



Recent Federal Elections challenged in Austria: Competencies and Experiences

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16th European EMB Conference
“Election Dispute Resolution”
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Three years ago ...



Austria presidential poll result overturned

01 July 2016 | Europe



Austria's highest court has annulled the result



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Austrian court overturns presidential election result

ALEXEI KOROLYOV | SPECIAL FOR USA TODAY | 12:20 pm EDT July 1, 2016

VIENNA — Austria's highest court on Friday overturned the result of the May presidential election and called for a rerun, a legal victory for the far-right candidate who lost by a razor-thin margin.

Three years ago ...

ACCUEIL / INTERNATIONAL

Présidentielle annulée en Autriche : nouveau scrutin le 2 octobre

🕒 12h32, le 05 juillet 2016 , modifié à 13h03, le 05 juillet 2016

AA



Le candidat d'extrême-droite avait perdu l'élection de justesse.

© Dieter Nagl / AFP



Alexander Van der Bellen, ici le 23 mai 2016, ne sera donc finalement pas investi à la fonction de président.
— Ronald Zak/AP/SIPA



ELECTION

Autriche: L'Autriche va devoir voter à nouveau, la présidentielle annulée

MIS À JOUR LE 01/07/16 À 17H02

La Cour constitutionnelle autrichienne a annoncé l'invalidation du résultat de la

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I. Introduction to Austria

Republic of Austria - Introduction

- Democratic republic (Federal President is head of state)
- Federal Parliament
(bi-cameral = National Council & Federal Council)
- Approx. 84,000 km²
- 8.6 million inhabitants.
- 2,098 municipalities
- 9 autonomous provinces (states)
 - specific executive powers
 - provincial parliaments with select legislative powers
 - own provincial electoral boards and electoral legislation (for elections on provincial level)



Nation-wide elections:

- **National Council Elections** (“parliamentary elections”)
→ max. every 5 years; last: 15 October 2017
(next: most probably on 29 September 2019)
- **Presidential Elections**
→ every 6 years; last: 4 December 2016
- **European Elections**
→ every 5 years; last: 26 May 2019
- **Referenda**

Other Electoral Events in Austria

Elections on different levels within a province

- Elections of provincial parliaments
- Municipal elections
- Elections to the office of mayor

Elections of bodies of “self-government”

(e.g. Chamber of Commerce, Federation of Students, ...)

II. Election Dispute Resolution in Austria

Election Dispute Resolution in Austria

- Constitutional Court has exclusive jurisdiction in electoral matters in Austria, deciding about challenged elections on all levels (federal, provincial, municipal, ...)
- Very limited competencies of other courts and the Federal Electoral Board in federal elections
- Election laws have to be interpreted by literal meaning – no margin of interpretation by electoral boards
- Most remedies can only be filed after final election results have been announced (ex-post system)
- Campaigning parties/candidates can appeal results

Election Dispute Resolution in Austria

Who can be approached in EDR matters?

- Federal Electoral Board
(= "Austrian National Election Commission")
- Federal Administrative Court
- Constitutional Court

Federal Electoral Board

- Very narrow competencies in EDR matters
- **Towards e-day:** Federal Electoral Board can revise or correct illegal decisions of subordinate electoral boards in federal elections (not in elections on other levels!)
- **After election:** Objection can be filed against electoral figures ascertained by a provincial election board or the Federal Electoral Board (within 3 days after announcement of results; „prima facie evidence“ has to be presented)
- Re-examination of results based on documents (no re-count!)
- If objection is founded: Federal Electoral Board rectifies results, revokes announcement, announces correct figures

Federal Administrative Court

(Bundesverwaltungsgericht)

- Voter registration issues (inaccuracies and omissions in the voter lists) can be challenged before election day
- Requests for amendments of the voter lists → resident municipality (decision within 6 days after end of the public viewing of voter lists)
- Appeal possible with Federal Administrative Court → within 2 days of municipality's decision
- Federal Administrative Court decision → within 4 days
- Ruling could be further appealed to Supreme Administrative Court or Constitutional Court (depending on subject-matter)

Constitutional Court



- Sole jurisdiction in electoral matters
- Permissible application (complaint) needed
- Mere ex-post review (after the end of elections)
- No decisions (preliminary rulings) by Constitutional Court during pre-election period
- Complaint within a period of 4 weeks after final results (exceptions: 1 week for EP elections and presidential elections)
- Challenges possible by all campaigning groups/candidates & groups/candidates who applied for candidacy (no individuals)

