No Benefit of Hindsight

Austria's Ongoing Legal Struggle in the Fight Against the Pandemic

Susanne Gstöttner & Konrad Lachmayer

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Austria is currently in the midst of a second hard lock-down. This move came after a somewhat carefree summertime that ended rather chaotic. Since then, the government has reacted late, the public was informed at short notice, coordination of the administration was poor and the enacted legislation and enforcement of measures are constitutionally problematic.

Croatian Summertime

In May 2020, the Austrian government started to reduce the lock-down measures from March 2020 step by step. It appears that in June people were under the impression that the Coronavirus did not have the same relevance anymore, that COVID-19 was defeated. The overall daily infection rate typically ranged between 20 and 70 persons. By mid-June the obligation to wear face masks was abandoned and restrictions in restaurants were significantly reduced. Normal life appeared possible again, which included summer holidays – not only in Austria but especially in Southern European countries like Spain, Italy, Greece, and Croatia. While infection numbers in Spain increased significantly already in July, holidays in Croatia still seemed possible in August. The daily infection numbers, however, started increasing considerably in Croatia as well as in Greece and Italy in the second half of August.

During the idyllic summertime, the Austrian government issued a travel warning for Croatia in mid-August 2020. This caused many people to rush back to Austria within one week. All tourists coming back had to provide a negative PCR test at the Austrian border or were quarantined for a period of 10 days or until they were tested negative. The border controls carried out following the travel warning, however, had been on a random basis as local authorities reported they lacked the staff needed to conduct comprehensive controls. The situation took a turn for the worse a week later when the government issued another ordinance overnight requiring all people travelling through Austria (transit traffic) – no longer only those returning – to fill out and sign forms. The implementation of this new provision within a day's notice presented local authorities with enormous administrative challenges, which in addition to the ambiguity regarding the required extent of controls led to massive differences in the handling of the new regulation. While people waited more than 12 hours at certain borders with every person being registered, elsewhere forms were collected following a sample check approach. The increasing return of tourists (and other people) back to Austria led to a chaotic situation at the Austrian borders. The federal ministry did not coordinate the travel warning and mandatory registration of travellers with the local authorities in advance. As local authorities were not even instructed on what to do with the thousands of forms collected, the forms did not display any significant effect. The state governor of Carinthia, Peter Kaiser, criticised this lack of information and coordination. Contradicting and unclear internal instructions of the federal Ministry of Health and high administrative efforts worsened the situation. The Ministry of Health later stated that while filling out the forms was now mandatory for all travellers, the collection of those and the correlating registration lay in the authorities' discretion.

In conclusion, the Austrian government took action too late (regarding COVID-19 prevention), the public was only informed at short notice, the administration was badly coordinated, and a professional legal basis was missing. The result was a lack of rule of law combined with low effectiveness of the measure. Many tourists came back to Austria and spread the virus all

over the country. While in the middle of August 158 new infection cases were reported per day, at the end of August the number increased linearly to 220 cases, a number, which has since amplified to more than 9.000 cases per day as of 11th November. The structural problems exposed by the chaotic Croatian summer experience have remained the same since then: late governmental reaction, unnecessarily short-term information of the public, bad coordination of the administration as well as rule of law problems within legislation and enforcement of measures.

Judicial Call to Rule of Law

While a more carefree life was restored in the summer 2020, the Austrian Constitutional Court (ACC) started declaring certain elements of the governmental lockdown measures as unlawful in various judgements from spring 2020 onwards. Remarkably, in most of the cases the ACC did not even have to strive for the constitution. The ordinances of the Minister of Health were plainly not according to the statutory law or neglected basic (rule of law) requirements, e.g. the necessity of giving reason (the ministry simply failed to justify certain measures).

This was the case with the general ban on entering all public spaces effective in spring 2020, which disregarded that the provision of COVID-19 Measures Act enabling the government to restrict access to certain places provided for just that: restrictions on certain, limited places as opposed to an all-encompassing ban for all public spaces in Austria. Therefore, it was declared to have been unlawful in July. This shortcoming of the government is all the more notable, since the relevant statutory law had been drafted by and enacted with the votes of the governing parties in parliament. Other measures not standing up to the scrutiny of the ACC were the favourable rules for hardware and gardening stores, which were allowed to open earlier than other places of commerce. They were found to violate the principle of equality of the Austrian constitution due to the lack of reason given for this privileged situation of the stores. At the October session the ACC continued to find many of the early COVID-19 restrictions like the prohibition to enter restaurants, regulations concerning events or the requirement to wear masks in indoor public spaces to be in violation of the COVID-19-Measures-Act. The competent authority – the minister of health – would have been obliged to make transparent the information on which the decision and the balancing of public interest and the rights of the concerned individuals had been based.

