

# 5 Formalism and judicial self-restraint as tools against populism?

Considerations regarding recent developments of the Austrian Constitutional Court

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## 5.1 Introduction

Populism is not a new phenomenon of the last decade in Austria but can be traced back to the 1990s. The developments of the last 30 years have challenged the Austrian constitutional order in many ways, but they also have affected the Austrian Constitutional Court (hereinafter ACC). The Austrian Constitutional Court – celebrating its 100th anniversary in 2020 – is one of the oldest centralized and specialized constitutional courts in the world.<sup>1</sup> Until the 1970s the Court was renowned as a formalist and restrained Court, but has become more activist – especially with regard to human rights – since the 1980s. The interrelation of populist movements and constitutional interpretation has not so far been analysed in a general approach, but examined only with regard to concrete case law.

The following study brings together the different perspectives on the topic over the last few decades and proposes the following hypotheses. First, the Austrian Constitutional Court's methodological approach has changed over time, but these changes do not relate to populism. Second, the Court has shifted in the last ten years from a rights-promoting approach to a rights-protecting approach and once again has become more self-restrained. Third, the Constitutional Court was confronted with different waves of populism. Fourth, the Court maintained its overall methodological approach when it was confronted with populism.

Regarding the analysis of these hypotheses, the study will first focus on the development of populism in Austria. Discussing the question of what can be understood by populism in the Austrian context, the analysis focuses on the rise of the populist Freedom Party in Austria and follows the traces of populism to the New People's Party (since 2017). In a second step, the different approaches adopted by the courts towards populism will be examined

<sup>1</sup> See Anna Gamper, 'Constitutional Borrowing from Austria? Einflüsse des B-VG auf ausländische Verfassungen' (2020) *Zeitschrift für Öffentliches Recht* 99.

and applied to the Constitutional Court's methodological approaches and its reaction to populism. In a third and final step, conclusions will be drawn.

## 5.2 Populism in Austria

### 5.2.1 Populism – what kind of populism?

The term populism is highly contested in international scholarship. In a general sense populism is understood as a political programme that 'claims to champion the common person, usually by favourable contrast with a real or perceived elite or establishment'.<sup>2</sup> This understanding, however, creates only a superficial grasp of the concept of populism. While it is not possible to deal with the complex questions of the concept of populism in this article, certain clarifications will be made, and the underlying understanding of populism regarding the following analysis will be presented.

It is important to consider the different understandings of the term populism in the English and the German language. Populism in German is understood as 'opportunistic, popular, often demagogic politics, which aims to gain the favor of the masses (with regard to elections) by dramatizing the political situation'.<sup>3</sup> The German understanding, thus, is much more general and more vague. It includes a much broader group of political movements. The English discussion refers to a much more elaborate concept of populism, which – as mentioned previously – claims to represent the people against an elite in an undemocratic manner.<sup>4</sup> Furthermore, this rhetoric might lead to measures against the ideas of constitutionalism.

A famous discussion on the term populism is presented by Jan-Werner Müller.<sup>5</sup> He argues that populism relates mainly to a claim to be the sole representatives of the people. Other groups (political parties) are understood as illegitimate. Populists claim to represent the (true) people. For him the element of the elite is not crucial; the core element is the anti-pluralist approach of populists.<sup>6</sup> Andres Arato criticizes Müller's perspective because it lacks the element of the 'embodiment of leadership'. According to Arato, populism also includes a 'name and will and even body of a single leader', who identifies the will of the people with the will of the group and avoids the possibility of division.<sup>7</sup>

2 <https://www.britannica.com/topic/populism> accessed 10 January 2021.

3 See <https://www.duden.de/rechtschreibung/Populismus> accessed 10 January 2021: 'von Opportunismus geprägte, volksnahe, oft demagogische Politik, die das Ziel hat, durch Dramatisierung der politischen Lage die Gunst der Massen (im Hinblick auf Wahlen) zu gewinnen'.

4 See Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 9: 'Populism has three core concepts: the people, the elite, and the general will'.

5 Jan-Werner Müller, *What Is Populism?* (Penguin 2017).

6 Ibid.

7 Andrew Arato, 'Populism, Constitutional Courts, and Civil Society', in Christine Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019) 318, 326.

In this chapter the following elements are used to identify populism, although it does not seem that all elements have to be represented with the same intensity. The first element of populism is the claim to represent ‘the People’; this includes an exclusionary second element against ‘the Others’, which can refer to different groups, especially minorities. The third element is a combination of the first and second elements, referring to the claim to be protecting the traditional population from the others (especially foreigners). The role and embodiment of a single leader serves as a fourth element. Further elements, which seem to be less essential, concern a form of nationalism, which opposes international cooperation, shows a preference for direct democratic approaches and the narrative of conducting a fight against the elite.

When it comes to populism in Austria, the focus lies on the rises and falls of the Austrian Freedom Party since 1986 (see the next sub-section). Beyond this familiar right-wing-populist narrative, the realignment of the conservative party by Sebastian Kurz (since 2017) also has to be analysed from a populist perspective.

## *5.2.2 The Austrian Freedom Party and the rise of populism in Austria*<sup>8</sup>

### *5.2.2.1 Jörg Haider and the Austrian Freedom Party (1986–2000)*

Populism in Austria is deeply linked to Jörg Haider’s takeover of the Freedom Party in 1986. His xenophobic, right-wing-populist approach, which also included statements in praise of or trivializing the Nazi regime, led to growing success at the election booths in the 1990s. This critical approach towards the government also included an attack on the privileges of the two ‘big’ parties (the Social Democrats and the conservative People’s Party), who formed coalition governments from 1986 to 2000. In 1989, Haider was elected state governor in Carinthia but lost his post because of a trivializing statement he made about the Nazi regime in 1991.<sup>9</sup> In 1999, however, he was re-elected as state governor by a much larger majority. In the meantime, he had been a member of Parliament and, as such, the leader of the largest opposition party. By criticizing the deficiencies of the grand coalition government, he gained increasing political importance.<sup>10</sup> The Freedom Party also became known for its xenophobic and

8 This chapter is based on Konrad Lachmayer, ‘Questioning the Basic Values I – Austria and Jörg Haider’ in András Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (Oxford University Press 2017) 436–455.

9 Berger, *Kurze Geschichte Österreichs im 20. Jahrhundert* (2nd edn., Facultas Verlags und Buchhandels AG 2008) 408–411.

