

Legislative responses to the BVT affair and the Vienna terror attack: Securitisation between structural reforms and symbolic policies

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Abstract: In recent years, the Austrian security architecture was shaken heavily and has undergone several changes. In this article, we focus on two events and subsequent legal amendments: In 2018, a police raid was carried out in the Federal Office for the Protection of the Constitution (BVT) and in 2020, the Vienna terror attack took place. We focus on two bills that were passed in 2021: The Terror Combat Act and the State Protection and Intelligence Act. We demonstrate how these legal amendments address the organisational restructuring of security agencies to secure their independence on the one hand, while they fit into the bigger picture of securitisation after 9/11 and the ongoing politicisation of Islam on the other.

Keywords: Austrian security architecture; Extremism and radicalisation; Terrorism; Terror Combat Act; State Protection and Intelligence Act.

2003

1. Introduction: The BVT affair and the Vienna terror attack

On 28 February 2018, a police raid took place on the premises of the Austrian Federal Office for the Protection of the Constitution (BVT) and in several private residences of employees.¹ This event was later referred to as the “BVT affair”. The raid took place during the tenure of Herbert Kickl, from the right-wing populist Freedom Party (FPÖ), as Minister of the Interior. In terms of institutional anchoring, the BVT is subordinate to the Directorate General for Public Security, which forms part of the Federal Ministry of the Interior. The raid took place following an order of the Economic and Corruption Prosecutor's Office (WKStA), the central Austrian authority for the prosecution of major economic and corruption offences, and was based on anonymous allegations. Although investigations had already been initiated well in advance, the actual authorisation took place rather hastily and in an unusual manner, as the search warrant of the

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¹ For an overview, see G. Heißl, K. Lachmayer, *Zur Leistungsfähigkeit der Gewaltenteilung in der BVT-Affäre: Chronologie und rechtsstaatliche Analyse der BVT-Affäre und ihrer Folgen*, in *Zeitschrift für öffentliches Recht*, 75(3), 2020, 531.

prosecution was authorised late at night by a judge on journal service who had to decide ad-hoc and without being fully on record.² The Ministry of the Interior ordered members of a police taskforce for combatting street crime to carry out the search, which was another point of criticism, as this unit had no previous experience with house searches and was led by an executive officer who was also a member of the FPÖ.

The police unit searched the premises of the BVT, including the unit on extremism and seized, inter alia, information about the right-wing extremist scene. Protective measures for handling classified information were not observed.³ Furthermore, the head of the BVT and several other officers were suspended. The raid led to a loss of trust and reputation for the BVT and, as a consequence, international partners isolated the Austrian intelligence agencies.⁴ In reaction to these events, parliament set up a committee of inquiry (*Untersuchungsausschuss*) that investigated potential politically motivated influence on the BVT.⁵ Parallel to these investigations, a court declared large parts of the house search unlawful, as the instrument of administrative assistance (*Amtshilfe*) would have been sufficient to obtain information. Another court lifted all but one of the suspensions. The parliamentary investigative committee brought to light substantial conflicts between leading officers in the Ministry of the Interior, the BVT and the Ministry of Justice. It concluded that there was a clear mandate for a new set-up of the BVT, which should aim at restoring the reputation of the authority.

Two and a half years later, on 2 November 2020, another event shook the Austrian security architecture, when 20-year-old K.F. fired around 150 gunshots in the city centre of Vienna, killing four people and injuring 23, before being killed by special forces. The assassin chose the time and place of his actions quite purposefully. He targeted a lively Jewish quarter with bars and night clubs in the city centre on the night before a nationwide Covid-19 lockdown was due to start.⁶ The perpetrator was not unknown to intelligence authorities, as he had previously been convicted. Initial information about the later assassin reached the Army Intelligence Agency (*Heeres-Nachrichtenamt*) in February 2018, when his attempts to join the Taliban in Afghanistan or ISIS in Syria had failed. Afghan authorities

² The journal service is responsible for the authorisation of urgent coercive measures (such as orders of arrest, house searches, or telephone surveillance) or the decision on an application for pre-trial detention as judicial authorisation must be guaranteed at all times for these matters. So-called journal prosecutors and journal judges do not stay in the court building around the clock but are permanently on call. When making a decision, the judge on journal duty often does not have access to the corresponding written file. He is therefore dependent on the oral description of the factual and legal circumstances by the prosecutor.

³ G. Heißl, K. Lachmayer, *Zur Leistungsfähigkeit der Gewaltenteilung in der BVT-Affäre: Chronologie und rechtsstaatliche Analyse der BVT-Affäre und ihrer Folgen*, cit.

⁴ www.washingtonpost.com/world/national-security/austrias-far-right-government-ordered-a-raid-on-its-own-intelligence-service-now-allies-are-freezing-the-country-out/2018/08/17/d20090fc-9985-11e8-b55e-5002300ef004_story.html.

⁵ For a detailed analysis of the case, see the final report of the parliamentary investigation committee: www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00695/index.shtml.

⁶ M. Haselbacher, I. Josipovic, U. Reeger, *Deradicalisation and Integration: Legal and Policy Framework in Austria*, in D. Rad, D4.1. Country Report, 2021.

refused him a visa, whereas Turkish authorities had detained and thereby prevented him from continuing his journey to Syria. He was thereafter extradited to Austria, where a criminal court sentenced him to 22 months in prison for membership in a criminal organisation (Art 278 Criminal Code) and membership in a terrorist organisation (Art 278b Criminal Code). At the end of 2019, a criminal judge released K.F. on parole. From then on, on the court's instruction, he had to participate in a deradicalisation programme, provided by the organisation *DERAD*. He had also received probation assistance from the organisation *Neustart*.⁷ In addition, state security authorities had monitored the would-be assassin.

