

**Conference on the occasion of the opening of the new court building of the Supreme Administrative Court of the Czech Republic
21- 23 November 2006 in Brno**

The Role of Supreme Courts in European Constitutional Systems - Time for a Change ?

**“Role and function of a Supreme Court in a multi-levelled court system
- Selection of cases and recent developments in Germany”**

Dear President Baxa, ladies and gentleman, distinguished colleagues,

in modern multi-levelled jurisdictions the role of the Supreme Courts is not difficult to define - but nearly impossible to perform:

We shall provide individual justice, safeguard the consistency of law and ensure the continuous development of jurisprudence all over our countries. In a perfect world we would be guardians, guides and avant-garde at the same time, creating a brilliant legal system and bringing justice in every single case ...but the world is not perfect.

In reality the huge number of lawsuits, the lack of staff and budget funds and the need to concentrate on the essential are forcing the legislator to restrict the admissibility of legal remedies and to limit the access to the Supreme Courts. There can be no doubt that some kind of filter is indispensable to ensure the functioning of Supreme Court jurisdiction. But the problem is to find a method of selection which guarantees both, effective jurisdiction **and** effective reduction of the caseload.

Until recently the German jurisdictions used to take different approaches to solve this problem.

Since the Administrative Court Act was enacted in 1960 the access to the Federal Administrative Court has always depended on the significance of the respective case for the public interest in the consistency and continuous development of administrative law jurisdiction.

Article 132 of the Administrative Court Act provides that the parties shall have the right to appeal for “revision” to the Federal Administrative Court against the judg-

ments of the higher administrative courts if the leave for “revision” has been granted either by the higher administrative court in the operative part of the judgment or - subsequent to a complaint against denial of leave - by the Federal Administrative Court itself.

“Revision” is the German technical term for legal review on points of law before a Supreme Court.

Leave for revision may be granted if

- the case is of fundamental importance,
- the judgment departs from a decision of the Federal Administrative Court, the joint Senate of the Federal Supreme Courts or the Federal Constitutional Court and rests on this departure, or
- a deficiency in procedure on which the judgment may rest has been claimed and found.

“Fundamental importance“ within the sense of the first ground means that the significance of a lawsuit must go beyond the individual case. The decision must be generally relevant and provide the Court with the opportunity to clarify crucial questions or develop new guidelines for the construction and application of legal provisions.

Nevertheless, the Federal Administrative Court is bound by the leave of the higher administrative court even in cases where these conditions are not fulfilled.

The access to the Federal Social Court, the Federal Court of Finance and the Federal Labour Court follows the same principles. The revision is dependent on a leave which requires the general relevance of the case, a procedural deficiency or the departure from a Supreme Court decision.

In contrast to that the criteria of selection in the Civil Court Act used to be slightly different. Until 2002 the access to the Federal Court of Justice had only partly depended on the significance of the dispute in question. Disputes involving a monetary sum of more than 30.000 € were open to revision without any leave and irrespective

of their importance for the public. Only appeals for the revision of cases which did not exceed this monetary threshold required the leave of the courts of appeal. Such leave was to be granted if the case was of fundamental importance or the judgment departed from a Supreme Court decision. A complaint to the Federal Court against denial of leave did not exist.

As a certain corrective, however, the Federal Court of Justice was entitled to dismiss cases which exceeded the threshold but had no particular public relevance.

Nevertheless it occurred that the Court accumulated a huge backlog of cases. Between 1980 and 1999 the number of annually registered disputes had more than doubled (from 2.249 in 1980 to 4.408 in 1999). At the same time the number of judges was only slightly increased so that the Court's backlogs rose from 2.175 cases in 1980 to 4.101 cases in 1999. Especially the "threshold sum revisions" amounted to this backlog since their number rose by 145 % whereas the number of revisions based on leave for fundamental importance decreased by more than 50 % during the same period. By the end of the 20th century only 14,5 % of the cases brought before the Federal Court of Justice fulfilled the criteria for a fully-fledged revision judgment while the vast majority of cases involved only bagatelle questions and had to be dismissed on grounds of lacking public relevance.

Thus, it became clear that about 80 % of the Court's manpower were bound by disputes which were neither well-founded nor of fundamental importance.

In contrast to that the increase in the caseload of the Federal Administrative Court was comparatively moderate.

In order to reduce the burden of cases resting on the Federal Court of Justice the Code of Civil Procedure was reformed in 2002. Now the selection of cases follows the same principles as in administrative law.

