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

Written Contribution by the Austrian Delegation

The Criminal Proceedings in Austria at a glance

1. The judicial investigation

a) Is the judicial investigation led by a judge independent of the executive branch or by public prosecutors? What material and legal means are available to them?

The applicable "Strafprozessordnung" ("Code of Criminal Procedure", abbr. **StPO**) is based on a crucial distinction between "Vorerhebungen" (preliminary proceedings) and the "Voruntersuchung" (preliminary investigations). The preliminary proceedings are conducted by the "Staatsanwalt" (public prosecutor) whereas the preliminary investigations are conducted by an independent "Untersuchungsrichter" (investigating judge). It will be useful to explicate the guiding ideas of this distinction by some (introductory) references to their constitutional foundations:

> According to the Austrian "Bundes-Verfassungsgesetz" (Federal Constitutional Law; abbr. **B-VG**) judges are independent in the exercise of their judicial office (Art. 87 para 1 B-VG). Judges can only be removed from office or transferred against their will or superannuated in the cases and ways prescribed by law and by reason of a formal judicial decision (Art. 88 para 2 B-VG). There is only one exception, namely that the law on the organisation of the courts will prescribe an age limit upon whose attainment judges will be put on the permanently retired list (Art. 88 para 1 B-VG).
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> On the contrary, offices of public prosecution are administrative authorities separated from the courts. Above all, they shall protect the public interest of the justice in penal affairs. This comprises mainly indictment and prosecution during the trial. This is also the reason why the offices of public prosecution are known as "Anklagebehörden" ("accusation authorities").
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> As public prosecutors are administrative authorities they are as such not independent but organised hierarchically and subordinate to the instructions of the competent higher authority ("Oberstaatsanwaltschaft") and, ultimately, the Federal Minister of Justice. In general, this principle of compliance is one of the basic tenets of the Austrian Constitution. It has its legal basis in Art. 20 B-VG and it is – in our given context – explicated in detail in the "Staatsanwaltschaftsgesetz" ("Public Prosecutor's Act"). Accordingly, instructions by the "Oberstaatsanwaltschaft" or the Federal Minister of Justice concerning actions in a specific proceeding must be justified and issued to the public prosecutors in writing.
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> The Federal Minister of Justice has – as any federal minister – to impart information about matters pertaining to his sphere of competence to Parliament in

so far as this does not conflict with a legal obligation to maintain secrecy. Hence, the hierarchical organisation of the administrative bodies and the principle of compliance are regarded as the counterpart of the minister's responsibility before parliament. To wit, the principle of compliance shall establish a specific coherency of responsibility between parliament and administrative bodies.

Similarly, the members of staff of a given public prosecution authority are under a legal duty to follow the instructions of the head of the authority. However, if an individual member of staff/members of staff regard a specific instruction in a proceeding as unlawful, he/they may request to receive that instruction in writing or he/they may even ask to be relieved from their duty in that penal case. *To sum up: the offices of public prosecution are organised within a system of superiority and subordination. This is necessary insofar as the decisions of the office of public prosecution cannot – contrary to judicial decisions – be impugned by a legal remedy.*

Sect. 2 StPO stipulates the principle of ex officio prosecution. Thus, judicial prosecution of a person on account of a statutory crime requires the act of indictment by the public prosecution office. It is a principle that the public prosecution offices must not conduct their own investigations. In the preliminary proceedings, the public prosecution offices will gather the grounds for an indictment or the dismissal of the charge by submitting (specific) requests to security police authorities and courts (sect. 36, 88, 91, 92, 97 para 1 StPO). In turn, security police authorities and courts are under a legal duty to comply with the requests of the public prosecution offices unless they are unlawful.

