

RESILIO Country Report Austria



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1. Introduction

Democracy in Austria has faced a number of challenges over the last few years and the country's various problems, as well as the reasons behind them, are closely linked. The increasing instability of the federal government, triggered by a corruption scandal, has had the greatest impact on Austrian democracy, compounded by underlying issue of populism.¹ The resurrection of populism has intensified the polarisation of Austrian society,² a phenomenon also detected in many other countries. Crises such as the COVID-19 crisis or the 2015 'migration/refugee' crisis³ highlight the fragility of society, though they also demonstrate its resilience.⁴ Globalisation also plays a major role, in terms of international corporations and networks influencing democracy by means of private rule- and law-making. Overall, the negative effects of (perceived) corruption on the stability and effectiveness of government, and public trust in – and by extension the legitimacy of – the state and the erosion of social interpersonal trust have become clearly visible.

The 2022 Freedom in the World Austria Country Report awards Austria 93 out of 100 points, warning that safeguards against official corruption could be stronger and more effective, and that the government does not operate with openness and transparency.⁵ The results are also discussed by Democracy Reporting International.⁶ In said report, the Austrian Presidential Elections and the Rule of Law were discussed. Austrian presidents have 'on paper' significant powers, but in practice they do not use them.

The Global State of Democracy Initiative (IDEA) presents monthly event reports on different topics such as Constitutional Court Rulings or different studies regarding Austria.⁷ IDEA also presents different indices on with regard to rule of law or democracy. Furthermore, the Bertelsmann Stiftung has also published a report in 2022.⁸ This report addresses the political turbulences in Austria over the last years, mainly caused by the Corona-Virus-pandemic.

2. Analysis of the country case along RESILIO model

2.1. Most important systemic factor: constitutional resilience

The Austrian Constitution (Federal Constitutional Act), enacted in 1920, has provided the basic concepts, principles and structures of the Austrian state for the past century.

Federal, State and Local Government

Austria is a representative democracy with considerable elements of direct democracy. On the federal level, there are popular initiatives, referenda and consultations.⁹ In the country's political culture, i.e. in practice, however, direct democracy has played a minor role. Moreover, the Austrian Constitutional Court (ACC) has restricted attempts to extend the constitutional possibilities of direct democracy.¹⁰

Austria is a federal republic that consists of nine states (*Länder*), overseen by a federal constitution.¹¹ Over 2,000

local communities form part of the Austrian democratic framework. The traditional and constitutionally established system of the Austrian federal state has created a constitutionally strong federation and relatively weak states. The states have few legislative powers in comparison to the federation, and depend to a significant degree on the federation when it comes to the executive branch.¹² In most fields of administration, the federation dominates in the hierarchy and has the power to issue instructions.

In real political terms, however, the role of the states is much greater. Due to the decentralised elements of party structure in Austria, and the fact that state governors generally remain in office for a very long time (often for many decades, whereas federal ministers change almost every two to three years), the influence of states is significant.¹³ The COVID-19 crisis can serve as an example of this. Initially, the federal government made decisions on its own, while the states increased their influence significantly over the course of the pandemic.¹⁴

The impact of the European dimension

Austria joined the EU in 1995 by formally enacting a total revision of the Austrian Constitution. While the text of the Federal Constitutional Act merely changed in the sense that Austria issued a Federal Constitutional Act on the Accession of Austria to the European Union,¹⁵ the principles of the Austrian Constitution, especially those involving democracy, the federal state, and the rule of law, now incorporate concepts of EU law.¹⁶ The process of these changes is ongoing and has reshaped Austrian democracy.

Rule-making powers were largely transferred to the European level, where decisions are not taken unanimously, but with a qualified majority. Union law led to the establishment of many independent regulatory agencies; these are decoupled from the Austrian constitutional concept of democratic legitimacy of the administration, which is based on hierarchy and instructions.¹⁷ As the government depends politically on the elected state parliaments, administrative authorities are bound by the instructions of ministers. Independent agencies have left this form of government; they receive instructions – if at all – from the European level.

Union law, as well as the specifications of the European Convention of Human Rights (ECHR), led to the establishment of administrative courts of first instance in 2014.¹⁸ The fostering of the rule of law, however, led to the weakening of the administrative authorities. While decision-

making was made more objective, it was transferred from the more democratically legitimate administrative authorities to the independent judiciary.¹⁹ EU law has reshaped Austrian democracy, creating a hybrid construct that is not truly consistent with either the Austrian or the European concept. This mixture might therefore have led to a sense of lost potential influence on the one hand, and a lack of identification with European rule- and decision-making on the other.

