

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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FOCUS: The Constitutional Framework of Minority Protection in Austria – Some Introductory Comments

The constitutional framework of minority protection in Austria is composed of a rather complex layer of legal texts from three distinct phases of Austrian history. Due to the character of the Austrian part of the Habsburg Empire as a multi-ethnic state, Article XIX of the "Basic Law on the Fundamental Rights of Citizens" (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*, in the following StGG), being part of the so-called "December Constitution" 1867, became the basic constitutional provision for the regulation of the rights of the so-called "nationalities" (*Volksstämme*) of this "cisleithanian" part of the empire. Interestingly, despite of the character of the basic law, i.e. to form a human rights catalogue for the individual citizens in the spirit of enlightenment philosophy and political liberalism, paragraph 1 of Article XIX guarantees the "equality of all nationalities of the state as well as an unviolable right to any nationality for the protection and support of its nationality and language." Since equality is – by the language of the text – not guaranteed to the individual citizens, being at the same time members of different nationalities – or in more modern and sociological language, ethnic groups – the prescription of "equality" is indeed one of "collective equality" between groups. This "Basic Law" was then incorporated into the republican Austrian Constitution of 1920 (*Bundes-Verfassungsgesetz 1920*, in the following B-VG) after the break-down of the Habsburg Empire without formally abrogating Article XIX StGG. Therefore, the Basic Law 1867 with its Article XIX provides for a legal structure which determines and confuses interpretation efforts with regard to minority protection until the very day: firstly, does constitutional law guarantee only "individual" rights to members of ethnic groups recognized as such by Austrian law or also group-related rights, i.e. is there also a "collective" dimension of legal instruments for minority protection? And secondly, from the very beginning the "nature" of Article XIX StGG was also contested in the implementation during the Habsburg monarchy, as we can see from the jurisprudence of the Imperial Supreme Court (*Reichsgericht*) and the High Administrative Court (*Verwaltungsgerichtshof*): on the one hand, the text of this Article with its "exceptional" character to provide for "collective" rights was interpreted by government authorities to give only a political "promise" to "respect" national identities which would, however, require implementing legislation to be justiciable. Both courts, however, declared claims based on Article XIX StGG admissible and granted not only individuals, but also legal entities such as municipalities or associations legal standing in procedures before the courts against the violation

of the other substantive provisions of Article XIX. Hence, the courts of the Habsburg Empire gave also the group-oriented provisions of Article XIX "direct effect" by declaring them "fundamental rights" which must directly be applied.

After the break-down of the Habsburg Empire, the Peace Treaty for Austria, signed in St. Germain in 1919 (in the following StV St.Germain) and in analogy to other peace treaties after World War I, contained minority protection provisions for Austrian citizens "which belong to a minority according to race, religion or language" (Article 67). In stark contrast to the provisions of Article XIX StGG, however, there is a new "philosophy" behind the provisions of these treaty which can be seen already from the wording. Individual non-discrimination and freedom of speech in private and public affairs, such as media publications or public gatherings, is fully guaranteed. On the other hand, following the nation-building efforts of the newly established states in Central and Eastern Europe, Article 66 paragraph 4 StV St.Germain allows for the determination of an "official language" with the corresponding obligation for the state authorities to "offer adequate alleviation to citizens who do not speak German when they use their language before courts (... werden nicht deutschsprechenden österreichischen Staatsangehörigen angemessene Erleichterungen beim Gebrauch ihrer Sprache vor Gericht ... geboten)." This text is, of course, revealing: no longer integration of ethnic groups as such, but the assimilation of individuals into newly formed nation-states is the obvious underlying premise.

Hence, when the Austrian Constitution 1920 was adopted, German was indeed declared the "official language" of the Republic through Article 8 B-VG which was justified, as we can see from the parliamentary records, by Austria's character as a "German national state."