When the public prosecution office brings forward a request for a "gerichtliche Voruntersuchung" (preliminary investigations) (which lies – in principal – in the dutiful discretion of the public prosecution office according to sect. 91 and 92 StPO) the "Untersuchungsrichter" (investigating judge) will assume control of the proceedings. The investigating judge may, in turn, delegate certain investigations to the security police authorities or to dictrict courts (sect. 93 StPO). However, the public prosecutors are prohibited on pain of nullity from conducting their own investigations during the entire preliminary judicial investigation (sect. 97 para 2 StPO).

The aim of the preliminary proceedings is to find out whether a criminal procedure shall be initiated at all and who shall be indicted. The aim of the preliminary investigations is to clarify whether the accusation of somebody justifies the action of indictment or whether the charge should be withdrawn. Once the preliminary investigations are closed, the investigating judge has to forward the files to the public prosecutor (sect. 112 para 1 StPO). Upon receiving the files, the public prosecutor must within 14 days either lay down an indictment against the suspect as suggested by the investigating judge or return the file to the investigating judge stating that he does not see any reasons for further proceedings. If the latter case applies, any person who is kept in custodial remand has to be released immediately.

Thus, it is the duty of the public prosecution office to decide on grounds of the preliminary proceedings and the preliminary investigations whether somebody shall be indicted (sect. 207 StPO) or whether a "Strafantrag" (at the district court level; sect. 451, 483, 484 StPO) shall be filed. To wit, it is the duty of the public prosecution office to move a court to decide on questions of guilt and sentence in a trial.

However, the "**Strafprozessreformgesetz**" ("Federal Law on the reform of Criminal Procedure"; Federal Law Gazette I 19/2004) which will be in force from 1 January 2008 will bring forth radical reforms of judicial investigation. From 2008 onwards, there will be a new and unified investigation procedure under the authority of the public prosecution office. The investigation will be carried out in cooperation with the criminal police, and the latter will then have competences of its own. The judicial preliminary investigations will be abolished, in order to overcome the union of investigator and legal safeguard in the person of the investigating judge. Then, the law courts will serve as authorities securing legal protection and lawfulness of all stages of the investigations. The courts – and thus independent judges – will decide on any alleged infringement of fundamental rights (e.g. custody, search of a house, bodily search etc.) or any refusal of procedural rights or any infringement of (other) subjective rights by the criminal police or by the public prosecution office.

b) When the examining judge wishes to organise an examination of the respondent, is the presence of a barrister mandatory, on pain of nullity? Can the respondent relinquish his right?

Sect. 97 para 2 (applicable) StPO stipulates that neither the defence counsel nor the public prosecutor shall – as a general rule – be present when the investigating judge is interrogating the respondent or witnesses. However, a joint ordinance of the Federal Ministry of Justice and the Federal Ministry of the Interior on the presence of a lawyer at the questioning of a suspect states that a suspect has the right to inform his lawyer and ask for the presence of his lawyer when he is interrogated by the police. Hence, the Federal Ministry of Justice has recommended that the judiciary shall not apply sect. 97 para 2 StPO in the strictest sense.

On the contrary, the "Strafprozessreformgesetz" will secure the right of the suspect to bring his defence counsel to the interrogation (sect. 164 para 2 new StPO). This right may only be refused if the presence of the defence counsel may compromise the investigation or the evidence. Still, if the presence of the defence counsel is refused on this grounds there shall be an audio or video recording of the interrogation.

c) Can barristers dispute the content of the official report of the confrontation or of the examination and, if so, can they appeal if the judge refuses to meet their request?

There has to be a report of proceedings on any judicial interrogation. The investigating judge has to dictate the report of proceedings to a recording clerk if an audio recording has not been ordered (sect. 101 and 104 StPO). Then, the judge must present the report to the suspect who can demand appropriate corrections and who has to authorise each page with his signature (sect. 106 StPO).

Furthermore, the suspect and his defence counsel have the right to examine the reports of proceedings and to make copies of the reports. If the investigating judge does not grant a demand for corrections of the report, the suspect can file a complaint with the "Ratskammer" (a senate of three judges at the court of first instance that decides about complaints in the preliminary investigations). Note that the decision of the "Ratskammer" is final (sect. 113 StPO; cf. infra d).

