

June 1944

Administrative and Judicial Processes as Instruments of Clerical Fascism in Austria

Charles A. Gulick Jr.

Follow this and additional works at: <http://scholarship.law.berkeley.edu/californialawreview>

Recommended Citation

Charles A. Gulick Jr., *Administrative and Judicial Processes as Instruments of Clerical Fascism in Austria*, 32 CAL. L. REV. 161 (1944).
Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol32/iss2/3>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z382793>

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Administrative and Judicial Processes As Instruments of Clerical Fascism In Austria*

Charles A. Gulick, Jr.†

I

IN NOVEMBER of 1943 it was announced that the participants in the Moscow Conference had decided to re-establish a free and independent Austria. There are weighty reasons for doubting that this was a wise decision; but since there is every indication that it will be adhered to, it is more realistic to call attention to one aspect of the revival of Austria that is causing concern to Austrians and their friends throughout the world. This can be best stated in the question: Is there any intention on the part of the leaders of the United Nations of restoring, or giving their blessing to a restoration of, the legal and political situation that existed just prior to Hitler's occupation of Austria in March of 1938? The casual reader of newspapers, as well as some well-informed specialists, would answer "No"; the matter will be left to the Austrians. On the other hand, responsible spokesmen for the governments of England and the United States have stated that they do not recognize the legality of anything that has happened in Austria from the minute Schuschnigg was forced to resign as Chancellor. The implication of these statements may be that there is the intention to revive, at least temporarily, the pre-Nazi situation. Other actions and statements of British and American officials have aroused the fear that they are not adverse to the restoration of Otto, the Habsburg pretender. Either of these policies, or a combination of them, which is far from inconceivable, would be a slap in the face to a decisive majority of Austrians who are liberal and democratic and want nothing to do with a Schuschnigg—or Habsburg—Austria. And in this connection it must not be forgotten that Schuschnigg was an avowed Habsburg restorationist.

*The author acknowledges with thanks generous financial assistance from the Social Science Research Council, the Carnegie Corporation, and the Institute of Social Sciences of the University of California, Berkeley, in furthering his study of "Democracy, Labor and Fascism in Austria, 1918-1938."

†Professor of Economics, University of California.

To discuss the Habsburg issue would take us too far afield. A primary purpose here is to offer one segment of the evidence which proves that it would be disastrous to resuscitate Dollfuss-Schuschnigg Austria. Another purpose is to show by some specific details the relation between administrative and judicial processes in the last years of the little Danubian state. Thirdly, the facts below will not be without interest in connection with developments in the United States. It is scarcely necessary to emphasize to readers of this *Review* the recent tremendous expansion of the number of administrative boards and of the volume of administrative decisions. Many business leaders and some lawyers and judges are seriously concerned that the continuance of existing trends may lead to the impairment, even the destruction, of basic liberties. There is, however, no intention of suggesting that the situation here begins to approximate that described below; even Mr. Avery of Montgomery-Ward would be hard put to it to draw a tenable analogy between the administrative powers of any American official and those of the Austrian General State Commissar.¹

As has been indicated, Hitler did not bring Fascism to Austria. That job was done by a cabinet in which Dollfuss was Chancellor and Schuschnigg was Minister of Justice. It is necessary to emphasize this fact for a definite reason. Dollfuss was murdered by the Nazis; Schuschnigg was brutally mistreated by them. The natural and praiseworthy sympathy thereby created for them as human beings has been misused as fertile soil in which to grow a carefully cultivated legend concerning them as political leaders and the state they were trying to build. This legend has little or no relation to the facts. Among those facts a few of the most pertinent should be recalled.

When Dollfuss was called to form a government in the spring of 1932 he refused to agree to new elections for parliament because he knew that his party, the Christian Social (Catholic), would take a thorough thrashing. Instead he organized a cabinet which had a majority of one in the Nationalrat, the lower house. Thus he became dependent upon a small group of representatives of the Heimwehr. This armed Fascist group was the Austrian counterpart of Hitler's brown shirts. For a little more than nine months Dollfuss struggled to carry on with his "majority" of one. Then his luck turned; the three presiding officers of the Nationalrat resigned during the ses-

¹ *Cf.*, p. 171, *infra*.

sion of March 4, 1933. This contingency was not provided for in the constitution or in the rules of order. The cabinet refused to reassemble the lower house, claiming there was no way to do it. The falsity of this claim was demonstrated in April, 1934, when a rump session was called to ratify the constitution of May 1, 1934.

Meanwhile, that is, immediately after the elimination of the Nationalrat, Dollfuss began to rule by a series of emergency decrees. These were based on the so-called "war economy emergency powers act."² This measure authorized the government to issue emergency decrees to meet economic difficulties arising out of World War I, and particularly to provide the people with the necessities of life. The way it was used is revealed in its popular name: the "potato law". Its life was limited to the "duration of the extraordinary conditions" brought about by war, but it had been allowed to stay on the statute books. How far the Dollfuss government stretched it may be indicated by noting that on June 30, 1933, it was used to issue a decree requiring most newspapers and journals to publish those announcements from the official News Bureau or the Political Correspondence that had been designated by the Chancellor's office as "compulsory"—and requiring that they appear "without insertions, omissions, additions and *without adverse comment . . .*"³ A high percentage of the cabinet's decrees were unconstitutional and were so denounced by almost all the constitutional lawyers of Austria at the time. The city of Vienna and other parties brought suits challenging a number of the decrees. Obviously afraid to submit its actions to judicial review, the cabinet issued another decree that put the Constitutional Court out of commission.

