

The judicial workplace and the intersection with judicial independence

Answers from Austria

Vereinigung Österreichischer Richterinnen und Richter (RIV)
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1. A Appointment to judicial office

a) Pre-Appointment – Selection for the Judicial Preparatory Service

The Austrian judiciary preferably employs people whom it has trained itself. Hence, in many cases the process leading to appointment as a judge in the years to come begins as soon as the law degree is completed. It is a legal requirement for the core legal professions that a seven month traineeship must be completed in various courts (judicial practice or court practice). This applies to lawyers, judges and notaries alike. Many graduates of a law degree program start judicial practice immediately afterwards. However, there are also some who gain relevant professional experience beforehand.

When applying for court practice, one has to announce whether one is seeking to be accepted into the judicial preparatory service. In order to be admitted to the judicial preparatory service, several requirements must be met. These are¹

- Austrian citizenship
- full capacity to act
- unrestricted personal and professional aptitude, including the necessary social skills for the tasks associated with the exercise of the judicial office
- the completion of a degree in Austrian law and

¹ § 2 para 1 RStDG (Richter- und Staatsanwältedienstgesetz – Austrian Judges and Prosecutors Service Act)

- a court internship as a legal trainee lasting seven months.

The professional aptitude consists in excellent legal skills and the ability to present and decide on legal cases, both orally and in writing. Personal aptitude includes critical faculties, the ability to deal with conflict, communication skills and the ability to work in a team. An understanding of social and economic contexts and their significance for the application of the law is also required.

Whether the personal and professional suitability and aptitude is present is then examined extensively and carefully in the course of the judicial practice, whereby the judicial practice is also extended beyond the seven-month period specifically for this purpose in cases that appear promising. The focus of the selection procedure is on the examination and determination of personal and professional suitability and competence.

In the course of court practice, candidates are assigned to different court departments for a period of one to three months each and are entrusted with various relevant activities. After each assignment, the candidates are described in detail by the respective training judges in an extensive assessment sheet. In addition, several professional examinations are also held during the course. Candidates must also undergo a psychological test. After several months of testing and scrutiny the best candidates are subject to a one hour hearing before a selection committee which is chaired by the President of the Higher Regional Court². A representative of the Austrian Association of Judges forms part of the panel that is asking the questions in this hearing, as well as (one or two) Vice Presidents of the Higher Regional Court, the Chief Public Prosecutor, a representative of the Public Service Union and a representative of the competent Personnel Panel. In order to identify the best talents, an external consultant with years of experience in personnel selection also participates.

The President of the Higher Regional Court then announces the candidates, together with a description on their suitability to the respective External Personnel Panel. The actual appointment is decided upon by the Ministry of Justice upon a proposal by the External Personnel Panel. Although the proposal by the Personnel Panel is not binding, these proposals are regularly followed by the Ministry of Justice.

² § 3 RSIDG

b) Judicial Preparatory Service

Those who are admitted to the judicial preparatory service then continue their education and practical training for a total duration of four years, including court service, as described above. The candidates are assigned to various court departments and also to the prosecutor's office, covering all fields of law and as many judicial activities as possible³. The education schedule consists of an extensive training on the job, rotating every three months to a different court department, as well as comprehensive courses and extra education, study trips and also a four months working experience at an external law firm, working experience within a penitentiary and at a victim protection organisation. After each assignment the candidates are described by their training judges or training prosecutors on their performance in an assignment sheet.

In times of staff shortages there is a possibility for external candidates to apply for the judicial preparatory service, who have already acquired legal practice outside the courts, for example in similar other public institutions or as an attorney. For those candidates the duration of the preparatory service can be reduced down to six months.

After four years of Judicial Preparatory Service, candidates may sit for the Judicial Exam⁴. External candidates who have already passed the Bar Exam or the Notary Exam can take a supplementary examination on the specific aspects of the Judiciary. The Judicial Exam is a comprehensive written and oral examination covering all areas of civil and criminal law relevant to judicial practice. For the written parts of the examination original court files are used.

c) Personnel Panels

In Austria all appointments of judges in the ordinary judiciary are preceded by nominations from two different Personnel Panels.

