APPELLATE JUDICIAL ISSUES
CASE ALLOCATION AND THE RULE OF LAW

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Sir Ivor Richardson has been the Counsellor and a supporter of the New Zealand Association of Comparative Law since its inaugaration. He has shown his keen interest in comparative law in many debates during seminars held by the Association. It, therefore, seems to be opportune to introduce the session on Appellate Judicial Issues by giving an overview of the role of the Judge in another legal system. Which other legal system would be more appropriate for me than to choose the German one! However, there is, besides my personal reason for choosing the German legal system, also a real legal one.

I INTRODUCTION

The real force of the law, the extent of justice, and the freedom that the German Constitution (Grundgesetz- "GG") guarantees, can only be guaranteed by an independent judiciary.[1] Human rights as stipulated in articles 1 to 20 of the Grundgesetz are the objective value system to which Germany adheres and which applies to all areas of the law.[2] Court organisation, the jurisdiction of the courts, and the function of the Judge are important areas, which demanded attention in the Grundgesetz, by the Constitutional Court and commentators since they are instrumental to fulfil the Grundgesetz's constitutional idea that human beings have their own value and that freedom and equality are basic values of state unity.[3] Part IX (articles 92-104) of the Grundgesetz deals with the administration of justice by the judiciary. When drafting the Grundgesetz the drafters were aware that the best guarantee for a State that adheres to the rule of law and human

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1 See BT Dr VI/3080, 51.

2 See BVerfGE 7, 175 (189); BVerfGE 2, 1 (12).

3 BVerfGE 2, 1 (12).

rights would be a strong third force - a strong judiciary.[4] The Grundgesetz provides for not only the organisation (article 94) and the jurisdiction of the Constitutional Court (article 93), but also states the general, and on first sight, quite obvious "fact" that Judges are administering the judicial power (article 92). Especially interesting, however, in light of this session of the Conference, are articles 97 and 101 I 2.

Article 97 I GG states:

> Judges are independent and only answerable to the law.

This article seems to state the obvious and does not seem to indicate any differences in either the position or the tasks of Judges in New Zealand and Germany.

However, article 101 I 2 GG which states:[5]

> [n]one shall be deprived of his/her lawful Judge,

might put a different slant on article 97- the phrase "lawful Judge" will be quite unfamiliar to the New Zealand audience.

Most would agree that the qualities of an independent judiciary are that it is not under some sort of political pressure, that its Judges are not related to the parties in front of them[6] - in other words that its Judges are impartial. Independence also means a reasonable salary and no dependence of any form to the executive or legislature.[7] However, does an independent Judge need to be someone who has been "arbitrarily" allocated to a case? "Arbitrarily" in this situation means that there is a system in place that allocates each individual case to a Judge in accordance with criteria, which have been specified in advance. This is what article 101 I 2 GG is about. It requires the courts to develop criteria that automatically allocate a claim to a Judge when it arrives at the court's doorstep. In other words: in Germany one has been allocated the Judge before committing the crime, before the proceedings have been launched. The system has to ensure that Judges cannot be allocated *ad hoc* and *ad personam*.[8]

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4 Bruno Schmidt-Bleibtreu in Bruno Schmidt-Bleibtreu, Franz Klein, and Mitarveit von Hons Bernhard Brockmeyer (eds) *Kommentar zum Grundgesetz* (9 ed, Luchterhand, Neuwied, 1999) 1409.

5 A similar guarantee was already to be found in the French Constitution of 1791 and most German State Constitutions in the nineteenth century.

6 Controversial, however, might be whether they can be related to the legal representative of the parties.

7 For example, for courts to have their own budget independent from the Ministry of Justice.

8 BVerfGE 82, 159 (194).

Before I give a description of the constitutional justification for this article, I will briefly explain how this "lawful Judge" is determined and outline a couple of pertinent decisions.

II DETERMINATION OF THE "LAWFUL JUDGE"

The "lawful Judge" is partly determined by the various procedural codes (civil, criminal, administrative), which decide upon broad jurisdictional issues. For example, § 25 ZPO (Civil Procedure Code) states that the jurisdiction for immovable property lies with the court where the immovable is located; § 9 StPO (Criminal Procedure Code) provides that jurisdiction lies with a court where the accused has been apprehended. The Judicature Act (GVG) provides which is the appropriate level of court (ie district or high court[9]).

