

## ■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Harald Eberhard

### Focus: Self-government in Austria

In the Austrian federal system, the *Gemeinden* (municipalities, local administrative bodies), i.e. the local municipalities which represent the basic level of governance, possess the right of *Selbstverwaltung* (territorial self-government) and – in this way – enjoy a certain amount of autonomy, as they are – within their autonomous sphere (own sphere of competence, "*eigener Wirkungsbereich*") – not subject to instructions from the Federation or the *Länder*. With regard to those powers which are only delegated to the municipalities ("*übertragener Wirkungsbereich*", assigned sphere of competence) from the Federation and the *Länder*, they can receive instructions both from the Federation and the *Länder*. As the municipalities are mere administrative bodies, they have, as opposed to the Federation and the *Länder*, no right to issue legislative regulation. The constitutionality of these bodies – as the third level of the Austrian federal system besides the Federation and the *Länder* – was undoubtedly clear because of the explicit provisions in the core constitutional act, the Federal Constitutional Act (Art. 115–120 B-VG). Aside from this *territorial* form of self-government, we have to face an enormous amount of other – *non-territorial* – self-governing bodies which have played an important role in the constitutional, as well as political, reality in Austria. Already in the 19<sup>th</sup> century, such non-territorial self-governing bodies were established in the Austrian administration and were entrusted with powers focussing mainly on the participation in the state legislation as well as administration. Furthermore, these bodies have traditionally held the function of the representative of interests of those people integrated in these chambers in an obligatory way (obligatory membership, *Pflichtmitgliedschaft*). There exist chambers of commerce (*Wirtschaftskammer*) and the chambers of labour (worker's chamber, *Arbeiterkammer*) – as the most important players within the Austrian system of social partnership (*Sozialpartnerschaft*) – as well as chambers of different professions such as medical doctors and pharmacists, lawyers, accountants or notaries (professional representatives). Furthermore, in the field of social security (Social Insurance Institutions) as well as with regard to the universities and student bodies (*Hochschülerschaften*) at these universities we can find quite different structures of self-government. Also within in the area of competence of the *Länder* there exist structures of non-territorial self-government, such as associations of hunters or in the field of fire service.

In the Austrian jurisdiction and jurisprudence, there was a long debate about the legitimacy of these organisations because there was no explicit exception from the principle of hierarchy mentioned in Art. 20 para. 1 B-VG and which – up

to the amendment BGBl. I 2008/2 – only allowed constitutional exemptions so that all forms of self-government would need a more or less explicit constitutional base unless they have to be declared as unconstitutional.

The jurisdiction of the Austrian Constitutional Court had cleared – around 30 years ago in its famous judgement about the *Salzburger Jägerschaft* (VfSlg. 8215/1977) – the basic conditions which have to be fulfilled to declare these bodies as constitutional institutions within the Austrian administrative structure: firstly, there has to exist a special interest of the certain group of people to integrate them into such a body as well as the ability of this group to manage the tasks assigned to it, secondly there must exist objective criteria to define this group of people according to the constitutional rule of equality (Art. 7 B-VG) and finally, it is necessary to create a system of a legal control by the state which substitutes the missing possibility to give instructions to these bodies. In addition, the jurisdiction had refined the constitutional conditions regarding the democratic legitimacy of self-governing bodies which has to be provided by periodical direct or at least indirect elections (VfSlg. 8644/1979, 10.306/1984). In this field, the legislator has – according to the permanent jurisdiction of the Constitutional Court – a wide margin of legal policy in designing this system of elections (VfSlg. 17.951/2006). However, it would be unconstitutional to exclude persons which are integrated in the self-governing body from the participation in its central executive organs (VfSlg. 17.023/2003 concerning the system of social self-government). From this democratic point of view, there exist certain limits for legal acts which address non-members of the self-governing body (VfSlg. 17.869/2006, VfGH 25.9.2008, G 10/08). The set of these conditions, therefore, can be qualified to a large extent as a product of the jurisdiction of the Constitutional Court during the last 30 years.

But in 2008, there had been set into force – for the first time – explicit provisions about these non-territorial self-governing bodies besides the around 2.350 municipalities. The integration of – in this way: "other" – self-governing bodies into the Federal Constitution (Art. 120a – 120c B-VG) which was realized with the recent constitutional amendment BGBl. I 2008/2 established a constitutional basis of these historically well established and politically very influential chambers and institutions. At its core, the new regulation can be qualified as an incorporation of the rules created by the jurisdiction of the Constitutional Court. But in one of the main constitutional questions regarding these bodies – their right to set up general provisions such as regulations – this amendment allows significant autonomy going beyond the status quo insofar as self-governing bodies in the future will have the right to enact ordinances not only on the basis of legal acts, but also within the framework of legal acts of the Federation and the *Länder* (Art. 120b para. 1 B-VG). Thereby, this amendment makes a correction to the traditional jurisdiction of the Constitutional Court which had always given strong restrictions to this right (see VfSlg. 16.900/2003).

In light of the importance of the jurisdiction for the field of self-governing bodies, we want to present the three most important decisions of the last years dealing with self-government issues. *Ulrich E. Zellenberg* will have a focus on the leading case regarding the constitutional limits of the margin of discretion of the legislator with regard to the organisational design and democratic legitimacy of self-government bodies (VfSlg. 17.023/2003). Thereby, the Court referred to its

hitherto existing jurisdiction and stated the constitutional conditions of self government more precisely. *Erich Pürgy* will deal with the judgement VfSlg. 17.869/2006. In this judgement, the Constitutional Court repealed a legal provision dealing with general regulations of a self-governing body for the first time on the grounds that the provision contravened the principles of self-government with a view to its restriction to a specific category of persons. Finally, *Metin Akyürek* gives an outline about the judgement of the Constitutional Court of September 25<sup>th</sup>, 2008 in the case G 10/08, in which it had specified these issues of the democratic legitimacy of the non-territorial self-governing bodies with regard to individual legal acts.

- *Harald Eberhard works as scientific assistant at the Austrian Constitutional Court.*