This raised questions on how it was possible for him to carry out the attack despite the close monitoring and the BVT was criticised for a multitude of errors in the run-up to the crime.⁸ Most notably, various foreign partners had warned Austrian security authorities as they noted suspicious activities of the future assassin. The German Federal Service of Criminal Investigation (BKA) passed information concerning the networking activities of K.F. with the Islamist scene in Germany and the Slovakian police informed the Austrian authorities that he had attempted to purchase ammunition and weapons in Slovakia. In addition, the BVT itself had observed the future perpetrator at a meeting with Islamic State sympathisers in Vienna in 2020 and a regional state office for the protection of the constitution and counterterrorism (LVT) had even suggested that the risk assessment of the later assassin should be revised. This did not happen, however, due to the malfunctioning of internal communication and because most of the resources of the BVT were exhausted by a raid against the Muslim Brotherhood, the so-called *operation Luxor*.⁹ The subsequent commission of inquiry stated that the problem was not a lack of authority, but rather an insufficient exchange of information between the actors involved, organisational problems, and the malfunctioning of the security authorities.¹⁰

The terror attack took place at a time when the Austrian intelligence and security landscape had already been at the centre of criticism due to the BVT affair and when reforms were still pending. Legislative reforms after the terror attack thus addressed the BVT affair and the terror attack simultaneously. Two bills are of particular importance in this regard: a) the Terror Combat Act (TeBG)¹¹, which came into force on 27 June 2021, and b) the State Protection and Intelligence Act (SNG)¹², which came into force on 26 June 2021. Whereas the first addresses criminal law, the second pertains to the restructuring of the security authorities in Austria. This article analyses the developments predating these legislative reforms in an

⁷ *Ibid.* See also I. Zerbes, H. Anderl, H. Andrä, F. Merli, W. Pleischl, "Zwischenbericht" – Untersuchungskommission zum Terroranschlag vom 02.11.2020. Geschäftszahl BMI: 2020-0.748.397. Geschäftszahl BMJ: 2020-0.752.496, (2020).

⁸ M. Haselbacher et al., *Deradicalisation and Integration: Legal and Policy Framework in Austria*, cit.

⁹ M. Haselbacher et al., *Deradicalisation and Integration: Legal and Policy Framework in Austria*, cit; I. Zerbes et al., "Zwischenbericht", cit.

¹⁰ I. Zerbes et al., "Zwischenbericht", cit.

¹¹ BGBl I 2021/159.

¹² BGBl I 2021/148.

integrated manner, to gain a better understanding of the effects of these events on the legislative framework regarding radicalisation, extremism, and terrorism. Based on a legal dogmatic analysis of the two bills as well as supplementary material such as the explanatory notes provided by the government and the statements submitted in the parliamentary procedure, we analyse the impact of these amendments on the Austrian security architecture. We furthermore assess whether recent legal amendments have indeed brought about substantial structural reforms or whether they rather form part of symbolic policies.

Security policies and counterterrorism measures take place in a field of tension in which various aspects must be weighed against each other. First, there is a conflict of interest between fundamental rights, such as the right to individual freedom, the right to privacy, and the right to data protection, which are restricted by surveillance measures that in turn aim to ensure the right to security.¹³ Second, there are differing approaches toward combatting terrorism. These range from suppression and the use of military force¹⁴ to counter-radicalisation measures that can be divided into primary, secondary, and tertiary prevention.¹⁵ Particularly suppressive counterterrorism laws may have the effect of converting countries with such an approach into a target for terrorist groups. However, at the same time, there is a heightened risk of copycat acts after terror attacks and a need to analyse their causes to erase potential legislative loopholes. Third, measures that explicitly target terrorism with a connection to the Islamic State often have exclusionary and discriminatory effects on Muslim populations that, in the worst case, can reinforce radicalisation tendencies.¹⁶ In this article, we address these fields of tension by focusing on the securitising effects of legal amendments after the Vienna terror attack. It is important, as we argue, to contextualise these amendments in order to analyse the topics they address and the ways in which these issues are connected to socio-political

¹³ See A. Adensamer, *Handbuch Überwachung*, in epicenter.works – Plattform Grundrechtspolitik, 2020 and D. Lyon, *Surveillance studies: An overview* (Repr.), Polity Press, 2012.

¹⁴ See B. Ganor, *Are counterterrorism frameworks based on suppression and military force effective in responding to terrorism? Yes. The use of force to combat terrorism*, in R. Jackson, D. Psoiu (Eds.), *Contemporary debates on terrorism*, Routledge, 2018, 183-188 and P. Rogers, *Are counterterrorism frameworks based on suppression and military force effective in responding to terrorism? No. Wars on terror—Learning the lessons of failure*, in R. Jackson, D. Psoiu (Eds.), *Contemporary debates on terrorism*, Routledge, 189-196, 2018.

¹⁵ See C. Heath-Kelly, *Are counter-radicalisation approaches an effective counterterrorist tool? No. A suspect of counterterrorism ‘science’ that ignores economic marginalisation, foreign policies and ethics*, in R. Jackson, D. Psoiu (Eds.), *Contemporary debates on terrorism*, Routledge, 217-224 and D. Koehler, *Are counter-radicalisation approaches an effective counterterrorist tool? Yes. An effective counterterrorism tool*, in R. Jackson, D. Psoiu (Eds.), *Contemporary debates on terrorism*, Routledge, 211-216, 2018.

¹⁶ F. Hafez, R. Heinisch, *Breaking with Austrian Consociationalism: How the Rise of Rightwing Populism and Party Competition Have Changed Austria’s Islam Politics*. In *Politics and Religion*, 11(3), 2018, 649-678. See also A. Mattes, *How religion came into play: ‘Muslim’ as a category of practice in immigrant integration debates*, in *Religion, State and Society*, 46(3), 186-205, 2018 and P. Scheibelhofer, *From Health Check to Muslim Test: The Shifting Politics of Governing Migrant Masculinity* in *Journal of Intercultural Studies*, 33(3), 319-332, 2012.

developments.