Pressure from the Heimwehr to finish the job of destroying representative democracy—the upper house of parliament, the state diets and the city councils had continued to function—grew more intense. In the most important speech of his career, September 11, 1933, Dollfuss demanded the undoing of "the errors of the last 150 years of our intellectual history", meaning the spread of liberal and democratic ideas following the French Revolution. On numerous occasions he announced that "We want a social, Christian, German state Austria on a corporative foundation under strong authoritarian leadership". He also stated frequently that it was his ambition to see his country the first to put into practice the principles of the papal

² *Reichsgesetzblatt*, 1917, Nr. 307. This set of statutes is cited hereafter as RGBL.

³ *Bundesgesetzblatt*, 1933, Nr. 282. Cited hereafter as BGBl. No italics in original.

encyclical *Quadragesimo Anno* of 1931, but to document how far he and his successor Schuschnigg departed from those noble principles would require a book, not an article. Their claims in this respect, their surrenders to the Heimwehr in emergencies, their own acceptance of much of the authoritarian philosophy, their guarantees to the Roman Catholic church in the constitution of 1934, and their use of the police explain, however, the most common, and the only accurate, characterization of the state they built. It was a clerical fascist police state. It was not totalitarian in the Nazi sense precisely because of the guarantees to the church.

Concerning the last act in the tragedy of the destruction of democracy in Austria, the brief civil war in February, 1934, it is necessary to note only one thing. It was precipitated by the mobilization of the Heimwehr in late January and its demands for the dissolution of political parties as well as for the replacement of elected officials by appointed commissars. The allegation that the conflict was a "Socialist revolution" is false from A to Z. The workers of Austria took to arms in a last desperate effort to stop a fascist counter-revolution that the Heimwehr had been publicly announcing as necessary for years and that one of their chief leaders, Prince Starhemberg, specifically approved on February 4.⁴

Finally, in this thumbnail sketch of the setting, it is important to call attention to the fact that the concept "police" was much broader in Austria than in America. Designated as police were not only the officers who maintained peace and order and regulated traffic, but also those who exercised functions such as those of building inspectors and game wardens here. There were, for examples, emigration police, accident police, sanitary police, trade and industry police.

With this background we turn to the specific matters indicated in the title.

II

POWERS OF THE POLICE

Among the characteristics distinguishing a constitutional state from a police state, a difference more of a sociological than of a strictly juristic nature, is the attempt to realize in practice the prin-

⁴For a more detailed presentation of these developments see the writer's articles, *How Fascism Came to Austria* (Jan. 1939) 8 U. OF TORONTO Q., 198-210, and *The Fascist Prince of Austria*, NEW YORK TIMES BOOK REVIEW, Nov. 8, 1942.

principle that no one should be punished twice for the same offense. Here it is important to keep in mind the facts that in the United States, for example, one act may constitute two or more offenses; that punishment for the same offense by both federal and state authorities is not considered a violation of the principle of double jeopardy, just because they are separate units of government; and that penal laws frequently list as separate offenses a series of acts that may constitute essentially only one transaction. As the late Professor H. L. McBain has pointed out it is improbable that a clearer case of double jeopardy could be found than the liability to both federal and state punishments,⁵ and the other instances just cited certainly approach double jeopardy closely. In other words, it is doubtful that the principle has ever been strictly adhered to despite constitutional and judicial pronouncements.

In Austria the procedure in criminal *courts* received its last thorough over-hauling in the statute of 1873. Its stipulations and the judicial interpretation thereof reflect acceptance of the principle that double jeopardy and multiple punishment were not to be tolerated in criminal *judicial* proceedings.⁶ Despite numerous amendments to the law this principle remained in it and remained sacred to practically the entire Austrian judiciary until Hitler's absorption of their country. In theory the Dollfuss and Schuschnigg regimes were likewise committed to the maintenance of this ideal of a constitutional state, but only by jesuitry can it be argued that they did so. The technical possibility of such a contention lies in the fact that Austrian practice had long recognized a distinction between administrative and judicial procedure, uncertain as the line frequently was, and had permitted punishment both by the police and by a court for the same offense. In popular opinion the worst expression of this legal sanction of an additional penalty by the police was the so-called "Flogging Ordinance" (*Prügelpatent*).⁷ The renovation of the *administrative* penal law and procedure in 1925 preserved the distinction between judicial and administrative proceedings, specifically providing that: "If an accused is charged by different authorities with punishable administrative offenses, or with an administrative offense and another unlawful action punishable by an administrative

⁵ 5 ENCYC. SOC. SCIENCES 223.

⁶ Cf. RGBl., 1873, Nr. 119, Art. 207, 259, 281 with LOHSING, OSTERREICHISCHES STRAFPROZESSRECHT (Wien, 1932) 308, 352, 393.

