The Austrian path to the constitution of 1 May 1934 – An application of the paradigm of ‘Militant Democracy’ just avant la lettre!?

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ABSTRACT

This paper seeks to compare the academic model of ‘militant democracy’ advocated in 1937 by Karl Loewenstein with the real political developments that had taken place only a few years before in Austria, under the responsibility of Engelbert Dollfuß. It further aims to reveal the ‘missing link’ between the actions (mere plans included) of – in particular – Catholic political leaders in Germany 1931/1933 (Heinrich Brüning, Franz v. Papen, Heinrich Held), directed at least from 1932 onwards in particular against the rise of the National Socialist movement, well-known both to Loewenstein and Dollfuß. It is argued that Loewenstein’s model contains serious theoretical flaws and paves, at least when taken literally, the way to dangerous exaggerations, while the approach of the Dollfuß government was far more balanced. Any assessment of Dollfuß’ measures that – as is still the case in Austria – only focuses on the breach of the constitution then in force (the main document being the Bundes-Verfassungsgesetz, B-VG) as such, without offering a better alternative to prevent the National Socialist danger is unconvincing, not only from a moral, but also, and in particular, from a legal perspective.

KEYWORDS

Karl Loewenstein, Engelbert Dollfuß, militant democracy, Austrian constitutional law, national socialism

Preface

What I am trying here is

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- to compare the *academic* model of ‘militant democracy’ advocated in 1937 by *Karl Loewenstein* with the *real* political developments which had taken place, only a few years before, in Austria, under the responsibility of Engelbert Dollfuß;
- to reveal the ‘missing link’ between both phenomena: the actions (mere plans included) of - in particular - Catholic political leaders in Germany 1931/1933 (Heinrich Brüning, Franz v. Papen, Heinrich Held), directed at least from 1932 onwards in particular against the rise of the NS movement, well-known both to Loewenstein and Dollfuß.

The aim is to show that

- Loewenstein’s model contains serious theoretical flaws and paves, at least when taken literally, the way to dangerous exaggerations, while the approach of the Dollfuß government was far more balanced
- an assessment¹ of Dollfuß’ measures which – as is still the case in Austria – only focuses on the breach of the constitution then in force (the main document being the Bundes-Verfassungsgesetz, B-VG) as such, without offering a better alternative to prevent the NS danger is unconvincing, not only from a moral, but also, and in particular, from a *legal* perspective.

Every focus implies simplification, in particular by emphasizing some aspects while dimming others. So I will disregard here

- general authoritarian tendencies of the time, not only in Austria or Germany, but also in western democracies (which only meant to enhance the efficacy of legislation without barring parts of the electorate from participation)²

¹If Afshin Ellian (2012) 26 f is right, this kind of assessment is rooted in ‘Protestant Theology’ – a curious finding for a country which had been predominantly *Catholic* for centuries, although only at first sight; cf. for the relevance of

- the Protestant ‘sola-scriptura-principle’ in Austrian constitutional law Balthasar (2006) 137 f, 172, fn 794
 - the device ‘Catholica non leguntur’ also in Austrian academia (Balthasar [2006] 294).

There is, however, some indication of hope: one the one hand, the current president of the Austrian Constitutional Court, Christoph Grabenwarter, stated, only some years ago, in the very first sentence of his foreword to a volume dealing with the relationship between law and necessity (2012) 5: ‘Der Staatsnotstand ist der Lackmустest für den Rechtsstaat. Erst im Staatsnotstand erweist es sich, ob sich der Rechtsstaat auch im Zustand existentieller Bedrohung behaupten und bewähren kann’ (‘the state of emergency is the litmus test for the rule of law. It is only in the state of emergency that we see whether the rule of law is able to stay its ground and prove itself against existential danger’; unofficial translation by A.B.). On the other hand, we dispose now of two recent studies revealing the *still existing limits of the current Austrian emergency law*: Fister (2012) and ALES (2016), comprising also Wiederin (2016).

²cf. for western countries and for Germany (during the chancellorship of Heinrich Brüning) Lindseth (2014) 171 f, for Austria Hanisch (1994) 302 f (on p 303 Hanisch reports that even the *representative of the League of Nations* of the time, Rost van Tonningen, had advocated already then and in this capacity ‘authoritarian measures’); Ilse Reiter-Zatloukal (2014) 19 f, 40 f (with regard to the ‘Patriotic Guards’ [‘Heimwehr’]), Wohnout (2014) 51 f, 53, fn 4 (with regard to the editor-in chief of the ‘Furche’, medium of the Catholic Party, Friedrich Fun-der), and Jabloner (2014) 99 f, 109 (with regard to ideas in that vein even acceptable to Karl Renner, one of the leading Social Democrats of the time, former head of government and president of the chamber of Deputies of Parliament, see infra section III, lit A/2/b/ba, and lit B/4, fn 284). In contrast, the *experimental application* of the famous KWG (‘Kriegswirtschaftliches Ermächtigungsgesetz’ = Act of 24 July 1917, RGBl Nr 307, adopted still in ‘Cisleithania’, the ‘Austrian’ part of the Austrian-Hungarian monarchy, explicitly kept in legal force in the subsequent law of the Austrian Republic by paragraph 7 (2) of the Act of 1 October 1920, BGBl Nr 2, on the transition to the new Constitution and applied several hundred times until 1927, see Hanisch [1994] 305, fn 63) in **October 1932** by the Dollfuß government (see Widder [1980] 349 f, 373 f; Wohnout [2014] 52, fn 3) seems to belong already to the given context here (cf. infra text by fn 148).

- the (Austro-)Marxist interpretation of the actions of the Dollfuß government.³

1. THE PARADIGM OF ‘MILITANT DEMOCRACY’

1.1. The paradigm

In 1937, the then (due to discrimination because of his Jewish origin) exiled German constitutional lawyer and (in the USA) political scientist *Karl Loewenstein* (in Germany: *Löwenstein*)⁴ published an article (*‘Militant Democracy and Fundamental Rights’*) in the *American Political Science Review* (417 et seq, 638 et seq) where he postulated that, in order to resist rising fascism, **‘Democracy must become militant’**.⁵ Starting from the three premises:

- ‘Democracy stands for fundamental rights, for fair play of all opinions, for free speech, assembly, press’⁶, but also for ‘legality’⁷

³In that direction I would like to restrict myself to the following: in my opinion it was

- the oversimplified *dichotomy of the Communist Manifesto* in which the *final combatants of the last class struggle* are **only the ‘bourgeoisie’ and the ‘proletariat’** (critical already *Bernstein [1923]* 63 f) as well as, consequently,
- the view that *the transition period* between the dictatorship of the ‘bourgeoisie’ and the dictatorship of the ‘proletariat’, the ‘democratic republic’, could *only oscillate between these two poles* (cf. *Adler [1922]* 188 f; cf. also *Balthasar [2006]* 243 f for the meaning of the term ‘demokratische Republik’ in Austro-Marxist theory) which **barred the view** of ‘Austro-Marxist’ Social Democrats (cf., paradigmatically, the speech of Otto Bauer delivered on 10 March 1933 before Social Democrat functionaries in Vienna, cited by *Berchtold [1998]* 724 f; see also *Kreisky [1986/1995]* 211 f, and *Leser [1988]* 52 [emphasis added], who characterized the Social Democrats’ attitude to that part of history as a **‘constant denial of facts’**; for the orthodox Communist ‘interpretation’ see *Reisberg [1974]* 3, 159 f) that
- the formal procedures of egalitarian democracy could also be abused by *third parties* (as the NS), and, consequently, that
- measures suspending the machinery of the ‘democratic republic’ were *not necessarily directed against the ‘proletariat’*, but *could even work also in their interest*.

⁴For a biographical survey see, e.g., *Lepsius (2015)* 411 f. See also, and in particular for two preceding contributions of Loewenstein (1935a and 1935b), *Cliteur/Rijkema (2012)* 28 f.

⁵Cit *Loewenstein (1937)* 423; see also 430 f, 638 f, 657 (‘militant will for self-preservation’). Is it too far-fetched to pick out of this term an allusion to

- the ‘ecclesia militans’ (a notion most probably coined in the 12th century and thus during the era of the *crusades* by the Cistercian monk *Alanus ab Insulis*)
- the victories of ancient Hellas at Marathon, Plataiai and Salamis over the repeated attempts of the Persian Grand King to subjugate the Greeks, which would have amounted to bringing to an end Greek autonomy and (early) democracy?

If this impression were true (and it is not in the least unlikely that Loewenstein became very well acquainted with *both* references when being educated in *Catholic* Munich, attending a *humanist* secondary school [‘Wilhelmsgymnasium’, with Latin and ancient *Greek* still today as obligatory languages]), Loewenstein would have in fact equated *European ‘fascists’* (i.e., after all, still parts of the European population!) with nothing less than *Europe’s most prominent arch-enemies* (ancient oriental despots as well as medieval oriental Muslims).

⁶Cit *Loewenstein (1937)* 430 f; see, with regard to the ‘free play of public opinion’, also 424.

⁷Cit *Loewenstein (1937)* 424.

- 'Democracy and democratic tolerance have been used' 'for their own destruction' by 'fascist' movements (apparently understood in a broad sense, thus including in particular German 'National-Socialism')⁸
- 'Fascism has declared war on democracy'⁹,

Loewenstein recommended 'checking' fascism 'by a similar technique'¹⁰ (!), 'by adopting autocratic methods'¹¹, by 'taking a vacation of legality'¹², in short: 'to forbid the enemies of its' (i.e. Democracy's) 'very existence the use of democratic instrumentalities'.¹³ The main reasoning runs as follows:

'Constitutional scruples can no longer restrain from **restrictions on democratic fundamentals, for the sake of ultimately preserving these fundamentals**. The liberal-democratic order reckons with normal times. The guarantee of individual and collective rights serves as a legal basis for compromise between interests which ... may fall into conflict, but which nevertheless are animated by common loyalty *toward the fundamentals* of government. **Constitutions** are dynamic to the extent that *they allow for peaceful change by regular methods*, but they **have to be** stiffened and **hardened when confronted by movements intent upon their destruction**. Where fundamental rights are institutionalized, their **temporary suspension is justified**. When the ordinary channels of legislation are blocked by obstruction and sabotage, **the democratic state uses the emergency powers** of enabling legislation which implicitly, if not explicitly, are involved in the very notion of government. Government is intended for governing. **Fascism has declared war on democracy**. a virtual state of siege confronts European democracies. State of siege means, even under democratic constitutions, **concentration of powers in the hands of the government and suspension of fundamental rights**. If democracy believes in the superiority of its **absolute values** over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and *every possible effort* must be made to rescue it, even at the risk and cost of **violating fundamental principles**.'¹⁴

1.2. Assessment

Although, at first sight, it sounds only too natural to secure one's own self-preservation against 'enemies' *by all necessary means*, already at second sight we realize serious flaws: two of Loewenstein's three premises are highly *problematic*, whereas the third is significantly *incomplete*. Hence, also the conclusions might deserve caution:

⁸Cit Loewenstein (1937) 423. On next page (424) we read in the same vein: 'the mechanism of democracy is the Trojan horse by which the enemy enters the city.'

⁹Cit Loewenstein (1937) 432.

¹⁰Cit Loewenstein (1937) 430.

¹¹Cit Loewenstein (1937) 432.

¹²In Loewenstein (1937) 432, the literal quotation runs: 'During war, Léon Blum observes, legality takes a vacation' (this thought is obviously already borrowed from the *medieval Canon Law theorem* 'necessitas non habet legem').

¹³Cit Loewenstein (1937) 424.

¹⁴Cit Loewenstein (1937) 432.

1.2.1. Discussion of the premises.

- Loewenstein uses a concept of ‘democracy’ stressing *only* the *deliberative* aspects and the *limits* set out for democracy by the *rule of law*¹⁵, while completely *neglecting egalitarian participation*¹⁶ and *people’s sovereignty*.¹⁷
- Apparently the second premise is drawn *only* from the German example¹⁸ and, at least in a strict sense, *not even true there*¹⁹ (albeit claimed by Adolf Hitler’s minister²⁰

¹⁵In Austria, Loewenstein’s criteria had already been satisfied by the Fundamental Rights Act (‘Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger’) of 21 December 1867, RGBI No 142 – hence at a time when one could seriously assess that the State recognized the *rule of law*, but certainly did *not* contain *any democratic* element. That this finding is not at all a misinterpretation or a malicious insinuation is underlined by the fact that *Loewenstein* (in the context of advocating for the compatibility of democracy with capitalism, see next fn) explicitly mentions ‘the **risks arising from universal suffrage**!’ (cit *Loewenstein* [1937] 422, emphasis added) and was perfectly ready to think of alternatives (cf. *Hacke* [2018] 252).

¹⁶Most remarkably, Loewenstein is eager to assure that democracy is more **compatible with capitalism** than fascist or ‘authoritarian’ regimes, going so far as formulating: ‘Private capitalism cannot have failed to understand that ... *capital controlling democracy is far preferable* to corporative middle-class bureaucracy controlling capitalism’ (!; cit *Loewenstein* [1937] 422, emphasis added). Presuming that ‘middle-class bureaucracy’ is, at least when compared with ‘capitalists’, economically considerably poor, Loewenstein – himself son of a manufacturer and, thus, of a ‘capitalist’ – seems to favour an *outspoken elitist* (‘liberal’) **model** of ‘democracy’ (see previous fn) close to that of Walter Lippmann and others (cf. for this line of American thinking of the time e.g. *Weaver/Motion/Roper* [2006] 7 f, 8 f).

¹⁷For the relevance of this omission see *infra* subsection 2/a.

¹⁸cf. *Loewenstein* (1937) 426 f.

¹⁹Firstly, Hitler was *not directly elected to power by democratic procedures*, but had *lost* the presidential elections in early 1932 where the former field marshal Paul v. Hindenburg was re-elected as National President (‘Reichspräsident’); so Hitler was only *appointed* as head of government (‘Reichskanzler’) on 30 January 1933 by President Hindenburg. Moreover, Hitler’s party had not only lost about 4% in the 6 November 1932 elections for the National Parliament (‘Reichstag’) compared with those of 31 July 1932, but also the newly formed coalition government had, at that time, *not yet had its own majority* in the National Parliament, so that this Parliament was again immediately dissolved by President Hindenburg after Hitler’s appointment (on 1 February 1933, for the legality as well as for the democratic legitimacy of this approach see *Jung* [1995] 6 f).

Secondly: Although it was the National Parliament which adopted the conferral of *ordinary* legislation (for four years) to the national government (‘Reichsregierung’) headed by Hitler (‘Gesetz zur Behebung der Not von Volk und Reich’ of 24 March 1933, Official National Law Gazette [Reichsgesetzblatt – RGBI] I S 125) the **democratic legitimacy** already of this Parliament elected on 5 March 1933 – and, therefore, also of this crucial Act as such – **may be disputed** due to the *effects the Emergency Ordinance* issued by the National President Hindenburg on 28 February 1933 (‘zum Schutz von Volk und Staat’) had had on the elections as well as on the formation of the will of members of that Parliament (see in more detail *infra* section II/D). Obviously, this reservation is still more valid with regard to the second crucial pillar of transformation of the State of Weimar into the NS-State, the Act of 30 January 1934 (the first anniversary of Hitler’s appointment to head of the national government), RGBI I p 75, ‘über den Neuaufbau des Reichs’, which enabled, in its Article 4, the national government also to amend the *Constitution* (in *every* respect and *without any time limit*!), because this Act (see *Jung* [1995] 59) was already adopted by an again new National Parliament ‘elected’ on 12 November 1933 where, after dissolution or abolition of all political parties except that of Hitler’s NSDAP, **no democratic competition at all had been allowed any more** (cf. *Jung* [1995] 36 f, 42 f, 52 f).

Thirdly: when in August 1934 a *referendum* (**not an election!**) was held to confirm Hitler’s rise to the position of head of State effected by the National Act of 1 August 1934, RGBI I p 747, it was precisely this referendum which was, measured against the yardstick of an already totalitarian régime, a **failure** (see *Jung* [1995] 61 f, 74 f, 82).

²⁰Given his official title (‘Minister für Volksaufklärung und Propaganda’) in principle *all* his enunciations (but *certainly all the official or public ones*) should be treated with caution in order not to be still caught – even decades later – by the trap of this ‘propaganda’.

Joseph Goebbels²¹), not to speak of any other European country of that time²², whereas

- the third statement is obviously correct, although likewise *obviously incomplete*, ignoring all the other ‘wars’ conducted by ‘Fascism’ against e.g. *Communism* or, at least by German ‘National-Socialism’, and even with more furor, against *religions* (in particular against the Roman-Catholic Church) or, here amounting to the very attempt at annihilation, against *races* (in particular against Jews²³ and Gypsies) or other ‘social groups’ (such as the mentally disabled or homosexuals).

1.2.2. Discussion of the conclusions

1.2.2.1. The problem of the ‘pouvoir constituant’²⁴. At least in a secular world a (fully-fledged) ‘constitution’ is a set of rules which has to be created by some human beings, arrogating themselves *sovereign* power at a certain point in *time* with regard to a certain number of human

²¹‘Wenn unsere Gegner sagen: Ja, wir haben Euch doch früher die [...] Freiheit der Meinung zugebilligt –, ja, Ihr uns, das ist doch kein Beweis, daß wir das Euch auch tun sollen! [...] Daß Ihr das uns gegeben habt, – das ist ja ein Beweis dafür, wie dumm Ihr seid!’ (speech of 4 December 1935: ‘That our enemies claim that *they* did grant *us* freedom of speech – that does not show that we should grant you the same, but only, how stupid you are’ [unofficial translation by A.B.]: see Heiber [1971] 272; see also Bracher [1964] 375, in particular the quotations mentioned in fns 39 f). See also, for a similar quotation of Goebbels, Bracher/Sauer/Schulz (1960), 21, fn 35, and, for *Hitler’s claim* that he was called to power by a ‘revolution’ enacted by ‘the’ German people, Jung (1995) 13 f, 16 f.

²²**Neither in Italy** nor in Hungary nor in Turkey nor in Spain **nor in any other country** mentioned (see Loewenstein [1937] 417) by Loewenstein (Austria, Bulgaria, Portugal, Greece, Rumania, Yugoslavia, Latvia, Lithuania, Poland) did the fascist or ‘authoritarian’ régime **rise to power by purely democratic means**. When looking more closely, this finding also applies with regard to the transition to Communist rule: neither in Russia in ‘October’ 1917 did the ‘Bolsheviks’ (despite the meaning of this term!) come into power by a majority based on universal suffrage, nor in the Central and Eastern European countries after World War II, nor in Afghanistan 1978: everywhere an **additional element of violence** was needed: in St Petersburg the so-called ‘storming of the Winter Palace’, in Central and Eastern Europe and Afghanistan the presence of the Red Army and the support granted to local communists by the Soviet-Union.

²³Even as early as 1937 this declaration of ‘war’ against *Jews* could not only have been perceived, but *was* of course perceived by Loewenstein, who had suffered the consequences of this persecution personally. This is one of the elements of his text where we have to be aware that *there is* – to use the words of Martin Heidegger (1954) 5 – ‘*Unsaid*’ behind the ‘*Said*’ or, to put it differently and underlining what was already mentioned supra in fns 15 et 16: Loewenstein’s concept of ‘**democracy**’ seems to be much more a **cipher for a state where there is no discrimination/persecution/annihilation of humans on racial grounds** than a ‘democracy’ in the political meaning of the term (and indeed, at the *very end* of the *second* part of his article [657 f], Loewenstein reveals his vision: ‘... democracy has to be redefined. It should be – at least ... until a better social adjustment ... has been accomplished – the application of disciplined authority, by liberal-minded men, for the ultimate ends of liberal government: human dignity and freedom’.

²⁴The arguments put forward here apply also to the form of ‘militant democracy’ advocated for by another scholar, and a contemporary of Loewenstein, George van den Bergh (see Cliteur/Rijkema [2012] 229, 240 f, 256 f). In contrast, Hong (2012), 329 f, 364 f accepts that ‘militant democracy’ could *not*, without self-contradiction, be based on an understanding of ‘democracy’ as ‘popular self-legislation’, but holds that an alternative understanding (as ‘legislative self-restraint’) would serve the purpose; Hong fails, however, to show *why his understanding should be exempt from negation by people’s* (‘popular’) *sovereignty*. The same argument applies also to the current German understanding of ‘militant democracy’ (cf. Thiel [2012] 273 f, who admits that no future German *pouvoir constituant* could be bound by this understanding [293], but focuses only on an ‘upheaval’, thus neglecting completely the path outlined by Article 146 of the German Fundamental Law [Grundgesetz – GG], where e.g. a *Constitutional Assembly* could assume ‘sovereign dictatorship’ - cf. Schmitt [1928a] 237 f).

(but also legal) *individuals*, their *property* and, nowadays as a rule almost without any exception, to a certain *territory*.

While some sovereigns are easily identifiable – this is in particular the case if this power is considered to reside only in one person, the ‘autocrator’²⁵ or monarch²⁶, but also in a society where the ‘nation’ is deemed to consist only of a few aristocrats (like in the former Hungary or Poland) where it is clear that at least assuming the competence of changing the constitution by ordinary people can only be illegitimate (from the perspective of the acting sovereign) – it is *extremely difficult to distinguish in a state based on people’s sovereignty* between acts of members of the people which are simply against the constitution still in force (and, therefore, *illegal*) and (the preparation of) *a new articulation of the sovereign*²⁷ who

- can not only **never be bound** by one of his previous temporary products²⁸, but is
- **always** (thus not only when just delivering a new product) **present in his own State**.²⁹

Hence, *not even deviations from* the concept of ‘*peaceful change* by regular methods’ and lack of ‘loyalty to the fundamentals’ of the current constitution **can bar** outright **the voice of the people** in its capacity **as sovereign**.

If, however, this ‘voice of the people’ is not unanimous, the question might arise as to *who* (*which part* of the people) is entitled to exercise this sovereign power? Whereas, still in the 16th and the first half of the 17th century, the answer to this question was quite commonly (e.g. in Germany, France and England) found only through *civil war* (the solution apparently again put forward by Loewenstein³⁰), classical Natural Law of the second half of the 17th/18th

²⁵For Immanuel Kant, only the ‘autocrator’ (the traditional title of the Russian Czar) *was* the sovereign, owning *all* power (see [2009] § 51).

²⁶It was precisely in this capacity that the Austrian emperor Francis Joseph twice *suspended a constitution* (1851 and 1865) – although in the end (1867) this was successfully contested by Hungary – thus making use of his *double role* as not only a ‘pouvoir constitué’ by the Constitution but also as the ‘pouvoir constituant’, i.e. the *Source of the constitution* (cf. for this category Schmitt [1928a] 236). This **sovereign** position *can* be perceived as being rooted in a ‘**pactum subiectionis**’ (see *infra* fn 35).

²⁷cf. Schmitt (1928b) 82 f.

²⁸See Böckenförde (1991) 90 f, 99 f; Schmitt (1928b) 83; Anschütz (1933) 1 ff; VfGH 30 June 1949, B 299/48, VfSlg 1827.

