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LEGITIMACY DEFICITS OF AUSTRIAN LEGAL COVID-19 MEASURES

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ABSTRACT: *The Austrian Government reacted fast and successful to the Covid-19 Crisis in March 2020. The following paper analysis the legal and structural challenges of this response. As a state of emergency was not declared officially the Austrian Constitution had to be fully applied. Not only questions of legality of the governmental measures, especially the compliance with the constitutional principle of the rule of law, arose, but also a reluctance towards transparency and accountability could be observed. The paper looks out for the lacks of legitimacy in the governmental measures including emergency action as well as the economic crisis governance.*

SUMMARY: 1. Legal quibbles. - 2. Quantitative dimensions. - 3. Transparency. - 4. Accountability. - 5. Conclusions.

1. The Austrian Covid-19 crisis started with a health mismanagement of the pandemic in places of skiing tourism in the Tyrolean Alps,¹ but led quickly to governmental measure, especially a public lock-down from mid-March to the mid/end of April 2020. The implementation of these measures failed to comply with the Austrian rule of law standards² and as no state of emergency was declared, the

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¹See further details Konrad Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis', *VerfBlog*, 2020/4/28, available at <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/> (accessed 25.6.2020), DOI: <https://doi.org/10.17176/20200428-165012-0/>

²One rule of law example refers to Sec. 2 COVID-19 Measures Act, which empowered the Minister of Health as well as for regional and local health authorities to prohibit the access to certain (defined) places (see Sec. 2 of the COVID-19 Measures Act). Based on the already constitutionally problematic statutory law, the Minister of Health enacted an ordinance, which includes a general curfew (with certain exceptions) for Austria. The provisions setting forth the general curfew are clearly unlawful. See Konrad Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis', *VerfBlog*, 2020/4/28.

public criticism of lawyers regarding the way of implementation of measures rose quickly.³ A core element of the criticism concerned an ordinance of the Minister of Health, which determined a general curfew and exempted in certain cases.⁴ In the public debate it remained unclear and contested between lawyers, if it is allowed to go on the street to meet friends in private premises. A legally internal but publicly announced order of the Minister of Health declared regarding Easter celebrations that private meetings are allowed if only five persons meet (who are not living in the same household). Lawyers doubted the legality of the announcement⁵ and criticised the overall approach to communicate internal orders in public,⁶ which created the impression of legally binding nature, but only had pseudo-legal effects.⁷ At the end of April the government conceded that there has never been a binding rule, which limited private meetings.⁸

At the begin of April the Austrian Chancellor Sebastian Kurz was interviewed in a famous Austrian evening news broadcast (ZIB 2)⁹ and was confronted with the legal inconsistencies of the existing ordinances. The Chancellor answered that there will be always people, who are legally pedantic. He told the interviewer that we are living in times of crisis and it is not the time to cause a maximum of confusion; all people shall do, what is necessary to tackle the crisis. He, moreover, referred to moral arguments ignoring legal criticism. This example illustrates that the Austrian government was

³See e.g. Alfred Noll, 'Corona-Krise: Der Verordnungsstaat', *Der Standard* 25.03.2020, available at <https://www.derstandard.at/story/2000116124769/corona-krise-der-verordnungsstaat> (accessed 25.6.2020); Manfred Matzka, 'Husch-pfusch-Gesetze, zahllose Erlässe: Das Virus im Maßnahmengesetz', available at <https://www.derstandard.at/story/2000116589247/husch-pfusch-gesetze-zahllose-erlaesse-das-virus-im-massnahmengesetz> (accessed 25.6.2020).

⁴See the Ordinance of the Minister of Health according to Sec. 2 No. 1 of the Covid-19 Measures Act, Federal Law Gazette II 98/2020.

⁵See <https://orf.at/stories/3160614/> (accessed 25.6.2020).