⁷ RGBl., 1854, Nr. 96, §11; Nr. 102, §4; *ibid.*, 1855, Nr. 61, §7; *ibid.*, 1857, Nr. 198.

authority or a court, the unlawful actions are to be prosecuted independently of one another, and usually even when the punishable actions have been committed through one and the same deed".⁸ The language used is unmistakably clear: a single act could lead to more than one proceeding against an accused, if a different offense was charged in each proceeding. From other sections of the law, from the committee report on the drafts of it and from the debate in the Nationalrat certain additional facts are also clear. The penalties which could be assessed by administrative authorities were ordinarily limited to maxima of 200 schillings fine and 14 days confinement. The penal power of those authorities was considered to be in good part a mere "bagatelle penal law". Some hangovers from the old absolutistic era were finally cleared away so that the citizen was no longer an "object" of the administration but a "party" in a proceeding. He could now be represented by counsel. He could carry an appeal to the Administrative Court under certain, greatly broadened, conditions. A major significance of this last change was that it prevented the political and police authorities from withdrawing a case from the competence of the Court simply by assessing a penalty. According to one of the members of parliament the change had been overdue since 1876, a year in which one minor alteration had been accomplished in this field.⁹

The conclusions are obvious. Both imperial and republican Austria accepted the principle that for one offense there could be only one punishment from the *courts*. The republic, however, restricted sharply the powers of the administrative (police) authorities and provided safeguards for persons taken into custody on administrative charges. Unfortunately, it proved impossible for the reformers of 1925 to secure a definitive classification of offenses so that any given one could be punished only by the police or only by the courts. Quite on the contrary, as already indicated, the passage quoted from the law of that year continued to make it technically possible to punish the same act an indefinite number of times by the simple device of declaring it an offense under each of an indefinite number of decrees or laws. During the period between the reforms of 1925 and the elimination of the parliament this possibility was rarely utilized;

⁸ BGBl., 1925, Nr. 275, Art. 30(1). Cf., LOHSING, *op. cit. supra* note 6, at 57.

⁹ BGBl., 1925, Nr. 273, Art. VII; *ibid.*, Nr. 274, §8, 10; *ibid.*, Nr. 275, Art. 11, 19. Nationalrat, *Protokoll*, June 5, 1924, at 1214; *ibid.*, July 21, 1925, at 2589, 2595; *ibid.*, Nr. 360 der *Beilagen*, at 23; Merkl, *Epilog zur Verfassungsreform* (Aug. 15, 1925) 17 DER OESTERREICHISCHE VOLKSWIRT 1271

but, of course, during the entire period of the republic punishments were inflicted for the same offense by the administrative authorities and the courts. The frequency of such cases was not great and Austrian attorneys questioned by the writer stated that between 1925 and 1933 they had looked forward to further reforms that would practically eliminate them. Under the Dollfuss and Schuschnigg governments, however, the relative rarity became the rule, particularly insofar as political offenses were concerned. Through the breach left by the 1925 statute they drove a steam-roller. As Minister of Justice and as Chancellor, Schuschnigg was forever proclaiming that Austria was a "constitutional state" and a "law state"; but, far from working toward the establishment of one of the distinguishing characteristics of such a state, that is, attempting to realize in practice the principle that no one should be punished twice for the same offense, he helped to put through a large number of decrees and laws whose express purpose was to create multiple penalties for the same offense. Sometimes this was done by breaking down one act into a number of offenses; frequently even that subterfuge was dispensed with. Such decrees constituted important steps in the transition to a police state. Since this transition was gradual, beginning long before May 1, 1934, when the new constitution was promulgated, it is necessary to recall certain of the more significant earlier measures furthering it.

The first decree issued by the Dollfuss cabinet after the elimination of parliament indicated its intention to enlarge the powers of the police and to break down one act into at least two offenses. This decree was labelled as one "concerning special measures for the prevention of the damages to economic life bound up with a disturbance of the public peace, order and safety." Actually it was primarily a press law. Among other things it authorized the police authorities to impose fines up to 2000 schillings, arrest up to three months, or both, for stipulated offenses. In addition, if public insults of the federal government of Austria, of a state government, of a foreign government or of the members of any of them endangered public peace, order and safety, the police could assess the same penalties. And they could do this "without prejudice to a possible prosecution in a penal court." No appeal was possible unless the fine was more than 200 schillings or the arrest more than 14 days.¹⁰ It should be observed that the phraseology just quoted was not invented by the clerical fascist regime; similar provisions appeared frequently in imperial

¹⁰ BGBl., 1933, Nr. 41.

decrees and occasionally in republican measures.¹¹ Again the point is that Dollfuss and Schuschnigg restored the device to a regular system. Specifically, we find that numerous subsequent decrees employed the exact formula used in the first one. Among them were those on strikes, on posters and handbills, on political demonstrations, on the Communist party, on the Nazi party, on the misuse of the property of others for political propaganda purposes, on "acts of terror", on the confiscation of the property of a forbidden party, on "fireworks, stink bombs and similar products", on the Social Democratic party, on the supervision of civil law corporations, on the prevention of damage to tourist traffic, on the confiscation and forfeiture of property because of forbidden political activity, on the unauthorized possession of firearms, explosives, fireworks, gas bombs and so on, and on the punishment of persons involved in the putsch of July 25, 1934.¹²

In other decrees or laws the formula was varied slightly, but the purposes and the results were the same. The order of March 9, 1934, concerning the employment of demobilized members of the Fascist private armies, provided that persons who misused the certificates issued in this connection could be punished by the police "without prejudice to the application of more severe penal stipulations." Violators of a decree on morality and health were likewise punishable "without prejudice to possible prosecution under other legal stipulations" and this formulation was employed in at least two other instances. In still other cases appear the expressions, "without prejudice to an order" of the General State Commissar, and "without prejudice to punishment according to other statutory prescriptions."¹³ None of the formulations leaves any ground for debate on the purposes of their authors.

Some concession to the bitter criticism, without Austria as well as within, of these violations of the principles of no double jeopardy and no multiple punishments appeared in the law of August 18, 1937. Primarily this took the form of a substantial reduction in the number of offenses for which the administrative authorities were authorized

¹¹ Cf., for examples, RGBl., 1854, Nr. 96, §11 and *Staatsgesetzblatt*, 1919, Nr. 345, §§19-23. Cited hereafter as StGBL.