§§ 21-21i GVG are for the purpose of this paper of special interest. This part of the GVG requires every court to form a "Präsidium" which is the court's management group. It consists of the president of the court as chairperson and a certain number of elected Judges (the number depends on the overall number of Judges at the court). According to § 21e GVG it is the task of the Präsidium to develop the management plan (Geschäftsverteilungsplan) for the court for the financial year ahead. This management plan states the criteria according to which cases are allocated to Judges. The Federal Constitutional Court has decided that the management plans have to be so detailed that the possibility of manipulating the allocation of cases is excluded. They should exclude the possibility that Judges are chosen according to subjective criteria rather than general objective criteria.[10] The Constitutional Court has held that even the mere possibility of manipulation infringed article 101 I 2 GG.[11] However, this strict view of article 101 I 2 GG has been criticised by academics and practitioners who suggest that the correct test is that the opportunity to manipulate has actually been taken advantage of.[12]

The management plan can be accessed through the court's registry. A typical management plan for the year 2002 is the one of the Landgericht (High Court) in Braunschweig (a city comparable in size with the greater Wellington area). The High Court deals with serious criminal matters (murder, rape, white collar crimes), civil matters

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9 See, for example, Judicature Act (GVG), § 23.

10 BFH (Bundesfinanzhof) (21.02.1964) in NJW 1964, 1591; Adolf Arndt *Die Gesetzlichkeit des Richters* DRIZ (1959) 171. Subjective criteria would be, for example, the party political affiliation of a Judge or his/her age. Individual judicial expertise in a particular field is not necessarily a subjective criteria, if the criterion is used in a general way. For example, all cases involving medical misadventure will be allocated to Judge X would pass muster.

11 BVerfGE (24.03.1964) in DRIZ (1964) 175.

12 Compare: Hans Bohlmann, *Der"gesetzliche Richter" in der Praxis* DRIZ (1965) 149; BFH (21.02.1964) in NJW 1964, 1591(1592).

with a case value above DM 10.000 and appeals from the District Court. The Landgericht Braunschweig has 55 judges available to it. The Präsidium decided to form 12 chambers (comprised of three Judges) for civil trials and 11 chambers (also comprising three judges) for criminal trials. It then decided in regard to civil matters to allocate certain subject areas to certain chambers. If a civil matter does not fall into one of the subject areas then it will be allocated to the next free chamber, which is determined by a points system. In regard to criminal matters, the chambers are all allocated a certain district. The plan also deals, for example, with substitution during illness and holidays, and who is responsible in a case of a retrial.[13] The management plan is twenty-four pages long and is renewed every year to take account, for example, of shifting workloads or retirements. These management plans are driven by the requirement of article 101 I 2 GG that everyone has a right to his/her lawful Judge. This gives the management plan a different focus than management plans which are driven by monetary viability, the efficient use of its staff, or fair workload distribution.

III DECISIONS

Questions about the compatibility of court management decisions with article 101 I 2 GG frequently come before the Constitutional Court[14]. In BVerfGE 4, 412, O was convicted of being an accomplice to fraud by the Munich High Court and sentenced to one year in prison and a fine of DM 10,000. On appeal, the Supreme Court (Bundesgerichtshof) quashed the sentence and ordered a retrial. At the end of the new trial O was again convicted and sentenced to one year in prison. With his new appeal O alleged that he was not tried by his lawful Judge. The trial date had been set by Dr L who had no authority to do so because he was not a member of the responsible chamber. Due to the timing of the trial, the Judges Dr R and O had not taken part in the decision even though they were members of the responsible chamber but at the trial date on holiday or otherwise prevented from taking part. The Constitutional Court held that the constitutional complaint had merits. It held that the ambit of article 101 I 2 GG not only encompassed the Judges presiding over a trial, but also the Judges who administer decisions preparing the decision, for example, the decision as to the trial date if that had an impact on the composition of the court.[15]

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13 Generally, retrials are decided by a different chamber at the same court.

14 The Constitutional Court has two senates. It divides cases between the two senates according to subject matter.

15 BVerfGE 4, 412 (417 et seq).

In another decision,[16] the complaint arose from a jurisdictional dispute between a number of district courts. The first District Court where the claim was originally lodged had declined jurisdiction and referred the proceedings by accident (without checking the jurisdiction) to another District Court that also - objectively - had no jurisdiction. The District Court which would have had jurisdiction declined jurisdiction with the argument that the referral was binding on the second District Court according to the Civil Procedure Code. The High Court upheld that decision. The Constitutional Court held that the claimant had been deprived of her lawful Judge. The second District Court had been arbitrarily chosen since the mistake was not due to some error in the law but due to a geographical error.

