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Reforming Training for Austrian Judges. Is a compulsory Teaching unit in Legal History an “extravagant luxury”?

Abstract

Judicial training in Austria includes extensive training of prospective judges in civil, criminal and procedural law, as well as a wide range of specialised courses on topics such as law and language or protection from violence. In future, training will be supplemented by an obligatory curriculum on the history of the judiciary (“Curriculum Justizgeschichte”). The subjects in this two-module course range from the judiciary in the 19th century to the current challenges faced by, and expectations of, judges, with a particular focus on the National Socialist era. The author analyses the development of the 2015/2016 Curriculum on the History of the Judiciary and examines its contents as well as its didactic structure. In addition to evaluating the Curriculum, the article also looks ahead and makes proposals for the future set-up of training in judicial history.

Die österreichische Richterausbildung sieht nicht nur eine umfassende Schulung der angehenden Richterinnen und Richter im Zivil-, Straf-, und Prozessrecht vor, sondern behandelt in Spezialkursen auch Themen wie Recht und Sprache, Gewaltschutz und vieles mehr. Künftig wird die Ausbildung durch ein verpflichtendes Curriculum Justizgeschichte ergänzt. Die aus zwei Modulen bestehende Veranstaltung spannt einen Bogen von der Justiz im 19. Jahrhundert bis zu den Herausforderungen und Erwartungen an Richterinnen und Richter in der Gegenwart, wobei die Zeit des Nationalsozialismus einen Schwerpunkt bildet. Der Autor analysiert die Entstehung des Curriculums Justizgeschichte 2015/2016 und geht auf dessen inhaltliche Struktur und didaktischen Aufbau ein. Neben einer Evaluierung des Curriculums Justizgeschichte 2015/2016, enthält der Artikel auch einen Ausblick und Vorschläge für die künftige Ausgestaltung der justizgeschichtlichen Richterausbildung.

I. Status quo: creeping reforms and a resounding scandal

Broad-based debate on the training of judges in Austria is rare. The last major discussion on training in Austria took place in the 1980s and was triggered by an inquiry into reforming training for judges. Since then, though, many small steps and new measures have been taken. Most originated within the judiciary, often at the suggestion of the representative body for judges. However, "judicial scandals" have occasionally served to accelerate change. This was the case with the introduction of psychological aptitude tests¹ for trainee judges and, more recently, with the discussion on including compulsory courses on the history of the judiciary in the training of future judges and public prosecutors.² Until now, attendance at the Curriculum on the History of the Judiciary, which was established in 2009 and which is the subject of this paper, was voluntary. However, the Minister of Justice has announced a plan to make it an obligatory part of judges' training in Austria.

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¹ T. CHORRHERR, Auch Justiz im Fall Rappolt verwickelt, in: Die Presse (13th March 1986), p. 12; W. FELLNER, Der Psychotest und andere Probleme der RiAA-Aufnahme, in: Wiener Richter 15 (1986), pp. 6-8.

² N.N., „Aula“-Anzeige: Folgen für Richter-Ausbildung, in: Der Standard (12th March 2016), p. 13; N.N., Justiz: Ausbildungs offensive nach „Aula“-Anzeige, in: Die Presse (12th March 2016), p. 7.

The basic concept follows on from comparable multi-day training courses of the Judicial Academy in Germany, which have been held for some time.³ The organisers of the Austrian Curriculum on the History of the Judiciary allowed the author (who is writing a dissertation on the training of judges in Austria, Germany and Switzerland) to attend the modules in 2015/2016 and requested feedback on the course. In order to understand the role of the Curriculum on the History of the Judiciary in the wider context of training for judges in Austria, a brief examination of how Austrian judges are trained seems reasonable. This is followed by a description of the content and schedule of the previous Curriculum on the History of the Judiciary, as well as proposals for its future structure.