²⁹I am definitely not of the opinion that ‘Sovereignty as a political category occurs’ only ‘during a crisis or menace’, whereas ‘in all other periods the sovereign is nothing other than an *untraceable notion*’ (!) ‘that occasionally happens to appear as a mist at the edge of a legal order’ (cit Ellian [2012] 64, emphasis added – a position which, according to the author’s own assessment, resembles ‘Protestant theology’, see *supra* fn 1); rather, in my view (cf. Balthasar [2006] 70, fn 292) it is only the **continued affirmation of the Sovereign** which provides the basis for the validity of the current law.

³⁰cf. the last sentences of the quotation cited *supra* in lit A. Keeping in mind that Loewenstein himself had to *emigrate* it is, at least from an empathetical perspective, quite understandable that (against the background of what he had lost) he would have preferred to have had the opportunity to *stand his ground* in Germany, and we may also admit that the costs of even a civil war in Germany in 1933 would have been far lower than what was eventually needed to defeat the NS regime in World War II. Nevertheless, the *singularity of the NS* is a strong argument *not to generalize* (as was indeed done by Loewenstein’s formulae applying not only to monstrosities).

century contested the *Aristotelian* premiss that ‘the people’³¹ is an *inevitable* entity *prior to the individual*³², which has to remain together in any circumstance, thus opening up the less bloody alternative that those parts overruled by the dominant part(s)³³ **terminate the underlying Social Contract** (or, more precisely, do not consent to the modified version after termination of the old one by the majority) **by** making use of their inherent natural right to **secession**³⁴, hence invoking ‘sovereignty’ (in the *fullest meaning* of the term³⁵) *also for themselves*.³⁶

1.2.2.2. ‘Democratic fundamentals’ beyond human grasp?. Now it is true that Loewenstein – in the article here at issue³⁷ – did not in the least refer to people’s sovereignty. This omission, however, as such does not solve the problem. Of course it is possible to presuppose an **ultimate non-secular source** of the ‘Constitution’ or of the ‘democratic fundamentals’. In this case,

³¹Aristoteles (see next fn) used the word ‘πόλις’ which corresponds to the Roman ‘populus’, but should obviously not be equated with ‘ἔθνος’.

³²cf. Aristoteles (1977) 1253a: ‘ἡ δὲ τούτων κοινωνία ποιεῖ οἰκίαν καὶ πόλιν. καὶ πρότερον δὲ τῇ φύσει πόλις ἢ οἰκία καὶ ἕκαστος ἡμῶν ἐστίν. τὸ γὰρ ὅλον πρότερον ἀναγκαῖον εἶναι τοῦ μέρους· ἀναιρουμένου γὰρ τοῦ ὅλου οὐκ ἔσται πούς οὐδὲ χεῖρ, εἰ μὴ ὁμονύμως, ὥσπερ εἴ τις λέγοι τὴν λιθίνην· διαφθαρεῖσα γὰρ ἔσται τοιαύτη, πάντα δὲ τ’ ἔργω ὠρίσται καὶ τῇ δυνάμει, ὥστε μηκέτι τοιαῦτα ὄντα οὐ λεκτέον τὰ αὐτὰ εἶναι ἀλλ’ ὁμώνυμα. ὅτι μὲν οὖν ἡ πόλις καὶ φύσει πρότερον ἢ ἕκαστος δῆλον· εἰ γὰρ μὴ αὐτάρκης ἕκαστος χωρισθείς, ὁμοίως τοῖς ἄλλοις μέρεσιν ἔξει πρὸς τὸ ὅλον, ὃ δὲ μὴ δυνάμενος κοινωνεῖν ἢ μὴδὲν δεόμενος δι’ αὐτάρκειαν οὐθέν μέρος πόλεως, ὥστε ἡθελίον ἢ θεός.’ This position was **again taken** – while explicitly *rejecting the theory of Social Contract* – **by Marxists** (cf. Adler [1922] 31, 69, in fn 1 referring to his terms ‘Sozial-a-priori’ and ‘Transzendentalsoziales’).

³³A majority as such is no argument at this stage, cf. Isensee (1995) 86.

³⁴cf. the common Article 1 of the ICCPR and of the ICESCR, respectively, completed by Articles 2 (1), 12 (1) and (4) ICCPR, showing however, that (individual or even collective) ‘secession’ is a *right of the minority, not an option for the majority* to get rid of the minority.

³⁵The ‘Social Contract’ *may* (inspired by Samuel v. Pufendorf, cf. Isensee [1995] 87 f) be *further structured* in

- the *original will* of individuals to form a ‘people’ (the ‘**pactum unionis**’ (cf. Locke [1960/1965/2008] VIII/§§ 95 f; Achenwall/Pütter [1995] § 655),
- the *subsequent fundamental decisions* as to
 - o *how* they should be governed (decision on the ‘*forma regiminis*’, i.e. abiding by the rule of law or despotically, cf. Kant [2011] 352)
 - o *who* is to govern (decision on the ‘*forma imperii*’, cf. Kant, ib) –
- an even less developed form of these decisions (ii) being the ‘**pactum subiectionis**’ (cf. Hobbes [1968/1980] Chapter XVII: ‘Commonwealth by Institution’, with only one limitation [*ineffectiveness*, see Chapter XXI; cf. infra, fn 42]; Locke [1960/1965/2008] Chapters X and XI/§§ 132 f, stating that ‘absolute arbitrary power’ could never ‘be supposed’ to have been conferred; Achenwall/Pütter [1995] § 656 – for limitations see §§ 669 f),

and only on this basis eventually in

- the specific constitution.

Obviously, among these steps *dissolving the ‘pactum unionis’ is the most fundamental exercise of ‘sovereignty’.*

³⁶On an individual basis this right to ‘secession’ (understood also as a means of legitimate *resistance*) has always taken the form of a ‘*ius emigrandi*’ (cf. Balthasar [2017] 214 f, 235 f, fns 180 f).

³⁷Loewenstein must have been completely aware of the implications of this notion, given that he had, 15 years ago, published a book on the founder of the theory of people’s *pouvoir constituant*, Emmanuel Sieyès (see Böckenförde [1991] 94 f, fn 9).

however, *prudence* advises us to *restrict* this sphere of ‘fundamental principles’, i.e. of ‘absolute values’ which are protected from every (even the most peaceful) attempt to change them to those core elements which can *credibly* be assumed as really transcending space and time and, thus, as truly ‘universal’ and ‘inalienable’, being withheld from any legitimate human interference, even by a human Sovereign.

Otherwise rapidly changing circumstances will enforce **multiple rapid changes of opinion** as to the exact content of these ‘fundamentals’ and, thus, reduce the concept of ‘inalienability’ (or, even if some changes of divine revelation from time to time are taken into account, at least divine dignity) **ad absurdum**.

And indeed there is some indication³⁸ that *Loewenstein* did, when referring to ‘absolute values’ worth being protected by ‘every possible effort’, really **only mean** – as a deeper meaning concealed beneath the surface term ‘democracy’ – what we now label ‘**human dignity**’, in the *individual* as well as in the *collective* dimension of this term. This interpretation would also coincide with the currently prevailing understanding of his concept – not so much in the field of ‘democracy’ as a political form of government, but in that of ‘*human rights*’.³⁹

1.2.2.3. Is self-preservation really an ‘absolute’ value? When restricted in this way, however, another problem⁴⁰ arises: if ‘human dignity’ is really the supreme (‘absolute’) value to be preserved at all costs from ‘fascist’ attack and, as such, ‘universal’ and ‘inalienable’, then

³⁸See *supra* fn 23.

³⁹cf., paradigmatically, Article 30 UDHR. The application of this idea, however, also to the sphere of ‘fundamental rights’ – despite the fact that the difference between universal ‘human’ and mutable ‘fundamental’ rights had already been made visible decades ago in sections (2) and (3) of Article 1 the German Fundamental Law (GG), respectively (cf., however, also Articles 2, 3 (5), 21 (1) TEU where the term ‘human rights’ is used, in contrast to the CFR; see in more detail *Balthasar/Pichler* [2014] 93 f, 97 f) – is *highly problematic*.

An attempt as stated in Article 54 of the EU Charter of *Fundamental Rights* to deny ‘the right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein’ is only legitimate *insofar as also all these rights are considered not to be human creations*, but to stem **all and in all their current elements** from ‘natural law’ (cf. for such a position indeed *Borowsky* [2014] point 9). Taken literally Article 54 CFR now *impedes* not only institutionally fully legitimate activities for, e.g. the *abolition of Article 6 (1) TEU*, but even *any application for termination of membership of the EU under Article 50 TEU* (because such a step implies, too, at least a future territorial ‘limitation’ of Charter rights and freedoms, as was indeed at least partly the intention of Brexit!). It is really alarming (showing the *growing fragmentation* between *institutional* and *human rights law*) that neither the Charter Convention nor, later on, e.g. *Wood* (2014) 1539 f nor *Bezemek* (2019), in particular point 3, have realized this **excessive effect on the future exercising of legislative powers** by means of a *human-made fundamental rights provision*, the danger of which may be illustrated by the hint that, strictly speaking, *not even the publication of this footnote is covered by Article 13 of the Charter*. cf., however, *Hoppe* (2019), points 12, 27, 39, 43.

⁴⁰The problem as such is addressed, but not solved in the contribution of *Cliteur/Rijkema* (2012) 265 f, 266 (dealing with their third, ‘civil rights’ centered meaning of ‘militant democracy’).

this value applies, at least in principle, also to the ‘fascist’ ‘enemy’ (not only to the ‘inimicus’, but also to the ‘hostis’⁴¹). Measures for self-preservation may of course be taken⁴², but *not* ‘at all costs’⁴³, i.e.

- **not** in simply applying the ‘*ius talionis*’ (and of course not, as suggested by *Loewenstein*’s concept, already **preventively applying the ‘enemy’s’ methods!**),
- even not in only a strictly proportionate⁴⁴ manner (i.e. limited to what is really needed to overcome the danger),
- but in addition also **unilaterally refraining in all circumstances from intrinsically inhuman action**.⁴⁵

These principles applying even in most extreme situations (*if* the ‘enemy’ should aim to *annihilate* one-self) they have to be respected – flowing from the principle of reciprocity or equality – the more so in less clear situations, thus also taking into account the degree of legitimacy which might underlay the ‘enemy’s’ position (or that of a third person⁴⁶). It is exactly

⁴¹See, for *this* difference *Schmitt* (1963) 29.

⁴²cf. not only *Article 51 UNC* (the application of which, however, is restricted to ‘attacks . . . imputable to a foreign State’, cit *ICJ* [2004] point 139)), but also the corresponding ‘*state of necessity* . . . recognized in customary international law’ (cit *ICJ*, ib, point 140, referring in particular to *Article 25 of the ILC ‘Articles on Responsibility of States for Internationally Wrongful Acts’*; see in this respect also *Molier* [2012] 187 f), but also *Article 4 ICCPR* or *Article 15 ECHR* (where the ‘*life of the nation*’ is explicitly stated as the *overriding value*). See also *Heintze* (2012). It may, however, very well be that

- even this current international setting will turn out to be **too narrowly construed** (cf. the views referred to by *Randelzhofer/Nolte* [2012] points 8, 11, 13, 36, 37 [fn 137], 51 f; cf. also, for the ECHR, *Balthasar* [2006] 659), but that in particular
- our modern written *national* constitutions (see, for the Austrian constitution, *supra* fn 1 and *infra* fns 211, 214, for the German constitution *Thiel* [2012] 297 f) have, more often than not, **failed to state** this not only *traditional* (cf. *Molier* [2012] 184 f), but *self-evident finding* in a way which also allows positivists to accept it.

From a natural law point of view one would assume that such a provision must be enshrined, if not in the respective constitution, then at any rate in the underlying **Social Contract** (see *supra* fn 35), as a *necessary corollary* (pre-condition) to the **task of a State to grant protection** (cf. for this task:

- *Hobbes* [1968/1980] Chapter XXI (‘The end of Obedience is Protection . . .’); *Locke* [1960/1965/2008] Chapter XI, § 134 (‘The great end of Men entring into Society, being the enjoyment of their Properties in Peace and Safety . . .’)
- *Article 2 of the French Declaration of Human and Citizens’ Rights* of 5 October 1789, which still forms part of the current French constitution, running: ‘Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l’Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l’oppression.’
- *Article 56* read in conjunction with *Article 55 lit c UNC*; *Article 1 ECHR*; *Article 2 ICCPR*; *Article 2 ICESCR*.

⁴³Cit *ECtHR 22 March 2001*, *Streletz, Kessler, Krenz/G*, points 71 f; while the principle is obviously correct, the specific application may be disputed, cf. *Balthasar* (2017) 233, fn 161.

⁴⁴cf., paradigmatically, *Article 31 (1) (c) and (d) of the Rome Statute of the International Criminal Court*; *Borowsky* (2014) point 10, also emphasized this limitation.

⁴⁵cf., paradigmatically, *Article 33 (2) of the Rome Statute*, *Article 10 (1) of the ICCPR* or the non-derogability of *Article 3 ECHR*.

⁴⁶As the Appeals Chamber of the ITY stated in its Judgement of 7 October 1997 (IT-96-22-A, *Erdemovic*), point 19, *even ‘duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.’*

this **negation of the principle ‘my country, right or wrong’** inherent even in **legal** concepts as a ‘state of emergency’ or ‘self-defence’⁴⁷ which **prevents** ‘civilized countries’ (in the meaning of Article 38 (1) (c) of the Statute of the ICJ or of Article 7 (2) of the ECHR) governed by the ‘rule of law’ (in the meaning of, e.g., Article 2 TEU or Article 3 SCE) **from slipping into the fully-fledged relativism and subjectivism** expressed

- already by ‘Louis-Antoine-Léon de Saint-Just, the ‘Archangel of Terror’ in the dark times of the French Revolution’ (‘No freedom for the enemies of freedom!’)⁴⁸

⁴⁷ cf. ICJ (2004) point 140; Randelzhofer/Nolte (2012) points 57 f. Given the original German academic background of Loewenstein as a *lawyer* it is striking that he did *not* make *any* use of a *juridical argument*. Did he – forced to change discipline in the USA (see Lepsius [2015] 431 f) – think that reference to European law concepts would not pay outside the European legal community and in particular not in the USA? Or could Loewenstein then having been of the opinion that Hitler’s **obvious abuse** of these legal terms, in particular in the National Government’s Act – based on the ‘Enabling Act’ of 24 March 1933 (see supra fn 19) – of 3 July 1934, RGBI I p. 529, which bluntly stated that ‘all the actions taken on 30 June and 1/2 July 1934 to suppress treason’ (i.e. the extra-legal killings – not by any means limited to the killing of Ernst Röhm and of his comrades, but also, e.g., of Kurt v. Schleicher [see infra text by fns 99 and 100], his former deputy in the ministry for defence, major-general Ferdinand v. Bredow, Gustav v. Kahr [see infra subsection 2.3], of Edgar Jung, a secretary of Franz v. Papen [see infra subsection 2.1.3] and other prominent Catholics, see Jung [1995] 71 f, fn 40) ‘are legal due to the State’s self-defence’ and which had been eloquently justified by Carl Schmitt ([1934] 945 f; see Quaritsch [1989], 80 f) **had spoiled (contaminated)** these terms/arguments/concepts?

⁴⁸ Cit Thiel (2012) 276. Likewise, also the still popular formula ‘no tolerance for intolerance’ (cf. Popper [2003], 361 f, only recently favoured again by the former German Federal President Hans-Joachim Gauck [see Der Spiegel [2019] ‘Wir müssen lernen, mutiger intolerant zu sein’, 15. 6. 2019: ‘Toleranz enthält das Gebot zur Intoleranz gegenüber Intoleranten’]) is **highly misleading**, due to the **lack of any objective yardstick**.

- taken literally, the formula allows us to *negate any right to anyone who dares not to agree with one’s own position* – hence, the crucial question is not the substance of the positions but *the role taken*: that one who sets the position forces the other either to accept or to oppose it – in the latter case this opposition can be denounced as ‘intolerance’ and safely be oppressed (this is, nowadays, exactly the way the attribution of the label ‘islamophobia’ works, cf. Weinberger – former Austrian ambassador in Tunis – [2020]).
- In a more refined sense the formula reminds one of the insight of Thomas Hobbes that the state of nature is a state of ‘bellum omnium contra omnes’ (cf. Hobbes [1968/1980] Chapter XIII: ‘warre . . . of every man, against every man’) which can only be overcome by a *synallagmatic agreement* (cf. id, ib, Chapter XIV for the ‘second Law of Nature’, which seems to be the ‘pactum unionis’ [see supra fn 35] replacing war with peace; cf. also Kant [2011] 348 f [ed of the Ac]). Even there, however, ‘tolerance’ can only mean *mutual respect* for one’s *own* affairs (‘property’ in the meaning of John Locke, i.e. ‘Lives, Liberties, Estates’, cit Locke [1960/1965/2008] Chapter IX/§ 123, or of Article 2 of the French Declaration 1789 [see supra fn 42]), providing *no solution for how to deal with common affairs*.
- Hence, what is really required instead of simply outlawing ‘intolerants’ (which was indeed advocated by Popper, *ib*, 362) is to **insist on universal respect for the law** (understood in a substantive as well as in a procedural sense). If need be, this *respect* has also to be *enforced* – but this enforcement does *not* trigger the ‘outlawing’ of the perpetrator, *nor* does it need a ‘tolerant’ internal (*moral*) attitude (on the – minoritarian or even majoritarian – side opposing a given position), but only that everyone **abides by the law** (*in foro externo*). See also infra section IV/B).
- It was, however, already observed that in particular the German term ‘Gewalt’ applies likewise to ‘*potestas*’ and to purely arbitrary/otherwise illegitimate ‘*violentia*’ (see Ernst, [1980] 191 f). Given that Loewenstein as well as Popper were both German native speakers, this ambiguity of their mother language may have influenced (and misled) the thinking of both.

- in the well-known dichotomy of ‘Freund’ and ‘Feind’ coined and presented as the ultimate principle of politics by Carl Schmitt⁴⁹ only a few years before Loewenstein’s article here at issue was published⁵⁰ and, thus **assimilating to the ‘enemy’** (arg: applying a ‘similar technique’) *loosening any objective justification* to resist to the ‘enemy’s’ attack⁵¹
- also in *Bolshevist* reasoning of the time⁵² - a perhaps even more *disturbing*⁵³ similarity.⁵⁴

⁴⁹See, in particular, Schmitt (1963) 26 f. For a proper assessment of this dichotomy in the context of Schmitt’s doctrine one has, however, to keep in mind that Schmitt had, even *at precisely the same time* as he published the first version of the said booklet, also been of the opinion that *even in a state of emergency only some constitutional provisions, not, however, the essence of the constitution itself could legally be suspended* (cf. Schmitt [1928b], 26) which implied for a state committed to the rule of law, inter alia, the restriction to *keep the essence of fundamental rights* even in extraordinary situations (cf. ib, 27). This line of thinking fits very well with his earlier work on the institution of ‘dictatorship’, in particular his differentiation between ‘*commissarial*’ and ‘*sovereign*’ dictatorship (cf. Schmitt [1928a] 25 f, 130 f, 236 f, even appreciated by Max Adler [1922] 193 f!) – according to which only the latter is equivalent to the ‘*pouvoir constituant*’, whereas the former is deemed to *re-establish*, though by *extraordinary means*, a prespecified, though temporarily perturbed order (this goal also *sets limits to the choice of the appropriate means*, in particular, if the envisaged order to be re-established is the rule of law). Hence, although it might be that the dichotomy position is the product of a ‘sharpening’ (cf. Quaritsch [1989] 29 f), where the ‘*commissarial* dictatorship’ was lost, I am more inclined to presume that there is *no contradiction at all*, meaning that the famous dichotomy just describes, from a purely theoretical point of view (as already in his earliest work on this issue: Political Theology 1921)), *very fundamental phenomena not to be presumed in internal conflicts and certainly not to be understood in a normative way* (cf. for such an understanding, already Böckenförde [2006] 344 f, 345; cf. also Ellian, [2012] 25 f, 41).

⁵⁰The original version of ‘Der Begriff des Politischen’ was published in 1927 (cf. Quaritsch [1989] 11), the text of the second edition (used here) in 1932 (see supra fn 41). This *conceptual closeness* of Loewenstein and Schmitt’s dichotomy (cf. also Schupmann [2017] 204, in particular fn 1) – and, furthermore, of Loewenstein and the Presidential Ordinance of 28 February 1933 *singling out specific enemies* (see infra fn 127) - is striking against the background that it was apparently in particular Loewenstein who pushed for Schmitt’s *prosecution* by US occupation forces after World War II (see Mehring [2009] 442).

⁵¹Even Lenin was still in 1917/18 eager to *point out the difference* between previous suppression of the exploited classes by the ruling ‘(capitalist)’ classes and the ‘dictatorship of the proletariat’ destined to prepare the end of all suppression (cf. Lenin [2012] 99 f, in particular 104; quite similar also Otto Bauer, see Reiter-Zatlouka [2014] 31).

⁵²Strongly criticized by Eduard Bernstein (as ‘barbarous’ and ‘most extreme terrorism’) Nikolai Bucharin had concluded - after having formulated in his ‘Communist Programme’: ‘the **dictatorship of the Working Class** means State Power for the Working Class, *strangling* the bourgeois and the landlords’ and ‘*destroying* the bourgeois state and the bourgeois power’: ‘Hence we see that it is necessary to **infringe all liberties of the enemies of the Revolution**. In the Revolution, there is **no room for the enemies of the People and of the Revolution**’ (cf., also cit Bernstein [1923] 118 f; translation into English by A.B.).

⁵³This disturbance has a *double foundation*: (i) in itself, given the *totalitarian* character of Soviet-Communism, but also (ii) against the background of Loewenstein’s *advocating capitalism* (see supra fn 16).

⁵⁴But also the Austrian Max Adler, although also (as Bernstein, see previous fn but one) contesting the bolshevist dictatorship of the Communist party (see Adler [1922] 188 f), wrote bluntly (ib, 201): ‘Die Diktatur des Proletariats ist **Gewalt einer Klasse gegen die andere**, ... die fortgesetzt werden muß ... **bis zu ihrer Vernichtung**, weil erst dann die klassenlose Gesellschaft möglich ist’ (‘the dictatorship of the proletariat is the application of force of one social class against the other, ... which has to be continued until the other class is destroyed, because only then a classless society is possible’ [!; translation by A.B.]).

2. THE ‘UNSAID’⁵⁵ GERMAN HISTORICAL BACKGROUND

Loewenstein does not convey the impression of absolute originality – in contrast, the second part of his article starts with ‘[s]ome illustrations of Militant Democracy’ (Finland, Estonia, Austria⁵⁶ and Czechoslovakia). Most strikingly, however, *Loewenstein* does not say a word – except a very imprecise mention of the temporary prohibition of the armed forces of the NSDAP⁵⁷ – about the *German* attempts to set the principle he favours in place – although it is more than likely that it was exactly his *home* country which – on the national level as well as, in particular, on the federated State level of Bavaria – inspired him to develop his concept⁵⁸:

2.1. The German national level

2.1.1. The constitutional background and the antecedents. Article 48 (2) of the German Constitution of 11 August 1919 (‘Weimar Constitution’; WC)⁵⁹ ran⁶⁰:

‘Der Reichspräsident kann, wenn im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen, erforderlichenfalls mit Hilfe der bewaffneten Macht

⁵⁵See *supra* fn 23.