¹² BGBl., 1933, Nr. 138, 155, 185, 200, 240, 248, 295, 368, 500; *ibid.*, 1934, I, Nr. 78, 130; *ibid.* 1934 II, Nr. 67, 71, 120, 163.

¹³ BGBl., 1934 I, Nr. 165, Art. 7 (2), Nr. 171, Art. 9 (1); *ibid.*, 1934 II, Nr. 224, Art. 2; *ibid.*, 1935, Nr. 33, Art. 3; *ibid.*, 1934 II, Nr. 193 Art. 8(1); *ibid.*, 1935, Nr. 174, Art. 1(1).

to assess specific fines or terms of confinement in addition to court punishments. Along the same line were two other provisions. If an accused were "prosecuted in court because of the same deed" that brought him into difficulties with the police but acquitted or otherwise released from the court prosecution, the time he had spent in "protective" or "examination" custody because he was suspected of an action punishable in criminal court was to be deducted from the sentence pronounced because of the administrative offense. If, secondly, his "detention" were ordered, the time spent in a concentration camp or police prison was to be taken into account in computing his sentence for an administrative offense. The significance of these concessions is greatly reduced by other stipulations of the law. In five articles there was a reaffirmation of the power of the police and administrative authorities to punish specific offenses "without prejudice to a possible penal court punishment." The offenses listed included those under which the bulk of the political cases had been brought. Even more important, the statute not only reaffirmed the power of the police to commit an individual to a concentration camp for three months on a "grounded suspicion" without any possibility of appeal to a court; it also created a new category of those who could be committed, namely, persons who endangered "the public peace [*Ruhe*], order and security by behavior disturbing the social peace [*Frieden*]." ¹⁴ The phraseology of the statute makes it clear that though time spent in a concentration camp was supposed to be taken into account in computing *administrative* sentences, it was not to be considered in connection with *judicial* sentences. In other words, "detention" operated in the latter case as a second punishment. But the reader must be warned that an erroneous conclusion may be drawn from the last two sentences. It was still possible for political offenders to be jailed for an administrative transgression, to serve their time, to be turned over to the courts, to be confined again for the penal offense, to serve their time, and then, on the basis of the same evidence, to be sent to a concentration camp because of a "grounded suspicion that they will take part in a threatening disturbance of the public peace, order or security", or because of the other reasons stated in section 23 of the law.

To summarize and repeat: the Dollfuss and Schuschnigg regimes deliberately perverted a legal situation which was being outgrown into a far-sweeping system of double jeopardy and double punish-

¹⁴ BGBl., 1937, Nr. 282, particularly §§4, 6, 8, 10, 11, 13 (4) (5), 23.

ment for one and the same offense under their own definition of offense, they broke down into two or more offenses what was actually only one, and they anchored this system by every method and every complication they could think of: The changes of 1937 improved the situation much less than might at first examination appear to be true.

In this connection contemporary comment is illuminating for the situation in Austria. The *Presse* stated that the law of 1937 excluded "for the future [and] as a rule double punishment for one and the same offense." The *Volkswirt* referred to efforts in the statute to eliminate, "where possible, double punishments for one and the same offense by mutual 'allowance' of the penalties." As has been shown the observation of the daily is definitely misleading, for "as a rule" the offenses charged were those for which double and triple punishments could still be assessed. The weekly obviously felt unable to suggest that the government might have furthered its alleged program of reconciling old Socialists by drawing some distinctions between them and the Nazis. Both sheets referred to "double punishments" in a matter of fact way which shows that they had become the norm for political transgressions in recent years.¹⁵

Another evidence of the intent to give greater power to the police appeared in the tendency to authorize more severe penalties. Instead of the usual maxima of 200 schillings and 14 days visualized in the 1925 law it became more and more common to authorize fines up to 2000 schillings and confinement up to six months. One of the most drastic orders, dealing with the illegal possession of firearms and explosives, provided a maximum fine of 20,000 schillings and a maximum sentence of one year—these in addition to possible penal prosecution and an indefinite stay in a concentration camp.¹⁶

A third method of extending the power of the police also emphasized the fact that the members of this regime were afraid to submit their actions to a court review. Only three months after they had begun to rule by fiat they ordered that in all decrees issued on the basis of the war economy emergency powers act in which the permissibility of an appeal from the decision of the police depended on the amount of the fine or the length of the incarceration the figures were to be raised from 200 to 1000 schillings and from 14 days to six weeks.¹⁷ Even this enlarged scope for arbitrary action was deemed

¹⁵ *Neue Freie Presse*, Aug. 18, 1937 (a.m.) at 2; (Aug. 21, 1937) 29 DER OESTERREICHISCHE VOLKSWIRT 900.

¹⁶ Cf. the decrees previously cited, particularly BGBl., 1934 II, Nr. 120.

