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**SCIENTISTS OF THE STATE, SCIENCE OF THE STATE, AND THE  
STATE: AUSTRIAN AND GERMAN PUBLIC LAWYERS IN THE  
SHORT 20<sup>TH</sup> CENTURY  
PART 1: THE AGE OF CATASTROPHE, 1914-1945**

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**ABSTRACT**

Between the First World War and the end of the Cold War, Germany and Austria, whose legal cultures were highly interdependent in terms of persons, conceptions, and institutions, saw eleven or twelve fundamentally different regimes, depending on the interpretation of Austria's status from 1938-45. Lawyers often ensured the legal functioning of these regimes and legitimized their existence. This again affected their notions of law, legality, and justice, and of the principles underlying these concepts, as well as their personal preferences and societal roles.

Based on the analysis of about two hundred biographical sketches of Austrian and German lawyers, mostly from the field of public (international) law, of about 2,500 contributions to the leading "(Österreichische) Zeitschrift für öffentliches Recht" from 1914 to 1945, and of the respective legal history-literature, this contribution analyzes the relation of Austrian and German lawyers to their respective states and regimes, and outlines the typical patterns of how they were affected by regime changes and how they reacted to them.

Proceeding from this analysis, in the second part of this study, the relation between lawyers and the state until the end of the cold war will be illustrated and it will be shown that

some typical patterns in the lawyers' reaction to regime changes can be identified. Also the impact the state-lawyers-relation had on the development of Austria and Germany to stable, functioning democracies will be outlined.

**KEYWORDS**

Germany, Austria, 1914-1945, Public Law, Law and Political Systems

**NOTE**

This article constitutes the first part of this study. The second part, together with the conclusions for the entirety of the study, will be presented in a follow-up article to be published in the next issue of the journal.

## INTRODUCTION

The history of Germany and Austria—that both had emerged as modern states from their common past in the Holy Roman Empire of the German Nation in the 19<sup>th</sup> century—continued to be intertwined to an extraordinary degree in what has been called the “Age of Catastrophe”<sup>1</sup>, the period between the unleashing of the First and the end of the Second World War. This mutual entanglement persisted to a lesser extent also until the end of the Cold War in 1989/91 and covered not only the fields of politics, the military, culture, language, etc., but also the realm of law<sup>2</sup>.

From 1914 to 1990, what we know today as Austria and Germany saw eleven or twelve fundamentally different regimes – depending on whether or not Austria is understood as a country of its own between 1938 and 1945, despite being annexed by Germany.

Austria started into the twentieth century as a huge, multi-national empire, transforming into a small, practically mono-ethnic republic in 1918. Traditional ideological cleavages that had been aggravated during the First World War and the Great Depression of the 1930s turned this republic into a catholic-authoritarian dictatorship in 1933/34, which again was replaced by Nazi-rule after 1938’s “Anschluss”. Only after war and liberation, Austria finally became a republic in 1945.

Germany’s twentieth-century history was even more chaotic. Starting out as an imperialist monarchy, the country turned into a liberal republic in 1919 that also was unable to survive the Great Depression for similar reasons as in Austria. The factors that were decisive for the development in Austria were worsened by the attempt of influential quarters to revise the results of the First World War and try to establish Germany as the hegemon of Europe. Hence, the republic gave way to the Nazi regime in 1933. After the Nazis plunged Germany into the Holocaust and the country’s most disastrous war, Germany was completely dissolved until 1949, with two states rising from the debris then at the frontline of the Cold War: a Western style capitalist democracy, and a socialist “people’s democracy”. These two states finally merged into today’s Federal Republic of Germany after the breakdown of “real-life socialism” in 1989/90.

Hence, regime changes were a common feature in the professional lives of Austrian and German lawyers, and since they were frequent, they called for quite

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<sup>1</sup> Eric Hobsbawm, *Age of Extremes. The Short Twentieth Century 1914-1991* (London: Michael Joseph, 1994), Part 1.

<sup>2</sup> Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Vol. 3: *Staats- und Verwaltungswissenschaft in Republik und Diktatur. 1914-1945* [History of Public Law in Germany, Vol. 3, The Science of State and Administration in Republic and Dictatorship. 1914-1945] (Munich: C. H. Beck, 1999), p. 6.

an extraordinary degree of flexibility: Monarchists had to ensure the functioning of republics, republicans administered dictatorships, and the supporters of whatever dictatorial regimes had to pose like democrats.

## 1. POISONING THE INTELLECTUAL WEAPONS IN THE WAR OF NATIONS – THE LAWYERS OF THE CENTRAL EMPIRES IN THE FIRST WORLD WAR

It was rather unexpected that the First World War, though initially welcomed in many quarters as a way out of the fragmentation and the widely felt decadence of the Austro-Hungarian and German societies<sup>3</sup>, soon turned into a fierce ideological crusade that left only little room for freedom of thought. As for the societies at large, this holds true for academia generally and the social sciences more particularly, affecting last but not least the lawyers in the beleaguered Central Empires. Consequently, many of them soon turned into combatants on the ideological frontline, legitimizing the policies and ideological foundations of their respective states. Thus, the Central Powers' legal communities as well as their legal concepts became part of the battlefield, where Germany struggled in her "Grasp for World Power"<sup>4</sup>.

Apart from organizing and administering the transformation of their comparatively liberal and democratic peacetime political systems into garrison states<sup>5</sup>, especially academic lawyers sided with their governments by conviction or acceptance of wartime necessities, especially when it came to the laws of neutrality and the war on the high seas.

When, for example, on June 29, 1915, Austria-Hungary protested to the US Department of State that America's exports of arms and ammunition to Britain and France were a violation of her status as a neutral power "according to all authorities in international law"<sup>6</sup>, the Ministry for Foreign Affairs could – and obviously did – draw on paper that Heinrich Lammasch, Austria's most renowned expert in public international law<sup>7</sup>, had just published in the "Österreichische Zeitschrift für

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<sup>3</sup> On this see Klaus Böhme, "Einleitung" [Introduction]: 10-12; in: Klaus Böhme, ed., *Aufrufe und Reden deutscher Professoren im Ersten Weltkrieg* [Appeals and Addresses of German Professors in the First World War] (Stuttgart: Philipp Reclam, 1975), for the academia in Germany. For Austria-Hungary refer to the more general Manfred Rauchensteiner, *Der Tod des Doppeladlers. Österreich-Ungarn und der Erste Weltkrieg* [The Death of the Double Eagle. Austria-Hungary and the First World War] (Graz: Styria, 1997), p. 100-103.

<sup>4</sup> As the title of Fritz Fischer's famous book *Germany's Aims in the First World War* is translated literally.

<sup>5</sup> Michael Stolleis, *supra* note 2, p. 53 f; Manfred Rauchensteiner, *supra* note 3, *passim*.

<sup>6</sup> An English translation of the protesting note is printed as an attachment of a letter of the US Ambassador in Austria, *Frederic C. Penfield*, of July 2<sup>nd</sup>, 1915 to the Secretary of State, Robert Lansing, a renowned international lawyer, in: *Papers relating to the Foreign Relations of the United States 1915. Supplement The World War* (Washington: United States Government Printing Office, 1928), p. 790 ff.

<sup>7</sup> Heinrich Lammasch, born in 1853, was Professor for criminal law and public international law at the University of Vienna since 1899. Among other assignments, he worked in the Austro-Hungarian

öffentliches Recht" (the name was changed to "Zeitschrift für öffentliches Recht" in 1919, hereafter it is sometimes quoted as ZOR): Here those "authorities" and their arguments were listed in detail without spending many words on those holding opposing opinions<sup>8</sup>.

