

The Restriction of Refugee Rights during the ÖVP-FPÖ Coalition 2017–2019 in Austria

*Consequences, Legacy and Potential for Future Resilience
against Populism*

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11.1 INTRODUCTION

This chapter analyses the lasting impact of the 2017/2019 government coalition on the state of refugee rights in Austria. We investigate to what extent the policies and legal initiatives of this government restricting refugee rights feature democratic decay, in particular elements of populism. The legacy of this coalition is of interest also for constitutional scholars as the Austrian Government was represented (again) by the Austrian People's Party (*Österreichische Volkspartei*, ÖVP) and the Freedom Party of Austria (*Freiheitliche Partei Österreichs*, FPÖ), a so-called radical right populist party.¹

First, we provide an account of refugee rights restrictions during the ÖVP-FPÖ coalition 2017/2019 (Section 11.2). Afterwards follows a diagnosis of whether the quality of democracy and the rule of law is in decay, stagnates or rises in Austria in connection to these restrictions. We argue that these restrictions show elements of populism and are thus interlinked with the phenomenon of democratic decay. This decreases the functionality of Austrian democracy and the rule of law (Section 11.3). In light of this finding, we show what constitutional law has done, can and could do to keep in check, prevent but also remedy such restrictions. We will particularly look at how human rights (including fundamental rights) as guaranteed by the Austrian Constitution and applied and interpreted by the Austrian Constitutional Court can or could provide relief (Section 11.4).

¹ Cas Mudde, *Populist Radical Right Parties in Europe* (Cambridge University Press 2007).

11.2 AN ACCOUNT OF (FURTHER) RESTRICTIONS OF REFUGEE RIGHTS BY THE 2017/2019 ÖVP-FPÖ COALITION

The FPÖ is one of the most successful ‘populist radical right parties’² in Western Europe.³ While in the early 1990s still on the fringes of the political spectrum, it has gradually become an ‘agenda setter’ or ‘opinion leader’ in the Austrian political system, at least when it comes to migration issues. After a string of electoral victories, it has arrived in the Austrian political mainstream. It has already formed part of the Austrian Government three times since 2000, always in cooperation with the ÖVP. Lately, the FPÖ rose to new heights under its former leader Heinz-Christian Strache when scoring election results, at a size which was previously only achievable for the two traditionally leading Austrian parties, the ÖVP and the Social Democratic Party of Austria (*Sozialdemokratische Partei Österreichs*, SPÖ). The almost twenty-six per cent of all votes at the 2017 Parliamentary Elections leading to the fourth government participation of the FPÖ in Austrian history, lasted until the so-called ‘Ibiza affair’. This chapter focuses on the ‘lasting output’ in the area of asylum of the third ÖVP-FPÖ Government coalition which endured not even one and a half years.

Restrictive trends have been prevailing in the Austrian immigration and asylum policies for the last decades.⁴ As also suggested in the literature, asylum policy has become – influenced by the FPÖ – increasingly deterring since the 1990s also under ‘Grand Coalitions’ between the ÖVP and the SPÖ; this was justified with the prevention of ‘asylum abuse’.⁵ This accelerated with the sudden rise in the number of asylum seekers in 2015 and 2016 (some of them only transiting) leading to several amendments in the Asylum Act under the ÖVP-SPÖ Government.⁶

² Ibid.; Laurenz Ennser-Jedenastik, ‘Von der Fundamentalopposition auf die Regierungsbank: Die FPÖ unter Heinz-Christian Strache’ in Emmerich Tálos (ed), *Die Schwarz-Blaue Wende in Österreich: Eine Bilanz* (LIT Verlag 2019) 33.

³ Ennser-Jedenastik (n 2) 30.

⁴ Bernd-Christian Funk and Joachim Stern, ‘Die österreichische Einwanderungs- und Asylpolitik: völkerrechtliche, europarechtliche und verfassungsrechtliche Aspekte’ in Peter Hilpold and Christoph Perathoner (eds), *Immigration und Integration* (Peter Lang 2010) 237.

⁵ See, e.g., Bernhard Perching and Gerd Valchars, ‘Einwanderungs- und Integrationspolitik’ in Emmerich Tálos (ed), *Die Schwarz-Blaue Wende in Österreich: Eine Bilanz* (LIT Verlag 2019) 429–30.

⁶ E.g., granting of a three-year permit, instead of a permanent one, to refugees; restrictions with regard to family reunification of beneficiaries of international protection; ‘emergency decree’ restricting access to the asylum procedure in the case of a high influx of asylum seekers.

The FPÖ has a long history of engaging in anti-migrant rhetoric. Immigration has been the central topic of the FPÖ since Jörg Haider took over the lead of the party in 1986, and even more since Heinz-Christian Strache became head of the party in 2005. This focus was spurred by the high numbers of asylum seekers in 2015 leading to very successful results in the 2016 Presidential Elections and the 2017 Parliamentary Elections.⁷ The topics of immigration and integration are for the FPÖ so dominant that they also feature in other policy fields, e.g., social policy or education policy. In this vein, the 2017 FPÖ election programme contained nativist scatters in almost all topics.⁸

The FPÖ has been influencing the positioning of other political parties including the two big parties of the centre, the ÖVP and the SPÖ, even without participating in governments. ÖVP and SPÖ have gradually taken over the rhetoric and politics of the FPÖ with its anti-immigration slogans since the early 1990s within the framework of the grand coalition.⁹ In recent years, in particular the ‘new’ ÖVP under Sebastian Kurz has increasingly sought to assume the role occupied by the FPÖ. During the 2017 election campaign for the Parliamentary Elections, Kurz stressed several times that he ‘closed the Balkan Route’, criticised the migration policy of Angela Merkel and supported the positions of the Visegrád group in the EU. At one point, the FPÖ even accused Sebastian Kurz of ‘stealing’ their policies and portrayed their leader H C Strache as ‘thought leader’ (*Vordenker*) to which other parties would finally follow suit.¹⁰ With this convergence of their agendas, Kurz’ ÖVP and Strache’s FPÖ formed a government coalition (2017–2019). In the Parliamentary Elections of October 2017, the ÖVP (*Liste Kurz*) succeeded with a very restrictive stance against refugees and asylum seekers outpacing the FPÖ.¹¹ By entering into a coalition with the FPÖ, issues of radical right parties

⁷ Ennser-Jedenastik (n 2) 32.

⁸ *Ibid.*, 35.

⁹ Franz Fallend, ‘Von Schwarz-Blau zu Türkis-Blau: Ursachen und Folgen der Koalitionsstrategien der ÖVP 1999/2000 und 2017’ in Emmerich Tálos (ed), *Die Schwarz-Blau-Wende in Österreich: Eine Bilanz* (LIT Verlag 2019) 9 referring to Michael Minkenberg, ‘The Radical Right in Public Office: Agenda-setting and Policy Effects’, *West European Politics* 24/4 (2001), 13–14; and to Heinz Fassmann, ‘Migrations- und Integrationspolitik’, in Robert Kriechbaumer and Franz Schausberger (eds), *Die Umstrittene Wende. Österreich 2000–2006* (Böhlau 2013) 698–701.

