

Brigitte Bailer

The “Ban on Re-Engagement in National Socialist Activity” as a Social and Political Counter-strategy

The “Ban on Re-Engagement in National Socialist Activity” as a Social and Political Counter-strategy of Brigitte Bailer was published 2013 (almost identical) in: Ralf Melzer / Sebastian Serafin (eds.), *Right-wing extremism in Europa: Country Analyses, Counter-Strategies and Labor-Market exit strategies*, Berlin, Friedrich-Ebert-Stiftung, 2013.

Right-wing extremism and re-engagement
in National-Socialist activity: a clarification of terms

Terms such as right-wing extremism, right-wing radicalism, neo-Nazism, and neo-fascism have been a source of constant confusion and misunderstanding in political and legal discourse. For that reason, this paper starts by explaining these terms briefly, particularly with regard to their relevance for official and judicial action against groups or individuals categorized as such. The analyses of the Dokumentationsarchiv des österreichischen Widerstandes (DÖW), or Documentation Archive of Austrian Resistance, on Austrian right-wing extremism are based on the definition of that concept first developed by Willibald I. Holzer in 1979 and revised in 1993,¹ the main features of which are almost identical to those used by other researchers. Holzer concentrates on the central concepts of national community (Volksgemeinschaft) and integral nationalism, which in Austrian right-wing discourse always takes German nationalism as its point

1 Willibald I. Holzer, *Rechtsextremismus – Konturen und Definitionskomponenten eines politischen Begriffs*, in *Dokumentationsarchiv des österreichischen Widerstandes* (ed.), *Rechtsextremismus in Österreich nach 1945*, Vienna 1979, pp. 11–97; and Willibald I. Holzer, *Dokumentationsarchiv des österreichischen Widerstandes* (ed.), *Rechtsextremismus – Konturen, Definitionsmerkmale und Erklärungsansätze*, in *Dokumentationsarchiv des österreichischen Widerstandes* (ed.), *Handbuch des österreichischen Rechtsextremismus*, Vienna 1993, pp. 11–96.

of orientation. From those concepts Holzer derives the individual elements of right-wing extremism. He certainly considers far right-wing ideology to be extreme; yet in his view it does not aim at a radical transformation of society in the sense of its stem, *radix* (Latin for “root”). Accordingly, Holzer rejects the label right-wing radicalism, believing it to be an inappropriate way to characterize this phenomenon.

The term “neo-fascism,” which is used repeatedly in Austrian political propaganda, also fails to lay bare the ideological and historical reality of the political movement so labelled. The recent academic debate on National Socialism and fascism shows that we need to distinguish between the Nazi regime in Germany and the fascist dictatorships that existed elsewhere in Europe at the same time. In the context of Austrian history, “neo-fascist” properly would refer to an ideology based on Austrofascism² or Italian-style fascism. However, the militant fringes of Austrian right-wing extremism indeed align themselves with some elements of National Socialist ideology, which suggests that the term “neo-Nazism” fits the facts.

Furthermore, the specific Austrian legal situation and the relevant jurisprudence are significant in this context. To be sure, the expression “right-wing extremist” as used in the sense defined by Holzer has been classified as a political value judgment rather than an actionable insult.³ On the other hand, the epithet “neo-Nazi” does indeed imply that the person so described has re-engaged in National Socialist activity. Hence, the use of the latter term can be successfully challenged in court in defamation proceedings because it alleges a criminal act. Against this background, the utmost care is recommended in the use of terminology, as employees of the DÖW learned the hard way in the wake of numerous judicial decisions. For example, the first Austrian work published on the topic of right-wing extremism in Austria after 1945⁴ (published in 1979) was challenged in court by the people named therein, who argued successfully that the then-Federal Minister of the Interior, Edwin Lanc, wrongly used the

2 As a designation for the dictatorship that lasted from 1933–1938, this concept is not without controversy among historians and political scientists. Cf. Ilse Reiter-Zatloukal / Christiane Rothländer / Pia Schölnberger (eds.), *Österreich 1933–1938: Interdisziplinäre Annäherungen an das Dollfuß-/Schuschnigg-Regime*, Vienna–Cologne–Weimar 2012. The term shall be used here nonetheless, following Emmerich Tálos, *Das austrofaschistische Herrschaftssystem*, in Emmerich Tálos / Wolfgang Neugebauer (eds.), *Austrofaschismus: Politik – Ökonomie – Kultur, 1933–1938*, Vienna 2005, pp. 394–420.

3 Documents on the proceedings, in the *Dokumentationsarchiv des österreichischen Widerstandes*.

4 *Dokumentationsarchiv des österreichischen Widerstandes* (ed.), *Rechtsextremismus in Österreich nach 1945*.

“Ban on Re-Engagement in National Socialist Activity” 3

two terms interchangeably in his foreword to the volume. Ultimately the claims had to be settled.⁵

Right-wing extremism under Austrian law: an overview⁶

Different levels of the Austrian legal system incorporate instruments for fighting the phenomena of racism, incitement against minorities, apologetics for the National Socialist regime, and re-engagement in National Socialist activity.

At the constitutional level, both the Verbotsgesetz (Prohibition Act), discussed below in some detail, and the 1955 Staatsvertrag (State Treaty) of Vienna⁷ are worthy of mention. The signatory states⁸ to the latter document, which restored Austria’s sovereignty, imposed a ban on the Anschluss (annexation) of Austria to Germany in Article 4⁹ and, in Article 9, obliged Austria to “dissolve Nazi organizations.” Austria was required to “continue the measures to eliminate all traces of Nazism from Austrian political, economic and cultural life, to ensure that the above-mentioned organizations are not revived in any form, and to prevent all Nazi and militarist activity and propaganda in Austria” (paragraph 1).