With the British blockade of the Central Empires' trade becoming one of the most serious strategic concerns in the on-going war, public international lawyers also provided valuable arguments to their governments in their effort to convince the remaining neutrals – above all the US – that British measures were unlawful and that countermeasures were perfectly justified. Thus, Hermann Gellmann argued in the ZOR that freedom of the seas was a concept misused to serve British interests<sup>9</sup>. And after a German submarine sank the ocean liner "Lusitania" on May 7, 1915, causing a death toll of about 1.200, Hans Wehberg, a pacifist already before the war who gained international reputation for this position afterwards<sup>10</sup>, claimed that the sinking was absolutely legitimate. He set out admitting that the sinking of unarmed merchant vessels (which he thought the "Lusitania" was) by submarines without warning was illegal in principle. Nevertheless, he then argued that the measure was justified, notwithstanding its death toll, since the German admiralty had declared this unprecedented form of naval warfare to be a reprisal against the equally unprecedented and illegal form of naval blockade Britain had introduced by the end of 1914<sup>11</sup>.

But the engagement of Austrian and German lawyers in the war effort of the Central Powers was not only limited to the realm of law proper. Starting out from a self-conception of being the mentors for the political life of their societies<sup>12</sup>, the German and Austrian academia – among them many lawyers – produced dozens of appeals, made public statements, etc., to justify and thus support the war efforts of their governments. In their support they showed only little restraint. For example,

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delegation at the first and second Hague Peace Conferences in 1899 and 1907, respectively, and member of the Permanent Court of Arbitration in The Hague. On October 25, 1918, ten days before Austria-Hungary ended the First World War, Lammasch became Prime Minister of Austria. He died in Salzburg on January 6, 1920 (Walter Goldinger and Stefan Verosta, "Lammasch Heinrich," vol. 4: 415 f.; in: Eva Obermayer-Marnach and Peter Csendes, eds., *Österreichisches Biographisches Lexikon 1815–1950* [Austrian Biographic Encyclopaedia 1815-1950; hereinafter OBL], 13 vols. (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1957-2010).

<sup>8</sup> Heinrich Lammasch, "Das Mediationsrecht der Neutralen" [The Neutral Powers' Right to Mediate], *Österreichische Zeitschrift für Öffentliches Recht* 2 (1915): 205, especially 229-237.

<sup>9</sup> Hermann Gellmann, "Die rechtliche Natur der Meeresfreiheit" [The Legal Nature of the Freedom of the Seas], *Österreichische Zeitschrift für Öffentliches Recht* 2 (1915): 437; Hermann Gellmann, "Meeresfreiheit im Kriege" [Freedom of the Seas in Times of War], *Österreichische Zeitschrift für Öffentliches Recht* 2 (1915): 657.

<sup>10</sup> Hans Wehberg, born in Düsseldorf in 1885, was employed in the Prussian legal administration at the time the war broke out. Having worked with Alfred Hermann Fried, Austrian Nobel Peace Prize Laureate of 1911, already before the war, in the 1920s he served as counsel in public international law to several German institutions, among them the Reichstag. In 1928 he accepted a chair for public international law in Geneva that he held until 1960. Wehberg died in Geneva on May 29, 1962.

<sup>11</sup> Hans Wehberg, "Der Lusitaniafall" [The Lusitania Case], *Österreichische Zeitschrift für Öffentliches Recht* 2 (1915): 275.

<sup>12</sup> Klaus Böhme, *supra* note 3: 6.

when German professors, co-prepared by Berlin academic lawyers<sup>13</sup>, protested on October 4, 1914 against *Entente* charges of the German army committing atrocities in the appeal "An die Kulturwelt" [To the World of Culture], they argued that these charges, even if they were true, could be made on no account by their foes "who have set Mongols and Negroes on the white race"<sup>14</sup>. This argument was also subscribed by Theodor Kipp, who held a chair for civil law in Berlin and was rector at that time, Paul Laband<sup>15</sup>, professor for constitutional law in Strasbourg, and Franz von Liszt<sup>16</sup>, also professor in Berlin and a widely renowned reformer of criminal law. But it has to be recorded that only relatively few lawyers signed this appeal, compared to their colleagues from chemistry, history, linguistics, and theology. But until 1918, "An die Kulturwelt" was followed by many similar appeals from academia, which were sometimes initiated and nearly always subscribed by the members of the law faculties, too<sup>17</sup>.

The war also resulted in the disruption of the ties academic lawyers in the Central Empires had with their colleagues in Western Europe, although this was at least sometimes regretted<sup>18</sup>. After members of the Oxford Faculty of Modern History, inspired by the public international lawyer H. Erle Richards, had published a lengthy defense of the British case in the war, arguing that Germany was fighting for the "prerogative to act outside and above the public law ..., while ...[Britain]

<sup>13</sup> Angela Klopsch, *Die Geschichte der juristischen Fakultät der Friedrich Wilhelms Universität zu Berlin im Umbruch von Weimar* [History of the Faculty of Law at the Friedrich Wilhelms-University Berlin at the Transformation to the Weimar Republic] (Berlin: Berliner Wissenschaftsverlag, 2009), p. 61.

<sup>14</sup> "Sich als Verteidiger europäischer Zivilisations zu gebärden, haben die am wenigsten das Recht, die sich mit Russen und Serben verbündeten und der Welt das schmachvolle Schauspiel bieten, Mongolen und Neger auf die weiße Rasse zu hetzen" ("Aufruf an die Kulturwelt" [Appeal to the World of Culture] (October 4, 1914): 47; in: Klaus Böhme, *supra* note 3.

<sup>15</sup> Paul Laband, born in Breslau (today Wrocław, Poland) in 1838, was professor for constitutional law at the University of Strasbourg since 1872, when the university was founded after the annexation of Alsace-Lorraine by Germany. Taking often a rather critical position in the political quarrels of the time, especially his fundamental four-volume book *Das Staatsrecht des deutschen Reiches* [Constitutional Law of the German Empire] that was published in five editions between 1876 and 1914 made him one of the most influential public lawyers of his time. Laband died on March 23, 1918 in Strasbourg. (Manfred Friedrich, "Laband, Paul", vol. 13 (1982): 362 f.; in: Historische Kommission bei der Bayerischen Akademie der Wissenschaften, ed., *Neue Deutsche Biographie* [New German Biography; hereinafter NDB], 24 vols. (Berlin: Duncker & Humblot, 1971-2010); Walter Pauly, "Laband, Paul [1838-1918]": 374 f.; in: Michael Stolleis, ed., *Juristen. Ein biographisches Lexikon. Von der Antike bis zum 20. Jahrhundert* [Lawyers. A Biographical Encyclopaedia. From Antiquity to the 20th Century] (München: C.H. Beck, 2001).

<sup>16</sup> Franz von Liszt, born in Vienna in 1851, was professor for criminal law in Berlin since 1899, following several appointments in Austria and Germany. Liszt argued for the consideration of psychological aspects in criminal law and hence became one of the foremost protagonists of criminal law reform in Germany. He died on June 21, 1919 in Seeheim/Bergstraße. A biographic sketch, stressing his impact in the field of criminal law can be found in Regina Harzer, "Liszt, Franz von (1851-1919)": 391 f.; in: Michael Stolleis, ed., *supra* note 15.

<sup>17</sup> Klaus Böhme, *Introduction* (*supra* note 3) offers a systematic overview over the most important appeals as well as their texts, Angela Klopsch, *Geschichte der juristischen Fakultät* (*supra* note 13) provides for some additional material with a focus on the influential University of Berlin.

