

The Austrian Presidential Crisis 2016

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The Austrian presidential election is finally over and a remarkable result is the outcome. For the first time, a Green Party candidate has become a head of state in Europe.¹ The full story of the Austrian presidential election campaign is, however, a bit more complicated than that since the Green Party candidate already won the run-off vote in May 2016 ...

1. A Crisis ?!

The result of the Austrian presidential election was annulled by the Austrian Constitutional Court on July 1, 2016.² The run-off vote had revealed new political dimensions: the candidates of the two traditional parties (the conservative and Social Democratic parties), which still form the government, did not even make it through to the run-off ballot, with the candidates from the opposition parties (the left-wing Green Party and the right-wing populist Freedom Party) receiving the most votes in the first round. The run-off vote (May 22, 2016) also led to the closest-ever result in a presidential run-off election: only 30,863 votes separated the two candidates after a voter turnout of 4.4m. Never before had a member of the Green Party won the presidential elections in Austria.³

Equally, the annulment of presidential elections had also never happened before. This unique occurrence meant that, for a period, Austria has had no federal president. On July 8, 2016, the term of the incumbent president, Heinz Fischer, ended; since then, the three presidents of the Austrian Parliament have carried out the role of the federal president as a collegial body (which means that the governmental parties have a majority stake in decision-making). One remarkable feature of this situation is that the Freedom Party presidential candidate, Norbert Hofer, as the third president of Parliament, has been involved in the function of federal president since the annulment in July 2016, because he was not willing to withdraw his role in Parliament. The annulment has had, therefore, the interesting consequence that the Green Party candidate, Alexander Van der Bellen, had to face the repetition of the elections, while the losing candidate participated in the collegial body replacing the federal president on an interim basis.

¹ The "Green" candidate Van der Bellen actually stood for election as an independent candidate and received broad support from across the political spectrum. However, he is the former leader and member of the Green Party.

² Judgement of the Austrian Constitutional Court (VfGH 2.7.2016, W I 6/2016) is available in German at https://www.vfgh.gv.at/downloads/w_i_6_2016.pdf.

³ See http://www.bmi.gv.at/cms/BMI_wahlen/bundespraes/bpw_2016/Ergebnis_2WG.aspx (in German).

Two weeks before the original run-off election, the Federal Chancellor, the leader of the Social Democrats, stepped down and a new Federal Chancellor was appointed by the incumbent President Heinz Fischer just five days before the run-off election.

Austria has its own history of repression of political developments. It is interesting that the public, the media and politicians did not seem to identify any form of (political) crisis in this situation. The country found itself in a kind of unsatisfactory interim phase. It seems that nobody was willing to understand or to accept what was going on and everybody was waiting for a final solution to the situation and pretending that the country was still running in the “business as usual” mode.

Two further discordant events after the annulment illustrate the fragility of the whole situation:

- The election should have been re-held on October 2, 2016. Due to faulty envelopes for the postal votes (a production error meant that they could not be sealed properly), the re-run had to be postponed. As the parliamentary statute concerning the election of the federal president did not provide for a possibility to postpone the election and it was already clear that the faulty envelopes would lead to an annulment of the new election results, Parliament amended the relevant Act of Parliament to postpone the elections until December 4, 2016.⁴ This short-notice postponement meant that the two candidates had to start a third campaign in November (after the ones in May and September). This not only had financial implications, since money needed to be raised for three campaigns, but it also affected people’s interest in the media debates.
- The president of the Austrian Constitutional Court made no comment on the judgement annulling the result after the public announcement and was not willing to participate in the subsequent public debate about the judgement.⁵ This situation led to a public statement by one of the 14 judges of the Constitutional Court, Johannes Schnizer, who publicly defended the judgement at the end of September.⁶ In his statement, he expressed the view that the contesting of the run-off result had already been prepared before the election by the Freedom Party. The flaw behind this argument was that the main reason for the annulment concerned formal irregularities during the election procedure, which could have been prevented by the scrutineers of the local electoral commissions, some of whom were provided by the Freedom Party. After Schnizer’s media statement, he was put under great

⁴ Federal Law Gazette I 2016/86, available at

https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_I_86/BGBLA_2016_I_86.pdf.

⁵ Usually, the President discusses important judgements after the announcement with the media.

⁶ <https://www.falter.at/archiv/wp/vor-der-wahl-zur-anfechtung-entschlossen>.

pressure to resign.⁷ He eventually apologised, but did not resign. Just two weeks ago, the Freedom Party decided to sue him for libel.⁸

To sum up, the Constitutional Court annulled the run-off vote, which was very tight and highly political. There was a change in federal chancellor around the same time and the government was not able to carry out the re-run election, which resulted in Parliament getting involved and having to postpone the election by parliamentary statute. Since the annulment, the losing candidate has been part of the collegial body representing the Federal President, a position that will have been vacant for at least six months. The president of the Constitutional Court refuses to defend the judgement and the only judge who has done so in public is now being sued for libel by the Freedom Party.