Relevant at the level of national laws is section 283 of the Strafgesetzbuch (Austrian Criminal Code),¹⁰ which mandates a prison sentence of up to one year for anyone who “publicly ... incites or instigates a hostile act against a church or religious community established in the country or against a group committed by their affiliation to such a church or religious community, to a race, people, tribe or state” or “seeks to incite against, insult, or disparage” such a group. Time and again this provision has proven to be a useful instrument in the fight against publicly expressed anti-Semitism and cases of right-wing extremist and neo-Nazi agitation that cannot be prosecuted using other legis-

5 Documents on the proceedings, in the Dokumentationsarchiv des österreichischen Widerstandes.

6 The overview offered here is done from the perspective of a historian who has some practical experience with legal matters; an actual consideration of all the relevant issues would require an appropriate level of legal expertise.

7 *Bundesgesetzblatt* (Federal Legal Gazette) no. 152, 1955.

8 These were the allied powers from WW II: the USA, Great Britain, France, and the Soviet Union.

9 This term relates to the German nationalism that is constitutive of the ideology of Austrian right-wing extremism and neo-Nazism.

10 *Bundesgesetzblatt* 1974, no. 60 in the version of *Bundesgesetzblatt* I, no. 103 (2011).

lation. Yet its utility is limited when agitation is broadly directed (for example, against “foreigners” or “asylum seekers”).

Other provisions can be found in the area of administrative criminal law. For example, the *Abzeichengesetz* (Insignia Act)¹¹ imposes an administrative penalty on the wearing, exhibiting, and sale of the insignia of forbidden organizations or similar symbols. This act not only applies to relevant publications, but also – albeit rarely – to the sale of Nazi memorabilia at flea markets or by second-hand dealers. To take another example, Article III of the *Einführungsgesetz zu den Verwaltungsverfahrensgesetzen* (EGVG), or Introductory Act to the Administrative Procedures Act,¹² imposes penalties for discrimination “on the grounds of race, skin color, national or ethnic origin, religious denomination, or disability,” as well as less serious cases of re-engagement in National Socialist activity.

The Verbotsgesetz

Background

Shortly after the liberation of Vienna on April 13, 1945, some of the political parties persecuted by the Nazis reconstituted, including the Social Democrats (SPÖ), the Conservatives (ÖVP) or Österreichische Volkspartei, and the Communists (KPÖ). In the case of the ÖVP, this step meant that the party re-formed on its Christian-Social base.¹³ The provisional government, made up of representatives of these three parties, declared Austria’s independence on April 27, and the Cabinet Committee passed the *Gesetz über das Verbot der NSDAP* (Act on the Prohibition of the NSDAP) on May 8, the day of surrender. Alongside the ban of the party and all its auxiliary organizations as well as any new engagement in NSDAP-related activity, the *Verbotsgesetz* required National Socialists to be registered, and included atonement measures. However, until the

11 *Abzeichengesetz* 1960, *Bundesgesetzblatt* no. 84 (1960), amended by *Bundesgesetzblatt* no. 117 (1980), and *Bundesgesetzblatt* I, nos. 50 and 113 (2012). The last amendments related to formal matters such as the conversion of the fine from Austrian Schillings to Euro. But the 1980 amendments are more substantive; for example, they ban on the use of symbols and insignias that are similar to those of forbidden organizations, while allowing their display in exhibitions or in publications aimed against these organizations.

12 *Bundesgesetzblatt* I, no. 87 (2008).

13 The Christian Social Party had been discredited due to its involvement in the establishment of the Austrofascist regime and for that reason was re-founded in 1945, albeit with continuity of membership with its predecessor.

autumn of 1945, when the Western powers recognized Austria’s provisional government, the law could only be put into effect in the eastern part of the country, which was then occupied by the Red Army. A central function of the Verbotsgesetz was to purge political, economic, and social life of National Socialists and their influence. But the de-Nazification process, which was supposed to be carried out schematically according to specified criteria, soon revealed its limits. Not only political decision-makers but even the general public regarded it as too rigid. However, the Allied Council refused to ratify a new version of the National Socialist Act passed in 1946 by the National Council that had been elected in November of 1945. The revised law was not passed until February of 1947, after more than fifty amendments – mostly more stringent provisions – had been added to it.¹⁴

At the same time, beginning as early as 1945, the newly-formed political parties had initiated some behind-the-scenes maneuvers designed to gain the allegiance of former National Socialists and their sympathizers. Moreover, they attempted to exploit on a grand scale the amnesty options provided for in the Act to promote their own ends.¹⁵ In particular, the establishment of the Verband der Unabhängigen (VdU), or Federation of Independents, as a rallying point for the votes of former National Socialists, of whom more than 90% had regained the right to vote in the 1949 National Council elections, generated renewed political competition. The VdU also became a core around which right-wing extremist groups and organizations could crystallize and re-establish themselves.

14 For an overview see Winfried R. Garscha, *Entnazifizierung und gerichtliche Ahndung von NS-Verbrechen*, in Emmerich Tálos, et al. (eds.), *NS-Herrschaft in Österreich: Ein Handbuch*, Vienna 2000, pp. 852–883; here: 858 f.