⁶Manfred Matzka, 'Husch-pfusch-Gesetze, zahllose Erlässe: Das Virus im Maßnahmengesetz', available at <https://www.derstandard.at/story/2000116589247/husch-pfusch-gesetze-zahllose-erlaesse-das-virus-im-massnahmengesetz> (accessed 25.6.2020).

⁷See further details Alexander Somek, 'Is the Constitution Law for the Court Only?: A Reply to Sebastian Kurz', *VerfBlog*, 2020/4/16, available at <https://verfassungsblog.de/is-the-constitution-law-for-the-court-only/> (accessed 25.6.2020), DOI: <https://doi.org/10.17176/20200416-182041-0>.

⁸See <https://www.derstandard.at/story/2000117145502/private-treffen-sind-erlaubt-aber-nicht-erwuenscht> (accessed 25.6.2020).

⁹Available only at <https://www.youtube.com/watch?v=u3V9NbSaxbM> (accessed 25.6.2020).

only partly willing to comply existing and constitutionally binding “rule of law”-standards, but was much more focused on a daily staged performance in Austrian media.

While on the one hand publicity was a main issue of the governmental strategy, the crisis management of the Austrian government led to an enormous amount of legislation, which ignored the information of the public (and the opposition parties) in timely manner. A public debate to understand the measures and its consequences was not possible. In many cases the government conceded not even a week for the public debate on new legislation. While some measures at the beginning of the crisis in March 2020 could not be postponed, the necessity to rush these measures through parliament was incomprehensible and criticised, especially by the opposition parties.

This unnecessary hurry also led to a general unprofessional behaviour of the government, which had counterproductive effects and even generated jeopardising moments. One of these moments took place at the end of May, when the parliament should decide on the Corona-based federal budget. While the opposition parties criticized that the Minister of Finance did not consider the effects of Corona in the governmental revenues,¹⁰ the government was careless when amending the proposed bill in parliament. In a final amendment of the bill in parliament the government forgot to add the noun “mil.” in the overall 102 bil. EUR high budget. This meant that the parliament had to decide upon instead of a 102.000 EUR budget instead on a 102 billion EUR budget. A member of the opposition party, precisely the Social Democrat’s spokesperson on financial matters, indicated in the last moment that the amendment was wrong and had to be amended itself.¹¹ The governmental majority of the parliament thereupon postponed the decision for one day and corrected the error. If this would not have happened and the parliament would have

¹⁰<https://www.derstandard.at/story/2000117696485/opposition-gegen-bluemels-fake-budget> (accessed 25.6.2020).

¹¹<https://www.derstandard.at/story/2000117770273/budgetbeschluss-im-parlament-im-letzten-moment-gestopt-offenbar-fehler-im> (accessed 25.6.2020).

passed the law and risked that the formal procedure of the whole legislative procedure would have had to start again. A debate between lawyers showed that the interpretation of the missing “mil.” could lead to both results: on the one hand it was argued, that the missing amount would have been irrelevant, on the other hand the repetition of the whole budgetary procedure was demanded.¹² While the government did not care about “legal quibbles”, when it came to the restrictions of fundamental rights, the government did not ignore the risk of passing the wrong budget and corrected the bill.¹³

The Austrian governmental measures from emergency actions to economic crisis governance in the first half of 2020 show that the government was not willing to fully comply with or take care about constitutional rules and principles. The paper analyses the lack of legitimacy in Austrian legal Covid-19 measures. In a first step significant quantitative dimensions of the governmental measures will be disclosed (2.). In a second step deficits in transparency shall be analysed (3.) and in a third step possibilities of accountability will be discussed (4.). Finally, the conclusions will deal with the role of the rule of law in times of health and economic crisis in Austria (5.).

2. Different problems legality and legitimacy could be observed in extraordinary quantitative dimensions. Three of these quantitative dimensions shall be analysed here: the first refers to immense quantity of acts of legislation, the second dimension concerns the real quantity of administrative emergency action and the third dimension relates to the amount of state resources unlocked by the parliament for the governmental action.

