

THE PROTECTION OF GENERAL INTERESTS AGAINST PARTICULAR INTERESTS

By

Prof. Dr. Hans SPANNER

Erlangen (Germany)

The treatment of the topic "The Protection of General Interests against Particular Interests" requires first of all the attempt to more closely examine the concepts of the general or public interest and of the particular interests. Particular interests can be described as the interests of *individual persons* or of *groups of persons* who are connected by a common interest.

The particular or special interests of individual persons are of less importance for us, since a contradiction between the general interest and individual interests may be inevitable and may exist everywhere and at every time. On the contrary the contradiction between the general interest and group interests has grown up to a great importance. That has its reason especially in the fact, that the organisation of the group-interests has developed in a very large extent, so that we shall deal especially with such group-interests and their possible contradiction to general interests.

The common interests of groups can arise out of altogether different causes: the living together within a closely bound territory (counties or member states of a federal union), out of the interests which arise by virtue of the pursuit of the same profession or of the same economic situation (professional guilds, chambers of commerce, labor guilds, labor unions, chambers of agriculture,

chambers of various other professions etc.), out of common cultural interests in its broadest sense (belonging to the "academic professions", i.e. to the jobs which require university training; belonging to the same religious denomination) and out of membership in different branches of production (industry, mining etc.).

We should go too far, if we should try to give a complete picture of all the various special interest-groups and I would like to consider only a few of the most important interest-groups, their legal position and their real activity. When we now deal with the topic "The Protection of general interests against particular interests", we have to examine two main questions: first: what sort of particular interest are today of essential importance in the public life and by what organisations are they represented; and second by what means can be given a real protection of the general interest against a unilateral preference given to particular interests. But since we are discussing as the main topic the Rule of Law, those questions are to be considered especially in coherence with the legislation and the administrative and the executive power.

But first we must deal a little with the concept and content of the general or public interest. It is harder to define than the particular interest, because it deals with a concept which in its contents particularly depends on changing approaches. In contrast to the particular interests this concerns the interest of the community in its entirety which manifests itself in altogether different areas. Legislation is ordinarily limited merely to references to the public interest and leaves to the administrative agencies and judiciary the interpretation of this concept. Only sporadically can references to the exact content of this concept be found in the statutes themselves. As an example taken from the Austrian legal system — with which this report is to deal primarily — § 87 of the Austrian Statute concerning Water Rights (*Wasserrechtsgesetz*) of 1934 can be cited which, by the way of examples, enumerates some aspects which fall under the concept of public interests within the meaning of this statute: for example, defense of the country, protection of the public security, protection of the public health, infringement of economic interests through insufficient considera-

tion for domestic products or for the domestic labor market. Yet already these two last named aspects can collide substantially with the particular interests. Since the premise is a possible contradiction between public interest and particular interests — and such contradictions are in fact frequent — the concept of the public interest has thus still another meaning.

The general or public interest does not simply mean a negation of individual interests or group interests but the *condition of a just balance between them*, which prevents the interest of an individual or of groups being preferred over and to the detriment of public interest. Under this aspect one understands the general welfare or the public interest. This concept can thus also negatively be described as the “*pushing back*” of individual interests or group interests. Just how much such a “pushing back” of individual interests or group interests or, contrariwise, a special protection of such interests is in the public interest, cannot be determined with general validity, as this differs with time and place and with the changing attitudes towards these problems. Thus, for example, such differences can be seen in the development of the legal position of the worker, when a comparison is made between the beginnings of industrialisation and the modern welfarestate.

II.

The *constitution*, as the — ordinarily written — legal and political basis of a state, contains usually in the modern state provisions which include a preferred position of the public interest as against individual or group interests. This is especially applicable for the basic rights of “*equality before the law*” which is mentioned several times in the Austrian constitution, particularly also in the Austrian State-Treaty (Staatsvertrag) of 1955. This principle binds the legislator as well as the law enforcement agencies, i.e. the judiciary and the administration. It means that basically equal things are to be treated equally, but also contrariwise that unequal things are to be treated unequally. With this it precludes the legislature as well as the judiciary and the administration from preferring individual or group interests, without an objective cogent reason.

The *principle of equality before the law* is thus the *principale basis for the protection of the general interest* as against the individual or group interests. By virtue of its binding force upon the legislator it prevents the parliament from decreeing laws which unilaterally benefit or harm an individual or groups.

