

Memo for Trial Brief

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I

When in 1933 Hitler had been given by Hindenburg the function of Reichskanzler, he within a few weeks succeeded in transforming this position which previously simply had been that of a prime-minister in a constitutional government into mere dictatorship. In this space of singular shortness he had replaced constitution and right by sheer tyranny.

In modern European history no similar development is to be found of this rapidity. Neither Napoleon I. nor Napoleon III. before their respective coups d'état had been that sort of a pure demagogue which Hitler had represented before January 30, 1933, who neither had been a victorious general like the first Napoleon, nor a statesman who had shown at least some qualities during a three years reign as a prince-president as Napoleon III. had done. Besides this even these two emperors had not acquired that amount of governmental power by their revolutionary acts, as Hitler gained by his "legal" taking over of the power.

But in spite of this pretended legality this development was not only a simple evolution but a revolution which necessarily implied violations of the constitution and of general law.

But whilst in all other similar cases this violations are obvious (such as the days of Brumaire 18th and 2nd of December 1851 in the above-mentioned cases of the Napoleons) here this violations are neither restricted to a limited space of time or to a special date nor are they self-evident. It is a leading feature of this development to an utmost illegality that it carefully was being covered by a curtain of a pharisaical pseudo-legality.

This is intended to be an attempt to point out those enactments of this period which are to be considered as violations of the Weimar constitution. As this is a mere legal inquiry all pure political considerations must be avoided. Between the enactments to be investigated here which were the milestones on the way to dictatorship there are lots of open outlawryes, and atrocities but also many administrative regulations, directed not immediatly to the public but to the public officials, but all without the character of enactments.

All of them here will be discussed only if it is necessary to

understand the enactments to be criticized.

II

Legal situation on 30th of January 1933

Position of the Reichskanzler and the Reich government on the Weimar constitution.

First of all one must review the position from which Hitler started on his point of departure on 30th of January 1933, to recollect all the legal walls which he had to smash, all the liberties he had to violate. This is interesting not only for the German in whose mind all these things are wiped out by the experience of the last 12 years(Mommsen is perfectly right in saying that the ingratitude of nations is only surpassed by the shortness of their remembrance) but also for the foreigner who has in his mind only a dictator-ruled Germany.

By Hitler's being made Reichskanzler not yet all was lost. On the contrary many people inside Germany and outside were of opinion, it would be the only way of overwhelming the Nazis to force them to show if they could do any positive work inside the government instead of mere criticism.

The origin of this part of view, which failed to see Hitler's and his men intention to blow up the whole of the constitution, was the deposition of the Reichskanzler as it was drafted by the constitution was far from giving a start to dictatorship.

1) Competences of the various constitutional elements.

The Reichskanzler was just a member of the council of ministers of the German government, to which he only was ~~named~~ "primus inter pares" (sec.52,55 Weimar Constitution).

His and the whole government's power was very restricted by other elements as laid down by the constitution. Those were:

a) the Reichspräsident. It was up to him to appoint and to dismiss the ministers (sec.53 Weimar constitution)

He also was competent - not the Reichskanzler, who just had to countersign - for all measures provided by sec.48 of the constitution against insubordinate Lander governments or generally

in case of need, such as the establishment of a state of siege.

- b) the parliament (Reichstag) which had to accept all statutes and general regulations which were not only addressed to the administration but which were intended to oblige the public.

As in all states with parliamentary rule the Ministers as well as the Reichskanzler were dependent in a high grade on the Reichstag, as they had to ~~be~~ withdraw if the legislative body had stated lack of confidence by simple majority.

- c) The Reichsrat. This was the representative organ of the 17 German states (Länder) which were forming the German Reich. The Reich at that time was a federal republic and each state had not only the right of self-government and of autonomy but also was to be considered as a real state with its own competences, not on the Reich's jurisdiction, as well as the Länder-government were not subject to orders given by the Reich-government.

Besides all in sec.59 of the constitution a legal responsibility was established for the Reichspräsident, the Reichskanzler and all other members of the Reich-government, all of whom could be brought to trial before a special state-tribunal for deliberate violations of the constitution or an other Reich statute law.

Thus in a real democratic way the governmental power was divided not only between the Reich and the Länder, but also between the various constitutional elements. They could "paralyze each other" as Pfundtner, undersecretary in the Reichsinnenministerium complained in "NS-Handbuch für Recht und Gesetzgebung", 2nd edition, 1937, p.307 .

2) Constitutional rights of the individual (Grundrechte).