⁵⁶See in more detail *infra* section 3.

⁵⁷See *Loewenstein* (1937) 427, where he regrets that only ‘for less than two months, in spring 1932, the wearing of political uniforms in public’ had been ‘unlawful’ (and even then not effectively enforced). See for the legislation at issue in more detail *infra* subsection 2.1.2.

⁵⁸It is obvious that *Loewenstein*, not only born and living in *Munich*, the capital of Bavaria, but also a reader in *Constitutional Law* at the University there *must have gained intimate knowledge* not only of the process on the national, but, in particular, on the federated state level.

⁵⁹The predecessor of this provision had been Article 68 of the previous constitution (of 16 April 1871; see *Raithel/Streng* [2000] 419 f; *Poetzsch-Heffter* [1928] 233; *Anschütz* [1933] 276) enabling the emperor to *declare war in every part of the national territory* (except Bavaria) in order to overcome threats to (*internal*) public security. We see here an unobtrusive *normative* source for *Loewenstein’s* as well as C. Schmitt’s dichotomy (cf. *supra* text by fn 49 f).

⁶⁰‘The National President may, in case public order and security is to a large extent disturbed or in danger in Germany, take the measures necessary to restore public order and security, if necessary also making use of the armed forces. For this purpose he may, in their entirety or in parts, suspend the fundamental rights enshrined in Articles 114, 115, 117, 118, 123, 124, 153.’ (unofficial translation by A.B.).

einschreiten. Zu diesem Zwecke darf er vorübergehend die in den Artikeln 114⁶¹, 115⁶², 117⁶³, 118⁶⁴, 123⁶⁵, 124⁶⁶ und 153⁶⁷ festgesetzten Grundrechte⁶⁸ ganz oder zum Teil außer Kraft setzen.’

Although implementing of legislation, as required in section 5 of this Article, was never adopted⁶⁹, this provision had been quite frequently used, in particular during the first years of the Republic of Weimar, by the National President of the time, Friedrich Ebert, a Social Democrat, at that time mainly directed against *Communists*⁷⁰, and again following the spring of 1930, after the end of the last national government based on a majority in the National Parliament⁷¹, by the National President Paul v. Hindenburg, as an alternative method to ordinary legislation⁷², to secure the efficiency of the national government headed at the time by Heinrich Brüning.⁷³ At that time, the background for the use of authoritarian rule, therefore, was not yet so much the necessity of defence against rising totalitarianism⁷⁴, but simply the *lack of coherence* and *willingness to cooperate* among the parties of the traditional ‘Weimar coalition’, i.e. Liberals, the Catholic Party and the Social Democrats.⁷⁵ It may be that exactly this fact had already *exhausted this option* before it could have served its genuine purpose.

⁶¹Right to liberty and security of person.

⁶²Protection of one’s home.

⁶³Protection of one’s communications (postal, telephone, telegraph).

⁶⁴Freedom of opinion; prohibition of censorship.

⁶⁵Freedom of assembly.

⁶⁶Freedom of association.

⁶⁷Right to property.

⁶⁸This list did **not** include **Articles 22 f**, governing the election of the National Parliament, in particular requiring, in Article 25 (2), elections to be held 60 days after dissolution by the National President, **nor Article 125**, granting the fundamental right to vote. Hence, contemporary doctrine was of the opinion that **general elections could not legally be suspended under Article 48 (2) WC** (cf. Poetzsch-Heffter [1928] 240; Anschütz [1933] 289; even Carl Schmitt, although advocating for a larger interpretation of Article 48 (2) WC, had in this respect produced –still in 1928 - the same result, cf. [1928a] 246). This limitation would acquire decisive importance, at least in hampering Schleicher’s proposal in January 1933 (see *infra* fn 106).

⁶⁹See Poetzsch-Heffter [1928] 246 f; Anschütz [1933] 281; Bracher (1964) 55, fn 98, 304 f; Raithel/Strengé [2000] 425.

⁷⁰See Raithel/Strengé (2000) 423; cf. also Anschütz (1933) 279, and Bracher (1964) 52 f, in particular fn 94.

⁷¹See, for the reasons of the resignation of chancellor (= head of national government) Hermann Müller, Bracher (1964) 287 f, in particular 296 f.

⁷²cf. Bracher (1964) 306 f. The first ordinance of this type was issued on 16 July 1930 (see Bracher, *ib*, 339, fn 27).

⁷³Brüning, (as Carl Schmitt and Franz v. Papen) a conservative Catholic Westphalian (see Bracher [1964] 307 f, 342 f) was appointed as chancellor on 30 March 1930 and dismissed on 30 May 1932. He was the first chancellor in the Weimar Republic to be more *dependent on the goodwill of the National President* than on the support of the parliamentary groups (see in more detail Bracher, *ib*, 322 f, 339 f, 416 f, 426 f, 511 f).

⁷⁴When Brüning was appointed, the National Parliament was still composed in conformity with the elections of 20 May 1928 where the Communist Party got 10.6% and the NS only 2.6% of the vote. Although these figures changed considerably in the elections of 14 September 1930 where the NS increased their share to 18.3% and the Communists to 13.1% (cf. Bracher (1964) 364 f), it was only the elections of 31 July 1932 in which the NS (37.3%) and Communists (14.3%) together got a *negative totalitarian majority of votes as well as of seats* (230 + 89 out of 608) the latter of which was maintained in the elections of 6 November 1932 (196 + 100 out of 585).

⁷⁵See Bracher (1964) 292 f, 297 f, 301 f.

2.1.2. The Presidential Ordinances of 28 March 1931, of 17 July 1931, of 13 April 1932 and of 14 June 1932. Specifically directed against the extremist action of Communists, but also, and in particular, of the NS and their right-wing partners on 28 March 1931 the National President issued an ordinance based on Article 48 (2) WC⁷⁶ which brought **tougher surveillance regarding political assemblies** (in particular paragraph 1), including their advertising (by leaflets as well as by media) and which also enabled authorities to **prohibit party uniforms** (paragraph 8).

On 17 July 1931, a second ordinance (RGBl I, p. 371) obliged all periodic media to publish, on request, official announcements; moreover, paragraph 2 allowed the seizure of all issues which endangered public order and security. Several ordinances followed⁷⁷, until on 13 April 1932, the direction taken by paragraph 8 of the first ordinance of 28 March was intensified by another ordinance which – based on intelligence from the Prussian Police⁷⁸ – dissolved with immediate effect ‘all military organisations’ *only of the NS-Party*, in particular the SA and the SS. Finally, all these ordinances, together with the ordinance of 3 May 1932 (RGBl I p. 185) were **codified** by the Ordinance of 14 June 1932 (RGBl I, p. 297). Its public impression, however, was reduced to the fact that not only had the unconditional and specific *prohibition only of NS armed forces* imposed by the ordinance of 13 April 1932 *not been maintained*⁷⁹, but also paragraph 8 of the Ordinance of 28 March 1931 was replaced by an provision *enabling only the national minister of the Interior to prohibit assemblies* [paragraph 4 (1) (2)].

That this (perhaps naive) attempt to once again pay tribute to the ideas of *general law* as well as of *equal treatment* in all parts of the national territory (both forming part of the rule of law) did, however, not imply a fundamental change of attitude of assessment of the NS – at least not by *Franz v. Papen*, appointed as head of government on 1 June 1932 – is evident from what happened during his term of office⁸⁰:

2.1.3. The draft of 24 November 1932. In summer and autumn 1932 the national government headed by Papen, a *Westphalian conservative Catholic* who, however, had to leave the Catholic

⁷⁶RGBl I, p. 79, see Bracher (1964) 396.

⁷⁷cf. paragraph 20 (2) of the PO of 14 June 1932, Nos 3-5.

⁷⁸See Bracher (1964) 481 f.

⁷⁹cf., also for the background, Bracher (1964) 545 f, who, however, reports (on p 548, in particular fn 109) *obviously erroneously* an ‘ordinance of 16 June, RGBl I, p. 302’, having cancelled the prohibition of the SA; but neither the first Implementing Ordinance (of 17 June 1932, RGBl I, p 302) nor the second Implementing Ordinance (of 17 June 1932, RGBl I, p. 306) deal with this matter. In fact, this cancellation was effected by (i) the Presidential Ordinance of 28 June 1932, RGBl I, p 339, and (ii) the Implementing Ordinance of 28 June 1932, RGBl I, p 339 f (see Bracher, ib, 551).

⁸⁰cf. also the Presidential Ordinances (i) of 29 July 1932, RGBl I, p. 389, (ii) of 9 August 1932, RGBl I, p. 403 f, (iii) of 9 August 1932, RGBl I, p. 407, and the Implementing Ordinance of 9 August 1932, RGBl I, p. 404 (see also Bracher [1964] 618).

Party ('Zentrum') on 2 June⁸¹ had indeed worked out plans for the transition to a 'New State'⁸² - a vague concept drawing mainly⁸³ from, in essence, traditional *Catholic elements* of the time favouring professional representation⁸⁴ instead of political parties, aristo- and meritocratic balances⁸⁵ against egalitarian votes⁸⁶, the mythos of the 'sacrum imperium'⁸⁷, the rule of natural law⁸⁸ and ultimate responsibility before God⁸⁹, as promoted by the *Austrian conservative Catholic Othmar Spann*, in particular,⁹⁰ - recommended as an alternative to modern democracy as well to modern Totalitarianism and directed against the rise of Hitler's party⁹¹, but at the

⁸¹See Bracher (1964) 535, fn 30.

⁸²See e.g. Braatz (1975) 321, 325 f; Bracher (1964) 536 f, 542 f, 593 f, 611, 614; Bracher/Sauer/Schulz (1960) 38. Apparently, Papen imagined, even after 30 January 1933, that he was still on the road to his 'New State' - otherwise he would not have welcomed Hitler's promise that the elections (for a National Parliament) of 5 March would be the last ones to be held (see Jung [1995] 14).

⁸³Of course, the general reception of this thinking also, and in particular, outside the Catholic minority was (against the background of an unsatisfactory level of party cooperation, see supra text before fn 75) facilitated by a **general authoritarian mood**, not least favoured by German *industry* as well as by Prussian *landlords*, but also by the National President Hindenburg and by parts of the *national armed forces* ('Reichswehr'), see Bracher (1964) 289 f, 299 f f, 343 f. In this vein, Brüning, a member of the Catholic party and head of the national government 1930-1932 (see supra fn 73) had, as early as 1931, explored the **option of restoring the monarchy**, although not in the form it had been until end of 1918, but resembling more the **British model**, and neither calling back Wilhelm II nor the Crown Prince Wilhelm (but rather one of his sons, see Bracher, ib, 444 ff). On the other hand, by no means did all members or even leaders of the Catholic party adhere to this traditional concept (neither in the *moderate* form represented by Brüning nor in the *fully-fledged* approach characteristic of Papen); in particular the hesitance of Bavarian prime minister Heinrich Held to call Prince Rupprecht to power [see infra subsection 2.3.2] was, apparently, due to *Held's democratic* grounding [see infra text by fn 121]; for the two wings within the Catholic party as well as for the gradual predominance of the conservative wing after 1928, see Bracher, ib, 297, fn 40).

⁸⁴cf. Bracher (1964) 541 ('ständisch getragene Selbstverwaltung').

⁸⁵cf. Bracher (1964) 541 f; Braatz (1975) 320, 326. The intention was to add a first chamber to the National Parliament composed of members appointed for life (but, apparently, not hereditary ones).

⁸⁶cf. Bracher (1964) 540 f.

⁸⁷cf. Bracher (1964) 541.

⁸⁸cf. Bracher (1964) 620, mentioning Papen's reference to the 'conservative rule of law' comprising 'faith in eternal law norms' in his grand programmatic speech of 28 August 1932.

⁸⁹cf. Bracher (1964) 544; Braatz (1975) 321.

⁹⁰See Bracher (1964) 545, fn 90. Spann himself, however, who had, at that time, already changed sides and clandestinely joined the NS movement in Austria, was nevertheless in 1938 detained for four months in the NS concentration camp Dachau (and severely ill-treated there).

⁹¹This *strategic* opposition against the NS movement did not hinder the *tactical* attempt to 'embrace' the NS in order to wear them out in government and, at the same time, make best use of their support among the electorate. Papen applied this approach in early August 1932 (cf. Bracher/Sauer/Schulz [1960] 40) and again when co-forming the government appointed on 30 January 1933 where he served only as vice-chancellor but thought, nevertheless that *he could control Hitler* (cf. Bracher [1964] 729, fn 211).

same time also⁹² (and maybe even more so⁹³) against the Communist Party.⁹⁴ This goal was to be achieved not only by issuing Presidential Emergency Ordinances based on the said Article 48, but also by *dissolution of the National Parliament* and – this was a new emergency element not explicitly provided by the Constitution⁹⁵ – by **postponing elections** for the new Parliament for an **indefinite** period.⁹⁶

⁹²Likewise, the coup d'état (likewise based on Article 48 (2) of the Weimar Constitution) against the Prussian caretaker government led by a *Social Democrat* (for the composition see *infra* fn 108) on 20 July 1932 ('Preußenschlag'; see in more detail Möller [2001] 298 f, in particular the references given in fn 275; Braatz [1975] 312 f, 327 f, 331 f) was not so much directed against the Social Democrats as such, but

- on the one hand aimed to solve the lack of coordination between the National State and the federated state of Prussia due to the flagrant disproportion (Prussia, as one of 18 federated states, comprising alone about three fifths of the population/territory of the National State) – a problem hidden in the pre-1918 era by the double **personal union** not only on the level of head of *State* (the Prussian king being *ex officio* also the German emperor), but also on the level of head of *government* (the *national chancellor almost always also serving as Prussian prime minister*, even in the case of Georg Graf v. Hertling who was a Bavarian, not a Prussian subject [!]) – but which was present during the whole Weimar period (cf. Anschütz [1933] 141 f, 145; Braatz [1975] 320, 323, 326; even the *Social Democrats* had, as late as 1928, considered solving this problem in the traditional form of a personal union: by proposing that Otto Braun, the Prussian prime minister, also be appointed head of the national government, see Bracher [1964] 288, fn 5)
- meant to strengthen Papen's position with regard to the NS, see Bracher/Sauer/Schulz (1960) 39; cf. also Bracher (1964) 590, 730, that Papen himself had claimed that the intention of this coup had been to **prevent NS control** of the Prussian police, something which was feared could happen in the near future if the Prussian government were to be taken over by an NS led coalition; although Bracher himself was rather sceptical as to the accuracy of this claim (cf. also [1964] 582), this view has been backed by others, cf. Gerhard Hoogers/Gohar Karapetian ([2018] 257 f, 271). In addition one might speculate that Papen's loyalty to *Prussia* as such, compared with the National State (the 'Reich'), could have indeed been limited, given the religious tensions during the 19th century (in which two Catholic archbishops of Cologne, Clemens Baron Vischering and Paul Melchers, had been arrested by the *Prussian* government). From both perspectives, the effect on the Social Democrats of this action would have amounted just to a sort of 'collateral damage'.

⁹³From the *contemporary* perspective, **Communism backed by the Soviet Union could have seemed to be much more dangerous** than Hitler's party which then controlled only the governments of some minor German federated states (Anhalt, Mecklenburg-Schwerin, Oldenburg, Thüringen). This had indeed also been the view of Alfred Hugenberg, leader of the nationalist party, Hitler's coalition partner in the national government appointed on 30 January 1933 (see Bracher [1964] 350).

⁹⁴In Prussia, the famous clash *between the NS and Communists* in Altona on 17 July 1932 ('Altonaer Blutsonntag') provided the final argument for the 'Preußenschlag' (see previous fn but one), cf. Möller (2001) 301; and Papen justified this coup on the very day (20 July 1932) in his national broadcast speech in particular with reference to the *Communist* danger (see Bracher [1964] 589). The seriousness of this warning has to be assessed against the facts that since the elections of (i) the Prussian Parliament on 24 April 1932 (ii) the National Parliament of 31 July 1932, the NS and Communists together had the – *negative* – *majority* in the respective Parliaments (cf. already *supra* fn 74); consequently, it was no longer possible to form a government backed by a parliamentary majority without the participation of one of these two parties on a national and on a Prussian level, respectively.

⁹⁵Not only was this suspension not *mentioned in Article 48 WC* (see *supra* fn 68) nor in *any other Article of the Constitution*. What is more, due to its *republican* character Germany then *lacked the monarch's reserve power* (see *supra* fn 26). Hence, when Papen referred, as a historical precedent, to the conflict between Prussian prime minister Otto v. Bismarck and the Second Chamber of the State Parliament in 1862–1866 (see Bracher [1964] 672), he did not only overlook the fact that Bismarck's action could, at least formally, be considered to have taken place against the background of an unclear legal situation (cf. Kluckert [2018] 366 f), but that even if the government had dared to introduce a clear breach of the monarchical constitution this breach would still have been covered by the monarch's sovereign power – a power not at the disposal of the National President Hindenburg.

⁹⁶cf. Quaritsch (1989) 42 f, with references in fn 71. Bracher (1964) 672, reports that even the next step had already been envisaged, i. e. calling a new Constitutional Assembly or a Constitutional referendum, thus circumventing the Parliament – a very dubious piece of information: why should the majority in such a referendum/Assembly have differed from that in the ordinary Parliament?

These plans had – at that point in time⁹⁷ – been strongly supported inter alia by Carl Schmitt (then a conservative *Catholic* Westphalian⁹⁸, too) who was also involved in the drafting⁹⁹; nevertheless these plans were dropped at that time due to the scepticism expressed by members of the armed forces ('Reichswehr'), among those the minister for defence in Papen's government and successor of Papen as chancellor, general Kurt v. Schleicher, on 1 and 2 December.¹⁰⁰ The irony was, however, that only some weeks later also Schleicher made – once again¹⁰¹ – the same proposal¹⁰², but this time the Catholic Party¹⁰³ (and their former member Papen¹⁰⁴) insisted on a (formal¹⁰⁵) return to *parliamentary majority* government¹⁰⁶ – a position which led directly to Hitler's appointment on 30 January 1933.

2.2. The level of Prussia

On federated State level the Prussian¹⁰⁷ government¹⁰⁸ issued – even before the national government – measures targeted against the NS and communists:

- Prohibition for members of the Prussian Civil Service of membership in, or sharing activities with, or support for the NS and Communists by the Government Ordinance of 3 July 1930¹⁰⁹

⁹⁷Given what he had published only some years before (see supra fn 68) Schmitt must here already have *changed categories*: from the 'commissarial dictatorship' provided by the application of Article 48 (2) WC to an **unwritten law of emergency** (cf. [1928a] 234 f.).

⁹⁸cf. Quaritsch (1989) 25 f.

⁹⁹cf. Quaritsch (1989) 42 f, 84; Schmitt did, however, not communicate directly with Papen, but with the ministry of defence then led by general Kurt v. Schleicher, the former spiritus rector (see Bracher [1964] 518 f, 532 f) and immediate successor of Papen as head of the national government.

¹⁰⁰cf. Bracher (1964) 672 f, Raithel/Streng (2000) 427, both referring to the negative expertise of lieutenant-colonel Eugen Ott.

¹⁰¹See previous fn but one.

¹⁰²See Bracher (1964) 710.

¹⁰³See Bracher (1964) 711; cf. in particular for the position of the chairman of the Catholic Party, Prelate Ludwig Kaas (in sharp contrast to that favoured by Carl Schmitt), Quaritsch (1989) 45 f.

¹⁰⁴cf. Bracher (1964) 716.

¹⁰⁵How closely together the positions were, however, is illustrated by the report of a conversation between Kaas and the National President Hindenburg on 18 November 1932 where also Kaas strongly supported the idea of 'authoritarian government' as an alternative to parliamentary democracy (see https://de.wikipedia.org/wiki/Ludwig_Kaas, fn 9).

¹⁰⁶What is more: already in December 1932, when Papen had first made the very same proposal (see supra text before fn 96) all actors concerned had been fully aware of the *unconstitutionality* (see supra fns 68, 95) of the plan (see Bracher [1964] 672); while at that time, however, Hindenburg would have supported Papen (see Bracher, ib, 673), in January the National President also insisted that the Constitution be respected.

¹⁰⁷Prussia was then by far the most important federated state in Germany (see supra fn 92).

¹⁰⁸The dominant figure was the Social Democrat Otto Braun, with two minor exceptions in 1921 and 1925 prime minister from March 1920 until the 'Preußenschlag' (see supra fn 92). The last Prussian government based on a parliamentary majority was a coalition of three Social Democrats, *three Catholics* and two liberals.

¹⁰⁹cf. Bracher (1964) 360. In contrast, the national government (at this time Brüning) did not yet share this attitude.

- Prohibition of wearing NS uniforms of 11 June 1930 (withdrawn on 1 April 1931, due to a court decision)¹¹⁰

In addition, the Prussian Parliament modified its rules of procedure regarding the necessary majority for the election of the government just before the elections of 24 April 1932, thus enabling the previous government to stay in office even without a parliamentary majority.¹¹¹ Otherwise, most probably an NS prime minister would have been elected by the State Parliament already *as early as* in May 1932¹¹² - and thus from that point in time on would have had the Prussian police¹¹³ at his disposal.¹¹⁴

2.3. The level of Bavaria

2.3.1. Wearing uniforms by members of political parties prohibited. Bavaria – federated home state of Loewenstein and for almost the whole period of the ‘Republic of Weimar’ governed by the regional Catholic Party (the ‘Bayerische Volkspartei’ – BVP) – had already in 1930 taken measures against rising National-Socialism, in particular had prohibited (as strongly advocated by Loewenstein!¹¹⁵) the wearing of uniforms by members of a political party.

This prohibition, after a while imitated by other federated states¹¹⁶ and also backed by paragraph 8 of the aforementioned National Presidential Ordinance of 28 March 1931, had, however, to be withdrawn when this Ordinance was abolished, as already mentioned, by the Presidential Ordinance of 14 June 1932. A subsequent attempt of Bavaria’s government which had issued, on the basis of Paragraph 64 of the Bavarian constitution then in force¹¹⁷ (the federated state counterpart to Article 48 of the national Constitution) a State Emergency Ordinance, to restore the essence of this prohibition was, however, finally blocked by a National Presidential Ordinance of 28 June 1932.¹¹⁸

¹¹⁰See Mennen (2013) 273. One consequence of this prohibition was that on 13 October 1930 the members of the newly elected (on 14 September 1930) National Parliament belonging to the NS group had to put on their uniforms *within* the Parliament building (see Bracher [1964] 376).

¹¹¹See Bracher (1964) 502 f; Möller (2001) 299 f.

¹¹²In the elections of 24 April 1932, the NSDAP increased its share of the vote from 1.8% (1928) to 36.3%, whereas the Social Democrats’ share fell from 29% (1928) to 21%. This relative majority would, according to the former rules, have sufficed to bring a new prime minister into office.

¹¹³As mentioned supra in fn 92, *securing control over the Prussian police* (their manpower then was almost equivalent to that of the national army!) motivated Papen to his ‘Preußenschlag’.

¹¹⁴Pursuant to Article 45 of the Prussian constitution of 30 November 1920 then in force, all ministers were appointed by the prime minister.

