

Upholding the Rule of Law and Due Process in Criminal Justice Systems

Written Contribution by the Austrian Delegation

The liability of judges in Austria

a) Are judges liable for their acts, for what categories of facts and to what extent? Does the incurrance of liability by judges presuppose the existence of professional misconduct? What categories of faults are laid down by the law (personal fault, jurisdictional fault)?

In principal, judges are liable according to disciplinary law for any culpable breach of their official and private (see infra b.) duties. This liability comprises job-related and private misconduct, i.e. undue delay of proceedings or incorrect adjudication. Though, the latter does not entail that a judge is liable according to disciplinary law for *any* incorrect decision but rather it has to be a particularly aggravated breach of the rules. In addition, judges may also be liable according to criminal law. Also, according to the “Liability of Public Bodies’ Act” the Republic of Austria is entitled to claim reimbursement from judges who have culpably inflicted an injury on whomsoever in execution of the laws (see infra e.).

b) Do judges have a code of professional conduct? If so, what is it and what is its legal value?

The “Richterdienstgesetz” (“Judicial Service Act“, Federal Law Gazette 305/1961, abbr. **RDG**) establishes a number of legal duties of judges in sect. 57 ff. RDG. A breach of these provisions will establish liability according to disciplinary law and – in some cases – according to criminal law:

- General Duties

A judge is under a duty of loyalty to the Republic of Austria and he has to observe the Austrian legal order in any situation. He has to attend to his office diligently and to fulfill the duties of a judge faithfully, impartially and disinterestedly. Insofar as the judge is not acting in his judicial office (in which [s]he is independent and not subject to instructions of higher authorities though liable according to disciplinary or criminal law; see supra a. and infra c.) he has to follow the instructions of his superiors and to attend to the interests of the office in the best way. A judge has to conduct his professional and private life free from blame and to refrain from anything that could impair trust in the exercise of his judicial functions or the integrity of the judiciary. A judge must not belong to any foreign political association. Also, a judge emeritus has to maintain a general attitude appropriate to the integrity of the judiciary.

- Official Secrecy

A judge is sworn to secrecy about any fact that he becomes acquainted with in his office and that should be kept secret in the interest of the public order and peace, national security, international relations, economic pursuits of corporations under public law, the preparation of a judicial decision or in the predominant interest of the contending parties. However, a judge must not keep such matters secret if he has to deliver an official report. If a judge has to appear as witness in court or before a public authority and he cannot tell from the summons whether he will be asked on matters of official secrecy, he has to notify the competent judiciary authority. The judiciary authority has to decide, whether the judge can be dispensed from the duty to keep official secrets. Hence, the competent authority has to balance reasons to uphold secrecy and to testify in court. Therefore, the authority has to consider the object of the trial and the disadvantages the judge might have to face. Still, the authority may dispense the judge from his duty to keep official secrecy under the condition that the public will be excluded when the judge testifies on matters of secrecy. On the other hand, if the judge cannot discern whether he might have to testify on matters of official secrecy, he may appear as witness in court. When he realises that he has to testify on secret matters in course of the hearing, he has to refuse the answer of any further questions. If the court or the public authority have a continued interest in those subject matters they have to file a request with the judicial authority and demand that the judge will be dispensed from his duty to keep official secrets. This duty to keep official secrets is still binding when the judge is off duty or retired. Also, a judge must not express his views on cases he has to decide in private.

- duty to train “law trainees” and “judicial trainees”

A judge has the duty to train “Rechtspraktikanten” (“law trainees”) and “Richteramtsanwärter” (“judicial trainees” – see infra f.) in accordance with the guidelines and principles of the RDG.

- prohibition of the acceptance of gifts

A judge must not accept any gifts or benefits that are given to him or affiliated persons with (direct or indirect) respect of his conduct of judicial functions. Also, a judge must not procure any gifts or benefits from his conduct of judicial functions.

- presence at court and further duties

A judge has to organise his presence at court in such a way that he can duly fulfil all his judicial and official duties. Hence, a judge has to reside in a place from which he can easily and without any special effort reach court and fulfil his functions. Also, a judge has to notify the court on his address and contact details. Whenever a judge will be away from his residence for more than three days he has – as far as possible – give contact details to the court so that any official communication may be conveyed to him. Whenever a judge is impeded to fulfil his duties due to illness or other special circumstances he has to inform the court with no delay and certify the reasons for absence upon request. A court may order a judge to undergo medical inspection if he is ill. Note that absence because of illness or justified special circumstances is not regarded as leave and will have no effects on salary or promotion.