Personnel Panels are to be formed at the (intermediate) regional courts. The lower (district) courts do not have Personnel Panels. The Personnel Panels at the regional courts consist of the Court President, one Vice President and three electoral members. If more than 100 judges' posts are systematised at a regional court,

3 § 10 RSIDG

4 § 16 RSIDG

including the posts at its subordinate (district) courts, the number of elected members shall increase to five⁵. The elected members are elected every four years by their peers from among the judges of the court and its subordinate courts.

At the higher regional courts (which are superior to the regional courts) and also at the Austrian Supreme Court there are additional personnel panels, which are called the (respective) External Personnel Panels. These external panels provide a second suggestion regarding all nominations for the appointment of judges to their subordinate courts. The External Personnel Panel at the higher regional courts is composed of the Court President, one Vice President and three electoral members. The Supreme Court's External Personnel Panel is also composed of the Court President, one Vice President and five electoral members.

The first recommendation and nomination of every appointment is expressed by the regular Personnel Panel of the respective court, and a second recommendation and nomination is expressed by the External Personnel Panel of the superior court.

d) Appointment

According to article 86 (1) *B-VG*⁶, judges are to be appointed by the Federal President, who has delegated this power to the Minister of Justice regarding posts as a judge of a regional (intermediate) or district (low level) court⁷. A judge can be appointed after having applied for a publicly offered post after the two respective personnel panels (see above) have been asked for their recommendations⁸. The Minister of Justice then makes the decision who to appoint and submits his or her nomination to the Federal President.

In comparison to other European countries, judges in Austria are not appointed within a framework of judicial self-administration, but by the executive (the Minister of Justice), which (or who) in this respect has a strong position from a comparative law perspective. The judicial personnel panels are only granted an advisory function by the constitution. The interaction between the executive power to appoint and the prior consultation of the judicial personnel panels, illustrates one of various attempts by the federal constitutional legislator to resolve the conflict between the demand for

5 § 36 RStDG

6 Bundes-Verfassungsgesetz - the Austrian Federal Constitutional Law

7 BGBl. II Nr. 245/2018

8 § 25 para 3 RStDG

sufficient democratic legitimisation of the actions of the main organs of the judiciary on the one hand and the endeavour to ensure the greatest possible independence of the judiciary on the other⁹.

Eligible for a nomination by a personnel panel and for appointment are only those candidates who fulfill the requirements to be accepted for the Judicial Preparatory Service, have passed the Judicial exam (or Judgeship Exam) and have spent at least four years of legal practice, one year of which must have been spent in the Judicial Preparatory Service¹⁰. When applying to become a judge in an intermediate or superior court, the applicant is usually already a judge. Each appointment proposal shall, if sufficient suitable candidates appear, include at least three persons, but if more than one position is to be filled, include at least twice as many persons as there are judges to be appointed.

If the Minister of Justice does not intend to follow one of the nominations made by a personnel panel, he shall inform the personnel panel in writing, stating the main reasons for the intended deviation from the panels' suggestions. Each personnel panel so consulted may submit a written statement within a period of 14 days. When submitting his nomination to the Federal President, those written statements have to be forwarded as well.

1.B. The aim of the procedure described above is to ensure that all decisions on the appointment of judges are based on merit. Political influence does not and should not matter when appointing judges. The Austrian Judges' Association has issued a self-imposed code of ethics stating¹¹ that membership of a political party or a judge's political activity could damage the credibility of an independent judiciary that is not influenced by party politics or bound by interest groups. When rumours of a possible political influence on the appointment to a judicial post become public, they are usually followed by an outcry from the media. Fortunately, this is not the case very often.