Constitutional Court

History



- November 1918: End of empire, Austrian republic founded
- 18 December 1918: first electoral code, basis for creation of an electoral court
- 6 February 1919: Legal basis for constitutional court to act as electoral court
- 1 October 1920: Constitutional law assigns electoral matters to constitutional court (sole jurisdiction for the whole country, irrespective of administrative level)

Constitutional Court decisions

Challenged acts/decisions must have been against the law and “may have had an influence on the result of the election” (no proof needed)

Consequences:

1. Annulment and repetition of an election
2. Annulment and repetition of parts of an election (e.g. in certain constituencies)
3. Revising of specific decisions/acts of the electoral process (no re-election; more „lenient means“)
 - *Parliament (National Council) remains in session until re-election results were published, while candidate for Federal President does NOT take office.*

Excursus: Constitutional Court & Fed. Electoral Board

Constitutional Court

- 14 members appointed by Federal President (based on proposals by Government or Parliament)
- Independent justices, cannot be removed (only by Court itself)
- Retiring age: 70
- Sole jurisdiction in electoral matters

Federal Electoral Board (National Election Commission)

- 17 members ("assessors") – 15 nominated by parties, 2 judges
- Commission is completely independent from Ministry ; newly formed before a national council election
- Chair is "ex officio" Federal Minister of the Interior; 3 deputies

III. Challenged Elections

Previously challenged Elections (1)

Statistics of challenged Austrian elections (1921-2016)

- National Council elections: 34 (**3 admitted** since 1921)
- Municipal elections: 260 (**108 admitted** since 1921)
- Presidential elections: 20 (**only 1 admitted** since 1921)
- Mayoral elections: 36 (**15 admitted** since 1921)
- EP Elections: 4 (**0 admitted**)
- Provincial diet elections: 43 (**4 admitted** since 1921)

Previously challenged Elections (2)

“Successful re-runs” of federal elections in the 2nd Republic (since 1945):

- 1970 Election to the National Council (partial re-run)
- 1995 Election to the National Council (partial re-run)
- 2016 Presidential Election (complete re-run)

Other note-worthy Constitutional Court decisions:

E.g. regarding local elections or the use of e-voting at the 2009 Federation of Students elections.

1970 National Council Election

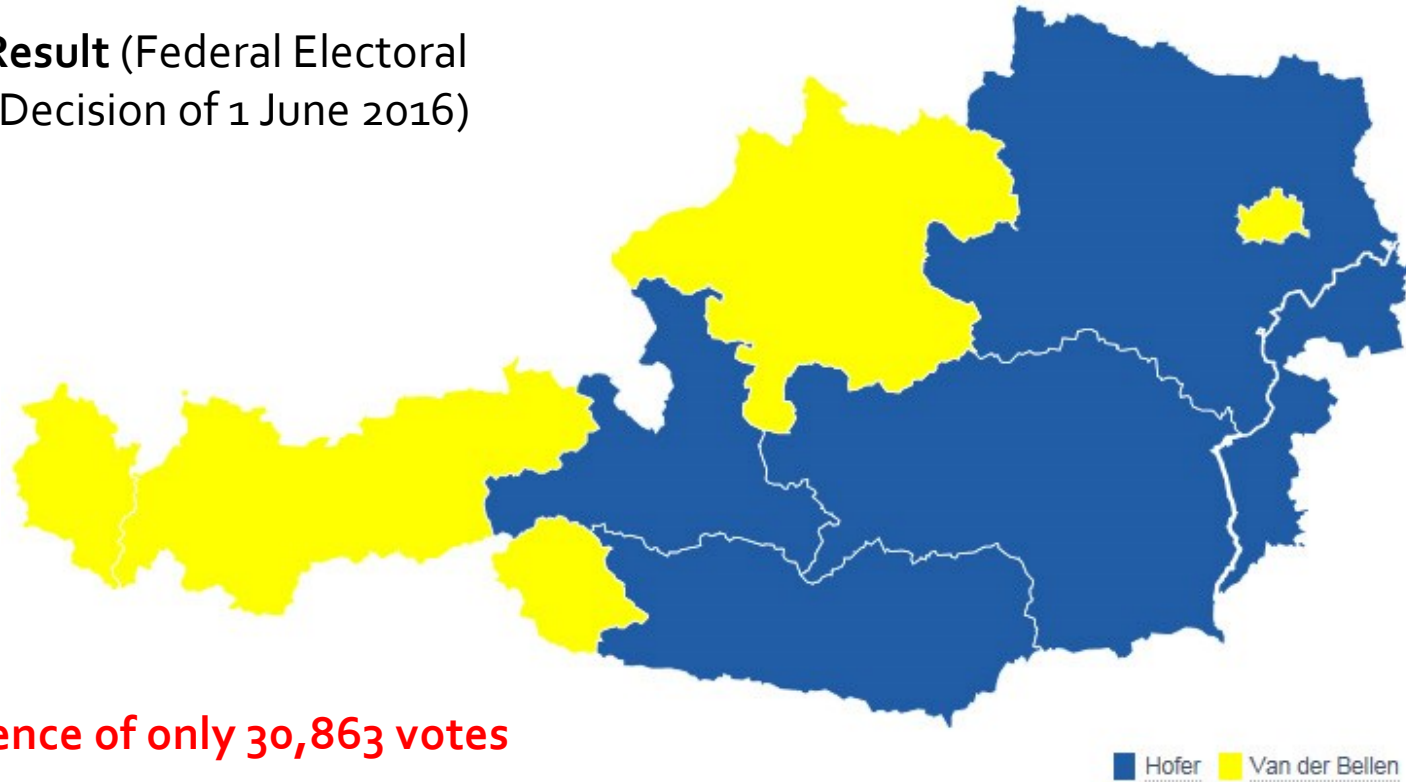
- Forged signatures under supporting declarations for a party were found
- No immediate actions possible so complaint filed with the Constitutional Court after end of election
- Fraudulent actions had an influence on the election's results
- Constitutional Court ordered new ballot in the affected constituencies