A crisis? Nobody in the Austrian debate identified a constitutional, political or structural crisis ...

2. The conceptual problems of the Constitutional Court's Judgement

The Austrian Constitutional Court annulled the judgement primarily due to the violation of formal rules of the Federal Presidential Elections Act, e.g. the opening of the ballots of the postal votes by the wrong individuals or the premature counting of votes on Sunday night instead of Monday morning. These formal rules are intended to prevent violations of the principles of democratic elections. The Constitutional Court traditionally applies a very restrictive approach when it comes to the violation of these principles election results are being contested. However, the Court only takes violations into consideration if they could have had an effect on the outcome of an election. To clarify this criterion, the Court looks at the overall number of votes which might have been affected by the violation, and at the difference between votes gained by the two candidates.

The calculation of the Court in this case was as follows: the number of votes potentially affected by violations against formal rules was about 77,000; even just half of the difference between the votes gained by each candidate, i.e. about 15,000 votes, could have affected the result. As 77,000 votes are far more than 15,000, the Court had to apply its restrictive review procedure and annul the election result. The Court followed its long-term case law and was convinced it had made the right decision by keeping up its formalistic rule-of-law approach, especially in such a politically sensitive case.

There are, however, many reasons why the Constitutional Court could have decided otherwise:

- The Court held an extended hearing involving many chairpersons of local electoral commissions in a way that has never occurred before in any

⁷ See the comment by Alexander Somek on the debate available at <http://verfassungsblog.de/das-hohe-und-das-menschliche-eine-anmerkung-zur-afaaere-schnizer/>.

⁸ See e.g. <http://diepresse.com/home/politik/bpwahl/5127531/FPOe-klagt-Verfassungsrichter-Schnizer>.

procedures of the Constitutional Court. The hearing included 90 witnesses. The Court identified the formal violations, but did not consider in its decision that there was no evidence of concrete manipulation of the result. The Court rejected the argument that it is necessary to find concrete manipulation, maintaining that it is only necessary to identify formal violations which create the potential for manipulation. The paradox of this argument is that, in other cases, the Court made a decision without all the evidence it gathered in this case. The Court ignored in its judgment the evidence that no manipulation could be identified.

- The calculation model is a very simple but also old one. The Court did not apply any modern statistics, which proved (as seen in the public debate afterwards) that, even if 77,000 votes were affected by formal violations, the probability of a different result would have been less than 0.000000001%.⁹ Although the Court does not engage with statistical mathematics, the result illustrates that the Court uses mathematical methods without truly considering them.
- The Court referred to violations of formal rules, though this was not the first time such violations had occurred in an election and they result from a lack of review by the Court itself in the last 20 years. Most of the problems had existed for a long time, with judges at least being aware of some of them beforehand. The Court only reviews elections in substance if there can be any effect on the result (using its own mathematics). Thus, in most cases, the Court refuses to look at structural problems in elections, because they do not have a bearing on the result. Even in cases where a substantive review takes place, the Court again restricts itself to the arguments brought forward by the complainant. The result of this restrictive constitutional concept has led to many structural problems, which have never been reviewed but are not unique.
- The Court did not take into consideration the democratic dimension of this election. Taking a rule-of-law-based approach, the Court focused its arguments on the principle of legality to protect democracy. It did not, however, consider its own effects on democracy caused by annulling a run-off vote in such a highly politicised and close election. The Court had never before annulled a federal election result in its entirety. The judgement is lacking any consideration of democracy, which goes beyond the aforementioned rule-of-law approach.

In conclusion, there are many good reasons to change the existing case law in a special case. The Court did the opposite by sticking to its case law and ignoring the democratic

⁹ See <https://cms.falter.at/falter/2016/09/06/eine-mathematik-lektion-fuer-den-vfgh/>.

impact of annulling a run-off vote in a presidential election in which no concrete manipulation could be proven. Its arguments were based on formal violations which were not unique, had been partly known about for years and were the result of the Court's restrictive approach towards reviewing elections. Finally, the old-fashioned "mathematics" employed by the Court was the basis used to create a probability of a problem which was not actually proven to exist.

3. A Heritage of Kelsen's Positivism?

It is also possible to approach the judgement from a more theoretical perspective. It seems that the Court in its decision stuck to the old Austrian heritage of Kelsen's positivism and was in keeping with Hans Kelsen himself, who is understood as the founding father of the Austrian Constitution, since he wrote the draft of the Constitution in 1920. The Constitutional Court referred in its judgement to a judgement of the Court in the 1920s¹⁰ which was prepared by Hans Kelsen, who was a judge at the Constitutional Court at that time. Moreover, the formalistic and legalistic approach in reviewing challenges of election results has been case law since the 1920s and illustrates a classical, old-style form of constitutional review by the Court. An explanation of this judgment could be the Austrian tradition of legal positivism. Such a view on the Court's judgement cannot, however, be expressed in such superficial terms and requires deeper analysis.