10 Ruth Picker, Brigitte Salfinger, and Eva Zeglovits, ‘Aufstieg und Fall der FPÖ aus der Perspektive der Empirischen Wahlforschung: Eine Langzeitanalyse (1986–2004)’ (2004) 33 *Österreichische Zeitschrift für Politikwissenschaft* 263, 264.

racist election campaigns.<sup>11</sup> Any real and explicit rejection of extreme right-wing political thought was absent.<sup>12</sup> On the contrary, certain FPÖ politicians, including Jörg Haider himself, made use of references to National Socialism.<sup>13</sup> Moreover, Haider attracted attention with the use of defamatory political tactics and his authoritarian political concepts (e.g. the establishment of a ‘Third Republic’).<sup>14</sup> During the decline of the grand coalition government and political growth of Haider’s Freedom Party, Austria joined the EU in 1995 after a referendum in June 1994 (66.6 per cent majority).<sup>15</sup>

Haider transformed the Freedom Party into a right-wing-populist party, fulfilling all the criteria mentioned as characteristics of a populist movement. In accordance with the broadest understanding of the term, the Freedom Party used demagogic politics ‘to gain the favor of the masses ... by dramatizing the political situation’.<sup>16</sup> Moreover, the Freedom Party claimed to represent ‘the People’; this included an exclusionary approach against ‘the Others’, which especially referred to foreigners but also to ethnic minorities in Austria (like the Slovenian minority in Carinthia).<sup>17</sup> The claim to be protecting the traditional population played a crucial role, which contained an anti-EU nationalistic approach as well. Haider clearly symbolized the charismatic leader who had authority, and he established an authoritarian approach within the party. The Freedom Party regularly claimed there was a need for more direct democratic approaches (which they ignored when this did not benefit them<sup>18</sup>). The fight against the governmental elite formed a crucial part of their political narrative. In conclusion, the Freedom Party is the Austrian prototype of a right-wing-populist party, internationally understood as far-right extremists for good reason, because a clear distinction from national-socialist thinking was never realized (although many affirmations have been made<sup>19</sup>).

11 Haider also exploited opportunities to sue journalists and academics for libel. Because the ordinary courts did not consider freedom of expression properly, he was actually successful in drawing people into long court proceedings. See Alfred J. Noll, ‘Die Freiheit der Wissenschaft im Lichte der Strafjustiz’ (2000) 29 *Österreichische Zeitschrift für Politikwissenschaft* 381; Alfred J. Noll, ‘Die Arbeit der Strafjustiz im Lichte der Wissenschaft’ (2001) 29 *Österreichische Zeitschrift für Politikwissenschaft* 233.

12 Franziska Marquart, ‘Rechtspopulismus im Wandel. Wahlplakate der FPÖ von 1978–2008’ (2013) 42 *Österreichische Zeitschrift für Politikwissenschaft* 353.

13 Andreas Peham, ‘Die zwei Seiten des Gemeinschaftsdünkels. Zum antisemitischen Gehalt freiheitlicher Identitätspolitik im Wandel’ (2010) 39 *Österreichische Zeitschrift für Politikwissenschaft* 467.

14 [http://www.zeit.de/2000/07/200007.assheuer\\_haider\\_.xml](http://www.zeit.de/2000/07/200007.assheuer_haider_.xml) accessed 10 January 2021.

15 Stefan Grillner, ‘Verfassungsfragen der österreichischen EU-Mitgliedschaft’ (1995) *Zeitschrift für Rechtsvergleichung* 89, 100, 107.

16 See <https://www.duden.de/rechtsschreibung/Populismus> accessed 10 January 2021.

17 See Section 5.3.2.

18 See <https://www.diepresse.com/5374405/der-arger-der-fpo-mit-dem-volk> accessed 10 January 2021.

19 <https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2003897-Strache-Identitaere-sind-Verein-mit-dem-FPOe-nie-etwas-zu-tun-hatte.html> accessed 10 January 2021.

5.2.2.2 *The European scandal: the Freedom Party in Austrian government – part I (2000–2006)*

The coalition government between the People's Party and the right-wing, populist Freedom Party was viewed domestically as a political trick by the conservatives, but it was never understood as a real threat to Austrian democracy as a whole.<sup>20</sup> Various negative reactions from civil society groups followed, such as a civil society movement which demonstrated against the coalition government every Thursday. The demonstrations continued for more than two years, starting with several thousand participants in 2000 and declining to around 100 participants. The President of the Austrian Republic, Thomas Klestil, was also not impressed by the formation of the government coalition and expressed his concern at the inauguration ceremony.<sup>21</sup>

The international perception of the Austrian political shift was much more dramatic and the reaction far greater than in Austria itself. While Austrians perceived Haider's party as a right-wing populist party,<sup>22</sup> the international media understood Haider as belonging to the far-right,<sup>23</sup> which might be true for some parts of the party base but which was definitely an inadequate description of the Freedom Party's members in government.

EU member states increasingly began to react to the developments in the Austrian government and instigated certain diplomatic measures (EU 14's sanctions against Austria).<sup>24</sup> The labelling of these diplomatic measures as EU 'sanctions' against Austria can be considered a political success of the Austrian government.<sup>25</sup> The Austrian government was thereby able to make

20 In contrast to the Jobbik Party in Hungary today, Haider's party did not have a similar agenda. The Freedom Party did not begin to organize paramilitary groups in Austria or regularly refer to Nazi imagery, nor did it openly argue in favour of abolishing democracy. However, this should not disguise the fact that the Freedom Party repeatedly used xenophobic rhetoric in its politics, sympathized with the Nazi past and had far-right supporters and politicians in its party base as well as authoritarian political ideas.

21 Manfred Welan, 'Regierungssystem unter Druck? Die gewendete Republik' in Anton Pelinka, Fritz Plasser, and Wolfgang Meixner (eds.), *Die Zukunft der österreichischen Demokratie* (Signum Verlag 2000) 335–360.

22 Anton Pelinka, 'Die FPÖ in der vergleichenden Parteienforschung. Zur typologischen Einordnung der Freiheitlichen Partei Österreichs' (2002) 31 *Österreichische Zeitschrift für Politikwissenschaft* 281.

23 <http://www.theguardian.com/world/2000/feb/04/austria.ianblack> accessed 10 January 2021. See also the analysis by Christoph Bärenreuter, Stephan Hofer, and Andreas Obermaier, 'Zur Außenwahrnehmung der FPÖ: Der Mediendiskurs in Frankreich, Israel und Schweden über die Nationalratswahlen und die Regierungsbildungen in den Jahren 1999/2000 und 2002/2003' (2004) 33 *Österreichische Zeitschrift für Politikwissenschaft* 327.

24 See Bojan Bugarič, 'Protecting Democracy Inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism', in Carlos Closa and Dimitry Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

25 Rosa Winkler-Hermaden, 'Als Österreich der Buhmann der EU war' (21 January 2010) *Der Standard*, <https://www.derstandard.at/story/1263705581215/eu-sanktionen-alsoesterreich-der-buhmann-der-eu-war> accessed 10 January 2021.

political capital out of the European measures by declaring them European ‘aggressions’ against Austria and pointing to the lack of understanding of the Austrian situation.