If the correctness of the report of proceedings is disputed in the trial the investigating judge and the recording clerk can be heard as witnesses.

d) Can barristers ask the judge for complementary investigative acts? Can the judge refuse and, if so, must he justify his decision? Can his decision be appealed against?

According to sect. 97 para 1 StPO the public prosecutor as well as the suspect can motion the investigating judge to take further evidence. If the investigating judge does not grant such a motion he has to decline it by means of a reasoned decree. Again, the public prosecutor respectively the suspect can file a complaint against this decree with the "Ratskammer". Note that a refusal of a motion to take evidence may not be grounded solely in the – rather strict – conditions applicable in the trial, as "provisional" evidence will usually be necessary in the preliminary investigations. However, it is a condition that a motion to take evidence has to specify which evidence can reasonably be expected.

In contrast, the accused or the suspect may only suggest specific investigative acts in the preliminary proceedings but he cannot demand any judicial decision on that matter. However, the public prosecutor is under a legal duty to act impartial and to pursue exculpatory and incriminating facts with the same rigour (sect. 3 StPO).

The "Strafprozessreformgesetz" and thus the new procedure of investigation will provide for a right of the suspect to file a motion to take evidence with the investigating criminal police, already (sect. 55 new StPO). If neither the criminal police nor the public prosecution office comply with such a motion the suspect has the right to protest before court.

e) According to what practical and legal procedures can barristers access the procedural file? Is a full copy made available to them? If so, are the costs of photocopying to be paid by the client?

The suspect (or if [s]he is legally represented his defence counsel) has according to sect. 45 para 2 StPO the right to access the files and to make a transcription during the preliminary proceedings and the preliminary investigation. Also, the investigating judge may provide the defence counsel with photocopies from the file. If the suspect has been granted legal aid, his defence counsel will receive the copies free of charge.

Still, the investigating judge can hold back specific documents of the file before the indictment is issued if the judge can justify fears that knowledge of the contents could compromise the investigation. Once the indictment has been issued a restriction of access to files is not permissible.

The court has to give free copies of the records of judicial inspection, findings and opinions by experts, public authorities and public offices and documents that are subject matter of the crime to the suspect or his defence counsel upon request. Also, the defence counsel may request that the court issues the order of arrest (cum grounds of arrest) and all judicial decisions against which the suspect has lodged an appeal.

Also, the court is under a legal duty to serve the public prosecutor and the defence counsel immediately with copies of all documents that are relevant for the assessment of the suspicion or the grounds for arrest (sect. 45 StPO).

f) Can the investigating judge call on experts? How are they appointed?

Experts are independent persons who testify in court because of their expertise in a certain field. They have to adhere to the truth when they report about their observations ("Befund", report) and the conclusions they draw from facts ("Gutachten", opinion). Thus, the work of an expert shall enable the court to evaluate ascertained facts. The expert is neither a judicial or an administrative organ. To wit, the expert acts as personal evidence comparable to a witness. Hence, the expert has to answer matters of fact and not matters of law; adjudication remains the domain of the court.

The investigating judge is entitled to appoint an expert by decree (sect. 119 para 1 StPO). He has to choose an appropriate expert from the list of sworn and judicially certified experts. The suspect and the public prosecutor have the right to raise objections due to lack of qualification or on account of partiality.

g) Is the professional qualification of experts regularly and independently monitored? If so, what are these monitoring authorities and what measures can they pronounce?

