

■ CONSTITUTIONAL DEVELOPMENTS

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Criminal Procedure and Separation of Powers

Austrian Constitutional Court
Judgment of 16 December 2010, G 259/09,
VfSlg 19.281/2010

I. Facts of the Case

In the year 2004, the Austrian Code of Criminal Procedure was amended in the most significant way since the enactment in the second half of the 19th century. The amendment focused on the preliminary criminal proceedings before the charge was brought before the court by the public prosecutor. The traditional concept from the 19th century followed the model of preliminary court proceedings and the investigating judge was the formal head. But this concept did not reflect the situation in practice any more, because the public prosecutor and the police departments already took over more and more the criminal investigation. After decades of debate the new concept was introduced, in which the public prosecutors became heads of the preliminary proceedings and investigate in cooperation with the police departments. The role of the court in the new concept now is limited, as it is up to the judge to approve only certain investigating measures, which are especially prone to interferences (like surveillance measures or inspections of bank accounts). The amendment of the Code of Criminal Procedure was enacted in 2004, but got into force in 2008. The time in between was necessary for the reorganisation of the courts, the public prosecutors and police departments to adopt the new legal concept.

The new § 106 of the Code of Criminal Procedure determined the legal protection regarding investigating measures which violate rights and harmonized the access to justice. In the traditional concept of legal protection regarding the preliminary proceedings, the competent authorities differed: if the police investigated on their own, these actions were understood as administrative actions and the legal protection was granted by the Independent Administrative Tribunals (which are quasi-judicial bodies of the administration¹). But, if the police action was based on a judicial order, the legal protection was granted by the ordinary courts. However, the new provision (§ 106) concentrated the legal protection at the courts, even in cases of independent police investigation.

After the amendment got into force in 2008 and the first procedures started, two Independent Administrative Tribunals and the Administrative Court filed an application at the Constitutional Court (according to Article 140 Federal Constitutional Law, hereinafter: B-VG), bringing forward that § 106 Code of Criminal Procedure is unconstitutional, because the legal protection by the courts

1 See Article 129a B-VG.

is inconsistent with the Separation of Powers principle, layed down in Article 94 B-VG. According to the applicant institutions, independent police investigation was always understood and still is administrative law enforcement and thus, legal protection has to be granted by the Independent Administrative Tribunals and not by the courts.

It has to be mentioned that this question of the Administrative Courts and the Administrative Tribunals did not refer to cases, in which the police investigation is based on an order of the public prosecutor. The public prosecutor is understood as jurisdictional body² and interestingly, this provision (Article 90a B-VG) was introduced in the Austrian Constitution in 2008, when the new Code of Criminal Procedure got into force. Without this constitutional provision the judgment of the Constitutional Court might have had even bigger impacts.

II. Relevant Provisions

Austrian Code of Criminal Procedure

Criminal police investigation

§ 18 (1) Criminal police investigation consists of the administration and enforcement of tasks regarding criminal procedure (Article 10 para 1 (6) Austrian Constitution), especially the investigation and prosecution of crimes and criminal offences due to this statute.

(2) Criminal police investigation is up to the security and police authorities (...)

Appeal due to rights violation

§ 106 (1) Every person can appeal to the court in the preliminary proceedings, if the person claims that a public prosecutor or criminal police investigation violated the rights of the person, because

1. the person is denied a right, which is guaranteed by this statute or
2. an investigative or compulsory measure is instructed or enforced in a way, which is violating this statute. (...)

B-VG

Article 90

(2) In criminal proceedings the procedure is initiated by indictment.

Article 90a

Public prosecutors are jurisdictional bodies. They investigate and prosecute crimes and criminal offences cases, sanctionable by a court (...)

2 See Article 90a B-VG.

Article 94

Judicial and administrative powers shall be separate at all levels of proceedings.

Article 129a

(1) The independent administrative tribunals in the states judge after exhaustion of administrative appeals, (...)

2. on complaints by persons who allege the violation of their rights by law enforcement or coercive measures (...)

III. Ruling of the Constitutional Court (Summary)

Summarized the Constitutional Court shares the concerns of the Independent Administrative Tribunals and the Administrative Court regarding the separation of powers principle and refers more over to Article 129a B-VG, which determines the task of the Independent Administrative Tribunals, because this provision includes the competence to decide in cases of infringements of rights with regard to law enforcement or coercive measures by administrative bodies.