In the next chapter, we provide a brief overview of the development of the legal and policy framework regarding radicalisation and terrorism over the past 20 years. Subsequently, we present a detailed discussion of the two bills that have been adopted after the terror attack and their effects on the institutional landscape of intelligence agencies as well as the legal consequences of these reforms. We conclude with the discussion of our results and embed them in recent socio-political developments.

2. The legal and policy framework regarding extremism and radicalisation in Austria

Overall, and compared to other countries, terror attacks and incidents involving fatalities have been rare exceptions in Austria. In the past, there have been incidents which can best be classified as imported conflicts and international terror. Vienna used to be of interest due to its geographical position and for being a hub for international organisations and diplomacy.

¹⁷ For example, in the 1970s, a series of terror attacks, inter alia on the OPEC headquarters, shook the country. Several years later, in 1985, an attack by the Palestinian Abu-Nidal group on the Israeli airline *El Al* killed three people at the Vienna International Airport.¹⁸ The last terror attacks date back to 2009, when a Sikh Guru was killed in a Gurdwara in Vienna¹⁹ and the mid-1990s when the right-wing extremist terrorist Franz Fuchs carried out a series of bomb attacks that killed four Roma in 1995 and injured several others.²⁰

As in other European countries, the events of 9/11 have led to the re-assessment of the internal security architecture in Austria. As a consequence Jihadist²¹ terrorism had become the focus area of national intelligence agencies. Austria was thereby described as being “threatened but rarely affected”²². The imminent threat of Islamic extremism was also reflected in

2007

¹⁷ M. Haselbacher et al., *Deradicalisation and Integration: Legal and Policy Framework in Austria*, cit.

¹⁸ J. Bunzl, *Gewalt ohne Grenzen: Nahost-Terror und Österreich*, Wien, 1991.

¹⁹ P. Schliefeiner, F. Hartleb, *Dschihadistischer Terror mit tödlichem Ausgang: Dschihadistischer Terror mit tödlichem Ausgang*, in *Zeitschrift Für Polizeiwissenschaft Und Polizeiliche Praxis*, 19(2), 4–22, 2022.

²⁰ E.M. Schneller, A. Klinger, (Eds.), *Das Attentat von Oberwart-Terror, Schock und Wendepunkt*, edition lex liszt 12, 2015.

²¹ Following Lohlker, we decided to use the term jihadism, which describes a religious-ideological movement that is based on a theology for which the use of violence is a central element. We explicitly distance ourselves from political terms used in populist discourse, such as political Islam, and refrain from using inaccurate terms such as Islamism. R. Lohlker (Ed.), *Jihadism: Online Discourses and Representations* (1st ed., Vol. 2), V&R unipress, 2013; R. Lohlker, 11.4 Dschihadistischer Terrorismus, in L. Rothenberger, J. Krause, J. Jost, K. Frankenthal (Eds.), *Terrorismusforschung*, 205–212, Nomos Verlagsgesellschaft mbH & Co. KG, 2022.

²² P. Schliefeiner, *Kapitel 8: Bedroht aber selten betroffen: Zur Entwicklung der Gefährdungslage durch radikal-islamischen und dschihadistischen Terrorismus in Österreich*, in J. Krause, M.-T. Beumler, M. Clasen, D. Burkert, S. G. Humer, D. Lichte, P. Lehr, T. Bino, P. Schliefeiner, A. Pfahl-Traugher, S. Gräfe, S. Goertz, F. Supola, M. Rohschürmann, J. von Pezold, *Jahrbuch Terrorismus*, Verlag Barbara Budrich, 177–209,

the risk assessment of national security agencies, which have ever since mentioned jihadist terror as a major challenge. Although terror attacks or violent incidents were absent, Austria has large numbers of sympathisers with the terrorist militia Islamic State. The country has one of the highest per capita shares of so-called foreign fighters, i.e. young people who have left the country to join jihadist groups or have attempted to do so.²³ According to the security report of the BVT, of the 326 people that had travelled to Syria and Iraq, it is estimated that 69 people have died in the region, 93 people returned to Austria, 62 were detained before leaving, and the rest was still believed to fight in the region.²⁴

The policy framework addressing the issues of extremism and terrorism is rather complex and concerns many policy areas, ranging from public security to immigration as well as immigrant integration, from the regulation of surveillance powers to the governance of political and religious associations, to name only a few. The mode of intervention also displays a great variety of approaches, including preventive policies, punitive measures, and the curtailing of rights. The legal and policy framework regarding extremism and radicalisation has developed along different lines for the two major strands of radicalisation in Austria, namely right-wing extremism and jihadi extremism. Whereas the National Socialist Prohibition Law (*Verbotsgesetz*) is the legislative centrepiece concerning right-wing extremism, the legislation targeting jihadi terrorism and extremism is dispersed across different acts of law.²⁵ In the following, we focus on the development of the legal and policy framework that aims at preventing, combatting and punishing jihadist activities. In a country such as Austria, where the religion of Islam has been the target of populist mobilisations of electorally successful right-wing parties²⁶, it is important to analyse the

2018.

²³ V. Hofinger, T. Schmidinger, 'Muhajirun' from Austria. *Why they left to join ISIS and why they don't return*, in Journal for Deradicalization, 287–318, 2020.

²⁴ https://www.dsn.gv.at/501/files/VSB/VSB_2019_Webversion_20201120.pdf.