The first quantitative dimension relates to the acts of legislation. From 15.3.2020 until 17.6.2020 the Austrian parliament enacted 20 COVID-19 Acts of

¹²<https://www.derstandard.at/story/2000117786757/was-bei-einem-budget-mit-zahlenfehler-passiert-waere> (accessed 25.6.2020).

¹³Ibid.

legislation. Most of these acts include amendments in various statutory acts.¹⁴ Already at the begin of April criticism of these kind of “quick and dirty”-form of legislation was debated in public,¹⁵ but did not stop the governmental approach to rush through parliament ignoring qualitative requirements. Some of these acts of legislation included a sunset clause (end of 2020),¹⁶ but most of them empowered members of government to deviate from statutory law by ordinances. The compliance with constitutional requirements remained unclear.¹⁷ The short time of review for the public and parliamentary opposition led to a reduced control as it has not been possible to review the drafts properly in time.

The Austrian Epidemic Act¹⁸ is based on a decentralised concept, which did not assemble the main competence on the federal level at the Ministry of Health, but on a state level at the state governor or on a district level at the regional administrative authorities.¹⁹ The crucial enforcement of the Epidemic, thus, did not only consists of the enactments of ordinances by the Minister of Health, but was based on an internal orders of the Minister of Health²⁰ and enforced by the regional administrative authorities. The public debate criticised the publicly announced internal orders of the Ministers,²¹ but did not focus on the ordinances of regional authorities. Although the internal orders did not create any legally binding force for

¹⁴The 2nd COVID Act alone (Federal Law Gazette I 16/2020) includes amendments in 40 statutory laws, from the Telecommunication Act to the University Act, and the enactment of four new Acts of legislation.

¹⁵Manfred Matzka, ‘Husch-pfusch-Gesetze, zahllose Erlässe: Das Virus im Maßnahmengesetz’, available at <https://www.derstandard.at/story/2000116589247/husch-pfusch-gesetze-zahllose-erlaesse-das-virus-im-massnahmengesetz> (accessed 25.6.2020).

¹⁶See e.g. the COVID-19 Measures Act, Federal Law Gazette I 12/2020.

¹⁷Konrad Lachmayer, ‘Austria: Rule of Law Lacking in Times of Crisis’, *VerfBlog*, 2020/4/28, available at <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/> (accessed 25.6.2020) , DOI: <https://doi.org/10.17176/20200428-165012-0/>.

¹⁸The Austrian Epidemic Act was enacted in 1950 (Federal Law Gazette 186/1950) and amended in the Corona crisis 2020 three times.

¹⁹See Sec. 43 Epidemic Act.

²⁰See <https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Rechtliches.html> (accessed 25.6.2020).

²¹Manfred Matzka, ‘Husch-pfusch-Gesetze, zahllose Erlässe: Das Virus im Maßnahmengesetz’, available at <https://www.derstandard.at/story/2000116589247/husch-pfusch-gesetze-zahllose-erlaesse-das-virus-im-massnahmengesetz> (accessed 25.6.2020).

the population, the governmental media announcements created this impression. These internal orders were published on the website²² of the Ministry of Health,²³ but were only internally binding for state and regional authorities. The website contains information about 10 internal orders²⁴ and 57 official ordinances at the end of June 2020.

The qualitative deficits regarding the taken measure did not only relate to the Ministry of Health, but also to the ordinances of the regional administrative authorities, which were implementing the internal orders of the Ministry of Health. Austria consists of 94 legal and political districts.²⁵ Each of these districts had to enforce the rules of the Minister of Health, partly by formal ordinance considering the regional particularities of the health crisis. While in Tyrol the ordinances had been presented online,²⁶ there has not been a unified online platform for Austria, where it would have been possible to review these ordinances. On the contrary, it was highly difficult to get to know at least some of them.²⁷ Even the (Capital) City of Vienna did not provide appropriate information on their website.²⁸ Looking at the details of such ordinances (e.g. regarding the curfew), they included even worse provisions²⁹ than the ordinances and orders of the Minister of Health, which also

²²As they are not official documents, they could not be published on the official Federal Law Gazette, which again creates a lack of transparency.