The third layer of constitutional and subsequent sub-constitutional provisions for minority protection was finally established again by an international treaty, the so-called "State Treaty For the Re-establishment of an Independent and Democratic Austria (*Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich*)", signed in 1955 (in the following StV Wien). Article 7 StV Wien, in contrast to the provisions of the StV St.Germain, enumerates the groups of concern, namely Slovenes and Croats in three of the states of the Austrian federation: Carinthia, Styria, and Burgenland. Already in 1964 the Constitutional Court had to establish in some sort of "authentic interpretation" that paragraphs 2, 3, and 4 of Article 7 enjoy constitutional rank "ab initio." Paragraph 2 prescribes that Austrian citizens belonging to the Slovene and Croat minorities in the said states "... are entitled to elementary instruction in the Slovene or Croat language and to a proportional number of their own secondary schools. ..." Paragraph 3 is subdivided: in shorthand, the first sentence declares that the Slovene and Croat languages must be accepted as an additional official language in those administrative and judicial districts of the said three states where Slovene, Croat, or "mixed populations" live. The second sentence of this provision declares that in those districts topographical terminology and inscriptions have to be bilingual. The provision of paragraph 4 is a special guarantee to "equal participation" in those territories in the cultural, administrative and judicial systems.

These constitutional provisions – containing, of course, also duties for the Austrian state authorities under public international law – were implemented

through legislation in a very slow process over several decades. Already in 1959 a federal law was adopted for Slovene minority education, providing the legal basis for a new organisational system of bi-lingual instruction in elementary schools in the settlement area of the Slovene minority in Carinthia as well as for the grammar school with instruction in Slovene only in the capital of Carinthia, Klagenfurt, which had been established already in 1957. Only two decades later, in 1976, following massive public protests against the establishment of bilingual street signs in Carinthia, the Austrian parliament adopted the Law on Ethnic Groups (*Volksgruppengesetz*, in the following VGG) which specified in particular the provisions of paragraph 3 and 4 of Article 7 StV Wien. The personal scope of application however is extended since the rules of this law are intended to protect not only Slovenes and Croats, but all ethnic groups living in Austria. Hence, paragraph 1, sub-paragraph 2 VGG does not enumerate these groups, but gives a general legal definition. According to paragraph 2 VGG, however, the Federal Government in consent with the Parliament and after hearing the respective State government has to establish advisory bodies of ethnic groups. Thus, in effect, particular groups were "officially" recognized through this procedure, namely Slovenes, Croats, Hungarians, Czechs, Slovaks, and Roma. The efforts to recognize also a Polish ethnic group living in Vienna failed. Moreover, since only one Slovene advisory board was established, also the "official" recognition of a distinct Slovene ethnic group in Styria is missing until the very day after this has been also rejected by the Styrian governments over the past decades.

For Croats in the Burgenland, the old provisions regarding education from the 1930ies which did not meet the standards of Article 7 St Wien, remained in force, however, until 1994 when the federal Minority Education Act for Burgenland was adopted which accords the same rights now also to the Hungarians.

Finally, in 2000 a new paragraph was added to Article 8 B-VG as paragraph 2 which provides for a "constitutional proclamation" that the Republic of Austria recognizes its linguistic and cultural diversity which finds its expression in the autochthonous ethnic groups. In conclusion, language and culture of these groups have to be respected, protected and supported. Following a long dispute between the political parties and the representatives of minority organisations, this constitutional proclamation – which is according to constitutional doctrine an obligation for state authorities, but does not confer fundamental rights on individuals or groups – was the minimum consensus that could be achieved. In the process of adoption of this constitutional provision, the proposal to formally abrogate Article XIX StGG was, however, rejected.

The story of this entire constitutional process and the implementing legislation makes clear that both the personal and the territorial application of the provisions of Article 7 were to complicate matters beyond the already complex layering of the Austrian constitutional minority protection regime. The two general problems for the implementation of legal rules are, of course, the same in our story of minority protection:

- a) Who is entitled to bring a claim before the courts with regard to the rules foreseen under the constitution, in particular through Article 7 StV Wien?
- b) On which territory have these rules to be applied?

