Chapter Two

Protecting Individuals from Vulnerable Groups and Minorities in the ECtHR: Litigation and Jurisprudence in Austria

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1. Introduction

After regaining its full sovereignty by the State Treaty of Vienna in 1955, Austria joined the Council of Europe (CoE) as its fifteenth Member State on 16 April 1956. Its membership in the CoE was a great opportunity for Austria to actively participate in a process that would later lead to the political unification of Europe. This was not considered in conflict with Austria’s perpetual neutrality, as the latter applied only to military actions. By its efforts to contribute to and co-operate in the framework of the Council of Europe, Austria was able to lay the foundation for its further European integration.

The fact that Austria was the first state to fully incorporate the European Convention on Human Rights (ECHR, the Convention) into its constitutional legal order created a high level of awareness within Austrian society concerning the Convention itself, as well as its legal and practical implications. Domestic courts and administrative authorities have so far dealt with nearly every right or freedom contained in the ECHR. Naturally, the Constitutional Court plays a central role in this respect, as it has an impact on both, domestic legislation and jurisdiction. However, the Convention’s special status neither implies direct applicability of the rulings of the European Court of Human Rights (ECtHR, the Court) within domestic law, nor does it mean that the decisions or laws infringing the Convention can be abolished solely on the basis of the Court’s judgments. In such cases the Austrian legislator has to annul or amend the respective provisions. Yet, the government and the parliament have sometimes demonstrated reluctance to fully observe and fulfil the human rights obligations specified in the Convention.
In Austria, human rights are often seen to predominantly protect the rights of minorities and marginalised groups in society. The following chapter tries to identify those minorities and vulnerable groups that tend to seek support from the ECtHR when their human rights have been violated. We will analyse why members of the identified groups take their cases to Strasbourg and why individuals belonging to other deprived groups do not turn to the ECtHR. We will also examine the factors conducive to taking legal action in Strasbourg and whether the judgments delivered by the ECtHR enhance the rights of minorities and other marginalised groups.

We will start by providing a short historical overview, in order to demonstrate the significance that is attributed to the Convention in the Austrian national context. This will also provide a succinct description of domestic judicial approaches and attitudes vis-à-vis the ECHR, as well as of the pertinent scholarly debate. The following analysis on ECtHR litigation under Articles 8 to 11 and 14 ECHR has a special focus on minority and immigration issues. Thereby we will show on behalf of which marginalised groups the individual applicants seek redress in Strasbourg. Moreover, the question why some potentially vulnerable groups are more likely to vindicate their rights before the Court than others will be addressed. This analysis will make references to the political debate and the public attitude regarding certain issues such as asylum and immigration. In section four the main areas of Austrian legislation and legal practice that have been influenced by the Convention and the case law of the Strasbourg institutions over the past two decades shall be discussed in the light of the central issues at stake. We will conclude by providing an answer to the question on whether and to what extent the Court’s jurisprudence exerts an impact on the protection of the rights of marginalised individuals and minorities.

2. The National Context: ECHR Status, Judicial Approaches and Academic Scholarship

Prior to the Convention’s ratification by Austria, fundamental rights and freedoms were guaranteed by the Basic Law of 1867 on the General Rights of Nationals1 (Basic Law 1867). Being a law of the Austrian-Hungarian Monarchy, the latter was incorporated into the constitutional legal order of the new democratic Republic of Austria in 1920. This law – a minimum consensus of

1 Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger 1867, Law Gazette of the Austrian empire [Reichsgesetzblatt], No. 142/1867 (RGBl. Nr. 142/1867).