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II. A brief description of judges' training in Austria

While judges in England and Wales must have years of work experience as well as a qualification as a barrister or solicitor, judges in Austria must complete specific training. This has its roots in the 19th century.⁴ Even today, a court clerkship (as a trainee at court) lasting several months must be completed after obtaining a law degree at university. This has a bridging function and is also a prerequisite to entering other legal professions (such as attorney or notary). Currently, the clerkship lasts five months.⁵ The objective of the court clerkship is to test and deepen the legal knowledge obtained during a student's studies in a practical setting.⁶ Trainees are allocated to different judges during the clerkship, and are involved in the daily business of district and regional courts, taking minutes and preparing judges' decisions.⁷

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Potential candidates for judges' training must perform particularly well during the court clerkship. Besides day-to-day, on-the-job training, compulsory courses in civil and criminal law are offered.⁸ In addition, the court clerkship is extended by several months for applicants for judges' training so that the judiciary can assess the candidate more closely. This is followed by a written and oral exam in civil, criminal and procedural law.⁹ Candidates who pass the psychological aptitude tests¹⁰ are invited to an entrance interview with the president of one of the four higher regional courts.¹¹ The

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³ GERMAN JUDICIAL ACADEMY, Tagungsprogramm 2010, pp. 87-88; GERMAN JUDICIAL ACADEMY, Tagungsprogramm 2016, pp. 72, 93.

⁴ P. G. MAYR, Richterausbildung in der zweiten Republik, in: G. KOHL / I. REITER-ZATLOUKAL (eds.), RichterInnen in Geschichte, Gegenwart und Zukunft. Auswahl, Ausbildung, Fortbildung und Berufslaufbahn, Vienna 2014, pp. 211-234, here pp. 211-212.

⁵ § 2 Abs. 1 Z. 5 Judiciary and Public Prosecution Service Act (RStDG); § 2 Abs. 2 Attorney Act (RAO).

⁶ An overview: P. G. MAYR, Die österreichische Juristenausbildung: Einführung, Rechtsgrundlagen, Erläuterungen und Hinweise, Statistik, Vienna 1998.

⁷ § 6 Abs. 1 Act concerning Legal Trainees (Rechtspraktikantengesetz).

⁸ § 5 Abs. 2 and § 7 Act concerning Legal Trainees (Rechtspraktikantengesetz).

⁹ Genesis of the written exam: J. SCHILLER, Auswahl des richterlichen Nachwuchses, ÖRZ 7 (1995), pp. 156-159, here p. 159.

¹⁰ Federal Ministry of Justice, JMZ 350.10/28-III 1/86.

¹¹ § 3 Abs. 1 Judiciary and Public Prosecution Service Act (RStDG).

president then proposes the remaining candidates to the Federal Minister of Justice for admission to the training programme for judges.¹²

During the four-year programme, trainee judges receive training tailored to the judge's office (as well as that of a public prosecutor). This includes further practical training at court in various areas of the law, as well as time spent out of court, for example with an attorney-at-law, at victim protection and welfare facilities, or at probation service offices.¹³ In addition, legal skills are honed during courses on civil law and international private law, civil procedural law, as well as criminal and criminal procedural law. Issues such as domestic violence, fees, tenancy law, employment and social law, constitutional law, administrative law and European law are covered as part of specialist courses, which are offered in blocks.¹⁴ Since 1988 there has been a focus on the "personal suitability" of applicants for work as a judge.¹⁵ The 2008 reform clarified this definition by placing an emphasis on "social skills". Since then, greater weight has been given to communication skills, as well as conflict and time management.¹⁶

The four-year programme for trainee judges is followed by the judicial examination. Candidates who pass both the oral and the written exam may apply for a vacant position as a judge.¹⁷ Austrian public prosecutors also complete the training for judges, as only people who fulfil the prerequisites for judges can become public prosecutors.¹⁸

III. History of the judiciary in judges' training – a luxury?

As shown above, trainee judges undergo extensive training and the programme is regularly changed and modified. But is it really necessary to put trainee judges through in-depth historical education too? A colleague who is involved in training at a foreign court believes that this would amount to an "extravagant luxury". Up to a point this might be true, but as Voltaire already knew "the superfluous is a very necessary thing"¹⁹.