1.C The requirement for equal treatment of men and women in working life has a decades-long tradition in the European Union and has its origins in the case law of the European Court of Justice on equal pay for men and women in the late seventies of

9 Zußner in *Kahl/Khakzadeh/Schmid*, Kommentar zum Bundesverfassungsrecht B-VG und Grundrechte Art. 86 B-VG (Stand 1.1.2021, rdb.at) Rz 1

10 § 26 RStDG

11 Welser Erklärung, Art. IX

the twentieth century. In the current (European) legal situation, there are comprehensive prohibitions of discrimination, not only with regard to possible discrimination on the grounds of sex, but also on the grounds of several other aspects, including ethnicity, religion or belief, age or sexual orientation, as well as consideration of marital status or whether someone has children. These prohibitions apply in the private and the public sector alike.

In Austria there are several public institutions for the promotion of equal treatment. Public employers also have an obligation to have a women's advancement plan in place in cases of under-representation of women in a particular area or institution, or in cases of discrimination. In this plan, women's quotas are set for the individual areas. As long as the quota has not been reached, female candidates who are equally qualified for the intended prominent position (function) will be given priority for appointment. This is also the case for the appointment of judges in certain areas where there is an under-representation of women.

With regard to the civil service, the Federal Equal Treatment Act provides for five persons (groups) and institutions that are particularly concerned with equal treatment and the advancement of women. One of these are the Equal Treatment Officers. The Equal Treatment Officers shall deal with all matters relating to equal treatment of women and men, the advancement of women, and (since July 2004) equal treatment without distinction as to ethnic origin, religion or belief, age or sexual orientation within the area of their representation¹².

In relation to the appointment of judges, the Equal Treatment Officer shall have the right to inspect the applications and, if she so requests, to be heard by the Personnel Panel. She may attend the meeting of the Personnel Panel or submit a written statement on the criteria to be taken into account in the ranking of the candidates. The Equal Treatment Officer will be informed of the dates and agendas of the Personnel Panel meetings.

The minutes of the hearing or their comments shall be attached to the appointment proposal. The Equal Treatment Officers shall have the right to be present at interviews and to ask questions. The final ranking shall be communicated to the Equal Treatment Officer¹³.

12 § 27 B-GlBG (Bundes-Gleichbehandlungsgesetz – Federal Equal Treatment Act)

13 § 32b RStDG

1. D. The appointment to judicial office is not independent of government, as it is subject to a decision by the Minister of Justice.

In the opinion of the Austrian Judges' Association, judicial independence could be better upheld if a Council of the Judiciary was established. In order to ensure that appointments be made without political influence, the Austrian Judges' Association has been advocating for years for a (non-political and independent) Council of the Judiciary to be established, with competences in the personnel and budgetary areas.

2. Promotion within the judiciary

There is no promotion within the judiciary. All posts and functions are publicly advertised and are subject to the nomination and appointment process described above.

3. Workload within the judiciary

All matters of adjudication have to be allocated to the respective competent judges beforehand, for the time period required by law. Only in exceptional circumstances can a case be reassigned to a different judge. Article 83 (2) *B-VG* establishes the right to be tried by one's lawful judge. It has to be possible to determine in advance who this judge is in any given case. A later change in jurisdiction may take place only in exceptional cases. The result is the principle of fixed case allocation.

For every court there must be a fixed case allocation which is decided upon by the competent Personnel Senates for the coming year. The allocation of cases can be made by objective criteria, such as letters of surnames, house numbers or certain types of cases. A comprehensive calculation based on the previous year's caseload is usually made beforehand.

There is a growing trend towards randomisation (*Rotation*), calculated by a computer system, in larger courts. To make randomisation work fairly, the different types of cases are scored according to how long they are expected to take, ie how much work they are going to be. The random case allocation system then allocates the cases according to their scores to the judges who have jurisdiction for each type of case in an equitable manner. The personnel senates are the decision makers with regard to

which scores are applied to which types of cases.

Another advantage of random allocation is that it is easy to rebalance the workload in the event of unexpected absences or staff turnover. In the case of individual impediments (e.g. illness or leave of absence), the personnel senates may decide that a particular judge may be exempted from the allocation of cases for a certain period of time. This will also be the case if the actually allocated cases exceed the expected amount of work excessively for good reasons, for example in the case of unexpected large-scale proceedings.