¹⁰ See, e.g., die Presse, ‘Neue FPÖ-Plakate: “Vordenker” Strache gegen “Spätzünder” Kurz’, 25 September 2017 <www.diepresse.com/5291629/neue-fpo-plakate-vordenker-strache-gegen-spatzuender-kurz> [last visited 29 September 2020].

¹¹ Emmerich Tálos, ‘Wende in Schwarz-Blau. Eine Bilanz’ in Emmerich Tálos (ed), *Die Schwarz-Blau-Wende in Österreich: Eine Bilanz* (LIT Verlag 2019) 446.

(e.g., national identity, abuse of the welfare state, immigration and security) were legitimised.¹²

In contrast to previous ÖVP-FPÖ coalitions, the content and wording of the 2017–2022 Government Programme showed a considerable incorporation of FPÖ positions,¹³ and a new focus was placed on the ‘extremely restrictive exclusionary treatment’ of asylum seekers, beneficiaries of international protection and foreign nationals in general.¹⁴ Moreover, for the very first time the FPÖ was responsible for its central topics including asylum by receiving departments such as the Ministry of the Interior.¹⁵ Very importantly, there was a ‘better ideological compatibility’ with the coalition partner¹⁶ since the ÖVP under Kurz embarked on a course overlapping strongly with the priorities of the FPÖ.¹⁷

Reactions to the FPÖ participation were in 2017 much ‘softer’ than in 2000, since in 2017 it seemed to be ‘normal’ that a populist radical right party participated in a European government. In the public opinion the ÖVP-FPÖ coalition did well. A Eurobarometer survey revealed that the confidence in the government after one year since its formation, was at the highest level since mid-2011.¹⁸

In the following, an overview of the main restrictions in the area of asylum introduced during the 2017/19 government is given.

11.2.1 *Asylum as an Issue of ‘Order and Security’*

In contrast to previous FPÖ government participations, this Government Programme¹⁹ clearly showed the handwriting of the FPÖ,²⁰ but arguably also of the ‘new ÖVP’ led by Sebastian Kurz. Even though in 2018 the number of asylum applications filed in Austria was the lowest since 2010,²¹ images of large

¹² Fallend (n 9) 9 referring to Roger Eatwell, ‘The Rebirth of Extreme Right in Western Europe?’ (2000) 53 *Parliamentary Affairs* 422 and to Piero Ignazi, *Extreme Right Parties in Western Europe* (Oxford University Press 2003) 203–204.

¹³ Perchinig and Valchars (n 5) 436; Ennser-Jedenastik (n 2) 30, 38.

¹⁴ Tálos (n 11) 458. Tálos argues that while the division between ‘own citizens’ (‘natives’) and ‘immigrants’ (‘others’) was widely discussed, also ‘natives’ were affected by restrictive policies.

¹⁵ Ennser-Jedenastik (n 2) 38.

¹⁶ *Ibid.*, 46.

¹⁷ *Ibid.*, 30.

¹⁸ *Ibid.*, 39.

¹⁹ Government Programme 2017–2022: Zusammen. Für unser Österreich [Together. For our Austria].

²⁰ Ennser-Jedenastik (n 2) 46.

²¹ Federal Ministry of the Interior, ‘Annual Asylum Statistics 2018’ <https://bmi.gv.at/301/Statistiken/files/Jahresstatistiken/Asyl-Jahresstatistik_2018.pdf> [last visited 29 September 2020].

movements of asylum seekers were used, strongly influenced by the experiences of the 2015 so-called refugee crisis. The programme also contained elements allowing nativist interpretations. For example, the preamble stressed that the governing parties would be working solely for Austria's citizens.²² One of the leading principles of the Programme was '*Heimat*' (home land):

We want to preserve our homeland Austria as a country worth living in with all its cultural advantages. This also includes deciding for ourselves who is allowed to live with us as an immigrant and putting an end to illegal migration.²³

The Programme claimed that the 'free and solidary society' would be 'increasingly challenged by the mistakes in migration policy of the past years' and linked the protection of the welfare state from abuse with the stop of 'illegal' migration to Austria.²⁴ What is more, it connected the will of the Austrian population to the end of 'illegal' migration:

Our migration policy should be designed in such a way that it can be supported by the population. We will therefore handle it in such a way that Austria remains a secure, stable state in which people can live in prosperity and social peace. To this end, illegal migration into our country must be stopped and qualified immigration geared to Austria's needs.²⁵

The topic of asylum was primarily located in the chapter about 'order and security' and the objective of the asylum policy was defined as the 'consistent prevention of asylum abuse and creation of a framework for rapid asylum procedures'.²⁶ To achieve this objective,²⁷ asylum was briefly mentioned as a form of 'temporary protection' as opposed to a form of a durable solution in Austria, and as something to be granted only to those who 'really need it'.²⁸ It was stressed that 'illegal' migration would 'usually' take place by abusing the right to asylum.

11.2.2 *Towards Zero Asylum Seekers Arriving in Austria?*

The Government Programme stressed that Austria would work towards the development of an EU asylum policy 'that relieves the burden on Austria and strengthens the returns of economic migrants'.²⁹ The reduction of asylum

²² Government Programme 2017–2022: Zusammen. Für unser Österreich [Together. For our Austria] 7.

²³ *Ibid.*, 9.

²⁴ *Ibid.*, 7.

²⁵ *Ibid.*, 29.

²⁶ *Ibid.*, 30.

²⁷ *Ibid.*, 33–35.

²⁸ *Ibid.*, 29.

²⁹ *Ibid.*, 33–34.

applications was also a goal pursued at the European Council in June 2018, where Chancellor Kurz was in favour of ‘Anlandeplattformen’ (docking platforms) outside Europe,³⁰ which implied that persons rescued at sea should be brought to third states instead of to the EU.³¹ This concept was taken over by the EU Council as ‘regional disembarkation platforms’³² and further developed in the documents of the European Commission.³³ In the same vein, during the Ministerial Conference on Security and Migration organised by the Austrian EU Council Presidency in September 2018, the Ministries of the Interior of Italy and Austria backed a proposal for asylum seekers to be processed on board ships rather than brought to shore in Europe.³⁴ Building on the European Council Conclusions from June 2018, the Austrian Ministry of the Interior and the Danish Ministry of Immigration and Integration proposed to shift the policy focus in favour of providing protection only to ‘the most vulnerable migrants’ in countries of first reception near conflict areas.³⁵ Thus, no asylum seekers should arrive in Europe anymore.

