

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Freedom of Assembly and National-Socialist Prohibition Act

Austrian Constitutional Court
Judgement of March 16th, 2007 (B 1954/06)

In a recent judgement the Austrian Constitutional Court found that the right to freedom of assembly is not violated if the national authority prohibits an assembly due to its appreciation that reengagement into national-socialist activities is to be expected in the course of the meeting.

The Circumstances of the case

The applicant, who is the head of the "Dokumentationszentrum des Welser Widerstandes" ("Documentation Center of Resistance in Wels" [*Wels* being a city in Upper Austria]), notified the District Administration Authority (*Bezirkshauptmannschaft*) that he would be holding a demonstration on the subject "*Multikulti beenden. Für unsa Hoamatland!*" ("Bring an end to multiculturalism. For our homecountry!") on the 27th May 2006 in "Ried im Inkreis" [another city in Upper Austria]. He attached two leaflets to the notification, which basically oppose the "multicultural project" and demand a "journey home instead of further entry".

The District Administrative Authority, relying on section 6 of the Assembly Act and on Article 11 ECHR, prohibited the meeting. An appeal by the applicant was dismissed by the Security Directorate (*Sicherheitsdirektion*). It noted that on a prior meeting organised by the applicant on the 18th March 2006 slogans closely related to national-socialist watchwords were used. Accordingly, the Security Directorate saw a risk of the repeated use of xenophobic statements mixed with national-socialist slogans. This decision was also determined by the estimation that the group of participants addressed by the notified meeting would largely correspond with the participants at the former meeting. With reference to an earlier judgement of the Austrian Constitutional Court (VfSlg 17.261/2004), the Authority stated that even though the activities planned by the applicant were not as objectionable as (yet) to be prohibited under the National-Socialist Prohibition Act (*Verbotsgesetz*, "Prohibition Act"), a meeting that is likely to encourage national-socialist thinking and aims will put the public good at risk. Eventually

the Security Directorate estimated that there was a risk of violent conflict with members of leftwing groups.

In his complaint the applicant alleged violations of his rights to freedom of assembly, freedom of expression and his right to equal treatment as well as his rights to fair trial and the right to be judged by the competent authority.

Relevant Austrian Law

- The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has the rank of an Austrian federal constitutional law. Article 11 reads:

"Freedom of assembly and association

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."
- The Basic Law of 21 December 1867 on the General Rights of Nationals (*Staatsgrundgesetz*) is a federal constitutional law. Article 12 reads as follows: "Austrian nationals have the right of assembly and to constitute associations. The exercise of these rights will be prescribed in special laws."
- The Assembly Act 1953 (*Versammlungsgesetz*) regulates the exercise of the right to freedom of assembly. Section 2 (1) provides that any person intending to organise a public assembly or any assembly which is generally open to persons other than invited guests must give the authorities notice in writing at least 24 hours in advance, indicating the purpose, place and time of the meeting. Pursuant to section 6, the competent authority must prohibit any assembly which would contravene criminal law or endanger public order or security.
- The National-Socialist Prohibition Act 1947 (*Verbotsgesetz*) is a federal constitutional law that forbids the NSDAP and other national-socialist groups. According to section 3 it is prohibited to act in favour of the NSDAP – may it be within or outside this organisation – or its aims.

The Court's Assessment

According to the standing jurisdiction of the Constitutional Court (cf. VfSlg 12.257/1990, 15.170/1998, 16.195/2001), each violation of the Assembly Act,

which directly affects the exercise of the right of assembly and therewith the right to freedom of assembly, is to be regarded as violation of the right to freedom of assembly as guaranteed by Article 12 of the Austrian Basic Law on the General Rights of Nationals (*Staatsgrundgesetz*). A decision that prohibits Austrian citizens to hold an assembly violates the constitutionally guaranteed right to freedom of assembly, if the law – which is to be interpreted according to Article 11 (2) ECHR – is not applied correctly. Section 6 of the Assembly Act has to be interpreted in accordance with Article 11 (2) ECHR. Furthermore, the values of the Prohibition Act have to be regarded. The public authority may only prohibit an assembly if this is inevitable with regards to the legitimate aims recognised in Article 11 (2) ECHR. The authorities' decision, which is based on a prognosis, has to be predicated on a realistic and comprehensible valuation of the events to be expected (see VfSlg 17.120/2004).

The Security Directive argued that there was a public interest – determined by the values of the Prohibition Act –, not to let the assembly take place. It also noted that under the circumstances of the case the public interest outweighs the organiser's interests to hold the assembly. This decision was particularly based on the fact that in the course of the assembly – held by the same organiser – on 18 March 2006, national-socialist slogans were used. In view of the leaflets issued for the current assembly, the Authority drew the conclusion, that the use of such paroles again had to be expected. The experiences from the prior assembly and the evaluation of the anticipated course of the demonstration led to the prohibition of the assembly.

In the opinion of the Court, the right to freedom of assembly was not violated:

The authority deciding on the prohibition of an assembly has to take into account section 3 of the Prohibition Act. The Court has held in the past that this provision forbids anybody to act in favour of the NSDAP (National-Socialist German Workers Party) or its aims (VfSlg 12.646/1991). These forms of reengagement into national-socialist activities (*Wiederbetätigung*) are declared unlawful without exception: Thoroughgoing rejection of National-Socialism is a constituting element of the Second Republic of Austria. As the Court held in VfSlg. 10.705/1985, every action lead by the State has to take into account this prohibition as directly applicable constitutional law. No act by a public authority shall contribute to reengagement into national-socialist activities. Hence the Court affirmed in VfSlg 16.054/2000 that section 3 of the Prohibition Act constitutes a prohibition that has to be complied with by every government body, including the authority deciding on the prohibition of an assembly (also see VfSlg 17.261/2004).

The Security Directorate had therefore correctly assumed that an assembly puts the public good at risk if the speeches planned are likely to reactivate national-socialist aims and thinking (also see VfSlg 2002/1950).

The Security Directorate had correctly assumed that national-socialist statements were to be expected in the course of the assembly. Its decision had to be particularly based on the diction of the leaflets (which were attached to the notification of the assembly), the fact that the applicant again acted as contact, as well as the fact that a group of participants similar to those in March 2006 was

to be expected. Furthermore, the applicant did not disagree with the Authorities' declaration on the facts of the assembly on the 18th March 2006.

Thus, the Security Directorate was legally obliged to prohibit the notified assembly. Hence the prohibition did not violate the right to freedom of assembly.

The Court also held that the Authorities' decision did not violate any other fundamental right relied on by the applicant.

Further information

See <http://www.ris.bka.gv.at/vfgh/> to check on the quoted judgements of the Austrian Constitutional Court (but only in German).

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