<sup>18</sup> A touching example of this regret can be found in the ZOR in 1916, where an exchange of letters between Adolf Menzel, professor for administrative law in Vienna, and Léon Duguit, a public lawyer from Bordeaux, that had been interrupted by the outbreak of the war, is printed (Adolf Menzel, "Ein Briefwechsel" [An Exchange of Letters], *Österreichische Zeitschrift für Öffentliches Recht* 2 [1915]: 724).

stands for the rule of public law"<sup>19</sup>, the lawyers Josef Kohler<sup>20</sup>, the already mentioned Franz von Liszt, Ferdinand von Martitz<sup>21</sup>, Heinrich Triepel<sup>22</sup> (all of them from the University of Berlin) and 22 professors from other faculties<sup>23</sup> on December 3<sup>rd</sup>, 1914, issued a counter-declaration that paid back with a listing of all British violations of public international law from the conquests of Egypt and India to the Boer War, to conclude that their opponents were "poisoning the intellectual weapons in the war of nations".<sup>24</sup>

Those and other political activities often recurred to concepts of a "German mission" that already before the war had been held by a majority of academic teachers, among them the lawyers. The underlying idea of this concept was the fight against the "ideas of the French Revolution", as there were democracy, liberalism, and individualism, to assert the anti-liberal, national, and collectivist "ideas of 1914"<sup>25</sup>. With the First World War, this traditional gulf between the Central and Western European legal concepts and their respective supporters grew even deeper.

But the war not only deepened the cleavages between Austrian and German lawyers and their colleagues from Western Europe, but also opened up new rifts inside the legal communities of both countries. Under the cloak of the political truce that stood at the outset of the war (the so-called "Burgfrieden", to be translated literally as "peace inside the fortress"), some lawyers started a debate about internal reform of the Central Empires after the enthusiasm of the period of the outbreak of the war had calmed down<sup>26</sup>. A striking example for this development from Austria-Hungary is the first special issue of the ZOR, dedicated to the Autonomy of the Monarchies and Countries united under the Habsburg Crown in

<sup>19</sup> Members of the Oxford Faculty of Modern History, *Why we are at War. Great Britain's Case*, 3rd edition (Oxford: Clarendon Press, 1914), p. 108.

<sup>20</sup> Josef Kohler, born in Offenburg (Grand Duchy of Baden) in 1849, was as eminent in legal history, legal philosophy, and comparative law as in his work on the existing legislative framework of the time. Holding a chair in Berlin since 1888, he became particularly famous for his re-discovery of Francesco de Vitoria and his doctrine of natural law. Kohler died in Berlin on August 3, 1919 (Klaus Luig, "Kohler, Josef": 425 f.; in: NDB, *supra* note 15, vol. 12 (1979)).

<sup>21</sup> Ferdinand von Martitz, born in Insterburg, East Prussia (today Chernyakhovsk, Russian Federation) in 1839 held a chair in constitutional and public international law in Berlin since 1889, a rather uncommon position at that time. Besides he was a member of the Permanent Court of Arbitration in The Hague and judge at the Prussian supreme administrative court (Oberverwaltungsgericht). Von Martitz died in Berlin on July 28, 1921 (Manfred Friedrich, "Martitz, Ferdinand von": 309; in: NDB, *supra* note 15, vol. 16 (1990)).

<sup>22</sup> Heinrich Triepel, born in Leipzig in 1868, without doubt was the most renowned German public international law professor in the first half of the 20th century. After teaching assignments in Tübingen and the Navy Academy in Kiel, he changed to Berlin in 1913 to teach constitutional and public international law. At the end of the First World War, Triepel engaged actively and sympathetically in the debate about a republican constitution for Germany and was co-founder of the "Vereinigung der Deutschen Staatsrechtslehrer", Germany's most influential association of public and constitutional law professors. After leaving university in 1935, Triepel died in Untergrainau, Bavaria on November 23, 1946 (Angela Forster, "Triepel, Heinrich [1868-1946]": 635 f.; in: Michael Stolleis, ed., *supra* note 15).

<sup>23</sup> Angela Klopsch, *supra* note 13, p. 63 f.

<sup>24</sup> "Erklärung gegen die Oxforder Hochschulen" [Declaration against the Oxford Universities] (December 12, 1914): 54 f.; in: Klaus Böhme, ed., *supra* note 3.

<sup>25</sup> Michael Stolleis, *supra* note 2, p. 49.

<sup>26</sup> Klaus Böhme, *Introduction*, *supra* note 3: 21 f.



1916, which was discussed by 14 lawyers from all over the Cisleithania<sup>27</sup> – among them Hans Nawiasky<sup>28</sup> and Franz Weyr<sup>29</sup> – in order to overcome the conflicts between the nationalities in the Austro-Hungarian Empire. For liberal German lawyers, in turn, democratic participation and the abolition of the Prussian census suffrage were major issues at debate, although contributions like, e.g., Gerhard Anschütz<sup>30</sup> "Gedanken über künftige Staatsformen"<sup>31</sup> or Hugo Preuß<sup>32</sup> "Das Deutsche Volk und die Politik"<sup>33</sup>, often were motivated by being a contribution to the maintenance of the national unity of the "Burgfrieden".

But since the issues at stake in more liberal quarters of the Austro-German legal community – national self-determination in Austria-Hungary and democracy in Germany – were exactly the ideological weapons the western enemies of the Central Powers had forged about the same time to serve them in their struggle, the stage was set for the intricate conflicts that erupted in the Austrian and even more so in the German legal communities when the war came to an end.

<sup>27</sup> "Sonderheft Länderautonomie," *Österreichische Zeitschrift für Öffentliches Recht* 3 (1916).

<sup>28</sup> Hans Nawiasky, born in Graz in 1880 as son of a Jewish opera singer from Kowno (today Kaunas, Lithuania), served in the Austro-Hungarian Army at that time, but had taught constitutional and administrative law at the University of Vienna before the war. Accepting a chair at the University of Munich after the war he became one of the protagonists of Kelsen's Pure Theory of Law. In 1933 Nawiasky fled the Nazis to Switzerland, teaching in St. Gallen until 1946 to return to Munich afterwards, contributing decisively to the Bavarian post-war constitution. On August 11, 1961, Nawiasky died in St. Gallen (Hans F. Zacher, "Nawiasky, Hans": 4 ff.; in: NDB, *supra* note 15, vol. 19 (1998)).

<sup>29</sup> Franz (František) Weyr, born in Prague in 1879, was professor for Austrian constitutional law at the Technical University of Prague. Playing an important role in the drafting of the post-war constitution of Czechoslovakia 1918/19, he moved to Brno to become a legal philosopher and a leading exponent of the Viennese School of Legal Theory grouping around Hans Kelsen. Weyr died on June 29, 1951 in Brno, Czechoslovakia (Petr Kreuz, "Weyr, František [1879-1951]": 670 f.; in: Michael Stolleis, ed., *supra* note 15).

<sup>30</sup> Gerhard Anschütz, born 1867 in Halle/Saale, at that time still was professor for constitutional law, legal history, and canon law in Berlin, moving to Heidelberg in 1916. He participated sympathetically in the debate about a republican constitution for Germany at the end of the First World War and was most noted for his commentary on the constitution of Weimar, which was sold in 14 (!) editions during the 14 years the Weimar Republic lasted. When the Nazis came into power, he justified his immediate application of retirement of March 31, 1933 with the argument that he was not able to teach constitutional law any longer due to "lack of attachment". On April 14, 1948, Anschütz died in Heidelberg following a traffic accident (Hans Nawiasky, "Anschütz, Gerhard": 307; in: NDB, *supra* note 15, vol. 1 (1953); Walter Pauly, "Anschütz, Gerhard [1867-1948]": 36 f.; in: Michael Stolleis, ed., *supra* note 15).

<sup>31</sup> Gerhard Anschütz, "Gedanken über künftige Staatsreform" [Thoughts about Future Reforms of the State]: 44; in: Friedrich Thimme, Carl Legien, eds., *Die Arbeiterschaft im neuen Deutschland* [Labour in the New Germany] (Leipzig: S. Hirzel, 1915); printed in: Klaus Böhme, ed., *supra* note 3: 113.