The coalition government between the conservative party and the Freedom Party lasted from 2000 to 2006. In 2002 the Freedom Party split, and Heinz-Christian Strache became the new leader of the Freedom Party while Haider’s part of the party (‘Alliance for the Future of Austria’) stayed in government. In 2006, a grand coalition government between the Social Democrats and the People’s Party ended the populist experiment.

Haider and his Freedom Party, as well as his Alliance for the Future of Austria Party, had another impact on the Austrian state, which posed an even greater threat to the rule of law. The Haider System managed to undermine the country at its foundations without any significant visible effect between 2000 and 2006, but the dramatic results of his influence are more evident today. Haider’s *modus operandi* as state governor, along with that of some members of the government (including the Minister of Finance until 2002), was based on corruption.<sup>26</sup> Particularly after the end of the participation of Haider’s party in government in 2006, the number of corruption scandals was enormous and could not be compared to anything which had come before.

The biggest scandal, which could also have affected the European Monetary Union, was the so-called Hypo Scandal,<sup>27</sup> regarding the former state bank of Carinthia.<sup>28</sup> Other corruption scandals involved the website of the Minister of Finance,<sup>29</sup> governmental real-estate projects (the BUWOG Scandal – privatization of apartments owned by the government),<sup>30</sup> and the Telekom Scandal (involving illegal funding of political parties).<sup>31</sup>

In conclusion, the involvement of the populist Freedom Party in government led to an intense conflict with the Austrian Constitutional Court regarding minority rights and to manifold corruption scandals. While in the 1990s the Freedom Party claimed to be fighting against the privileges of the elite, the party proved to be the first to use governmental privileges for their own interests.

After Haider’s death in 2008, Haider’s Alliance for the Future of Austria became unimportant, but the Freedom Party again increased their vote in elections, which led to a new coalition government of the conservative party and the Freedom Party in 2017 under Chancellor Sebastian Kurz.

26 See <https://www.derstandard.at/story/1342947561584/steuerberater-birnbacher-erweitert-gestaendnis> accessed 10 January 2021.

27 See [http://diepresse.com/home/wirtschaft/economist/4610315/Hypo\\_Versagen-auf-allen-Linien](http://diepresse.com/home/wirtschaft/economist/4610315/Hypo_Versagen-auf-allen-Linien) accessed 10 January 2021.

28 Haider used this bank as his private slush fund to finance several prestigious projects and to finance his state party.

29 <http://derstandard.at/1777793/Grasser-Homepage-ueber-220000-Euro-wert--Gerichtsverfahren-moeglich> accessed 10 January 2021.

30 <https://www.trend.at/skandale/grasser/affaere-wie-karl-heinz-grasser-joerg-haider-buwog-deal-268641> accessed 10 January 2021.

31 Oliver Rathkolb, *Die paradoxe Republik. Österreich 1945–2015* (Paul Zsolnay 2015) 148–155.

### **5.2.3 Recent development: the Freedom Party in Austrian government – part II (2017–2019)**

After the migration crisis 2015, with more than one million refugees traveling through Austria and about 100,000 refugees applying for asylum, the xenophobic political climate in Austria affected the overall political situation and led to another involvement of the reinvigorated Freedom Party in a coalition government in 2017 with the ‘new’ conservative party under Chancellor Kurz. This involvement of the Freedom Party led to another series of political and legal scandals.

Before the Ibiza Scandal changed the Austrian political situation in 2019, an intelligence agency affair (‘BVT-Affäre’) dominated the political landscape.<sup>32</sup> Soon after the formation of the coalition government, the then new Minister of the Interior, Mr. Kickl from the Freedom Party, decided to acquire political control over the domestic intelligence agency. The general secretary of the Minister of the Interior orchestrated a house search in the office space of the Federal Office for the Protection of the Constitution and Counterterrorism. This office is the central unit of the domestic intelligence agency and part of the Ministry of the Interior itself. The ministerial cabinet organized the decisive witnesses for the public prosecutor’s office, and an artificially created deadline led to rushed action. The house search was executed by a street crimes unit, which would not have been the regular police unit employed for this particular house search, and involved a police officer who was active in the Freedom Party. The reasons for this house search seemed unclear, and the Court of Appeal in Vienna subsequently declared the house search unlawful, because a regular administrative assistant proceeding would have been sufficient to gain the relevant information.<sup>33</sup>

The ostensible reasons did not relate to information regarding far-right extremist activities in Austria; however, the house search led to the confiscation of a significant amount of information about far-right extremists. Political speculations by opposition parties included the suspicion that the Minister was interested in the level of information of the intelligence service on far-right extremists in Austria. Moreover, the preliminary suspension of the head of the domestic intelligence agency failed, because the Federal Administrative Court annulled the suspension because of a lack of evidence for the use of this disciplinary measure. A parliamentary investigation uncovered a highly unprofessional procedure by the Ministry of Interior with unclear aims. The international reputation of the Austrian intelligence service suffered significantly because of the access of

32 See Gregor Heißl and Konrad Lachmayer, ‘Zur Leistungsfähigkeit der Gewaltenteilung in der BVT-Affäre. Chronologie und rechtsstaatliche Analyse der BVT-Affäre und ihrer Folgen’ (2020) *Zeitschrift für öffentliches Recht* 531–559.

33 See press release by the Court of Appeal of Vienna, 28 August 2018.

the right-wing populist Freedom Party to sensitive international intelligence.<sup>34</sup> The Austrian Constitutional Court supported the parliamentary investigation by arguing in a formal case that the Minister of the Interior was obliged to hand over all the internal documents of the general secretary of the Ministry to the Parliament, which the Ministry at first refused to do.<sup>35</sup>

The very same Minister of the Interior – Mr. Kickl – questioned the European Convention on Human Rights in the context of asylum law in 2018. He stated that ‘law has to follow politics and not politics the law’.<sup>36</sup> He received harsh criticism for this statement not only from law professors and civil society but also from the Minister of Justice and the President of the Republic. It was, however, a significant break of a taboo in that fundamental rights were questioned by a member of the government. Moreover, both leading and minor party members of the Freedom Party have, on a regular basis, made very public xenophobic, racist or Nazi statements. The Freedom Party always tried to create the impression of an immediate reaction to, and non-tolerance of these statements, but in many cases party officials stayed in office or statements were played down.<sup>37</sup>

In conclusion, the involvement of the Freedom Party in government in each case (2000–2002, 2002–2006, 2017–2019) led to significant rule of law violations. The Austrian Constitutional Court maintained rule of law standards, especially rights protection. In 2019 the Austrian Constitutional Court annulled the statutory possibilities of installing spy software on private IT infrastructure or mobile phones,<sup>38</sup> which was enacted in 2018 and was a signature project of the Minister of the Interior, Mr. Kickl. The Constitutional Court declared the statutory provision as disproportionate and unconstitutional, because of a lack of effective legal protection and thus a violation of privacy rights.<sup>39</sup> The Court

34 [https://www.washingtonpost.com/world/national-security/austrias-far-right-government-ordered-a-raid-on-its-own-intelligence-service-now-allies-are-freezing-the-country-out/2018/08/17/d20090fc-9985-11e8-b55e-5002300ef004\\_story.html?noredirect=on](https://www.washingtonpost.com/world/national-security/austrias-far-right-government-ordered-a-raid-on-its-own-intelligence-service-now-allies-are-freezing-the-country-out/2018/08/17/d20090fc-9985-11e8-b55e-5002300ef004_story.html?noredirect=on) accessed 10 January 2021.