- By-occupation

A by-occupation is any occupation that is pursued by a judge apart from his judicial occupation or a secondary activity (see infra). A judge must not pursue any by-occupation that compromises the dignity of his judicial office, that hinders him to fulfil

his judicial duties, that may cause reasonable suppositions of bias, or that may compromise other important official interests. If a judge pursues a by-occupation – apart from scholarly activities – he must not give any information about his judicial office and has to safeguard that no other person will do so. If a judge had to devote so much time to the by-occupation that he wouldn't be able to fulfil his judicial duties he must not pursue that by-occupation. When a judge works part-time or is on leave to care for a handicapped child he must not pursue any by-occupation if the efforts devoted to the by-occupation contradict the reasons for the reduction of his workload. Also, a judge must not be a member of an executive board, a governing board or any other organ of a private organisation with gainful intent. If a judge is a member of a board of any other private organisation he – or any other person – must not receive a remuneration. Further on, an active judge must not act as a court expert or sit upon a tribunal (a court of arbitration according to the Code of Civil Procedure). If a judge pursues a by-occupation, he has to notify the competent judicial authority immediately about the nature, extent, begin and completion of that occupation. Also, he has to inform the judicial authority with no delay about any important changes regarding that occupation.

- Secondary activities

A secondary activity is any activity that is not directly linked to the judicial and administrative duties of a judge. However, if somebody wants to pursue such an activity it is a legal requirement that he is a judge. Thus, a judge will usually be assigned to secondary activities by the judicial authority. Otherwise, a judge has to obtain consent of the judicial authority. Also, a judge has to obtain consent of the judicial authority if he will pursue the secondary activity while working only part-time. The judicial authority has to refuse consent if interests attended by the judicial authority will be affected.

c) What is the competent authority which can engage their liability? What is its composition and who can bring a matter before it?

Apart from his liability according to civil (see infra e.) and criminal law, a judge is liable according to disciplinary law and has to appear before a disciplinary court. A senate of five judges under the chairmanship of one judge will hear and determine the case. Anyone can file an information against a judge who violated his duties with the disciplinary court (“Disziplinaranzeige” – disciplinary information). Though usually, the judicial authority or the chairperson of the court of the respective judge will notify the disciplinary court about misconduct.

d) What measures can be pronounced against a judge guilty of professional misconduct? Do disciplinary proceedings comply with the adversarial rules? Are there statistical data?

The disciplinary court can admonish the judge, it can bar the judge from the periodical “Gehaltsvorrückung” (advancement to the next salary level) for a certain period of time, or it can decree a temporary cut of salary. Also, the disciplinary court has the power to transfer a judge to a different duty station, or remove the judge to retirement and decree reduced retirement pay. At the most, the disciplinary court can decree the removal from the judicial office. The disciplinary court will institute

contentious proceedings if it does not dismiss the case or if it will not issue only an admonition or a warning.

In Austria, there are about 30-40 disciplinary proceedings per year. The disciplinary courts ascertain professional misconduct in – roughly – half of the cases. The prevalent sanction decreed by disciplinary courts is admonition. However, the courts will impose a fine on accused judges, as well (i.e. exemption from advancement to the next salary level or temporary cut of salary). Also, the courts use their power to transfer a judge to a different duty station or remove him to retirement. Still, the removal from judicial office is imposed rarely.

e) Does the state have the possibility of bringing actions for indemnity against judges having committed a fault? If so, according to what procedures can it do so? Are there statistical data?

According to Art. 23 B-VG and sect. 1 Amtshaftungsgesetz (“Liability of Public Bodies’ Act”; abbr. **AHG**) the Republic of Austria is liable for the injury which judges have culpably inflicted by illegal behaviour on whomsoever in execution of the laws (that means within the scope of their official duties in court) and if this injury could not be averted by legal remedy. However, no claim for any indemnity can be based on any ruling of the Constitutional Court, the Supreme Court and the Administrative Court (sect. 2 para 3 AHG) except for cases of state liability for a breach of a rule of community law or of the ECHR.

Provided that the Republic of Austria has indemnified the injured person, it is entitled to claim reimbursement from the persons who acted as its organs and committed or caused the respective violation of the law with intent or gross negligence (sect. 3 AHG). If the Republic of Austria and the organ cannot reach a settlement the Republic may assert reimbursement by action in labour court. In case the organ committed or caused the violation of the law grossly negligent the court may mitigate such reimbursement on grounds of equity (usually 5/7 of the sum of indemnity).