²³See in German <https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Rechtliches.html> (accessed 25.6.2020).

²⁴The Ministry of Health did not leave all the orders on the website but deleted them. This means that it is formally not possible to know all the information and trace back the problems and deficits of these orders.

²⁵These 94 regional administrative districts consist of 15 statutory cities and 79 rural districts.

²⁶<https://www.tirol.gv.at/gesundheit-vorsorge/infekt/coronavirus-covid-19-informationen/gesetze-und-verordnungen/uebersicht-ueber-die-verordnungen-des-landeshauptmannes-und-der-bezirksverwaltung-gsbehoerden-auf-grundlage-des-epidemiegesetzes-1950-und-des-covid-19-massnahmengesetzes/> (accessed 25.6.2020).

²⁷See e.g. <https://hafnerbach.gv.at/aktuelles/2020/04/verordnungen-im-zusammenhang-mit-corona-der-bezirksverwaltungsbehoerde/> (accessed 25.6.2020).

²⁸The particular website <https://coronavirus.wien.gv.at/> (accessed 25.6.2020) does not contain any relevant legal information.

²⁹See e.g. the ordinance of the District Administrative Authority St. Johann im Pongau (Salzburg), which includes a series of rules that cannot be founded in the COVID-19 Measures Act.

were confronted with substantial legal problems.³⁰ In conclusion, deeper and hidden rule of law deficits occurred in significant quantity on a district level. Neither the federal state nor the state provided the necessary transparency and, thus, also limited the possibility of accountability regarding the regional law significantly. This situation is neither known nor discussed in the public debate.

A third dimension of quantity refers to the unbelievable amount of state resources, which have been released. While the Austrian government presented a federal state budget surplus in 2019 and illustrates that it is possible to successfully restructure state finance and reduce the state expenses,³¹ the government unlocked resources in the Covid-19 crisis up to the amount of 38 billion EUR. The overall Austrian federal state budget reaches a size of 80 billion EUR.³² A 6 billion EUR tax reform was considered to be as not affordable before the Covid-19 crisis.³³ In the next decade the ignorance of the existing financial possibilities will have huge effects on the economy, the social security, the health system, the education and research funding possibilities etc. While Austria struggled in the financial crisis significantly,³⁴ the quantitative dimension of state expenses unlocked in the year 2020 surpasses any existing financial dimension of the Austrian state budget.

All three presented dimensions of quantity illustrate different fields of fast legal interventions with huge effects. The first deals with the democratic foundation of legislation, the second concerns rule of law questions and the third refers to the demolished limits of state budgetary management. The last dimension raises deep concerns about the economic reasonability of the existing budgetary management

³⁰See Konrad Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis', *VerfBlog*, 2020/4/28, available at <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/> (accessed 25.6.2020), DOI: <https://doi.org/10.17176/20200428-165012-0/>

³¹<https://www.derstandard.at/story/2000113205007/budget-ueberschuss-um-eine-milliarde-groesser-als-veranschlagt> (accessed 25.6.2020).

³²<https://www.derstandard.at/story/2000076541087/das-budget-im-ueberblick> (accessed 25.6.2020).

³³<https://www.profil.at/oesterreich/steuerreform-groesste-entlastung-aller-zeiten-kaum-finanzierbar/400915955> (accessed 25.6.2020).

³⁴See Konrad Lachmayer, 'Between International Standards and Transnational Greed: Providing Transnational Rules of Law in Times of Economic Crisis' (2016) *The Hague Journal on the Rule of Law* 2016, 291-309.

through the formal parliamentary empowerment of the government (or in a substantive perspective a self-empowerment of the government). The legality and the legitimacy of the Covid-19 measures taken by the Austrian government are more than questionable. Transparency and accountability of these measures become crucial to assess their legitimacy.