¹¹⁵See supra fn 57. Obviously Loewenstein *only* referred to the *prohibition of the armed forces* of the NSDAP on the *national* level, neglecting all the other initiatives on a national as well as, in particular, a Bavarian level.

¹¹⁶See, for Hessen and Baden, Mennen (2013) 273, for Prussia (where the prohibition was not a general one, but restricted to NS uniforms, supra subsection 2.2).

¹¹⁷Of 14 August 1919. The WC did not bar outright the use of these emergency powers enshrined in a federated state constitution, although on this basis any infringement of national law was considered to be illegal (see Anschütz [1933] 276).

¹¹⁸RGBl I, p. 339. As already stated in the PO of 14 June 1932, prohibitions of this kind had to be issued in principle by the national minister of the interior (paragraph 2); competences of federated state authorities in that field were strictly limited to (i) cases of imminent danger, (ii) local application or (iii) individual cases and subject to control of the national minister (paragraph 1); see also https://www.historisches-lexikon-bayerns.de/Lexikon/Uniformverbot_1930-1932.

2.3.2. The idea of establishing Prince Rupprecht as a bulwark against NS. In late 1932/early 1933¹¹⁹ the idea of calling the former Bavarian Crown Prince Rupprecht to power (under Article 64 of the Bavarian Constitution then in force¹²⁰) was discussed, calculating that the National President would not dare to overrule such an appointment. The attempt failed, however, not least due to the fact that prime minister Held was unwilling to become sufficiently subordinate to Prince Rupprecht.¹²¹

This idea as such was, however, not too far-fetched – there had been already a precedent ten years ago when the former prime minister Gustav Ritter v. Kahr had been appointed as ‘Commissioner General’ from 26 September 1923 until 17 February 1924 by the Bavarian government, pursuant to the afore-mentioned Paragraph 64, exercising **dictatorial powers, including command of the national armed forces stationed in Bavaria**. Although *Kahr’s appointment* had then not been directed against Hitler, nevertheless this model would have provided **much symbolic force** because, during Hitler’s attempt to start a coup d’état in Munich on 8/9 November 1923, it had been Kahr’s decision not to join this action, but, on the contrary, to prohibit Hitler’s party in the early morning of 9 November 1923 and to crush the so-called ‘March to Berlin’ while it was still in the centre of Munich (at the ‘Feldherrenhalle’ monument), which had been **decisive for the failure** of this first attempt by Hitler to seize power (and for his subsequent conviction).¹²²

2.4. The tragedy of the Presidential Ordinances of 4 and of 28 February 1933

Against the background set out in subsections 2.1 - 2.3 one can indeed gain the impression that Loewenstein’s –at first sight *general and purely theoretical* - plea for a ‘militant’ reaction against ‘fascism’ is, in essence, not much more than a well disguised regret that the *concrete attempts* which *had in fact been pondered* or even set out on a national as well as on a federated state level *had not been effective enough* to stop Hitler’s party in time.

This regret is the more understandable when taking into account that, immediately after having been appointed as head of national government, it was Hitler who was able to motivate the National President to issue exactly the type of ordinances Papen and Schleicher had requested before in vain¹²³: first, the one issued on 4 February 1933¹²⁴ and second, after the fire in the National Parliament Building on 27 February, the Ordinance of 28 February¹²⁵ - and that it was

¹¹⁹There is evidence that prime minister Held threatened this option even in the *afternoon of 28 February* (in a telephone call with vice-chancellor Papen) trying to prevent paragraph 2 of the (then drafted) National President’s Ordinance of 28 February 1933 (see *infra* lit D), see Raithel/Strengé (2000) 432, fn 102.

¹²⁰Also Article 48 (4) WC would have provided a basis.

¹²¹See in more detail v. Aretin (1981) 513 f.

¹²²Hitler did not forget this contribution – on 30 June 1934, in the context of the action against Ernst Röhm, Kahr was murdered in Dachau (see *supra* fn 47).

¹²³Of course, the situations are different, but only in degree: it was not only Papen and Schleicher who had lacked a parliamentary majority; Hitler too, before the elections of 5 March 1933, did not enjoy a majority; his intention was, however, not to suspend general elections for an indefinite period – but in contrast, he *aimed* to win the elections – although with the support of this Ordinance which had intimidated already large parts of the electorate belonging to the opposition.

¹²⁴RGBl I, p. 35, cf. Raithel/Strengé (2000) 428. This ordinance had already considerably hampered the opposition’s activities in the campaign for the elections to the National Parliament of 5 March 1933.

¹²⁵RGBl I, p. 83; cf. Raithel/Strengé (2000) 416 f, 428 f.

exactly these Ordinances (the latter only allegedly directed, like most of its early predecessors¹²⁶, only against *Communist* actions¹²⁷) which now, administered by National Socialists, helped *them into power* – first on a national level (via the elections of 5 March 1933¹²⁸), but very soon also on a federated state level¹²⁹, in particular also in Bavaria¹³⁰ – instead of barring them.

That also, and in particular, this latter Ordinance – ‘for the protection of the People and the State’ – was also *directed against the Catholic party* very soon became apparent when also in Bavaria *from 9 March 1933 on*, a national Commissioner took over the responsibilities of the state government (prime minister Held, consequently, finally resigning from office *on 27 March*). What is more, it was not only the Catholic Party which was forced to dissolve (as was every other party except the Social Democrats and the Communist Party which were prohibited), but also the Catholic *students’ associations* were *immediately* brought under NS control¹³¹, thus *severely hampering the further cohesion and expression of the academic elite*¹³² of Catholic ‘civil society’.

3. THE AUSTRIAN CASE

3.1. The facts

3.1.1. Chancellor Dollfuß was perfectly aware of the German developments. First it has to be emphasized that, in particular, the head of the Austrian government (‘Bundeskanzler’) of that time, Engelbert Dollfuß, *must have been fully aware of the situation in Germany*, both on the national and the federated state level (in Prussia, but in particular in Bavaria) and *within the Catholic milieu*:

¹²⁶See supra fn 70.

¹²⁷The first sentence of this Ordinance contains the motivation: ‘zur Abwehr kommunistischer staatsgefährdender Gewaltakte’ (‘to fend off Communist violence endangering the State’; translation by A.B.). This sentence obviously reflects the fact that it was the Communists who had been held responsible for the fire by the Government (this hypothesis was, however, never verified: indeed, several Communist leaders charged with that accusation were acquitted by the German Supreme Court [‘Reichsgericht’] on 23 December 1933).

On the other hand, making the implicit cause explicit was a fairly *new element* (cf. Raithel/Streng [2000] 435, referring to only one predecessor, the emergency Ordinance of 3 May 1932, also directed against Communists which had been criticized in the media for breaching the principle of equal treatment; Raithel/Streng *themselves* comment that singling out the ideological addressee could be understood as a restriction of application, but also that the State gave up its ideological neutrality, taking sides in the ideological warfare).

¹²⁸See supra fn 19.

¹²⁹cf. in particular the National Act of 31 March 1933, RGBl I p 153 (‘Vorläufiges Gesetz zur Gleichschaltung der Länder mit dem Reich’).

¹³⁰See text right infra.

¹³¹See Fritz/Handl/Krause/Taus (1988) 48 f.

¹³²Despite the term ‘students’ associations’ these associations comprised, due to the principle of life-time membership, not only active students, but *all former students who had finished their studies*.

- On the one hand, Dollfuß had not only met Franz v. Papen in 1931 at the Austrian Catholic Party's Congress in Klagenfurt¹³³, but participated in September 1932 in the German National Catholic Congress in Essen where his invitation that the Congress should meet next year in Vienna 'was enthusiastically received'¹³⁴, paying on that occasion a personal visit to the Bavarian prime minister Heinrich Held – who belonged to the very same social group as Dollfuß¹³⁵ – on 3 September 1932 at the Munich aerodrome.¹³⁶
- On the other hand, Dollfuß, in his capacity as chairman of the alumni section¹³⁷ of an Austrian Catholic students' association which at that time still belonged to the *German* umbrella association ('Cartellverband' – 'CV') was not only *directly affected* by the measures effected against this umbrella organisation and its member associations in Germany by National-Socialists as early as end of May 1933¹³⁸, but was *personally* perceived by them as an 'enemy'.¹³⁹ What is more, it was precisely these NS-measures which led to the *declaration of independence* of the Austrian (and Czechoslovakian) associations in **early July 1933**.¹⁴⁰ **From this point in time at the latest** Dollfuß must have been aware that the German NS (government and party) also posed a severe threat to Austrian Catholics, the more so, because Hitler combined the positions of supreme head of the *Austrian* NS party with that of the head of the *German* national government¹⁴¹, without any reciprocal opportunity to interfere in Germany¹⁴² for the Austrian side.¹⁴³

¹³³See v. Schuschnigg (1938) 160.

¹³⁴See v. Schuschnigg (1938) 160 f (cit 163). Both Brüning and Papen had been invited to this congress, but both declined the invitation due to the personal tension between them, a fact which was very well noted by Schuschnigg (who had accompanied Dollfuß), speaking of 'a cold shadow' which 'could be sensed here and there' (cit ib, 162).

¹³⁵Held was also a member of several Catholic students' associations, one of them an *Austrian* one.

¹³⁶https://austria-forum.org/af/Bilder_und_Videos/Historische_Bilder_IMAGNO/Dollfu%C3%9F%2C_Engelbert/00623702. Dollfuß was accompanied here (I owe this knowledge to Karl Schrammel, secretary general of the Austrian Federation of Catholic Students' Associations [ÖCV]) by Otto Kemptner (on the left side behind Dollfuß), then Dollfuß' secretary in the Federal Chancellery and from 1. 8. 1933 on, secretary general of the Patriotic Front – a fact which underlines the political character of this visit.

¹³⁷See right supra fn 132.

¹³⁸See right supra fn 131.

¹³⁹See Fritz/Handl/Krause/Taus (1988) 9: Dollfuß and all other members of the Austrian government who were members of a CV association had been dismissed by the newly installed 'leader' of the CV, Edmund Forschbach.

¹⁴⁰See Fritz/Handl/Krause/Taus (1988) 9 f.

¹⁴¹See Kindermann (1984) 34 f; Hanisch (1994) 317 (on a lower level the same model of a double role was applied: Theo Habicht, leader of the Austrian NS, was a member of the German national Parliament; see Hanisch, ib, 219); Wohnout (2014) 55.

¹⁴²In principle, the Catholic Church could have played exactly this role, and indeed the Austrian bishops tried to step in (see infra fn 178), whereas their German colleagues had been duped by Hitler, cf., for background and motivation of the 'Declaration of Fulda' of 28 March 1933, Mikat (1962) 209 f, in particular 223 f, 235 (text).

¹⁴³The situation at that time was similar to well-known situations where Communist parties in certain countries were backed and supported either by Soviet-Union or, after 1949, by the People's Republic of China.

- Only in addition it should be mentioned that Dollfuß had, in 1920, spent several months in *Berlin* (the national capital as well as *Prussian* capital) as a student and met his wife there ¹⁴⁴; so it can be presumed that, from that time on, he had had much *closer ties to Germany (and Prussia in particular) than the average Austrian politician of that time.* ¹⁴⁵

This German prelude – and the fact that awareness of it was not shared among all Austrian actors to the same extent – is the main key ¹⁴⁶ to the proper understanding of the Austrian tragedy which followed:

3.1.2. The Austrian developments

3.1.2.1. The struggle to remain independent. Whereas already in April 1932 regional elections had resulted in a remarkable rise of the Austrian NSDAP, although not yet of German dimensions ¹⁴⁷, Dollfuß opposed and stressed at least **from autumn 1932** on the *capability* of Austria to survive as an **independent state** ¹⁴⁸ – obviously a remarkable shift in the Austrian position which had been, from the very beginning of the Republic (originally named ‘German Austria’) that, after the decline of the Danube Monarchy, unification with the German National Republic was to be achieved as soon as possible ¹⁴⁹; this conviction of Dollfuß laid the basis for the **struggle** for independence following Hitler’s appointment to head of the German national government. ¹⁵⁰ In contrast, Hitler was, after 5 March 1933, first of the opinion that Austria could be taken over in almost the same way as the German federated states. ¹⁵¹ He had, however,

¹⁴⁴ Alwine Glienke was born in Poppow (Lauenburg in Pommern) which meant that *Prussia* was *her home State*; cf. Schaunig (2010) 57 f; see also E. Weber (1935) 6.

¹⁴⁵ One exception was Ernst Rüdiger Prince Starhemberg, vice-chancellor since 17 May 1934 – but his impressions of Hitler (cf. Kindermann [1984] 111 ff) can only have supported Dollfuß’ view.

¹⁴⁶ Hence, authors like Tólos (2013) who downplay the relevance of the ‘resistance against NS’ factor (cf. the quite cursory manner by which the phenomenon ‘NS in Austria’ is dealt with on pages 52 f, 501 f) fail to grasp, despite many correctly reported individual facts, the very essence of the Austrian government of the time and, therefore, are led to a *fundamental misinterpretation of its aims and character.*

¹⁴⁷ cf. Kindermann (1984) 61; Reisberg (1974) 148; Hanisch (1994) 147; see also Kreisky (1986/1995) 184.

¹⁴⁸ See Kindermann (1984) 62; cf. also Kreisky (1986/1995) 207 f, reporting there that he (Kreisky) was sent (by Benedikt Kautsky) already in 1929 when drafting his College thesis and in that context looking for support for his opinion that Austria was economically capable to survive, to Dollfuß, then still director of the Agricultural Chamber of Lower Austria.

¹⁴⁹ cf. the first sentence of Article 2 of the Act of 12 November 1918 on the form of State and Government, StGBI No 5; Kelsen/Froehlich/Merkel (1922) 66; Berchtold, (1998) 35 f, 82 f; Hanisch (1994) 265, 271, 308 f. Still in 1930, however, the League of Nations vetoed the attempt at a customs union (see Bracher (1964) 398 f; Kindermann (1984) 29; Berchtold, ib, 605 f). On the other hand already the fact that in 1929 when amending the constitution the position of the Federal President was shaped on the model of the German National President showed (not, however, without any controversy, see below fn 200) that Austria had increased her confidence in her existence as a independent state. Likewise, at this time the Austrian minister for Justice (later on chancellor) Schuschnigg no longer preferred to speak of ‘unification’, but of a mere ‘alliance’ (see v. Schuschnigg [1938] 167).

¹⁵⁰ This fact had already been explicitly and unconditionally stressed by Hanisch (1994) 317.

¹⁵¹ cf. Wahnout (2014) 56 f.

to learn that neither the takeover of the Pan-German party¹⁵² nor terrorist acts¹⁵³ nor public demonstrations (like that of Bavarian minister for Justice Hans Frank in Vienna in May 1933¹⁵⁴) nor economic pressure (the famous 1000 mark tax, a retorsion for the expulsion of Frank by the Austrian government¹⁵⁵) would suffice¹⁵⁶:

On the contrary, being well aware of the full extent of the danger¹⁵⁷ (in particular, that *the NS did not need to wait for an absolute majority* of votes¹⁵⁸ in order to take over the country¹⁵⁹)

- already, immediately after the 5 March 1933, seizing the opportunity the events in Austrian Parliament of 4 March offered (see *infra* subsection 3.1.2.2), the decision was taken¹⁶⁰ to prevent further general (and other¹⁶¹) elections¹⁶²;

¹⁵²cf. [Berchtold \(1998\)](#) 746: on 15 May 1933 this party formally subordinated to Hitler, but already on 16 April a preparatory manifesto was published (signed, on behalf of the Pan-Germans, by Straffner, former third president of the first chamber of Parliament [see *infra* fn 196]).

¹⁵³cf. [Wohnout \(2014\)](#) 57, 63; [Tálos \(2013\)](#), 52 f.

¹⁵⁴cf. [Kindermann \(1984\)](#) 63.

¹⁵⁵cf. [Kindermann \(1984\)](#) 63; [Wohnout \(2014\)](#) 63.

¹⁵⁶cf. for a consolidated view on the NS measures and the government's reactions also [Hanisch \(1994\)](#) 319 f.

¹⁵⁷The victory of the NSDAP on 5 March in the German National Parliament elections immediately triggered not only more than 1000 assemblies in Austria (bonfires on the top of mountains not included) but a public demand by the Austrian NS leader as early as 6 March to hold general elections and to build a new, strong and 'national' government (see [Berchtold \[1998\]](#) 710). When discussing the measures of 7 March (see *right infra* in the main text) Dollfuß referred to precisely these events (see *id*, *ib*, 714).

¹⁵⁸This finding makes a **decisive difference** to *Loewenstein's second premise* (see *supra* subsection 1.1.1; cf. also fn 22).

¹⁵⁹As the former chancellor and minister of the army for many years Carl Vaugoin expressed it on 14 March 1933: a 30% vote for the NS would suffice for their dictatorship (see [Berchtold \[1998\]](#) 727) – a quite accurate assessment, in particular because the NS would not have contented themselves with purely legal means, as can be inferred not only from the subsequent events preceding the insurrection of 25 July 1934 (see, for plans of action already to be implemented in 1933 but then vetoed by Hitler, [Kindermann \[1984\]](#) 150, and for the plan for various actions in several Austrian regions outside the capital actually implemented in July 1934 *ib*, 159 f), but was then already well-known from the German 'Boxheim' document (disclosed on 25 November 1931 to Frankfurt police authorities, see [Bracher \(1964\)](#) 431 f). Moreover, it had to be feared that riots provoked on the streets by the NS would give Germany a *pretext* for *sending her army* (such a scheme was in fact put into action in March 1938, Chancellor Schuschnigg referring to it in his Farewell Broadcast Speech of 11 March 1938 ('I declare before the world that the reports issued in Austria concerning disorders created by workers and the allegation that the situation had got out of control of the government were lies from A to Z'; *cit v.* [Schuschnigg \[1938\]](#) Appendixes III, 328).

¹⁶⁰See, in more detail, [Wohnout \(2014\)](#) 52 f.

¹⁶¹By ordinance of 10 May 1933 (BGBl Nr 172) local and regional elections were suspended, initially until 31 October 1933 (prolonged by ordinance of 12 October 1933, BGBl Nr 476, until 31 March 1934).

¹⁶²Of course, it was **the NS in particular** who **tried to enforce new general elections**, in order to promote the unification of Austria with Germany (see *right upra* fn 157, but also [Berchtold \(1998\)](#) 746). This demand was still supported by the experience of the local elections in Innsbruck, capital of the Tyrol region, where – on 23 April 1933 – the NSDAP's support rose from 3.82% to 41.21% (!; see [Wohnout \[2014\]](#), 59, fn 19; [Berchtold](#), *ib*, 747).

- already on 7 March 1933 surveillance of the *press* was enhanced¹⁶³ and *assemblies* of every kind prohibited¹⁶⁴;
- the efficacy of internal security was enhanced by
 - o the centralization of the police¹⁶⁵
 - o the acceptance of assistance provided by the armed forces of patriotic associations¹⁶⁶;
- in May 1933 (after the failure of negotiations with the NS¹⁶⁷) NS uniforms were prohibited¹⁶⁸, on 9 June the main medium of NS propaganda, the ‘Völkische[r] Beobachter’, as well as 13 other NS media¹⁶⁹, and on 19 June the whole NS party (SA and SS included)¹⁷⁰ - but there was, in sharp contrast to Germany’s behaviour with regard to ‘enemies’, no physical ill-treatment of NS individuals¹⁷¹;
- on 1 September, the ministry for the armed forces was relabelled ‘ministry for defence of the country’ (‘Landesverteidigung’) and in paragraph 2 of the Federal Act on Defence the purpose ‘defence of the frontiers of the State’ upgraded (from *litera c* to *litera a*)¹⁷²
- from 7 to 12 September 1933 the ‘General German Catholic Congress’ took place in Vienna¹⁷³ and attracted several tens of thousands of participants, *although* not officially recognized by the German authorities and, hence, participation from Germany was impeded. In this context, the famous speech of Dollfuß at the Viennese Turf on 11 September¹⁷⁴ marked the start of the

¹⁶³See the ordinance based on the KWG BGBl 1933/41, obviously partly derogating the Decision of the Provisional National Assembly of 30 October 1918, StGBI No 3. On 26 April 1933, an ordinance directed against the dissemination of leaflets and other printed material the content of which could disturb public order, followed (BGBl No 155).

¹⁶⁴Strictly speaking, the chancellor (then also competent in matters of internal security) did not in general prohibit assemblies by an ordinance but issued an *instruction* that the competent authorities *should*, without any exception, prohibit assemblies based on paragraph 6 of the Act on Assemblies (RGI 1867/135; see Berchtold [1998] 715, 721, fn 52).

¹⁶⁵By ordinance of 0.13 June 1933, BGBl No 226, regional commanders of the police (‘Sicherheitsdirektoren’) subordinated directly to the minister (then the chancellor himself) were established. Already by ordinance of 10 March 1933, BGBl No 43, a federal police authority had been established in the capital of the Tyrol region, Innsbruck (for the reason for this choice see right *supra*, fn 162).

¹⁶⁶See Kindermann (1984) 109; Staudinger (1971) 297 f, 360 f.

¹⁶⁷cf. Berchtold (1998) 747 f.

¹⁶⁸As a precondition thereof, Dollfuß had felt the need to prohibit (at least *formally*) the armed forces of the Social Democrats (see *infra* fn 285).

¹⁶⁹See Kindermann (1984) 108.

¹⁷⁰See Kindermann (1984) 109. Also here (cf. *supra* previous fn but one) this prohibition was preluded by the prohibition of the (small and unimportant) Communist Party on 26 May (see Wohnout [2014] 66).

¹⁷¹cf. Schölnberger (2010), 3: ‘In Wöllersdorf wurde weder gehungert noch gefoltert noch gemordet.’ cf. also Tálos (2013), 285 f, in particular 291 f, and 581 f.

¹⁷²See BGBl 1933/392.

¹⁷³According to the invitation made by Dollfuß in Essen 1932 (see *supra* text by fn 134); cf. also Schuschnigg (1938) 184 f.

¹⁷⁴‘Trabrennplatzrede’ (for the full text, see https://austria-forum.org/af/Wissenssammlungen/Symbole/Faschismus_-_die_Symbole/Trabrennplatzrede_1933); cf. also v. Schuschnigg (1938) 184; Wohnout (2014) 67; Jabloner (2014) 103; Huemer (1975) 241 f.

‘new state’¹⁷⁵ – not least understood as the ‘better German State’¹⁷⁶, i.e. the *civilized* and *Europe-oriented* alternative to NS barbarism within the traditions of Catholic religion, German culture and population and, thus, introducing a new (and for Hitler in particular dangerous) level of (*spiritual*) quality¹⁷⁷ into the resistance to NS pressure;¹⁷⁸

- on 1 May 1934, a fully-fledged new constitution – offering rule of law¹⁷⁹ as well as fora for Parliamentary deliberation, but avoiding general elections – was adopted (subsection 3.1.2.3)
- Not even the **assassination** of Dollfuß on 25 July 1934 in the course of an **NS insurrection**¹⁸⁰ brought the NS immediate success – but from that point on resistance weakened remarkably.