15 Studies on the SPÖ have already been done: see for example Wolfgang Neugebauer and Peter Schwarz, *Der Wille zum aufrechten Gang: Offenlegung der Rolle des BSA bei der gesellschaftlichen Reintegration der ehemaligen Nationalsozialisten*, Vienna 2004, and Maria Mesner (ed.), *Entnazifizierung zwischen politischem Anspruch, Parteienkonkurrenz und kaltem Krieg: am Beispiel SPÖ*, Vienna-Munich 2005. Currently, only indirect conclusions about the situation in the ÖVP are possible, for example regarding the integration of former National Socialists in ministerial offices, such as Minister of Finance Reinhard Kamitz; Federal Minister of Agriculture and Forestry Franz Thoma; and Federal Minister of Trade and Reconstruction Josef Böck-Greisenau. All three were named by ÖVP General Secretary Alfred Maleta in the 1953 election campaign. See Brigitte Bailer-Galanda, *Hoch klingt das Lied vom ‘kleinen Nazi’: Die politischen Parteien Österreichs und die ehemaligen Nationalsozialisten*, in *Dokumentationsarchiv des österreichischen Widerstandes* (ed.), *Themen der Zeitgeschichte und der Gegenwart. Arbeiterbewegung – NS-Herrschaft – Rechts-Extremismus. Ein Resümee aus Anlass des 60. Geburtstags von Wolfgang Neugebauer*, Vienna 2004, pp. 120-135; here: p. 129 f.

Because of the intervention by the political parties, fewer and fewer people suffered the consequences of the National Socialist Act as “tainted National Socialists.” Nevertheless, the governing parties ÖVP and SPÖ made several attempts to end the de-Nazification process before the 1955 Staatsvertrag, all of which failed because of the resistance of the Allied Council.¹⁶ Legislative approval of the Staatsvertrag ultimately opened the way to a comprehensive Nazi amnesty, which was passed by the National Council on March 14, 1957.¹⁷ The NS-Verbotsgesetz (National Socialist Prohibition Act) had thus achieved its primary historical task. Those parts of the Act that impose penalties for re-engagement in National Socialist-related activity have been unaffected by these amnesties and continue to make the Verbotsgesetz relevant to current conditions in Austria.

The re-engagement ban

Section 3 of the original version of the 1945 Verbotsgesetz already contained a provision regarding re-engagement in National Socialist activity:

“Engagement with the NSDAP or its aims, including outside that organization, shall be prohibited. Whoever continues to belong to this party or engages with its aims shall be guilty of a criminal offense and shall be punished by death and forfeit of his entire assets. In particularly extenuating cases, a prison sentence of ten to twenty years may be imposed instead of the death penalty.”¹⁸

In the amended version of the Act passed in 1947, this very brief provision had expanded to become sections 3a-3g. Sections 3a-f enshrined the ban on the re-establishment of a National Socialist organization and the support of any such organization through donations or in printed material. However, state prosecutors and courts preferred to use the very broadly worded catch-all provision of section 3g, paragraph 1, for prosecuting neo-Nazi activities. Beginning in the 1980s, they also applied it to Holocaust denial:

16 Ibid., pp. 127–131.

17 28th session of the National Council, VIII legislative period, March 14, 1957.

18 *Staatsgesetzblatt* (State Legal Gazette) 1945, no. 13

“Ban on Re-Engagement in National Socialist Activity”

7

“Whoever is active in a National-Socialist sense shall, unless the act is not subject to higher punishment under another provision, be punished with imprisonment between one and ten years, [or] in case of the perpetrator or the committed act being particularly dangerous, up to 20 years. A forfeit of assets may also be determined.”

Paragraph 2 also made non-notification of such activities a criminal offense. The elements of the offense detailed in section 3 and the associated threat of punishment remain in force today. The death penalty, which the 1947 act had still included, was abolished in Austria in 1950 for ordinary proceedings and in 1968 for summary proceedings. Consequently, it was no longer part of the Verbotsgesetz.

Applications, and associated problems before 1992

Shortly after the end of the war, those provisions that relate to re-engagement in National Socialist activity were used for the first time against the “Were-wolf” group centered around Theodor Soucek, a merchant from Graz who had been a member of the NSDAP, the Hitler Youth, and the SA (the members of which were recruited from former Hitler Youth and Waffen-SS associates). On May 15, 1948, Soucek and two of his co-defendants were sentenced to death by the Volksgericht (People’s Court) in Graz; however, their sentences were commuted to life imprisonment by the Federal President in 1949, and the men were ultimately released from custody after three years.¹⁹ In the second half of the 1950s, Soucek once again stepped into the limelight as the organizer of SS veterans’ meetings and neo-Nazi youth associations.

After numerous German nationalist and right-wing extremist organizations succeeded in re-establishing themselves in the early 1950s, encouraged by the presence and initial electoral successes of the VdU, the democratic public was confronted by a resurgence of organized right-wing extremism. Neo-Nazi groups, especially, enjoyed considerable success in appealing to young people, particularly on the occasion of the so-called “Schiller commemorations” in 1959. Allegedly celebrating Friedrich Schiller’s 200th birthday, thousands of

19 Martin F. Polaschek, *Im Namen der Republik Österreich! Die Volksgerichte in der Steiermark, 1945–1955*, Graz 1998, pp. 205–231. Polaschek provides not only a detailed account of the trial against Soucek, but also mentions a number of other trials against re-engagement in National Socialist activity held in Styria in the 1940s.

right wing extremists, Neo-National Socialists and members of German nationalist student fraternities participated in a demonstration in downtown Vienna. It was then that the democratic public came to realize how extensively these groups had re-established themselves after 1945. The security services reacted to these events by dissolving numerous militant right-wing extremist organizations, albeit not on the basis of the *Verbotsgesetz*, but instead on suspicion of extremist activities under the *Vereinsgesetz* (Act on Associations).²⁰