The *significance* of this principle is *the greater* as far the legislator is concerned *the more a parliament contains strong parties which are inclined to unilaterally further group interests*. Particular danger exists when one party or a coalition of parties have the absolute majority in the parliament. In this context the coalition between the Austrian Volkspartei and the Socialist Party of Austria after the last elections for the Austrian National Council (Nationalrat) is of particular interest if one considers especially the connections of those main parties to entrepreneurs and chambers of commerce on the hand and to labor guilds (Arbeiterkammern) and to the Austrian trade union on the other hand.

It is obvious that the existence of two main parties, none of them being in opposition against the government, is leading to a *unilateral treatment of all public affairs*. Groups standing outside of those parties and their interests have nearly no influence. The decisive influence of the leaders or leading groups of the two main political parties is also decisive for the *legislator*, as the members of the legislative bodies are in fact bound to vote in accordance with the instructions given them by the leaders of the parties. That means that the real decision on a draft law is not made by the parliament, but by the leaders of the political parties before the vote of *parliament*, which then has *de facto* a *merely formal function*. For the same reason the personal formation of the government depends on the leaders of the political parties and on their agreement.

As the majority in the Austrian Parliament (Nationalrat) is formed by a coalition of parties, the *agreement made by the two toresaid parties for the government* during the coalition is in fact *nearly a kind of law*, but *entirely beyond the constitution*. Such a development is getting so much the more dangerous when special organs or bodies are formed, consisting only of representatives of

the parties, or when civil servants and officers are appointed primarily in accordance with a proportional system, upon which the parties have agreed.

This situation has found its clear expression, perhaps a too clear expression, in a *document*, the so called *coalition-agreement* (Koalitionspakt), made by the Austrian Volkspartei and the Austrian Socialist Party after the elections for the National Council (Nationalrat) of May 13, 1956. That agreement has been published in the press.

Under *number two (2) of that agreement is said* (translated literally):

"For the relations between the Austrian Volkspartei and the Austrian Socialist Party is the proportion of the result of the elections of May 13, 1956 recognized as basic. That proportion is to be applied to all presentations for appointments of the leading organs of the nationalized concerns and enterprises. It is also relevant for the designation of the members of the board of supervisors and the board of managing directors of the nationalized banks ... About the appointment of them decides the federal government."

Also quite beyond the constitution exists a *coalition-committee* with the federal chancellor in the chair, having the task of securing a good cooperation of the two parties. The *power of the parliament is prejudiced* by the clause of the coalition-agreement, that the two parties shall agree before the voting in the parliament the way of the voting.

Concerning the close connections between the political parties and the representatives of especially economic group interests is there a large influence of those group interests too.

III.

A special problem arises out of the fact, that the *representatives of economic interest groups have aspired to more and more influence on law-making and administration* and that now this

influence has grown up already to a very large extent. In the public discussion that evolution is called in Austria often as an evolution to a "chamber-state" (Kammerstaat), since especially the chambers of commerce and of labor and of agriculture act the leading part for that development.

The chambers of commerce and industry or the chambers of commerce have been established in 1850 and have got their present form after various changes in 1946. These chambers are associations of employers. In 1920 the chambers of workers and employees have been established as representatives of the interests of the workers and employees. The membership to both kinds of chambers is a compulsory one. The importance of the chambers of workers and employees (Arbeiterkammer) has been lessened by the establishment of the Austrian Trade Union (Österreichischer Gewerkschaftsbund). This Trade Union is a registered society and the membership is a voluntary one, but workers and employees refusing to join the Trade Union are not welcome by the organized workers and employees. The Trade Union has adopted to a large extent the tasks of the chambers of workers and employees.

Besides those organisations the chambers of agriculture as organisations of the farmers and the chambers of the agricultural workers are of great importance.

The protection of particular interests as well as their mutual balance and thus the protection of the general interest is especially served by provisions which grant the representatives of those interests the opportunity to voice their opinions concerning drafts of statutes in proceedings for the preparation of such drafts. If these provisions be ignored, however, the statute will not be rendered unconstitutional, as the consultation of the representations of interests is only provided for by simple statute and not by the constitution.

But all the aforesaid organisations, especially the chambers have extended their influence over the functions of mere representations of economic interests into all spheres of the economic life and by this into the sphere of political life too.

This influence is exercised to a large extent through the political parties. We have here a *mutual influence between interest groups and political parties*. On the one side these interest groups are influencing the intentions of the political parties and their leaders, on the other side can we see, that the leaders of the political parties have an influence to the aforesaid chambers and the Trade Union. Those facts are showing a remarkable tendency to a combination of a democracy with political parties on the one and with representatives of economic groups on the other side, both acting in the fields of economic and political sphere.