35 Austrian Constitutional Court 14 September 2019, UA 1/2018.

36 <https://www.diepresse.com/5566984/asyl-recht-muss-politik-folgen-nicht-politik-dem-recht> accessed 10 January 2021.

37 In this political atmosphere on Friday, 17 May 2019, ‘German media published video footage (“Ibiza Video”) showing *Heinz Christian Strache*, the Vice Chancellor and chairman of the so-called “Freedom Party” (FPÖ) at that time, 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’ (Ibiza Scandal). See Konrad Lachmayer and Lukas Wieser, ‘Entering into New Constitutional Territory in Austria. From a Conservative Minority Government to a Transitional Expert Government’ (3 June 2019) <https://verfassungsblog.de/entering-into-new-constitutional-territory-in-austria/>, DOI: <https://doi.org/10.17176/20190603-115423-0> accessed 10 January 2021.

38 Austrian Constitutional Court 11 December 2019, G72/2019 ua (G72-74/2019-48, G181-182/2019-18).

39 *Ibid.*



referred to the case law of the European Court of Human Rights, the European Court of Justice and the German Constitutional Court.<sup>40</sup>

## 5.3 The Kurz Governments

### 5.3.1 *Kurz I (2017–2019)*

The grand coalition government between the Social Democrats and the People's Party collapsed when the (conservative) Minister of Foreign Affairs, Mr. Kurz, took over the People's Party.<sup>41</sup> The following elections led to a significant increase in the People's Party's seats in Parliament (compared with the 2017 elections) and to a coalition government between the 'new' People's Party led by Chancellor Kurz and the Freedom Party. While the populist approach of the Freedom Party was already known, the new approach of Kurz's reorganized People's Party had (and still has) populist tendencies, as well; these could be observed in many initiatives of the Kurz government (covered in this section). The first Kurz government collapsed, which led to the dissolution of Parliament (initiated by Kurz) in the wake of the Ibiza Scandal. The following transitional government, also led by Kurz, lost the confidence of Parliament and was dismissed.

The reorganization of the People's Party in 2017 proved to be successful. This reorganization led to an authoritarian inner-party approach, which transferred significant power to the party leader Kurz. The party was completely reshaped towards the name, will and body of Sebastian Kurz as single leader. One of the reasons for the success was a changed approach towards refugees with the People's Party taking over the positions of the Freedom Party; this was combined with a newly adopted critical approach towards the EU. Over the last 20 years, Austrian legislation in migration law has grown ever more restrictive. The Aliens Police Act 2005 represented a major turn towards a security-based understanding of migration in Austria.<sup>42</sup> Between 2005 and 2018, the Aliens Police Act 2005 was amended 23 times, with five amendments occurring between 2017 and 2018. The Asylum Act 2005 has been amended 17 times since 2005 and 5 times from 2017 to 2019. These amendments contained adjustments making it more complicated to apply for asylum or to stay in Austria.

The Kurz Government further introduced the 'gold plating' argument in the context of the implementation of EU law in Austria. The term 'gold plating' refers to 'unnecessary' rules of member states, which go beyond a

40 See Konrad Lachmayer, 'Rechtsstaatliche Grenzen polizeilicher Überwachungsbefugnisse. Anmerkungen zum Erk des VfGH 11.12.2019, G 72-74/2019 ua', in Gerhard Baumgartner (ed.), *Jahrbuch Öffentliches Recht* (Neuer Wissenschaftlicher Verlag 2020) 105–127.

41 <https://www.diepresse.com/5217803/die-ovp-gibt-sebastian-kurz-alle-macht> accessed 10 January 2021.

42 In 2005, a coalition of the conservative People's Party and the Freedom Party (2000–2006) was already following a policy agenda which was hostile to foreigners.

European (minimum) standard. This argument prevents the domestic legislator to act in any case in which EU law already exists and national law would make businesses more expensive (e.g. by applying higher labour law standards).<sup>43</sup> The Kurz government adopted this lobbyist argument to argue that EU law should be implemented only in a minimum way, without the national Parliament having the possibility to add further content. However, this political strategy did not liberate businesses but did take away political leeway for legislative policy from Parliament.

The first Kurz Government (2017–2019) changed the role of the weekly ministerial council, which serves as a decision-making body of the government. While the media presentations given after the weekly ministerial council have changed regularly over the last ten years (presentation by the chancellor alone, additionally the vice-chancellor or other members of government), Kurz introduced a governmental spokesperson, which had not existed before. This was part of a new form of governmental ‘message control’, which aims to prevent differences between members of the government becoming public. Thus, the media is presented only with prepared concepts and not the ad hoc personal statements of ministers.

The Austrian government also initiated a new legislative act to accelerate large infrastructure projects (Location Development Act).<sup>44</sup> The limiting of the duration of administrative procedures to a time frame of 12 months creates a structural problem regarding the Environmental Impact Assessment Directive. Moreover, deficiencies in legal protection were created. The Location Development Act negatively affects the procedural rights of local initiatives and NGOs. Projects of ‘special public interest’ are prioritized at the expense of environmental protection. Local initiatives and NGOs are prevented from participating and raising critical issues by the measures taken to streamline procedures (e.g. by the possibility to restrict pleading times and topics or the obligation to bear costs caused by a ‘culpably delayed submission’).<sup>45</sup> Another statutory amendment regarding the Environmental Impact Assessment Act concerned environmental NGOs. Environmental NGOs are involved in the impact assessment process as party to the administrative procedure. The 2018 amendment<sup>46</sup> introduced a novel requirement for the participation of NGOs in administrative procedures (a minimum of 100 members). It is not clear as of this writing whether this ‘minimum membership’ requirement is compatible with EU or international law. Moreover, NGOs must prove that these requirements are met every three years. NGOs rightly voiced concerns about

43 <https://www.eesc.europa.eu/sites/default/files/resources/docs/qe-01-14-863-en-n.pdf> accessed 10 January 2021.