The government's power was also very restricted as to the individual whose position was formed by the Weimar constitution in a very democratic and liberal way by establishing numerous "Grundrechte". Though there was much legal controversy about their nature, i.e. if they were to be considered as real constitutional rights (subjektive öffentliche Rechte) or not, the respective articles are remarkable for their wording and some of them to day may be interesting enough to be quoted literally:

sec. 102. All judges are independent and only submitted to the law.
sec. 105. Extraordinary courts are not admitted. Nobody can be

brought to accord the competency of which is not provided by statute.

sec. 109. All Germans are equal in law.

sec. 111. All Germans are allowed to move and to settle down freely throughout Germany

sec. 113. Not-German speaking minorities in Germany are to be protected by legislation and administration.

sec. 114. The Freedom of the person is inviolable.

sec. 116. No punishment shall be inflicted unless the act to be punished is expressly made punishable by statute in force at the time of its commission

sec. 124. All Germans are entitled to establish societies and coalitions provided that their purposes are not disapproved by Penal Statute Law.

sec. 125. Herewith are guaranteed free and secret elections.

sec. 135. All inhabitants of the Reich are granted absolute religious freedom

sec. 142. Arts and sciences are free as well as their doctrines.

III

The fundamental enactments which brought the change

- 1) The Notverordnung of 4th of February 1933 "for the protection of the German people.

Already a few days after Hitler's appointment to Reichskanzler, on 4th of February an ordinance was issued. It was based on the constitution, sec. 48, ss. 2. and signed by Hindenburg, countersigned by Hitler Frick and Gurtner (RGBl I, 40)

- a) by this ordinance all political adversaries were silenced. It established the compulsory notifying to the police for all public meetings and demonstrations. The police were enabled to suppress such meetings or demonstrations not generally but "up the circumstances of each individual case". This was something new, because all similar regulations enacted by former governments had prohibited generally all demonstrations for the time of their effectiveness, which would be a very limited one. But now a judgement was transferred to the police which was not to be rendered by the police according to their free and independent opinion, but which had to be adapted to administrative regulations, forwarded to the police

authorities by the new Nazi-government.

- b) On the other hand by sec.6 of this ordinance were annulled all general prohibitions of meetings and demonstrations which had been established by the Lnder-authorities. Thus the Lnder were disabled to stop Nazi-demonstrations as they had done up to this day. These demonstrations which now were free meant terrorism.
- c) Likewise was abolished the freedom of press by sec 7 of this ordinance. Severe punishments were proclaimed for all daschnlichen disobeyances to this ordinance. In sec.22 already was to be found a police-detention, which is to be regarded as a predecessor of the famous Schutzhaft; but at that stage a detention by the police - without order or consent of a legal authority - was something revolutionary, though this kind of a police detention which was established under this ordinance was limited to a short time and had to be lifted on a judges order.
- d) Of this ordinance is to be considered in any case illegal and void at least the annullment of the general prohibitions of demonstrations, which had been in appliance by the Lnder-governments. If the ordinance of 4th of February 1933 was meant to restaure public safety, as foreseen by sec.48 ss2 of the constitution it could not repeal those measures intending to maintain the political peace in the country which now was being badly troubled by the terrorist demonstrations of semi-military organizations.

2) Notverordnung of 28th February 1933

Those were the conditions under which preparations had to take place for the Reichstagsselections after Hindenburg had dissolved the parliament on 1st of February (RGBl I,45) referring to sec.25 of the Weimar constitution "in order" to enable the German people to show its opinion as to the government of the national coalition"

- a) On 27th of February the Reichtagbuilding was set on fire. On 28th of February a new ordinance was issued under the excuse of this fire which was laid at the communist's door. Accordingly in its preamble this ordinance emphasized, that it was issued "to prevent further communist outrages". That this was a mere excuse became evident in Bavaria where obviously no communist danger was to be seen, but where on the base of this ordinance measures were taken by the new Nazi-Reich-government against the constitutional Bavarian government (See below).

This ordinance wholly was apparently void because it lacked the due base in the constitution. Neither the Reichstagsbrand which was ~~hmm~~ its main pretended motive was fit to be such base, nor were their any real outrages to be feared from the communists, as - all other political adversaries - they had been silenced already by the first *Notverordnung*.

- b) Besides this, in sec.1 of this ordinance "until further notice" all constitutional rights of importance were abolished such as freedom of the person (sec.114), inviolability of the individual home (sec.115), secrecy of post, telephone and so on (sec.117), freedom of speech (sec.118), free assembling (sec.123), freedom of forming corporations and societies (sec.124), and freedom of property (sec.153). In ss.2 of this section it was plainly declared that further-to any interference was possible into the sphere of the individual,

All these restrictions of liberties never were repealed during the whole third Reich. Pfundtner in the above-mentioned Handbuch p.311 stated ~~mm~~ that all these constitutional rights were incompatible with the principles of the *Führerstaat*, where no sphere of individual liberty could be admitted.

