

## **“Constitutional aspects of Covid-19”**

*by Univ.- Prof. Dr. Iris Eisenberger, MSc. (LSE), University of Vienna*

After the first cases of infections with the novel coronavirus occurred in late February 2020, Austria’s government proclaimed the first nationwide lockdown. There have been four lockdowns in total in Austria by September 2022. Here is a quick overview of all lockdowns:

- 1<sup>st</sup> lockdown lasted from 16<sup>th</sup> of March 2020 until 1<sup>st</sup> of May 2020.
- 2<sup>nd</sup> lockdown lasted from 3<sup>rd</sup> of November 2020 until 6<sup>th</sup> of December 2020 – it can be split into a
  - o “light lockdown” (3<sup>rd</sup> of November 2020 until 16<sup>th</sup> of November 2020) and
  - o “hard lockdown” (17<sup>th</sup> of November 2020 until 6<sup>th</sup> of December 2020)
- 3<sup>rd</sup> lockdown lasted from 26<sup>th</sup> of December 2020 until 18<sup>th</sup> of January 2021 with regional differences in terms of restrictions
- 4<sup>th</sup> and final lockdown so far started only for unvaccinated people at 15<sup>th</sup> of November 2021 and since 22<sup>nd</sup> of November 2021 also included vaccinated people until it got lifted on 31<sup>st</sup> of January 2022. Since March 2022 most sanctions got lifted.

There have been numerous restrictions since the pandemic started, that may raise concern from a constitutional perspective. Those include for an example: the closings of stores (except food stores), restaurants, schools, universities, public places and so on. Furthermore, the wearing of masks, contact tracing, testing and vaccination, but also other responses like hardship funds and corona relief fund, have also been the topic of political discussions.

The following principles of Austria’s constitution – Bundes-Verfassungsgesetz (B-VG) – have been in conflict with restrictions and measures due to Covid-19. Particularly speaking of a power shift from executive regulation rather than parliamentary regulation, has proven to be a huge challenge to:

- The democratic principle
- The federal principle
- formulating crisis norms
- fundamental rights
- and where to get experts?

In conflict with the democratic principle is this previously mentioned power shift from parliament to administration. This has proven to be a lack of plurality; hence the legal quality suffers. Another issue that appeared in Austria’s legal system, was the lack of coordination of requirements needed to maintain legal expertise, opposition in media and science.

The federal state has been violated by reviving a competition of the best state in terms of setting the right priorities and reactions to regional infection events. Henceforth, unpopular decisions got shifted to state, nation and the European Union.

When it comes to formulations, many doubts of the population towards the government arose, it was unclear what restrictions have been made public. Due to misinformation “Verbotsirrtümer” (errors of law) occurred, citizens and authorities could not know what behavior at which place is allowed and which not, transparency suffered.

When it comes to expertise, the preservation of responsibilities, organizations of plurality of scientific opinions and prognosis decisions, have not always been met.

In terms of achievement of fundamental rights, the limits of political power, the willingness of evaluation, the restrictions of freedom and movement (worst since the second world war), private and family life, data security, conscience, culture, assembly and to carry a business, have been a wide range of problematics caused by the political powers. The Austrian constitutional court – Verfassungsgerichtshof (VfGH) has not seen one single violation of these fundamental rights. What also must be mentioned, is that the equal treatment has shown a rise of concerns, children got hit hard by restrictions and a lack of equality, that too often got left behind in the background.

Legal protections in due time have been an issue, it has shown to be difficult with judicial review based on the short duration of measures.

A different treatment between religion and culture, especially the common practice of religion since November – December 2021 while culture was still banned, might raise many questions. According to Austria’s constitutional court, there has not been any violations of freedom of culture.

Questionable prognosis decisions occurred. For an instance, the access to gardening and hardware stores has been provided, whilst more popular types of attractions to the population still were banned. Austria’s constitutional court refers to time pressure, little room for prognosis, crisis and uncertainty as legitimation through justification.

There have been exceptions for public places. Being outdoors has only been allowed with persons living in the same household. There has not been an adequate legal basis for this ban, the argument is: sensitive rights.

Very controversial have been the lockdowns which were made public by press conference. The government communicated with citizens in new ways. The “three exceptions” to leave home during lockdowns have not been stated in a legal act. Another issue with press conferences is the fact, that they are not reviewable by due process.

Conclusion:

- Most intensive restrictions since the second world war
- Crisis management challenges liberal democracy
- Inequalities occur when two groups who are the same are treated unequal. Factual differences are acceptable, legal differences are not.
- Switch back sooner to parliamentary regulation.

Antonio Jakovic