²⁵ The *Verbotsgesetz* dates back to 1945 and is closely tied to the country's history and its National Socialist past, as the country's independence (and later its sovereignty) depended on its commitment to anti-fascism. The *Verbotsgesetz* has had constitutional status since 1947. It focuses on the total prohibition of the NSDAP in Article I, as well as on the registration of National Socialists in Article II in an attempt at the denazification of the country. The former is still highly relevant as it forbids any activity in the spirit of National Socialism (denial, trivialisation, approval, and justification), including the denial of the Holocaust. Prosecutions and convictions based on the *Verbotsgesetz* are common: according to the crime statistics of the Ministry of the Interior, 1,671 cases were reported in 2021, with convictions in 226 cases. However, there are attempts at reforming the law, as it has proven to be inadequate for the prosecution, for example, of crimes committed online (see also M. Lichtenwagner, I. Reiter-Zatloukal, "... um alle nazistische Tätigkeit und Propaganda in Österreich zu verhindern": *NS-Wiederbetätigung im Spiegel von Verbotsgesetz und Verwaltungsstrafrecht*, Clio, 2018; M. Haselbacher, et al., *Deradicalisation and Integration: Legal and Policy Framework in Austria*, cit).

²⁶ E. Ajanovic, S. Mayer, & B. Sauer, *Spaces of Right-Wing Populism and Anti Muslim Racism in Austria*, in Politologický Časopis - Czech Journal of Political Science, 23(2), 131–148, 2016. See also F. Hafez, R. Heinisch, *Breaking with Austrian Consociationalism: How the Rise of Rightwing Populism and Party Competition Have Changed Austria's Islam Politics*. In Politics and Religion, 11(3), 649–678, 2018 and A. Mattes, *How religion came*

legislative framework in the context of socio-political events. The politicisation of refugee immigration and Islam as well as the participation of right-wing populist parties in government have influenced Austrian legislation in the realm of extremism and terrorism during the past three decades.

The topics of security, migration, asylum, and integration have converged greatly in the past decades. The terror attacks of 11 September 2001 in the US mark a critical moment even for Austrian counter-terrorism legislation. Not long after the event, in accordance with the EU framework decision of the council on combatting terrorism²⁷, Austrian legislature introduced three new offences to the Criminal Code (StGB²⁸) leadership and membership in a terrorist organisation²⁹, committing of terrorist crimes³⁰, and financing of terrorist activities³¹.³² In the following years, punitive measures were expanded by adding two further offences to the Criminal Code: training for terrorist purposes³³ in 2010, and instruction to commit a terrorist offence³⁴ in 2011.³⁵ This thematic convergence is likewise visible in Austria's current National Security Strategy.³⁶ Adopted in 2013, it proposes a series of different political approaches to prevent or combat extremism, ranging from international cooperation on counterterrorism to immigrant integration.³⁷ It was complemented by the National Action Plan for Immigrant Integration³⁸, which attempts to prevent extremist and fundamentalist trends, placing particular emphasis on dialogue concerning fundamental rights across cultures and religions.

Convergence continued in 2014, when the Austrian parliament passed a legal package that primarily addressed jihadi terrorism and the recruitment of jihadi combatants. The amendment to the Symbols Act (*Symbole-Gesetz*) prohibits the use and dissemination of symbols of the

2009

into play: 'Muslim' as a category of practice in immigrant integration debates, in Religion, State and Society, 46(3), 186–205, 2018.

²⁷ Framework decision of the Council 2002/475/JI on combatting terrorism.

²⁸ Criminal Law Amendment Act 2002, BGBl I 2002/134.

²⁹ Art 278b StGB, penalised with one to ten years of imprisonment for membership and five to 15 years of imprisonment for leadership in a terrorist organisation.

³⁰ Art 278c StGB, covering murder, specific forms of bodily injuries, extortionate kidnapping, aggravated coercion, specific forms of dangerous threat, and the damaging of critical infrastructure. These acts have a terrorist connection if "the act is likely to cause serious or prolonged disruption of public life or serious damage to economic life and is committed with the intent to seriously intimidate the population, to coerce public authorities or an international organisation to act, acquiesce or refrain from acting, or to seriously shake or destroy the fundamental political, constitutional, economic or social structures of a state or an international organisation".

³¹ Art 278d StGB.

³² F. Forsthuber, *Terrorismus und Strafrecht – Gedanken aus richterlicher und grundrechtlicher Sicht*, in AIDP, A. Lehner, M. Leitner (Eds.), *Terrorismus und Strafrecht*, Symposium am 15. April 2016, Wien, 2017.

³³ Art 278e StGB, covering training in the construction of weapons.

³⁴ Art 278f StGB, covering online media work promoting or instructing terror attacks.

³⁵ BGBl I 2010/108 and BGBl I 2011/103.

³⁶ www.bmi.gv.at/502/files/130717_Sicherheitsstrategie_Kern_A4_WEB_barrierefrei.pdf.

³⁷ www.bundestkanzleramt.gv.at/themen/sicherheitspolitik/sicherheitsstrategie.html.

³⁸ www.bundestkanzleramt.gv.at/dam/jcr:76ab3e9a-19e0-40cb-89eb-44a7b177cf97/nap_massnahmenkatalog.pdf.

Islamic State, Al-Qaeda, and organisations associated with these groups.³⁹ In the same year, an amendment to the Border Control Act (GrekoG) enabled authorities to check whether departing minors had their parents' consent to leave the country if there was any suspicion that they intended to take part in hostilities abroad.⁴⁰ Amendments to the Citizenship Act (StbG) stipulate that Austrians who have participated voluntarily and actively in combat operations abroad in the context of an armed conflict will have their citizenship revoked if they hold another citizenship.