That combination is very effective by the fact, that the leading persons of the chambers and of the Austrian Trade Union on the occasion of general elections are nominated on safe places of the lists of candidates, as to guarantee their election. In this way we have to a large extent a personal union between the leading members of the chambers and the Trade Union and the membership to the parliamentary bodies. Leading members of the chambers and of the Trade Union are often appointed members of the federal government and of the governments of the member states of the federal union.

During the years after the end of the second world war, when the *wages and prices* were increasing in an uncontrollable manner, the chambers and the Trade Union got an increasing influence on those questions, which was of very great importance for securing the economic and social peace. There were made the so called *agreements on wages and prices* (Lohn- und Preisabkommen) between the aforesaid organisations representing the interests of entrepreneurs on the one side and of workers and employees on the other side. This was in so far not in accordance with the constitution as the real decisions on those questions had been made by the aforesaid agreements: the National council (Nationalrat), i.e. the parliament had than only the task decreeing the formal laws according to those agreements.

The political parties on the one side and the chambers and the Trade Union on the other side can be dangerous to the general interest if they put the party's interests or the group interests which

they are representing, before the general interest. Political parties do so especially before elections.

A special position in the way of protection of particular interest and the balance of the same among each other and against the interests of the member states in a federal state system (Bundesstaaten) — in Austria the federal council (Bundesrat)—. This is only effective, however, if such a second chamber is not also made up primarily according to political parties, resulting in the interests of the political parties, not the interests of the member states, being the primary factors.

IV.

In the *political and economic life* we see thus a *permanent struggle* between the various group interests, represented by the political parties and the various organisations aforesaid. *This struggle* we see also in the *law making bodies*.

From the impossibility of giving a generally valid definition of the concept of the public interest or of the general welfare the question arises, who can make a *binding determination* in a concrete historic situation, or in an particular state, *of what is in the public interest*. Legally this question arises on all levels of law making and application. It confronts the framer of a constitution, the legislator, the justice, and particularly the administrator.

Apart from the principle of equality before the law, *provisions in constitutions which deal with the particular interests, generally serve the protection of the same as against the interests of the community*. Where this is the case, they will ordinarily be provisions connected with the principle of equality before the law, such as the abolition of the privileges of nobility or the abolition of classes.

To be sure, an *effective guarantee* for the *most important principle of equality before the law* is only given when there exists a *judicial system for constitutional questions* (Verfassungsgerichtsbarkeit) which permits the possibility to invalidate also laws con-

trary to this principle. When the control of the preservation of the constitution and especially of the principle of the equality is given to a court for constitutional questions, the latter will also decide questions concerning the protection of the general interest as against the particular interests arising under the principle. So we see, that the court is giving the binding determination of what is in the public interest and so also for the legislator. In a decision in 1949 (Slg. 1809/1949) the Austrian Constitutional Court (Verfassungsgerichtshof) has nullified a clause of a statute of Vienna, providing the possibility of expropriations of enterprises of amusement, such as theaters, cinemas etc. The court adopted the view, that there *was no public interest for expropriating such enterprises.*

In the context with such a competence of a court the question of capacity or standing before the court is of great importance. The right to have standing before the court given to an individual or to group organisations, can indirectly serve the protection of the general interests. There would be also the possibility of appointing a special representative of the public interest in a judicial system for constitutional questions. The more the struggle between particular interests and against the public interests is growing up, the more it would be useful, to appoint such a representative of the public interest. In Austria there is not such an institution.

V.

Following the premise that the constitution and the statutes decreed pursuant to the constitution already contain the realization of the general interests by way of a balancing of interests, the question now arises, how this public interest is to be realized and protected against particular interests in the area of the *application of the statutes* by means of the judiciary and the judiciary and the administrative agencies.

The security for the application of the law according to its meaning and purpose is grater in the *judiciary* than in the administration. This is the result of primarily two things: First it results from the position of the independent judge who is only

bound by the law, i.e., not also by directives of superior agencies. Secondly it results from the fact that the judge is ordinarily bound to adhere to the law more closely than are the administrative agencies which may often decide individual cases according to the special circumstances with a great deal of *discretion*. The area of discretion is so broad that adherence to the law at times is limited to a norm of competency (*Zuständigkeitsnorm*) for instance administrative power to reprieve. Much more frequent, however, are cases in which statutes set up minimum standards which must be met before the administration may act, for instance the licensing of businesses. The exercise of discretion also has limits which prohibit that it be used to the detriment of the general interest as for the benefit of a unilateral preference of a particular interest; these limits are set basically by the principle of equality and the prohibition against discrimination implicit in it. In this context the express provision in the Austrian constitution (Art. 130), which requires that discretion for one thing be exercised only *within the statutory limits* and for another *within the meaning of the statute*, is of importance.