¹⁷ BGBl., 1933, Nr. 237.

inadequate. A constitutional law of September 24, 1934, issued by the cabinet alone, provided that no appeal to the new Supreme Court on Constitution and Administration [*Bundesgerichtshof*] would be permitted on convictions under any one of a list of 17 decrees and laws. This meant that appeals from an administrative decision to a judicial body were entirely excluded in these instances. More than this, the law was retroactive in the most complete sense. It applied to offenses allegedly committed before it was decreed, and it cancelled all pending appeals in these categories of cases.¹⁸

A considerable part of the 17, nine to be exact, were decrees in which the police had been given power to assess a second punishment. An examination of a few of these 17 decrees will help to explain why most Austrians do not want their country to fall back into the hands of disciples of Dollfuss, Schuschnigg, Starhemberg and Fey. Under one of them a person who displayed by means of print, picture or writing, or distributed by handbills, matter which was likely to arouse offense, disturb order in a public place, wound public propriety or cause unseemly disturbing noise could be punished by the police with a fine not to exceed 2000 schillings or arrest not to exceed three months. In addition, they could deprive him of his license to do business. Any one who distributed from house to house handbills likely to bring about the same results was subject to the same penalties.¹⁹ The possibilities of such India rubber phraseology are, unfortunately, all too well known throughout the world.

Another of the 17, a "constitutional law" adopted by the cabinet on August 17, 1934, created a General State Commissar and authorized extraordinary measures for combatting activities in the private economy that were inimical to the state and the cabinet. Briefly stated the duties of the Commissar were to eliminate from all private economic pursuits all persons who were dangerous to the state. But "persons dangerous to the state" was defined to include those who willfully further activities inimical to the state "or the cabinet", or who induced or sought to induce others to actions inimical to the state

¹⁸ BGBl., 1934 II, Nr. 254; CONSTITUTION OF 1934, Art. 164; BGBl., 1934 II, Nr. 123, Art. 38. Under the 1929 constitution the Administrative Court had had exclusive jurisdiction over complaints against decisions by administrative authorities. The constitution of 1934 permitted ordinary courts to review such decisions, if the review had been provided for in federal or state laws. The decrees under discussion made no such provision; consequently, there was *no* appeal. Cf. ADAMOVICH, GRUNDRISS DES ÖSTERREICHISCHEN STAATRECHTES (Wien, 1935) at 236 (footnote 1) and 239.

¹⁹ BGBl., 1933, Nr. 155; *ibid.*, 1925, Nr. 273, Art. VIII, (1), (a).

“or the cabinet.” Particularly proscribed were individuals who espoused the cause of a political party whose activity had been prohibited; or individuals concerning whom, on the basis of proved actions or of failure to act, it could be “assumed” that they favored the efforts of such a party. If an employer or a person exercising an occupation independently were held to be dangerous, the Commissar could cancel his authorization to exercise the occupation; order him to close his place of business; prevent him from exercising his occupation; prevent him from directly or indirectly getting contracts from or doing work for a long list of public bodies, including all political units and such public law corporations as the National Bank and the Federal Railways; or order that he be excluded from all favorable allowances and respites in the payment of taxes and social insurance contributions. If the dangerous person were an employee, the Commissar could order the termination of his employment. The law stated categorically that such an order had the effect of a discharge because of the fault of the worker, that contractual stipulations guaranteeing any claims to the worker or his dependents in case of dismissal were invalidated, and that provisions in contracts or collective agreements requiring a hearing before discharge were not applicable. Employers who continued the engagement of a worker despite an order terminating the employment were classified as “persons dangerous to the state.” Although supposed to expire at the end of 1934 this law was extended in all its essential features until the close of the Schuschnigg era.²⁰ A more perfect instrument for political and economic persecution would be difficult to draft. It is not too much to say that the powers delegated to the Commissar were more similar to those associated with an oriental despot than with an official of a Christian state. The individual to whom they were entrusted was Fey²¹—without much doubt the most hated and despised person in Austria at this time. Among the hundreds of actions that convinced the workers that the governments’ talk of reconciliation was a lot of hypocritical cant this one ranked close to the top in importance.

A third act in this list of those in which appeals to the highest court were excluded was the second concentration camp law. Although it did not use the term “persons dangerous to the state”, it authorized the confinement by the police for definite or indefinite

²⁰ BGBl., 1934 II, Nr. 193; *ibid.*, Nr. 454; *ibid.*, 1935, Nr. 270; *ibid.*, Nr. 383; *ibid.*, Nr. 473; *ibid.*, 1936, Nr. 452.

²¹ *Neue Freie Presse*, Aug. 21, 1934 (a.m.) at 4.

periods of those who were guilty, or could be "assumed" to be guilty, of actions or "omissions" inimical to state or cabinet in almost exactly the same language as that summarized above. If the period were indefinite or exceeded three months an appeal could be taken to the Federal Chancellor, or to the competent minister, but the appeal did not stay the sentence. The Chancellor, or competent minister, could prolong or cancel the term of confinement. If the prisoner were the recipient of any benefits under the social insurance or incapacity compensation laws, he was deprived of control over them. The police allotted to his legal dependents the absolute minimum required for their needs. If anything remained, it could be applied to the costs of the prisoner's maintenance. If something still remained, the prisoner had no claim to it. The prisoner had to pay all execution costs and had no right of appeal concerning them. All legal measures, that is, complaints and appeals, pending against decisions under the first concentration camp law were to be considered as "withdrawn."²²

Most of the reasons why the clerical fascist regime refused to permit appeals to the highest court against many of the punishments assessed by its various police authorities are obvious. There was one reason, however, that deserves particular attention. Just because the overwhelming majority of the population despised the regime, violations or alleged violations of the political decrees ran into the thousands. Several Viennese attorneys interviewed by the writer had each handled upward of 500 cases of this character. They explained that the police had developed a system of bringing charges against a person by "anonymous information", refusing to confront him with the informer or informers, and sentencing him on the basis of this "confidential investigation." In hundreds of instances the "anonymous information" was the only "evidence" against the accused. Attempts by the attorneys to compel the informer to appear in the proceedings were almost always rejected. In order to eliminate the possibility that the Supreme Court on Constitution and Administration might hold that in the particular circumstances just stated there was no real evidence, the right of appeal to it was eliminated.