44 <https://www.derstandard.at/story/2000110172899/eu-kommission-zerpflueckt-oesterreichisches-standortentwicklungsgesetz> accessed 10 January 2021.

45 <https://www.derstandard.at/story/2000091945947/regierung-boxt-standortgesetz-durch> accessed 10 January 2021.

46 Federal Law Gazette I 80/2018.

these kinds of ‘Hungarian circumstances’.<sup>47</sup> While the first draft of the amendment still obliged NGOs to provide the names of at least 100 members to the authority, criticism in the context of data protection concerns (GDPR) led to a change, with NGOs having to prove the fulfilment of the minimum-member requirement only to a lawyer or a notary.<sup>48</sup>

In conclusion, the Austrian People’s Party under its party leader Sebastian Kurz contains populist elements. The focus on the person of Kurz as a charismatic leader is significant. The ‘new conservative party’ represents its party leader. Furthermore, the party has adopted a law and order approach towards refugees. After losing the vote of confidence in parliament, Kurz declared in front of party supporters that ‘Today Parliament has decided, but in the end [at the elections in September 2019] the people decide’. Even though the movement approach of the new conservative People’s Party exhibits clear populist tendencies, the party has not been employing the claim to be the exclusive representatives of ‘the people’ as a whole. Rather, it is claiming to offer the best solution for the people (which is a regular claim in any democracy). However, Kurz’s new People’s Party exhibits clear authoritarian tendencies. Examples are the course of action chosen by Kurz in his takeover of the party, the (partly informal) re-structuring of the government or the implementation of message control within the government.

### *5.3.2 Kurz II (2020–)*

After the turbulences of the Ibiza Scandal,<sup>49</sup> the elections in September 2019 brought a new version<sup>50</sup> of a coalition government between the conservative People’s Party and the Green Party. Some elements in this coalition government still relate to the exclusive concept of the new conservative People’s Party regarding refugees. In the context of migration, the Chancellor declared he would continue his right-wing approach, which he established while in government with the Freedom Party. The Green Party not only accepted this announcement, but also the possibility contained in the coalition agreement that the conservative party may – in the case of another migration crisis like 2015 – look for other majorities in parliament (with the Freedom Party as the most likely ally) to introduce severe migration measures.

More recently, the Ministry of Interior planned to reorganize the provision of legal advice for asylum seekers. In May 2019, during the last days of the first Kurz Government, Parliament approved the establishment of a federal

47 <https://kurier.at/politik/inland/ngos-beklagen-frontalangriff-auf-umweltschutz-durch-regierung/400136198> accessed 10 January 2021.

48 See Federal Law Gazette I 80/2018.

49 The Ibiza Scandal led to the dissolution of the coalition government between the People’s Party and the Freedom Party, the vote of no-confidence against Kurz and the subsequent dissolution of Parliament.

50 A coalition between these two parties had not existed on a federal level before.

agency<sup>51</sup> to take over the provision of legal advice from NGOs. This federal agency would organize primary care, legal advice and return counselling for asylum seekers. In a ‘law and order’ policy, the perspectives and possibilities for refugees and migrants, who have come to Austria over the last few years, would be limited to a minimum, preferably resulting in deportation after an efficient asylum procedure. These legislative measures have created tension with EU secondary law regarding legal advice for asylum seekers.<sup>52</sup>

The overall complexity of the Austrian constitutional design and the existing institutions provide a certain level of resilience, but the limitations of this resistance can be clearly observed. Further developments will depend on the new Kurz II government, consisting of a dominant conservative party, but also of a Green Party with a completely different political agenda. The coalition agreement illustrates these tensions, including populist measures concerning refugees as well as reform projects to safeguard the rule of law (e.g. support and strengthening of the judiciary). The Covid-19 crisis has led to further constitutional challenges, which cannot be discussed in detail here.<sup>53</sup>

## 5.4 Changing approaches of the Austrian Constitutional Court

### 5.4.1 *Judicial approaches towards populism*

International constitutional scholarship debates the appropriate role of the judiciary in times of populism. The international debate in comparative constitutional studies seems to agree that (constitutional) courts play a decisive role in times of populism, but that they cannot on their own protect the constitution from authoritarian developments by governments.<sup>54</sup> Populism implies anti-pluralist and anti-democratic claims, which have to be addressed

51 Bundesgesetz über die Errichtung der Bundesagentur für Betreuungs – und Unterstützungsleistungen Gesellschaft mit beschränkter Haftung (BBU-Errichtungsgesetz – BBU-G), Federal Law Gazette I 53/2019.

52 Richtlinie 2013/33/EU (Aufnahmerichtlinie), Art 8, 12, 19, 20, 21, Richtlinie 2013/32/EU (Asylverfahrensrichtlinie), Art 27 Verordnung (EU) Nr. 604/2013 (Dublin III).

53 See for a first analysis Alexander Somek, ‘Is the Constitution Law for the Court Only? A Reply to Sebastian Kurz’ *Verfassungsblog* (16 April 2020) at: <https://verfassungsblog.de/is-the-constitution-law-for-the-court-only/> accessed 10 January 2021; Konrad Lachmayer, ‘Austria: Rule of Law Lacking in Times of Crisis’ *Verfassungsblog* (28 April 2020) at: <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/> accessed 10 January 2021; Kevin Fredy Hinterberger, ‘Österreich setzt das Asylrecht aus,’ *Verfassungsblog* (26 April 2020) at: <https://verfassungsblog.de/oesterreich-setzt-das-asylrecht-aus/> accessed 10 January 2021.

54 See e.g. Yaniv Roznai, ‘Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy’ (2020) 29 *William & Mary Bill of Rights Journal*; András Jakab, ‘What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law’ (2019) *MPIL Research Paper Series* No. 2019-15.

by constitutional courts. Different approaches can be followed by constitutional/supreme courts, as Yaniv Roznai suggests:<sup>55</sup>

- (1) Courts could behave in an activist way to stop further anti-constitutional developments;<sup>56</sup>
- (2) Courts could maintain their own approach (as before);
- (3) Courts could restrain themselves and try to play for time.

From an Austrian perspective, this chapter will illustrate how the case law of the Austrian Constitutional Court has changed in the last ten years from an activist court to a more restrained court, which acts as the guardian of the constitution, without further developing constitutional rights and principles in new directions. When the Austrian Constitutional Court was already confronted with populism twenty years ago, the Court reacted in an activist way and promoted its rights-based agenda (1).

The character of the Court has changed, but this change was induced not by populism but much more by other factors. Although these factors have not yet been analysed academically, the generational change of judges might be one relevant aspect. The overall change of the Court also had an impact on dealing with the increasing populism in the federal government between 2017 and 2019.

