

## ■ CONSTITUTIONAL DEVELOPMENTS

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### **Administration of Justice and Separation of Powers**

Austrian Constitutional Court,  
Judgment of 12 October 2000, G 56/00,  
VfSlg 15.986/2000

#### **I. Facts of the case**

Due to a pending case before it, the Administrative Court decided to file an application pursuant to Article 89 para 2 and Article 140 para 1 Federal Constitutional Law ("Bundes-Verfassungsgesetz", hereinafter: B-VG) to abolish the word order in § 9 para 3 Federal Law concerning the Drafting of Jurors and Lay Assessors ("Geschworenen- und Schöffengesetz", hereinafter: GSchG), Federal Law Gazette No 256/1990 "to the president of the locally competent criminal court of first instance" as well as in § 12 para 1 GSchG the word order "decides on appeals (§ 9 para 3) as last instance and" as unconstitutional.

The underlying proceedings were brought before the Administrative Court by a woman (hereinafter: the applicant) who in 1996 had requested the exemption from her duty of serving as juror or lay assessor. After the district administrative authority (*Bezirkshauptmannschaft*) had rejected her request, the applicant appealed to the president of the criminal court of first instance according to the relevant provision of the GSchG. Her appeal was dismissed as unfounded. In her complaint before the Administrative Court the applicant complained that she had fulfilled all necessary prerequisites and that therefore her right to exemption of the duty of serving as juror or lay assessor had been violated.

#### **II. Ruling of the Constitutional Court**

As to the merits of the case the Constitutional Court found that the constitutional concerns of the Administrative Court were unfounded.

At the outset the Constitutional Court reiterated that according to established case-law the execution is strictly divided between the Federation and the Länder, apart from exceptions explicitly provided for in the Federal Constitution. Therefore, no stages of appeal are viable that link the executive sphere of the Federation with that of the Länder. However, the principle of separation of powers with regard to the two differing executive ambits (Federation and Länder) is invalid in cases explicitly provided for by the Federal Constitution, e.g. in matters of indirect Federal administration (*mittelbare Bundesverwaltung*).

The Constitutional Court first sought to incorporate the impugned provisions into the system of the B-VG in order to clarify whether the principles developed with regard to Article 102 para 2 B-VG were applicable without restrictions.

Article 82 para 1 B-VG declares that the Federation is the source of all jurisdiction and thus the sole holder of the executive power in this respect. The field of administration of justice, unless exercised by a single judge in which case the judge is not acting independently but is bound by instructions of the Federal Minister of Justice, also falls under the head of jurisdiction.

The Constitutional Court reiterated that the classification of acts to the field of administration of justice might pose difficulties. It held that in such cases the historically applicable legislation at the time of the entering into force of the B-VG has to be taken into consideration and found that in 1897 a regulation of the Minister of Justice included the "establishing of the list of jurors" as belonging to the field of administration of justice, executed by the president of the court. In addition, the fact that the constitutional provision establishing the participation of the people in the jurisprudence (Article 91 B-VG) falls under the header of "jurisdiction" of the B-VG shows that provisions guaranteeing the availability of sufficient jurors and lay assessors have to be regarded as belonging to the field of administration of justice (in a material sense). Accordingly, the execution of this part of the administration of justice is exclusively exercised by the Federation and therefore is not affected by Article 102 B-VG.

The objections of the Administrative Court concerning the possibility of an appeal from an administrative authority of the Länder to the president of the criminal court of first instance are unfounded given the fact that the historical development shows that close cooperation between district administrative authorities and courts already formed part of the body of law existing at the time of entry into force of the B-VG. According to the Law concerning the establishment of the list of jurors ("Gesetz betreffend die Bildung der Geschworenenlisten") it appertained to the duty of the head of the competent administrative authority (*Bezirkshauptmann*) to present the so-called "Urliste" – the "original" list of citizens – with comments and suggestions regarding the citizens' loyalty, truthfulness and aptitude towards being drafted as jurors to the president of the court of first instance. The municipality commission (*Gemeindekommission*) decided on objections brought against the list and a complaint could be directed to a commission presided by the president of the court. This legal status remained essentially the same.

The Constitutional Court therefore concluded that this collaboration between the district administrative authority and courts thus belonged to the simple legal status of the field of administration of justice at the time of entry into force of the B-VG and is justified by the fact that municipalities and district administrative authorities have direct access to the data to be processed by the judiciary.

Hence, the request of the Administrative Court was dismissed as unfounded.

### III. Assessment

With this judgment the Constitutional Court partly deviates from its former case-law and seems to establish an exception from the principle of separation of powers as guaranteed by Article 94 B-VG. This decision is based on the specifications inherent to the field of administration of justice. This janus-faced field seems beyond the strict separation of powers as it combines administration and the judiciary *per se*. Nevertheless it used to be common ground that appeals

from an administrative authority to a court or *vice versa* were not allowed – apart from the constitutionally prescribed exceptions.

Since the principle of uniform stages of appeal (*einheitlicher Instanzenzug*) would require that either only administrative authorities – *ie* in the field of indirect Federal administration the competent regional governor (*Landeshauptmann*) – would determine the constitution of the decision body of the judiciary or on the contrary, that district courts would have to administer the evidence of citizens.

Hence, the Constitutional Court applies the petrification theory (*Versteinierungstheorie*) in order to declare the current case as belonging to the field of administration of justice and argues that from a historic point of view and due to the material proximity (*sachliche Nähe*) of the issue at hand an appeal from administrative authorities of first instance to the president of the court is constitutional.

Although it may be limited in scope it is an astounding judgment of the Constitutional Court in the field of separation of powers.

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