3. The Austrian Covid-19 measures lacked certain aspects of transparency from the very beginning. The Austrian government was advised by health experts since the shut-down in March 2020. The advising experts, however, were not known to the public and the mechanism and criteria of their selection were not clear. The parliamentary opposition started a formal request at the government³⁵ and protocols of the expert committee were leaked in a critical Austrian newspaper.³⁶ It took until the mid of June that the Ministry of Health answered the parliamentary inquiry³⁷ and until the end of June that the protocols of the expert committee from end of February until the end of April were published in the internet.³⁸ The sub-committees of the expert group are still not clarified.³⁹ Further experts, who produced crucial studies at the end of March for the federal chancellery,⁴⁰ were never clarified.

In conclusion, decisions made by the government were not transparent and only partly comprehensible. The published information, however, showed that the government did not followed the expert committee in any suggestion and did not

³⁵See 'Schriftliche Anfrage der Abgeordneten Dr. Dagmar Belakowitsch, Kolleginnen und Kollegen an den Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz betreffend Beraterstäbe der Corona-Taskforce im BMSGPK' available at https://www.parlament.gv.at/PAKT/VHG/XXVII/J/J_01627/index.shtml (accessed 25.6.2020).

³⁶See <https://www.falter.at/zeitung/20200512/was-passiert-wenn-es-eng-wird> (accessed 25.6.2020).

³⁷https://www.parlament.gv.at/PAKT/VHG/XXVII/J/J_01627/index.shtml (accessed 25.6.2020).

³⁸<https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Taskforce.html> (accessed 25.6.2020).

³⁹<https://www.derstandard.at/story/2000118237451/tuerkis-gruen-laesst-bei-corona-massnahmen-transparenz-vermissen> (accessed 25.6.2020).

⁴⁰<https://www.derstandard.at/story/2000117097615/wissenschaftliche-corona-beratung-hinter-verschlossenen-tueren> (accessed 25.6.2020).

clarified its deviation,⁴¹ while referring on the experts' advice at the same time. The composition of the expert committee consisted mainly of health experts⁴² and did not consider other relevant expertise, which would have been crucial to balance the different perspectives on the challenges caused by the coronavirus. The government proved to be reluctant to create transparency. The lack of transparency relates to the overall approach of Chancellor Kurz since 2017 to control the flow information towards media, which was called "message control".⁴³ The Chancellor and his team actively restricted information to the public and focus on staging information in a prepared and controlled manner. This approach creates in the Covid-19 crisis a calculated lack of transparency.

Another element of lacking transparency refers to the (number of) infected persons in Austria. The statistical number of infected persons in Austria correlates to the number of coronavirus checks, which are daily performed. The overall number of virus checks in Austria at the end of June amount to more than 600.000. While the number sounds impressive, this assessment changes if one considers, that the overall population in Austria is more than 8.8 mil. people⁴⁴ and that the number of checks relates to a period of four months⁴⁵. The average daily number of checks, thus, is 5.000. While at the beginning the numbers of tests increased, the virus checks ranged in June 2020 between and 2.376 and 8.508.⁴⁶

At the end of March, the Austrian government claimed to increase the capacity to carry out coronavirus tests up to the amount of 15.000 per day.⁴⁷ On the

⁴¹See regarding the ambivalence of expert committees <https://www.derstandard.at/story/2000117473133/die-angstprotokolle-politik-statt-expertokratie> (accessed 25.6.2020).

⁴²See <https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Taskforce.html> (accessed 25.6.2020).

⁴³See a debate <https://www.derstandard.at/story/2000110959806/message-control-kanzler-kommt-wieder-als-messias-daher> (accessed 25.6.2020).

⁴⁴https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/index.html (accessed 25.6.2020).

⁴⁵From March to June 2020.

⁴⁶<https://www.derstandard.at/story/2000115810293/aktuelle-zahlen-zum-coronavirus> (accessed 25.6.2020).