In Austria, and particularly at the University of Vienna, legal and constitutional history form an important element of the university's law degree.²⁰ However, because legal history is taught during

¹² § 3 Abs. 2 Judiciary and Public Prosecution Service Act (RStDG).

¹³ §§ 2-3 Ordinance concerning Trainee Judges (RiAA-AusbVO).

¹⁴ Higher Regional Court Vienna (OLG Wien), Jv 9606/14t-9a.

¹⁵ Federal Law Gazette (BGBl.) 230/1988.

¹⁶ Federal Law Gazette (BGBl.) I 147/2008; O. SCHEIBER, Einzug von sozialer Kompetenz und Europarecht. Die Dienstrechts-Novelle 2008 bringt Neuerungen in RStDG und RpflG, in: ÖRZ 6 (2009), pp. 137-139, here p. 137.

¹⁷ §§ 16, 25 Judiciary and Public Prosecution Service Act (RStDG).

¹⁸ § 174 Abs. 1 Judiciary and Public Prosecution Service Act (RStDG).

¹⁹ VOLTAIRE, Poem Le Mondain (1736).

²⁰ University Vienna Bulletin (MtBl.) 2006/202, Curriculum Diplomstudium der Rechtswissenschaften.

the first two semesters in Vienna, it is only possible to give graduates an insight and an overview, and to encourage them to critically analyse the past.²¹

Ideally, the Curriculum on the History of the Judiciary should take this as its starting point, and facilitate a more detailed examination of the history of the judiciary. It would make sense to begin with the history of the judiciary from the 19th century. Many present-day laws can be traced back to that time (for example, the Austrian Civil Code, the Code of Civil Procedure and the rules governing judges' training). In addition, studying the 19th and in particular the 20th century enables a thorough examination of how the judiciary has changed under different forms of state and government. For example, 19th century constitutionalism gave rise to judicial independence and the accompanying immunity of judges from removal from office or transfer to another position. It will also be necessary to examine the continuities and ruptures during the transitions from monarchy to republic, and from republic to corporate state. An analysis of National Socialism will also be required. Besides considering legality and illegality, there should also be a stronger focus on judges' self-perception. One approach would be to analyse the demands placed on judges a hundred years ago and identify differences compared with the present day.

Due to increasing interest in the history of the judiciary as a research subject, a few years ago the University of Vienna's Law Faculty put together a separate optional course that covers the history of the judiciary in Austria, as well as its European dimension.²²

IV. Case study: the Curriculum on the History of the Judiciary in 2015/2016

1. *The creation of the Curriculum in 2009*

Claudia Kuretsidis-Haider and Winfried R. Garscha from the Austrian Research Bureau for Post-War Justice (RBPWJ) were responsible for the design and ongoing supervision of the Curriculum on the History of the Judiciary, in consultation with judge Oliver Scheiber. The Bureau was established by the Ministry of Justice in 1998 and is part of the Documentation Centre of Austrian Resistance.²³ The RBPWJ documents the investigation of crimes committed by the National Socialists in Austria. According to its mission statement, "not only does it compile academic records of the legal reappraisal, but it also has a socio-political function in terms of raising awareness of the crimes committed, and of whether or not they were punished"²⁴.

²¹ G. GRÜNSTÄUDL / S. SPITRA / I. REBHAN-GLÜCK, Vom Leitbild zur Umsetzung: Rechtswissenschaftliche Fachdidaktik in Anwendungsbeispielen, in: ZDRW 2 (2016), pp. 162-173.

²² Since summer term 2007 in the university calendar (Vlvz-Nr 030430): KU Geschichte des Österreichischen Justizrechts und seiner europäischen Dimension.

²³ <http://www.doew.at/erforschen/projekte/arbeitschwerpunkte/nachkriegsjustiz> (30th June 2016).

²⁴ Translation; <http://www.nachkriegsjustiz.at/fstn> (30th June 2016).