In the following decades, the *Verbotsgesetz* itself was rarely invoked. Between 1961 and 1967, the number of indictments and trials under the *Verbotsgesetz* declined almost constantly, to the point that the Ministry of the Interior stopped collecting statistics on it. In the 1970s there were only a small number of cases pending. the Ministry lists only five.²¹

At the same time, the 1960s witnessed a steep rise in right-wing extremism and neo-Nazism. Right-wing extremist student groups such as the Ring Freiheitlicher Studenten (Ring of Free Students) achieved considerable success in the elections to the *Studentenvertretung* (Austrian students' parliament). The scandal surrounding an anti-Semitic university professor and former National Socialist, Taras Borodajkewycz, resulted in violent clashes between his supporters and anti-fascist counter-demonstrators.²² However, the defection of the neo-Nazi *Nationaldemokratische Partei* (NDP), or National Democratic Party, from the *Freiheitliche Partei* (FPÖ), or Freedom Party, the successor party to the *VdU*, in 1967,²³ signaled the incipient radicalization of a growing number of small but militant neo-Nazi groups and newspapers that proliferated over the following decade. The paucity of trials under the *Verbotsgesetz* during this period is thus clearly related to the tolerance and acquiescence displayed by the government and civil society toward even militant right-wing extremism. It also indicated that public officials were reluctant to initiate legal action against such groups. Until well into the 1980s Austrian politicians, including the

20 Federal Ministry of the Interior, *Gesetzliche Bestimmungen und behördliche Maßnahmen gegen den Rechtsextremismus*, in *Dokumentationsarchiv des österreichischen Widerstandes* (ed.), *Rechtsextremismus in Österreich nach 1945*, revised and expanded 5th edition, Vienna 1981, pp. 364–387; here: p. 366 f., p. 371 f.

21 Federal Ministry of the Interior, *Gesetzliche Bestimmungen*, Vienna 1981, p. 369 f.

22 Cf. Gerard Kasemir, *Die Borodajkewycz-Affäre 1965: spätes Ende für 'wissenschaftlich' vorgetragenen Rassismus*, in Michael Gehler / Hubert Sickinger (eds.), *Politische Affären und Skandale in Österreich: Von Mayerling bis Waldheim*, Thaur 1995, pp. 486-501; and Heinz Fischer, *Taras Borodajkewycz – Einer im Vordergrund: Eine Dokumentation*, Vienna 1966.

23 *Junge Generation in der SPÖ Wien* (ed.), *Von Hitler zu Burger. Zur Geschichte, Ideologie und Rechtssituation der NDP*, Vienna 1981.

then-Federal Chancellor Bruno Kreisky of the SPÖ, argued that it was better to keep these groups under public scrutiny than to drive them underground with statutory measures.

Since the 1970s the neo-Nazi, racist, and aggressively anti-Semitic press has become more prominent. Examples include the newspaper *Sieg* by Walter Ochensberger from Vorarlberg and the initially mainly anti-immigrant newspaper *Halt* by Gerd Honsik, a neo-Nazi activist who had been operating since the 1960s. Ochensberger’s associations, such as the *Bund Volkstreuer Jugend* (Association of Youth Loyal to the People), were prosecuted under the laws on associations.²⁴ In the 1980s, both Ochensberger and Honsik turned to Holocaust denial. *Halt* mainly tried to influence the thinking of young people, especially schoolchildren. In a number of cases the publication was sent to teachers and distributed outside Viennese schools. In response, school administrators called upon historians and living witnesses to produce informational brochures to counter the distortions disseminated in *Halt*.²⁵ Similarly, a neo-Nazi student group had been established at Vienna University in the form of the *Aktion Neue Rechte* (Action for the New Right); when the organization had little success in elections to the student’s parliament, its members responded by committing violent acts.

One provision of the *Parteiengesetz* (Parties Act) passed in 1975²⁶ and having the force of constitutional law expressly stipulates that the activity of political parties may not be “subject to any limitation arising out of special legal provisions” (Article I, paragraph 3). This clause became an escape route for neo-Nazi organizations seeking to avoid a government ban or official dissolution. The decision of the NDP, ANR, and similar groups to register as political parties protected them from official intervention for a number of years. However, proceedings against the ANR in particular demonstrated that the *Verbotsgesetz* could be used against both individual activists and political parties. A trial conducted in 1984 against functionaries of the ANR, including a German neo-Nazi and terrorist who had attempted to bomb Jewish-owned business establishments ended with the conviction of the ANR’s entire leadership. The

24 This association was dissolved by the authorities in 1975. Wolfgang Neugebauer, *Organisationen*, in *Dokumentationsarchiv des österreichischen Widerstandes* (ed.), *Rechtsextremismus in Österreich nach 1945*, pp. 161–249; here: p. 180 f.

25 *Gesellschaft für politische Aufklärung*, *Wissen macht Halt haltlos*, Innsbruck, no date; *Dokumentationsarchiv des österreichischen Widerstandes / Bundesministerium für Unterricht und Kunst* (eds.), *Amoklauf gegen die Wirklichkeit. NS-Verbrechen und ‘revisionistische’ Geschichtsschreibung*, Vienna 1991.

26 *Bundesgesetzblatt* 1975, no. 404.

judge in the case, Heinrich Gallhuber, took special care in formulating his instructions to the jury, a strategy that clearly worked.