⁴⁷<https://kurier.at/coronavirus/coronavirus-kurz-und-kogler-informieren-ueber-letzte-details/400791020> (accessed 25.6.2020).

website of the Ministry of Health this claim is confirmed (since the end of May 2020).⁴⁸ The realisation of this amount of testing, however, never happened. The highest number of virus checks was reached on 22 April 2020, when 12.776 tests were reported.⁴⁹

The low number of effective tests per day created a significant lack of transparency, when it comes to the number of infected people. A famous example refers to postal distribution centres around Vienna, which illustrated that precise testing will lead to the identification of infected persons.⁵⁰ The number of infected persons would increase, but the governmental measures would be more precise and the legitimization of these measures would be higher. An important testing case to gain more transparency for better health governance are (public) schools. While schools re-opened at the mid of May 2020, teachers had not been tested extensively.

Another example refers to antibody tests. These tests were carried out in June 2020 in the small mountain village Ischgl, which has been the Austrian Corona hotspot at the begin of March.⁵¹ The results revealed that 40 percent of the inhabitants of the small Tyrolean village were infected.⁵² Interestingly, the numbers of formerly infected persons is six times higher than the number of positively tested persons by the regular PCR⁵³-test.⁵⁴

The lack of transparency is, however, not restricted to emergency measures, but can also be observed in the context of the economic measures taken by the government. Regarding the huge amount of state budget involved, the parliamentary

⁴⁸<https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Haeufig-gestellte-Fragen/FAQ--Testungen-und-Quarantaene.html> (accessed 25.6.2020).

⁴⁹Due to delayed reporting the statistical highest number dates back to 2.4.2020 with 36.327 reported tests, which was in substance was not reached on one day. <https://www.derstandard.at/story/2000115810293/aktuelle-zahlen-zum-coronavirus> (accessed 25.6.2020).

⁵⁰<https://www.derstandard.at/story/2000117759680/positiver-fall-auch-in-briefverteilzentrum-in-wien> (accessed 25.6.2020).

⁵¹See Konrad Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis', *VerfBlog*, 2020/4/28, available at <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/> (accessed 25.6.2020) , DOI: <https://doi.org/10.17176/20200428-165012-0/>

⁵²<https://www.i-med.ac.at/mypoint/news/746359.html> (accessed 25.6.2020).

⁵³Polymerase chain reaction (PCR).

⁵⁴<https://www.i-med.ac.at/mypoint/news/746359.html> (accessed 25.6.2020).

opposition demanded since April 2020 the establishment of a parliamentary subcommittee to control the financial aid spent by the government.⁵⁵ The government, however, refused to create more transparency and argued that certain reporting obligations already exist in particular statutory Covid-Acts, that the Court of Auditors still have its control powers and that an advisory committee was established in the context of financial aid for corporation.⁵⁶ The aspects of transparency mentioned by the government are, however, still quite limited and cannot be compared to a fully transparent parliamentary control. Remarkably, the Ministry for the European and Constitutional Affairs started an initiative for a Freedom of Information Act,⁵⁷ which is still missing in Austria but discussed since years.⁵⁸ While the general debate for more transparency is crucial in Austria, the government is not willing to establish the obvious and necessary transparency in the context of the Covid-19 crisis.

In conclusion, various forms of lacking transparency emerged. The lacks of transparency refer to organisational and structural as well as to procedural and substantial aspects. The starting point is missing information of the parliament and the public, which makes it impossible to understand and retrace the measures taken by the government. It also creates a kind of governmental immunity to further accountability if information is not given. While the government disclosed some information step by step in the last months, a certain kind of reluctance to do so can be observed.

4. The parliamentary opposition did not only demand a parliamentary sub-

⁵⁵https://www.ots.at/presseaussendung/OTS_20200617_OT0256/covid-19-unterausschuss-oppositio-n-fordert-rasche-einsetzung; https://www.parlament.gv.at/PAKT/VHG/XXVII/A/A_00421/imfname_792318.pdf (accessed 25.6.2020).