<sup>32</sup> Hugo Preuß, born in Berlin in 1860, received his *venia legendi* already in 1889, but only taught at the Berlin Commerce School until the end of the First World War. In 1917, he developed strategies for the democratisation of Germany on instruction of the Supreme Command of the Imperial Army. Four days after the armistice of 1918 he was made Secretary for the Interior and charged with the drafting of a new, republican constitution. Hence, Preuß can be rightly called to be the father of the Weimar constitution. He died in Berlin on October 9, 1925 (Angela Forster, "Preuß, Hugo [1860-1925]": 515 f.; in: Michael Stolleis, ed., *supra* note 15; Manfred Friedrich, "Preuß, Hugo": 708-710; in: NDB, *supra* note 15, vol. 20 (2001)).

<sup>33</sup> Hugo Preuß, *Das deutsche Volk und die Politik* [The German People and Politics] (Jena: Diederichs, 1915).



## 2. THE FIGHT OF JUSTICE AGAINST THE LAW – LAWYERS IN AUSTRIA AND GERMANY IN THE INTERWAR REPUBLICS

Military defeat and the subsequent changes in the political, economic, and societal systems constituted a complete reversal of the political and moral concepts of the German and Austrian societies, with the break-up of the vast Austro-Hungarian Empire into half a dozen of successor states adding to the difficulties to cope with the changes. For public lawyers, and especially for constitutional and administrative lawyers, the complete break-up of the traditional political frameworks also brought about a devaluation of their work hitherto undertaken. By chance, at least in the realm of public law, these fundamental changes went hand in hand with a change of generations.<sup>34</sup>

In Germany, the situation was considerably worsened by the fact that as soon as the war ended, a vigorous and polemical public dispute about the reasons for the military defeat broke out. The right wing of the political spectrum soon spread the legend that liberals and leftists in the hinterland had stabbed the unconquered, if not victorious German army in the back; an argument that in the absence of leftists<sup>35</sup> could easily be used also against the liberals in the legal community, who during the war had supported national self-determination and democratization, the enemy's war aims.

With many ordinary people, a large portion of the academic lawyers understood the political changes that took place in Germany after 1918 as dictates that has been forced on their country by its former wartime enemies, and hence only few of them actively supported the new, democratic state. The already mentioned Hugo Preuß, the father of the Weimar constitution<sup>36</sup>, did not engage in an academic career any more but served as a Member of Parliament in Prussia and took part in the creation of the moderate left "Deutsche Demokratische Partei" that was part of most German governments until 1933. Gerhard Anschütz, also mentioned above, was perhaps the most active academic constitutional lawyer who never ceased to defend the Weimar Republic<sup>37</sup>, and also several others, like the social-democrats Gustav Radbruch<sup>38</sup> and – from the late 1920s on – the Austrian Hermann Heller<sup>39</sup> vigorously defended the new state.

<sup>34</sup> Michael Stolleis, *supra* note 2, p. 56. Alone of the eleven lawyers introduced in this paper so far, four (Lammasch, Laband, Kohler, and von Martitz) died between 1918 and 1921.

<sup>35</sup> *Ibid.*, p. 64; Walter Pauly, "Anschütz, Gerhard," *supra* note 30: 37.

<sup>36</sup> Michael Stolleis, *supra* note 2, p. 81-86.

<sup>37</sup> *Ibid.*, p. 63 f.

<sup>38</sup> Gustav Radbruch, born 1878 in Lübeck, was an influential legal philosopher and criminal lawyer. He held a chair at the University of Kiel since his return from service in the Imperial Army in 1919, changing to Heidelberg in 1926. Sentenced to death in Kiel by rebels during the failed Kapp-coup in 1920, the actively engaged republican and social-democrat served as Minister of Justice from 1921-22 and again for a brief period in 1923, and was Member of the Reichstag from 1920-24. On May 8, 1933 he was among the first law professors to be ousted from university by the Nazis, and when he was called on a

Nevertheless, the vast majority of academic public lawyers in the Weimar Republic remained in an indifferent or moderately dismissive position that perhaps found its most authentic expression in a speech Fritz Freiherr Marschall von Bieberstein, professor for public law in Freiburg, Baden, gave on the occasion of the commemoration of the foundation of the republic in 1925. Talking in an iambic metrical food under the heading "The Fight of Justice against the Law", Marschall von Bieberstein described the foundation of the republic as an act of high treason and Friedrich Ebert, the President of the Reich, as an usurper. Although ending in an investigation against Marschall von Bieberstein, the talk was widely reflected in the legal community as well as in the public at large – and in most cases approvingly.<sup>40</sup>

But an important minority of German lawyers went even further than indifference or tacit disapproval, turning actively hostile towards the Weimar Republic. The intellectual leader of this group made up of lawyers like Carl Bilfinger, Conrad Bornhak, Ernst Rudolf Huber, Otto Koellreutter, and others, was Carl Schmitt<sup>41</sup>, who not only contributed substantially to the development of anti-liberal theory<sup>42</sup>, but actively backed the transformation of the late Weimar Republic into a semi-democratic presidential democracy by representing its proponents in court on several occasions, etc.

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chair at the Vytautas Magnus University in Kaunas, Lithuania in 1934, the Nazi government barred him from leaving Germany. Surviving the Nazi period working in the field of cultural history, in 1945 he was re-installed at Heidelberg and developed the so-called "Radbruch-formula" of "statutory injustice" that has to yield to the superior "supra-statutory justice", which became an important concept in Germany's dealing with the legal systems of Nazi-Germany and later the GDR. Radbruch died on November 23, 1949 in Heidelberg (Günter Spendel, "Radbruch, Gustav Lambert": 83 ff.; in: NDB, *supra* note 15, vol. 21 (2003)).

<sup>39</sup> Hermann Heller, born in Teschen (today Cieszyn, Poland) in 1891, after meeting Gustav Radbruch in Kiel in 1919 became an active social-democrat. After his habilitation in 1920 he worked in the field of adult education and later at the Kaiser Wilhelm Institute for Comparative Public Law and International Law in Berlin. Finally being appointed as professor for public law at Frankfurt/Main in 1932, he defended the social-democrat faction of the Prussian parliament at the Staatsgerichtshof-trial against the coup of the German Chancellor *Papen* (who was defended by Carl Schmitt) in July 1932 ("Preussenschlag"). Lecturing in Britain when the Nazis came into power, Heller escaped into exile to Madrid without returning to Germany. There he died on November 5, 1933 (Peter Graf von Kielmansegg, "Heller, Hermann Ignatz": 477 ff.; in: NDB, *supra* note 15, vol. 8 (1969)).

<sup>40</sup> "Vom Kampf des Rechts gegen die Gesetze", Michael Stolleis, *supra* note 2, p. 162 f. Be it only for linguistic reasons, unfortunately, the manuscript of the talk is lost.

<sup>41</sup> Carl Schmitt, born in Plettenberg, Westphalia, in 1885, after several appointments in German universities crowded Hans Kelsen out of his chair in Cologne in 1933, changing to Berlin in the same year, where he became the "crown jurist" of the Third Reich, embracing and supporting Nazi rule from its very beginning. Although falling into disgrace to a certain extent after 1936, Schmitt kept his anti-democratic and anti-Semitic positions even after 1945. He died in Plettenberg on April 7, 1985 (Reinhard Mehring, "Schmitt, Carl", in: NDB [Fn. 15] vol. 23 [2007], p. 236 ff.).

With Schmitt counting doubtlessly among the most eminent, influential, and controversial political thinkers in 20th century Germany, a thorough description of his life activity would go far beyond the scope of this paper. Suggestions for further reading are provided in Michael Stolleis, "Schmitt, Carl (1888-1985)": 562 f.; in: Michael Stolleis, ed., *supra* note 15.