The new Art. 543(2) of the Code of Civil Procedure provides that every revision to the Federal Court of Justice requires a leave which may be granted by the court of appeal or - subsequent to a complaint - by the Federal Court of Justice itself if

- either the case is of fundamental importance
- or a Supreme Court decision is necessary to safeguard the development of law or the consistency of jurisdiction.

During the legislative process the advantages and disadvantages of the “threshold sum revision” and the revision based on fundamental importance were broadly discussed.

On the one hand the selection based on the sum in dispute supports the Supreme Court’s role as guardian of individual justice and is clearly more favourable for the claimant’s personal interest in having a full third instance, at least in cases where a considerable amount of money is involved.

On the other hand cases which do not exceed the threshold have no or merely a theoretical chance to reach the supreme instance. This fact is not only dissatisfying for the claimants who are completely dependent on the court of appeal’s inclination to grant leave. It is also problematic for the Supreme Court because the latter cannot base its jurisdiction on a representative selection of cases but only hope that important questions are more or less accidentally brought before it either by the lower courts or by way of the threshold sum revision.

It goes without saying that this method of selection adversely affects the Supreme Courts’ possibility to develop guidelines beyond the individual case.

Furthermore, as the example of the Federal Court of Justice illustrates, the “threshold sum revision” is not suitable to provide sufficient reduction of the caseload. To be effective the threshold would have to be set on a very high level no longer compatible with the constitutional guarantee of judicial protection.

In contrast to that the selection based on fundamental importance combined with the complaint against denial of leave gives priority to the public interest in safeguarding the consistency and the continuous development of law. In other words, it supports the Courts’ role as guides and avant-garde.

The selection of cases is more representative and the reduction of the Courts’ work-

load more effective.

The decision between the two methods of selection is to a great extent a political one. It involves social, economic and sometimes even historical considerations. Nevertheless, I am of the opinion that in cases where - for budget reasons - the individual interest in a full third instance and the public interest in the consistency and development of jurisdiction cannot be equally satisfied the latter must be given priority.

Developing general guidelines is not only important in administrative law where one of the parties is regularly an administrative authority or public body which often has to decide on a large number of similar cases.

It is also important in civil law where for example disputes on standard business conditions or issues of consumer protection may not involve a high amount of money in the individual case but may have far-reaching consequences on a vast number of legal transactions.

Moreover, the selection based on fundamental importance does not completely ignore the individual interest. It certainly includes cases which may lack general relevance but involve obvious errors, substantial procedural deficiencies or the violation of fundamental rights.

And it also goes without saying that in a multi-levelled jurisdiction the legal protection provided by the courts of first and second instance is - under normal circumstances - absolutely sufficient to safeguard individual case justice.

Talking of the lower instances we should not forget that the selection of cases does not begin with the access to the Supreme Court but already starts at the appeal level. In administrative law the requirement of leave for appeal was introduced in 1996. Before that time all concluding judgments of the administrative courts of first instance were open to appeal. Today the criteria for the selection of appeal cases are more or less similar to those for revision. Leave is necessary and in addition to the grounds already mentioned in connection with revision the court of appeal also grants leave if a case is especially difficult or if there are serious doubts as to the correctness of the lower court's decision.

In civil law leave of the court of first instance is only required if the sum in dispute does not exceed 600,- €. Disputes involving higher amounts of money are always open to appeal. Certainly, this less restrictive selection at the appeal level is another factor which leads to the comparably high workload of the supreme instance in civil law matters.

In contrast to that the administrative jurisdiction had the problem that after introducing the requirement of leave in 1996 the access to the appeal instance became too restrictive. The reason was that - originally - leave could only be granted by the courts of appeal themselves. The lower courts were not entitled to include a decision of leave in their concluding judgments. Subsequently, it soon occurred that the courts of second instance were very reluctant to grant leave. Consequently, the caseload of some courts of appeal, mainly in the western part of Germany, decreased - not only significantly but even alarmingly - which had certain effects on the caseload of the Federal Administrative Court as well. As a consequence, the code of procedure was reformed again. Now - since 2002 - both, the courts of appeal and the courts of first instance, may grant leave for appeal.

The German Constitutional Court has held such methods of selection as compatible with the constitutional guarantee of effective legal protection and the rule of law on the condition that the access to legal remedies is not completely restricted and fundamental rights - esp. the guarantee of equal treatment - are observed.