⁵⁶https://www.ots.at/presseaussendung/OTS_20200617_OT0256/covid-19-unterausschuss-oppositio-n-fordert-rasche-einsetzung (accessed 25.6.2020).

⁵⁷<https://www.derstandard.at/story/2000117817278/edtstadler-kuendigt-gesetzesentwurf-fuer-abschaf-fung-des-amtsgeheimnisses-an> (accessed 25.6.2020).

⁵⁸See e.g. a news report from 2012: <https://www.diepresse.com/1260095/osterreich-ist-schlusslicht-bei-informationsfreiheit> (accessed 25.6.2020).

committee to control the economic measures of the government, but a general investigatory committee to evaluate the way the government made its decisions.⁵⁹ While the possibility of a parliamentary investigation has been a possibility only for the majority of the parliament for a long time, a constitutional amendment in 2014⁶⁰ opened up this possibility for a parliamentary minority (46 out of 183 MPs). The possibilities to establish an investigatory committee are still limited as opposition parties (as minority) can only demand one investigatory committee at the same time. As the Ibiza Scandal from 2019⁶¹ led to the establishment of an investigatory committee, which is not concluded yet,⁶² the opposition parties have no possibility to establish another investigatory committee.

The investigatory committees are a core instrument of the parliament to hold the government politically accountable.⁶³ The government declined the attempt of two opposition parties to establish an investigatory committee regarding the crisis governance deficits of the government. The government argued that it is too early as Austria is still within the crisis.⁶⁴ It will be crucial that the parliamentary opposition will establish an investigatory committee after the other one will be concluded. This might be the case in 2021 and will give the possibility to reveal the governmental decision-making process. It shall reveal rationality, create transparency and finally

⁵⁹<https://www.derstandard.at/story/2000117699621/fpoe-blitzt-mit-antrag-fuer-corona-u-ausschuss-ab> (accessed 25.6.2020).

⁶⁰See Art 53 Federal Constitutional Act; Federal Law Gazette I 101/2014.

⁶¹The Ibiza scandal refers to a video showing the former Vice Chancellor and chairman of the right-populist „Freedom Party” (FPÖ), in a meeting with supposed Russian oligarchs. In the video, *Strache* lays out a plan to manipulate voters through media takeovers and sketches possibilities of rigging procurement procedures. Konrad Lachmayer and Lukas Wieser, ‘*Entering into New Constitutional Territory in Austria: From a Conservative Minority Government to a Transitional Expert Government*’, *VerfBlog* 2019/6/03, <https://verfassungsblog.de/entering-into-new-constitutional-territory-in-austria/> (accessed 25.6.2020) DOI: <https://doi.org/10.17176/20190603-115423-0>.

⁶²One significant problem within the current Ibiza investigatory committee is that the government is not willing to fully cooperate. The Chancellor and the Minister of Finance declined to give relevant information. See <https://www.derstandard.at/story/2000118367154/kanzler-kurz-im-u-ausschuss-die-anatomie-der-befragung>, <https://kurier.at/politik/inland/kurz-kam-laechelnte-und-liess-viele-fragen-ins-leere-laufen/400950299> (accessed 25.6.2020).

⁶³ See regarding the general possibility of political accountability Art. 76 Federal Constitutional Act.

⁶⁴<https://www.derstandard.at/story/2000117699621/fpoe-blitzt-mit-antrag-fuer-corona-u-ausschuss-ab> (accessed 25.6.2020).

lead to accountability.