<sup>42</sup> *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (Munich: Duncker & Humblot, 1922) (English: *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: MIT Press, 1985)); *Der Begriff des Politischen* (Tübingen: Mohr, 1927) (English: *The Concept of the Political* (New Brunswick, N.J.: Rutgers University Press, 1976)); *Verfassungslehre* (Munich: Duncker & Humblot, 1928) (English: *Constitutional Theory* (Durham: Duke University Press, 2008)); *Der Hüter der Verfassung* (The Guardian of the Constitution) (Tübingen: Mohr, 1931), etc.

*Mutatis mutandis*, the same development prevailed in Austria and Germany with regard to the new international order and its institutions, which had been set up by the Paris Peace Treaties at the end of the First World War. The Treaty of Versailles was rejected by practically all German lawyers, and also among their Austrian colleagues it was univocally disdained<sup>43</sup> – surprisingly to a much stronger degree than the Austrian peace treaty of St. Germain. But also the new international order that was built on the Paris Peace Treaties of 1919, with the League of Nations and other international organizations as its cornerstones, did not enjoy overwhelming popularity. Apart from Josef L. Kunz<sup>44</sup> in Vienna, Walter Schücking<sup>45</sup> in Berlin and the already mentioned Hans Wehberg, Austrian and German lawyers took nearly nothing positive from it, and public international law in Germany “risked to be merely understood as an anti-victor and anti-League-of-Nations discipline”<sup>46</sup>.

But in the debate about the country’s political system and status, in a comparative perspective Austria experienced a healthier climate in the 1920s. Since total defeat in the First World War and the definite loss of the great power status of the country were evident enough, the prospects of revisionism were less brilliant and political positions in consequence less radical and intransigent as in Germany – at least as far as basic constitutional principles like the form of government or the role of the country in the world orders are concerned. This healthier climate affected last but not least the legal community.

Gathering around Hans Kelsen<sup>47</sup>, the Viennese School of Legal Theory<sup>48</sup> together with the “*Zeitschrift für öffentliches Recht*” were the centerpieces around

<sup>43</sup> Michael Stolleis, *supra* note 2, p. 87 f., offers many citations.

<sup>44</sup> Josef Laurenz Kunz, born in Vienna in 1890, was a disciple of Hans Kelsen and extraordinary professor for public international law at the University of Vienna and represented Hungary in the Hungarian-Romanian Optants case in the Permanent Court of International Justice at The Hague. He emigrated to the US in 1932 to become an American citizen, teach at the University of Toledo Law School and become a Member of the Board of the American Journal of International Law. Kunz died on August 5, 1970, in Toledo, Ohio (Herbert W. Briggs, “Josef L. Kunz, 1890-1970”, *American Journal of International Law* 65 (1971): 129).

<sup>45</sup> Walther Schücking, born in Münster, Westphalia in 1875, engaged in the creation of international organisations to prevent future wars already before and during the First World War. In 1903 he became professor for constitutional, administrative and public international law in Marburg and acted as member of the German delegation during the Versailles Peace Treaty negotiations in 1919. From 1919-28 he was Member of the Reichstag for the centre-left Deutsche Demokratische Partei, and wrote – jointly with Hans Wehberg – the most important German commentary on the statutes of the League of Nations (*Die Satzung des Völkerbundes* (Berlin: Vahlen, 1921)). In 1933 the Nazis ousted him from the chair at the University of Kiel which he held at that time. But already 1930 he had been chosen the first permanent German judge at the Permanent Court of International Justice in The Hague, a position which got him out of reach of the Nazis and which he held until his death in that city on August 25, 1935 (Andreas Thier, “Schücking, Walther Max Adrian”: 631 ff.; in NDB, *supra* note 15, vol. 23 (2007)).

<sup>46</sup> Michael Stolleis, *supra* note 2, p. 88 (translation by the author).

<sup>47</sup> Hans Kelsen, born in Prague in 1881, professor in Vienna since 1914/19, was one of the key authors of the Austrian Constitution of 1920, with the establishment of a constitutional court overseeing the constitutionality of legislation belonging to his core achievements. With his “Pure Theory of Law” (1934) that attracted worldwide attention, he tried to create an epistemological foundation of law similar to that of natural science, allowing for cognition beyond the reach of value judgments. Kelsen moved to Cologne in 1930 to be banished from there by the Nazis in general and Carl Schmitt particularly, taught later in Prague and Geneva and moved to the US in 1940, where he finally settled in Berkeley, California. There

which the liberal quarters of the Austrian legal community gathered. Many of the lawyers in Kelsen's circle explicitly fought the German right-wingers surrounding Carl Schmitt in their articles<sup>49</sup>, be it not for political reasons because of their – although sometimes critical – attachment to legal positivism and to what soon became Kelsen's "Pure Theory of Law". But although theoretical issues were much more important in Austria than in Germany<sup>50</sup>, the debate focused not only on legal theory, but contrary to many of their German colleagues, Austrian public lawyers concentrated in a business-like fashion on the day-to-day analysis of the Austrian constitutional and administrative law instead of disputing about their genesis.

Last but not least the fact that the right wing of the political spectrum in the Austrian legal community was made up of relatively temperate conservatives contributed considerably to the easing of tension and to reconciliation, compared to the situation in Germany. Conservatives like Ludwig Adamovich (sen.), professor for constitutional and administrative law in Prague, Graz, and Vienna, Adolf Menzel<sup>51</sup>, or Paul Vitorelli, the first President of Austria's new Constitutional Court, were much more moderate than their German counterparts, thus avoiding fanning the flames that were already burning high.

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he died on April 19, 1973 (Nicoletta Bersier Ladavac, "Hans Kelsen [1881-1973]. Biographical Note and Bibliography", *European Journal of International Law* 9 (1998): 391; Rudolf Thienel, "Kelsen, Hans [1881-1973]": 354 ff.; in: Michael Stolleis, ed., *supra* note 15; Robert Walter, "Kelsen, Hans": 479 f.; in: NDB, *supra* note 15, vol. 11 (1977)).

Since Kelsen is the most influential legal philosopher of the 20th century at least in the German speaking area, a thorough description of his life activity would go far beyond the scope of this paper. A brief introduction providing further references is provided in Michael Stolleis, *supra* note 2, p. 163-171, and the classical biography in German is still Rudolf Aladár Métall, *Hans Kelsen. Leben und Werk* (Vienna: Deuticke, 1969).

<sup>48</sup> According to the selection made in Robert Walter, Clemens Jabloner, and Klaus Zeleny, eds., *Der Kreis um Hans Kelsen. Die Anfangsjahre der Reinen Rechtslehre* [The Kelsen Circle. The Early Years of the Pure Theory of Law] (Vienna: Manz, 2008), in the 1920s the Viennese School of Legal Theory consisted of Hans Aufricht, Otto Bondy, Charles Eisenmann, Georg Fleischer, Leo Gross, Walter Henrich, John Herz, Felix Kaufmann, Hans (Yitzhak) Klinghoffer, Alois Körner, Julius Kraft, Margit Kraft-Fuchs, Josef L. Kunz, Luis Legaz y Lacambra, Hans Mayer, Rudolf Aladár Métall, Leonid Pitamic, Marinus Maurits van Praag, Luis Recaséns Siches, Gisela Rohatyn, Sigmund Rohatyn, Alf Ross, Fritz Sander, Fritz Schreier, Helen Silving, Moritz Stockhammer, Eric Voegelin, and Emanuel Winternitz, with some of them separating from Kelsen and his school of thought in later years.

<sup>49</sup> E.g. Gisela Rohatyn, "Das Naturrecht des Stärkeren" [The Natural Law of the Jungle], *Zeitschrift für Öffentliches Recht* 8 (1929): 593; Margit Kraft-Fuchs, "Prinzipielle Bemerkungen zu Carl Schmitts Verfassungslehre" [Principle Remarks on Carl Schmitt's Theory of Constitution], *Zeitschrift für Öffentliches Recht* 9 (1930): 511; Erich Voegelin, "Die Verfassungslehre von Carl Schmitt. Versuch einer konstruktiven Analyse ihrer staatstheoretischen Prinzipien" [Carl Schmitt's Constitutional Theory. Essay of a Constructive Analysis of its Principles with Regard to the Theory of State], *Zeitschrift für Öffentliches Recht* 11 (1931): 89, etc.