In 2016, the coalition between the Social Democrats (SPÖ) and the People's Party (ÖVP) agreed on a new Police State Protection Act (PStSG) and amendments to the Security Police Act (*Sicherheitspolizeigesetz*)⁴¹ to provide for effective protection against terrorist threats, as the government argued that authorities had too few opportunities to be proactive in the run-up to criminal acts. It created the legal framework for establishing an extensive database while expanding the powers of observation for authorities. It thus became possible to recruit confidential informants in the course of undercover investigations, to store the data of all contacts of suspects, and to determine cell phone location data in the event of a concrete threat without judicial control, a fact that was heavily criticised by experts and by the opposition. These surveillance measures were expanded even further in April 2018, when the so-called Security Package passed the National Council. It included a series of measures to prevent terrorist attacks, which, according to an ÖVP member of parliament, aimed to address "Islamic extremist structures" and "jihadi travellers".⁴² Due to massive resistance from the opposition and from civil society, the package was mildened and adopted through small changes. The amendment that was adopted during the ÖVP-FPÖ government (coalition of the People's Party and Freedom Party) included, inter alia, the introduction of state spyware (also referred to as *Bundestrojaner*⁴³) and IMSI catchers.⁴⁴ It furthermore authorised security agencies to access the video and audio surveillance results of public spaces in order to prevent probable attacks through facial recognition and the automated identification of conspicuous behaviour.⁴⁵ In December 2019, the Austrian Constitutional Court (VfGH) annulled most sections of the Security Package⁴⁶, as the law was "disproportionate" and a "serious interference" of secrecy interests as defined in the Data Protection Act (*Datenschutzgesetz*) as well as of the right to respect for private life under Art 8 ECHR. Likewise, regarding the application of spyware, the court

³⁹ BGBl I 2014/103.

⁴⁰ BGBl I 2014/104.

⁴¹ BGBl I 2016/5.

⁴² www.parlament.gv.at/PAKT/PR/JAHR_2017/PK0782/.

⁴³ The *Bundestrojaner* enabled so-called remote hacking of suspects' digital devices in order to vet encrypted messages.

⁴⁴ Devices that enable the location of cell phones and the interception of calls.

⁴⁵ Furthermore, security agencies were given access to the recordings of Austrian roads (vehicle license plate numbers, car brand, type, and colour) as well as the option of requiring data storage by telecommunications operators for up to one year. It provided for obligatory identity registration on the purchase of SIM cards (including prepaid cards), and the restriction of the secrecy of correspondence for persons that remain imprisoned for more than one year.

⁴⁶ G 72-74/2019 and G 181-182/2019.

argued that such measures were only permissible within extremely narrow limits.⁴⁷

In 2018, the Criminal Code and the Criminal Procedures Act were once more amended⁴⁸, thereby transposing the EU Directive on combatting terrorism.⁴⁹ The law now enables authorities to consider a wider scope of offences as potential terrorist attacks, lowering the threshold regarding levels of bodily harm, damage to property, and data capturing and storage. Furthermore, the law introduced “travelling for terrorist purposes” to the Criminal Code.⁵⁰ In December 2020, the federal government introduced an amendment bill to the Citizenship Act and the Symbols Act, aiming to facilitate the withdrawal of citizenship in the event of a final conviction for a terrorist-motivated crime and pursuing action against the spread of extremist and radicalising ideas.⁵¹

Regarding counterterrorism and deradicalisation actions at the institutional level, the Ministry of the Interior (BM.I) is responsible at the federal level. The organisational units and agencies that are part of the portfolio of the Minister of the Interior address the topics of border control, immigration and emigration, asylum, return, citizenship, as well as criminal persecution and counterterrorism. Most importantly, the police forces form part of the BM.I. Since 2000, the Ministry of the Interior has been led by ÖVP Ministers, with the exception of Herbert Kickl’s tenure in office and that of two independent Ministers during interim governments in 2019. Since 2002, the Federal Office for the Protection of the Constitution and Counterterrorism (BVT) had been the key counterterrorism agency in Austria that was operating as the national intelligence agency. It was created as part of a restructuring initiative that assigned sections of the state police and special task forces to the BM.I. In accordance with the federal structure of Austria, there are nine Provincial Offices for the Protection of the Constitution and Counterterrorism (LVT). While the BVT acted as an organisational unit of the General Directorate for Public Security, the LVTs formed part of the Provincial Police Directorates. Both the BVT and the LVTs were federal authorities and were thus bound by the instructions of

⁴⁷ To achieve the constitutionality of such measures, the Constitutional Court (VfGH) calls for legal restrictions on surveillance powers in terms of space, time, and technology. On the other hand, judicial or similarly impartial control of ongoing surveillance must be ensured. K. Lachmayer, *Rechtsstaatliche Grenzen polizeilicher Überwachungsbefugnisse. Anmerkungen zum Erkenntnis des VfGH 11. 12. 2019, G 72-74/2019* ua, in G. Baumgartner (Ed.), *Jahrbuch Öffentliches Recht*, 105–127, NWV Verlag, 2020

⁴⁸ BGBl I 2018/70.

⁴⁹ Directive (EU) 2017/541.

⁵⁰ Art 278g StGB, travelling to another country to commit a terrorist offence can be fined with a prison sentence of six months to five years. D. Pieringer, *Terror(tour)ismus*, in *Journal für Strafrecht*, 8(1), 34, 2021.

⁵¹ By amending the Citizenship Act, Austrian citizenship can be revoked, provided that the person does not become stateless, if the person concerned has been convicted of leading or participating in a terrorist organisation, committed a terrorist offence, financed terrorism, conducted training for terrorist purposes, instructed others to commit a terrorist offence, travelled for terrorist purposes, incited someone towards or approved of someone committing terrorist offences, or has been convicted by final judgment to an unconditional or partially conditional custodial sentence.

the Minister of the Interior within Austria's monocratic authority structure.