Only a few months later, the Minister of the Interior at that time, Mr. Kickl (FPÖ), announced the objective that ‘basically nobody, [. . .] should be able to file an asylum application in Austria anymore’, since Austria would be surrounded by secure third countries.³⁶ At the same time, initial reception centres of asylum seekers (*Erstaufnahmezentren*) were renamed to ‘departure centres’ (*Ausreisezentren*), even though the notion ‘*Erstaufnahmezentrum*’ is a legal notion (e.g., Sec. 1 GVG-Bund 2005). This was meant to signal that asylum seekers were not welcome in Austria and not in need of international protection.³⁷

³⁰ Federal Chancellery Austria, ‘Bundeskanzler Kurz: Trendwende in der Flüchtlingspolitik möglich’ (28 June 2018) <www.bundeskanzleramt.gv.at/bundeskanzleramt/nachrichten-der-bundesregierung/2017-2018/bundeskanzler-kurz-trendwende-in-der-fluechtlingspolitik-moeglich.html> [last visited 29 September 2020].

³¹ Ibid.

³² European Council Conclusions 28 June 2018.

³³ See, e.g., Non-paper by the European Commission <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-regional-disembarkation-arrangements_en.pdf> [last visited 29 September 2020].

³⁴ ECRE, ‘Italy and Austria look to “solve” disembarkation crisis by processing migrants at sea’, 21 September 2018 <www.ecre.org/italy-and-austria-look-to-solve-disembarkation-crisis-by-processing-migrants-at-sea/> [last visited 29 September 2020].

³⁵ Austrian Federal Ministry of the Interior, Danish Ministry for Immigration and Integration ‘Vision for a Better Protection System in a Globalized World Mending a Broken System’, 2018, <https://uim.dk/filer/nyheder-2018/vision-for-a-better-protection-system-in-a-globalized-world.pdf> [last visited 29 September 2020].

³⁶ ORF Zeit im Bild 2, 25 February 2019.

³⁷ The then new interim Minister of the Interior – after the ‘Ibiza affair’ – changed the name of ‘departure centres’ back to the previous name: initial reception centres (*Erstaufnahmezentren*).

While the ÖVP-FPÖ Government brought forward ideas to externalise protection, there were no initiatives promoting legal avenues for accessing protection in Austria – even though resettlement was mentioned in the Government Programme.³⁸ To the contrary, since 2018 Austria does not have any resettlement programme anymore.³⁹

The government finally decided to abstain from voting regarding the Global Compact on Migration (2018) even though Austria had previously contributed to its drafting. This raised considerable criticism as regards the role of Austria during the EU presidency as well as during the consultations leading to the adoption of the Compact. While Kurz in 2017 (at that time Minister for Foreign Affairs) was in favour of the Compact, he eventually changed his position, in particular after the Austrian right-wing *Identitäre Bewegung* had started to mobilise against the Compact and also the FPÖ opposed joining the Compact. It is noteworthy in this context, that the recent ÖVP-Green Party Government will abide by the decision not to join the Compact.⁴⁰ Given its less ambitious content, the Global Compact on Refugees did not meet any comparable resistance.

11.2.3 *Further Restrictions in the Name of the Prevention of Asylum Abuse*

In accordance with the Government Programme, the ÖVP-FPÖ Government proposed several legislative measures in the field of asylum aiming at the prevention of asylum abuse and achieving more effectiveness. These legislative acts, in particular the 2018 Aliens Law Amendment Act (FrÄG), the 2019 Federal Law on the Establishment of the Federal Agency for Care and Support Services, and the 2019 Social Assistance Act led to the restriction of the rights of asylum seekers and beneficiaries of international protection.

Apart from new legislative initiatives, policy implementation focused – as also visible in the Government Programme – on the withdrawal of protection status and returns. The number of first instance proceedings to revoke protection status quadrupled between 2017 and 2018,⁴¹ even though in much fewer

³⁸ Government Programme 2017–2022: Zusammen. Für unser Österreich [Together. For our Austria] 35.

³⁹ Between 2014 and 2017, Austria resettled in total 1,900 refugees from Syria.

⁴⁰ ORF.at, 'UNO-Migrationspakt: Beitrittsfrage für Van der Bellen abgehakt', 18 January 2020 <<https://orf.at/stories/3151449/>> [last visited 29 September 2020].

⁴¹ Answer to Parliamentary Enquiry 4105/AB of 31 October 2019 to 4117/J (XXVI. GP) <www.parlament.gv.at/PAKT/VHG/XXVI/AB/AB_04105/imfname_770753.pdf> [last visited 29 September 2020].

cases protection status was actually revoked. Forced removals increased in 2018 by forty-seven per cent compared to 2017.⁴²

With the 2018 Aliens Law Amendment Act (FrÄG 2018)⁴³ the trend to ‘prevent abuse of asylum’ and ‘increase the efficiency of asylum and aliens law procedures’ continued. Measures interfering with the human rights of asylum seekers were undertaken. These included the authorisation of public security bodies to search asylum seekers and seize cash of up to EUR 840.00 per person to contribute to the basic care costs; the authorization to seize data carriers such as mobile phones and to evaluate the data stored on them in case of doubt in relation to identity or flight route;⁴⁴ and further restrictions with regard to freedom of movement of asylum seekers.⁴⁵ The actual necessity and proportionality of these measures in relation to the (controversial) objective of countering asylum abuse was not clarified.⁴⁶ For this reason, the UNHCR criticized the 2018 FrÄG by noting that the law conveyed ‘the broad impression that the vast majority of asylum seekers submit an asylum application that has no connection with the granting of protection’ and that a general danger would come from asylum seekers. The UNHCR also added that the measures – imposing a number of additional tasks on the competent authorities – did not appear to be suitable for achieving the objective of increased efficiency.⁴⁷

The government 2017/19 also made the already difficult access to the labour market for asylum seekers⁴⁸ even more cumbersome by abolishing access to apprenticeship schemes.⁴⁹

⁴² EU Fundamental Rights Agency, ‘Migration: Key Fundamental Rights Concerns, Quarterly Bulletin’, 1.7.–30.9.2019 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-migration-bulletin-4_en.pdf> [last visited 29 September 2020]. See also Answer to Parliamentary Enquiry 4105/AB.

⁴³ *Fremdenrechtsänderungsgesetz 2018 – FrÄG 2018* [Aliens Law Amendment Act 2018] BGBl I 56/2018.

⁴⁴ Sec. 39a BFA-VG.

⁴⁵ Sec. 15b Asylum Act.

⁴⁶ Adel-Naim Reyhani, ‘Stellungnahme des Ludwig Boltzmann Instituts für Menschenrechte zum FrÄG 2018, 12/SN-38/ME XXVI. GP’ (14 May 2018) <www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME_00905/imfname_693777.pdf> 3–4; For details see also: UNHCR, ‘Analyse des Entwurfs für das Fremdenrechtsänderungsgesetz 2018, 4/SN-38/ME XXVI. GP,’ (9 May 2018) 16–18 <www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME_00872/imfname_693196.pdf> [last visited 29 September 2020].