3.1.2.2. The Self-Blockage of the Austrian Parliament on 4 March 1933. These substantive measures (just mentioned supra in subsection 3.1.2.1) as such were, however, not only facilitated, but in fact **triggered** by a **contingent** event (almost¹⁸¹) **completely outside** the NS context (3.1.2.2.1); nevertheless it was exactly the evaluation of this event which played – although the connection was, in a rational analysis, nothing but a *bizarre mix-up* – a decisive role in the evaluation of the substantive measures (3.1.2.2.2).

3.1.2.2.1. The self-blockage as such and options for a way out. On Saturday (!), 4 March 1933, in the course of a highly emotional plenary discussion and against the background of a very

¹⁷⁵The speech started with the commitment: ‘Wir wollen das **neue Österreich**’ – the similarity to *Papen’s* ‘New State’ (see supra fn 82) is evident.

¹⁷⁶cf. *Kustatscher* (2016) 414 f, in particular the references in fn 1,168; see also v. *Schuschnigg* (1938) 6 f, 185 f; E. *Weber* (1935) 63 f, 75 f, 206, 234 f; *Zeyringer/Gollner* (2012) 482; *Zenker* (2016), 19; *Tálos* (2013), 70, 74 f.

¹⁷⁷The Austrian constitution still retains an allusion to this spiritual element of defence when defining the four dimensions of ‘fully-fledged defence of the country’ in Article 9a (2) B-VG since BGBl 1975/368 as military, *spiritual*, civic and economic.

¹⁷⁸cf. for this dimension in more detail *Kindermann* (1984) 52 f. Also the *Austrian* Catholic Bishops had already issued in *December* 1933 a verdict against NS, in sharp contrast to their *German* counterparts who had cancelled their prior verdict quite soon after Hitler’s rise to power on 28 *March* 1933 (see supra fn 142). Against the background of the traditional *global unity* of the Catholic Church this **Austrian contradiction of the German declaration amounted to its formal withdrawal** (*also and in particular with regard to the German Reich!*) already three years before the papal Encyclica ‘Mit brennender Sorge’ of 14 *March* 1937 was issued, thus underlining the official argument of the Dollfuß government that *Austria* was then (apart from Saarland and the city of Danzig) the **only part of Germany which had kept her independence from NS** and where, therefore, Catholic Church was still free to utter the truth (see also *Kindermann*, ib, 53). Against this evidence the assessment of *Kreisky* (1986/1995) 211, that there had hardly been any difference between Hitler and Dollfuß (and, thus, the latter’s attitude of resistance was not credible) shows a remarkable rejection of the facts (cf. for such an attitude already supra fn 3).

¹⁷⁹See infra fn 237.

¹⁸⁰See in more detail for these events – which are the **best ex-post-facto proof for the level of danger Austria had been facing since 5 March 1933** – *Kindermann* (1984) 139 f.

¹⁸¹The issue of the Parliamentary debate had been the application of an ordinance of 27 July 1914, RGBl No 155, sanctioning strikes in the public service, with regard to a strike of railway workers on 1 *March* 1933 (cf. also *Tálos* [2013] 31). This strike, however, had been *instigated mainly by the NS*, although Catholic and Social Democrat trade unions felt obliged to support this strike (see *Berchtold* [1998] 699). It may well be that this specific background contributed to the government’s resoluteness during the debate.

narrow government majority, suddenly all three presidents of the first chamber of the Austrian Parliament ('Nationalrat') **resigned**.¹⁸² Obviously, Dollfuß could not have planned this development (the first president, who initiated it, was Karl Renner, a very prominent Social Democrat, the third one, who gave full effect to it, a Pan-German).¹⁸³

Apparently, not only the opposition¹⁸⁴, but also the government¹⁸⁵ (the Federal President included¹⁸⁶) were still for a while – although without any in depth legal analysis!¹⁸⁷ – of the opinion that there **would be some legal way to solve the impasse**, caused by what, at first sight, had been no more than a technical mishap and focused on the aspect of political will¹⁸⁸. The

¹⁸²There is no doubt that all three presidents in fact **stepped down from their office as such**, rather than just leaving the chair of the session temporarily, cf. *Berchtold* [1998] 704 ff (emphasis added), in particular 704, also fn 10 (where with regard to the first president Karl Renner we read (i) 'Ich lege meine *Stelle als Präsident nieder*', and, even more precise: (ii) 'Er *legte sofort das Amt zurück*'), 706 (where the discussion of *whether resignation* from office had legally been possible is referred to), and 717, fn 42, first part (where Renner, in a statement of 9 March 1933, argues that a president even *in statu demissionis* still has obligations). For the answers of the government and of the Federal President (who both had the understanding that a *full resignation* had happened) see *infra* fn 197 and fn 199, respectively.

Resignation from this office was also – although not unanimously – considered as **allowed** and, thus, **valid** (cf., for the contemporary mainstream view of the doctrine *Jablonec* [2013] 377 f, (i) with regard to the office of the *head of State* 377, fn 2, 381 f, 386 f, (ii) with regard to the office of the president of the National Assembly 388. The opposite was advocated among academia by Ludwig Adamovich sen. (see *Jablonec*, *ib.*, 377, fn 1, 380 f), and among practitioners by Karl Seitz, then mayor of Vienna (see *Berchtold* [1998], 706, who himself, however, forms part of the mainstream, too, see *ib.*). Hence it required formal legislation (insertion of a paragraph 38a in the Act on the Rules of procedures by KWG-Ordinance of 24 April 1934, BGBl Nr 238) to reactivate the House (see *infra* fn 203).

¹⁸³See in more detail, *Janystin-Nowak* (2014) 7 ff; *Berchtold* [1998] 699 ff. From a modern perspective it is really hard to understand **how frivolously the parties concerned put at stake the constitution** and the state – apart from the levity mentioned in the previous fn it has to be emphasized that *the sole purpose* of the resignations (to reactivate the right to participate in the parliamentary poll at issue of the respective president, by blocking the same right of the succeeding president) *by no means required resignation from office*, but *only to temporarily leave the chair* (the provision at issue, paragraph 60 A of the rules of procedure running: 'Der *Vorsitzende stimmt ... niemals mit*').

¹⁸⁴cf., apart from the activities of former third president Straffner, in particular the resolutions of the second chamber of Parliament (the 'Bundesrat') on 17 March 1933 and of the *Viennese* regional assembly where the Social Democrats held an absolute majority on 9 March 1933, of the *Salzburg* regional assembly and of the regional assembly of *Lower Austria* where the Social Democrats together with the NS held the majority on 10 and 14 March, respectively (see *Berchtold* [1998] 738 f, 721 f, 724 and 728, respectively).

¹⁸⁵On 8 March 1933 the government declared that there was 'no State Crisis', because (i) Federal President and government were in office and (ii) the government did not wish that the country to be deprived permanently of Parliament (see *Berchtold* [1998] 716).

¹⁸⁶President Wilhelm Miklas was still, on 20 March, of the opinion that the appropriate instrument to solve the impasse was an emergency ordinance issued by him; with regard to the necessary requirement for this, i.e. the consent of the permanent subcommittee of the main committee of the first chamber of Parliament, he consequently urged consent from 'the parties' (see *Berchtold* [1998] 741).

¹⁸⁷It is really striking that, apparently, **when this question arose it was not immediately treated as one needing solid legal expertise, neither by the legal service** of any institution (with regard to the government's service we read only that its head, Hugo Jäckl, had, in the course of a meeting of the governmental groups on 14 March, been put a question to which he responded in an unwelcome way (see *Berchtold* [1998] 727) **nor by academia**.

¹⁸⁸Paradigmatically, on 14 March Odo Neustädter-Stürmer (Marquess de Gozani, then representative of the Patriotic Guards, later secretary of State and minister) admitted in an internal discussion of the governmental groups that it was well-known that a solution could be found, however, before that certain political goals should be attained (see *Berchtold* [1998] 727).

same view has been held up to the present, almost unanimously, by the community of Austrian lawyers¹⁸⁹ and historians¹⁹⁰ or political scientists.¹⁹¹ Most interestingly, however, Klaus Berchtold had already pointed out that in principle¹⁹² – as a more meticulous examination¹⁹³ reveals – after having accepted that full resignation had taken place with regard to all three presidents – there was indeed **no constitutional way**¹⁹⁴ at all left open to resolve the situation:

- With regard to the attempt by the former presidents, in particular of the third one, Sepp Straffner (who had stepped down last) simply to continue to act until new presidents were elected¹⁹⁵, the government had already on 9 March 1933 published a formally¹⁹⁶ fully correct answer stating that *there was no provision entitling a former president of the House who had voluntarily stepped down to continue to act*.¹⁹⁷ Also the Federal President, Wilhelm Miklas, was of the opinion that exactly that element of *analogy* which Straffner's interpretation of the Parliament's rules of procedure implied¹⁹⁸ hindered its application¹⁹⁹

¹⁸⁹cf., parte pro toto, [Wiederin \(2014\)](#) 75 ff, 75 f, who states, without any references or argument (thus indicating that he is staying on common ground) that the federal government *abused* the resignation of the three presidents to *prevent* further sessions of Parliament and to legislate by ordinances. cf. also that Manfred Welan had blamed Wilhelm Miklas, then head of State, for not having resigned (see [Wohnout \[2014\]](#) 60, fn 22), although in this case **no successor could have taken office any more**, because *the National Assembly, presided over by the president of the 'Nationalrat'*, would have been needed (Article 62 (1) read in conjunction with Article 39 (1) B-VG). The observations of Brauner (2009, 232) are also much too superficial and, in the end, incorrect (as will be demonstrated infra; cf. also Balthasar [2021], section III/A).

¹⁹⁰See, also parte pro toto, [Hanisch \(1994\)](#) 304, stating both fatalistically and superficially: 'Wer die Spielregeln von Demokratie und Verfassung so grob verletzte, mußte in der Diktatur enden.'; [Wohnout \(2014\)](#) 60.

¹⁹¹cf. [Tálos \(2013\)](#), 5 f, **who proposed two legal solutions:**

- (i) dissolution of the Nationalrat by the Federal President or
 - (ii) amendment of the rules of procedure by an Emergency Ordinance issued likewise by the Federal President
- Neither of which was viable** without infringement of the letter of the Constitution, as demonstrated right infra.

¹⁹²See [Berchtold \(1998\)](#) 705 f, 715.

¹⁹³Only a few years before the publication of *Berchtold's* book, [Spanner \(1980, 42\)](#) was also still contenting himself with a purely superficial – and eventually incorrect – assessment ('... weder der Bundespräsident noch die Bundesregierung entschlossen sich, den *wohl möglichen* Weg über eine „Notverordnung“ nach Art. 18 B-VG zu beschreiten'; emphasis added).

¹⁹⁴To be more precise: there was no way which did not imply a breach of *ordinary constitutional law* (see, however, for the option of recurring directly to the fundamental order, infra fn 218).

¹⁹⁵See [Berchtold \(1998\)](#) 717, fn 42 (first part) where we read that the former first president Renner still assumed responsibilities, and 719, 730 ff, for the attempt of former third president Straffner to convoke a plenary session of the House.

¹⁹⁶Against the fact that it was precisely this former third president, Straffner, who would sign, only one month later, a *collaboration agreement with the NS* (see supra fn 152), it is perhaps not too far-fetched to presume that this **specific background might have facilitated sticking to the formal argument**.

¹⁹⁷See [Berchtold \(1998\)](#) 717, fn 42 (second part; emphasis added): 'Es *gibt* derzeit *kein Präsidium* des Nationalrates, es gibt auch keinen Punkt in der Verfassung oder in der Geschäftsordnung, der einem *ehemaligen Präsidenten* des Nationalrates, der *freiwillig auf seine Stelle verzichtet* hat, das Recht gibt, sich Pflichten oder Rechte eines Präsidenten des Nationalrates zuzusprechen oder sie auszuüben.'

¹⁹⁸Straffner himself admitted this element (see [Berchtold \(1998\)](#) 714, fn 37), but, apparently, followed a different methodology.

¹⁹⁹See [Berchtold \(1998\)](#) 729.

- As to the option of issuing an *Emergency Ordinance* of the Federal President (Art 18 (3)–(5) B-VG), a provision inserted in the constitution only in 1929, shaped after the model of Article 48 of the Weimar Constitution, but mitigated in several regards²⁰⁰ due to the Social Democrats' opposition²⁰¹), more than one *condition* for its applicability was *not* met.²⁰²

²⁰⁰cf. [Berchtold \[1998\]](#) 532 f, 564, 572. In particular the requirements – none of them already part of the Government's Draft Bill (Article I § 9 RV 382 Blg NR III. GP, 3) – that

- the issuing of the ordinance was restricted to times where Parliament was *not assembled* and
- needed the *consent* of a *parliamentary committee* resembled **Article 55 of the Prussian Constitution** of 30 November 1920. Given the close contacts between the Austrian Social Democrats and the German Social Democrats (in particular Otto Bauer – former Austrian secretary of State for foreign affairs and in particular enthusiastic about unification with Germany, see [Hanisch \[1994\]](#) 139, 265, 271 – was highly respected and influential among left wing members of the SPD, cf. [Zarusky \[1992\]](#), 276 f; [Wollenberg \[2003\]](#)) it is very likely that in this regard the *Prussian Constitution* (of 30 November 1920) served as a model for the opposition, as did Article 48 (2) WC for the government's side. What the Austrian Social Democrats, however, overlooked was the **difference in status**: Prussia, as a federated State of Germany, could more easily do without a fully-fledged emergency instrument than could Austria as a sovereign State. Moreover, while Article 48 WC was also applicable – and even on two levels! – to meet dangers arising in Prussia (whereas Article 48 (2) WC was a tool of the National President, Article 48 (4) WC granted the same competences to the government of the federated state, thus *overruling any limitations enshrined in the federated constitution*) a **comparable safeguard was completely lacking in Austria**.

As pointed out in the next fn but one, it was precisely *these additional limitations which made the Austrian instrument unfit to solve the crisis of 4 March 1933*.

²⁰¹Even after 4 March 1933, Otto Bauer, then leader of the Social Democrats, firmly *opposed any enlargement* of this provision, fearing it could serve as a basis for fascism (cf. [Berchtold \[1998\]](#) 735, fn 84) – thus *completely negating* (cf *supra* fn 3) *the fact that also legitimate regimes could fail without some back-up system (so that, therefore, the proper attitude is not to avoid effective emergency powers outright, but to construe them in a way compatible with the purposes of a legitimate state)*.

²⁰²The *most pertinent* problem was that such an ordinance needed the **consent of a parliamentary sub-committee** which had **not yet been elected** (the so-called 'Ständige[r] Unterausschuss des Hauptausschusses des Nationalrates'). During the first days following 4 March 1933 there had indeed been attempts to rectify this omission (cf. also *supra* fn 186) – which was, as such, still perfectly possible because this committee, although in fact chaired by president Renner, had had, legally speaking, its own '*chairman*' (see paragraph 13 (6) of the Act on Procedures, BGBl 1920/10) and Renner had *not stepped down in this capacity*, too) – but they failed due to disagreement among the parties (see [Berchtold, \[1998\]](#) 741 f). However, despite these attempts, the **constitution** of this committee (as the necessary precondition for its operability) **would have failed at any rate**, because *paragraph 23 A of the rules of procedure* had conferred this task on the **president of the House** (a position which had been, as previously mentioned, vacant since 4 March 1933). It was only in 1975 that paragraph 35 (3) of the Rules of Procedures Act (BGBl Nr 410) clarified that the constitution of an *ordinary* preparatory subcommittee is up to the *chairman of the committee* (but still it is not clear whether this provision does indeed apply to the *extraordinary* 'Ständige[r] Unterausschuss des Hauptausschusses des Nationalrates', too).

The *second* problem was that the rules of procedure could have been considered '*constitutional law*' which could not be amended by such an ordinance (cf. [VfGH 16 March 2001](#), G 150/00, VfSlg 16.151), and the *third* problem was that Presidential Ordinances based on Article 18 (3) of the Constitution required legislation in times *when* Parliament '*was not assembled*', the peculiarity of the case at issue, however, being that the plenary *was in fact 'assembled'*, but *unable to act* (hence, the session of 4 March 1933 was eventually closed only on 30 April 1934, on the basis of a KWG-Ordinance [see next fn; see, for the latter two legal obstacles, already [Berchtold \[1998\]](#) 707, 715).

- Although eventually, in April 1934, indeed used to convoke again the plenary²⁰³, an *ordinance based on the KWG*²⁰⁴ was likewise inappropriate, because the KWG allowed legislative measures to be taken by the government **only** insofar as it was necessary to overcome shortcomings **caused by World War I**, not to solve an impasse created fifteen years later.
- Finally, not even the *dissolution of the House* by the Federal President, based on Article 29 (1) B-VG (a provision only recently, in 1929, inserted into the constitution), would have helped²⁰⁵, because the **constitution of the newly elected House would have needed**, pursuant to Article 2A of the rules of procedure, to be chaired by ‘**the president of the former**’ House – and again meeting this requirement was **impossible** when, as in the situation at issue, all three presidents had resigned.²⁰⁶

3.1.2.2.2. *The evaluation.* Dollfuß and his colleagues in the Austrian Catholic party *realized immediately* – in contrast to the Social Democrats²⁰⁷ – the *opportunity* this event provided *with regard to meeting the danger*²⁰⁸ emanating from Hitler after his victory in the German National Parliament elections of 5 March 1933²⁰⁹, i.e.

²⁰³Ordinance of 24 April 1934, BGBl Nr 238.

²⁰⁴See supra fn 2.

²⁰⁵Moreover, it is far from obvious that the issuing of such a presidential ordinance would still have been allowed in this specific case where Parliament **had already dissolved itself** (see BGBl 1932/136), without determining a date for the elections so that, pursuant to Article 29 (3) B-VG, the dissolved Parliament could *continue to act*. According to both Raschauer (2003, point 14), and Konrath (2017, point 18), however, dissolution of Parliament by the Federal President requires that Parliament is *still* ‘legally existent’ – hence the opinion of Konrath (ib, point 42) that due to the *fact* that a Parliament *already dissolved* under Article 29 [2] B-VG continues to *exist* as an *acting* body, why it might *still be dissolved* under Article 29 (1) B-VG may be questioned; in fact, Lienbacher (2000, point 13) too emphasizes that a dissolution under Article 29 (2) B-VG is, legally speaking, already a *dissolutio perfecta*.

²⁰⁶Correspondingly, paragraph 5 C of these rules stated that the *period of office lasted for the whole period of the House* and paragraph 6 that the presidents as well as the main committee *remained in office* until their successors had been elected by the new House. This whole set of provisions, however, did **not take into account voluntary resignation** – nor the fact that the dissolution by the Federal President, inserted in 1929 on the constitutional level, implied the *loss of office for all members of the House, only excepting the members of the permanent subcommittee* of the main committee. So, from a strictly legal perspective, *paragraph 6 of the rules of procedure had been unconstitutional since 1929* (nevertheless, it had not yet been annulled by the Constitutional Court and could, therefore, still be applied in 1930, after presidential dissolution of the House). **Had Parliament**, however, **adjusted its rule of procedures to the amendments of the constitution in time** (even the insertion of paragraph 21a, taking into account the permanent subcommittee of the main committee at all, was delayed until 30 November 1932 [!] which was the reason why it was not yet elected in March 1933 [see supra fn 202]) it would, most probably, have realized the need to take care of the case of the involuntary loss of office of the presidents of the House by presidential dissolution (and, in this way, also have solved the situation which arose in March 1933 and which turned out, without such an amendment, to be insoluble).

²⁰⁷cf. Wahnout (2014) 60 f (Otto Bauer later on admitted that he had not sufficiently taken into account Hitler’s victory in Germany when assessing the Austrian situation after 4 March 1933).

²⁰⁸In this respect Dollfuß indeed fell short of Loewenstein’s device, because Dollfuß *needed* this *contingent* opportunity to prepare his mind for the subsequent ‘militant’ actions; or, to put it differently: it remains a most interesting question what Dollfuß would have done if he had not been provided with this opportunity – **by Providence**, as Richard Schmitz, later mayor of Vienna, put it (cf. Hanisch [1994] 303, fn 56; Tálos [2013], 32; cf. also E. Weber [1935] 66, for the opinion of Dollfuß himself) – precisely at the time when the objective necessity arose.

²⁰⁹For the particular relevance of this date for the Austrian government see Wahnout (2014) 54, 58 f.

- to avoid in particular elections (at all levels)²¹⁰ which would offer Hitler a pseudo-legal opportunity to repeat the takeover he had just performed in Germany
- **to amend (somehow²¹¹) the Constitution** (at least in the direction already intended in 1929 by the government²¹², which, however, had then not been approved by the Social Democrats required for the qualified majority²¹³) –

although they were convinced²¹⁴ that this intention would amount to a breach of the current Constitution; they relied, however, for justification of such a breach of the law on Catholic morality.²¹⁵

In such a situation one might really wonder what advice would have been given by the Constitutional Court:

Would – **could** – it really have contented itself with stating the obvious without offering any practical solution²¹⁶ – the latter, however, **necessarily implying some deviation** from the letter of the Constitution?!

Moreover, had the Constitutional Court once accepted that a *breach of the letter of the constitution was simply unavoidable in order to make the constitution work again with regard to the functioning of Parliament²¹⁷* – could this **first metapositivist finding** with regard to rules of procedure not have paved the way for the more substantive insight that **also** – or, more precisely, **with even much more legitimacy** – the NS threat as such justified the suspension of some provisions of the Constitution to some extent, in particular the suspension of general

²¹⁰See supra fns 161 f.

²¹¹As already stated supra (see text by fns 184 f), among *all* actors the impression prevailed that some legal way out of the impasse would always be possible if only the relevant parties would agree – a highly misleading illusion which only eventually was replaced by the insight that a veritable *cutting of the Gordian knot* would be *necessary*.

²¹²Hanisch (1994), 304; Jabloner (2014) 103.

²¹³Jabloner (2014) 102; Berchtold (1998) 735.

²¹⁴What we see here is, therefore, the finding that the Dollfuß' government was *convinced* to do – *in substance* – the right thing although they were of the opinion that these actions implied the *breach of law*. Put in this way this attitude is an outstanding example of what Max Weber had, only some years before, named '**Verantwortungsethik**' (i.e. 'ethic of responsibility', in contrast to 'Gesinnungsethik' (i.e. 'ethic of abiding to rules'), see [1919] 56; cf. also ib, 55 [italic emphasis original] '... so gilt für den Politiker umgekehrt der Satz: Du sollst dem Übel **gewaltsam** widerstehen – sonst bist du für seine Überhandnahme *verantwortlich*').

²¹⁵See Wahnout (2014) 54.

²¹⁶Apparently that was, however, exactly what the government feared (see Berchtold [1998] 750 f).

²¹⁷In this regard the most convincing solution would have been to apply Art 18 (3) B-VG even *without involving the inexistent permanent subcommittee* (referring here to 'factual impossibility', i.e. the general principle of 'ultra posse nemo tenetur'). Given, however, that even then the Federal President would only have called back a *Parliament of doubtful legitimacy* (because it had, already eight month ago, dissolved itself; see right supra fn 205) and that *electing a new Parliament* was, with regard to the NS, an *almost suicidal option*, it is understandable that the government aimed to negotiate a '*full package*' before any action was started (for the concrete action see infra fn 231).

elections, thus elaborating a *lawful* alternative²¹⁸ to the far too simple formulae of *Louis de St-Just*²¹⁹, *Carl Schmitt's dichotomy*²²⁰, *Nikolai Bucharin*²²¹ and, finally, *Karl Loewenstein*²²² (and *Karl Popper*²²³)?