There are no exact statistical data on the occurrence of reimbursement claims. From experience, there is on an average one reimbursement claim against a judge per year. Usually, a settlement out of court will be reached and a part of the claim will be satisfied by the professional liability insurance of the judge. The filing of an action against a judge is uncommon.

f) What professional training to judges receive? Is this training given at a school reserved for judges or else at an institution attended by other legal professionals, such as barristers?

The training of prospective judges (“Richteramtsanwärter”, “judicial trainees”) in legal and non-legal matters takes four years. In this period, prospective judges work and receive training at different courts and the public prosecution office, also they will attend internships in a law office, at a public notary, or in detention centres. Further on, they have to attend courses, which are given in – among others – judicial training centres. However, there is no special school reserved for judges.

The presidents of the four courts of appeal, the professional representations of judges and public prosecutors, and the Federal Ministry of Justice provide for further

education of judges. However, there is nothing like a “judicial academy” as a central institution of further education, in Austria.

The Federal Ministry of Justice and the “Fortbildungsbeirat” (“Advisory Board on Further Education”) organise a yearly program of further education on the basis of evaluation of educational programmes and needs and the constant observations by the competent departments of the Courts of Appeal. The “Fortbildungsbeirat” is an advisory board with members from the Supreme Court, the Courts of Appeal, the “Oberstaatsanwaltschaft” (“HigSenior Public Prosecution Offices”), and the professional representations of judges and public prosecutors. This board will organise a program of further education considering current needs and interests in the legal and non-legal fields. Also, the board will see that there is a balance of subject matters and regional coverage. All judges and public prosecutors will receive a copy of the program of further education. In addition, further seminars or conferences will be organised at short notice if there is a justified need due to current events.

The program of further legal education comprises seminars on changes and developments in civil law, civil procedure, criminal law, labour law, social security law, non-contentious proceedings, law of inheritance, laws of family and domestic relations, laws of tenancy and condominium, commercial law, laws on execution and insolvency, traffic law, insurance law, financial crime etc. Also, matters of European Law will be covered in the context of each subject. Further on, further legal education comprises fundamental and human rights, anti-discrimination etc.

Non-legal seminars will usually cover topics like rhetoric, communication skills, psychology, conflict resolution, citizen based behaviour and attitudes, mediation, time- and human resources-management, procedural economy, public relations, media training, information technologies and foreign languages.

Usually, it is assumed that judges and public prosecution have a broad knowledge about the circumstances and living conditions of the people that appear in court. Still, it is an important concern of further education programmes to deepen the knowledge and understanding about these issues. Thus, seminars and workshop on violence (with a special focus on sexual violence against/abuse of women and children), human trafficking, organised crime, unstated xenophobia and other issues on the social context of cases before court supplement the educational program.

It is to be noted, that judges and public prosecutors have the opportunity to take professional supervision/counselling and that the Federal Ministry of Justice will pay a part of the fees.

Apart from the seminars and trainings mentioned before, the Federal Ministry of Justice organises special courses, i.e. a course for judges in non-contentious proceedings or family law. This course shall improve the qualifications of judges who have to deal with particularly difficult situations of conflict, e.g. child custody. A new course on human resource management was just launched, and a course for judges and public prosecutors concerned with juvenile crimes is in preparation.

The lecturers in the above mentioned seminars and courses are mainly judges and public prosecutors. The non-legal topics are covered by external experts.

In addition to the educational activities of the judiciary, the Federal Ministry of Justice and the professional representations encourage judges and public prosecutors to

attend courses and conferences at universities, private institutions or foreign judicial institutions.

Judges are not obliged to attend further educational programs. However, the general duties of a judge as laid down in the RDG comprise an order to study further. Thus, about 73 % of all judges active in Austria attended programs of further education in 2004.

g) Are judges dealing with cases of under-age victims specialised in this field? Assuming that they are specialised judges, how many of them are there and how is this specialisation acquired?

In Austria, there is a special competence for sex crimes (including under-age victims) and a special competence for juvenile delinquents respectively “young adults” in criminal courts. However, the age of the victim is no specific criteria for judicial competence.

h) Do public prosecutors and judges belong to one and the same body or to two separate bodies?

Public prosecutors and judges receive the same training and belong to the same salary class, though they are subject to different public services laws (“Dienstrecht”). In the performance of their duties, public prosecution offices are independent from the courts in all instances. Though, public prosecution offices and courts will often occupy the same building. Note, that nobody can be a public prosecutor and a judge at the same time. However, it is possible, that a judge applies for the office of a public prosecutor after a certain time of professional practice and vice versa.