In view of the preservation of the balance of interests in the application of statutes the absolute validity of the principle of *legal regularity in the administrative agencies* (*Gesetzmäßigkeit der Verwaltung*) is of highest importance. In this it is not only important that this principle applies to an equality in the *burdening* (interference with freedom and property) of individuals or members of particular groups, but also that it applies with respect to *preferred treatment* of individuals (granting of permits or releases), since preferred treatment of individuals or members of particular groups must necessarily lead to discrimination against others: One shortcoming of this interdependence is that legal remedies are generally only available to him who asserts to be directly injured in his rights, i.e., there is ordinarily no possibility to contest the unilateral preferential treatment afforded others or particular groups. At times organisations have the right to use such remedies.

For securing the administration according to the laws and especially to the principle of equality before the law there must be

a *system of administrative judiciary* allowing a person who asserts, to be injured in his rights, to bring the case before an *independent court* with the competence to quash an administrative act, which was given against the law and against the principle of equality before the law.

If it be the case of *discrimination through refusal of the rights* in the area of administration, recourse to such courts for administrative questions (Verwaltungsgerichte) might afford relief, if, as in Austria, inaction of the administration is also a ground for appeal to this court.

Also the question of *personnel in the administrative positions* is of basic significance for the protection and the implementation of the general interest as against the particular interest. In this area the *influence of organisations* which represent the particular interest can be felt to an *increasing extent*. This influence can particularly be felt by way of the influence of political parties. Again the already referred to coalition agreement is of particular interest in the case of Austria. That would be the best way to a real spoil system. We are, however, often concerned with an other absolutely illegal, "underground" influence upon appointing civil servants and officers. At times it is possible, as a decision of the Austrian constitutional court (Verfassungsgerichtshof) prove, that reference to the principle of equality before the law will also afford relief in this area, and only when some person appears to have been harmed.

In an interesting decision the Austrian Constitutional Court in 1953 (Slg. 1602/53) has decided, that a notice of dismissal to a public officer on the ground of his refusal to join a certain political party or organisation, was against the constitution and has violated the equality before the law. That sentence has also to be applicable for the *nomination* of civil servants. That means that the system of nomination in accordance with a proportional system, as agreed in the aforesaid coalition agreement for certain ranks is unconstitutional and repugnant to the equality before the law. But there is *de facto* a great difficulty in the fact, that it is generally scarcely possible to give evidence of such political reasons having been prevailing for nominations and notices.

VI.

Coming now to the end of my report, it can be said, that the problem of the protection of general interest against particular interests is of importance in every state and in every historic phase of its development. In this context it can be noted, that pursuant to its historical development the particular interests of particular groups occupied a preferred position in the beginning, as for instance of the nobility and the landed society or also the interests of denominational groups. With the increasing influence of other groups and classes of the populace such onesidedness ceased and the balancing of interests which, according to its results and contents, can be described as general interests moved into the foreground.

The rise of new and increasingly strong groups can also be seen in the articles on basic rights in constitutions, where these may be found, for instance, provisions for the protection of agriculture, now independent from the noble overlords after the abolition of such dependency, or provisions for the protection of the yet dependent employees in industry (in its broadest sense). These groups initially protected by such provisions, developed, however, as the time went on such a strong influence by virtue of the representation of their particular interests particularly through the aid of their organisations, that today the protection of the general interest against them is necessary, as for instance against unjustified strikes, or, of course, also against unjustified lockouts.

Of particular significance in this context is the power of the tariff-partners (Tarifpartner) in the framing of conditions of employment, especially as this is often connected with the establishment of prices - which is of great importance to the community. Another good example is provided by the aforesaid "Wage- and Price-Agreements" in Austria, which were concluded between the interest group organisations and which were enforced through the legislative organs of the state which thus practically became the enforcement agency of those organisations. Under certain circumstances such agreements can, if concluded without reference of other branches of the economy, be detrimental to the general interest.

The cited examples show also that the *nature* of the particular interests has changed in the course of development: *today the economic particular interests* are in the *foreground* as well as the organisations representing them.

The essential safeguards, however, in the area of the law and its application, for the protection of general interest against particular interests can, in our opinion, thus be found in the *basic rights of equality before the law* and in the *principle of the legal regularity of the administrative agencies* (*Gesetzmäßigkeit der Verwaltung*).

In this short report it was of course only possible, to give a few examples referring to the large topic of the protection of general interest against the particular interests.