The core task of the BVT comprised the protection of state institutions and the maintenance of the basic democratic order inscribed in the constitution. It however also was responsible for the protection of critical infrastructure and representatives of international organisations. The BVT was a police authority with intelligence competence. It stood in regular exchange with foreign authorities and had access to all relevant databases for criminal persecution, including the international ones. The Police State Protection Act (PStSG) of 2016 reformed the BVT and readjusted the distribution of tasks between the intelligence and security agencies. It implemented parts of the SPÖ-ÖVP government programme that provided for the restructuring of the institutional security architecture, namely the creation of special federal regulations for state protection. The PStSG furthermore regulated the organisation of the State Protection Service as well as the division of its tasks and powers. In the area of tasks, on the one hand, legislature transferred extended threat research from the Security Police Act to the PStSG. In addition, the law created the new task of preventive protection against attacks that threaten the constitution. To accomplish the tasks, legislation created powers for the State Protection Service, which the security authorities were already using within the framework of the Security Police Act. These included undercover investigations, observation, and the use of image and sound-recording devices.⁵² According to the law (Art 1 para 2 PStSG), the performance of these tasks was reserved for the BVT and the LVT. This institutional structure defined the Austrian security landscape until 2021, when the State Protection and Intelligence Act came into force.

3. Restructuring of the security architecture after the Vienna terror attack and the BVT-affair

The BVT scandal and the Vienna terror attack led to legislative changes in two different areas: a) on the institutional level, regarding the general organisation of the state protection and intelligence authorities; and b) in the area of criminal law. Both bills, the State Protection and Intelligence Act (SNG) and the Terror-Combat Act (TeBG) went through a parliamentary review process, which started with a ministerial draft to which people and organisations could submit comments. After the review process, the bills were submitted as a so-called government bill to the national council for a first reading and vote. With regard to the State Protection and Intelligence Act (SNG), 8,875 opinions were submitted, whereas only 62 were submitted concerning the Terror-Combat Act (TeBG). These opinions reflect socio-political discourses regarding the reforms, which will be included in the following analysis. Both Acts passed the legislative procedure and entered into force in June 2021.

⁵² G. Heißl, *Polizeiliches Staatsschutzgesetz. Überblick und Besprechung ausgewählter Aspekte*, in ÖJZ 2016, 719.

3.1 The State Protection and Intelligence Act (SNG)

According to the parliamentary explanatory notes to the draft law, the State Protection and Intelligence Act (SNG) brought about a “major restructuring”⁵³ of the Austrian Federal Office for the Protection of the Constitution and Counter-Terrorism (BVT). The act revised and substituted the Police State Protection Act (PStSG). The main goal of the legislative amendment was to restore trust in the work of the BVT, both for Austrian citizens and for international partners (ibid.). Notably, the bill responded to the BVT affair by dissolving the BVT, creating the Directorate of State Protection and Intelligence Service (DSN). Furthermore, there were intra-organisational reforms to separate the tasks of the police regarding state security and the intelligence services. Each of these organisational units now has its own deputy director. In terms of terminology, the law provides for the main task of “protection of the constitution”, which is subdivided into the areas of “intelligence services” and “state protection”. This was reflected terminologically as the PStSG was renamed into “State Protection and Intelligence Act” (SNG).⁵⁴

In the parliamentary review process, substantial criticism regarding the institutional restructuring and the division of tasks was voiced, although critics emphasised different aspects. Unlike other intelligence agencies that served as models for the reform, the SNG did not introduce a strict separation between organisational units as required by the rule of law.⁵⁵ In the area of state protection, the law introduced case conferences in analogy to the security-police case conferences that deal with persons whose risk assessment is high and who pose a threat to the constitution.⁵⁶ The goal is to jointly develop and coordinate measures for each case, such as participation in deradicalisation programmes, and to be able to monitor the developments of the cases more closely. This should lead to a rapid exchange of information between all actors to prevent attacks that pose a threat to the constitution⁵⁷. Opinions submitted in the parliamentary procedure show unanimous support for the introduction of such case conferences.⁵⁸

In addition, the bill aimed at strengthening the protection of classified information: On the one hand, through the legal standardisation of the competence to search persons entering or leaving the DSN. On the other, by establishing a system for the protection of classified information in criminal proceedings when such information was seized from public authorities and

⁵³ ErlRV 937 BlgNR XXVII. GP.

⁵⁴ Ibid. See also D.P. Schmidt, *Operative Tätigkeiten des zivilen Inlandsnachrichtendienstes im Ausland*, ÖJZ 2022/121 and M. Vogl, *Die Neuorganisation des Verfassungsschutzes in Österreich*, Juristische Blätter 2021, 754.

⁵⁵ A. Figl, M. Müller, Verfassungsschutz neu: Ist der Nachrichtendienst (weiterhin) Kriminalpolizei?, in Journal für Strafrecht, 135, 2022. See also R. Soyer, P. Marsch, N. Schäffler, *Zum Entwurf eines Staatsschutz- und Nachrichtendienstgesetzes (SNG) und der geplanten Abschaffung von "Behördenrazzien"*, AnwBl 2021/191, 2021b.

⁵⁶ Authorities, educational institutions, and organisations such as DERAD and Neustart are now welcome to participate in these case conferences alongside the State Protection organisational unit.

⁵⁷ M. Vogl, *Die Neuorganisation des Verfassungsschutzes in Österreich*, Juristische Blätter 2021.