When these rights were abolished it was intended to enact this measure as one of permanent nature, not as one as only provided by sec.48 ss.2 of the Weimar constitution just of transitory character. That this abolishment of freedom already at the issue of this ordinance was intended to be a permanent one, is resulting of Hitler's and his helpers spirits, as they became evident by the ^{ir}attitude against all kinds of freedom.

This abolition of rights is to be considered as an illicit suspending of an essential part of the Weimar constitution or other words as a high treason, of which are guilty all persons responsible for this ordinance.

- c) In section 2 of this ordinance was provided that if a German state government (*landesregierung*) would not take the steps necessary to reestablish public ^fsafety and order, the Reich-government should be entitled to exercise temporally the power of the Land government. This was based as the whole of the ordinance on ss. 2 of sec.48 of the constitution.

But the case provided for in this section is obviously not one of this subsection, but one of subsection 1 of sec.48, where it was enacted that if a "Land" does not fulfill the duties to which it is bound according to constitution or to Reich statute law

the Reichspräsident should be entitled to enforce obéissance even by military means . But nothing is said that the Reich wholly could turn out the Land's government and exercise itself the latter's power.

So also this section has to be considered void as not legitimated by constitution.

- d) Measures taken by the Reich government against the Bavarian constitutional government in appliance of sec.2 of the ordinance of 28th of February 1933.

Not-with-standing the development in the Reich, in Bavaria the constitutional government was maintained quite a while after Hitler had taken over the Reich's rule. This Bavarian government under its prime-minister Dr.Held strongly resisted all Nazi attempts to get to power in Bavaria too, up to 10th of March 1933.

In Bavaria there had been no trouble as public safety easily was maintained by this constitutional government. No communist's outrages were imminent as this party in Bavaria always had been very weak. The only element which tried to cause trouble were the militant organizations of the NSDAP .

Nevertheless on 10th of March 1933 by the Reich government a Reich commissioner was installed to replace the Bavarian government. This measure was based on the said sec.2 of the ordinance of 28th of February 1933. Even if this enactment would not have been void , it would not have been applicable to Bavaria, because the conditions for such measure even under this ordinance were not fulfilled.

In the choice of the Reich commissioner's person Hitler showed considerable tactical skill, as he appointed Gener l von Epp who had a great popularity throughout Bavaria on account of the part which he had played in defeating the Bavarian Red Republic in May 1919.

Immediately before this measure was published, Hitler Frick and Hindenburg himself had emphatically denied that any steps based on the ordinance of 28th of February were being considered.

Such declarations were given to the Bavarian representing minister in Berlin Sperr and to Dr.Schäffer, Bavarian undersecretary, as well as to other important personalities of the Bavarian government. Even at the day before von Epp was appointed Reich commissioner the Reich authority , especially Frick had denied all

rumours . So it was in Bavaria, where the Nazi had to drop the veil~~ly~~ of pseudo-legality, which they used so skilfully everywhere.

IV

Conclusions from the unconstitutional character of the two ordinances.

Under these two ordinances no free elections could take place, in accordance to the constitution.

Therefore the Reichstag which resulted from the elections of 5th of March 1933 is not to be considered as one in a legal way elected. It was this Reichstag in which the Nazis including their supporters the first time had obtained a real majority, whereasⁱⁿ the last Reichstag which had been elected in November 1932 and dissolved by Hindenburg they had only had 270 seats under 585. (among the 270 there even were only 169 Nazis and 74 Deutschnationals).

As this new Reichstag was not elected in accordance to the constitution it must be stated that also all its enactments are void. The most important of these enactments was the famous Ermächtigungsgesetz of 24th of March 1933, which Act empowered the government to all legislation including such modifying^{the} the constitution. The Ermächtigungsgesetz had the subtitle: Law for termination of the danger for the people and the state.

This law was not only void for the lack of legitimation of the new Reichstag but only because it contained a complete renunciation to legislation by the legislating body. As legislation is not just a right of the legislating body, but its essential duty~~ly~~, a renunciation in this totality can not be considered valid, even if the enactment by which this renunciation is carried out, would be made in accordance with the formalities existing for constitutional law.

On this Ermächtigungsgesetz practically all legislative acts of the third Reich were based. (Originally it was restricted till 1937 but it always remained in force).