The requirements that have to be met by candidates in order to be received in the list of sworn and judicially certified experts (court experts) are as follows (see sect. 2 para 2 cl. 1 lit a "Sachverständigen- und Dolmetschergesetz" [Federal Statute on Experts and Interpreters], Federal Law Gazette 1975/137; abbr. **SDG**):

- expertise
- sound knowledge of the principles and central provisions of procedural law and matters of court expertise
- skills in survey-design, structuring, writing and presenting a coherent and comprehensible expert's report
- professional practice as demanded by the statute, i.e. ten years of (preferably) professional practice in a senior position in the field of expertise (or in a related field) before application; five years of practice are sufficient if the applicant has successfully completed a university degree or a secondary technical or vocational school or college.
- necessary equipment
- full capacity to contract
- physical and intellectual aptitude
- trustworthiness
- Austrian citizenship (alternatively: citizenship of an EEA-member state or Switzerland)
- ordinary residence or professional residence in the court district of the regional court (court of first instance) at whose president the applicant has to apply for the certification as an expert
- settled financial circumstances
- conclusion of a professional liability insurance.

The competent president of a regional court (court of first instance) is responsible for the procedure of admission and certification of an expert. He will ask an independent commission to submit a professional opinion about the applicant according to sect. 4 and 4a SDG. This commission will consist of three persons and will be presided by a judge. The other members will be appointed by the "Hauptverband der Gerichtssachverständigen" ("Federal Association of Court Experts") and the respective section of a legally established representation of interest, i.e. the Federal Chamber of Commerce. These examiners should – preferably – be active court experts, as well. This commission will document all the stages of the examination process.

Affiliation as a court expert will be solely in the interest of administration of justice. The applicant has no legal claim to be certified as a court expert. Thus, he will only receive a notice about a rejection of the application and no such ruling will be decreed.

The first recording in the list of experts is restricted to a period of five years, and it can be renewed upon application for ten years, respectively (sect. 6 SDG). A renewal (re-certification) is possible if the requirements for certification are still met. Also, if an expert applies for re-certification he has to enclose a list of all cases in which he has delivered an opinion and thus proof his merits. It is possible that the competent president of the regional court asks for an opinion of the independent commission, again.

The presidents of the regional courts observe the requirements for the recording of an expert in the lists of court experts throughout the period of certification. Complaints about an expert can be brought before him by anybody. However, courts and public prosecution offices are under a legal duty to notify the president of the regional court whenever they have doubts about a court expert. The president of the regional court has to remind the court experts to adhere to the experts' code of conduct, as well as to prompt them to attend trainings and further education programs on a regular basis. The president has to initiate a procedure of revocation though, if a court expert does not meet the necessary requirements any more or if he refuses or delays the submission of opinions in unjustified ways.

2. Scrutiny over the judicial investigation and custodial remand:

a) Is the investigation led by the judge scrutinised by a higher judicial body?

Once a preliminary investigation has been initiated it will be solely conducted by an independent investigating judge. Thus, the judicial investigation can only be scrutinised by a superior court if and only if a complaint has been filed. Anybody who considers herself/himself as aggrieved by a decree or delay of the investigating judge while still in the preliminary proceedings, the preliminary investigation or the time in between the indictment and the trial has the right – insofar the law does not hold an exception – to demand a decision of the "Ratskammer" (see supra e.). He may file her request in writing or verbally with the investigating judge or directly with the "Ratskammer". Though, such a request will usually not bar the enforcement of the decree. The only exception to this rule is a complaint against a disciplinary penalty (sect. 113 para 1 StPO). If the complaint is justified but has become obsolete in the

meantime, the “Ratskammer” will rule that the decree or the proceedings were unlawful or that the law was applied incorrectly (sect. 113 para 2 StPO). Note again that the decisions of the “Ratskammer” are final.

Also, it is important to note that all decisions of a court on detention and interim decrees can be contested before the competent court of second instance.

b) What are the legal criteria for placing a person on custodial remand? Which judge can order such a measure, and for how long? Are the proceedings before this judge public?

The public prosecution office can request that the investigating judge issues a written warrant if grounds of arrest or founded suspicion are given and applicable. However, security police officers can arrest a person without a judicial warrant if they catch him in the very act or if there is danger ahead. If continued custody (more than 48 hours) is deemed necessary the arrested person has to be transferred to the competent court right away, at the latest within 48 hours upon arrest (sect 177 para 2 StPO). In this case, the public prosecution office has to be notified *before* arrival at the court jail.