⁴⁷ UNHCR, ‘Analyse des Entwurfs für das Fremdenrechtsänderungsgesetz 2018’ (n 46) 1.

⁴⁸ While the Aliens Employment Act (AuslBG) does not prohibit access to wage-earning employment as such, a decree restricts asylum seekers to seasonal and harvest work. This seems not to fulfil the requirements of the Recast Reception Conditions Directive.

⁴⁹ Access was abolished per decree of the Minister of Social Affairs. Asylum seekers enrolled in apprenticeship schemes had to stop their apprenticeship if a negative decision in the asylum procedure was delivered or if subsidiary protection status was revoked.

Finally, while not mentioned in the Government Programme, in 2019 the former FPÖ Minister of the Interior Kickl planned detention for potentially dangerous asylum seekers (a so-called preventive or security detention) without criminal offence; it was to be decided by the authority under the Ministry of the Interior after a risk analysis with judicial review only *ex post*.⁵⁰ Chancellor Kurz supported this plan and the government even agreed on the cornerstones of such ‘security detention’.⁵¹ However, a necessary amendment of the Federal Constitutional Act on the Protection of Personal Liberty⁵² would have required a two-thirds majority in the Parliament. Soon after the agreement on the cornerstones, the ‘Ibizagate’ – which finally led to the dissolution of the government – became public.

11.2.4 *Abolishment of Independent Legal Assistance for Asylum Seekers*

Despite sharp criticism by UNHCR,⁵³ NGOs,⁵⁴ academics,⁵⁵ and OHCHR,⁵⁶ the ‘Law on the establishment of a Federal Agency for Care and Support

⁵⁰ This idea was triggered by the stabbing of a public official in a social welfare service in Vorarlberg, allegedly by an asylum seeker who had been banned from the Schengen area.

⁵¹ See Federal Chancellery of Austria, ‘Bundeskanzler Sebastian Kurz: Sicherungshaft mit richterlicher Genehmigung soll Österreich wieder sicherer machen’, 6 March 2019 <www.bundeskanzleramt.gv.at/bundeskanzleramt/nachrichten-der-bundesregierung/2019/bundeskanzler-sebastian-kurz-sicherungshaft-mit-richterlicher-genehmigung-soll-oesterreich-wieder-sicherer-machen.html> [last visited 29 September 2020].

⁵² *Bundesverfassungsgesetz vom 29 November 1988 über den Schutz der persönlichen Freiheit* [Federal Constitutional Act on the Protection of Personal Liberty], BGBl Nr. 684/1988, last amended by BGBl I Nr 2/2008.

⁵³ UNHCR, ‘Analyse des Entwurfs für ein BBU-Errichtungsgesetz, 15/SN-127/ME XXVI. GP’ (11 April 2019) <www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME_04072/imfname_747916.pdf> [last visited 29 September 2020].

⁵⁴ See also ECRE, ‘Reforming Legal Assistance in Austria: An End to Independent Provision? ECRE’s Call for Withdrawal of Measures that severely restrict Access to Independent Legal Assistance’, 2019, <www.ecre.org/wp-content/uploads/2019/07/Legal-Note-5.pdf> [last visited 29 September 2020].

⁵⁵ Margit Ammer and Adel-Naim Reyhani, ‘Stellungnahme des Ludwig Boltzmann Instituts für Menschenrechte zum Entwurf betreffend das BBU-Errichtungsgesetz [Legal opinion on the draft law on the establishment of a “Bundesagentur für Betreuungs- und Unterstützungsleistungen (BBU)” (Federal Agency for Care and Support Services)]’ (36/SN-127/ME XXVI. GP, 12 April 2019) <www.parlament.gv.at/PAKT/VHG/XXVI/SNME/SNME_04118/imfname_748026.pdf> [last visited 29 September 2020].

⁵⁶ OHCHR, ‘Report of mission to Austria focusing on the human rights of migrants, particularly in the context of return’ (October 2018) <www.ohchr.org/Documents/Issues/Migration/AustriaMigrationMissionReport.pdf> [last visited 29 September 2020], 41: ‘OHCHR regards it essential for the Government to ensure sufficient space for a plurality of civil society actors to meaningfully promote and protect the human rights of migrants within migration processes

Services (BBU-G)⁵⁷ was adopted in May 2019, gaining majority solely through the votes of ÖVP and FPÖ members of the National Assembly. The law abolished independent legal advice by NGOs. This idea stemmed from the FPÖ that had already accused NGOs earlier of ‘greed for profit’ and to be part of the ‘asylum industry’.⁵⁸

The new agency, owned by the Federal Government, which *inter alia* provides legal assistance in asylum and return procedures since the beginning of 2021, is subordinated to the Ministry of Interior, which is also responsible for the first instance asylum authority. The establishment of the agency was considered necessary for countering the strong dependence of legal assistance on external service providers. The Agency was also viewed as necessary for optimisation of costs and quality assurance.⁵⁹ While the exclusion of civil society from legal assistance in asylum and return procedures in itself already constitutes a considerable cut, it is questionable whether the legal advice provided by the Agency can be independent and impartial.

Although, according to the BBU-G, legal advisors must be independent and not bound by instructions, a closer look reveals that these requirements are compromised by the primary goals of the BBU-G and the organisational design of the Agency. The Federal Minister of the Interior, which is to exercise shareholder rights on behalf of the Federation as a hundred-per-cent owner of the Agency, will have considerable influence on the work of the Agency. The Minister also has an internal right to issue instructions, affecting all management decisions, and is – in support of his management and auditing rights – entitled to a comprehensive right to information. This influence raises serious concerns with regard to the right to an effective remedy and seems to conflict with the provisions of the EU Procedures Directive.⁶⁰ It is

and policies. This includes providing independent legal counselling and assistance, and facilitating administrative procedures and legal remedies.’

⁵⁷ *Bundesgesetz über die Errichtung der Bundesagentur für Betreuungs- und Unterstützungsleistungen Gesellschaft mit beschränkter Haftung (BBU-Errichtungsgesetz – BBU-G)*, [Federal law on the establishment of the Federal Agency for Care and Support Services Limited liability company], BGBl I 53/2019; entry into force in June 2019.

⁵⁸ Perchinig and Valchars (n 5) 430–431.

⁵⁹ Government bill, 594 der Beilagen XXVI. GP, Erläuterungen, 1.