To summarize again: by means of the law under discussion²³ the cabinet simply placed the police above the court in respect to the cases falling under the 17 enumerated laws and decrees. And it must not be forgotten that these cases were in addition to the numerous

²² BGBl., 1934 II, Nr. 253.

²³ BGBl., 1934 II, Nr. 254.

others in which the police had likewise been placed above the court by the device of so expanding their powers that their decision was final if the fine was less than 1000 schillings and the period of incarceration less than six weeks.

III

THE COURTS AND JUDICIAL PROCEDURE

The jury system had been under attack for years before March, 1933, particularly since a famous political murder trial in 1927, and these attacks had been intensified after the elimination of the parliament. Indeed, within less than three weeks after that event Schuschnigg issued a decree altering the procedure in jury courts.²⁴ Another decree of late January, 1934, eliminated the separate deliberations of jurors and judges and compelled each juror to make an elaborate explanation of the reasons for the conclusions he had reached.²⁵ These changes not proving adequate the jury court was eliminated. For it was substituted a court composed of three professional judges and three laymen; the six deliberated jointly on the issues of guilt and punishment. The name for this body, *Schwurgericht*, was reminiscent of that for a jury court proper, *Geschwornengericht*; but the decree of June 19, 1934, amended the existing laws in numerous places to delete the latter term, and eliminated entirely the 19th main section of the law of 1873 dealing with jury courts.²⁶

Since a dictatorial regime rests more upon the fear than the consent of the people this one not only reintroduced capital punishment in ordinary procedure but applied it to offenses for which the previous penalties had been as little as imprisonment for one year. As a preliminary move summary procedure permitting the death penalty for the crimes of murder, arson and public violence through the malicious damaging of the property of others was ordered on November 10, 1933. Individuals who incited or participated in these crimes were likewise liable to execution.²⁷ On May 25, 1934, the scope of sum-

²⁴ BGBl., 1933, Nr. 81.

²⁵ BGBl., 1934 I, Nr. 61, §§327, 331.

²⁶ BGBl., 1934 II, Nr. 77, particularly Art. IV, 4, 25, Cf. ADAMOVICH, *op. cit. supra* note 18, at 161, and MÄRZ, *STÄNDESTAAT OESTERREICH*, at 21. It is worth noting that both these authors were professors at the University of Vienna, though "März" is a pseudonym, that Adamovich's book was published by the government printing office, and that he states that "the institution of the jury court was . . . eliminated by the constitution", referring to Art. 106 of that document and the law just cited.

²⁷ BGBl., 1933, Nr. 505.

mary procedure was expanded and the number of offenses for which death was the penalty were increased; that is, if in one or more districts the crimes of murder, robbery, arson, malicious damage to property of stipulated amount and character (particularly if it endangered life or health), or of intentionally using explosives to bring about danger to property, health or life, without regard to the extent thereof, showed a dangerously increased frequency, summary law was to be instituted, and if the defendants were found guilty by unanimous vote of the court the sentence was, ordinarily, death. Only if the execution of one or more persons had been a sufficiently warning example, so that order had been restored, or if the crime had not cost a human life, could the court, under important extenuating circumstances, reduce the punishment to life imprisonment, or, in the case of defendants less seriously involved, to five to 20 years.²⁸ Two weeks later, on June 10, the summary procedure was extended to additional violations of the explosives act of 1885. After the lapse of only nine days the republican statute abolishing the death penalty in ordinary procedure was annulled and that penalty was restored for most of the crimes so punishable under the penal law of 1852 and the explosives act. Three days after this, June 22, the cabinet adopted a law concerning the "summary punishment of crimes involving explosives," defined as those stipulated in the explosives act of 1885 and all others "if they were committed by the use of explosives." The chief purpose of this third law was to introduce a more rapid procedure in such cases, even in the ordinary courts. Among its more interesting provisions were those stating that "The bill of indictment requires no substantiation"; that "No demurrer to the indictment is permissible"; and that certain articles of the law were applicable to acts committed before it went into effect. On July 12 even more drastic alterations were adopted. For murder and for a list of crimes under the explosives act, if the prosecution were under summary procedure, the only possible punishment was death. Even under ordinary procedure this was true if the defendant were 20 years of age. These special prescriptions also applied for all other crimes for which the summary procedure had been proclaimed if they had been committed by means of explosives or if the safety of operation of a public carrier or of a public utility supplying water, light or power had otherwise been endangered.²⁹

²⁸ BGBl., 1934 II, Nr. 31; cf. RGBl., 1852, Nr. 117, §§85, 87, 89, and *ibid.*, 1885, Nr. 134, §4.

²⁹ BGBl., 1934 II, Nr. 52; 77; 98, particularly Art. 1, 10 (1), (3), 15 (2), 119.