To begin with the first problem of the personal scope of application, which has two dimensions:

When referring to "Austrian citizens of the Slovene and Croat minorities" in the text of Article 7 StV Wien, the first problem in any administrative dispute and court proceeding in order to determine the admissibility is, of course, the question whether the individual person submitting a claim is not only Austrian citizen, but also qualified as a "member" of the Slovene and Croat minorities, i.e. falling under the personal scope of application of the respective rule for minority protection. If every person has to give evidence for his or her belonging to a "national minority" under various circumstances in each and every procedure, for instance when they want to be registered as a voter, want to enroll their children in school, want to establish an association, or want to use a minority language in administrative or judicial proceedings, it is evident that this puts enormous pressure on members of minorities to "out" their being "different" on many occasions or even stirs up public disputes over the "identity" of a person with the danger that they may become stigmatized as outsiders and therefore discriminated against or marginalized. Hence, the Austrian Constitutional Court in its decision VfSlg 11585/1987 established very soon the doctrine that a claim made by an Austrian citizen making use of the minority protection rules cannot be contested in those areas designated by the Austrian State Treaty for minority protection. Hence, the reference to the territorial scope of application not only relieves administrative bodies and courts from the need to determine the personal scope of application by "checking" the "national identity" of persons, but is an important step to effectively protect members of minorities against assimilative pressures.

Secondly, the heading of Article 7 StV Wien, namely "Rights of the Slovene and Croat Minorities" and the language referring to Austrian citizens as "bearers" of those rights, makes clear that the old structural dichotomy between individual rights and group-related rights would revive in administrative disputes and before the courts.

In particular, the phrase of a "mixed population" in "administrative districts" of paragraph 3 of Article 7 makes clear that again the territorial and personal scope of application are intimately interwoven and need specifying criteria for application. So what "is" a "mixed population"? How can the existence of a "mixed population" be determined? One method, of course, indeed used, but boycotted by the Slovene minority organizations in Carinthia in 1976, is to hold an advisory referendum on belonging to a national minority. On the other hand, census figures may include indicators which would allow the respective conclusions. Hence, Austrian census figures with their questions on which language is spoken or considered the "mother-tongue" are taken as a functional equivalent for the determination not of individual identities, but for statistical conclusions how many minority speakers live on a given territory. In conclusion, of course, the Constitutional Court has then to determine on that basis a numerical threshold when a given territorial unit can be considered a "district with mixed population." Already in the decision VfSlg 11585/1987 the Constitutional Court had to deal with the determination of the meaning of "mixed population", but could limit itself to the statement that this thus not require individual evidence of belonging, but that "a larger number of persons living in the territory must belong to the minority" for which rough statistical evidence would suffice. This ruling was affirmed by the decision VfSlg 12836/1991, but the particular complaint rejected on the grounds that not even 5% Croats were living in the capital of Burgenland,

the city of Eisenstadt due to most recent statistics. For the first time thus, a numerical threshold – albeit for not being sufficient to determine a territorial unit as a "minority district" – was established by the Court.

At the same time we have to take into consideration, that the legislature had established another numerical threshold, namely a threshold of 25% of minority members living in the respective territorial unit for the establishment of bilingual topographical signs and inscriptions already in the Law on Ethnic Groups 1976. Thus, finally in 2000 an individual constitutional complaint was decided before the Constitutional Court which should clarify the uncertainty which numerical threshold should determine the existence of a territory with mixed population. In the decision VfSlg 15970/2000 both the territorial as well as the personal scope of application were under scrutiny. First, the question was raised whether only administrative "districts" in the strict sense according to the territorial layering of Austrian administrative organization are covered by the meaning of Article 7 or also municipalities as units of self-government and secondly, which number – within the spectrum of 25% and 5% – exactly determines a "mixed population." In conclusion, the Court ruled out that the municipality of Eberndorf/Dobrla was with a share of 10.4% Slovene inhabitants constituted such an "administrative district with a mixed population" in the meaning of the text of Article 7 paragraph 3 StV Wien. The next decision, presented by Michaela Salamun in the following, therefore consequently also declared the 25% threshold of the Ethnic Groups' Law 1976 for the establishment of bilingual signs unconstitutional.

