# Muddling through Mutation Times or the Return of Federalism in Austria

From Covid-19 Response to the Vaccination Campaign

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## Tyrolean Trainings for British Skiing Instructors

While Austria went into lockdown immediately after Christmas (26 December 2020) for another six weeks, the skiing season had only just started. Hotels were closed, but locals and persons with secondary residences could enjoy skiing and keep Austrian winter tourism alive. Although many measures were taken since then, skiing and ski tours were never forbidden again. The consequences of the Christmas ski opening became immediately evident. In January 2021, positive PCR-tests in Tyrol included the "UK" Covid-19 variant B.1.1.7: more than 30 skiing instructors had come to Austria to complete skiing training in Tyrol during lockdown. As the training was exercised in relation to potential work in Austria, the training of skiing instructors was legally correct, although the situation seemed more than bizarre: while the country was in a hard lockdown, the training of British skiing instructors on Austrian slopes led to the spread of the Covid-variant B.1.1.7 in Tyrol. Returning Tyrolian tourists from South Africa introduced further variants. A coherent quarantine concept for incoming persons was lacking.

While the Austrian government´s reactions during the first wave of Covid-19 in spring 2020 are considered to have been successful, disillusionment followed in the fall 2020 with a second wave, for which the government did not seem to have prepared properly. The third period (January to April 2021), on which I will focus in this blog entry, shows a mixed performance of the government. Consolidating the first Covid-19 year in Austria, the death toll stands at 10,000 persons dying infected with Covid-19 with more than 600,000 officially registered infections (the Austrian population is about 9 million people and yearly fatalities are about 83,000, which increased in 2020 to 90,000).

The overall governmental performance from January to April 2021 led to the return to lockdowns, which, however, have been step-by-step as well as regionalised and localised. While a law-and-order approach re-appeared in different guises, the vaccination campaign relieved after a struggling start the overall tight situation. The first year of the Covid-19 crisis was concluded by the resignation of the Minister of Health on 13 April 2021 because of physical exhaustion.

## Struggling to Amend the Statutory Framework

From March 2020 to February 2021 the Epidemics Act was amended nine times. While at the beginning there was a national consent of all parties that statutory empowerments of the government were necessary, scepticism grew already in fall 2020 and the Parliament demanded the involvement of the main committee of the Parliament to decide upon lockdowns. Interestingly, the perceived weak second chamber of the Austrian Parliament, the Federal Council (Bundesrat), became important. The Federal Council can only block the bills in Parliament for three months. This possibility had not played any significant role before the Covid-19 crisis, but became relevant as a period of three months made a huge difference as the government (Conservative Party/Green Party coalition) lacks a majority in the Federal Council. While the amendments in fall still found the support of the Social Democrats, the opposition parties denied consent to the governmental plans because they included a provi-

sion that meetings of five persons shall count as a 'formal event' (which could then be restricted). The government combined this provision with other useful measures and hoped to convince the opposition or to increase the political pressure; however, they were not successful. The government had to redraft the bill and found acceptance in Parliament for the other measures. The rejection of the bill was an impressive example that even weak constitutional mechanisms can become highly relevant in times of crisis and that parliamentary scrutiny is an important value especially in times of crisis. Instead of further restricting people's rights the government had to accept a more liberal approach.

Successful amendments to the Epidemics Act as well as the Covid-19 Measures Act at the end of 2020 and the beginning of 2021 concerned data processing for contact tracing regarding restaurants, hotels, cultural institutions, hospitals, private sports facilities etc. and data processing regarding certification of vaccinations, obligatory tests and evidence of these tests to access certain facilities, like nursing homes, or assemblies. Besides the obligation to present Covid-19 tests in many contexts (schools, assemblies, proximal services as hairdressers or massages) one of the most crucial obligations related to the wearing of FFP2 masks almost everywhere (e.g. in public transport, supermarkets, public in-door places, taxis, customer areas of companies, nursing homes etc.). The FFP2 masks have been provided by supermarkets at cost price. The government provided different strategies to increase testing in companies or in schools. Moreover, the City of Vienna enabled free PCR-testing within 24 hours for every person (four times a week).

## The Austrian Constitutional Court's Justification Claims

New judgements of the Austrian Constitutional Court (ACC) show that the Court was able to develop a differentiated review of Covid-19 measures. In July and October 2020 the ACC mainly argued – regarding governmental measures in spring 2020 – that the Ministry of Health did not provide the necessary justification in the process of enactment of ordinances. The Court continued this formal claim for justification of ordinances in December 2020 in the context of restrictions in schools and in March 2021 concerning sports facilities. In March 2021, the Court also declared that the Viennese Contact Tracing Ordinance was lacking a documented justification and thus, violated the statutory framework. Moreover, the ACC confirmed that traffic restrictions could not be justified under the Covid-19 Measures Act as enacted in spring 2020. Regarding the legal protection against quarantine the ACC declared a provision as unconstitutional because it contradicted the principle of legal certainty. The ACC, however, also confirmed that an ordinance by the Mayor of Innsbruck (Tyrol's state capital) from spring 2020 was in conformity with statutory law. The ACC also confirmed an ordinance of the Ministry of Education, which obliged pupils to engage in distant learning.

