

Judicial Workplace and Judicial Independence

Austrian Association of Judges

Vereinigung Österreichischer Richterinnen und Richter (RIV)

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1.) Judicial Independence

In article 87 *B-VG (Bundes-Verfassungsgesetz)*, the Austrian Constitution provides for the independence of the judiciary by stating that judges are independent when exercising their office. Independence is thereby guaranteed with regard to all tasks of adjudication. Independence of judges also applies when decisions of judicial administration or judicial governance are to be rendered by panels or commissions (rather than by individual officers, see below), as required by law. 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.

Independence is furthermore 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 laid down in the Statute on the Employment of Judges and Prosecutors (*Richter- und Staatsanwaltschaftsdienstgesetz - RStDG*). 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.

2.) Nominations and Appointments

According to article 86 (1) *B-VG*, judges are to be appointed by the Federal President, who has delegated this power to the Minister of Justice in most cases (with the exception of certain court presidency positions).

In order to be appointed, in most cases, there has to be a preceding nomination by the

competent personnel panels, which are in place in accordance with the applicable court constitution. For regional courts and their subordinate district courts, personnel panels consist of the president and one vice-president of the respective regional court, plus a number of members who are elected by the judges of the judicial entity in question. The number of elected members (3 or 5) differs depending on the size of the judicial entity.

For the Appellate Courts and the Supreme Court, similar personnel panels are in place. In most cases two separate panels, namely the one of the court in question and a special personnel panel of the superior court, have to nominate at least three applicants who fulfill the necessary requirements for the position. The establishment of similar staff panels for the nomination of prosecutors is currently under discussion.

The Austrian Association of Judges advocates for the appointment of candidates for judicial office (i.e. trainee judges), too, to be preceded by a proposal from a personnel panel, as should the appointment of the President and Vice Presidents of the Supreme Court, who are currently exempt from the process as explained above. Also, the GRECO¹ evaluation report of 21 October 2016 recommends that nominations by personnel panels should have a stronger impact on the final appointment, that they should ideally be binding, and should cover the positions of presidents and vice presidents².

A corresponding amendment to the law has been promised recently, and a draft law has already been prepared³. However, the latest version of the draft, which is currently being discussed in Parliament, regrettably no longer contains the passages referring to these promised amendments.

The Minister of Justice and the Federal President are not bound by the panels' nominations. In the utmost majority of cases, however, one of the nominees is appointed. If the Minister of Justice intends not to follow any of the nominations, they have to submit written reasons to the competent personnel panel, who can then submit statements on the Minister's reasoning within two weeks. The Minister of Justice must forward all statements received when submitting the appointment proposal to the Federal President (§ 33a *RStDG*), who then has to sign the final appointment decision. The requirement to submit reasons when intending to differ from panel proposals was implemented in 2020, following a recommendation by the GRECO evaluation report on Austria and after corresponding demands made by the Austrian Association of Judges⁴. The current approach increases the transparency of the appointment process.

1 Group of States against Corruption www.coe.int/greco

2 GRECO Evaluation Report on Austria, Fourth Evaluation Round, Section 93

3 [193/ME \(XXVII. GP\) - Dienstrechts-Novelle 2022 | Parlament Österreich](https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00193/index.shtml) – Ministerialentwurf (https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00193/index.shtml)

4 Schemthanner/Vogel/Felseisen, "Die dritte Staatsgewalt – ein Potemkin'sches Dorf?" - Richterliche Unabhängigkeit als staatspolitische Leerformel – Seminar Zukunft Justiz, RZ 2018, 131

With regard to possible discriminatory aspects of appointments, the respective Equal Treatment Officer has to be involved in the nomination process and can ask to be present at hearings of candidates. The Equal Treatment Officer has the right to comment on which criteria are to be given special consideration in the ranking process.

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.

3.) Independence in decision making and governance

Austrian judges are bound only by the sources of law they interpret. There is no obligation to follow instructions. With regard to their judicial tasks, supervision is limited to making suggestions or providing assistance, but may never include issuing instructions.

The duties of judicial governance and judicial administration are legally divided between, on the one hand, special bodies provided for by law (i.e. personnel panels, see above) and, on the other hand, the presidents of regional courts and of the respective superior courts, who are charged with judicial administration and bound by instructions in this capacity, and ultimately, the Minister of Justice.

Section 73 para. 1 of the Judicial Organization Act (*Gerichtsorganisationsgesetz - GOG*) obliges all bodies and officers charged with judicial governance and judicial administration to provide all personnel and material resources for the operation of the courts and public prosecutor's offices in their respective areas of competence, in compliance with the principles of legality, effectiveness, efficiency and economy.

Furthermore, personnel panels and court presidents have a right of supervision, which is intended to ensure that judicial administration safeguards the legal interests of the population. Furthermore, they are obliged to encourage judges to perform their duties and to offer them assistance, if necessary. Judicial governance is thus both a right and a duty, and in any case strictly governed by law⁵.

Judicial governance has to ensure that judicial proceedings can be conducted properly, including, for example, that court cases can be completed and decisions can be rendered within a reasonable period of time. Also, judicial governance has to provide the necessary means for fulfilling these tasks. Any intervention that prevents a judge from making an independent decision is prohibited. All those charged with judicial administration and

governance are also obliged to safeguard judicial independence⁶.

In the event that judicial independence is not duly respected, this can constitute a violation of disciplinary law by the respective individuals, who can then be held responsible by the competent disciplinary authorities. The respective disciplinary courts or disciplinary authorities can impose various sanctions in such events.

4.) Funds and resources

The funds and resources of the judiciary are allocated to the Minister of Justice. The decision on the extent of funds available for the judiciary is ultimately made by the Austrian Parliament for each budget period. There have been significant cost-cutting efforts in the last two decades, particularly regarding the back-office area. Efforts have been made to compensate for this by increasing digitization.

For example, fewer and fewer court reporters are being used in Austrian court proceedings. Judges usually record the minutes themselves by using digital dictaphones. The tape recording is then transcribed after the hearing. More and more courts are carrying out their work using a fully digitized system for case files.

All in all, an effort is being made to allocate the existing resources as fairly as possible among the various judicial units. The Austrian Association of Judges is tirelessly campaigning for adequate staffing and material resources. Obviously, a lack of necessary resources would impede judicial independence. At the moment, a project is taking place in which the distribution of tasks among the different professional groups working at the courts is subjected to critical examination.

6 Para 73 section 2 GOG: *Alle Organe der Justizverwaltung haben darauf zu achten, dass kein Eingriff in die richterliche Unabhängigkeit erfolgt.*