Most unfortunately, however, history worked exactly the other way round: The government having more confidence in Catholic morality than in the interpretation of secular public law²²⁴ began to paralyze the Constitutional Court in a most sophisticated, but, of course, *most incorrect way*.²²⁵ In my opinion it is mainly this **apparent (though, most probably, erroneous!) admission of guilt** which has *hindered*, up to now, any serious legal discussion as to whether the **substantive** measures of the Dollfuß government directed against NS attempts at a takeover should– as is submitted here²²⁶ – be considered **justified**.²²⁷

²¹⁸Although a *thorough analysis of the most fundamental layer of the Constitution* (the ‘fundamental order’) would have shown that there is indeed a *hierarchy among the fundamental principles* where **self-preservation of the State** (forming part of the *republican principle*) **ranks on the very top** (see Balthasar, Grundordnung, 471), whereas *the ambit of the democratic principle is restricted to the sphere left open after compliance with all other principles*, in particular also with the principle of the rule of law (see id, ib, 688), such a thorough analysis – even the awareness that the ‘rule of law’ formed at all part of this ‘fundamental order’ – was *not yet at the disposal of the doctrine of the time* (see Wiederin [2014] 92; cf. also, for the *notion* of the ‘fundamental order’ as such, which seems to be taken from the German Fundamental Act [‘Grundgesetz’] 1949, Balthasar, ib, 19 f, fn 28). Moreover, there is, even today, **no constitutional doctrine in Austria** with regard to (the preconditions, operability and limits of) cases of **emergency** (cf. id, ib, 159 f; see already supra fn 1). cf. also Balthasar (2021), section IV/C.

²¹⁹See supra text by fn 48.

²²⁰See supra fn 49.

²²¹See supra fn 52.

²²²See supra subsection 1.1.

²²³See supra fn 48.

²²⁴See supra fn 215; the reason for this bewildering finding seems to be what has already been pointed out supra in fn 1, combined with what is stated infra in subsection 3.2.1.3: the *mental gap* between the secular, and in particular, lawyers’ academia, and the line of thinking of the Catholic party.

²²⁵cf. Wiederin (2014) 76 ff; Berchtold (1998) 750 f; Stephan Hinghofer-Szalkay (2018) 357 f, 361 f. Nevertheless, even there the position of the government was *not without any fundamentum in re*: as a member of the Constitutional Court, Adolf Wanschura, put it when giving reasons for his resignation on 18 May 1933 (cf. Berchtold [1998] 751 f), at least half of the members had been appointed on the basis of proposals of parliamentary groups. Could it really be expected that these members – from whom, apparently, only the minority belonged to the government’s side – would ignore the position their political parties had taken in the highly political questions at issue? What we see here is the ‘dark side’ of national constitutional courts which need, with regard to their normal business, *more political legitimation* than ordinary courts, but might *precisely because of this closeness be disqualified* from rendering impartial judgements in most sensitive cases. I wonder whether here perhaps, *de constitutione ferenda*, the inclusion of elements of *international arbitrage* could help?.

²²⁶See infra subsections 3.2.2. and 3.2.3. From that point of view I cannot share the view taken only quite recently by the Austrian legislator when adopting the Act on Repeal and Rehabilitation, BGBl I 2012/8, in which the historical background of emergency measures has been completely ignored.

²²⁷In this case there is an even greater *tragedy* in the assessment found supra in fn 214, because

- while the conviction to do the right thing was, then, correct, the conviction to have therefore to *breach* the constitution was incorrect insofar, as **law itself** (cf. right supra fn 218) provided a justification, thereby annulling the verdict of a ‘breach’
- hence, the *second*, real *breach* of the constitution by blocking the Constitutional Court (meant to conceal the first ‘breach’) was simply *unnecessary*.

3.1.2.3. The Constitution of 1 May 1934. At any rate on 30 April 1934 a **new constitution** was adopted²²⁸ – with Parliament’s consent²²⁹ to the government’s ordinance based on the KWG²³⁰ and, thus, in *formal compliance* with (even *over-fulfilment of*) its paragraph 3²³¹, but up to then unanimously contested as unconstitutional from the perspective of the B-VG.²³² Nevertheless this constitution – invoking in its preamble ‘Almighty God’ not only as the *source of all Law*, but also as the *ultimate authority legitimizing* the Austrian People’s *Act of Constituting* this Constitution, thus apparently aiming at circumventing the problems of pure ‘people’s sovereignty’ set out supra in subsection 1.2.2.3 – gained effectiveness in its **own right**²³³ – this being the **decisive further step** which the German

²²⁸This constitution was first published on 30 April 1934 (see Article II of the Constitutional Act BGBl 1934 I/255), but again **promulgated on 1 May 1934** (BGBl 1934 II/1); it came into effect on 1 July 1934 (see Article III/paragraph 56 (2) of the Federal Act of 23 June 1934, BGBl 1934 II/75).

²²⁹Pursuant to paragraph 1 of the Act on the election of the national Parliament (House of Deputies), BGBl 1923/367, the House then consisted of 165 members. Article 44 (1) of the B-VG requiring the presence of at least the half of all members for the adoption of acts of constitutional rank, these two norms read in conjunction meant that a minimum of 83 members present was needed for constitutional amendments – a number not reached in the final sessions of 30 April 1934. However: KWG-ordinances (i) of 12 February 1934, BGBl I 78, amended by the ordinance of 16 February 1934, BGBl I 100, and (ii) of 27 February 1934, BGBl I 118, had annulled (i) all seats held by the Social Democrats as well as all claims of deputies on the electoral list (72) and, in addition, (ii) of all members who had left their party. According to the Official Protocol (cf. [Parlamentsdirektion \[2014\]](#) 129) the acting president of the session of 30 April 1934 had been of the opinion that for the purpose of this session the House was no longer made up of 165, but only of 91 members, 76 of whom had been present. cf. also [Tálos \(2013\)](#), 80 f.

²³⁰BGBl 1934 I/239.

²³¹Whereas the second sentence of this paragraph only required the ordinances *be submitted* to Parliament (and to be cancelled if Parliament *demand*ed; the submission was carried out on 30 April 1934 with all 417 ordinances based on the KWG, no demand was raised, see [Parlamentsdirektion \[2014\]](#), 124), government requested (albeit only with regard to the ordinance BGBl 1934 I/239) for a *formal approval* of Parliament. Nevertheless, it is still *one complex procedure* (cf. [Balthasar \(2016\)](#) 130 f, do FN 616), not, as still [Brauneder \(2009\)](#), 234, apparently misunderstood it, *two different methods of adoption*.

In addition, Article 44 (2) of the B-VG requiring a referendum for the validity of fundamental changes in the Constitution was abolished by Article I of the Constitutional Act BGBl 1934 I/255 (according to current doctrine, this abolition would have required a referendum, see [Balthasar \[2006\]](#), 195 f, fn 896, but the doctrine of the time was less developed, cf. supra fn 218) and the Federal President *Miklas confirmed*, based on Article 67 (1) of the B-VG, the *formal constitutionality* of the whole Act BGBl 1934 I/255. See also [Balthasar \(2021\)](#) fn 2.

²³²cf., *parte pro toto*, only [Jabloner \(2014\)](#) 105 f, fn 18, who is of the opinion that after the blockage of the CC (see supra text by fn 224) all further actions of the government based on the KWG were null and void, [Brauneder \(2009\)](#), 234 f, and [Spanner, Entwicklung](#), 43 (‘unter – rechtlich völlig unhaltbarer – Berufung auf das’ KWG).

²³³cf. [Böckenförde \(1991\)](#) 105 f; cf. also [Schupmann \(2017\)](#) 134.

government had not dared to make in 1932²³⁴ - and remained in force until March 1938.²³⁵ **It preserved (even emphasized) the essence²³⁶ of the rule of law²³⁷ by denying any general suffrage.**²³⁸

This constitution was, however, accompanied by Article III (2) of the Constitutional Act of 30 April 1934, BGBl I Nr 255, this provision (= the ‘Enabling Act 1934’) granting,

²³⁴See supra fns 100 and 106.

²³⁵On the basis that the ‘reunification’ of Austria with Germany on 13 March 1938 was ‘null and void’ (cit Moscow Declaration 1943; see also Article II of the Austrian ‘Declaration of Independence’ of 27 April 1945, StGBI No 1), the Constitution of 1 May 1934 remained, from a legal point of view, valid until it was replaced by the Provisional Constitution of 1 May 1945 (StGBI No 5).

²³⁶While [Wiederin \(2014\)](#) 83 f, despite his general assessment (see next fn) nevertheless realizes that there were some ‘steps backwards’ in the substance of fundamental rights from the standard of the B-VG (resp. the StGG, i.e. the former [and again current] fundamental rights catalogue) to the Constitution of 1934, these differences are, in my opinion, much more due to the *greater realism* (honesty) of the authors of the Constitution 1934 who *refrained from proclaiming farfetched ideals which could not, at least not for the time being, be implemented in practice*.

This finding may be illustrated by one provision, deserving particular attention in the context here at issue: pursuant to Article 16 (3) const cit all posts in the public service were no longer equally accessible (as stated in Article 3 of the StGG) for all citizens, but only for those *citizens who were loyal to the State*. While it is perfectly evident that also under Article 3 of the StGG and under much less dramatic circumstances than in 1934 f no disloyal citizen could ever have enforced his/her appointment (mostly due to the fact that, according to the still current steady case-law of the CC, no citizen has any legal remedy to contest his/her non-appointment in court; see only [Mayer/Muzak \[2015\]](#) 622), the *Constitution 1934 was naive enough to spell out this necessity* - which, by the way, has **also been paid tribute to in Germany since World War II**, see

- German Federal Constitutional Court 22 May 1975, 2 BvL 13/73, [BVerfGE 39, 334](#),

- and even, at least in principle, by the [ECtHR 26 September 1995](#), ANo 17851/91, *Vogt v. Germany*, point 59, first sentence: ‘The Court proceeds on the basis that **a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded**’, although paving the way, in the following sentences, for *some reasonable mitigations*.

²³⁷cf. for this assessment (not only from a contemporary, but also from a current perspective) [Wiederin \(2014\)](#) 79 f, 85 f, 91 f, who also emphasizes the **structure of the constitution** in which, *unusually for that time, fundamental rights had been promoted to the top* (ib, 82). In this regard we see here *the aim to tie in again with the rule of law tradition* given that the *French Charte Constitutionnelle* of 4 June 1814, then the Constitution of the United Kingdom of the *Netherlands* of 24 August 1815 and, after the Revolution of 1830, also the *Belgian Constitution* of 7 February 1831 had already shown this structure. Likewise, only shortly after 1848, the *Prussian Constitution* of 31 January 1850 had also included a large catalogue of fundamental rights (Title 2, Articles 3–32) at the top. But also the (although much smaller) fundamental rights’ catalogue of the *Austrian Constitution* of 4 March 1849 was ranked as Section III (after the sections dealing with the Realm and the Emperor, but *before all those other sections* regarding local communities and regions, Parliament and Government, Judiciary, Budget, Military ...).

²³⁸Although the Constitution of 1934 provided *ample parliamentary machinery* on federal, regional and local levels, the members of all these representative bodies had all been, in one way or the other, *appointed*. Hence, when assessing the character of the régime, [Hanisch \(1994\)](#) 310 f, prefers the labels ‘authoritarian’ or ‘neo-absolute’.

although *until the full implementation* of the provisions governing two of the advisory parliamentary bodies²³⁹, the federal government²⁴⁰, *unlimited legislative powers*, most fundamental amendments of the Constitution included.²⁴¹

3.2. The assessment

3.2.1. *The differences between the Austrian situation after 5 March 1933 and the German situation in 1932*

3.2.1.1. *A Clearer and Stronger Position against NS in Austria.*

- Due to their ‘Austro-Marxist’ basis the Austrian Social-Democrats managed to *maintain*, to a far greater extent than in Germany, where the original movement split, at least for some years, into three parts (the Social Democrats, the Independent Socialists and the Communists), the *unity* of the ‘working class movement’²⁴²; consequently, not only did a Communist party belonging to the III. International Association (remotely-)controlled by *Moscow* play a much less important role in Austria than in Germany²⁴³, but the *Social-Democrats as such – not controlled by Moscow or by any other foreign power either – did not pose a comparable threat*, either.²⁴⁴
- Whereas, from Papen’s perspective, Hitler had been, in 1932, only the leader of a German political party supported by about one third of the electorate, but by no foreign power, the situation had, after the elections of 5 March 1933 at the latest, changed dramatically for Dollfuß: for him, Hitler was not only the leader of the Austrian NS movement (supported likewise by about one third of the Austrian electorate), but, in addition, the omnipotent head of government of a huge neighbouring country.²⁴⁵

²³⁹The Federal Councils for Culture and for Economy (‘Bundeskulturrat’ and ‘Bundeswirtschaftsrat’), cf. Article III/paragraph 56 (3) of the Federal Act of 23 June 1934, BGBl 1934 II/75; this delay in implementation was due to the fact that these Councils should be composed of delegates of the ‘Professional Estates’ (the core element of the Constitution 1934) the constitution of which (with the exception of only two ‘Estates’) had, however, not yet been achieved in March 1938, see Hanisch (1994) 316.

²⁴⁰In sharp contrast to the German Enabling Acts (of 24 March 1933 and of 30 January 1934, respectively; see supra fn 19), however, this governmental legislation **needed**, just like parliamentary legislation, the **signature** of the **Federal President**.

²⁴¹Hence, this provision – then still in force, due to the delay mentioned in the previous fn but one – could be used to implement what then was pretended to be unification with Germany (cf. the Constitutional Act of 13 March 1938, BGBl No 75).

²⁴²Cf., e.g., Kreisky (1986/1995) 144 ff, 152 f; Hanisch (1994) 127, 135 f; Leser (1988) 27; Reisberg (1974) 89 f.

²⁴³See even Reisberg (1974) 90.

²⁴⁴On the other hand, due to their limited ideology (see supra fn 3) cooperation between the Dollfuß government and the Social Democrats to jointly keep down the NS (as suggested, among others, later on by Kreisky [1986/1995] 210) was not an option either, cf. Kindermann (1984) 129 f, outlining what positions would then have to be accepted by the Social Democrats *in the interest of an effective defence of the country*.

²⁴⁵See supra text by fn 141.

Both elements taken together meant that for Dollfuß in 1933/34 *the main danger obviously came from the NS*²⁴⁶, not from the Communists (not to speak of the Social Democrats²⁴⁷).

3.2.1.2. The need for a safeguard for an indefinite period of time. Given Hitler's rise to power in Germany, the Austrian defence measures had to face a **much longer-lasting state of emergency** than would have been necessary when *Papen's* measures had been implemented.

3.2.1.3. Predominance of Catholicism in Austria. Whereas in Germany, at least on national and on Prussian State levels, Catholics and their thinking had always been a *minority* within the Protestant majority²⁴⁸, the situation in Austria was the complete opposite: The Catholic Church had always been *predominant*, in the State²⁴⁹ as well as in society²⁵⁰ (at least apart from academia²⁵¹) and as a percentage of the population.²⁵² This also meant that in Austria the ideas

²⁴⁶This is even admitted by Kreisky (1986/1995) 210.

²⁴⁷It may well be that Dollfuß was urged by the Italian prime minister (and leader of the Fascist movement) of the time, Benito Mussolini – to whom Dollfuß relied for protection against Hitler's Germany – to take action against the Social Democrats (see Wohnout [2014] 60 ff, 68 f). The crushing of this party in February 1934, however, was not due to this Italian pressure, but **only an inevitable consequence of the rebellion** started by parts of the – at that time already illegal (see supra fn 168) - Social Democrats' *armed forces* (not only without any order from the party leaders, but even *against their own clear orders*, cf. Reisberg [1974] 1, 4) on 12 February 1934 ('Schutzbundaufstand'). In this regard, Wohnout (ib, 69) reports that in January 1934 Dollfuß was still *resisting* the voices in his entourage encouraging him to crush the Social Democrats fearing that in this case frustrated Social Democrats would then join the NS (this assessment was quite accurate, cf. Kreisky [1986/1995] 206 f, 214).

²⁴⁸Furthermore, v. Schuschnigg (1938) 161, gives the impression that this minority position had indeed already led to a certain amount of *accommodation*, German Catholics consequently resenting the Austrian 'baroque Catholicism' of the time.

²⁴⁹Still in the first Austrian Republic, the Archbishop of Vienna, Theodor Innitzer (Archbishop since 1932; Cardinal since 1933) had previously been a minister in the federal government (1929/30.); on the other hand, a prelate, Ignaz Seipel, had been not only leader of the Catholic party (1921–1930), but in autumn 1918 for some weeks a member of the last imperial government and subsequently several times head of the federal government (1922–1924; 1926–1929).

²⁵⁰Until 1938 the law on marriage was taken from the various religious communities, meaning that for all Catholics – the vast majority (see next fn but one) - the Canon law applied; in addition, a multitude of Catholic associations existed, cf. Hanisch (1994) 293.

²⁵¹'Catholica non leguntur' (See supra fn 1).

²⁵²More than 80%, cf. Hanisch (1994) 214 f.

for a Catholic alternative to modern parliamentary democracy, based on ecclesiastical concepts²⁵³, in particular on the Encyclica ‘Quadragesimo Anno’²⁵⁴, were much more elaborated than the German corollary of the ‘New State’.²⁵⁵

3.2.1.4. The obstacles to a restoration of the monarchy in Austria. Whereas in Bavaria the heir to the Crown, Prince Rupprecht, had been a highly respected (Bavarian and Prussian) field marshal during World War I and whereas also on national (and Prussian) levels there existed, at that time, at least workable options (either Emperor and King Wilhelm II himself, or Crown Prince Wilhelm, himself also a general in World War I²⁵⁶, or one of his sons²⁵⁷), the situation in Austria was – despite a very strong legitimistic movement – much less favourable:

- On the one hand, the territory now forming the Republic of Austria had *never formed a monarchical unity* so that the choice of an *appropriate title* would already have posed problems.²⁵⁸
- On the other hand, the heir to the throne of the former Austrian(-Hungarian) Empire, Archduke Otto, was only born in 1912 and, thus, would already due to his youth²⁵⁹ not yet have been a fully convincing alternative.²⁶⁰
- Thirdly, given the double failure of the attempts of Otto’s father, Emperor Charles, to restore his rule (as king) in Hungary not least due to international protests (in particular from Czechoslovakia, but also from Romania and Yugoslavia, the ‘small entente’, and finally backed

²⁵³See in more detail Hanisch (1994) 315 f.

²⁵⁴cf. Hanisch (1994) 303, 317, here citing Rudolf Count Hoyos, then president of the Parliament (‘Bundestag’); see, however, also Reisberg (1974) 150 and Tálos (2013) 87. Tálos, however, holds that the Constitution 1934 misinterpreted the Encyclica when assigning to the ‘professional estates’ the quality of State institutions instead of mere members of civil society. Whereas a proper answer would require a separate contribution (also taking into account the similar, but much better elaborated remarks of Isensee [2001], 27 f), I restrict myself to the following

- (i) even in contemporary Austria the successors of these professional estates are located, by Articles 120a f of the B-VG, on *both sides of the borderline*, combining the task of representing particular interests vis-à-vis the State with the carrying out of functions as administrative bodies of the State
- (ii) the whole distinction between State and civil society is a *modern* one, a consequence of the monopoly of power achieved by the absolute monarch, and does not fit into more traditional concepts of society such as, among others, does the Catholic Social Teaching still deeply rooted in *medieval* thinking.

²⁵⁵See supra text by fn 82.

²⁵⁶As is well-known, there had indeed been plans to put forward *Wilhelm* as candidate for the national presidential elections in 1932.

²⁵⁷Prince Wilhelm (born 1906) or Prince Louis Ferdinand (born 1907); see already supra fn 83.

²⁵⁸The most appropriate title being that of a ‘kingdom’ one would have had to go back to the project agreed on (but never implemented) by Emperor Frederic II (Hohenstaufen) and Duke Frederic II (Babenberg) in 1245.

²⁵⁹In contrast to his German counterpart, Wilhelm (see right supra fn 256), Otto would not have been qualified to stand for election as Federal President of the Republic, Article 60 (3) B-VG requiring a minimum age of 35.

²⁶⁰In Austria, memories of the beginning of the reign of Emperor Francis Joseph – who had succeeded to the throne in December 1848 when only 18 years old and had already lost Austria’s predominant position in Europe in his first few years (in 1856, 1859 and 1866) – were then still fresh, as were memories of the rather weak performance of the last Emperor Charles who, although already 29 years old when becoming monarch, was still considered to be ‘young’ (compared not only with old Francis Joseph but also with the very dominant personality of Archduke Francis Ferdinand, assassinated in 1914, then heir to the throne).

by France and by the United Kingdom²⁶¹), restoration of Habsburg²⁶² rule in Austria, even as a tool against Hitler²⁶³ would have been *much more complicated* than a comparable restoration of the respective former dynasty in Germany or in any one of the German federated States.

So in fact it was no longer important in the Austrian case that Dollfuß, most probably²⁶⁴ shared the self-confidence of Bavaria's prime minister Held who was not really inclined to subordinate himself to a monarch²⁶⁵ – in contrast to the genuine monarchist Papen.

3.2.2. The solution. On the **fundamental** level, Dollfuß found a **classical answer to Hitler**, expressed in the preamble to the Constitution of 1 May 1934 where we read that it is 'Almighty God from whom all law emanates'. By this small statement Dollfuß

- firmly **contradicted** the NS principle that it is the will of the mortal 'Führer'²⁶⁶ which is supreme²⁶⁷
- made clear that the **State is founded on 'law'**, not on sheer power (*violentia*) as such.

From an *emotional* perspective one may doubt whether this principle, lacking the traditional combination with the monarchy (based on the 'Grace of God') could then really have sufficed. From a **principal** perspective, however, Dollfuß had, by this formula, found and expressed in a purely *rational* way the essence of the decisive difference between human 'fascism' and the 'rule of transcendent 'law'.

²⁶¹See in more detail e.g. Sakmyster (2006) 97 f.

²⁶²Strictly speaking, the name of the dynasty would have been 'Habsburg-Lothringen' or, even more correctly, 'Austria'.

²⁶³Nevertheless, Otto was still perceived by Hitler as the main Austrian 'enemy' in 1938: the plan for the military occupation implemented on 12 March was named 'Unternehmen Otto', and on 20 April 1938 an arrest warrant was issued against Archduke Otto for high treason (see Kindermann [2010/2012], 101 f, in particular 104 f); opinions that the 'Unternehmen Otto' referred to emperor Otto I (912–973) exist, but seem to be farfetched and to reflect the fact that the plan to invade the Soviet-Union (finally: 'Barbarossa') was first, in 1940, also labelled 'Otto' – maybe to conceal, post factum, the importance Hitler still had attributed to Archduke Otto in 1938.