<sup>50</sup> The already mentioned Franz Weyr interpreted this period as a "time of abundance in exhaustive books and treatises in legal philosophy" (Franz Weyr, "Rechtsphilosophie und Rechtswissenschaft" [Legal Philosophy and Jurisprudence], *Zeitschrift für Öffentliches Recht* 2 (1921): 671; cf. Michael Stolleis, *supra* note 2, p. 164).

<sup>51</sup> Adolf Menzel, born in Reichenberg (today Liberec, Czech Republic) in 1857, was professor for administrative law in Vienna since 1894. Menzel was among the most influential public lawyers in Austria and from its foundation until 1930 he was Vice-President of the Austrian Constitutional Court. He died in Vienna on August 8, 1938 (Erwin Melichar, "Menzel, Adolf": 225 f.; in: OBL, *supra* note 7, vol. 6 (1974)).

### 3. THE CATHOLIC CONCEPT OF THE STATE – PUBLIC LAW IN AUSTRIA FROM 1934-38

In the wake of the global Great Depression, that had one of its epicenters in the Austrian financial industry, also in Austria democracy eroded step by step since 1930 latest. The suspension of parliament in March 1933 and the civil war of February 1934 highlighted this development. The result was the establishment of an authoritarian state with Catholicism as an ideological foundation that is usually described either as the "Corporative State" ("Ständestaat") or Austro-Fascism, depending on political attitudes.

The process of turning the Austrian democracy into an authoritarian state by way of a cold coup had many legal aspects, since the main instrument of the christian-social government in that process was a legal one, namely decrees issued on the basis of the War Economy Emergency Powers Act of 1917<sup>52</sup>. Especially in the suspension of parliament, the Constitutional Court and its judges played an important role. With the social-democratic City Council of Vienna trying to take the government to court for its unconstitutional action, chancellor Dollfuß planned to inqorate the Constitutional Court. In this he finally succeeded by convincing judge Adolf Wanschura, who had been nominated by Dollfuß' party in 1926, to step down on May 18, 1933. Only five days later the government issued a decree adding a provision to the Verfassungsgerichtshofsgesetz of 1930<sup>53</sup> – practically the rules of procedure for the Constitutional Court in force at that time – that stipulated that a judge who had been appointed on proposal of the government could only exercise his functions as long as all members nominated in the same way remained on the court<sup>54</sup>. Thus, as Erich Voegelin, one of Kelsen's disciples has put it, the government "did not formally revoke the competence of the Constitutional Court to review decrees, but only made its exercise impossible through a technical condition"<sup>55</sup>, which was rather typical for the methods Dollfuß and his government used in abolishing the Austrian democracy. With the new Austrian constitution,

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<sup>52</sup> Gesetz, mit welchem die Regierung ermächtigt wird, aus Anlaß der durch den Kriegszustand verursachten außerordentlichen Verhältnisse die notwendigen Verfügungen auf wirtschaftlichem Gebiete zu treffen [Act Empowering the Government to Decree Provisions in the Economic Field Necessary because of the Extraordinary Conditions Brought about by the State of War], RGBl [Imperial Law Gazette, Austria], 302/1917.

<sup>53</sup> Verordnung der Bundesregierung vom 23. Mai 1933, betreffend Abänderungen des Verfassungsgerichtshofsgesetzes 1930 [Act of the Federal Government of May 23rd, 1933 with Regard to Changes of the Constitutional Court Act of 1930], BGBl [Federal Law Gazette, Austria], 191/1933.

<sup>54</sup> Klaus Berchtold, *Verfassungsgeschichte der Republik Österreich, vol. 1, 1918-1933: Fünfzehn Jahre Verfassungskampf* [Constitutional History of the Austrian Republic, vol. 1: 1918-1933: Fifteen Years of Constitutional Struggle] (Vienna: Springer, 1998), p. 750 ff. The suspension of the Constitutional Court and its history is described in English in great detail in Charles Gulick, *Austria from Habsburg to Hitler*, vol. 2, *Fascim's Subversion of Democracy* (Berkeley: University of California Press, 1948) p. 1074-1078.

<sup>55</sup> Erich Voegelin, *Der autoritäre Staat. Ein Versuch über das österreichische Staatsproblem* [The Authoritarian State. An Essay on the Problem of the Austrian State] (Vienna: Springer, 1936), p. 168; cf. Charles Gulick, *supra* note 54, p. 1076.

promulgated on May 1<sup>st</sup>, 1934, the Constitutional Court was finally abolished, to be re-established only in 1945.

Also for some academic lawyers, Austria's turn to dictatorship had severe consequences. For example, Max Layer<sup>56</sup>, who opposed the anti-constitutional government by decree and the suspension of the Constitutional Court and organized a protest resolution of all Austrian law faculties against the latter measure, was retired by the government.

But adaption was rather easy for most of the conservatives of the 1920s, and many of them succeeded in advancing their careers. The most prominent example is Ludwig Adamovich (sen.). After the suspension of the Constitutional Court, he changed to the Administrative Court ("Verwaltungsgerichtshof") that was joined with the remnants of the Constitutional Court to the Federal Court ("Bundesgerichtshof") under the 1934 constitution. Adamovich was also appointed member the State Council ("Staatsrat") that had to prepare legislation, and of the "Bundestag" that united selected members of the State Council with selected members of the three other institutions that "prepared legislation" under the 1934 constitution (Bundeswirtschaftsrat [Federal Economic Council], Bundeskulturrat [Federal Cultural Council], and Länderrat [Council of States]). In February 1938, one month before the Anschluss, Chancellor Kurt Schuschnigg (also a lawyer who, after becoming an American citizen in 1948 taught constitutional law at the University of St. Louis) appointed Adamovich as Minister of Justice.

Likewise, the establishment of Austro-Fascism positively affected the career of lawyers like Josef Dobretsberger, who became Minister of Social Affairs, or the already mentioned Adolf Menzel, who was "pleased to say that many of my thoughts have made their way into the fascist theory of state", and was honored with a doctorate *honoris causa* for constitutional law in 1937.<sup>57</sup> All three of them had been working together closely with Hans Kelsen in the ZOR in the preceding years.

Others, such as Karl Gottfried Hugelmann<sup>58</sup>, also a frequent author in the ZOR, faced greater difficulties. Although an old partisan of the christian-social party since before the First World War, like very many Austrians of the time he took a

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<sup>56</sup> Max Layer, born in Graz in 1866, was professor for public law at the University of Graz since 1908. 1924-28 he was member of the Constitutional Court and accepted a call on a chair at the University of Vienna in 1928. After having been forced to resign in 1933, he declined a chair in Cologne, and died in Vienna on January 24, 1941 (Erwin Melichar, "Layer Max": 55; in: OBL, *supra* note 7, vol. 5 (1970)).

<sup>57</sup> Wilhelm Brauner, "Menzel, Adolf": 104 f.; in: NDB, *supra* note 15, vol. 17 (1994).