These kaleidoscopic changes in penal law and procedure brought about the following situation by the middle of July, 1934. Under normal procedure, for murder, high treason, and "foreseeable" manslaughter by means of explosives, capital punishment had been restored. It had been introduced for a number of additional "explosives crimes" for which the former penalties had been one to five or five to 10 years. These were the imperilment of the property, health or life of another by the use of explosives; the planning of such imperilments; the production, acquisition, ordering or possession of explosives with the intention of causing these dangers or placing others in a position to do so. Under summary procedure everything that has been said concerning normal procedure was true. In addition, the former could be applied to malicious acts or failures to act under particularly dangerous conditions. For murder and explosives crimes the summary court had to inflict the death penalty on all convicted.³⁰

The usual justification of police and penal measures such as those reported to this point is that they are necessary for the maintenance of order and the security of the state. But the reader must have noticed that this regime, like all authoritarian regimes, had set up new categories of crime; namely, acts and even "efforts" that were "inimical to the cabinet." By this was really meant inimical to the policy of the cabinet. What these clerical fascists were primarily trying to maintain was not order nor the security of the state, but their own positions of power. Thirteen days after the adoption of the last of the laws just cited Dollfuss was dead, murdered by the Nazis. To some this is sufficient proof that the measures previously taken were justified; they regret only that they had not been more severe and more effective. To others it is another proof that a legalized system of police and summary court terror can bring only turmoil and chaos, not order and security. Again the western European democracies might have taken the opportunity to offer their assistance in cleaning up the mess that was Austria, insisting on some honest efforts to reconcile the workers and other liberal elements who were the most reliable opponents of Hitler; in other words, to do what Schuschnigg did falteringly and inadequately in 1938 when it was too late. Instead, France and England left it to Mussolini to send troops to the Brenner—and his money, literally, was on the existing regime.

³⁰ Cf., MÄRZ, E., *op. cit. supra* note 26, at 20-21.

Under any circumstances it was in order to punish those who were implicated in the assassination and the subsequent disturbances. Unfortunately, though many details of the events of these unhappy days have never been entirely clarified, it is probable that a number of the worst culprits in Austria were never penalized and certain that those across the borders were not.

On July 26, the day after the murder, the cabinet issued a constitutional law creating a special military court with exclusive jurisdiction over all punishable acts connected with the putsch. Fourteen categories of offenses were listed. The court functioned in panels composed of one judge and three commissioned officers, active or retired, of the army. It had to sentence to death those convicted of offenses for which summary law had been proclaimed, for which ordinary procedure prescribed capital punishment, and, in addition, for cases which fell under 12 enumerated sections or sub-sections of the penal code. No appeal of any sort was permitted and requests for mercy had no delaying effect. If execution was ordered, it took place three hours after the sentence. Certain sections of the penal code dealing with mitigating circumstances could not be applied.³¹

Four days later there appeared another constitutional law dealing with those who had participated in the putsch in a minor fashion. The police decided which persons fell in this category unless a denunciation were already before the public prosecutor; in this case he decided. Such persons were to be detained "in a specified place" [concentration camp] and without exception were to perform hard labor. No appeal against the detention order was possible. Against the amount of execution costs assessed to the internee there was likewise no appeal. The property of persons against whom court proceedings had been instituted in connection with the disturbances, or who had fled the country, or who had been "detained" was confiscated. A protest against the confiscation could be based only on the claim that the property owner did not belong in any of the stated categories. From the decision of the administrative authorities on a protest there was no possibility of appeal, but if the owner were subsequently acquitted in court or released from detention as guiltless his property could be regained. Finally, to tie everything up as tightly as possible, appeals to the Supreme Court on Constitution and Administration from any decision issued under this law were excluded.³²

³¹ BGBl., 1934 II, Nr. 152.

³² *Ibid.*, Nr. 163.

If a public employee were under the well-grounded suspicion that he had participated in the revolt his salary was to be impounded until the conclusion of the administrative or judicial proceedings. If he were found guilty, the sum was to be confiscated; otherwise, paid out. The same regulations applied to the recipients of pensions or other public subventions.³³

A fourth constitutional law stipulated that no person who had taken part in the events of February or July, 1934, or who belonged to a prohibited party or to their militant formations was permitted to own or bear arms and munitions even though he had a permit to do so. Violations might be punished by the police with fines up to 20,000 schillings or confinement up to a year or both, "without prejudice to a possible prosecution under other legal provisions." Appeals to the highest court were excluded. Persons possessing arms or munitions were required to turn them in within five days without any claim to compensation.³⁴ Because of the century-long tradition of arms-bearing in some of the Alpine provinces, particularly Tirol, this order was bitterly resented. Technically, of course, it was a violation of the constitutional guarantee of the equality of citizens before the law.

As has been indicated the pattern for judicial procedure had been set two weeks before the murder of Dollfuss. The constitution embodied a constant threat to the independence of the judiciary. Jury courts had been eliminated. For a long list of offenses the police and administrative authorities had been placed above the courts. Summary procedure in a form closely analogous to that in courts-martial had become a permanent institution. For crimes involving explosives a special variety of summary procedure had been instituted. New categories of crimes had been created and the punishments for old ones tremendously increased. The right of appeal had been greatly limited or in numerous instances absolutely destroyed. The results could have been foretold by any second year college student of political science. A decisive majority of the population of Austria lost all respect for the law or for judicial processes. They did not look to either for protection of their rights and liberties. They hated and despised both.

In the years remaining before Austria disappeared from the political map the two laws most important for this discussion were those

³³ *Ibid.*, Nr. 181.