²⁶⁴In his speech of 1 May 1934 promulgating the Constitution 1934 (see E. Weber [1935] 223 f, 238; translation into English by A.B.) Dollfuß stated that from now on 'under the **authoritarian leadership of the Chancellor** experienced men ... would guide Austria' and, in an even more normative way: 'The **whole leadership resorts to the Chancellor** who in turn is appointed by the Federal President. ...'. This self-confidence of the head of government could have fit with a purely ceremonial role for a monarch, not however, with a more active understanding of monarchical responsibility as Archduke Otto was also very likely to feel still bound to (indeed, as is well-known, Otto would request in February 1938 to be appointed *Chancellor* himself – not Regent, although also this could have been done quite easily by applying the 'Enabling Act' of 30 April 1934 [see supra subsection 3.1.2.3]).

²⁶⁵See supra fn 121.

²⁶⁶Nevertheless, Hitler had assumed **pseudo-religious status** as a '*salvator populi a Deo missus*' (and as such even been recognized by the German Crown Prince Wilhelm [!], see Bracher (1964) 118 ff) – obviously a severe challenge for Christians, in particular for the Catholic Church. For the full implications of the position of the 'Führer' see Schmitt (1934) 946 f; Wacke (1944), 273 f, in particular 278 f.

²⁶⁷That this message of the Constitution 1934 (which may have been advised by the former federal chancellor and minister for the army Carl Vaugoin who had demanded such a constitutional provision back in May 1933; see Staudinger [1071] 348 f) was indeed understood by friends and enemies can be inferred from the famous statement the Archbishop of Vienna, Innitzer, made in October 1938, already under NS domination, addressing himself to the Catholic youth: 'Christus is your leader' – which was answered by a storming of the Bishop's Palace by NS youth (see Fritz/Handl/Krause/Taus [1988] 27 f).

Also on the *tactical* level, Dollfuß focused more clearly than Article 48 of the Weimar Constitution, or even later Loewenstein, on what was decisive in hindering Hitler's rise to power: not so much the suspension of classical fundamental rights (liberty, security; home; property; opinion, assembly, association, communication) which were all provided in principle by the Constitution 1934²⁶⁸ but of the *right to political participation* – a position which again implies a commitment to the 'rule of law' even in cases in which political participation cannot be preserved, hence – **if a choice needed to be made – a clear preference for the 'rule of law' over the maintenance of 'democracy'**.²⁶⁹

Even the supplement – the *temporary* authorization of the government to *unlimited* legislation²⁷⁰ – does still fit in this picture: exactly due to the fact that this authorization *was to be terminated* by the implementation of crucial parts of the new Constitution we realize here exactly that sort of dictatorship which Carl Schmitt had labelled '**commissarial**'²⁷¹, i.e. *destined* not to quit permanently the rule of law, but *to re-establish* regular conditions²⁷² – although, on *technical* level, **this aim (teleology) was not enshrined clearly enough**: otherwise, exactly this provision, deemed *to restore* the full rule of law, could not have been used for its most complete *abolition*.²⁷³

3.2.3. The classification against the background of Loewenstein's 'militant democracy'. Obviously, the measures implemented by Dollfuß (whether lawful from the perspective of the B-VG or not) **coincided** with Loewenstein's intention insofar as they *effectively delayed the NS rise to power in Austria* – originally envisaged for the first half of 1933, to be in lockstep with the takeover in the German federated states²⁷⁴ – *until March 1938*.

²⁶⁸ Obviously each of these rights had its limitations, the texts of which, however, do not exceed what we still read in the limitation clauses of modern human rights instruments.

²⁶⁹ It is noteworthy that by making this clear preference Dollfuß and his Constitution 1934 **did not leave the ground of the tradition** also enshrined as the '**fundamental order**', in the B-VG (see supra fn 218). Nevertheless, Pelinka (2014) 119, raises the question of *whether rule of law without democracy* could ever exist and answers: 'When man den Rechtsstaat auch unter dem Gesichtspunkt der liberalen und individuellen Grundrechte sieht, so kann es keinen nicht-demokratischen Rechtsstaat geben.' This statement (by a political scientist) is, obviously, only correct when the notion 'liberale und individuelle Grundrechte' is understood in Pelinka's peculiar way, i.e. not only including 'die zentralen liberalen politischen Grundrechte' as such, but, not in the least self-evident (in particular under the label 'liberal!'), *also egalitarian voting rights*. In this latter case, however, **no legal order in the 19th Century**, including Austria under the December Constitution (part of which had formed the StGG 1867/142!), **could be considered a 'Rechtsstaat'**, nor could the concepts of the very reformulators of this idea at the beginning of that century, Robert v. Mohl and others (see Wiederin [2014] 88 f) – a rather absurd consequence.

²⁷⁰ See supra text after fn 238.

²⁷¹ See supra fn 49.

²⁷² For the future, Dollfuß was apparently of the opinion that the *enlarged* emergency provisions of the new Constitution (in particular Art 148 which also allowed, if necessary, deviation from constitutional law, insofar as the essence of the Constitution was preserved) would suffice.

²⁷³ In fact this authorization gave license to *unlimited legislation* (in particular due to the abolition of Article 44 [2] B-VG having required a referendum for fundamental changes by BGBl 1934 I/255; see supra fn 231) and may, therefore, be considered as *resorting temporarily to the full power of a sovereign* (even in this case, however, not with the aim of creating a new order, but as an ultimate means *to safeguard the already existing order*). Such a limited understanding is supported by the fact that the Federal President of the time, (still) Wilhelm Miklas, preferred to *resign from office* rather than to sign the 'Reunification Act' (see supra fn 241).

²⁷⁴ cf. Wahnout (2014) 56 ff, 63.

The measures – culminating in the oktroi of a fully-fledged constitution, based on the concept of the radical supremacy of the rule of (Divine) law – **transcended**, however, by far the somewhat simplistic advice of Loewenstein to just apply (even preventively) the ‘ius talionis’ to ‘fascists’ (hence, it is not purely coincidental that *Loewenstein’s* concept resembles more the Presidential Ordinance of 28 February 1933²⁷⁵ – with the sole difference being the addressees – than the measures taken by Dollfuß or planned by *Papen*). In fact, Dollfuß’ measures corresponded – from the perspective that the deeply rooted ‘forma regiminis’²⁷⁶, the ‘rule of law’, was *more fundamental*, at least in the *Austrian constitution*, than the only more recently introduced ‘forma imperii’²⁷⁷, the ‘principle of democracy’ – much more to the analysis of *Carl Schmitt of 1928*²⁷⁸ that it was justified to suspend several constitutional provisions in order to preserve the essence of the constitution, i.e. the essence of the rule of law also in a state of emergency and with regard to the ‘enemy’.

3.2.4. The assessment by Loewenstein himself. *Loewenstein* himself approved at least the **original coincidence** of Dollfuß’ policy with his own concept when stating (in the context of ‘[s]ome Illustrations to Militant Democracy’²⁷⁹):

*‘For a short while, between March, 1933, and February, 1934, the Austrian Republic seemed to take a similar course. The government of Dollfuss was at first intent on avoiding fascism as well as communism, and in May, 1933, it outlawed subversive movements of all kinds impartially.’*²⁸⁰

Loewenstein, however, continued:

*‘In February, 1934, however, Dollfuss ruthlessly crushed the Socialist party, which was intensely loyal to constitutional government, and established a one-party state, thus openly flouting the rule of law and turning Austria into a fascist country without even the pretext of constitutional government. The attempt of the dominating minority group to keep out national socialism by a pitiful imitation of its emotional propaganda’*²⁸¹ seems doomed to failure.²⁸²

²⁷⁵See supra fn 50 and subsection 2.4, first paragraph. For the similarity to the Bolshevik view see supra fn 52.

²⁷⁶See supra fn 35.

²⁷⁷See supra fn 35.

²⁷⁸See supra fn 49.

²⁷⁹Cit *Loewenstein (1937)* 638 (see already supra the introduction to section 2).

²⁸⁰Cit *Loewenstein (1937)* 640.

²⁸¹Such tendencies (‘überhitlern’) – with the clear view of ‘**keeping out**’ the NS! – did indeed exist, see *Hanisch (1994)* 304, fn 58; *Wohnout (2014)* 69. Although one might very well dispute the efficacy (Dollfuß himself was rather sceptical, see *Wohnout*, ib), it is striking that it was only Loewenstein – himself advocating that fascism ‘be checked’ and ‘by a similar technique’ (see supra text at fn 10) – who criticized this ‘attempt’(!).

²⁸²Cit *Loewenstein (1937)* 640.

Most unfortunately, Loewenstein did not provide any evidence or sources for the facts underlying his assessment.²⁸³ So one can only state that the **basis** of Loewenstein's assessment was **inaccurate** in several respects:

- Dollfuß did not 'ruthlessly' 'crush' an 'intensely loyal'²⁸⁴ 'Socialist party', but was **forced to react effectively to the rebellion of the (already illegal²⁸⁵) armed forces** of the Social Democrats²⁸⁶ in

²⁸³This lack of evidence is no particularity of this specific part but a general characteristic of the whole article. This deficiency is, however, in particular felt with regard to these events here at issue because they happened at a time when Loewenstein was *no longer at the scene* (cf., in contrast, the situation mentioned in fn 58), but far away in the USA and had to rely on information which one would have liked to know in order to assess its accuracy.

²⁸⁴When one of the leading Austro-Marxists of the time, Max Adler, wrote (1922) 197, (emphasis added): 'Solange ein Staat durch ökonomische Klassengegensätze gespalten ist, hat er eben bei noch so demokratischem Wahlrecht keine Volksvertretung, weil es ein solidarisches Volk in ihm nicht gibt. In den Formen der parlamentarischen Selbstbestimmung vollzieht sich dann immer noch bloß ein Stück des Klassenkampfes. Und die demokratische Parlamentsmehrheit ist im Klassenstaate stets *Machtwille der die Majorität kommandierenden Klasse* ...', announced that *fundamental rights* as freedom of the press, of assembly, of association would be limited or even *cancelled* with regard to the members of the overthrown classes (ib, 192 f), and even spoke of '*annihilation*' (see supra fn 54), one is entitled to doubt whether this loyalty did in fact ever exist.

Nevertheless it is true that before February 1934 Dollfuß had maintained contacts with some Social Democrats (cf. *Berchtold* [1998] 748 f), in particular to Karl Renner who

- (i) not only on 26 October 1933 presented a proposal for a authoritarian reform of the B-VG - apparently close to what had already been in force during the implementation of the Geneva loan (see Kohl [2018] 318 f, in particular 321 f, for the Act BGBl 1922/844); cf. *Jablöner* [2014] 109)
- (ii) but had also, about the same time, elaborated an even much more far-reaching proposal (already close to the Constitution 1934 (see *Jablöner*, ib, 109 f).

²⁸⁵The *armed forces* of the Social Democrats ('Schutzbund') – not the party as such - had already been *prohibited*, on 30/31 March 1933 – not, however, so much as an end in itself but as a means to enhance the government's credibility when fighting the NS (see *Kindermann* [1984] 105). In fact this prohibition was scarcely enforced, otherwise the insurgence of February 1934 would have lacked the capacity (*Hanisch* [1994] 305, even reports that the 'Schutzbund' was *armed* 'frantically' from Czechoslovakian territory *after* having been prohibited).

²⁸⁶It may be only a detail, but one apt in particular to assess Loewenstein's accuracy as well as the sources of his information (cf. supra fn 283): The correct denomination of the SDAP ('Sozialdemokratische Arbeiterpartei'), i.e. the *party* here at issue, was at the relevant point in time *not (yet)* the 'Socialist Party', but the 'Social Democrats'. It was only after the events of February 1934 that *one former faction* of the party, the '*Revolutionary Socialists*' (cf. *Kreisky* [1986/1995] 156) arose as a *de facto independent* entity which, in April 1945, formed, together with the former Social Democrats, the new 'Socialist Party' (SPÖ; renamed the 'Social Democrats' in 1991).

February 1934²⁸⁷ - not least with regard²⁸⁸ to the fact that his overarching aim remained to *prevent similar actions* by the NS.²⁸⁹

- He certainly did not aim to 'turn Austria into a fascist country without even the pretext of constitutional government' - which is apparent from the very existence of the Constitution 1934 (which is not even mentioned by *Loewenstein*!) as such.²⁹⁰

²⁸⁷This eventual rebellion (not approved at all by the central party leaders, see *supra* fn 247) marks the decisive (double) difference from the 'Preußenschlag' in Berlin in 1932: in Austria, the regional government of Vienna led by the Social Democrats was only removed *after the armed rebellion*, whereas the German Social Democrats did not even dispose of armed forces of their own (they supported, together with the Catholic Party and other smaller groups, the so-called 'Reichsbanner Schwarz-Rot-Gold') and, thus, strictly stuck to a policy of 'legality'.

²⁸⁸There was, however, already a *doubtful prelude* to the rebellion of February 1934 (which, most probably, *worked in favour of the rapid and effective action of the government, too*): the riots of July 1927 triggered by the jury's verdict of acquittal in the so-called 'Schattendorf'-trial. There, a furious mob, incited by the editor in chief of the 'ArbeiterZeitung' (the official medium of the Social Democrats), Friedrich Austerlitz (then also a member of the Constitutional Court!!), supported by Social Democrat Viennese municipal employees who either called a general municipal transport services strike (*Schuschnigg*) or just switched off electricity for the tramway (*Konrad*) and by the Social Democrat mayor of Vienna Karl Seitz who refused to call for support from the army in time, resulted in

- the *destruction of the very symbol of the rule of law in Austria, the Palace of Justice*, and
- in a fairly high number of deaths (89 rioters and 5 policemen) and in even more (above 1000) persons seriously injured. Far from assuming fundamental responsibility (although, it is true, some Social Democrats, including the former army general and latter Federal President Theodor Körner had tried to calm down the masses) the Commander of the Viennese Police (Johannes Schober, twice head of the federal government) who was responsible for the police action and the final defeat of the rioters was denounced by Social Democrats as the '*assassin of the workers*' (see v. *Schuschnigg* [1938] 104 f; *Reisberg* [1974] 121 f; *Kindermann* (1984) 91 f; *Konrad* [2017]; *Leser* (1988) 35 f; *Hanisch* [1994] 286, 288 f).

How close the two incidents (the first of which *Loewenstein* failed to mention) were interconnected is shown by

- the **amazingly low number of losses, in particular on the side of the insurgents in February 1934**: during this *countrywide and armed* rebellion about 112 members of the governmental armed forces, but roughly only the same number of members of the rebelling forces and again roughly the same number of civilians were killed in or on the occasion of action, see [https://de.wikipedia.org/wiki/Februark%C3%A4mpfe_1934#cite_note-Bauer74-12] - apparently due to the *lessons learned before*, i.e. the - this time - *immediate* (see *Reisberg* [1974] 6, 10 f), *but apparently most considerate deployment of the federal army*
- the *epitheton ornans* conveyed by Social Democrats in February 1934 to chancellor Dollfuß ('Arbeitermörder') - which entailed **no proper judgement of the new facts** but was, as said, **simply transferred** from Schober in July 1927 to Dollfuß in February 1934, being particularly unfair with regard to *the latter* who had, as shown, kept the number of dead 'workers' (despite the fact that, this time, they were *armed*) amazingly low (apparently at the expense of the government's forces who suffered almost the same number of losses as the insurgents).

²⁸⁹For NS terrorist action in 1932 as well as in 1933 in Austria, see *Wohnout* (2014) 55 ff. In particular regarding the **principle of equal treatment** placed at the very centre of the rule of law the Austrian government could not tolerate, on the one hand, an armed rebellion by Social Democrats when on the other hand aiming to prevent the NS movement from enacting exactly the same kind of violent acts. This reasoning also implied the use of the death penalty (for high treason or similar charges) with regard to Social Democrats: here, too, this most probably was an **effective and credible deterrent with regard to the NS** which played a **decisive** role, in particular against the background of the *Potempa-case* (see *Bracher* (1964) 619 f) where five NS activists had been sentenced to death by a court in Silesia for having murdered a Communist (on 9/10 August 1932), but (i) had their sentence commuted to *life imprisonment* by the Papen government and (ii) were finally *released*, only some months later (on 23 March 1933), by Hitler's government.

²⁹⁰This finding remains true even though the Constitution 1934 was never fully implemented (see *supra* fn 239).

- On his way towards this Constitution 1934, Dollfuß may have ‘flouted’ the *letter* of the Constitution 1920/29 then in force, but certainly not the ‘rule of law’. On the contrary, the formal breach of the B-VG was designed to **preserve its very essence**: precisely the rule of law – and thus exactly the same principle recommended by *Loewenstein* himself (despite his somewhat misleading wording, taking ‘democracy’ for the ‘rule of law’²⁹¹).
- Finally, also the assessment of Austria as a ‘one-party-State’ can be disputed: in sharp contrast to *Hitler* (but also to *Lenin*), *Dollfuß* did not simply forbid any other party except his own, but dissolved his *own* party, too, aiming to *replace the party system as such* by an *aliud*: the Patriotic Front.²⁹²

When combining *Loewenstein*’s initial assessment and the demonstrated flaws in the basis of his assessment for the period after February 1934, is it not reasonable to presume that *Loewenstein*, after having corrected these flaws (which were, besides, all committed not only in a field *outside his own core competence*, but also under circumstances in which he did not have easy access to reliable first-hand information) would have come to the conclusion that **the subsequent measures** taken by *Dollfuß*, the *oktroi* of the constitution 1934 included, **also met his own criteria of ‘militant democracy’**?²⁹³

4. CONCLUSION

4.1. Historical

The suspension of democracy in Austria from March 1933 onwards enacted by *Dollfuß*

- can only be understood properly when **put into the context** of
 - o **failed German attempts**, mainly of *Catholic* origin, to suspend democratic procedures by using emergency powers on the national as well as on the federated state level (Prussia; Bavaria) against the rising NS movement
 - o the stupendous **efficacy** by which *Hitler*, after his rise to power, applied precisely those **emergency tools** his adversaries did not dare to use against him against not only Communists, but also *against Social Democrats* and – even much more important from *Dollfuß*’ perspective – **against Catholics**.
- spared not only Austria five years of NS dominance, but thus also delayed to exactly this extent NS dominance over Europe²⁹⁴ – thus most probably laying the ground for final defeat of NS in 1945. From this perspective, the resistance of *Dollfuß* is by no means the least cause for the **restoration of the ‘rule of law’ in contemporary Europe** – as enshrined in Article 3 SCE as well as in Article 2 TEU – based on the conviction that a **fundamental layer of ‘inalienable’ norms or principles is not at human disposal at all**.

²⁹¹See supra fn 23.

²⁹²cf. *Berchtold* (1998) 749 f.

²⁹³See the quotation supra at the end of fn 23.

²⁹⁴As *Theo Habicht*, leader of the Austrian NS, had put it already as early as 1932: ‘**Austria is the key in the core of Europe**. Who is in the possession of Austria, dominates Central Europe’ (see *Hanisch* [1994] 319; translation into English by A.B.).

4.2. Dogmatical

The theoretical concept of ‘militant democracy’ coined by *Loewenstein* reflects – via the practical, although failed plans of (in particular) Papen and Held familiar to *Loewenstein*²⁹⁵ – nothing but **the traditional – mainly**²⁹⁶ *Catholic* – position that the **fundamentals** of rules governing human individual and societal life are **not at human disposal**, but enshrined in Divine (and natural) law, a position which, however, can also be derived from the father of modern State sovereignty, Jean Bodin.²⁹⁷ It was precisely this position which was – after having been denied by the positivism of the 19th century – again given precise expression in the **preamble to the Austrian Constitution of 1 May 1934** and gained, only shortly afterwards and in the same context of overcoming NS, world-wide ground, as the Charter of the UN, the UDHR and sub-sequent human rights documents show²⁹⁸, also and in particular with regard to international criminal law²⁹⁹ and, not least, the general concept of an international ‘ius cogens’ taking precedence even over national or international state treaty law.³⁰⁰

In sharp contrast to Karl Loewenstein’s misunderstanding of this position (as well as to his quite doubtful vicinity to *St. Just*, *Bucharin* and *Carl Schmitt’s dichotomy*³⁰¹), however, it has to be emphasized that this concept (of the Austrian Constitution 1934 as well as of current international law) is a concept of the ‘rule of law’ and, thus, the **natural opposite** of all concepts based on **sheer submission to force**. So even **enforcing the necessary respect for the rule of law may never amount to a simple assimilation to ‘fascism’** as advocated indeed by *Loewenstein*.

²⁹⁵Most unfortunately, for the aforementioned reasons *Loewenstein* did not take into account the Austrian Constitution of 1 May 1934.

²⁹⁶Also the German *Social Democrats’* conviction (underlying, at least partly, the attempts of the Prussian government led by Otto Braun), however, might ultimately have been rooted in a comparable belief in the existence of supra-positive natural law (cf. *Bernstein* [1923] 11 ff, in particular with regard to the sources of pre- and non-Marxist socialism, even of Karl Liebknecht’s views [ib, 30, 35]).

²⁹⁷cf. [1981]: ‘That all monarchs are subject to natural law is beyond any doubt’; translation into English by A.B.).

²⁹⁸In Lucerne, during a plenary session of the IVR Congress 2019 (‘Human Dignity: Challenges, Controversies and Promise’, Friday 12 July), one of the panellists, Heiner Bielefeldt, affirmed when asked by the author of this contribution, that in his (Bielefeldt’s) view the value of ‘human dignity’ and other core human rights already mentioned in the UNC and further developed in the subsequent documents were indeed *not at human disposal* but *stemmed from (a sort of) natural law*.

²⁹⁹cf. Article 15 (2) ICCPR or Article 7 (2) ECHR which state in essence that national law is null and void insofar as it deviates from ‘general principles of law recognized by the community of nations’/‘by civilized nations’ with regard to behaviour considered to be ‘criminal’ by these principles.

³⁰⁰cf. Article 53 VCLT.

³⁰¹See supra (text by) fn 48 and seq.

This finding implies in particular that even the most dangerous perpetrator may *never be completely thrown out* of the sphere of law³⁰²; because, as the Austrian Supreme Administrative Court put it in perhaps its most clamorous case:

‘Es steht im Rechtsstaat kein Mensch über dem Recht und keiner außerhalb des Rechts’.³⁰³

REFERENCES

I. MONOGRAPHTIES

- Achenwall, G. and Pütter, J.St., *Anfangsgründe es Naturrechts: Elementa Iuris Naturae* (ed Jan Schröder, Insel Verlag 1995).
- Adler, M., *Die Staatsauffassung des Marxismus. Ein Beitrag zur Unterscheidung von soziologischer und juristischer Methode* (1922 [reprint 1964] Wissenschaftliche Buchgesellschaft).
- Anschütz, G., *Die Verfassung des Deutschen Reichs vom 11. August 1919* (14 th edn, Georg Stilke 1933).
- Aristoteles, *Politics* (Greek – English, ed Harris Rackham, Harvard University Press 1932/1944/2005).
- Balthasar, A., *Die österreichische bundesverfassungsrechtliche Grundordnung unter besonderer Berücksichtigung des demokratischen Prinzips. Versuch einer Interpretation* (Springer 2006).
- Balthasar, A., *Absolute Nichtigkeit genereller Normen in der österreichischen Rechtsordnung* (Verlag Sramek 2016).
- Berchtold, K., *Verfassungsgeschichte der Republik Österreich, Fünfzehn Jahre Verfassungskampf 1918 – 1933* (volume I [only volume], Springer Verlag 1998).
- Bernstein, E., *Der Sozialismus einst und jetzt. Streitfragen des Sozialismus in Vergangenheit und Gegenwart* (2nd edn, J. H. W. Dietz 1923).
- Bodin, J., *Sechs Bücher über den Staat* (German translation by Bernd Wimmer, ed Peter Mayer-Tasch C.H. Beck 1981).
- Bracher, K. D., *Die Auflösung der Weimarer Republik* (4th edn, Ring Verlag 1964).
- Bracher, K., Sauer, W., & Schulz, G., *Die nationalsozialistische Machtergreifung. Studien zur Errichtung des totalitären Herrschaftssystems in Deutschland 1933/34* (Springer 1960).