Private Law-Making

Besides the influence of the EU, globalisation is also directly affecting Austria in manifold ways, with international corporations and networks in particular influencing democracy by means of private rule- and law-making. Most relevant for the state of democracy are the social media platforms, which create fragmented forms of (public) debates based on surveillance, emotions, and economic interests.²⁰ Populist parties in Austria have made extensive use of the opportunity to reach their voters via social media.²¹ Movements against COVID-19 measures and right-wing extremists in Austria are using social media platforms to network and recruit new supporters.²² Although the EU has started to regulate social media companies and platforms, for example via the GDPR (General Data Protection Regulation), these companies' impact on democracy is still striking and is not yet subject to proper regulation. The Austrian initiative 'Europe vs Facebook' led to significant judgments by the Court of Justice of the EU (for instance in the Schrems cases) and the Vienna-based NGO 'None Of Your Business' (noyb) is continuing the fight for effective regulation of privacy.²³

Private law-making is not limited to social media, but involves many different companies. Not only global technological companies like Amazon, Google, Microsoft or Apple, but also former start-ups like Uber or Airbnb exemplify the major impact on local economies, using private law-making to establish their rules while governments struggle to regain regulatory powers. A recent Austrian federal law has attempted to regulate Uber,²⁴ while a lawsuit has established that municipal apartments in Vienna may not be rented out via Airbnb.²⁵

2.2. Most important subsidiary factor: political resilience

These current developments should be understood in view of the structural challenges of Austrian democracy as it was conceptualised 100 years ago.²⁶ The Austrian Consti-

tution was enacted after World War I at a time when the political, economic and technological situation was completely different. Although the Federal Constitutional Act has been amended more than 100 times and the case law of the Austrian Constitutional Court has significantly shaped and concretised Austrian democracy,²⁷ the need to adapt democracy to current challenges remains a permanent constitutional and political task. Three examples can be used to illustrate democratic challenges due to the historical constitutional concepts of democracy: citizenship, social rights, and freedom of information.

One of the many issues faced by foreigners living in Austria is that gaining Austrian citizenship is extremely difficult. In an international comparison, Austria has one of the most restrictive citizenship laws.²⁸ The Nationality Act follows the *ius sanguinis* principle,²⁹ which means that a child born in Austria only obtains Austrian citizenship according to Article 7(1) of the Nationality Act if at least one parent is Austrian. This restriction has one major consequence: in Vienna for example, 30.7% of the population aged over 16 are not Austrian citizens and therefore not entitled to vote in local, state, or federal elections.³⁰ From a democratic perspective, this development is extremely questionable, which is why many have called for a more liberal approach.³¹ However, politics seems to be stuck in the past.³²

In 1920, the newly established Austrian (first) republic enacted its new constitution, the Federal Constitutional Act. This enactment was preceded by a political dispute concerning the establishment of social rights in the Constitution. While the old catalogue of fundamental rights from 1867 (State Basic Law about the General Rights of Citizens) did not contain any social rights, the socialist party (SPÖ) demanded that these be established. The conservative party opposed this and, since no compromise could be found, the solution was to integrate the old liberal fundamental rights catalogue from 1867 into the newly enacted constitution. Between 1920 and 2020, the number of fundamental rights increased from 30 to more than 60, but a social rights catalogue has not been enacted. However, some rights do include a social rights dimension, such as children's rights, the right to education, the prohibition of inhumane or degrading treatment or punishment, or equality rights.³³ In the last hundred years, various attempts to revise the Austrian fundamental rights have failed. Most prominently, the Austrian Convention (following the European Convention) tried to re-conceptualise the Austrian Constitution (2003–2005) to include the enactment of a modern human rights

catalogue.³⁴ A new human rights catalogue, however, failed (once again) due to the lack of compromise regarding social rights.³⁵

The rejection of social rights by the conservative party, however, does not seem justified as Austria still has one of the world's strongest welfare states.³⁶ While on a statutory level social benefits and social care are carefully organised, these social rights are not included in the Austrian Constitution.³⁷ Yet the Austrian welfare state is coming under increasing pressure, due to increased life expectancy or the huge variety of expensive medical treatments. Economic pressure on deprived social groups increases the popularity of populism in Austrian society. Populist parties, however, do not necessarily resolve social problems but lead to further social radicalisation and internal corruption.

