

Entering into New Constitutional Territory in Austria

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Entering into New Constitutional Territory in Austria From a Conservative Minority Government to a Transitional Expert Government Konrad Lachmayer , Lukas Wieser Mo 3 Jun 2019

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10 days after the “Ibiza Video” scandal a vote of no confidence in the Austrian Parliament removed the Austrian government from office. While international media focused – in light of the exceptional circumstances – primarily on the “Ibiza Video” scandal, the constitutional dynamics were mostly neglected. It is therefore necessary to explain the events of the last days as well as to analyse the constitutional dynamics of the situation in Austria.

On Friday, 17 May 2019, German media published video footage (“Ibiza Video”) showing *Heinz Christian Strache*, the (now former) Vice Chancellor and chairman of the so-called „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.

The publication of the video footage led to the resignation from all offices of the Vice Chancellor on the following day. On that evening, Chancellor *Sebastian Kurz* of the conservative ÖVP party declared – after consulting with the Federal President of Austria Alexander van der Bellen – the coalition government terminated and proposed new parliamentary elections.

The resignation of ministers and the premature termination of a coalition government are nothing new in Austrian politics. In the last twelve years, only one government succeeded to stay in office for the constitutionally intended term of office of five years (Article 27 of the Austrian Constitution). Two years ago it was already *Mr. Kurz*, then Minister of Foreign Affairs, who initiated premature elections one year before the end of term in the wake of taking over the party leadership of the conservative party.

What was genuinely “new territory” for Austrian politics followed on Monday, 20 May 2019, when Chancellor *Kurz* made successful use of his competence to propose to the Federal President the dismissal of a minister: The Minister of the Interior *Herbert Kickl* (FPÖ) had refused a request from Chancellor *Kurz* to step down voluntarily. He had been general secretary of the Freedom Party in 2017, when the “Ibiza Video” was recorded. As minister of interior he would have had to investigate against his own party and maybe even himself. Thus, Chancellor *Kurz* requested that *Mr. Kickl* step down and hand over the interior ministry to the conservative party.

But since *Mr. Kickl* was disinclined to vacate his seat voluntarily, *Mr. Kurz* requested his dismissal which the Federal President *Van der Bellen* carried out. The consequence of this historically first dismissal in the so-called 2nd Republic since 1945 was that all ministers of the Freedom Party, except for independent, but FPÖ-nominated Foreign minister *Karin Kneissl*, resigned from office. This in turn led – again for the first time in the 2nd Republic – to the situation that a government (partly) steps down before parliamentary elections are held.

The subsequent consequence of this move was that the Federal President had to find new ministers, together with the Chancellor who has the right of nomination, to fill the vacant offices. This new government, however, would not have had a majority in Parliament and thus would have qualified as the only second minority government in Austrian politics since 1945 (after *Bruno Kreisky's* government of 1970). Although this minority government was meant to stay in office only for several months until the elections in fall 2019, it was politically crucial who would be appointed as ministers for the vacant offices.

Instead of coordinating the appointment of the “transitional government” with all parliamentary factions – the social democrats (SPÖ), the freedom party (FPÖ), the liberal party (NEOS) and the party of a former green politicians (JETZT) –, within 24 hours Chancellor *Kurz* proposed the appointment of four new ministers which were appointed by the Federal President on 22 May 2019. These ministers were understood as experts/technocrats and included a former president of the Supreme Court, two high-ranking public servants and the head of an independent administrative authority. As Vice Chancellor, the conservative minister of finance *Hartwig Löger* was appointed. Also, certain agendas were transferred to conservative ministers who had stayed in office. The opposition parties were informed about these developments but were not actively invited to nominate candidates for the “transitional expert” government. Thus, the opposition parties did not regard this government as a “transitional expert” government, but rather as a minority government of the conservative party. In this regard, it is important to mention that Chancellor *Kurz* already appointed several experts as ministers for his government in 2017; these experts were closely linked to the conservative party.

As Chancellor *Kurz* did not involve the parliamentary factions during this rapid governmental transition (which was argued to be necessary to guarantee stability), the social democrats (SPÖ) and the freedom party (FPÖ) contested the parliamentary legitimacy of the “transitional” government. They raised the objection that the “transitional” government as a minority government did not have the “trust of Parliament”. Chancellor *Kurz* defended his choice as essential to guaranteeing stability until the parliamentary elections scheduled for September, given the present uncertainty.