⁶⁰ According to Article 21(1) of the Procedures Directive (2013/32/EU) ‘specialised services of the State’ could be used to provide legal and procedural information in first instance proceedings (Article 19). However, this possibility is not allowed for legal assistance and representation (under Article 20) in appeal proceedings – here the Directive clearly refers to ‘persons’ and not to ‘specialised services of the State’. This separation also requires an interpretation of Article 21 (1) in conformity with human rights. Legal assistance and representation requires mutual trust, which in turn demands a clear separation from state institutions. This suggests that persons

questionable whether legal assistance by the Agency can be independent and impartial since the Ministry of the Interior is the authority that is also responsible for the first instance of the asylum procedure. Even assuming that the substantive activities of legal advisors could take place without direct influence from the Minister, the proposed constellation is prone to indirectly influence the motives of legal advisors and to create an appearance of bias and inequality of arms.⁶¹

The Minister of Justice of the subsequent ÖVP-Green Party Government, Green Party member Alma Zadić that took office in 2020, has tried to implement the law in such a way that civil society can still provide input to the work of the Agency, for example, by appointing a former NGO person as head of a newly introduced department for legal advice, installing a quality advisory board, or staffing the supervisory board of the BBU GmbH also by external experts in addition to representatives of the ministries.⁶² Still, these efforts have not remedied the weaknesses mentioned above.

11.2.5 *Restrictions for Beneficiaries of International Protection*

Legislative amendments initiated by the ÖVP-FPÖ Government hampered the integration of recognised refugees by impeding access to citizenship and cutting social assistance for those with insufficient command of German or English. In particular, the 2018 Aliens Law Amendment Act (FrÄG 2018) increased the minimum duration of lawful and uninterrupted residence for the granting of citizenship to recognised refugees (from six to ten years).⁶³ Therefore, recognised refugees are no longer granted more favourable treatment than other foreign nationals.⁶⁴ Surprisingly, the explanatory notes to the draft bill⁶⁵ considered this change to be in compliance with Article 34 of the

working for 'specialised services of the State' cannot be 'persons as admitted or permitted under national law' (according to Article 21(1), second sentence).

⁶¹ For details see Ammer and Reyhani (n 55).

⁶² See Austrian Ministry of Justice, 'Zadić: Unabhängigkeit der Rechtsberatung für Asylsuchende garantiert', APA OTS, 3 July 2020, www.ots.at/presseaussendung/OTS_20200703_OTS0110/zadic-unabhaengigkeit-der-rechtsberatung-fuer-asylsuchende-garantiert [last visited 29 September 2020].

⁶³ This corresponds to the standard minimum duration. See Sec. 11a (7) *Staatsbürgerschaftsgesetz* [Citizenship Act], BGBl 311/1985, last amended by BGBl I 56/2018.

⁶⁴ At the same time, the FPÖ wanted to introduce double citizenship for South Tyrolians with German and Ladin mother tongue even without residence in Austria, which constitutes a long-standing demand of the FPÖ but also right-wing South Tyrolian parties. See Perching and Valchars (n 5) 426–427.

⁶⁵ ErläutRV 189 BlgNR 26. GP, 40.

Refugee Convention that, actually, demands facilitation of naturalisation of refugees as far as possible. Many stakeholders including UNHCR, however, saw the tension.⁶⁶

The ÖVP-FPÖ Government introduced a new Basic Law on Social Assistance,⁶⁷ entering into force in June 2019, that made the full amount of social assistance for recognised refugees dependent on a certain level of German or English skills. More specifically, at least thirty-five per cent of the benefit was made dependent on employability at the labour market; such employability could be only assumed if the person has German level B1 or English level C1.⁶⁸ However, in December 2019, the Austrian Constitutional Court ruled that this provision was contrary to the constitutional principle of equality.⁶⁹

In this context, it must be also noted that the ÖVP-FPÖ Government restricted access to German language courses. The 2018 FrÄG abolished the entitlement of certain asylum seekers (those admitted to the asylum procedure and for whom there is a very high probability of being granted international protection) to German language courses. The legal provision containing the entitlement of asylum seekers to German language courses had entered into force only in 2018.⁷⁰ In addition, language courses beyond A2 level offered by the Labour Market Service (AMS) to beneficiaries of international protection, were reduced considerably.⁷¹

Under the new Basic Law on Social Assistance, beneficiaries of subsidiary protection can only be granted ‘core social assistance benefits which do not exceed the level of basic care’.⁷² The Austrian Constitutional Court did not regard this limitation as unconstitutional.⁷³

⁶⁶ UNHCR-Analyse des Entwurfs für das Fremdenrechtsänderungsgesetz 2018, 4/SN-38/ME XXVI. GP (n 53) 18–20. See also Reyhani (n 46) 4.

⁶⁷ Federal Act concerning Federal Law on Principles of Social Assistance (Basic Law on Social Assistance), BGBl I 41/2019.

⁶⁸ Sec. 5(6) and (7) Basic Law on Social Assistance.

⁶⁹ Constitutional Court (12.12.2019) VfSlg. 20.359/2019, para 2.3.3.3. The *Gleichheitssatz* [principle of equality] is applicable also to third-country nationals via Article I (1) Federal Constitutional Law implementing the International Convention on the Elimination of all forms of Racial Discrimination (see Constitutional Court, VfSlg. 13.836; 14.191.).

⁷⁰ Sec. 68 (1) Asylum Act.

⁷¹ See, e.g., Die Presse, ‘Arbeitsmarktservice streicht Großteil der Deutschkurse’, 30 November 2018 <www.diepresse.com/5538879/arbeitsmarktservice-streicht-grossteil-der-deutschkurse> [last visited 29 September 2020].

⁷² Sec. 4(1) Basic Law on Social Assistance.

⁷³ See Constitutional Court (12.12.2019) VfSlg. 20.359/2019, para 2.2.1.5, with reference to Constitutional Court (28.06.2017) VfSlg. 20.177/2017.

11.3 THE CONFLUENCE AND INTERRELATION OF POPULISM AND THE RESTRICTION OF REFUGEE RIGHTS IN AUSTRIA: IS DEMOCRACY IN DECAY IN AUSTRIA?

11.3.1 *Are We Witnessing Populism in Austrian Politics?*

While the rule of law and democracy crisis is among the most important issues of (European) constitutionalism and democracy studies in the early twenty-first century, the numerous studies analysing this crisis have led to a rapidly growing body of literature usually focusing on populism. By now libraries can be filled with studies on populism and an overview of the literature becomes difficult to oversee.⁷⁴ Jan-Werner Müller, for instance, prominently conceives of populism as ‘a moralized form of anti-pluralism’.⁷⁵ According to his definition, the decisive claim of populists is to be the true representatives of the people, which even goes so far as populists themselves, in an anti-institutional manner, claiming that it is them and only them who represent the people. Thereby populists appeal to a ‘unity’ and ‘community’, which constructs the ‘other’ as an enemy. This ‘othering’ aims to exclude, among others, asylum seekers. Wojciech Sadurski goes beyond such a discourse-related understanding of populist politics and identifies populism with actions. Thereby he also includes ‘hostility to *institutional* pluralism’ in his understanding of populism.⁷⁶

We will refer to populism here broadly speaking as a phenomenon constituting an important challenge to discursive and institutional pluralism. In so doing, this contribution identifies, among several other important criteria for the current misery, also the danger represented by political lies and voter manipulation as a key issue and problem.⁷⁷ Thereby it becomes clear that ‘populists’ do not actually care for the interest of the people. Rather, they use techniques in order to gain their support other than through sheer force. Elsewhere, one of us has referred to this by labelling such politicians ‘cuckoo politicians’.⁷⁸

⁷⁴ For an overview, see Cristóbal Rovira Kaltwasser, Paul A. Taggart, Paulina Ochoa Espejo and Pierre Ostiguy (eds.), *The Oxford Handbook of Populism* (Oxford University Press 2017).