An interesting case is BVerfGE 40, 356. In this case, the second senate of the Constitutional Court had to decide whether one of its Judges was eligible to sit on a case-whether he was the lawful Judge in the particular case. The key question was whether the Vice President of the Constitutional Court at the time, Dr Zeidler, had been unlawfully elected for his second term. The decision highlights the awareness of the courts as to how important it is for the confidence of the public to have their "lawful Judge" when in court and also the Court's[17] willingness to examine its own conduct.

To show that the Constitutional Court is not immune from scrutiny and criticism a debate evolved around the election of two new Constitutional Court Judges in 1996. The Constitutional Court Act states that after the Judges' term of office of 12 years they conduct business until their successor is elected.[18] The idea is to ensure that the Constitutional Court can work even if the election cannot be conducted in time. At the end of 1995, the second senate of the Constitutional Court asked the Bundesrat (Federal Council), which is responsible for the election of the Constitutional Court Judges, to postpone the election of two new Judges for a couple of months until 1996 to give the senate the chance to finish a number of complicated cases in regard to the right to asylum. The election was delayed and the decisions rendered in May 1996. This action has been criticised as an infringement of article 101 I 2 GG.[19]

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16 BVerfGE 29, 45.

17 In this case the second senate decided that Dr Zeidler's election to Vice President of the Constitutional Court was lawful. Dr Zeidler did not take part in the decision.

18 The Constitutional Court Act, BVerfGG, § 4 I, IV.

19 For the debate see: Bernd Rüthers "Nicht wiederholbar!" (1996) NJW 1867; Bernd Sangmeister "Manipulierte Richterbank des Bundesverfassungsgerichts in den Asylverfahren?" (1996) NJW 2561.

IV CONSTITUTIONAL PRINCIPLES

What are the underlying constitutional principles? Article 101 I 2 GG is a specific principle deriving from the rule of law and the equality principle. Historically, the right to a lawful Judge was to prevent any influence from the outside especially from the executive.[20] Nowadays, it is also seen as a safeguard against deprivation of the lawful Judge through measures within the court administration.[21] Article 101 I 2 GG, therefore, not only guarantees the subjective right of the citizen to his or her lawful Judge but it also prohibits other State authorities from taking away his or her lawful Judge from the citizen. In addition, it obliges the legislature to legislate the jurisdiction of a Judge, as clearly as possible.[22] The principle of the rule of law commands, inter alia, that the legislature is bound by the constitution and that legal protection is guaranteed. Article 101 I 2 GG is a specific form of the rule of law complementing the duty to provide legal protection for all which would be meaningless if case allocation could be manipulated. Article 101 I 2 GG also emphasises the need for the legislature to implement as clearly as possible rules by which the lawful Judge is determined.

Article 3 GG guarantees equality before the law. Through article 101 I 2 GG, equality is achieved in respect of the citizen's access and treatment by the judiciary. To ensure that nobody gets a more favourable treatment by the judicial system and everybody has the same chance when dealing with the judiciary an objective allocation system has to operate.[23] Otherwise the danger exists that people receive a different treatment from the judiciary without any justification.

V CONCLUSION

The practical translation of article 101 I 2 GG plays a considerable part in establishing the trust of the people in an independent judiciary. Only if a citizen can trust that the case allocation takes place without any regard to his or her case can the citizen be assured of being judged by an independent judiciary.

To compare the New Zealand case allocation system with the German one would go beyond the scope of an introduction and will be the topic of another publication. At this point, I think, it suffices to say that in Germany, the President of a court has not only a

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20 BVerfGE 6, 45 (50); 22, 49 (73).

21 BVerfGE 82, 286 (298).

22 BVerfGE 40, 356 (360, 361).

23 Theodor Maunz in Theodor Maunz and Günter Dürig (eds) *Grundgesetz Kommentar, Band IV-Artikel 91a-146* (Beck, München 1971) Article 101–114; Adolf Arndt *Die Gesetzlichkeit des Richters* DRIZ (1959) 171 (172).

leadership role but also oversees an important constitutional function by presiding over the court's management group which develops the management plan. The idea of the necessity of management plans because of constitutional requirements, that is compliance with the rule of law, and not because of resource and financial management requirements is probably a rather unusual one in New Zealand. However, I think it is worthwhile to discuss.