are no implementing provisions (*Ausführungsbestimmungen*), the right to use the Slovenian or Croatian language is a directly applicable right following directly from the State Treaty and that persons belonging to the Slovene or Croat minority could directly invoke that right in dealing with an authority. This can also be seen from the legislative history of the State Treaty. The explanatory remarks to the government bill (517 BlgNR VII.GP., 3) regarding Art. 7 subpara. 3, first sentence, state: "This provision requires no detailed implementing legislation; it is directly applicable".

The Constitutional Court further held that a provision of an international treaty is directly applicable if its content is addressed "to the persons affected by it or to law-enforcement authorities". The provision needs to be capable of constituting "a direct basis for an individual administrative act or for a judgement". In order to avoid problems with the interpretation of Art. 7 subpara. 3, it may be appropriate to enact implementing provisions in laws and regulations. Nevertheless, this does not deprive the provision of its direct applicability for those areas that are not covered by the implementing provisions.

The Ethnic Groups' Law, which was enacted as an implementing law to Article 7 of the State Treaty, however, stipulates in §§ 13 et seq. that the authorities and institutions in which the language of the minority group is recognized in addition to the German language need to be defined by implementing regulations.

Therefore, the use of minority languages is envisaged as an exception. And for this reason anyone who wants to use the minority language in any proceedings has to inform the authorities individually. Bilingualism is guaranteed only upon request.

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