⁷⁵ Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016) 20. See also Chantal Mouffe, *The Democratic Paradox* (Verso 2000) 44–45.

⁷⁶ Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019) 22–24.

⁷⁷ Lando Kirchmair, ‘What Gustav Radbruch Teaches Us about (Authoritarian) Populism: Lies by Officials Should Not Be Referred to as Populism Because They Are a Genuine Threat to the Democratic Legal Culture’ in Stephan Kirste and Norbert Paulo (eds.), *Populism – Perspectives from Legal Philosophy* (2021) Beiheft Archiv für Rechts- und Sozialphilosophie 81–112.

⁷⁸ Lando Kirchmair, ‘Demokratische Legitimität, die EU-Rechtsstaatlichkeitskrise und Vorüberlegungen zu einer transnationalen Gewaltengliederung’ (2019) 6 (2) *Zeitschrift für praktische Philosophie* 171.

Even though a large-scale diagnosis cannot be provided within the frame of this contribution, Austrian politics are marked – at least to some extent – by populism. Especially the restriction of human rights as described in Section II is an important instance of populism. Generally speaking, the ÖVP-FPÖ Government coalition made integration of beneficiaries of international protection very difficult if not impossible. At the same time, social benefits were made dependent upon integration (language skills at a certain level). Portraying refugees generally as abusers of the system and unwilling to integrate and linking them broadly speaking to irregular migration and criminal behaviour while at the same time making access to the labour market and language courses difficult, is the work of populists. Refugees were portrayed as ‘the others’, constituting a security problem. Blurring the legal concepts of asylum and migration and ignoring international and EU legal obligations in particular in areas of asylum and human rights, disrespects legal guarantees. The ÖVP-FPÖ Government justified interferences in the human rights of asylum seekers with new measures and legislative acts as a ‘prevention of asylum abuse’. This is populist propaganda, especially because such claims were lacking any empirical evidence. Finally, civil society, the media, as well as human rights activists and to some extent even the prestigious Austrian Constitutional Court, were verbally attacked in particular by the FPÖ, which shows a clear disrespect for important pillars of institutional pluralism. The coalition partner ÖVP has not firmly opposed this conduct, which entails ‘complicity’ in populism.

The given examples also indicate a common link between the restriction of refugee rights and democracy which is also related to discursive and institutional pluralism. Human rights and democracy are mutually dependent. It is not possible to have rule of law guaranteed without democracy. Nor can we have democracy without the rule of law.⁷⁹ Precisely therein lies the conceptual relationship between the restriction of refugee rights and democracy. Conceiving of democracy without human rights makes little sense. The right to vote, bluntly speaking, is of little value, if basic human rights such as freedom of information and freedom of press are absent. This holds also true the other way round. The rule of law and basic human rights are not sustainable without democracy, as political restrictions of such rights might not face protest at the ballot box. Also, historically, democracy and human rights have co-evolved.

⁷⁹ See only, e.g., András Jakab, ‘Was kann Verfassungsrecht gegen die Erosion von Demokratie und Rechtsstaatlichkeit tun? Zur Verbundenheit des Schutzes von Demokratie und Rechtsstaatlichkeit’ (2019) 74 *Zeitschrift für öffentliches Recht* 390 describing the relationship between the rule of law and democracy like a working marriage. Even though there are structural conflicts, one cannot do without another.

Their coinciding is not a mere historical coincidence. If the democratic legal culture erodes, human rights thus will suffer too. Many dictatorships have and do still show that they disfavour individual rights. Also, the other way round it is hard to secure human rights if democratic control is missing.

This is particularly troublesome for refugee rights, because refugees usually lack democratic rights such as the right to vote (in the country of refuge). Hence, if governments limit the rights of refugees, refugees themselves cannot express their protest at the ballot box. They have to rely on ‘altruistic support’ from voters which are not directly concerned by the rights restriction. Precisely a lack of concern among voters for the restriction of refugee rights can be exploited by populist parties like the FPÖ. Additionally, this is unlikely to be counteracted by mainstream parties like the ÖVP since they have nothing to gain and much to lose if they would be seen as ‘altruistically’ refugee-friendly. This is what causes the (informal) elements of democracy to crumble and lead to – or fail to prevent – further restrictions of refugee rights. Limiting refugee rights, however, is still a restriction of human rights, and thus also a contribution to the deterioration of the balance between democracy and human rights. In such a climate, radical ideas by populist right-wing parties like those of the FPÖ are more likely to be picked up by other parties such as the ÖVP. In a climate where limitations of human rights are part of the political game, more moderate parties like the ÖVP also become more radical. This might even work if ‘mainstream’ political parties ‘only’ co-opt restrictive asylum policies to ‘cut off’ support for more radical populist right-wing parties like the FPÖ. This displays an indirect link between populism and restrictive asylum policies which is also connected to the question as to whether such populist elements also imply democratic decay.⁸⁰

11.3.2 *Democratic Decay in Austria?*

Democratic decay is ‘the incremental degradation of the structures and substance of liberal constitutional democracy’.⁸¹ Importantly such decay must

⁸⁰ For an early analysis of ‘right-wing populism’ in Austria, see Reinhard Heinisch, ‘Success in Opposition – Failure in Government: Explaining the Performance of Right-wing Populist Parties in Public Office’ (2003) 26 *West European Politics* 91. See also Konrad Lachmayer, ‘Questioning Basic Values: Austria and Jörg Haider’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press 2017) 436.

⁸¹ See for this definition Tom Gerald Daly, ‘Diagnosing Democratic Decay’, paper presented at Comparative Constitutional Roundtable, UNSW Sydney 7 August 2017, as quoted in Wojciech Sadurski, ‘How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding’, *Sydney Law School Legal Studies Research Paper* 1 (2018) 8.

not be understood in an isolated fashion, for if this would be the case, this might create the impression of a ‘connotation of a degradation which is slow and almost impersonal, occurring without a plan – a connotation certainly not giving justice to energy, enthusiasm and design.’⁸² Another caveat is that decay implies a temporal component. Similarly, as it is impossible to engage in conclusions on climate change by simply looking at the weather yesterday and today, or by saying that last year it was colder than this year, and thus, climate change is not happening, it is also misleading to say that democracy in Austria is rising as the current government constituted by the refurbished ÖVP and the Green Party is ‘more democratic’ than the ÖVP-FPÖ coalition. Starting from a specific point in time and a given quality of democracy, decay points at a negative evolution of democracy in relation to the starting point.