Since the 18th century, Austrian government and bureaucracy have been characterised by the principle of official secrecy.³⁸ While all EU countries follow a freedom of information (FOI) concept, the Austrian government still lacks transparency.³⁹ The dramatic consequences of this constitutional tradition were rendered visible in the corruption affairs of recent years. For instance, journalists have been legally prevented from obtaining information from the government and the administration,⁴⁰ and the populist neo-conservative Austrian People's Party (ÖVP, 2017–2021) reduced still further the open and direct exchange of information and introduced a concept of governmental message control.⁴¹ The effects on the public sphere and public debate were catastrophic. As a counter-movement to these developments, more and more cases of whistleblowing and leaking of information have become part of the constitutional and administrative culture in Austria.⁴² Governmental attempts to introduce a Freedom of Information Act in Austria over the last 10 years have always failed. The political will for this is obviously not strong enough. The FOI Act has basically not made any progress since its introduction in the Austrian Parliament in November 2019.⁴³ However, in October 2023 a new attempt has been made by the current Austrian Government: The principle of official secrecy is to be abolished and access to government information facilitated.⁴⁴

2.3. Most important contextual factor: the resilience of public discourse

Three contextual aspects are core to understand the Austrian situation: corruption, populism, and polarisation.

In 2019, the Ibiza scandal,⁴⁵ which revealed the corrupt fantasies of the then Vice-Chancellor, Heinz-Christian Strache, shocked Austrian society and triggered a series of governmental crises.⁴⁶ Subsequent investigations by public prosecutors and the findings of parliamentary inquiry committees brought various forms of corruption and misconduct to light.⁴⁷ As a result, the population has increasingly lost trust in politics and the long-term impact on Austrian democracy cannot be underestimated.⁴⁸ Adjustments to the constitutional framework in the last 15 years, such as the empowering of parliamentary minorities to establish committees of inquiry⁴⁹ or the strengthening of public prosecutions, have been necessary preconditions for the effectiveness of constitutional provisions over recent years. Empowering parliamentary minorities seems particularly important considering that corruption is or can be most prevalent among the ruling majority, since they are the ones in power and making decisions.

The increased corruption in Austrian politics can be linked to the rise of populism in Austria.⁵⁰ Populism is often defined as ‘an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, “the pure people” versus “the corrupt elite”, and which argues that politics should be an expression of the *volonté générale* (general will) of the people’.⁵¹ Corruption is a core element of populist rhetoric, and thus any (perceived) increase in corruption might well be related to increasing success of populist parties and politicians.

The first wave of populism in Austria dates back more than 20 years to when the EU 14 imposed sanctions on the (in)famous coalition between the conservative party (ÖVP) and Jörg Haider’s right-wing Freedom Party (FPÖ).⁵² While the sanctions seemed to fizzle out, the consequences of Haider’s populism have not been investigated.⁵³ The collapse of the Carinthian Hypo bank caused by massive mismanagement and corruption led to the largest Austrian state bailout at a cost of more than 10 billion euros.⁵⁴

After the collapse of the Freedom Party and its spin-offs, it was another 10 years until a new version of the now neo-conservative ÖVP and the Freedom Party formed a new coalition in 2017, which again collapsed after two years in the Ibiza scandal mentioned above.⁵⁵

Austrian populism is related not only to corruption but is also rooted in xenophobia. While Haider’s Freedom Party had gained support in the 1990s after the wars in the former Yugoslavia led to an influx of refugees from that

region,⁵⁶ the rise of populism in the conservative party and the 2017 coalition made political capital out of the ‘migration/refugee crisis’ of 2015.⁵⁷ The subsequent populist governments continued to tighten asylum, migration, and citizenship laws.⁵⁸

Election analysis shows the increased polarisation in Austrian society, specifically between certain urban and rural areas.⁵⁹ While certain sections of urban society are considered to be profiting from globalisation, more and more social groups are less able to benefit. Populists play off different socially deprived sections of the population (e.g. workers and migrants) against each other.⁶⁰ Wealthier citizens are keen to enjoy the benefits of globalisation (new technological gadgets, long-distance travel, stock market gains, etc.), but have no wish to show solidarity with refugees, including those from areas which have been adversely affected by globalisation. Actual societal challenges, like the COVID-19 health crisis or climate change, illustrate the increasing polarisation in society and the lack of global solidarity.⁶¹

3. Impact of crises on the rule of law: the COVID-19 pandemic

The COVID-19 crisis has led to major challenges for Austrian democracy and could be viewed as the most decisive point in Austrian history since World War II, requiring local responses to global challenges. While short-term restrictions to liberal democracy such as the different lockdowns that restricted the freedom of movement or that schools had to close⁶² initially seemed to be a solution, the crisis shows little sign of disappearing any time soon and the changes to societies are likely to be permanent. Much like the rise of surveillance after 9/11, liberal democracies will have to find answers to new situations which do not end up in autocratic governments. Financial and ecological challenges will follow the COVID-19 crisis and governments will be under even greater pressure to find solutions, although their room for manoeuvre is shrinking due to globalisation. There are several possible ways to foster Austrian democracy and to guarantee the values of democracy, rule of law and human rights: e.g. the introduction of an FOI Act. Maintaining the existing constitutional culture and developing targeted responses to existing challenges will give Austrian politics the chance to uphold Austrian democracy.