A system is in place to determine the staffing needs of the judiciary as a whole, based on a time survey carried out a few years ago with the assistance of an external consultancy¹⁴. In this system, a minute value is stored for each type of court proceedings, so that the numbers of cases can be used to determine how many judges are needed. This system is used to decide how to staff individual courts.

Based on the statistical information available, the workload for the individual judge can be assigned in a fair and equitable manner. If a judge negligently accumulates arrears, the first step that will follow is a discussion with the court president or the respective person competent for judicial administration. There are various possible sanctions if the work is not carried out properly. The description of the job performance can be re-evaluated or downgraded. Often the process of evaluation alone is enough to motivate the judge. In severe cases disciplinary measures are taken. In a recent case in Vienna, where a judge had accumulated significant arrears, the judge had to pay a disciplinary fine of two months' salary¹⁵.

Judges are not expected or required to assist other judges who may be adversely affected from overload. However, it is common practice for many colleagues to provide each other with some support, as well as to discuss cases and legal issues. The organs of judicial administration, ie either the court President or the respective personnel senates, have to decide on appropriate measures in cases of overload, looking at the reasons and how they might be fixed. In certain cases, files may be taken away from the overburdened judge, or a trainee judge may be assigned to assist the judge. The fixed allocation of cases, to be decided annually, may also contain provisions for this eventuality.

¹⁴ PAR – Personalanforderungsrechnung (personnel requirement calculation)

¹⁵ <https://www.diepresse.com/13427969/verfahren-verzoegert-geldstrafe-fuer-chaotischen-richter> (5 July, 2023)

4. Removal from judicial office

Judicial independence is secured by the provisions of article 88 *B-VG*, which provides that judges can only be transferred or removed from office against their will by formal judicial decision. The only possible reasons for such transfer or removal are the following:

- The decision of the superior court's (external) personnel panel that the judge must be transferred to another court where there is a staff shortage, because of an excess of staff in the court to which the judge is assigned¹⁶. This can only happen to the most recently appointed judges in a court of law who know from the beginning of their appointment that this might happen to them for a certain period of time. There is no right of audience and also no appeal against these decisions.
- A decision of the Service Tribunal (*Dienstgericht*¹⁷) if circumstances for which the judge is not responsible and which are outside the exercise of his office seriously affect his reputation and his activity as a judge, or if there is an incompatibility with another public office or function; or in the event that a relationship of kinship is entered into between judges in a smaller court (less than 10 judges);
- a decision by the Disciplinary Court (*Disziplinargericht*), in cases of serious misconduct¹⁸.

The proceedings before the Service Tribunal or the Disciplinary Court are tried by three judges of the Higher Regional Court. An oral hearing will be held. The decision can be appealed. There are a number of possible sanctions. These range from a reprimand, to a fine, to transfer to another post, to dismissal¹⁹. Dismissals are very rare and would only be justified in particularly serious cases, or if there had been fraud in the appointment process (which has happened once, many years ago).

After dismissal there is no longer an entitlement to pension or remuneration. However, the Austrian state has to pay a transfer amount into the general pension system for the periods of work completed, so that a pension is subsequently made possible according to the system of those otherwise employed in the private sector²⁰. Similar to unemployment benefits in the private sector, there is also a special statutory

¹⁶ § 77 Abs 6 RStG

¹⁷ §§ 82 and 93 RStDG

¹⁸ § 104 RStDG

¹⁹ § 104 RStDG

²⁰ *Fellner/Nogratnig*, RStDG, GOG und StAG I 5.02 § 100 RStDG (Stand 1.3.2023, rdb.at) Rz 19

allowance²¹.

The societal consequences and the future impact on employment cannot be assessed in a general way, but will depend on the individual situation.

Article 88 *B-VG* also states the requirement of a legal age limit for judges, which is presently 65 years of age (§ 99 *RStDG*), when a judge or prosecutor must retire.

²¹ *Fellner/Nogratnig*, RStDG, GOG und StAG 15.02 § 100 RStDG (Stand 1.3.2023, rdb.at) Rz 18.