One might argue that the Constitutional Court recalled old virtues and relied on its positivistic culture of the past. The Court seemed to be proud to uphold a restrictive view and a legalistic and formalistic approach. Such a perspective, however, masks the real process of decision-making:

- After the judgement, doubts arose as to whether the Court had referred correctly to Kelsen's judgement from the 1920s.¹¹ The reference just seems to have been used to create authority and continuity, but does not actually reflect the situation surrounding the 2016 presidential elections.
- In its own case law, the Constitutional Court had already in the last 30 years replaced a formalistic and positivistic understanding of the constitution with a broader fundamental-rights-oriented and principle-based understanding of the Austrian Constitution. Significant case law of recent years clearly shows that the Court is willing and able to create new approaches towards constitutional law.¹²

¹⁰ Collection of the Judgements of the Constitutional Court (VfSlg) 888/1927.

¹¹ See <https://kurier.at/politik/inland/anwalt-noll-wahlaufhebung-als-erziehungsdiktatorische-vorgabe/208.047.073>; https://www.falter.at/archiv/FALTER_20160824CD5181F339/bpw16.

¹² See e.g. the Decision on the Charter of Fundamental Rights. In this decision, the Court argued that the Court has to review Charter rights as if they were constitutional rights. See e.g. Lachmayer, Constitutional Reasoning in the Austrian Constitutional Court, in: András Jakab, Arthur Dyevre and Giulio Itzcovich (eds.), Constitutional Reasoning, Cambridge University Press (*forthcoming*).

Only in some areas of constitutional law are there some relics left from old case law, and this clearly includes the case law on challenges of election results. The Court obviously had the possibility to change its case law.

- Kelsen's theory on interpretation law illustrates the limits of interpretation.¹³ Judges, both ordinary and even more so constitutional judges, are not only tasked with interpreting law, but also have to decide their own political scope. They have to use their argumentative strength to justify their political decision-making.
- Thus, the judgement of the Constitutional Court was a political decision to ignore the democratic decision of the people because of formal errors in the election which had no substantive effect on the election result. The Court presented its judgement as purely legal and hid its political dimension. The reference to the existing case law was supposed to substitute for a substantive discussion with the relevant arguments of the case. The President of the Court did not participate in the public debate afterwards. The Court used its political power and operated as a political actor but refused to reveal its political role.
- The Court presented itself as the final decision-making body without facing public criticism. This approach, which assumes the honourableness of the Court, is not a Kelsenian approach, but belongs to a much older legal culture, dating back to the Austrian(-Hungarian) monarchy, whereby the monarch has no need for self-justification. The public discussion on dissenting opinions of constitutional court judges, which are not allowed as yet in Austria, illustrated that the monarchic tradition, which favours the prestige of the Court, is still an important part of Austrian constitutional culture and represses democratic elements of deliberation. Interestingly, this approach can also be found in the judgement of the Constitutional Court as the Court ignored the democratic aspect of the elections and focused on formal and procedural elements.

In conclusion, the Court made a political decision, which it hid behind its case law based on formalistic aspects. It therefore followed a monarchic approach much more than a Kelsenian one. The Court did not take responsibility for its judgement in the public debate, but created the illusion that the judgement was solely a legal one. The Court avoided the issue of democracy in its argumentation, following instead a formalistic approach. The behaviour of the President of the Court after the judgement confirmed the overall lack of democratic deliberation.

¹³ Hans Kelsen, *Pure Theory of Law*, 2nd edition, University of California Press, 1967, p. 354: "The interpretation of the law-applying organ is always authentic. It creates law".

4. The Future of Constitutionalism

The election is finally over and the Constitutional Court's judgment seemed to be legitimised by the popular vote on December 4, 2016, which resulted in the same candidate being elected again. Voter turnout increased and the difference between the number of votes received by the candidates rose to more than 300,000. The 2016 Austrian presidential crisis, which had never been conceived as such, finally came to an end. The crisis did, however, reveal the fragility of the constitutional system and the deficits in Austrian constitutionalism. Austrian constitutional culture still has some undemocratic aspects, which date back to its monarchic cultural heritage.

Constitutionalism is under stress these days. The political developments around the world have created and will continue to create pressure on liberal democracies, representing a stress test for democracies under real circumstances. This stress test will reveal both the political, legal and cultural weaknesses and the resilience of each system. There are no guarantees that a system will not break under pressure and turn away from liberal, democratic and rule-of-law-based approaches of constitutional law.

Since every constitutional order is unique, each country will react differently to the rise of right-wing populist movements, but it is still possible for us to learn from each other by maintaining dialogues in times of constitutional crises. Each generation has to face its own constitutional challenges and make its own contributions to the constitution, which might have been established a long time ago or in the recent past. A breakdown of constitutionalism cannot support the hope of maintaining either prosperity or social justice and will instead bring corruption and violence. This does not, however, mean that it is not necessary to adapt constitutional and political systems to overcome the dark sides of globalisation.

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