The Austrian Constitutional Court's approach changed from a 'rights-promoting activist' Court (1) to a 'protecting the constitution' Court which maintained its own approach (2). In its 'new' approach, the Constitutional Court has now become much more a guardian of the constitution and its existing case law. In still-existing rights-promoting cases the Court usually refers to the case law of the CJEU or the ECtHR as legitimation for promoting rights but does not develop its own strategy to develop new rights and principles.

#### *5.4.2 Promoting Rights in a European Context (1970–2008)*<sup>57</sup>

While the Austrian Constitutional Court was renowned for its formalistic, positivistic and self-restrained case law after World War II, the Court's jurisdiction shifted towards more judicial activism in the 1970s. Inspired by the German Constitutional Court and its constitutional reasoning, the Austrian constitutional court used the concept of rights to develop its own

55 See Roznai (n 54), who prefers to 'stand firm' by following the 'business as usual' approach.

56 See Jakab (n 54). Roznai (n 54) criticizes the approach and believes that it makes things even worse.

57 See with regard to this chapter a former version by the author: Konrad Lachmayer, 'The Austrian Constitutional Court' in András Jakab, Arthur Dyevre, and Giulio Itzcovich (eds.), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 75–114.

possibilities of substantive review.<sup>58</sup> The most prominent case law refers to the right to equality, which was used as a constitutional basis for the judicial establishment of a principle of reasonability<sup>59</sup> and a principle of the protection of legitimate expectations.<sup>60</sup>

The function and the self-understanding of the Court have changed. The Court has not abandoned the old approach completely but has developed its own mix of judicial restraint, focusing on the meaning of words and historical approaches on the one hand, and judicial activism promoting rights protection and teleological reasoning on the other. The fragmented structure of the Austrian human rights system in the Constitution provides many different sources for the Constitutional Court. The Constitutional Court uses a fundamental rights catalogue from 1867,<sup>61</sup> different post-war treaties (St. Germain 1919, Vienna 1955),<sup>62</sup> the ECHR and other international treaties,<sup>63</sup> further constitutional provisions (e.g. data protection)<sup>64</sup> and finally, since 2012, the EU Charter of Fundamental Rights.<sup>65</sup> Influenced by the ECtHR and the German Constitutional Court, the application of the proportionality test has proved to be most important when dealing with human rights questions by the Austrian Constitutional Court.

The Constitutional Court in particular used the principle of equality to develop new principles and rights.<sup>66</sup> Thus, this principle played a major role in the judicial activism of the Austrian Constitutional Court. The core of the principle of equality refers to the right of equal treatment before the law (Art. 7 Austrian Constitution). The Austrian Constitutional Court has derived a whole set of principles and rights from Art. 7 of the Austrian Constitution since the 1970s. This includes a non-discrimination principle, a principle of prohibition of arbitrariness, a principle of reasonability, a principle of the protection of legitimate expectations, a principle of tax capacity (ability-to-pay principle), an equal treatment of men and women principle, a principle of system coherence, etc. These developments can be linked to the change of the Court towards a more substantive, value-based and active court.

58 See Konrad Lachmayer, 'Eine Sprache, zwei Rechtskulturen: deutsches und österreichisches Verfassungsrechtsdenken' in Uwe Kischel (ed.), *Der Einfluss des deutschen Verfassungsrechtsdenkens in der Welt: Bedeutung, Grenzen, Zukunftsperspektiven* (Mohr Siebeck Verlag 2014) 65–91.

59 VfSlg (Official Collection of Case Law of the Austrian Constitutional Court) 10.043/1984.

60 VfSlg 11.309/1987.

61 Manfred Stelzer, *The Constitution of the Republic of Austria. A Contextual Analysis* (Hart 2011) 209.

62 Ibid., 211–212.

63 See e.g. the International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969.

64 See Sec. 1 Data Protection Act.

65 See VfSlg 19.632/2012.

66 Stelzer (n 61) 242–244.

The Austrian Constitutional Court, in comparison with the German Constitutional Court, still follows an unemotional, prosaic style with relatively short reasoning. Although inspired by the German approach towards EU law, the Austrian Constitutional Court has developed an open-minded attitude towards EU law, trying to implement the EU's legal thinking into Austrian constitutional law. The last 25 years mainly reflect the adaption of the Constitutional Court to EU constitutional law.<sup>67</sup> This development – combined with an increasing relevance of the case law of the ECtHR in Strasbourg – has led to a further strengthening of a rights-and-principle-based approach towards constitutional law. In the 1990s, the Austrian Constitutional Court started to foster its constitutional reasoning based on the rule of law principle and the democratic principle.<sup>68</sup> This again led to an opening in the understanding of the Austrian Constitution not only regarding human rights, but also concerning state organization. The introduction of administrative courts of first instance in 2014 is an impressive result of these changes of the Austrian Constitution and the constitutional reasoning of the Constitutional Court.

#### *5.4.3 The Slovenian Minority Case Law*

When it comes to the methodological approach regarding populism, the Carinthian minorities case about road traffic signs illustrates the activist, rights-promoting approach of the Austrian Constitutional Court.<sup>69</sup> The Court did actively fight against populist approaches at that time. In 2001, the Court reached a new decision with regard to bilingual road signs in Carinthia (concerning the Slovenian minority).<sup>70</sup> The case considered the re-evaluation of the (existing) 25 per cent rule (which was lowered by the Austrian Constitutional Court to 10 per cent on the basis of the Treaty of Vienna

67 VfSlg 14.390/1995; VfSlg 14.863/1997; VfSlg 14.886/1997; VfSlg 15.427/2000; VfSlg 17.967/2006; VfSlg 19.499/2011; VfSlg 19.632/2012.

68 See e.g. Martin Hiesel, 'Die Rechtsstaatsjudikatur des Verfassungsgerichtshofes' (1999) *Österreichische Juristenzeitung* 522; Martin Hiesel, 'Die Entfaltung der Rechtsstaatsjudikatur des Verfassungsgerichtshofs' (2009) *Österreichische Juristenzeitung* 111; Martin Hiesel, 'Entwicklungen der Rechtsstaatsjudikatur des Verfassungsgerichtshofs' (2016) *Österreichische Juristenzeitung* 205; see also Harald Eberhard and Konrad Lachmayer, 'Rule of Law in Austria' in *Understandings of the Rule of Law in Various Legal Orders of the World*, Rule of Law Wiki 2011, <http://wikis.fu-berlin.de/display/SBprojectrol/Austria> accessed 10 January 2021.