³⁰²cf., in exactly this vein, also Bradley/Ewing (2011) 90: ‘However lawless may have been the acts of the IRA, ... government must not retaliate with measures which are not only not lawful but are of such a nature that it would be impossible on moral ... grounds to make them lawful’, and, even more recently, Jesse (2019) 14 (emphasis added): ‘... die Demokratie darf sich *niemals* der Mittel ihrer Gegner bedienen.’

³⁰³Cit Judgement of 24 May 1963, No 0245/62, (VwSlg) No 6035/A, dealing with the right of Austria’s last Crown Prince, Archduke Otto (see already supra text after fn 257), to enter his home country: ‘Under the rule of law nobody is above the law and nobody outside (of the) law.’ (unofficial translation by A.B.). It is said that this famous sentence was coined by Hans Klecatsky, later professor of Constitutional Law, member of the Austrian Constitutional Court and (1966–1970) Austrian federal minister for Justice. Hence, see for his understanding of the rule of law (also and in particular with regard to its relationship to the principle of democracy) Klecatsky (1967), on p 14 f, referring also to the famous judgement cited here.

- Bradley, A., & Ewing, K., *Constitutional and Administrative Law* (15th edn, Pearson Education Limited 2011).
- Brauneder, W., *Österreichische Verfassungsgeschichte* (11th edn, Verlag Manz 2009).
- Fritz, H., Handl, R., Krause, P., & Taus, G., *Farbe Tragen, Farbe bekennen 1938 – 1945, Katholisch Korporierte in Widerstand und Verfolgung* (Österreichischer Verein für Studentengeschichte 1988).
- Hacke, J., *Existenzkrise der Demokratie. Zur politischen Theorie des Liberalismus in der Zwischenkriegszeit* (Suhrkamp - Insel Verlag 2018).
- Hanisch, E., *Der lange Schatten des Staates. Österreichische Gesellschaftsgeschichte im 20. Jahrhundert* (Ueberreuter Verlag 1994).
- Heiber, H., *Goebbels-Reden* (Verlag Droste 1971).
- Heidegger, M., *Platons Lehre von der Wahrheit. Mit einem Brief über den Humanismus* (2nd edn, Francke Verlag 1954).
- Huemer, P., *Sektionschef Robert Hecht und die Zerstörung der Demokratie in Österreich. Eine historisch-politische Studie* (Verlag für Geschichte und Politik Wien 1975).
- Hobbes, T., *Leviathan, or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill* (ed. Crawford Macpherson 1968, 1980 Penguin Books).
- Isensee, J., *Subsidiaritätsprinzip und Verfassungsrecht. Eine Studie über das Regulativ des Verhältnisses von Staat und Gesellschaft* (2nd edn with a supplement: Die Zeitperspektive 2002. Subsidiarität – das Prinzip und seine Prämissen (Duncker & Humblot 2001).
- Isensee, J., *Das Volk als Grund der Verfassung: Mythos und Relevanz der Lehre von der verfassungsgebenden Gewalt* (Springer Verlag 1995).
- Jung, O., *Plebizit und Diktatur: die Volksabstimmungen der Nationalsozialisten* (Mohr Siebeck 1995).
- Kant, I., *Zum ewigen Frieden und Auszüge aus der Rechtslehre* (ed. Oliver Eberl and Peter Niesen, indication of pages according to the 'Academy edition' Suhrkamp 2011).
- Kant, I., *Metaphysische Anfangsgründe der Rechtslehre. Metaphysik der Sitten Erster Teil* (ed. Bernd Ludwig, indication of pages according to the 'Academy edition', 3rd edn, Felix Meiner 2009).
- Kelsen, H., Froehlich, G. and Merkl, A., *Die Bundesverfassung vom 1. Oktober 1920* (Franz Deuticke 1922).
- Kindermann, D., *Die Habsburger ohne Reich. Geschichte einer Familie seit 1918* (2nd edn, Verlag Kremayr & Scheriau KG 2010/2012).
- Kindermann, G., *Hitlers Niederlage in Österreich. Bewaffneter NS-Putsch, Kanzlermord und Österreichs Abwehrsieg 1934* (Hoffmann und Campe Verlag 1984).
- Kluckert, S., *Zuwendung und Gesetz insbesondere zu Grund und Grenzen der Außenwirkung von Haushaltsgesetz und Haushaltsplan* (Mohr Siebeck 2018).
- Kreisky, B., *Zwischen den Zeiten. Erinnerungen aus fünf Jahrzehnten* (Siedler 1986/1995).
- Kustatscher, E., *Berufsstand oder Stand? Ein politischer Schlüsselbegriff im Österreich der Zwischenkriegszeit* (Böhlau Verlag 2016).
- Lenin, W.I., *Staat und Revolution. Die Lehre des Marxismus vom Staat und die Aufgaben des Proletariats in der Revolution* (reprint of the German translation of the second edition, 2nd edn, Verlag Das Freie Buch 2012).
- Leser, N., *Salz der Gesellschaft. Wesen und Wandel des österreichischen Sozialismus* (Orac Verlag 1988).
- Locke, J., *The Second Treatise. An Essay Concerning the True Original, Extent, and End of Civil Government*, in: *id, Two Treatises of Government* (ed. Peter Laslett, Cambridge University Press 1960, 1965, 2008).
- Mayer, H., and Muzak, G., B-VG. *Kurzkomentar* (5th edn, Manz Verlag 2015).
- Mehring, R. and Schmitt, C., *Aufstieg und Fall. Eine Biographie* (C.H. Beck 2009).

- Mennen, K., *Selbstinszenierung im öffentlichen Raum: Katholische und sozialdemokratische Repertoireediskussionen um 1930* (Waxmann 2013).
- Poetzsch-Heffter, F., *Handkommentar der Reichsverfassung vom 11. August 1919* (3rd edn, Liebmann 1928).
- Popper, K., *Die offene Gesellschaft und ihre Feinde I. Der Zauber Platons* (8th edn, Mohr Siebeck Verlag 2003).
- Quaritsch, H., *Positionen und Begriffe Carl Schmitts* (Duncker & Humblot 1989).
- Reisberg, A., Februar 1934. *Hintergründe und Folgen* (Globus Verlag 1974).
- Schaunig, Ch., *Frauen im Austrofaschismus – Rückschritt, Stillstand, Fortschritt? Eine Suche in der Stadt und auf dem Land*, (master's thesis 2010), available online: <https://core.ac.uk/download/pdf/11591417.pdf> [accessed 5 November 2020].
- Schmitt, C., *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien* (Duncker & Humblot 1963).
- Schmitt, C., *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf. Mit einem Anhang: Die Diktatur des Reichspräsidenten nach Art. 48 der Weimarer Verfassung* (2nd edn, Duncker & Humblot 1928).
- Sakmyster, T., and Horthy, M., *Ungarn 1918 – 1944* (Edition Steinbauer German edition 2006).
- Schmitt, C., *Verfassungslehre* (11th edn, Duncker & Humblot 2017/1928).
- Schmitt, C., *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (Duncker & Humblot 1921).
- Schupmann, B., *Carl Schmitt's State and Constitutional Theory. A Critical Analysis* (Oxford University Press 2017).
- Schuschnigg, K. v., *Farewell Austria* (Cassell & Company Ltd 1938).
- Tálos, E., *Das austrofaschistische Herrschaftssystem. Österreich 1933-1938* (LIT Verlag 2013).
- Weber, E., *Dollfuß an Österreich. Eines Mannes Wort und Ziel* (E. Reinhold Verlag 1935).
- Weber, M., *Politik als Beruf* (1919, https://commons.wikimedia.org/wiki/Politik_als_Beruf#/media/File:Max_Weber_-_Politik_als_Beruf_Seite_01.jpg accessed 21 November 2020).
- Zarusky, J., *Die deutschen Sozialdemokraten und das sowjetische Modell. Ideologische Auseinandersetzung und außenpolitische Konzeptionen 1917 – 1933* (Walter De Gruyter 1992).
- Zenker, T., *Österreich 1938. Hintergründe, Vorgeschichte und Folgen des 'Anschlusses'* (2nd edn, Drehbuchverlag 2016).
- Zeyringer, K., Gollner, H., *Eine österreichische Literaturgeschichte seit 1650* (Studien Verlag 2012).

II. CONTRIBUTIONS IN EDITED BOOKS

- Arelin, K.O. v., 'Der bayerische Adel. Von der Monarchie zum Dritten Reich' in: Broszat, M., Fröhlich, E., Großmann, A. (eds), *Bayern in der NS-Zeit. Herrschaft und Gesellschaft im Konflikt Teil B* (Walter De Gruyter 1981) 513 - 68.
- Balthasar, A., '100 Jahre B-VG - eine komplexe Bilanz' in Balthasar, A. and Vincze A. (eds), *Hundert Jahre österreichisches Bundes-Verfassungsgesetz. Die Perspektive von außen* (2021) 229–317.
- Balthasar, A. and Pichler, J., 'Interdependence between Fundamental Rights and institutional Law of the European Union' in Pichler, J. and Balthasar A. (eds), *The Report on the Future of Europe – Striking the Balance between 'Unity' and 'Diversity'?* Proceedings of the Conference on European Democracy 2013 (nvw 2014) 93 -164.

- Bezemek, Ch., 'Commentary on Article 54 EUCFR' in Holoubek, M. and Lienbacher G. (eds), *Charta der Grundrechte der Europäischen Union. GRC-Kommentar* (2nd edn Manz 2019) 979–87.
- Borowsky, M., 'Commentary on Article 54 EUCFR' in Meyer, J. (ed), *Charta der Grundrechte der Europäischen Union* (4th edn, Nomos 2014) 826–32.
- Böckenförde, E.W., 'Der Begriff des Politischen als Schlüssel zum staatsrechtlichen Werk Carl Schmitts' in Böckenförde, E.W., *Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*. (Erweiterte Ausgabe Suhrkamp 2006) 344–66.
- Böckenförde, E., 'Die verfassungsgebende Gewalt des Volkes – Ein Grenzbegriff des Verfassungsrechts' in Böckenförde, E., *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und Verfassungsrecht* (Suhrkamp 1991) 90–112.
- Cliteur, P. and Rijpkema, B., 'The Foundations of Militant Democracy' in Ellian, A. and Molier G. (eds), *The State of Exceptions and Militant Democracy in a time of Terror* (Republic of Letters Publishing 2012) 227–72.
- Ellian, A. 'The State of Exception in a time of Terror' in Ellian, A. and Molier G. (eds), *The State of Exceptions and Militant Democracy in a time of Terror* (Republic of Letters Publishing 2012) 23–68.
- Ernst, W., 'Politische Gewalt und bürgerliche Revolution' in Reinalter, H. (ed), *Revolution und Gesellschaft. Zur Entwicklung des neuzeitlichen Revolutionsbegriffs* (Inn Verlag 1980) 191–202.
- Fister, M., 'Staatsnotstandrecht in Österreich' in Zwitter, A. (ed), *Notstand und Recht* (5th ed Nomos 2012) 160–196.
- Grabenwarter, Ch., 'Geleitwort' in Zwitter, A. (ed), *Notstand und Recht* (5th ed Nomos 2012).
- Heintze, H.-J., 'Völkerrechtliche Aspekte des Notstandsrechts' in Zwitter A. (ed), *Notstand und Recht* (5th ed Nomos 2012) 47–81.
- Hong, Q.L., 'Democracy, Freedom of Speech and the Twin Challenges' in: Ellian, A. and Molier G. (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012) 329–366.
- Hoppe, T., 'Commentary on Article 54 EUCFR' in Meyer J. (ed), *Charta der Grundrechte der Europäischen Union* (5th edn, Nomos 2019) 992–1008.
- Jabloner, C., 'Wenigstens formale Kontinuität? Gescheiterte Bemühungen nach dem 4. März 1933' in: Parlamentsdirektion (ed), *Staats- und Verfassungskrise 1933* (Böhlau 2014) 99–112.
- Jabloner, C., 'Kann der Bundespräsident auf sein Amt verzichten?' reprinted in Olechowski, T. Zeleny K. (eds), in Jabloner C. (ed), *Methodenreinheit und Erkenntnisvielfalt. Aufsätze zur Rechtstheorie, Rechtsdogmatik und Rechtsgeschichte* (Manz Verlag 2013) 377–90.
- Janistyn-Nowák, S., 'Vorwort' in Parlamentsdirektion (ed), *Staats- und Verfassungskrise 1933* (Böhlau Verlag 2014) 7–15.
- Klecatsky, H., 'Was verlangt der Rechtsstaat heute?' in Klecatsky, H., *Der Rechtsstaat zwischen heute und morgen* (Verlag Herder 1967) 13–31.
- Konrath, Ch., 'Commentary on Art 29 B-VG' in Kneihs, B. and Lienbacher G. (eds), *Rill-Schäffer-Kommentar* (19. Delivery 2017).
- Lepsius, O., 'Karl Loewenstein (1891 – 1973)' in Häberle P., Kilian, M. and Wolff H. (eds), *Staatsrecht-lehrer des 20. Jahrhunderts. Deutschland – Österreich – Schweiz* (Walter De Gruyter 2015), 411–437.
- Lienbacher, G., 'Commentary on Article 29/2, 3 B-VG', in Korinek et al (eds), *Bundesverfassungsrecht* (3. Delivery 2000).
- Lindseth, P., 'Der europäische Kontext: Von der Krise der Zwischenkriegszeit zur Verfassungsregelung nach dem Krieg und darüber hinaus', in Parlamentsdirektion (ed), *Staats- und Verfassungskrise 1933* (Böhlau Verlag 2014), 171–96.

- Molier, G., 'The State of Exception and Necessity under International Law', in: Ellian/Molier (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012) 177–225.
- Möller, H., 'Preußen von 1918 bis 1947: Weimarer Republik, Preußen und der Nationalsozialismus' 149 - 316, in Neugebauer W. (ed), *Handbuch der Preußischen Geschichte III Vom Kaiserreich zum 20. Jahrhundert und große Themen der Geschichte Preußens* (Walter De Gruyter 2001).
- Pelinka, A., 'Kommentar zum Panel 'Demokratiekrise und Staatsentwürfe'', in Parlamentsdirektion (ed), *Staats- und Verfassungskrise 1933* (Böhlau Verlag 2014), 113–22.
- Randelzhofer, A. and Nolte, G., 'Commentary on Article 51 UNC' in Simma B. et al (eds), *The Charter of the United Nations* (3rd ed 2012), 1397–1428.
- Raschauer, B., 'Commentary on Art 29/1 B-VG' in: Korinek, K. et al (eds), *Österreichisches Bundesverfassungsrecht* (6. Delivery 2003).
- Reiter-Zatloukal, I., 'Parlamentarismus im Fadenkreuz. Demokratiekonzepte und (Anti-) Parlamentarismus in Österreich 1918 bis 1933/34' in Parlamentsdirektion (ed), *Staats- und Verfassungskrise 1933* (Böhlau Verlag 2014) 19–50.
- Spanner, H., 'Die Entwicklung' in: Herbert Schambeck (ed), *Das österreichische Bundes-Verfassungsgesetz und seine Entwicklung* (Duncker & Humblot 1980) 33–55.
- Thiel, M., 'Militant Democracy and State of Emergency in Germany' Ellian, A. Molier, G. (eds), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing 2012) 273–327.
- Weaver, C.K., Motion, J. and Roper, J., 'From Propaganda to discourse (and Back Again): Truth, Power, the Public Interest, and Public Relations' in L'Etang J. and Pieczka, M. (eds), *Public Relations. Critical Debates and Contemporary Practice* (Routledge 2006) 7–21.
- Widder, H., 'Die Gesetzgebung' in Schambeck H. (ed), *Das österreichische Bundes-Verfassungsgesetz und seine Entwicklung* (Duncker & Humblot 1980) 349–423.
- Wiederin, E., 'Die Rechtsstaatskonzeption der Verfassung 1934. Zugleich Mutmaßungen über die Gründe einer Begriffsrenaissance' in Parlamentsdirektion (ed), *Staats- und Verfassungskrise 1933* (Böhlau Verlag 2014) 75–97.
- Wiederin, E., 'Das Recht des Staatsnotstands in Österreich' 5. ALES-Tagung 'Freiheit versus Sicherheit'. Proceedings (2016) 115–46.
- Wohnout, H., 'Schritte auf dem Weg zur Diktatur. Die Entwicklung nach dem Ende des demokratischen Parlamentarismus im Spannungsfeld der deutschen und italienischen Österreichpolitik' in: Parlamentsdirektion (ed), *Staats- und Verfassungskrise 1933* (Böhlau Verlag 2014) 51–74.
- Wood, L., 'Commentary on Article 54 CFR' in: Peers, S., Hervey, T., Kenner J. and Ward A. (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014) 1539–56.

III. ARTICLES IN JOURNALS

- Balthasar, A., 'Internationaler Schutz im Wandel – vom II. Weltkrieg über den Ost-West-Konflikt zum Nord-Süd-Konflikt' (2017) JRP 214–39.
- Hinghofer-Szalkay, St., 'Richterliche Rechtsnormvernichtung im Notstand' (2018) BRGÖ 357–70.
- Hoogers, G., Karapetian, G., 'Federal disputes in the German Reich under the Weimar Constitution: Lessons in Dispute Settlement for the Kingdom of the Netherlands' (2018) ICL Journal 257–87.

- Loewenstein, K., 'Autocracy versus Democracy in Contemporaneous Europe I and II' (1935) APSC 571–593, 755–84.
- Loewenstein, K., 'Militant Democracy and Fundamental Rights' (1937) APSR 417–432, 638–58.
- Mikat, P., 'Zur Kundgebung der Fuldaer Bischofskonferenz über die nationalsozialistische Bewegung vom 28. März 1933' (1962) JCSW 209–35.
- Raithel, Th. and Strenge, I., 'Die Reichstagsbrandverordnung. Grundlegung der Diktatur mit den Instrumenten des Weimarer Ausnahmezustands' (2000) VfZ 413–60.
- Schmitt, C., 'Der Führer schützt das Recht. Zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934' (1934) DJZ, 945–50.
- Schölnberger, P., 'Durchaus erträglich?' Alltag im Anhaltelager Wöllersdorf' (2010) 195 DÖW Mitteilungen 1–4.
- Staudinger, A., 'Bemühungen Carl Vaugoins um Suprematie der Christlich-Sozialen Partei in Österreich' (1971) MÖStA 1970 297–376.
- Wacke, G., 'Staatsrechtliche Wandlung. Gedanken zur Verlängerung der Regierungsgesetzgebung' (1944) ZgS 273–303.
- Braatz, W., 'Franz von Papen und die Frage der Reichsreform' (1975) PVS 319–40.

IV. COURTS

- International Court of Justice (CJ), Advisory Opinion of 9 July 2004, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory'.
- UN International Criminal Tribunal for the former Yugoslavia (IT-96-22-A, *Erdemovic*).
- European Court of Human Rights (CtHR), Judgement of 26 September 1995, ANo 17851/91, *Vogt/G*.
- European Court of Human Rights (CtHR), Judgement of 22 March 2001, ANos 34044/96, 35532/97 and 44801/98, *Streletz, Kessler, Krenz/G*.
- Austrian Constitutional Court (VfGH), Judgement of 30 June 1949, No B 299/48, Official Collection (VfSlg) No 1827.
- Austrian Constitutional Court (VfGH), Judgement of 16 March 2001, No G 150/00, Official Collection (VfSlg) No 16.151.
- Austrian Supreme Administrative Court (VwGH), Judgement of 24 May 1963, No 0245/62, Official Collection (VwSlg) No 6035/A.
- German Federal Constitutional Court (BVerfG), Judgement of 22 May 1975, No 2 BvL 13, Official Collection (BVerfGE) 39, 334.

V. OTHER SOURCES

- Austrian Center for Law Enforcement Sciences (ALES), Resilienz des Rechts in Krisenzeiten, of 23th December 2016, commanded by the Austrian Federal Ministry of the Interior, accessed 5 November 2020: https://bmi.gv.at/bmi_documents/2025.pdf.

- Jesse, E., Die offene Gesellschaft ist von vielen Seiten bedroht, – wer die Gefahren erkennen will, fährt immer noch gut mit Karl Popper, NZZ 2 August 2019, accessed 5 November 2020: <https://www.nzz.ch/meinung/karl-popper-heute-die-offene-gesellschaft-ist-vielfach-bedroht-ld.1491360?reduced=true>.
- Konrad, H., 'Der Blick in den Abgrund', Kleine Zeitung, 2nd July 2017, accessed 5 November 2020: https://austria-forum.org/af/Wissenssammlungen/Essays/Geschichte/Justizpalast-Brand_1927.
- Parlamentsdirektion (ed) *Staats- und Verfassungskrise 1933. Protokolle aus Nationalrat und Bundesrat* (2014) accessed 5 November 2020: https://www.parlament.gv.at/ZUSD/PDF/Verfassungskrise_1933_Materialienband.pdf.
- Weinberger, G, Sie verfolgen jeden mit Hass, der nicht ihrer Meinung ist. Die islamistische 'Islamophobie'-Ideologie ist die Grundlage für das Verbrechen von Conflans, Die Presse, 23. 10. 2020, 27.
- Wollenberg, J., 'Republik ist schon viel ...' Zur Wiederaneignung demokratischer Traditionen in der Erwachsenenbildung, Deutsches Institut für Erwachsenenbildung 2003, accessed 5 November 2020. <https://www.die-bonn.de/doks/wollenberg0301.pdf>.
- Der Spiegel 15. 6. 2019, 'Wir müssen lernen, mutiger intolerant zu sein', accessed 5 November 2020: <https://www.spiegel.de/politik/joachim-gauck-wir-muessen-lernen-mutiger-intolerant-zu-sein-a-00000000-0002-0001-0000-000164407502>.
- https://de.wikipedia.org/wiki/Februark%C3%A4mpfe_1934#cite_note-Bauer74-12 accessed 5 November 2020.
- https://de.wikipedia.org/wiki/Ludwig_Kaas accessed 5 November 2020.
- https://austria-forum.org/af/Wissenssammlungen/Symbole/Faschismus_-_die_Symbole/Trabrennplatzrede_1933 accessed 5 November 2020.
- https://austria-forum.org/af/Bilder_und_Videos/Historische_Bilder_IMAGNO/Dollfu%C3%9F%2C_Engelbert/00623702 accessed 5 November 2020.
- https://www.historisches-lexikon-bayerns.de/Lexikon/Uniformverbot_1930-1932, accessed 5 November 2020.