The Constitutional Court stressed that the legal protection regarding police investigation is now granted by § 106 Code of Criminal Procedure to the ordinary courts and examined if this provision violates the separation of judicial and administrative powers. The Court stated that independent police investigations are still administrative measures and § 106 Code of Criminal Procedure enables a judicial control of administrative action without a specific constitutional foundation. But such a constitutional foundation is necessary, as the constitutional competence of the Independent Administrative Tribunals is to decide with regard to complaints on infringements of rights by the administration especially with regard to police measures.

A constitutional provision to protect § 106 was indeed intended by the legislator, but the necessary majority was not reached in parliament. Thus, § 106 was lacking the necessary constitutional foundation and therefore the possibility to lodge a complaint at the court regarding administrative measures violated Article 94 B-VG.

Furthermore, the Court rejected the argument that a historical interpretation of the principle of public prosecution (Article 90 para 2 B-VG) might legitimate the legal protection by the courts. Article 90 para 2 B-VG does not state an exemption with regard to independent police investigation from the principle of separation of powers as guaranteed in Article 94 B-VG.

Thus, the Constitutional Court declared the words "or criminal police investigation" in § 106 para 1 Code of Criminal Procedure as unconstitutional and abolished them. The Constitutional Court did not discuss further concerns regarding the legality of the provision.

IV. Assessment

The judgment of the Constitutional Court was not surprising. The Constitutional Court followed its own case law and the main doctrine in this field.

The relevance of the judgment, however, is still very high, as it affects the basic concept of legal protection in preliminary proceedings in criminal procedure.

Moreover, it has to be mentioned that the Constitutional Court followed a formal approach with regard to the understanding of separation of powers. In a more substantive approach of the separation of powers principle it would have been possible to uphold the new harmonized concept of legal protection. The result of the judgment is now again a dual system of legal protection in criminal procedure: If the criminal police investigates on their own, the legal protection leads to the Independent Administrative Tribunals (eg regarding stop and search powers); if the criminal police investigates by the order of public prosecution or the judge, the legal protection is granted by the courts.

The legal protection of the Independent Administrative Tribunals, however, already existed regarding the prevention of crimes by the police (so called security police – *Sicherheitspolizei*), which gives the police powers to prevent and prohibit crimes. Since 9/11 more and more police functions cannot be differentiated between preventive measures and investigative measure properly. Thus, the question of one system of legal protection seems to be illusory anyway.

Another interesting aspect refers to intelligence by the police. The Constitutional Court focused in its concerns on coercive measures, but neglected that intelligence is similarly effected by the legal protection clause in § 106 Code of Criminal Procedure. The effect of the Constitutional Court judgment regarding coercive measure is quite clear, as the Independent Administrative Tribunals are competent again. Though, in terms of intelligence the legal protection is uncertain, because the (independent) Data Protection Commission is competent to grant legal protection regarding administrative intelligence. However, § 1 para 5 Data Protection Act, which is a constitutional provision, and § 31 para 1 Data Protection Act exempt activities of the courts from the area of competences of the Data Protection Commission. It was already argued in legal scholarship that criminal police investigation is part of this exemption.³ Thus, the question remains, if a system of legal protection regarding intelligence within independent criminal police investigation exists at all. Due to the Constitutional Court judgment, the ordinary courts are not competent anymore and the legal protection by the Data Protection Commission is at least unclear.

In December 2011, the government introduced a governmental bill to amend Article 94 B-VG. The new provision shall not only legitimize § 106 Code of Criminal Procedure but shall open up the concept of separation of powers generally. Legal protection by the courts shall be possible with regard to any form of administrative measures. If the Parliament adopts the governmental bill, the whole understanding of constitutional powers will be changed.

To sum up, the judgment of the Constitutional Court was not unexpected, but has a major impact on the concept of legal protection in criminal preliminary proceedings. The attempt to harmonize legal protection failed. Moreover, the judgment did not consider questions of intelligence by criminal police and, thus, take at risk a lack in the system of legal protection. Finally, the judgment is an

3 See eg Heinz Mayer, 'Die Sicherheitsbehörden im Dienst der Strafjustiz und die Zuständigkeit der Datenschutzkommission', *Österreichische Juristenzeitung* (2007) 17.

essential Austrian contribution to the separation of powers doctrine and will probably change the Austrian system of separation of powers.

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