The ACC increased the rule of law standards of the enactment of ordinances when fundamental rights are at stake. Moreover, the Court claimed that the principles of legality and legal certainty have to be applied properly. The main problem, however, is the long time until the ACC has the possibility to decide because of the long proceedings necessary before an appeal to the ACC is possible combined with at least a three-month period before the Court decides.

## Federal Distinctions: Regional Shutoffs, Openings and Lockdowns

While in spring and fall 2020 attempts of regionalisation and localisation of Covid-19 measures failed, in March 2021 the time was ripe for a decentralised approach. Three measures shall be highlighted:

***Local Shutdowns***

Due to infection rates and 7-days incidence rates (400 daily infections / 100,000 persons over a period of one week) local shutdowns of villages and towns (e.g. Wiener Neustadt) were organised by decree of the Minister of Health followed by an ordinance of the respective state governor or competent local authority. These ordinances mainly contain prohibitions to leave the shut locations without a valid negative test result (antigen test or PCR test). Exceptions include children

under the age of 10, persons passing by or cases of imminent risk for life or health. The police erected road-blocks, but in an Austrian approach these road-side inspections never were conducted comprehensively; the example of Wiener Neustadt (about 45,000 inhabitants) illustrates the measures: during a one month timespan 100,000 persons were checked with 1,600 persons stopped without a test, 37 offences were charged.

***Model Region Vorarlberg – Opening in the West***

While shutdowns were implemented to stop the spread of the Coronavirus, the most Western state of Austria – Vorarlberg – headed in another direction. Due to low infection rates, the state was declared as a model region in mid-March and restaurants (including ski lodges), cultural institutions as well as sports facilities were opened. Although the infection rates quadrupled until the end of April, the capacities in the intensive care units of the hospitals remained mostly free. The opening of Vorarlberg was politically contested; while the state governor labelled it a success (although some villages already faced a local shutdown), experts saw an unnecessary risk.

***Easter Lockdown in the East***

While Vorarlberg opened its restaurants, shops and schools closed in eastern Austria (including Lower Austria, Vienna and Burgenland) from Easter (beginning of April) until the end of April. Not only were infection rates higher than in other parts of the country, but capacities in the ICUs of the hospitals were decreasing rapidly. Regularly scheduled surgeries already had to be postponed. Most contested was the closure of schools as the testing strategies in schools had proved to be successful before the lockdown.

Overall, the regional differentiation can be understood as a success as it prevents disproportionate lockdowns of the whole country; likewise, the Covid-19 experiment in Vorarlberg proves that the increase of infection rates does not necessarily lead to an overload in hospitals. Moreover, the lockdown fatigue in Eastern Austria also illustrates that the effects of lockdowns can wear out.

## Restricting the Freedom of Assembly

The lockdowns in January and April 2021 restricted the freedom of movement and personal freedoms as well as the freedom to carry on a business in a similar manner as last year. Although society seemed to get used to this form of social apathy, more and more people were affected personally, especially financially, mentally or socially. The lockdowns also affected schools, cultural workers and institutions as well as sport facilities. While cultural workers and professional athletes could at least train, they could only perform online or on TV without audience or viewers. In contrast to the also rights´ protected artistic freedom, which was restricted significantly, churches and religious groups were always exempted from Covid-19 measures from October 2020 to April 2021. Questions of the violation of the fundamental right to equal treatment and the freedom of art have been brought before the ACC, who will – most likely – decide in June 2021.

The most remarkable change of the government´s attitude towards fundamental rights, however, took place with regard to the freedom of assembly. While the statutory law regarding Covid-19 measure did not affect assemblies, the competent police authorities started restricting and prohibiting assemblies in 2021. The reason for this change to an increasing intolerance towards assemblies arose from demonstrations of coronavirus deniers, who were not willing to comply with health requirements at the demonstrations. The climax was reached when the police authorities prohibited a demonstration by the right-populist FPÖ (Freedom Party), which is a parliamentary party. The assembly nevertheless took place and the Freedom Party filed a legal complaint at the State Court of Administrative Law, which declared the prohibition void. Most unfortunately, the deciding judge came to highly questionable conclusions (including strange statements about the Covid-19 crisis in general). The police authority appealed and thus the (Supreme) Administrative Court will most likely decide within the coming months.

## Outlook

The spring 2021 was dominated by the vaccination campaign, which faced various struggles in the first four months of the year. While the first vaccination took place on 27 December 2020, the next months were characterised by delivery failures, misinformation about vaccines and questions of prioritisation. The attempts of the Federal Chancellor to obtain more vaccines from Brussels failed as well as efforts to bring in the Russian vaccine prior to an official approval by the European authorities.

The learning from a year of the Covid-19 health crisis is that the government´s attempt to restrict rights, push back parliamentary scrutiny and ignore rule of law standards has been successful only to a limited extent. Parliaments and courts were able – at least to a certain extent – to regain power and to limit governmental fantasies of total health control. The last months have been characterised by a (typically Austrian) muddling through the Covid-19 crisis, which was hampered by mutations of the virus and administrative ponderousness but also improved by regional differentiation and the steadily progressing vaccination campaign. A long-lasting concept to live with Covid-19 has not been established, but the bet that a vaccine will be available in an acceptable amount of time was successful. Thus, we hope that the expectations placed in the vaccination will be fulfilled.

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