The imposition and prolongation of custodial remand presupposes a corresponding request by the public prosecution office. The arrested person must be released immediately if there is no such request. Also, a suspect must not be transferred to a court jail if the ends of detention can be achieved by other means, i.e. deposit of the passport or driver’s licence. If this is the case the relevant documents cum the results of the inquiry/investigation must be handed over to the public prosecutor within 48 hours after the arrest at latest (sect. 177 StPO).

The investigating judge has to hear any suspect immediately (within 48 hours at latest) after he has been brought to the court jail. The investigating judge has to inform the suspect about the accusations against him. Also, the judge has to point out that it lies within the suspect’s discretion to say something on the case or to confer with his defence counsel before.

At the end of this hearing, the judge must immediately declare whether the suspect shall be placed in custodial remand (sect. 179 para 2) or whether alternatives apply (sect. 180 para 5 StPO). The respective order cum grounds must be issued to the suspect and the public prosecution office. Any appeal against this decree has to be brought before the court of second instance.

This order and its grounds have to be pronounced to the suspect immediately. The written order must be served upon the detainee within 24 hours. The detainee has the right to complain before the court of second instance within 14 days of service (sect. 179 StPO). Such a complaint must be submitted by a defence counsel (sect. 41 para 1 cl. 3, para 3 and 4, sect. 42 para 3 StPO).

If the investigating judge decides that the suspect ought to be released, he has to do so at once. The written decree must be served upon the public prosecution office within 24 hours. A complaint against this decree by the public prosecution office will have no suspensive effect.

Custody on remand is only admissible upon request of the public prosecutor (sect. 180 para 1 StPO) and if a preliminary investigation is conducted or if the suspect has been indicted. Further on, there has to be a strong suspicion that the suspect has committed a crime. In addition, there must be well-founded reasons to keep the

suspect in detention (see sect. 180 para 2 and 7 StPO: i.e. risk of absconding, risk of collusion, risk of further commission of offences). Also, there must have been an interrogation of the suspect on the matters of suspicion and on the requirements for keeping him in remand. Detention on remand and its prolongation are only admissible if the proportionality to the impending penalty is observed and if the ends of keeping a suspect in custody cannot be achieved by other less intrusive means.

It is a principle that the preliminary proceedings are not open to the public.

c) Must the situation of the person placed on custodial remand be periodically re-examined by this judge?

The investigative judge's initial decision to impose detention on remand is – according to sect. 179 para 1 StPO valid for 14 days upon arrest. It is a principle that decisions to impose or to prolongate detention on remand as well as decisions of the court of second instance to prolongate detention on remand (sect. 182 para 4 StPO) are valid *only for a fixed period* ("Haftfrist"). The last day of this period must be asserted in the decision. A hearing on the justification of further detention ("Haftverhandlung") has to be held each time before the maximum period expires. Otherwise the detainee must be released (sect. 181 para 1 StPO).

The period of detention is 14 days upon arrest. The first prolongation is valid for one month and every ensuing one is valid for two months upon decision (sect. 181 StPO).

The investigating judge conducts the hearing on further justification of detention. It is a contentious proceeding and closed to the public. The suspect, his defence counsel, the public prosecutor and a probation assistant must be notified. The suspect will be brought before the judge unless he is ill. Also, he has to be represented by a defence counsel (sect. 182 para 1 and 2 StPO).

The hearing starts with the public prosecutor's motion on and justification of prolongation of detention. The suspect and his defence counsel may deliver a replication. If a probation assistant has been appointed he may comment on the necessity of detention. The investigating judge may hear witnesses or take evidence upon request of the public prosecutor, the suspect, or the defence counsel. The judge may also do so ex officio. The public prosecutor, the suspect and the defence counsel have a right to query and may request further declarations by the court. Also, the suspect or the legal counsel have the right of the concluding statement in the hearing. Then, the investigating judge will make a decision and pronounce it immediately. He has to issue the decision in writing, afterwards (sect. 181 para 3 StPO).