Regarding the legal accountability, administrative courts started to annul fines of the police, which were imposed on the basis of the curfew.⁶⁵ Besides, more than 70 complaints have been filed (mainly directly) at the Constitutional Court, who will decide on the issue in June and July 2020.⁶⁶ The upcoming case law of the Constitutional Court will be crucial regarding the legal accountability of the governmental action. In the mid of April 2020, the representative of the administrative court judges argued for granting the Constitutional Court new competences regarding mechanisms of interim legal protection, which are missing so far.⁶⁷ Such mechanisms could provide effective legal protection; it is, however, doubtful, if the Court would be able to decide faster as time of preparation is also important for an apex court. The weighing of arguments and time for the formation of an opinion is also an important element of constitutional justice.⁶⁸ It might be, however, important to review the accountability mechanism of the Austrian Constitutional Court after the crisis. In the mid of April 2020, Chancellor Kurz answered – when confronted with constitutional concerns of the taken measures – that the passed legal acts will not be in force anymore when the constitutional court will decide in June 2020.⁶⁹ Interestingly enough, this is not the case. While the crucial curfew is not regulated anymore, the overall statutory act is still in force.⁷⁰

The political and legal accountability regarding the taken measures are about to start. The government, however, has been, again, reluctant to enable and

⁶⁵See e.g. a judgement of the State Administrative Court (of first instance) in Lower Austria (LVwG 15.05.2020, LVwG-S-891/001-2020).

⁶⁶<https://www.derstandard.at/story/2000117981276/hoechstgericht-muss-sich-fuer-zweite-corona-welle-ruesten> (accessed 25.6.2020).

⁶⁷<https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2057200-Verwaltungsrichter-fordern-rascheren-Rechtsschutz.html> (accessed 25.6.2020).

⁶⁸See regarding the competences of the Austrian Constitutional Court Maria Bertel and Esther Happacher, ‘Constitutional Court of Austria’ (2018) *Max Planck Encyclopedia of Comparative Constitutional Law*, para. 13-33; Konrad Lachmayer, The Austrian Constitutional Court in: András Jakab/Arthur Dyevre/Itzcovich (eds.), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 75–114.

⁶⁹<https://www.derstandard.at/story/2000116907401/der-verfassungsgerichtshof-und-der-kanzler>.

⁷⁰The Covid-19 Measures Act has a sunset clause (31. December 2020).

strengthen the possibilities of accountability. The existing limits of accountability restrict a fast review of the governmental measures. It will, however, be necessary to establish a slower and more sustainable critical review of the governmental measures taken in spring 2020.

5. The overall interim evaluation at the end of June 2020 is sobering. The taken Covid-19 measures of the Austrian government are lacking significant legitimacy.

On the one hand Austria can be seen as a successful country in meeting the challenges of the Coronavirus. The government did not declare a state of emergency, the number of infected persons had been limited to 18.000 and the number of deaths range about 700 persons. These numbers illustrate a situation under control. The restrictions in March and April 2020 had been dramatic (with regard to the restrictions of fundamental rights), but not as dramatic as in Italy, France or Spain. The government reacted fast and effective. Moreover, it also provided significant support with regard to the economy.

On the other hand, the governmental measures show a lack of transparency and reasonability. From a legal perspective the (even possible) compliance with the constitutional principle of the “rule of law” was neglected. This approach started with emergency measures in March 2020 and led to a significant ignorance towards the constitutional framework. The overall negative effect on the rule of law is difficult to evaluate as many legal measures have never been published appropriately. The changing attitude of the government by ignoring certain aspects of the legal framework might also create further challenges of constitutional compliance by the government in the future. The empowerment of the government in terms of the budgetary management of economic rescue packages still implies a much higher risk with significant long-term effects, which cannot be fully evaluated yet. Formal constitutional limitations to the governmental scope of action regarding the state

expenses were never introduced in the Austrian constitution.⁷¹

In conclusion, the paper has shown that the legitimacy of Covid-19 measures in Austria is questionable. While transparency was missing to a certain extent, it will be first of all up to the Austrian Constitutional Court to take first steps with regard to the accountability of the government and to strengthen the role of the rule of law again, which is even more necessary in times of crisis.

⁷¹The latest attempt in October 2019 failed; see https://www.parlament.gv.at/PAKT/PR/JAHR_2019/PK0992/ (accessed 25.6.2020).