It should be noted however that the access to the Federal Constitutional Court is not dependent on a leave or some other criteria of pre-selection. As a consequence, the Court has to cope with a vast number of - mostly unfounded - constitutional complaints. Since on the other hand the number of judges is limited to 16 the signature is often the only part of a decision actually stemming from the judges while the research and drafting is completely done by assistants. The judges just do not have the time to occupy themselves with every individual case. They have to concentrate on the more important constitutional complaints. Hence, you might say that the selection criterion of fundamental importance does not regulate the access to the Federal Constitutional Court as such but its internal assignment of responsibilities.

An external selection might be worth of discussion as well, yet the German constitu-

tional jurisdiction is not multi-levelled and thus a restriction would mean to exclude some cases from this jurisdiction at all.

Following the title of this conference "*The role of Supreme Courts in European Constitutional Systems - Time for a change ?*" I have tried to show in the foregoing that in Germany certain important changes in the function of Supreme Courts have already taken place. In our modern codes of procedure priority has been given to the Courts' role as guide and avant-garde while the responsibility to safeguard individual case justice was more and more left to the courts of first and second instance.

Although this approach was quite successful recent developments - especially in administrative law - go into the opposite direction.

For reasons of accelerating the proceedings the legislator is assigning more and more original competences to the Federal Administrative Court. In these cases the Court's scope of judicial review is not limited to points of law but comprises the establishment of facts as well. The panels have to do on-the-spot inspections, hear evidence, interrogate witnesses and experts. In short: They are occupied with all those procedural complications you think to have left behind when you are appointed as a Federal Judge. Although I do not want to deny that sometimes this more lively part of our work can be enjoyable as well.

Formerly, the Court had original competence only in very exceptional cases, for example in all non-constitutional litigation between the "Länder" and the Federation or in cases concerning disciplinary matters of the secret service. Later, after the German re-unification, the scope of original competences was extended to infrastructural projects within the "new Länder" (roads, highways, airports etc.) in order to facilitate the modernization of East Germany's road network. At first this competence was to be valid only for a transitional period but the concept proved to be successful and now the validity has been elongated and it is even planned to extend the Court's original competence to certain planning projects in the "old Länder" as well.

You see what happens to a Court which is working too efficient !

I am not at all happy with this development because, as I said before, a Supreme Court should be able to concentrate on its actual role. Original competences not only deprive the citizens of at least one instance, they also require significant staff, time and budget resources.

Recently the Federal Administrative Court had to decide on the planning permission for the enlargement of the "Berlin-Schönefeld Airport".

Since the workload could not be done with the existing equipment, the Court had to institute a special "Schönefeld" department, employ additional staff, furnish extra rooms and create new admission procedures for the public hearings. Moreover, a whole senate was occupied with the matter for more than a year. The hearings took several weeks and when the first decisions were published in June this year they covered 260 pages each.

Admittedly, the enlargement of an airport is rather exceptional and not comparable to the construction of a by-road or even a highway. But there are still many roads to modernize in Germany and in the end many roads may well make an airport.

In judicial respect the original competence of the Supreme instance is not required in these cases. The courts of appeal in the "old Länder" have longstanding experience in planning law and as regards the jurisdictions in the "new Länder" it is time to provide them with the opportunity to gain that experience too. There is no reason to assume that the lower courts will not be able to handle huge building projects correctly. Not to forget that these courts are closer to the affected regions.

Finally, - especially in respect of far-reaching projects - the claimants should not be deprived of a second instance even if the opportunity to apply for revision will render the proceedings more time-consuming. Vesting a Supreme Court with original competences always means to give up the multi-levelled system for the respective branch of law. In a one-levelled system, however, a supreme instance is deprived of its special functions.

The acceleration of proceedings is clearly a fine thing but it is not an end in itself and should not be realized at the expense of an approved role allocation.

Another factor which has influenced the role of the Supreme Courts is the European unification. In relation to issues of Community law and in relation to the guarantees laid down in the European Convention of Human Rights the national Supreme Courts are no longer the Supreme instance. They have to respect the legal opinions of the European Court of Human Rights and are subject to the decisions of the European Court of Justice. They are even obliged to initiate a ruling of the ECJ when the requirements for a preliminary ruling procedure are given.

At first sight this appears to be a fundamental restriction of the Courts' judicial powers. At a closer look however the changes are not as dramatic. In practice there are only very few reference procedures per year. Thus, the Supreme Courts' leading role on the national level is not put into question. And the obligations under European law are not so much a restriction as an enrichment of the Courts' functions. With the opportunity to promote the development of Community jurisdiction via the preliminary reference procedure the Supreme Courts have taken on not a minor but a new role. In addition to their role as leading actors on the national stage they are now co-actors on the European stage.