A year later, in 1985, the Constitutional Court issued a landmark verdict that put paid to the instrumentalization of the Parteiengesetz by neo-Nazi groupings. The country's election commission, citing the Verbotsgesetz, rejected the slate of candidates submitted by the ANR for the 1979 election to the student parliament (Österreichische Hochschülerschaft). The ANR objected by filing a petition with the Constitutional Court, which confirmed the ANR's interpretation of the law. That ruling enabled it to run candidates during the next elections, held in 1981, in which it won a seat. The Verband Sozialistischer Studenten (Association of Socialist Students) and the Kommunistische Studentenverband (Communist Students' Association) filed an objection on the grounds that certain provisions relating to the election process had been breached. When a lower court rejected that claim, the two groups filed an appeal to the Constitutional Court, which subjected the provisions of the Hochschülerschaftsgesetz (Students' Parliament Act) that governed the elections to judicial review. The Court ruled that the Verbotsgesetz would still be applicable even "if the law to which the public authority is subject²⁷ does not expressly stipulate [...] compliance therewith." It reasoned that "the ban on re-engagement in National Socialist activity is further not merely an ancillary aim of the state's activity for a specific domain that would have to cede to other ancillary aims of other domains, but instead an all-embracing requirement of all state acts. [...] Every act of the state without exception must comply with this prohibition. No act by a public authority may be performed that would mean the involvement of the state in any re-engagement in National Socialist activity."²⁸

Following this verdict, both the ANR and the NDP were stripped of their status as political parties in 1988, a decision that eliminated any further legal obstacles to their dissolution.²⁹ Since that time, investigations have been carried out for elections at all levels (local, regional, national) to determine whether any of the campaigning groups or parties has breached the ban on re-engagement.

27 In this case the act governing the elections to the Austrian students' parliament.

28 Constitutional Court, G175/84 (November 29, 1985), p. 17.

29 Revocation of the NDP's status as a political party: verdict of the Constitutional Court dated June 25, 1988, B 999/87-15. The dissolution of the NDP as a legally recognized association was effected via a notice from the Security Directorate of Vienna, association matters, dated November 21, 1988, no. I-SD-1272-BVP/88. For further detail on this process, see Brigitte Bailer / Wolfgang Neugebauer, *Rechtsextreme Vereine, Parteien, Zeitschriften, legale/illegale Gruppen*, in *Dokumentationsarchiv des österreichischen Widerstandes* (ed.), *Handbuch des österreichischen Rechtsextremismus*, pp. 102-238; here: p. 163.

“Ban on Re-Engagement in National Socialist Activity” 11

ment in National Socialist activity through its internal statutes, programs, or activities. When this is found to be the case, such parties are not permitted to campaign. Thus, for example two neo-Nazi groups³⁰ were excluded from the Upper Austrian regional elections in 2009.

However, in the 1980s, the authorities still ran into problems in applying the ban on re-engagement in National Socialist activity to individual activists or newspaper publishers, such as Honsik and Ochensberger. Ochensberger’s National Socialist apologetics and even his open denial of the Holocaust did not result in criminal convictions. The jury acquitted him in every case, whether because the minimum punishments provided for in the Verbotsgesetz appeared too severe, as was supposed everywhere (though probably not correctly),³¹ or because they could not understand why the acts were punishable in the first place. The fact that section 3g of the Verbotsgesetz was phrased in a vague and general way appears to have contributed to the difficulty that prosecutors encountered in bringing solid cases against neo-Nazis. Several preliminary investigations initiated against Honsik similarly did not result in any indictments.

1992: The turning point

During the 1980s, some historians turned their attention to Holocaust studies. In Austria, this new focus was prompted largely by the controversy surrounding Kurt Waldheim, the former United Nations Secretary General who was elected as the Austrian Federal President in 1986. Many observers believed that Waldheim’s wartime past had been portrayed in an excessively rose-colored light. The affair seemed to sensitize the public, the political class, and the media to neo-Nazi activities in general and Holocaust denial in particular. Official and judicial powerlessness in the face of blatant, unrepentant Holocaust denial by Ochensberger and Honsik, which at the very least represented a mockery of and insult to the victims, provoked severe criticism. Among critics, the most vociferous included Holocaust survivors (notably Hermann Langbein³² and

30 These were *Die Bunten* (the Brightly Coloreds) and *Nationale Volkspartei* (National People’s Party).

31 See Heinrich Gallhuber, *Rechtsextremismus und Strafrecht*, in *Dokumentationsarchiv des österreichischen Widerstandes* (ed.), *Handbuch des österreichischen Rechtsextremismus*, p. 583.

32 Hermann Langbein, an Austrian resistance fighter, was incarcerated in the concentration camps Dachau and Auschwitz, where he played a prominent role in the camp resistance. After the liberation, Langbein dedicated most of his life to educating the public about the

Simon Wiesenthal), the Jewish community generally, and the Dokumentationsarchiv des österreichischen Widerstandes. In May of 1990, a conference on the topic of suitable statutory measures for combatting Holocaust denial and re-engagement in National Socialist activity was held in Vienna.³³ The conference's findings and recommendations were taken up in the parliamentary proceedings that commenced shortly afterwards. While representatives of the ÖVP proposed a lowering of the minimum penalty in order to reduce the supposed or actual inhibitions of juries, the SPÖ worked on an amendment to the incitement provisions in criminal law.³⁴ An expert hearing convened by the Justice Committee of the National Council on November 20, 1991 was attended not only by parliamentarians and representatives of the Federal Ministry of Justice, but also by Simon Wiesenthal, legal scholars, and representatives of both the Jewish and Slovenian communities. A number of lawyers and this author, in her capacity as a historian, also attended on behalf of the Dokumentationsarchiv des österreichischen Widerstandes.³⁵ Ultimately, members of parliament from the SPÖ and ÖVP agreed on a compromise motion, which resulted in an amendment to the Act being passed on February 26, 1992. This amendment reduced the minimum punishments provided for in the Act while adding a new provision, section 3h, that threatens to punish “whomever attempts to deny, grossly downplay, condone or justify the National Socialist genocide or other National Socialist crimes against humanity in a printed work, in the broadcast media, through another medium, or through any other public channel, and does so in a manner that is accessible to many people.”³⁶ The provision also made it easier to prosecute offenders by dispensing with the previous requirement for what is known as the “mens rea,” or the subjective aspect of an offense. That is, prosecutors would not longer have to prove the perpetrator’s intention to engage with National Socialist activity through denying these crimes.