The other decision, presented by *Marianne Pasterk-Reisinger*, revives the old dispute with which already the Courts of the Habsburg Empire had to deal with. Due to the character of the State Treaty 1955 as an instrument of public international law which had been "incorporated" into the Austrian legal system through "general transformation", from the very beginning the question was raised whether the provisions of Article 7 StV Wien have "direct effect" as justiciable rights or whether these rules need implementing legislation so that administrative authorities and courts can apply them. In conclusion, as long as implementing legislation does not exist, administrative authorities and courts would have to reject claims as inadmissible. Based on the factual situation that the administrative authorities had rejected the appeals against an administrative fine due to the fact that the defendant had allegedly missed the time-limit for appeals after he had first requested that the administrative decision written in German must be delivered in Slovene, the case, VfSlg 9744/1983 is thus the "authoritative" determination by the Constitutional Court – with reference to the heading "Rights of the Slovene and Croat Minorities" as well as the function of these rules in providing protection to linguistic minorities – that Article 7 is not a political proclamation which needs implementing legislation for application, but that it is a "constitutionally guaranteed, individual right." In conclusion, only the Slovene copy of the decision could trigger the time-limit for appeal so that the rejection by the administrative authorities had violated his constitutionally guaranteed right.

However, the Austrian government went on to argue as a party before the Constitutional Court that the provisions of Article 7 are not applicable as can be seen from the decisions in VfSlg 9801/1983, 11585/1987 and 12245/1989. In all of these cases the Court upheld its jurisdiction of "direct effect", if there is no implementing legislation. In particular in decision 12245/1989 the Court ruled

out that the territorial scope of the rules of Article 7 paragraph 2 on elementary education covers not only the minority settlement areas, but the entire territories of the three states mentioned, namely Carinthia, Styria, and Burgenland with the distinction that in minority settlement areas in each of the municipalities a minority school is institutionally guaranteed, whereas outside the minority settlement areas it is allowed to establish territorially dispersed school centers in order to guarantee the "right of every pupil" to instruction in the minority language in those three states of Austria.

It is also important to see in the entire context of minority protection that only the "functional" interpretation of minority laws will effectively guarantee minority protection against societal assimilation. The "groundbreaking" decision in this regard was handed down by the Constitutional Court already in VfSlg 9224/1981 where it argued that all the minority protection provisions of the Austrian Constitutional System together give evidence of the "original intent" of the constitutional legislator in favor of minority protection so that the application of the equality principle could even "require to privilege minorities." Despite of the fact that the Court itself did not apply this newly created doctrine in the case at hand and struck down the claim of a Slovene political party (Koroska Enotna Lista, KEL) to be represented in the State legislature of Carinthia, the Court went on to proclaim the necessity of a functional interpretation in VfSlg 12245/1989 and 15.970/2000.

Even in light of the political and legal resistance exercised by the Governor of the Land Carinthia against the implementation of the decisions of the Constitutional Court on behalf of the establishment of bilingual topographical signs, the Court made, however, two steps back in its "minority-friendly" jurisprudence based on the doctrine of the constitutional value-judgement on behalf of minorities and the necessity to functional interpretation in its ruling (Beschluss) VfSlg 17417/2004. In contrast to the entire jurisdiction so far to apply the provisions of Article 7 StV Wien case-by-case as "fundamental rights" with direct effect, the Court denied in this case legal standing to individual members of the Slovene minority as well as to two associations of the Slovene minority with the reasoning that the provision on bilingual topographical inscriptions does confer "subjective rights" (subjektive Rechte) neither to members of the Slovene minority nor to the minority as such. Without respecting the explicit rules following from Article 8 paragraph 2 B-VG which require Austrian state authorities, including the Constitutional Court, to "respect, protect, and to support" the Austrian "autochthonous ethnic groups" as such (!), nor its own previous jurisprudence on the necessity of functional interpretation, the Constitutional Court has made a full circle back to 1867: This provision of Article 7 simply remains an unfulfilled international obligation and political proclamation. The Imperial Supreme Court and the Administrative Court of the Habsburg Empire had thus already been more "minority-friendly" by granting legal standing to individuals and legal entities acting "on behalf" of the minority.

Further references:

- *Joseph Marko*, Artikel 8, in Korinek/Holoubek, B-VG Kommentar, Loseblattsammlung

- Ibid., Artikel 8 Abs 2, in Korinek/Holoubek, B-VG Kommentar, Loseblattsammlung;
- *Dieter Kolonovits*, Artikel 7 StV Wien, in Korinek/Holoubek, B-VG Kommentar, Loseblattsammlung;
- *Joseph Marko*, *Autonomie und Integration. Rechtsinstitute des Nationalitätenrechts im funktionalen Vergleich*, Wien-Köln-Graz 1995.

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