⁵⁸ Opinion of Assoz. Prof. Farsam Salimi (7119/SN-104/ME XXVII. GP).

public offices. This possibility is explicitly based on Art 112 of the Code of Criminal Procedure, which provides for the possibility of objection by data subjects with subsequent judicial review. The possibility of objection, together with judicial review, shall ensure that particularly sensitive and classified information is not taken into the criminal file and handed over again.⁵⁹

In addition, the legislative reform strengthened control instruments. Several areas are worth mentioning in this context: The reporting obligations of the Federal Minister of the Interior to the National Council (Internal Affairs Subcommittee) were significantly expanded, including a new report on the performance of tasks by all organisational units of the Office for the Protection of the Constitution (Art 17 para 1a SNG). Furthermore, the law established an independent Control Commission for the Protection of the Constitution, which is not subject to directives. This serves the structural and accompanying control of all organisational units that are active in the protection of the constitution.⁶⁰ Here, too, submitted opinions show approval,⁶¹ but there also were isolated critical voices stating that these control instruments were negligible in practice.⁶²

3.2 The Terror Combat Act (TeBG)

Parallel to the SNG, Parliament adopted the so-called Terror Combat Act (TeBG). The supplementary material provided by the Ministry made explicit references to the Vienna terror attack, which was also reflected in the naming of the bill. It aimed at sharpening the monitoring of released terrorist offenders and furthermore aimed at combatting religiously motivated extremism in a more decisive manner whilst targeting terrorist financing.⁶³ The law provided for extended and repeated probationary periods and an additional aggravating ground for a religiously motivated extremist commission of the offence. Art 247b of the Criminal Code created a new criminal offence relating to religiously motivated extremism. According to the legislator, this offence specifically targets jihadism and all forms of extremism in connection with Islam.⁶⁴

The law was subject to much criticism. The interim and final report of the investigative commission on the terrorist attack in Vienna already spoke out against the new criminal offence of religiously motivated extremism. The existing criminal law on terrorism was sufficient and Art 247b of the Criminal Code was therefore redundant.⁶⁵ Opinions on the law are formulated similarly: from a dogmatic and practical point of view, there is no discernible benefit and legislature should abolish the offence of

⁵⁹ M. Vogl, *Die Neuorganisation des Verfassungsschutzes in Österreich*, cit.

⁶⁰ M. Vogl, *Die Neuorganisation des Verfassungsschutzes in Österreich*, cit.

⁶¹ Opinion of Assoz. Prof. Farsam Salimi, cit.

⁶² Opinion of the Public Prosecutor's Office Vienna (13/SN-83/ME XXVII. GP).

⁶³ ErlRV 849 BlgNR XXVII. GP.

⁶⁴ *Ibid.* See also M. Haselbacher et al., *Deradicalisation and Integration: Legal and Policy Framework in Austria*, cit.

⁶⁵ See both I. Zerbes et al., "Zwischenbericht", cit and I. Zerbes, H. Anderl, H. Andrä, F. Merli, W. Pleischl, 'Abschlussbericht' – Untersuchungskommission zum Terroranschlag vom 02.11.2020. Geschäftszahl BMI: 2020-0.748.397. Geschäftszahl BMJ: 2020-0.752.496, (2021).

religiously motivated extremism entirely.⁶⁶ Furthermore, it was noted that it is difficult to identify the scope of application⁶⁷ and that this is cause-and-effect legislation, which should generally be avoided and thus be rejected.⁶⁸ Others described the offence as being “unsuitable and obsolete”.⁶⁹

4. Discussion and Conclusion

The Department Director of the Federal Ministry of the Interior (BM.I), Mathias Vogl, published an essay in a legal journal in late 2021, titled “The Reorganization of the Office for the Protection of the Constitution in Austria”⁷⁰. In it, he analysed the changes concerning the intelligence service and the state protection service, stating: “Instead of the previously used generic term ‘police protection of the state,’ the term ‘protection of the constitution’ will now be used. Protection of the constitution consists of two tasks, on the one hand the protection of the state and on the other hand the intelligence service (Art 1 para 4 SNG26). In accordance with this logic, the PStSG was renamed ‘State Protection Intelligence Service Act’, or SNG for short, and the BVT was renamed ‘Directorate for State Protection and Intelligence Service,’ or DSN for short (Art 1 para 3 SNG).”⁷¹ Vogl, as part of the BM.I, which is the institution that negotiated and drafted the bill, praises the reform, stating that “no stone (remained) unturned, neither in terms of staffing nor in terms of organisation”⁷². In this section, we want to review the changes to see if the two bills have indeed brought about deeper structural reforms or whether changes rather are of a terminological nature, as the initial quote suggests, and can thus be understood as a continuation of previous policy paths.

We first return to the demands and recommendations of the parliamentary investigative committee and the investigative commission to see how far the adopted law deviates from the initial reform aspirations. The investigative commission that was established after the terror attack primarily criticised the poor flow of information between the departments and organisations involved. For example, the organisations concerned with probation and deradicalisation were not informed of the later assassin’s meetings with Islamic State sympathisers, nor of his attempted weapons purchase. More importantly, not even state authorities informed each other in a timely and comprehensive manner. The Commission therefore proposed the establishment of case conferences and the improvement of information flows. Support organisations such as *DERAD* and *Neustart* were to be involved in the exchange of information to achieve the best possible outcome.⁷³ The two commission reports also address other proposals for

⁶⁶ Opinion of Univ.-Prof. Susanne Reindl-Krauskopf (21/SN-83/ME XXVII. GP).

⁶⁷ Opinion of the Public Prosecutor’s Office Vienna, cit.

⁶⁸ Opinion of Univ.-Prof. Robert Kert (27/SN-83/ME XXVII. GP). See also Opinion of Österreichischer Rechtsanwaltskammertag [Austrian Bar Association] (23/SN-83/ME XXVII. GP).

⁶⁹ Opinion of epicenter.works (57/SN-83/ME XXVII. GP).

⁷⁰ M. Vogl, *Die Neuorganisation des Verfassungsschutzes in Österreich*, cit.

⁷¹ Ibid., 754 f, translation by the authors,.

⁷² Ibid., 761, translation by the authors.

⁷³ See note no. 57.

improvement in the fight against terrorism. Deradicalisation efforts should be legally enshrined, enjoy improved funding, and exerted during the enforcement of prison sentences. In addition, a functioning data processing system is to be established, according to which all services are required to enter relevant data immediately. Finally, the Commission noted that it sees no deficits in substantive criminal law on terrorism (ibid.).