<sup>58</sup> Karl Gottfried Hugelmann, born in Vienna in 1879, since 1924 held a chair for constitutional history and canon law at the University of Vienna. Besides he was vice-president of the Federal Council ("Bundesrat") for the christian-social government of Lower Austria from 1923-32. In that function he supported the Anschluss on numerous occasions, but lost the backing his party after the party-strongman Seipel died in 1932. After being released from the Wöllersdorf concentration camp, in 1934 he accepted a chair at the University of Münster, Westphalia where he stayed until 1944. Hugelmann died in Göttingen on October 1<sup>st</sup>, 1959 (Wilhelm Wegener, "Hugelmann, Karl Gottfried": 9 f.; in: NDB *supra* note 15, vol. 10 (1974)).



pro-Anschluss position throughout the 1920s, adverse to that of the Austro-Fascist regime. Therefore, counting as politically unreliable, Hugelmann was thrown into the Wöllersdorf concentration camp near Vienna for two months by the Austro-Fascist government after the failed Nazi coup of July 1934 and emigrated to Germany afterwards.

It is evident that a dictatorship like Austro-Fascist Austria – although far from having the abhorrent character of Nazi Germany – did not attract liberal lawyers that had options abroad, like Kelsen, who moved to Czechoslovakia and Switzerland after being ousted by the Nazis from his chair at Cologne, or Leo Gross, who went to London to work at the LSE.

Obviously, the Christian ideological foundations of the Austro-Fascist state<sup>59</sup> also affected the research interest of the academic lawyers who remained in the country. Between 1934 and 1938, with the exception of 1936, each volume of the ZOR, that until 1934 only by and then had dealt with canon law as part of public law but did not excel in the issue, started with an in-depth contribution on the relation between the Church and the State<sup>60</sup>. Additionally, in every volume of the period several other elaborate papers dealing with respective topics were to follow. This series, proving impressively the close relationship between Catholicism and freedom of thought, only broke after the Anschluss, when the first paper that was published in the ZOR after March 1938 was dedicated to the "Character of the Führer-State"<sup>61</sup>.

#### 4. THE BEHEMOTH – LAW AND THE LEGAL COMMUNITY IN NAZI GERMANY

Meanwhile, things had turned even more dramatic in Germany. With the coming into power of the Nazi regime on January 30, 1933, the working conditions of lawyers in the academia, in legal practice, and in the administration changed as fundamentally as most other aspects of the German society. Since a plethora of

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<sup>59</sup> The 1934 constitution was introduced with the words "In the name of God the Almighty, from whom all Laws emanate, the Austrian People receives for its Christian, German federal state on a corporative foundation this constitution" ("Im Namen Gottes, des Allmächtigen, von dem alles Recht ausgeht, erhält das österreichische Volk für seinen christlichen, deutschen Bundesstaat auf ständischer Grundlage diese Verfassung", translated by the author) (*Kundmachung der Bundesregierung vom 1. Mai 1934, womit die Verfassung 1934 verlautbart wird* [Promulgation of the Federal Government of May 1st, 1934, Proclaiming the Constitution 1934], BGBl [Federal Law Gazette, Austria] 1/1934).

<sup>60</sup> 1934: Paul Schoen, "Die rechtliche Natur der Vatikanstadt und des politischen Lateranvertrages" [The Legal Nature of the Vatican City and the Political Lateran Treaty], *Zeitschrift für öffentliches Recht (ZOR)* 14 (1934): 1; 1935: Rudolf Köstler, "Das neue österreichische Konkordat" [The New Austrian Concordat], *ZOR* 15 (1935): 1; 1937: Adolf Merkl, "Die Staatsbürgerpflichten nach katholischer Staatsauffassung" [The Duties of the Citizens According to the Catholic Concept of the State], *ZOR* 17 (1937): 1; 1938: Willibald Plöchl, "Das Legitimitätsproblem und das kanonische Recht" [The Problem of Legitimacy and Canon Law], *ZOR* 18 (1938): 1.

<sup>61</sup> Fritz Sander, "Das Wesen des Führer-Staates" [The Character of the Führer State], *ZOR* 18 (1938): 161.



publications has already dealt with these developments and its facets and an in-depth analysis would by far exceed the scope of this paper, only brief reference is made here to the most important aspects of Nazi rule for public lawyers.

The first for whom the new regime meant catastrophe were Jews, or those whom the Nazis understood to be Jews according to their racist conceptions. The "Act for the Restoration of the Professional Civil Service"<sup>62</sup> of April 7, 1933, stipulated under its § 3 that civil servants of non-Aryan ancestry had to retire. Alone at the University of Berlin this forced 234 professors into resignation<sup>63</sup>. Among the professors ousted were many public lawyers like the above-mentioned Hermann Heller<sup>64</sup> in Frankfurt, Hans Kelsen in Cologne, Gerhart Husserl and Hermann Kantorowicz<sup>65</sup> in Kiel, and many others who had to quit their chairs and give way to lawyers whom the Nazis deemed more opportune, many of them *homines novi* that had never held a chair before. Ernst Forsthoff<sup>66</sup> took over the chair of Heller, Carl Schmitt for a brief time that of Kelsen, Karl Larenz that of Husserl, and Georg Dahm<sup>67</sup> that of Kantorowicz, the latter two creating the nucleus of what soon was to become the Kiel "Stoßtruppfakultät" for public law – a typical example of *Lingua Tertii Imperii*<sup>68</sup> that may be translated into "assault detachment-faculty". The underlying idea to establish such a faculty was the concentration of reliable lawyers to a critical mass that was expected to be able to further develop

<sup>62</sup> Gesetz zur Wiederherstellung des Berufsbeamtentums [Act for the Restoration of the Professional Civil Service], RGBl [Law Gazette of the Reich, Germany], 1933, Part I, p. 175.

<sup>63</sup> Michael Stolleis, *supra* note 2, p. 257. On pages 256-299 of that book, an overview, in alphabetic order of universities in Germany, post-Anschluss Austria, and the Protectorate of Bohemia and Moravia is provided.

<sup>64</sup> *Supra* note 39.

<sup>65</sup> Hermann Kantorowicz, born in Posen (today Poznan, Poland) in 1877, after various other assignments held a chair for criminal law in Kiel since 1928. Kantorowicz was one of the fathers of the controversial so-called "Freirechtslehre", arguing for the extension of law-making by judges in the case of *lacunae* and became hotly contested when he held in an expert opinion for the Reichstag, that Germany was at least partially guilty for the outbreak of the First World War. Already in 1933 Kantorowicz fled first to the US and later to Britain, teaching in New York, London, Oxford, and Cambridge/UK, where he died on February 12, 1940 (Gerd Bender, "Kantorowicz, Hermann Ulrich, 1877-1940": 347 ff.; in: Michael Stolleis, ed., *supra* note 15; Thomas Würtemberger jun., "Kantorowicz, Hermann": 127 f.; in: NDB, *supra* note 15, vol. 11 (1977)).

<sup>66</sup> Ernst Forsthoff, born in Duisburg in 1903, was a disciple of Carl Schmitt. The chair for public law which he took over from Heller was his first appointment. His book *Der Totale Staat* [The Totalitarian State] (Hamburg: Hanseatische Verlagsanstalt 1933), justifying Nazi rule and the declaration of Jews enemies to be eradicated (p. 29), was widely received. After various other appointments, Forsthoff saw the end of the war as professor in Heidelberg from where he was removed by the victorious allies in 1946. Returning on his chair in 1952, Forsthoff played an important role in the drafting of the Cypriot constitution in 1960 and became President of the Constitutional Court in Nicosia until 1963. He died in Heidelberg on August 13, 1974. A very cautious biographical sketch is provided by Florian Herrmann, "Forsthoff, Ernst (1903-1974)": 219 f.; in: Michael Stolleis, *supra* note 15.

<sup>67</sup> Georg Dahm, born in Hamburg in 1904, had his first appointment on the chair for criminal law at the university of Kiel, having become eligible with a hard-line book on criminal law he had published in a Nazi publishing house with Friedrich Schaffstein (*Liberales oder autoritäres Strafrecht?* [Liberal or Authoritarian Criminal Law] (Hamburg: Hanseatische Verlagsanstalt, 1933)). In 1939 he left Kiel for Leipzig, Strasbourg, and Berlin, to be removed by the allies after the war and emigrating to Dacca, Bangladesh (Pakistan at that time). In 1955 he was allowed to teach again in Kiel, where he died on July 30, 1963.