2. Basic concept and target group

The Curriculum on the History of the Judiciary is divided into two modules and lasts for two years. Alternating from year to year, either a two-and-a-half day winter module or a two-and-a-half day spring module is held. The modules do not supplement one another, so it is possible to begin the Curriculum with either the spring or the winter module. The objective of the Curriculum on the History of the Judiciary is to provide trainee judges with "basic empirical knowledge of the contemporary history of the judiciary in the 19th and 20th centuries, and to play a part in raising awareness of the political implications of civil and criminal law decisions."²⁵

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All Austrian trainee judges receive an invitation to the course. Until now, attendance has been voluntary. In each of the last three years, between 20 and 30 people took part. The percentage of female participants ranged from 55% to 83%, which was due to the increasing number of female trainee judges. However, the number of participants in the Curriculum on the History of the Judiciary was limited to 30 people, so in 2015, for the first time, some prospective participants – ten in total – were not able to attend.²⁶ This problem may now be consigned to the past due to the obligatory attendance requirement in the future, which is set to be extended to all trainee judges.

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3. Winter module with a focus on euthanasia by the National Socialists at the Spiegelgrund clinic

The fourth round of the Curriculum on the History of the Judiciary, which will be considered in more detail below, kicked off with the winter module held at the Judicial Training Centre near Vienna. At the beginning of the Curriculum, the participants were asked about their expectations and their reasons for registering. These varied widely, ranging from an interest in the image of judges in different eras and the replacement of judicial structures during the Nazi period to the changing role of women in the judiciary, political influence and the independence of judges from a historical perspective. There was strong interest in internal issues, such as the evolution of the training of judges, and also in external questions such as public opinion of the judiciary in a historical context.

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The module began with an introduction to the *history of the judiciary in Austria in the 19th and 20th centuries*, which mainly focused on the 20th century and did not go beyond a description of the history of criminal law. It was not possible to cover any other topics in the allotted 55 minutes. The second lecture on the first day concerned the *right of the Minister of Justice to issue directions to the public prosecution service over the years*, and covered the period from the establishment of public prosecution offices in 1879 through to the discussion on establishing an independent instruction committee in 2015.²⁷ After the lecture, which had a strong practical element thanks to the short examples provided by the lecturer (the former head of the Public Prosecutor's Office for White-

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²⁵ Translation; Federal Ministry of Justice, BMJ-V108.01/0016-III 3/2011.

²⁶ Federal Ministry of Justice, BMJ-V108.01/0006-III 3/2015.

²⁷ § 29b Public Prosecution Act (Staatsanwaltschaftsgesetz).

Collar Crime and Corruption), the future judges discussed the current challenges associated with issuing instructions with a journalist from a well-known Austrian daily newspaper.

The second day began with three lectures on the latest *developments in the penal system*, including a talk by a prison governor on current problems, while a representative of the Federal Ministry for Justice gave a presentation on new legislative plans. The third lecturer, from the Institute for the Sociology of Law and Criminology, assessed reform measures from a social sciences perspective. An expert discussion between a youth court judge and the former president of the Youth Court about the youth custody system over the last 30 years concluded the teaching block.

The afternoon programme was a visit to the *Steinhof Memorial*. Under National Socialist rule, people considered "inferior", such as those with disabilities or mental illnesses, were taken from the Steinhof psychiatric hospital and murdered.²⁸ The specialist paediatric department, established in 1940, helped the National Socialists to enforce their racist and eugenic ideology. Children with "mental illnesses" or deformities who were committed to the hospital were examined and "treated" using agonising methods. Lethal experiments were conducted on 800 youngsters.²⁹ After a tour of the memorial, the participants watched the film "*Meine liebe Republik*" ("My Dear Republic"). The film examines the experiences of one of the victims of Steinhof, Friedrich Zawrel, and his subsequent, unexpected meeting with his former tormentor, who appeared before a court as an expert on neurology after the fall of National Socialism.³⁰

The third day included a discussion on the *family law reforms of the 1970s*. The reform of marriage law in 1975 brought about equality between men and women. Amicable divorce was introduced in 1978, and there were also more extensive reforms of child law.³¹ This block stood out thanks to the two lecturers: an academic and a former section head at the Federal Ministry at the time of the reforms talked about and commented on the trigger for the reforms, their implementation and the associated problems.