crimes committed at Auschwitz. See Katharina Stengel, Hermann Langbein: Ein Auschwitz-Überlebender in den erinnerungspolitischen Konflikten der Nachkriegszeit, Frankfurt: Wissenschaftliche Reihe des Fritz Bauer Instituts, 2012, vol. 21, and Brigitte Halbmayr, Zeit-lebens konsequent: Hermann Langbein. Eine politische Biographie, Vienna 2012.

33 Dokumentationsarchiv des österreichischen Widerstandes / Israelitische Kultusgemeinde Wien / Gesellschaft für politische Aufklärung (eds.), Justiz und nationalsozialistische Wiederbetätigung. Protokoll der gleichnamigen Tagung am 15. Mai 1990 in Wien, Vienna 1991.

34 Motion 253/A of the MPs Dr. Graff and others relating to a federal constitutional act to amend the Prohibition Act (ÖVP motion); motion 139/A by MPs Dr. Fuhrmann, Dr. Schranz, and others, relating to a federal act to amend the Criminal Code, appendices to the stenographic minutes, XVIII legislative period.

35 387 of the appendices to the stenographic minutes of the National Council, XVIII legislative period.

36 *Bundesgesetzblatt* 1992, no. 148.

“Ban on Re-Engagement in National Socialist Activity” 13

The application of the re-engagement ban since 1992

The February, 1992 amendment to the Verbotsgesetz constituted a breakthrough in the prosecution of re-engagement in National Socialist activity, because it enabled neo-Nazi publicists like Honsik and Ochensberger to be tried successfully for Holocaust denial. The discussions that occurred prior to the passage of the amendment also had important repercussions on the attitude of courts and juries. In December of 1991, before the amendment was even passed, Walter Ochensberger was convicted for the first time.³⁷ Gerd Honsik was convicted the following May.³⁸ Between 1992 and July 31, 2007, a total of 273 people were brought to justice under the Verbotsgesetz, and 70 trials were still pending.³⁹ The statistics provided in Tables 1, 2, and 3 show that the Verbotsgesetz has now become an instrument that is constantly deployed in combating re-engagement in National Socialist activity.

Table 1: Indictments under Strafgesetzbuch and Verbotsgesetz, 2008–2010

INDICTMENTS	2008	2009	2010
Verbotsgesetz	360	396	522
Incitement (section 283, Strafgesetzbuch)	73	33	79
Other Strafgesetzbuch offenses (e.g. property damage, bodily harm, malicious threats)	304	253	380
Abzeichengesetz	21	40	20
Art. III para. 1 no. 4 EGVG	77	69	39
Total	835	791	1,040

Source: Federal Ministry of the Interior, Federal Office of State Protection and Counter Terrorism, 2011 Verfassungsschutzbericht (State Protection Report), p. 18

37 *Kurier*, December 10, 1991; Wilhelm Lasek, ‘Revisionistische’ Autoren und ihre Publikationen, in Brigitte Bailer-Galanda / Wolfgang Neugebauer (eds.), *Wahrheit und Auschwitzlüge: Zur Bekämpfung ‘revisionistischer’ Propaganda*, Vienna 1995, pp. 252-292; here: p. 276 f.

38 *Die Presse*, May 6, 1992.

39 Response to query by Federal Justice Minister Dr. Maria Berger, 1101/AB, XXIII legislative period, August 21, 2007.

Table 2: **Convictions under Strafgesetzbuch, section 283, and Verbotsgesetz, section 3a ff. (2000–2010)**

YEAR	SECTION 283, STRAFGESETZBUCH		SECTION 3 A ff., VERBOTSGESETZ	
	Criminal court statistics	Internal BJM statistics	Criminal court statistics	Internal BJM statistics
2000	0	1	31	32
2001	9	11	17	24
2002	7	9	17	20
2003	13	13	29	31
2004	9	14	31	29
2005	6	11	22	18
2006	6	9	19	17
2007	5	9	10	9
2008	3	3	28	32
2009	5	5	34	36
2010	9	9	40	43

Source: Federal Ministry of Justice, Bericht über die Tätigkeit der Strafjustiz (Report on the activities of the criminal justice authorities), 2010 Sicherheitsbericht (Security report), p. 41

Table 3: **Outcomes of other completed trials under Strafgesetzbuch, section 283, and Verbotsgesetz, section 3a ff. (2008–2010)**

TRIAL OUTCOMES	Section 283 Strafgesetzbuch (Internal BMJ statistics)			Section 3a ff Verbotsgesetz (Internal BMJ statistics)		
	2008	2009	2010	2008	2009	2010
Complaints/indictments	14	13	7	25	46	73
Acquittals	3	4	2	5	7	6

Source: Federal Ministry of Justice, Bericht über die Tätigkeit der Strafjustiz (Report on the activities of the criminal justice authorities), 2010 Sicherheitsbericht (Security report), p. 41