However, to what extent do the above-described restrictions of refugee rights represent a form of democratic decay in populist times? Instead of identifying a specific point in time as the heyday of Austrian democracy, the prior identification of elements of populism points to some, isolated, but nevertheless important cuts into the blueprint of liberal democracy which is generally present in Austria.⁸³

Hence, after having made transparent how populism is understood in this contribution and the analysis whether elements in Austria are present, it would be nevertheless implausible to conclude that democracy is on the rise in Austria. Whether we witness democratic decay in Austria also depends on the conceptual understanding of democracy.⁸⁴ This contribution cautiously floats the hypothesis that indeed some incidents surely are worrisome from the perspective of liberal democracy. The restriction of human rights of refugees is a cut into what is at the very core of liberal democracy because human rights and the rule of law as well as democracy are interconnected. Moreover, these examples constitute linkages between populism and democratic decay.

Against the measure of a well-functioning democracy, we can thus say that the restrictions of refugee rights are cuts into Austrian liberal democracy. This is not a negligible by-product or a passive development without agents. Rather,

⁸² Sadurski (n 81) 8 speaking about PiS in Poland.

⁸³ See for a comparative analysis, e.g., Ludger Helms and David M. Wineroither (eds), *Die Österreichische Demokratie im Vergleich* (2nd ed. Nomos and facultas 2017). C.f. also Tarunabh Khaitan, ‘Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India’ (2020) 14 (1) *Law & Ethics of Human Rights* 49 speaking also of ‘cuts’ especially pointing to the problem of dismantling liberal democratic institutions in a *systemic* manner.

⁸⁴ See generally, Günter Bischof and David M. Wineroither (eds.), *Democracy in Austria* (Innsbruck University Press 2019) providing an overview.

there is a connection between populism that causes democratic decay also by significantly restricting refugee rights. The responsible agents for these developments are populist politicians. However, those responsible are not only populist politicians, but also the people. Surveys show that twenty-two per cent in Austria held in 2019 that 'Austria would be in need of a strong leader which must not rely on parliament or elections'⁸⁵ and in 2018 forty-three per cent generally wished for a 'strong leader'.⁸⁶

11.4 LEGAL RESILIENCE: THE POSSIBILITIES AND LIMITS OF CONSTITUTIONAL LAW TO KEEP IN CHECK, PREVENT BUT ALSO REMEDY THE RESTRICTION OF REFUGEE RIGHTS, POPULISTS AND DEMOCRATIC DECAY

Finally, this contribution asks what Austrian (constitutional) law can do to prevent democratic decay and populism in general, as well as the restriction of refugee rights more specifically.⁸⁷ At first sight, Austrian (constitutional) law deeply influenced by Kelsenian positivism, seems to be rather toothless due to its strong neutrality regarding politics. Whatever content a specific law has, if the two-thirds-majority in parliament is ensured, even constitutional law can be amended or created.⁸⁸ This is potentially problematic as exemplified by the former Minister of the Interior, Mr. Kickl, who argued that it is the law which must bow to politics, and not the other way round.⁸⁹ However, at a second glance there are some tools provided by constitutional law which might offer some relief, and thereby strengthen the democratic compass.⁹⁰ An effective tool of the Austrian Constitution is that even constitutional law must be in line

⁸⁵ Hans Rauscher, 'Autoritäres Potential', *DerStandard*, 11 December 2019, available at www.derstandard.at/story/2000112168429/autoritaeres-potenzial [last visited 29 September 2020].

⁸⁶ APA, '43 Prozent der Österreicher wünschen sich starken Mann an der Spitze', *Die Presse*, 20 April 2017, available at www.diepresse.com/5203856/43-prozent-der-osterreicher-wunschen-sich-starken-mann-an-der-staatsspitze [last visited 29 September 2020].

⁸⁷ For an overview, see Jakab (n 79).

⁸⁸ See generally on this, Theo Öhlinger, 'Die Verfassung der demokratischen Republik: ein europäischer Sonderfall?' in Ludger Helms and David M. Wineroither (eds), *Die Österreichische Demokratie im Vergleich* (2nd ed. Nomos and facultas 2017), 105–127 (especially 109 with further references). Only once in history, the Austrian Constitutional Court declared a constitutional law unconstitutional (as it violated the fundamental principles of the Austrian Constitution), see VfSlg. 16.327/2001.

⁸⁹ See *Die Presse*, 'Recht muss Politik folgen, nicht Politik dem Recht', 23 January 2019, available at www.diepresse.com/5566984/asyl-recht-muss-politik-folgen-nicht-politik-dem-recht [last visited 29 September 2020].

⁹⁰ See generally Ulrich Wagrاندl, 'Militant Democracy in Austria' (2018) 2 *Vienna Law Review* 95 arguing that Austria is more of a militant democracy than is usually perceived.

with the most important constitutional principles that are of the highest rank in the Austrian Constitution. The Austrian Constitutional Court guards these principles which include – among other principles – also a democratic principle, human rights and the rule of law and can declare constitutional laws unconstitutional if they violate these principles.⁹¹

Human rights are themselves another important element of legal resilience, which are also anchored in the Austrian Constitution. Apart from the State Basic Law on the protection of the rights of citizens that contains traditional civil liberties,⁹² it is in particular the European Convention on Human Rights (ECHR) that constitutes ‘the main, constitutionalised source of fundamental rights protection’.⁹³ Other rights in the Austrian Constitution are, for example, the right to equality in Article 7 Federal Constitutional Law (B-VG);⁹⁴ the rights in other international treaties adopted by Austria on a constitutional level (e.g., the International Convention on the Elimination of All Forms of Racial Discrimination)⁹⁵ or implemented through special constitutional acts (e.g., the Convention on the Rights of the Child),⁹⁶ and the constitutional rights in peace treaties.⁹⁷ During the past decade, the EU Charter of Fundamental Rights (CFR) has increasingly become important in the Austrian human rights system. In 2012, the Constitutional Court ruled that the rights in the CFR can be asserted before the Court as constitutionally guaranteed rights.⁹⁸ In particular, in the area of asylum the Charter plays an important role.⁹⁹ Given that asylum procedures do not fall within the scope of application of the Article 6 ECHR, provisions of the CFR such as Article 47, have been increasingly invoked and applied in the asylum procedure.

⁹¹ For such a decision of the Constitutional Court, see VfSlg. 16.327/2001. Naturally, this safeguard rests on a functioning constitutional court that has not been captured.

⁹² *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger (StGG)*, RGBl 142/1867, incorporated in the Austrian Constitution in 1920.

⁹³ ECHR rights ‘are understood as constitutional rights, as they are formally part of Austrian constitutional law (rather than the ECHR being applied as an international treaty).’ See 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) 1283.

⁹⁴ *Bundes-Verfassungsgesetz (B-VG)*, BGBl 1/1930, last amended by BGBl 1013/1994.

⁹⁵ Transformation to Austrian constitutional law by BGBl 1973/390.

⁹⁶ Austrian Constitutional Act on the Rights of the Child, BGBl I 2011/4.