A teaching block on the law on *demonstrations and freedom of assembly* rounded off the first module. A legal and historical analysis of the evolution of the law on assembly was followed by a discussion on current challenges.

4. Spring module with a focus on the Mauthausen Memorial

Held in Linz, the spring module began with a lecture on forms of *transitional justice*. There were discussions on the present-day and past methods (such as lustration, restitution, and truth and

²⁸ The texts of the exhibition are also available online: <http://gedenkstaettesteinhof.at/en/exhibition/steinhof-vienna> (30th June 2016).

²⁹ <http://gedenkstaettesteinhof.at/en/exhibition/10-diagnosis-useless> (30th June 2016).

³⁰ Before his death, Friedrich Zawrel was even invited as a contemporary witness to the curriculum: W. R. GARSCHA, *Zeit- und Rechtsgeschichte - neue Trends eines Dialogs mit Tradition*, in: W. PILGERMAIR (ed.), *Wandel in der Justiz*, Vienna 2013, pp. 293-294.

³¹ ARBEITSGEMEINSCHAFT ÖSTERREICHISCHE RECHTSGESCHICHTE (eds.), *Rechts- und Verfassungsgeschichte*, Vienna 2014, pp. 331-332.

reconciliation commissions) that can be used to accomplish a transition, as well as the prerequisites for rebuilding democratic societies after a violent past.

The second teaching block concerned "*Aryanisation*", *restitution and compensation*. After an introduction to the issue by a historian, attention turned to the difficulties and shortcomings in the legislative and practical aspects of returning artistic and cultural artefacts stolen by the National Socialists. Using case studies, a judge who had previously worked on the procedure for returning artistic and cultural assets described the legal problems associated with ascertaining the truth, the questionable suitability of the legal basis, and the reasons for the length of restitution proceedings. 21

The centrepiece of the module was the second day, with a tour of the *Mauthausen Memorial*. In the afternoon, the two historians responsible for designing the curriculum spoke to the participants. They described the sluggish *judicial prosecution of Nazi criminals* in Austria after 1945, as well as the origins of and current questions concerning the *Verbotsgesetz* (National Socialism Prohibition Act). The Act prohibited National Socialist organisations and provided for denazification measures, as well as making re-engagement in National Socialist activities a criminal offence³² – a provision that still forms the basis for criminal investigations and convictions today.³³ 22

The third day focused on judges' training and judicial careers. First of all, *continuities and ruptures in the training of judges* in Austria were examined, with an emphasis on the National Socialist period. Taking this as a starting point, the continuity of judicial careers despite political upheavals was analysed. 23

Concluding the Curriculum on the History of the Judiciary, there was a panel discussion entitled "*Knowing the past, shaping the future*". After several contributions from the panel, the participants had the chance to reflect on the past few days, rounding out the issues discussed (staff selection, the future of judges' training, and the profile of a judge) with their own thoughts and talking them over with colleagues. 24

V. Outlook: history of the judiciary as a compulsory element of judges' training

1. *Obligation as knee-jerk legislation?*

The Minister of Justice's announcement that the Curriculum on the History of the Judiciary would become a compulsory part of training for judges and public prosecutors follows criticism surrounding the closing of a re-engagement trial for National Socialist activities. The Federal Ministry of Justice reprimanded the public prosecutor's office in Graz and called the grounds for closing the proceedings inhuman.³⁴ In the view of the Ministry, the Curriculum on the History of the Judiciary should result in increased sensitivity when dealing with the history of the country, 25

³² § 3 and §§ 3a-3j Prohibition Act (Verbotsgesetz) 1947.

³³ For current statistics see the parliamentary inquiry 1109/J-NR/2014: 1009/AB, XXV GP.