An ongoing period of detention ends two months after the indictment has become legally binding or the trial has been arranged. If the (sole) judge decrees the trial at the time of the initial period of detention (14 days upon arrest), this period will cease one month upon the decree. If the period of detention would elapse before the trial begins and if the suspect cannot be released the (sole) judge has to arrange for a hearing on the justification of further detention. The same case applies if the detainee submits a request for release and if a decision cannot be reached without delay in the trial itself (sect. 181 para 3 StPO).

The suspect has the right to waive another hearing on the justification of further detention once there have been two such hearings, already. In this case, the judge

can decide in writing and without any hearing (sect. 181 para 4 StPO). Once the trial has been opened there are no further ex officio hearings on the justification of further detention and the detention on remand is not fixed to a period of time any more (sect. 181 para 5 StPO). However, there have to be hearings on the justification of further detention if the detainee submits a request for release.

Note that certain provisions set absolute time limits for detention on remand before the opening of the trial. Sect. 194 StPO stipulates that detention on the sole ground of danger of collusion (as stated in sect. 180 para 2 n. 2 StPO) must not exceed two months. Also, the detainee must be released, if the trial hasn't been opened yet and if he has already been detained for six months on grounds of suspicion of having committed a minor case ("Vergehen"), respectively for one year on grounds of suspicion of having committed a crime punishable by a maximum deprivation of liberty of more than three years, respectively for two years on grounds of suspicion of having committed a crime punishable by a maximum deprivation of liberty of more than five years.

In any event, the court can hold up detention on remand for more than six months if and only if this can be justified due to the gravity of the grounds for detention, or due to the (qualitative and/or quantitative) complexity of the case (sect. 194 para 3 StPO).

Note that all public authorities involved in the case are under a legal duty to ensure that the detention on remand is kept as short as possible (sect. 193 para 1 StPO).

d) What is the proportion of persons placed on custodial remand with respect to the total number of respondents?

The proportion of persons placed under custodial remand during preliminary proceedings on the regional court level[1] is 44,9 % in criminal proceedings against known/identified defendants. The proportion of defendants who are kept under detention is 23,81 % in cases before a sole judge of a regional court and 90,38 % in cases that are tried before a court of judge and jury or before a jury.

e) Does the payment of a bail or placement under court supervision form an alternative to custodial remand?

A suspect must not be kept in custodial remand, just as well as custodial remand must not be prolongated if the ends of detention can be achieved by imprisonment at the same time, other forms of confinement, or less intrusive means. The latter can be (sect. 180 para 5 StPO):

- a solemn declaration of the defendant not to abscond until the legally binding completion of the trial and not to leave his residence without approval of the investigating judge,
- a solemn declaration not to interfere with the evidence
- the order of the investigating judge not to reside at a certain place, not to visit certain places, not to meet certain people, to stay away from alcoholic beverages or narcotics or to work in an orderly way

[1] The regional courts are competent to decide in all cases of alleged crimes punishable by a maximum deprivation of liberty of more than one year.

- the order to inform the public authorities about any change of residence, or the order to report to the court or other public authorities in certain intervals
- upon approval of the defendant: the order to undergo detoxification, psychotherapy or medical treatment
- the temporal deposition of the passport or the driving license at court
- the payment of a bail
- the provisional appointment of a probation assistant according to sect. 197 StPO.

In principal, detention on remand can be averted by a bail and a solemn promise if and only if risk of absconding is the only reason for detention (sect. 190 para 1 StPO). According to this, a bail shall merely assure that a suspect will not abscond from criminal proceedings or the execution of the sentence because of the imminent threat of forfeiture of the bail. Thus, the judge has to designate the bail according to the gravity of the alleged criminal offence, the personal and the financial situation of the defendant.

3. The liability of judges and their training in question

a) Are judges liable for their acts, for what categories of facts and to what extent? Does the incurrence 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 then 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 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 juveline 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.