An improvement in the flow of information could only be met partially by the reform. On the one hand, the separation of the tasks into policing activities regarding state security and intelligence services resulted in two separate organisational units, each with their own deputy directors. Consequently, Soyer et al. note that miscommunication, which was one of the main problems prior to the Vienna terror attack, was not adequately addressed⁷⁴. Instead, the organisational separation between the area of intelligence services and state security creates additional potential for communication and coordination deficits. Several organisations have argued that it is not clear why greater separation should bring improvements in combatting threats to the constitution⁷⁵. The separation was not definite enough to bring about a clear distribution of tasks. It rather has resulted in two organisationally separated units that have similar tasks and competences, which has only increased the coordination workload. On the other hand, all actors welcomed the introduction of case conferences, as this truly represented an improvement of the previous situation, ensuring effective communication among the relevant actors while harmonising deradicalisation efforts and monitoring activities.

As far as the Terror Combat Act is concerned, the situation is somewhat more clear-cut, as none of the experts considered the introduction of a separate criminal offence of religiously motivated extremism and an additional aggravating circumstance a necessity. According to the comments, the existing grounds for extremism-related aggravation already include forms of religious extremism. The regulation therefore primarily has a symbolic effect as it only circles out one form of extremism by naming religiously motivated extremism.⁷⁶ The explicit reference to religiously motivated extremism rather fulfilled the function of showing the public that the government has taken action after the incidents than of filling a legislative gap. The previous legal provisions already provided sufficiently for the prosecution of religiously motivated extremism, which is why these parts of the TeBG are to be seen as ad-hoc legislation. Several organisations moreover expressed serious concerns about the discriminatory effects of the law on Muslims living in Austria.⁷⁷

⁷⁴ R. Soyer, P. Marsch, N. Schäffler, *Zum neuen Staatsschutz- und Nachrichtendienst-Gesetz – SNG und zur Neufassung des § 112a StPO*, AnwBl 2021, 224.

⁷⁵ Opinion of Univ.-Prof. Susanne Reindl-Krauskopf (8097/SN-104/ME XXVII. GP); Opinion of Assoz. Prof. Farsam Salimi (7119/SN-104/ME XXVII. GP); Opinion of Volksanwaltschaft (8298/SN-104/ME XXVII. GP).

⁷⁶ Opinion of Univ.-Prof. Robert Kert (27/SN-83/ME XXVII. GP); Opinion of Univ.-Prof. Susanne Reindl-Krauskopf (21/SN-83/ME XXVII. GP); Opinion of the Public Prosecutor's Office Vienna, cit; Opinion of Lawyer Alexia Stuefer (8/SN-83/ME XXVII. GP).

⁷⁷ Epicenter.works, cit.; Opinion of Amnesty International (16/SN-83/ME XXVII. GP).

Furthermore, these legal amendments display once more a focus on repressive and punitive measures instead of strengthening deradicalisation measures that fall into the field of primary, secondary, and tertiary prevention. Since criminal law is always repressive in character, the ability to control and prevent radicalisation and extremism through the law is limited and as we have pointed out legislation had already provided for substantial punitive measures before the amendments. However, there is still substantial room for improvement regarding the prevention of radicalisation through measures and programs from the field of primary prevention (aiming at the society as a whole), secondary prevention (targeting individuals who are at risk of radicalisation), and tertiary prevention (targeting individuals who have already expressed extremist worldviews and have either been penalised or come into the focus of authorities). Building on the insights of the D.Rad project, we argue that there is ample room for improvement regarding primary and secondary prevention in terms of the provision of resources, the networking of practitioners as well as the development of comprehensive strategies. Since Austria is a latecomer in this field, the country has started to develop deradicalisation programs comparatively late.⁷⁸ This is also the case for tertiary prevention. For example, deradicalisation work in prisons needs to be strengthened (both for detainees who have already been convicted based on terrorist offences and for those who are imprisoned because of other offences) since prisons are a place where people are particularly vulnerable and hence at risk of radicalisation.⁷⁹

In summary, both bills are a continuation of previous policy paths: The Terror Combat Act represents the further politicisation and securitisation of Islam⁸⁰, while the State Protection and Intelligence Act (SNG) did not result in any substantial changes to the Austrian security architecture, since changes rather were terminological in nature. Both bills can partially be seen as ad-hoc legislation that is grounded on knee-jerk reactions to specific events, in our case the terror attack and the BVT affair. As such, large parts of the bills fall into the category of symbolic policies. However, there are some improvements, notably the introduction of case conferences and the strengthening of control instruments. The field of counterterrorism and radicalisation remains dynamic, and it is yet to be seen what these legal changes may imply for the practice of counterterrorism and deradicalisation efforts in Austria.

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⁷⁸ M. Haselbacher et al., *Deradicalisation and Integration: Legal and Policy Framework in Austria*, cit.

⁷⁹ See V. Hofinger, T. Schmidinger, *Wege in die Radikalisierung. Wie Jugendliche zu IS-Sympathisanten werden (und welche Rolle die Justiz dabei spielt)*, Vienna: Institut für Rechts- und Kriminalsoziologie, 2017, and V. Hofinger et al., *‘Muhajirun’ from Austria. Why they left to join ISIS and why they don’t return*, cit.

⁸⁰ F. Hafez, R. Heinisch, *Breaking with Austrian Consociationalism*, cit. See both A. Mattes, *How religion came into play: ‘Muslim’ as a category of practice in immigrant integration debates*, cit., and A. Mattes, *Liberal Democratic Representation and the Politicization of Religion*, in *Interdisciplinary Journal for Religion and Transformation in Contemporary Society – J-RaT*, 4(2), 142–171, 2018.

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