⁹⁷ E.g., Treaty of St. Germain 1919, Treaty of Vienna 1955, containing, e.g., rights for minorities.

⁹⁸ Constitutional Court, VfSlg 19.632/2012.

⁹⁹ Constitutional Court, VfSlg 19.632/2012: Asylum procedures are within the scope of application of the CFR.

The Constitutional Court ‘reads the relevant provisions from the different instruments together, to provide a comprehensive protection’.¹⁰⁰ In addition, human rights and the rule of law also pertain to the above-mentioned core principles of the Austrian Constitution. The Constitutional Court might, thus, declare even a constitutional act that aims at diminishing or even abolishing specific human rights, unconstitutional. Only by a popular referendum and a so-called total revision of the Austrian Constitution, could human rights be abolished.¹⁰¹ This protection against considerably amending or abolishing human rights also by potential acts of parliament is an important instrument of legal resilience against further, admittedly large-scale, restrictions of refugee rights.

Arguably, also an Austrian withdrawal from the ECHR would only be possible after such a popular referendum (in addition to a two-thirds majority in parliament) due to the constitutional rank and the high importance of the ECHR in Austria. This is an important contributing factor of legal resilience of the Austrian Constitution. It protects against attacks by members of the former ÖVP-FPÖ Government like the former Minister of the Interior (FPÖ) who questioned the ECHR indirectly in line with the FPÖ election programme 2017 that contained possible withdrawal from the ECHR and its replacement by an Austrian Human Rights Convention (which should protect also the ‘home land rights of Austrians’).¹⁰² The same minister devalued human rights guarantees at national, EU and international level as ‘strange legal constructs’ which would be obstacles to do ‘what is necessary’.¹⁰³

The Constitutional Court exercises important functions that may serve to keep populist behaviour and democratic decay in check. Such functions include judicial review of laws and regulations, review of rulings by administrative tribunals and the verification of elections.¹⁰⁴ With regard to the cutting of social assistance for recognised refugees, for instance, the Constitutional Court declared these norms initiated by the ÖVP-FPÖ Government as

¹⁰⁰ Lachmayer (93) 1271.

¹⁰¹ Article 44 (3) B-VG.

¹⁰² FPÖ Election Programme 2017, ‘Unsere Souveränität und Selbstbestimmung schützen’: one of four demands of the FPÖ in order to eliminate crisis of fairness in the area of freedom and responsibility: ‘Evaluation of ECHR and possibly replacement by Austrian Human Rights Convention which protects also the homeland right of Austrians.’ C.f. Ennser-Jedenastik (n 2) 41.

¹⁰³ Tálos (n 11) 462–463.

¹⁰⁴ Additional elements of legal resilience, such as strengthening electoral laws like strict rules on party financing and a proper role for the Court of Audit, can be further important tools.

unconstitutional.¹⁰⁵ Still, it seems to be only the tip of an iceberg which the Court can address according to its mandate.

In line with the above-mentioned importance of informal democratic legal culture and human rights support, civil society also plays an important role to keep elements of populism in check. This is visible in petitions such as the petition relating to access to the labour market of asylum seekers or in relation to the Global Compact on Migration. The role of the civil society is also visible in the statements submitted in the context of the parliamentary procedure or in protests against the renaming of first reception centres into return centres.¹⁰⁶ Still, there is no legal obligation to take civil society's petitions, protests, etc. into account. The ÖVP-FPÖ Government also tried to reduce the influence of civil society in the asylum procedure by introducing the BBU-G. Hence, there is not one single strategy or tool of resilience. Rather, the network of formal and informal rules of the democratic legal culture and safeguards of human rights are needed in order to prevent democratic decay and populist propaganda.

11.5 CONCLUSION

The open attacks against human rights, the rule of law and also attacks on parts of civil society by members of the government, were the innovations brought with the 2017/2019 ÖVP-FPÖ Government.¹⁰⁷ The legacy of the ÖVP-FPÖ Government has a dark and long shadow eclipsing also the coalition government by the ÖVP and the Green Party which has been in office since January 2020.¹⁰⁸ During the first year of the ÖVP Green Party Government, in particular the refusal of the ÖVP to accept even a single child from the refugee camps on the Greek islands, not even after the catastrophe in Moria, underlines this legacy. 'Security detention' now features in the Government Programme, albeit the programme stresses that it must be in conformity with the Constitution, the ECHR and EU law.¹⁰⁹ The decision not to join the Global Compact on Migration and the abolition of the

¹⁰⁵ Constitutional Court (12.12.2019) VfSlg. 20.359/2019, para 2.3.3.3.

¹⁰⁶ Der Standard, "'Ausreisezentrum"-Taferl in Traiskirchen von Aktivisten entfernt', 23 May 2020, www.derstandard.at/story/2000103706372/kickl-weg-ausreisezentrum-taferl-in-traiskirchen-von-aktivisten-entfernt [last visited 29 September 2020].

¹⁰⁷ Tálos (n 11) 463.

¹⁰⁸ Parliamentary elections in September 2019 resulted in a major victory of the ÖVP and the Green Party but a loss for the FPÖ of almost 10% but also for the SPÖ. In January 2020, the ÖVP under Sebastian Kurz and the Green Party formed a new government.

¹⁰⁹ Government Programme 2020–2024: Aus Verantwortung für Österreich, 199.

independent legal assistance of asylum seekers are maintained. Looking more broadly at the Government Programme, externalisation tendencies in the asylum policy and the protection of external borders prevail too.

While the FPÖ was a trendsetter in othering refugees and restricting their rights, it is hard to say whether elements of populism represented by the FPÖ have actually led to more restrictive refugee laws and policies, or whether the othering of refugees has contributed to the success of the FPÖ in the first place. Restrictions were in place even before the FPÖ rose to power. Yet, it is undisputed that the politics of the FPÖ, which were largely also adopted and continued by the ÖVP, brought further restrictions. At least in the Austrian case a clearcut, black or white answer to the question as to whether the restriction of refugee rights accelerates democratic decay or whether it is the other way round, cannot be provided. Both phenomena are more likely part of a symbiotic and constantly amplifying process. The more populists dominate politics, the more they will restrict refugee rights. Further restricting refugee rights might easily lead to more support for populists. The more populists have to say, the worse this is for democracy. A bad state of democracy, in turn, is a more fruitful ground for populism. Hence, populism, the restriction of refugee rights and democratic decay is a downward spiral that is not easily hindered. Yet, a strong legal culture and support for the constitution are vital. In Austria this support is ensured by the most fundamental principles of constitutional law that can only be derogated by a public referendum according to Article 44 (3) of the Austrian Constitution. This provides a strong arsenal for resilience. Further specific regulations, such as a strong commitment to human rights and a robust safeguarding of the democratic process are supportive too. This, however, is not given. The Austrian Constitutional Court, constitutional scholars and politicians as well as civil society must work to support liberal democracy and its values.