1995 National Council Election

- Approx. 100 incorrect ballot sheets used in one municipality (Donnerskirchen)
- One campaigning party filed a complaint with the Constitutional Court after the end of the election
- Complaint included more than 50 different claims (i.e. alleged irregularities/illegality that could have had an influence on the election results)
- Constitutional Court decided, based on the claims, that re-elections be held in two constituencies (partial re-run)
- Plus: In one municipality, a particular decision was revised (as „more lenient means“)
- Other claims were considered unfounded

IV. 2016 Presidential Election

Final Result (Federal Electoral Board Decision of 1 June 2016)



Difference of only 30,863 votes

Österreich, endgültiges Endergebnis

Ing. Norbert Hofer 49,7 % (+14,6 %)



Dr. Alexander Van der Bellen 50,3 % (+29,0 %)



2016 Presidential election

PRESIDENTIAL ELECTION

**1st
round**

24 April

**2nd
round
(run-off)**

22 May

**Constitutional
Court
Proceedings**

**20 June –
1 July**

1 June: FEB announces
official final results

8 June: Results challenged
at Constitutional Court

**Constitutional
Court Decision:**

**Election
overturned -
runoff election
to be repeated**

1 July

Constitutional Court Proceedings

- Largest public hearing in history of Austria's Constitutional Court
- Court summoned 90 witnesses (and interviewed around 70)
- Behaviour in 14 districts found problematic

Below picture: orf.at



Constitutional Court Proceedings

- Decision rendered in less than 4 weeks (election challenged on 8 June, decision on 1 July).
- Only 2nd round of 22 May to be repeated.

Ruling of 1 July:

"Runoff election to the office of Federal President has to be repeated in its entirety all over Austria."



Court's Reasoning

1. District Electoral Boards

- Infringements of the law occurred in 14 district electoral authorities (total of 77,929 postal votes concerned);
- difference between candidates Alexander van der Bellen and Norbert Hofer was only 30,863 votes
→ *may have had "an influence on the election result"*

2. Transmission of partial results

- Decision by FEB to transmit partial results to select media and universities to prepare pre-calculations
→ *may have had "an influence on the election result"*
(*freedom of elections*)

“Stare decisis”: Long line of Court decisions

- Laws governing elections must be strictly applied (generally no room for discretion; provisions must be interpreted by their literal meaning)
→ in order to exclude any abuse and manipulation.
- No need to proof any manipulations “if infringements of the law are of an extent that they may have had an influence on the election result” (first comparable decision rendered in 1927).

Conclusions

- Strong role of the Constitutional Court, full investigation
- Powerful consequences (e.g. re-run in the whole country)
- Strict interpretation of the law by literal meaning; no need to proof manipulations
- Mere “ex-post” review (intended to ensure a speedy electoral process , avoid delays and unforeseen developments or a perpetuation of remedies)
- Discussions about other models in the past (e.g. Governmental Program 2007-2010); recommendation in OSCE Reports to allow for additional EDR measures before election day → issue for future electoral law reforms.
- Additional court appeal in voter registration cases since 2014.

Thank You for Your Attention!

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