In his reasoning he was supported by the Federal President *Van der Bellen*, who also claimed the necessity of political stability, referring explicitly to the possible economic implications of the governmental crisis. The government was therefore

intended to stay in power until a new coalition government was formed after the parliamentary elections. This would have given the “transitional expert” government a six-month life span (May-October 2019).

On Monday, 27 May 2019, the social democrats called for a vote of no confidence against the entire government. The vote was successful, obtaining a parliamentary majority primarily supported by the social democrats and the freedom party. Thus, Chancellor *Kurz* was removed from office together with his entire government. On the same day, a formal proposal of dissolution was introduced into Parliament to enable new elections in September. On Tuesday, 28 May 2019, the Federal President *Van der Bellen* appointed the conservative Vice Chancellor of the “transitional expert” government (and Minister of Finance of the original ÖVP/FPÖ government) as interim Chancellor and reappointed all ministers to stay temporarily in office. The Federal President is now working to establish a new “transitional expert” government until a definitive government can be formed after the elections in September. On Thursday, 30 May 2019, he proclaimed that the President of the Constitutional Court, Mrs. Brigitte Bierlein, will become interim Chancellor, and that former President of the Supreme Administrative Court, Prof. Clemens Jabloner, will become interim Vice-Chancellor.

A “Conservative Minority” or a „Transitional Expert” Government?

An important element of this institutional conflict refers to the question, which kind of government was established in the week between the resignation of the members of government of the freedom party and the parliamentary vote of no confidence. Was it a “transitional expert” government (as the President seemed to assume) or was it a “conservative minority” government (as the opposition parties in Parliament were arguing)?

It is remarkable that the Austrian Constitution differentiates regarding this question. While Article 70 of the Austrian Constitution regulates the appointment of a “regular” government, Article 71 of the Constitution provides rules for the formation of a “transitional” government. Article 71 Austrian Constitution states that “[s]hould the federal government have left office, the federal president shall entrust members of the outgoing government with continuation of the administration. One of them is to be entrusted with the chairmanship of the provisional federal government. An under-secretary of state appointed to the concerned outgoing federal minister or a senior civil servant in the concerned federal ministry may likewise be entrusted with continuation of the administration. This provision applies analogously if individual members of the federal government have left office. Whoever is entrusted with continuation of the administration bears the same responsibility as a federal minister.”

The approach chosen by the Federal President and the Chancellor, however, was not to make use of Article 71 of the Austrian Constitution, but rather of Article 70 of the Austrian Constitution. Thus, the constitutional possibility of appointing a “transitional” government was not used. Instead the appointment must be qualified as the installation of a “regular” government. However, an appointment under Article 71 of the Austrian Constitution would not have been possible in any case, since the experts appointed were not “senior civil servants in the federal ministry concerned”, but rather “outsiders” suggested by the Chancellor *Kurz*. As the Chancellor had already appointed many “experts” for the original ÖVP/FPÖ government of 2017, the experts appointed for the “transitional” government did not differ from the experts chosen in 2017 in any significant way. The Chancellor also provided political cabinets made up of members of the conservative party for the new expert ministers. It is, thus, legitimate to qualify the “transitional” one-week government as a “regular” conservative minority government, rather than a “transitional expert” government. As a minority government, the government needed a majority in Parliament, which Parliament made clear it did not have.

The new government from Monday, 3 June 2019, which will be the fourth government within 14 days, with actual President of the Constitutional Court, Mrs. Brigitte Bierlein, as interim Chancellor, and the former President of the Supreme Administrative Court, Prof. Clemens Jabloner, as interim Vice-Chancellor, will be a transitional expert government, including high official of ministries. Although Austria has no experience with expert government in the 2nd Republic, it will be a challenging task of the new government to deal with politics. As a government cannot just “administer” the state, but has always to take political decisions the role of the government remains unclear. Most of the ministers have at least some links to a certain political party, the factions in parliament do not seem to stay inactive until election in September 2019 and the necessity to make some important personal decisions on a European level already show that these “experts” will have to prove their capabilities as politicians.



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All the best, *Max Steinbeis*

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