“Ban on Re-Engagement in National Socialist Activity” 15

The 2012 Verfassungsschutzbericht by the Federal Agency for State Protection and Counter Terrorism in the Federal Ministry of the Interior recorded 436 indictments under the Verbotsgesetz and 84 indictments on suspicion of incitement for 2011.⁴⁰ The reporting facility on the homepage of the Federal Agency for State Protection and Counter-Terrorism in the Federal Ministry of the Interior, which encourages reports about postings “with neo-Nazi, racist and anti-Semitic content” on websites or in newsgroups,⁴¹ received 338 notifications in 2011.⁴²

Social and political benefits of applying the Verbotsgesetz

The conviction of leading neo-Nazi propagandists in the aftermath of the 1992 amendment had some positive direct consequences. In particular, the associated prohibition of newspapers and flyers specifically targeted at young people precipitated a clear reduction in the channels available for disseminating neo-Nazi propaganda. Of course, that sort of content can be accessed on the Internet at any time, but (with the exception of chance finds) it usually requires a targeted search. This contrasts with the situation that prevailed before 1992, in which people who had shown little or no prior interest in such matters were exposed to neo-Nazi ideology. For example, the incidents described above (section 3.3) involving propagandistic pamphlets distributed in front of schools indiscriminately reached all schoolchildren. That the results of that kind of activity could be unsettling was demonstrated in 1987, when a purportedly genuine document casting doubt on the existence of gas chambers in various concentration camps was disseminated in schools through Honsik’s Halt, giving rise to considerable uncertainty about the whole matter, even among teachers.⁴³ Prior to 1992, officials were not empowered to counter the efforts of neo-Nazi propagandists to try to influence public opinion. Now, however, the security services can even use the Verbotsgesetz to combat propaganda on the Internet. For example, in January, 2013 the Vienna Landesgericht (Regional Court) convicted those behind the neo-Nazi website “Alpen-Donau Info” (Alps-Danube Info), although

40 Federal office for State Protection and Counter Terrorism, Verfassungsschutzbericht 2012, p. 17.

41 Cf. www.bmi.gv.at/cms/bmi_verfassungsschutz/meldestelle (January 17, 2013).

42 Verfassungsschutzbericht 2012, p. 20.

43 Dokumentationsarchiv des österreichischen Widerstandes (ed.), Das Lachout-Dokument: Anatomie einer Fälschung, Vienna 1999.

the conviction does not yet have the force of law.⁴⁴ In this context, the 2012 Verfassungsschutzbericht points to a decline in neo-Nazi activities following the arrest of these individuals.⁴⁵

The comparatively higher number of indictments made and trials conducted over recent years probably has less to do with increased crime than with the more stringent application of the Verbotsgesetz and a heightened sensitivity on the part of the public, the police, and judicial authorities. Such increased vigilance, in turn, reflects deeper historical knowledge and awareness of the National Socialists' crimes. Laws can always be understood as an expression of socio-political will. In this context, the amendment itself indicated a resolve on the part of the legislature to combat re-engagement in National Socialist activity and Holocaust denial more vigorously. The effects of that decision have ramified over the years. Trials under the Verbotsgesetz and the corresponding media reports in turn help highlight to the public the fact that re-engagement in National Socialist activity is punishable, which itself increases sensitivity towards the topic.

Criticism of the Verbotsgesetz

Since the time of its passage, right-wing extremists of all orientations have criticized and challenged the Verbotsgesetz, which they correctly view as a brake on their activities. In 2007, the FPÖ joined in this chorus of criticism, the most common argument being that the act supposedly restricts freedom of expression. FPÖ chief Heinz-Christian Strache asserted that independent-minded politicians were constantly experiencing a situation of "being criminalized through slurs and campaigns and forced into a corner where they don't belong."⁴⁶ This view was shared by National Council member Martin Graf, now the third President of the National Council,⁴⁷ as well as by Barbara Rosenkranz,⁴⁸ who ran for the office of Federal President in 2010. It is telling that her criticism of the

44 *Wiener Zeitung*, January 12, 2013; *Der Standard*, January 12, 2013.

45 Verfassungsschutzbericht 2012, p. 17.

46 Quoted in www.vol.at/news/vorarlberg/artikel/strache-will-verbotsgesetz-abschaffen/en/news-20070223-05195534 (February 24, 2007, print-out in DÖW).

47 Query made by MP Dr. Graf and colleagues to the Federal Minister of Justice, June 26, 2007, 1091/J XXIII legislative period.

48 *Niederösterreichische Nachrichten* (NÖN), November 5, 2007; see also *profil* 46, November 12, 2007.

“Ban on Re-Engagement in National Socialist Activity” 17

Verbotsgesetz in this context damaged her reputation so much that Strache felt obliged to retract it.⁴⁹

However, there are also voices that criticize the Verbotsgesetz from a classical liberal perspective, as became clear during the 2005 trial of the British Holocaust denier, David Irving. Respected journalists, even academics, spoke out against the treatment of Holocaust denial as a matter for criminal law. They argued that unfounded “opinions” should be refuted through discussion, not threatened with punishment.⁵⁰ “In stable democracies,” so the argument went, “the fight against barbaric ideologies” should be conducted politically rather than through the courts.⁵¹ In this view, the Austrian people could also be trusted to “resist the resurgence of the National Socialist ideology”⁵² without court involvement. Similarly, in January of 2013, the severity of the penalty against Gottfried Küssel, an active neo-Nazi for decades and one of the suspected founders of the neo-Nazi website, “Alpen Donau Info,” was criticized by legal commentators and journalists amid demands for a further reduction in the minimum penalty.⁵³

In 2008, an international group of academics, including Austrian-born Eric Hobsbawm (the British Marxist historian, who died in 2012), spoke out against the ban on denying historical facts, arguing that it could “not be a matter” for “political authority” to “determine historical truth and to restrict the freedom of historians with the threat of sanctions”.⁵⁴ The academics pointed to a French law passed in 2008 that imposes sanctions on the denial of Turkey’s genocide of Armenians at the start of the 20th century – a law dictated by foreign-policy

49 Declaration by Heinz-Christian Strache of March 5, 2010. See [www.fpoe.at/news/detail/news/strache-verbotsgesetz-ist-wic/?tx_thgenericlist\[114\]\[offset\]=0&cHash=b561e84fc882ea06926dc0346e234c67](http://www.fpoe.at/news/detail/news/strache-verbotsgesetz-ist-wic/?tx_thgenericlist[114][offset]=0&cHash=b561e84fc882ea06926dc0346e234c67) (January 29, 2013).