4. Conclusion

There are various possible ways forward to protect and improve the rule of law and democracy in Austria. Both, the rule of law and democracy are intertwined and must be addressed together. The enactment of a Freedom of Information Act is overdue, and the political resistance from certain groups can no longer be permitted. Switching from a culture of governmental message control to one of openness and transparency depends not only on a constitutional amendment but also on a change of constitutional culture. Such a step will have a long-lasting effect on the rule of law and democracy in Austria and seems crucial in times of populism and increasing corruption. Hopefully, the new attempt by the Austrian Government in October 2023 will finally lead to the enactment of a FOI act.

Democracy is a permanent process of adaptation so that the (democratic) involvement of the people and the (democratic) exercise of power remains in accordance with actual developments of society. With regard to the Austrian situation, it is possible to adjust the existing constitutional framework to enable effective social media regulation and a more open approach towards citizenship.

Empowering people could be achieved by fostering their involvement, especially by promoting direct democracy and participatory elements. The relevance of direct democracy in Austria is still limited. Greater options are often demanded, but it seems that the existing possibilities, especially the optional referendum on statutory law, could be used more often. In times of populism, direct democracy does not seem to be a very attractive prospect, but it merely depends on the fields of application. If certain policy fields (e.g. the limitation of minority rights, budgetary questions, etc.) are not involved, direct democracy still has the potential to improve citizens' involvement. This, however, also requires the establishment of a culture of participation, so that a majority of citizens become actively involved.

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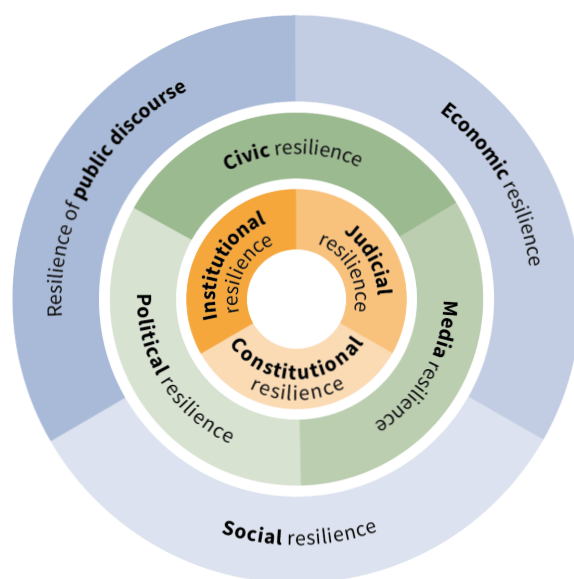
About the project

RESILIO aims to identify institutional and societal factors that make the rule of law more resilient, thus adding a constructive contribution to academic and policy debates. It draws on a “thick” definition of the rule of law, understood as closely connected to democracy and fundamental rights. The resilience of the rule of law means that the rule of law can experience hazardous events or incremental threats without losing its core function, structure and purpose.

About the paper

This paper is part of the **RESILIO Country Report series**. It is a collection of compact analyses that assess the source of rule of law resilience in each EU member state by examining the most prominent resilience factors, using the analytical framework of the RESILIO model.

RESILIENCE FACTORS



RESILIO offers a multi-layered model of the rule of law resilience. Systemic dimension (orange) reflects upon the resilience of the legal setup; subsidiary dimension (green) looks at the phenomena and tendencies present in societies as possible facilitators; and contextual dimension (blue) analyses the broader habitat, determined by structural and systemic variables like economic growth, social cohesion, and general political climate. RESILIO also takes into account the horizontal effects of unpredicted and unprecedented crises that can affect all dimensions of rule of law resilience with different intensity.

While each factor is necessary for a resilient rule of law, they are only sufficient in combination.

The considerations in this paper are compatible with the developed conceptual model of the resilience of the rule of law. They focus on **social resilience** as a contextual factor strengthening the rule of law.

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