<sup>68</sup> Victor Klemperer, *LTI. Notizbuch eines Philologen* [LTI (= Lingua Tertii Imperii). Notebook of a Philologist] (Berlin: Aufbau Verlag, 1947) offers an early linguistic analysis of Nazi language that often also touches on the language of law.

and spread a new law of the “national revolution” and its theoretical foundation throughout the Reich first, and later throughout the world<sup>69</sup>.

Showing symptoms of the Behemoth-structure that has become famous through the works of Franz Neumann<sup>70</sup> from the very beginning of the Nazi rule, a large number of new institutions was founded, to line up academics in the system. Apart from general academic institutions like the “Nationalsozialistischer Dozentenbund” (“Union of National Socialist University Teachers”), lawyers were addressed by special institutions like the “Akademie für Deutsches Recht” (“Academy for German Law”), the “Nationalsozialistischer Rechtswahrerbund” (“Union of National Socialist Law Preservers”), and later the “Arbeitsgemeinschaft für den Kriegseinsatz der Geisteswissenschaften”, which was commonly known as “Aktion Ritterbusch”<sup>71</sup>, named after its founder Paul Ritterbusch<sup>72</sup>, professor for public international law at the notorious University of Kiel.

When the Anschluss took place in March 1938, what had happened in Germany was repeated in what under Nazi rule became the “Ostmark”. Not only all Jewish professors were driven out of their positions, but also all supporters of the previous Austro-Fascist regime. Hence, for example the Jews Rudolf Blühdorn and Felix Kaufmann<sup>73</sup> had to leave the university and in many cases their country in equal measure as the already mentioned career lawyers of Austro-Fascism Ludwig Adamovich or Josef Dobretsberger, most of them to be replaced by mediocre successors from Germany like, e.g., Norbert Gürke<sup>74</sup>, or also by Austrians who had been secret Nazis throughout the period of Austro-Fascism, outing themselves after the Anschluss and building a career on it, like, for example, Julius Bombiero<sup>75</sup>, who became professor for canon law in Vienna.

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<sup>69</sup> Rudolf Meyer-Pritzl, “Die Kieler Rechts- und Staatswissenschaften. Eine ‘Stoßtruppfakultät’” [Constitutional and Administrative Law in Kiel. An ‘Assault Detachment Faculty’]; in: Christoph Cornelißen, Carsten Misch, eds., *Wissenschaft an der Grenze. Die Universität Kiel im Nationalsozialismus* [Science at the Border. The University of Kiel during National Socialism] (Essen: Klartext, 2010). The members of the faculty are briefly introduced in Michael Stolleis, *supra* note 2, p. 279 ff.

<sup>70</sup> Franz L. Neumann, *Behemoth. The structure and practice of national socialism 1933-1944*, 2<sup>nd</sup> edition (New York: Oxford University Press, 1944).

<sup>71</sup> On the “Aktion Ritterbusch” and the participation of public lawyers in it, see Michael Stolleis, *supra* note 2, p. 409 f.

<sup>72</sup> Paul Ritterbusch, born near Torgau, Saxony, in 1900 held his first chair for public law at the University of Königsberg (today Kaliningrad, Russian Federation) since 1933, having entered the Nazi party already in 1932. In 1935 he moved to Kiel, replacing Georg Dahm as rector. Additionally working for the Ministry of Education, Ritterbusch established to so-called “Aktion Ritterbusch” in 1940 to summon support for the German war effort in academia. Falling into disgrace in 1944 and being drawn to the army afterwards, Ritterbusch committed suicide on April 26, 1945 during a battle near Bad Düben, Saxony (Martin Otto, “Ritterbusch, Paul Wilhelm Heinrich”: 668 ff.; in: NDB, *supra* note 15, vol. 21 (2003)).

<sup>73</sup> Hans Kristoferitsch, Andreas Orator, “Felix Kaufmann”: 153 (155); in: Robert Walter, Clemens Jabloner, and Klaus Zeleny, eds., *supra* note 48.

<sup>74</sup> Michael Stolleis, *supra* note 2, p. 292 ff.

<sup>75</sup> Irmgard Schartner, *Die Staatsrechtler der juristischen Fakultät der Universität Wien im ‘Ansturm’ des Nationalsozialismus* [The Public Lawyers of the Vienna University’s Law Faculty Facing the ‘Onslaught’ of National Socialism] (Frankfurt, Wien: Lang, 2011), p. 156 f.

In their chaired positions, the professors that remained in the law faculties often legitimized the regime<sup>76</sup> or produced illusions about the rule of law being still in force in Germany and business as usual prevailing<sup>77</sup>, thus again contributing to the legitimization of the Nazi rule, as numerous examples from the ZOR and other academic journals demonstrate.

But the fundamentally criminal character of the Nazi regime and its atrocities led at least some Germans and Austrians to the conclusion that active resistance was not only justified, but unavoidable. This group of people comprised also a considerable number of lawyers, such as Wolfgang Abendroth, Klaus Bonhoeffer, Justus Delbrück, Hans von Dohnanyi, Carl Goerdeler, Nikolaus von Halem, Ernst von Harnack, Gustav Heinemann, Hans John, Lothar Kreyssig, Friedrich Justus Perels, Rüdiger Schleicher, and Adam von Trott zu Solz, as well as some others<sup>78</sup>. Looking in that list for professors of public law that still held chairs is futile.

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<sup>76</sup> Only some examples from the ZOR: Ernst Wolgast, "Über die Bedeutung des Werkes von München vom 29. und 30. September 1938" [The Significance of the Labour of Munich on September 29 and 30, 1938 (i.e. the Munich Agreement)], ZOR 18 (1938): 415; Eberhard Menzel, "Der 'anglo-amerikanische' und der kontinentale Kriegs- und Feindbegriff" [The 'Anglo-American' and the Continental Concepts of War and Enemy], ZOR 20 (1940): 161; A. Peters, "Die politische Lebenshaltung im totalitären Staate und die Unzeitgemäßheit der englischen Auffassung von 'Politik'" [The Political Living in the Totalitarian State and how the English Concept of 'Politics' is out of Date], ZOR 20 (1940): 330; Hermann J. Held, "Europäische Völkergemeinschaft, europäisches Völkerrecht" [The European Peoples' Community and European Public International Law], ZOR 21 (1941): 217, etc.

<sup>77</sup> For example Theodor Steimle, "Die Neugestaltung des öffentlichen Rechts und die Verwaltungsgerichtsbarkeit" [The Redevelopment of Public Law and Administrative Jurisdiction], ZOR 18 (1938): 457; or, most irritating, Friedrich Giese, "Die gegenwärtige Staatsangehörigkeit der aus ehemals polnischen Gebieten stammenden Juden in Deutschland" [The Present Citizenship of Jews Coming from the Former Polish Territories], ZOR 21 (1941): 53, suggesting that regular administrative procedures could be applied to individual Polish Jews, thus creating a bizarre image of rule of law in an area where in reality mere murder reigned supreme. On this paper see also Stefan Ruppert, "'Streng wissenschaftlich und völlig unpolitisch'. Der Frankfurter Staatsrechtler Friedrich Giese in der Zeit des Nationalsozialismus" [Strictly Scholarly and Completely Apolitical'. The Constitutional Lawyer Friedrich Giese from Frankfurt during National Socialism]: 183; in: Jörn Kobes and Jan-Otmar Hesse, eds., *Frankfurter Wissenschaftler zwischen 1933 und 1945* [Scholars from Frankfurt from 1933 to 1945] (Frankfurt: Wallstein, 2008).

<sup>78</sup> Some additional names and references for literature are provided in Michael Stolleis, *supra* note 2, p. 412 f.

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