Legislative Empowering of the Government

Due to the judgement of the ACC in July, the government drafted new bills to strengthen governmental powers to address COVID-19. In September 2020 the Austrian parliament enacted an amendment of the core statutory acts regarding the governmental possibilities to react to increasing infection rates (Epidemic Act, COVID-19 Measures Act). With this, the legislative empowerment of the government reached new dimensions (not known in Austria before). The amendment included limitations for personal freedom in the public space, including driving restrictions and curfews. These measures were not introduced generally but are restricted to COVID-19 threats and limited with a sunset clause until the end of June 2021 (granting the government the option of a one-time prolongation until the end of 2021).

A core rule of law problem of the new governmental powers is the possibility of regional differentiation (even if it might be a useful strategy with regard to COVID-19), which enables the Minister of Health, the (nine) state governors as well as more than 90 district authorities to enact ordinances to restrict personal freedoms of the people living in the very same, relevant territory. The effectiveness of legal protection is also very limited, as it takes too much time and is highly complicated (formal procedure, mandatory representation by an attorney...). The Austrian government created a flexible but highly complex statutory framework. It leads to a confusing legal situation, while at the same time the Austrian system provides only difficult access to legal protection.

The Austrian government did not wait long before it started to apply the new powers. Three types of measures could be observed within one month: road-

blocks and shut-off of a village (1), curfews at night all over Austria (2) and a full lockdown of the country (3).

Roadblocks: In the middle of October 2020 the state of Salzburg started to impose a curfew on a small village ("Kuchl") because of highly increased infection numbers. This curfew included road blocks and traffic controls to prohibit people from visiting the village. The regulatory chaos started as the Minister of Health, the state governor of Salzburg and the competent district authority enacted several ordinances, which included detailed behavioural rules, e.g. regarding shopping, restaurants, cultural and sports events or funerals. The different ordinances provided some similar and some diverging rules for different temporal and territorial scopes. To understand the applicable rules for one week, it was necessary to read three or four different legal documents. The same effort was necessary for the next week as rules changed in the meantime.

Night curfews: By the end of October the Austrian government had already given up on the regional approach and introduced Austrian-wide measures, especially a curfew (from 8 p.m. to 6 a.m.). However, leaving one's home was permitted not only for professional reasons, but also physical or psychological ones. Meetings in public space have not been allowed and restaurants had to close completely.

Full Lockdown: After two weeks of the so-called "light lock down", the Austrian government enacted a stronger lockdown towards mid-November. Most shops (excluding e.g. supermarkets, drug stores or pharmacies, but also pet food stores, weapons store or car repair shops) as well as schools had to close (pupils until the age of 14 could be sent to school for supervision but not teaching, which took place online). The exceptions allowing people to enter public spaces remained the same as determined in the light lockdown for nights. A discussion, however, arose on the subject of how many people were allowed to meet in public as well as in private rooms.

The application of the new measure followed the same procedure as in spring. The government reacted hastily and did not transparently communicate the upcoming measures. The public was informed via press conferences, while the legal acts were provided only some days later and did not exactly correlate to the information given at the press conference. The provided governmental acts largely exhibited flaws and have already been challenged before the ACC.

Ongoing challenges

The second wave of constitutional complaints has already started. Multiple legal problems were identified by civil society in the past weeks. A core problem relates to the (constitutionally guaranteed) principle of equality. Many different groups were treated differently (e.g. while both faced restrictions, professional sports events were still better off in comparison to cultural events). The governmental closing of schools did not consider the opposing recommendation of the (governmental) expert committee established to expertise on the necessary measures. First constitutional complaints were already submitted to the constitutional court and surely further complaints will follow. The constitutional court might already decide on certain measures in December, but will most likely decide in March/April 2021 on the relevant governmental measures from October/November 2020. Core issues at stake are the equality and proportionality of the measures.

As an upcoming measure, the government is organising mass tests in the first part of December 2020. The army shall be involved and people shall participate voluntarily; if these tests will be on a voluntary basis for teachers and other essential workers has been the subject of discussions. The Ministry of Health maintains that people unwilling to take a test will not face negative consequences but members of certain occupational groups will potentially by required to wear special protective masks while at work. The situation resembles the one in the last months; it will be a short-term and complex procedure with lacking existing regulatory framework. When the governmental measure is applied, real problems will occur, and the lack of a professional regulatory strategy will lead to distortions. Different testing strategies carried out according to varying timelines across all nine federal states have already been initiated. By the

way, the Western states (*Länder*) will immediately start testing; it can be speculated that this is due to the beginning of the skiing season in the Austrian Alps (which are primarily situated in the Western part of Austria) – however, the hope of tourists returning to the slopes for Christmas has been dashed by the latest reported plans of the government.

ABOUT THE AUTHORS

Susanne Gstöttner
Susanne Gstöttner is a research assistant at the Chair of Public and European Law (Prof. Dr. Konrad Lachmayer) at the Sigmund Freud University Vienna.
Konrad Lachmayer
Konrad Lachmayer is a Professor of Public Law and European Law at the Sigmund Freud University Vienna.

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