³⁴ Response to the parliamentary inquiry 7910/J-NR/2016 concerning the closing of a re-engagement trial for National Socialist activities: 7633/AB, XXV GP.

whose laws future judges and public prosecutors will apply in practice, but above all make such sensitivity obligatory.

2. However: the history of the judiciary can do more

In any case, the Curriculum on the History of the Judiciary can play a part in making graduates more sensitive to history when faced with such difficult cases. The curriculum devotes considerable time to the history of the judiciary during the National Socialist period and its effects, as well as its reappraisal – or the lack thereof – in the Second Republic. However, it only partially achieves the intended goal of providing "basic knowledge of the contemporary history of the judiciary in the 19th and 20th centuries"³⁵, as the former is only covered in a fairly rudimentary manner. There is no consideration of the genesis of and the motives behind the Austrian Code of Civil Procedure (*Zivilprozessordnung*), which was first enacted in 1895 and has been amended 95 times to date, nor is there any consideration of how the organisation of the courts in Austria, which dates back to the 19th century, came into being.

In terms of scheduling and content, the Curriculum on the History of the Judiciary could also be extended to include an analysis of the judge's self-image and views on the role of judges – these range from the judge as a servant of the state in the Habsburg monarchy to the judge as a social engineer in the 1970s.³⁶ This could help trainee judges grow into the role that they will assume in future. It would also be worthwhile looking beyond Austria's borders to gain a better understanding of the state's, society's and the judiciary's expectations of Austrian judges. For example, why is party membership essential for selection as a judge in Switzerland, while in Austria judges portray themselves as apolitical?

Today, 67% of trainee judges in Austria are women.³⁷ This was not always the case. Until the turn of the century, the judiciary was a male-dominated profession.³⁸ The break-up of these structures and the associated long career path for women entering the judiciary should be included in a future Curriculum on the History of the Judiciary. Against this backdrop, the course could also serve as an opportunity to critically analyse the role of gender and the law. The Curriculum on the History of the Judiciary could also take a closer look at the history of marriage law and examine it in the

³⁵ Translation; Federal Ministry of Justice, BMJ-V108.01/0016-III 3/2011.

³⁶ For example B. DÖLEMEYER, *Vom Staatsdiener zum „Sozialingenieur“*. Zum Richterbild in der Habsburgermonarchie, in: A. GOURON and others (eds.), *Europäische und amerikanische Richterbilder*, Frankfurt/Main 1996, pp. 359-382; G. KOHL, *Richter in der Habsburgermonarchie*, in: G. KOHL / I. REITER- ZATLOUKAL (eds.), *RichterInnen in Geschichte, Gegenwart und Zukunft*. Auswahl, Ausbildung, Fortbildung und Berufslaufbahn, Vienna 2014; M. LUMINATI, *Priester der Themis. Richterliches Selbstverständnis in Italien nach 1945*, Frankfurt/Main 2007; R. OGOREK, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert*, Frankfurt/Main 2008.

³⁷ Statistics 2013: Federal Ministry of Justice, BMJ-Pr235.10/0102-Pr6/2013.

³⁸ G. SCHNEIDER, *Richterinnen in Österreich*, in: *Juridikum* 4 (2013), pp. 502-504.

context of the tug-of-war between law and religion. This particular area of the law was shaped by the parallel ideas on the organisation of state justice and religious norms until the 20th century.³⁹

Judges are far more than mere mouthpieces of the law.⁴⁰ The objective of the Curriculum on the History of the Judiciary must therefore be to show how forms of government, ideologies, world view and religion influence the law, as seen from a historical perspective. This also defines the new model for judges in Austria: the focus is on appointing judges who have a knowledge of history, and are sensitive to the interplay between law and society. Only time will tell to what extent this objective can be achieved – it will be interesting to see how the situation develops.

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³⁹ G. KOHL and others (eds.), *Eherecht 1811 bis 2011. Historische Entwicklungen und aktuelle Herausforderungen*, Vienna 2012.

⁴⁰ „la bouche de la loi“ in: MONTESQUIEU, *De l'esprit des lois* XI, 6.