69 This section is based on Lachmayer (n 8).

70 Gerhart Holzinger, 'Die Rechte der Volksgruppen in der Rechtsprechung des Verfassungsgerichtshofes' in Bernd-Christian Funk et al. (eds.), *Der Rechtsstaat vor neuen Herausforderungen. Festschrift Adamovich* (Verlag Österreich 2002) 193; Joseph Marko, 'System des österreichischen Volksgruppenrechts und Minderheitenschutzes', in Gregor Heißl (eds.), *Handbuch Menschenrechte* (Facultas Verlagsgesellschaft 2009) 421, 432–435.

from 1955, which does not specify a percentage).<sup>71</sup> The rule regarded the percentage that a minority would have to represent in a population to require the erection of bilingual signs. Using newly elaborated reasoning, the Court argued that it was necessary from the perspective of international law and constitutional minority rights to erect bilingual road signs in more than 200 municipalities.<sup>72</sup>

Jörg Haider, as state governor of Carinthia and leader of the Freedom Party,<sup>73</sup> started a populist campaign against this judgment, not only breaking the law but also attacking the Constitutional Court, whose authority had never before been politically questioned in the Second Republic in such a manner.<sup>74</sup> Haider savagely attacked the President of the Constitutional Court, Ludwig Adamovich, publicly.<sup>75</sup> The Constitutional Court actually reviewed the possibility of starting impeachment proceedings against its own President,<sup>76</sup> not to concede anything to Haider, but rather to create a forum to formally reject Haider's accusations. The ACC thus openly started to oppose the populist attack on the Court, held firm and enabled the strengthening of the protection of minority rights.

Haider toyed with enforcing the judgment using various legal arguments, such as rearranging a village's signage and arguing that the signs were therefore not affected by the judgment, or erecting very small signs in the Slovenian language.<sup>77</sup> This resulted in an extensive body of case law for the Constitutional Court, initiated by the representatives of the Slovenian minority in Carinthia and the Austrian Ombudsman.<sup>78</sup> Haider's activities were politically supported, at least to a certain extent, by ministers in the

71 Art 7 (3) Treaty of Vienna 1955: 'In the administrative and judicial districts of Carinthia, Burgenland and Styria, where there are Slovene, Croat or mixed populations, the Slovene or Croat language shall be accepted as an official language in addition to German. *In such districts topographical terminology and inscriptions shall be in the Slovene or Croat language as well as in German*' (emphasis added).

72 Austrian Constitutional Court, 13 December 2001, VfSlg 16.404/2001; see Michaela Salamun, 'Minority Rights of the Slovene Minority in Carinthia: Placement of Bilingual Signs for Municipal Units (Ortschaften) with 10 Per Cent (Previously 25 Per Cent) Minority Population' (2008) Vienna Journal on International Constitutional Law 135.

73 <https://www.diepresse.com/647029/chronologie-der-ortstafel-streit-seit-1955> accessed 10 January 2021.

74 Anna Bender and Konrad Lachmayer, 'Kampf ums Recht: Minderheitenschutz, Rechtsstaat und Verfassungsgerichtshof' in A. Masát, E. Bos et al. (eds.), *Der Donauraum in Europa* (Nomos Verlagsgesellschaft 2013) 336, 340–341.

75 Albert Otti and Michael Karsten Schulze, 'Die Gewalten auf Konfrontationskurs? Eine Fallstudie über das Verhältnis von VfGH und Regierung in den Anfängen der Wende' (2004) 33 Österreichische Zeitschrift für Politikwissenschaft 67, 72–75.

76 VfSlg 16.408/2002.

77 Bernd-Christian Funk, 'Kärntner Ortstafelkonflikt – Zulässigkeit einer Volksbefragung?' (2006) *migraLex* 74.

78 Valerie Leskovar, 'Rights of Minorities and Place Name Signs' (2008) Vienna Journal on International Constitutional Law 141; Alexander Klingensbrunner, 'Bilingual Topography: Differences between German and Slovenian Place Names in Size Are Unconstitutional' (2008) Vienna Journal on International Constitutional Law 146.



Federal Government, who were members of the Freedom Party. Moreover, the Minister of Justice at the time was a member of the Freedom Party and could prohibit any measures initiated by public prosecutors; the Minister for Transport, who could also have been involved in the installation of bilingual road signs, was also a member of the Freedom Party. Haider never implemented the judgment of the Constitutional Court before his death in 2008.

The case of the bilingual road signs clearly showed that the ACC was not only willing to uphold its authority but also to step up towards a more progressive form of rights promotion in times of populism. The Court used judicial activism to extend the scope of minority rights and fostered its approach by establishing a long-lasting case law in this regard. Its open confrontation did create challenges to the Court's authority as the Carinthian governor refused to comply, but the Court held its position and extended its case law until a political compromise was found and the Constitution was amended in 2011.

#### *5.4.4 Protecting Rights in a European Context (2008–2020)*

In the last ten years, the Austrian Constitutional Court has changed its general approach to constitutional review. The times of judicial activism seem to have passed, and a more restrained period has begun. The statistics show that the Court has become less activist. In the last few years the Court has reduced the numbers of cases in which it declared a statutory provision as unconstitutional. An important argument of the Constitutional Court is the 'great leeway for legislative policy by the parliament', which can be qualified as a domestic version of the margin of appreciation doctrine of the ECtHR. The Court gave back more political decision-making power to the government. As mentioned earlier, this change in the Court's methodological approach already started before the next wave of populism in Austria and is not linked to populism. The more restrained approach has also affected the Court's way of dealing with populism since 2017.

Although a more general tendency towards judicial restraint can be observed, significant highlights in the case law in the last ten years illustrate that the Court is still the guardian of human rights. Although not actively promoting them, the protection of human rights is still an important part of its case law. Important judgments over the last ten years have often been linked to developments in human rights on a European level. The Austrian Constitutional Court has thus implemented the case law of the ECtHR and the CJEU. This case law refers, for example, to the equality of LGBT persons, including same-sex marriage,<sup>79</sup> the adoption of children by same-sex

79 VfSlg 20.225/2017; Christa Pail, 'Austrian Constitutional Court. Somewhere under the Rainbow: Marriage Equality and the Role of the Austrian Constitutional Court' (2018) *Vienna Journal on International Constitutional Law* 225.

couples<sup>80</sup> and the recognition of a third gender.<sup>81</sup> The innovative integration of the EU Charter of Fundamental Rights in the constitutional rights adjudication in 2012 is an example of the strengthening of the Court's power (with regard to other apex courts in Austria) and was less the pursuit of a rights-promoting agenda, although it still retained this effect to a certain extent.<sup>82</sup> The Court thus still continues to protect fundamental rights today.<sup>83</sup>