³⁴ *Ibid.*, Nr. 224.

for the protection of the state and for the protection of public peace, order and security. The former, issued July 11, 1936, was directed: first, against those who organized or supported armed organizations; and, second, against those who organized or supported organizations which sought in an unlawful fashion to disturb the independence, the form of the state or government, or the constitutional institutions of Austria, or which sought to hinder or "render difficult" the execution of laws, decrees, decisions or orders of officials, or the payment of taxes. Other sections dealt with agreements on or participation in crimes such as murder, robbery, arson and public violence, and with the secret collection of arms and poisonous gases as well as their manufacture and distribution. Penalties ranged all the way from six months to 20 years. The second main division of the law prohibited the maintenance or support of a secret news service which operated to the disadvantage of Austria. The minimum sentence for such activities was six months. Convicted foreigners were to be deported.³⁵

The law of August 18, 1937, has already been noted in the section on the powers of the police.³⁶ It was a codification of the statutes and orders dealing with public order and security, and as such included practically all the matters mentioned in that section, such as political demonstrations and activity on behalf of a prohibited political party, as well as some others yet to be discussed. In a number of respects its terms were an improvement as compared with those which had been on the books since July of 1934. The penalties which could be assessed by the police were substantially reduced. For one group of offenses they were ordinarily limited to fines of 500 schillings, or confinement for four weeks, but under aggravating circumstances to 2000 schillings or three months; for a second group ordinarily 2000 schillings or three months, but possibly 5000 schillings or six months. Even these were considerably more severe than had been usual in the republican era. Probably more important was the restoration of the right of appeal to the *Bundesgerichtshof* from decisions of the police in a wide range of offenses if the fine were more than 200 schillings, the arrest more than 14 days or the value of confiscated property more than 500 schillings. Carefully excluded from this right of appeal, however, were sentences to concentration camps unless that appeal were against a prolongation of the sentence. By this exclusion the police state kept practically undulled one of its sharpest weapons.

³⁵ BGBl., 1936, Nr. 223.

³⁶ *Cf.*, p. 168, *supra*.

Furthermore, the law reserved to the government the right to proclaim by simple decree more severe regulations for preserving order if the need should arise in particular districts or in the nation. These regulations consisted primarily in doubling the penalties for the more important offenses, raising the limits of the punishments below which an appeal was impossible, suspending the guarantees of the privacy of letters and other sealed writings in connection with the prosecution of an offense under this law, and permitting the application to first offenders of penalties ordinarily intended for second offenders. Punishable acts of the sort listed in the decree as having led to the imposition of the regulations were subject to them even though committed prior to the issuance of the decree.³⁷

For more than a year Schuschnigg had been announcing that this law would restore the norms of a constitutional state. It did nothing of the sort. As was shown above it retained for the commonest political offenses provisions for specific punishment both by the police and the courts for the same offense. It retained the power of the police to "detain" an offender—a third punishment for the same offense. It left untouched the law compelling judges to give ordinarily a minimum sentence to five years at hard labor for the distribution of printed matter of a "treasonable" character. It retained, with some modifications, a whole series of decrees that permitted the government to order the discharge of private employees and to deprive professional persons of the right to exercise their occupations because of oppositional activities.³⁸ The general significance of the foregoing points is clear enough. It is, however, important to repeat the warning that these police state methods were not being used against the Nazis alone. Sympathy with strong measures against those "brown pests" should not obscure the facts that the authorities in the Austro-Fascist regime were assiduously copying the methods of Hitler and using them more vigorously against the workers and other democratic elements than against the Nazis.

IV

Many students of Danubian affairs are firmly convinced that the resuscitation of a Dollfuss-Schuschnigg Austria could easily lead to civil war. The foregoing pages offer only one small segment

³⁷ BGBl., 1937, Nr. 282.

³⁸ *Ibid.*, particularly §§4, 6, 8, 10, 11, 22, 23; *Neue Freie Presse*, Aug. 18, 1937 (a.m.) at 5.

of the evidence that supports this conclusion. Another conclusion, more completely demonstrated above, is that judicial processes in Austria after the elimination of the Nationalrat were subordinated in important respects to administrative or police processes; and that both, in varying degrees, were prostituted to the ends of the particular Austrian brand of Fascism. One lesson for us, despite the present lack of any approximation to the Austrian situation of 1933-1938, is the old one that eternal vigilance is the price of liberty. Another, of at least equally great immediate importance, is that we can not stop at preventing any revival of the political and legal institutions of Clerical Fascism; we must also prevent the personalities of that system from playing any role in the reconstruction of Austria. Numbers of them, notably Prince Starhemberg, are making desperate efforts to rehabilitate themselves. He and other Heimwehr leaders deserve no more consideration than Hitler and Goebbels—and for precisely the same reasons. As for the quasi-fascist Christian Social figures, the most appropriate comment is a paraphrase of a passage from *Quadragesimo Anno*—the encyclical they pretended to be following: “Indeed, there are some who even abuse religion itself, cloaking their own unjust impositions under its name, that they may protect themselves against the clearly just demands of their” fellow citizens for liberty and equality.

Immediately after the fall of Rome, Baron Berger-Waldenegg repossessed the Austrian legation there, with the approval of the Allies. This man was a Heimwehr leader and was foreign minister in 1936 when vice-Chancellor Starhemberg sent his notorious telegram to Mussolini congratulating him on the capture of Addis Ababa and on the “glorious and magnificent victory of the Italian armies over barbarism, on the victory of the Fascist spirit over democratic dishonesty and hypocrisy, on the victory of Fascist sacrifice and disciplined courage over demagogic falsehood.” Because of a flood of protests against this telegram from member nations of the League, and for other reasons, Schuschnigg forced both men out of the cabinet but made the Baron minister to Italy.

Is it too much to suggest that it would have been more desirable for the Allies to begin the reconstitution of Austria by installing a democratic representative of that country in the legation in Rome? Certainly this would have been more in line with other recent developments such as the dropping of Badoglio as premier of Italy.