50 The quotation, from Graz sociologist Christian Fleck, appears in his article, *Lasst den Irving doch reden!* in *Der Standard* (November 23, 2005); see also *Der Standard* (December 3–4, 2005).

51 Georg Hoffmann-Ostenhof, *Der Fall Irving: Wie gefährlich ist der in Österreich verhaftete britische Nazi-Historiker wirklich?*, in *profil* 47 (November 21, 2005). Hoffmann-Ostenhof later admitted to having been wrong: see Hoffmann-Ostenhof, *Rauchen, Nazis und der Papst: Manchmal muss man seine Meinung überdenken – drei aktuelle Beispiele*, in *profil* 47 (April 2, 2010).

52 Michael Fleischhacker, *An den Grenzen der Meinungsfreiheit*, in *Die Presse* (February 22, 2006). In an earlier article, he had conceded that a repeal of the *Verbotsgesetz* is not yet possible; see Fleischhacker, *Demokratie oder Inquisition. Das Verbotsgesetz ist Ausdruck eines breiten Konsenses über den Unreifegrad unserer demokratischen Kultur*, in *Die Presse* (March 6, 1992).

53 Cf. Florian Klenk, *Neun Jahre Haft für Gottfried Küssel sind unangemessen*, in *Der Falter* (March, 2013), p. 7.

54 *Der Standard*, October 27, 2008.

considerations. In contrast to this French law, with its clear political motivation, the Austrian prohibition on re-engagement in National Socialist activity and the associated ban on denying National Socialist crimes of violence occupies a completely different historical and political context. The Austrian Verbotsgesetz in no way impairs either serious historical research or academic freedom. Indeed, the assertion that the Verbotsgesetz restricts the right to free expression was rejected by the Constitutional Court as early as 1985. The Court ruled that the Convention on Human Rights should not “be interpreted such that it justifies the right of the state, a group, or a person to perform an activity or commit an act that has as its objective the abolition of the rights and freedoms [...] set down therein.”⁵⁵ It is precisely this objective, however, that is pursued by those who re-engage in National Socialist activity and Holocaust denial, their ultimate aim being to absolve Nazi ideology of the most serious crimes committed in its name and, in so doing, to make it acceptable once again. In this way, an opinion becomes a political intention.

A range of legal arguments can be deployed against the abolition of the Verbotsgesetz, proving that it does not violate any of the basic rights enshrined in the constitution. Moreover, restrictions on the right to freedom of expression can be found in other contexts in the legal system as well. Insulting individuals or inciting hostility toward ethnic or religious minorities, to name just two examples, are also prohibited under the Austrian legal system.⁵⁶

Aside from the legal and political arguments considered thus far, there are other important values at stake in this debate. For one thing, the skeptical discourse noted above, which decidedly has a classical liberal slant, conflicts with the need to defend the memory and honor of the victims of National Socialist violent crimes.⁵⁷ Furthermore, it vitiates the resoluteness required to face down an anti-Semitism that is constantly re-appearing in new guises. “The ban on the Auschwitz lie,” writes the historian and writer Doron Rabinovici, “is aimed at the global hate preachers of our time, because the fable of the so-called Auschwitz lie has long become today’s blood libel. The intentional denial of the crimes is not an opinion, but a slogan of hatred. It assumes a global Jewish conspiracy. It is a symbol of identity, just like the swastika or Nazi salute. All survivors, all Jews, are branded as fraudsters. The mass murder is disputed despite knowing better, so that appetites are whetted for the next one.”⁵⁸

55 Constitutional Court G175/84, November 29, 1985.

56 The lawyer Alfred J. Noll provides a whole list of statutory provisions: see Noll, Die Abschaffer, in *Die Presse, Spectrum*, of (December 17, 2005).

57 See also Noll, Cui bono?, in *Die Presse* (January 3, 2006).

58 Doron Rabinovici, Märtyrer schauen anders aus, in *Die Presse* (February 25, 2006).

Closing remarks

The Austrian ban on re-engagement in National Socialist activity, which arose in the historical context of de-Nazification, has proven to be an effective instrument for preventing neo-Nazi propaganda and publications, particularly during the last 20 years. It has also supplied legal grounds for the prosecution in the courts of neo-Nazi activities committed by groups and individuals. The increased use of the Act in recent years has also generated an increased awareness among the general public that re-engagement in Nazi activity is wrong. The Act has been criticized both from right-wing extremist and classical liberal perspectives – albeit with opposing motivations – as a supposedly unnecessary restriction on freedom of opinion. Where classical liberals interpret freedom of expression as part and parcel of an open society and a freewheeling democracy, right-wing extremists and neo-Nazis see the Verbotsgesetz as a restriction on their opportunities for publication and propaganda. It is specifically this criticism from the right-wing extremist perspective that underlines the necessity of bans on both re-engagement in National Socialist activity and the denial of National Socialist crimes of violence.