#### 5.4.5 *Surveillance Case Law*

The grand coalition government in power after 2006 tried to avoid implementing the EU Data Retention Directive.<sup>84</sup> The Government remained hesitant until 2011, when Austria had already been punished by the CJEU for missing the implementation deadline for this kind of surveillance directive. Finally, the bill was drafted by the Ministry of Technology in cooperation with a human rights institute to strengthen the constitutional rights elements in the Austrian implementation. The state of Carinthia, as well as human rights activists, immediately initiated proceedings at the Constitutional Court as soon as the implementing act entered into force. The Constitutional Court initiated preliminary proceedings in the CJEU, where an Irish case was already pending.<sup>85</sup>

After the judgment of the CJEU in April 2014, the Constitutional Court ruled in June 2014 on the (un)constitutionality of the Austrian statutory provisions implementing the EU Directive. The Court declared the relevant domestic statutory provisions to be unconstitutional and thus null and void. The Austrian Constitutional Court took over the argumentation of the CJEU.<sup>86</sup>

After ten years of attempts by the Ministry of Interior, the Kurz I government initiated a new surveillance package on the statutory level, which

80 VfSlg 19.942/2014; Iris Murer, 'Exclusion of Registered Partners from Adoption Rights Found to Be Discriminatory' (2015) *Vienna Journal on International Constitutional Law* 281.

81 VfSlg 20.266/2018.

82 VfSlg 19.632/2012; Gisela Kristoferitsch, 'The Charter of Fundamental Rights of the European Union to be treated like Constitutional Law' (2013) 7 *Vienna Journal on International Constitutional Law* 88.

83 See recent case law in Chapter IV.

84 See in more detail Konrad Lachmayer, 'The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity' in Anneli Albi and Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 1271, 1293–1295.

85 See CJEU Case C-189/09 *Commission and Council v. Austria* [2010] ECR I-00099; Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238; VfSlg. 19.702/2012.

86 VfSlg 19.892/2014; Andreas Lehner, 'Data Retention: A Violation of the Right to Data Protection. Strengthening the Judicial Review System in Austria' 8 (2014) *Vienna Journal on International Constitutional Law*, 445–457.

included intrusive software in personal computers and mobile phones as well as police access to traffic data ('Bundestrojaner', state spyware).<sup>87</sup> Parliament enacted these measures in 2018, and the Austrian Constitutional Court declared the relevant provisions unconstitutional, especially regarding Art. 8 ECHR.<sup>88</sup> Regarding the relevant argumentation, the Constitutional Court referred to the case law of the ECtHR and its own judgment in the Data Retention Case, which was mainly influenced by the CJEU. Although the Court also referred to the German Constitutional Court, the Austrian Constitutional Court was not willing to go one step further to establish a separate right of confidentiality and integrity of IT systems as the German Constitutional Court did.<sup>89</sup>

The surveillance cases of the Austrian Constitutional Court showed that the Court is still willing to protect human rights by declaring the surveillance measures of a populist government unconstitutional. The Court, however, developed existing case law further and was willing to integrate European case law into the Austrian constitutional landscape.

## **5.5 Conclusion – The Austrian Constitutional Court maintains its own approach**

When looking back on the overall tendencies of the last few years, the Austrian Constitutional Court has confirmed the approach adopted over the last ten years; while protecting rights in a European context, the Court has clearly shifted in a more restrained direction.

On the one hand, the Court has held firm in its rights-protecting case law in crucial cases. At the end of 2019 the Constitutional Court declared crucial projects of the Kurz I government, such as stronger state surveillance or fewer social benefits for refugees, to be unconstitutional. Austria offers recognized refugees' different forms of social benefits including a guaranteed minimum income. The states (*Länder*) have the legislative competence to regulate these social benefits. The legislative developments of the last few years – especially in conservative states or states where the Freedom Party participates in the state government – have led to amendments of statutory acts to restrict social benefits, particularly regarding recognized refugees. As a consequence, the CJEU,<sup>90</sup> as well as the Austrian Constitutional Court,<sup>91</sup> declared certain provisions to be contrary to EU law, or unconstitutional.

87 See, with regard to further details, Lachmayer (n 40).

88 Austrian Constitutional Court 11.12.2019, G 72-74/2019 ua.

89 German Constitutional Court 1 BvR 370/07, 1 BvR 595/07.

90 <https://www.diepresse.com/5533648/eugh-kiptt-kurzung-der-mindestsicherung-fur-asylberechtigte-in-oberosterreich> accessed 10 January 2021.

91 VfSlg 20.244/2018, 20.297/2018, 20.300/2018.

On the other hand, a trend towards judicial restraint in the ACC's case law can also be observed. In 2016 the ACC decided<sup>92</sup> in a remarkably formalistic decision against the stronger involvement of environmental issues in constitutional law. In the so-called third runway (of the Vienna airport) decision, the ACC declared that international law concerning climate change must not be considered in the approval of economically significant decisions regarding the establishment of aviation facilities. In 2019, the Constitutional Court qualified the reform of the social security organizations regarding a crucial point of legitimacy (enabling the conservative party to politically influence the Austrian health care system) as constitutional. The Court even extended existing case law regarding the undemocratic composition of self-governing bodies.<sup>93</sup>

In conclusion, although the Austrian Constitutional Court is much more activist than 50 years ago,<sup>94</sup> it has become more formalistic and judicially restrained in the last 10–15 years. This, however, cannot be linked to the populist movements of the last few decades. While acting in an activist way 20 years ago in general and with regard to populist developments, the Court now acts with more restraint in general, but also with regard to populist legislation and law enforcement. Thus, the Court maintains its own approach regarding populism. Although the overall methodological approach is changing over the decades – which might be related to the personal composition of the Court – this does not mean that the Court is adopting its own methodology to react to populism. In that regard the Court's approach corresponds to the 'business-as-usual' model described by Yaniv Roznai.<sup>95</sup>

With regard to human rights, the Court can also be identified as a transformer<sup>96</sup> of the case law of the CJEU and ECtHR. By doing so, the Court keeps its function of protecting human rights and still creates an activist element. While the Court promoted human rights in a more activist way 20–30 years ago, it still remains as a protector of human rights in accordance with still increasing European standards.

The upcoming challenges of the Covid-19 crisis are diverse and have the potential to give populism new strength. We will see if the Court's approach will be successful in defending democracy and protecting the rights of citizens. The first judgments confirm that the Court also maintains its own approach to the Covid-19 crisis.<sup>97</sup>

92 VfSlg 20.185/2017.

93 VfSlg 20.361/2019.

94 Harald Eberhard, 'Judicial activism und judicial self restraint in der Judikatur des VfGH', in Erwin Bernat et al. (eds.), *Festschrift Christian Kopetzki* (Manz 2019) 141, 150.

95 Roznai (n 54).

96 Eberhard (n 94) 141, 150.

97 Austrian Constitutional Court, 14 July 2020, G 202/2020, V 408/2020, V 411/2020, V 363/2020.