From its unconstitutional character results the illegality of all these enactments.

Thus the taking over by the Nazis only was carried out in a pseudo-legality, which practically means illegality in spite of their

continual emphasizing that they had obtained the government by purest legality. Only the access to the Kanzlership was made in a legal way but the transformation of the government by suspending a great part of the constitution was plainly illegal. It is a special trait of all legal essays in the third Reich dealing with constitutional law, that they modestly omit the two decisive enactments that is the two Notverordnungen of 4th February and 28th February 1933 and declare state that the development which brought the change in the legal constitution began no sooner than the Ermächtigungsgesetz, which is alleged to have been issued in full accordance with all due formalities established by the Weimar constitution (See Frank, Grundsätze des NS Rechtsdenkens und Rechtswollens in the above-mentioned Handbuch p.6).

By the way the bulk of the provisions of the Weimar constitution never was officially repealed. In legal literature it just gloomily was pointed out that certain sections of it could no longer be considered as effective, since they were incompatible with the Führerstaat.

V

Other illegal measures modifying the constitution.

If things are looked at like this, all later enactments notwithstanding their political and historical importance are of a secondary legal interest, just like for a judge who has to deal with an offense all dispositions are of minor importance which are made by the criminal after the commission of his delict.

Nevertheless some of the most important ones are enumerated here as far as they concern constitutional law:

- 1) measures intended to abolish the federal structure of the Reich which had been established in many centuries of German history.
 - a) After the elections of the 5th of March (when not only the Reichstag but also the Prussian Landtag had been reelected) the parliaments of the Länder other than Prussia still were obstacles to totalitarianism.

They were reorganized in a remarkable way by the "Vorläufiges Gleichschaltungsgesetz" (provisional law, adapting the Länder to the Reich) of 31st of March 1933 (RGBl I, 153). By this enactment the Länder parliament were adapted to the results of the Reichs-

tagelections by appointing deputies in the same proportions as the ^{result of the} Reichstags elections. It was the first time in the History of German parliamentarism that members of a parliament did not result from an election but from a governmental order. The excuse for this singular procedure was "to spare to the people the trouble of new elections".

By this enactment also all seats gained by the communists in any representative body of Reich, Lnder and local self-governing corporations were declared forfeited.

- b) By the second "adaption law" which followed the first one within a week's interval on 7th of April 1933 (RGBl I, 173) the Lnder governments were submitted the directions and orders of the Reich government and Reichsstatthalters were established as controlling organs of the Reich. The Reichsstatthalters were independent from the Lnder government in all states other than Prussia where the Reichskanzler was combining the power of Reich and Lnder.
- c) This development was finished by the Neuaufbaugesetz, law concerning the new organisation of Reich of 30th of January 1934 voted by the Reichstag (RGBl I, 75)
Its main features were the following:
 - aa) Abolishment of all Lnder parliaments (sec. 1)
 - bb) Transfer of all sovereignty of the Lnder to Reich.
The Lnder government put under control of the Reich government (sec. 2)
 - cc) The Reichsstatthalter made dependent on the Reichsinnenminister (sec. 3)
 - dd) The reich government is granted unlimited authorization to enact new constitutional law (sec. 4)
- d) As a mere consequence of the abolishment of Lnder the Reichsrat was finally dissolved (law of 12th April 1934 RGBl I, 89)

2) Measures intended to concentrate all governmental power with

Hitler:

- a) After Hindenburg's death a law was issued "concerning the head of the German Reich" on 1st of August 1934 (RGBl I, 747). By this law Hitler was given all power which hitherto had been with the Reichsprsident in addition to his power as Reichskanzler. By thus combining the competences of these two functions, all legislature, jurisdiction and executive were put in

one single hand. Hitler as well was made supreme commander of the Wehrmacht and "Oberster Gerichtsherr des deutschen Volkes"

- b) If there would have been still any legal obstacles formed by statute or law these too were abolished by the Reichtags-proclamation of 26th April 1942 (RGBl I, 247). Herewith the last veil's were dropped.

3) Measures creating a monopoly for the Nazi-party in political life and mixing up party and state.

- a) In early 1933 the communist party totally had been dissolved under the ordinance of 28th February 1933. Socialist party (SPD) was declared dangerous to the state by decree issued by the Reichsinnenminister on 21st of June 33 which was directed to Lander governments. Accordingly all its activity was paralyzed by the political police of the Lander (the predecessor of the Gestapo).

In the same way as previously it had been done to the communists all seats of deputies in representative assemblies of Reich, Lander and local self-governing corporations were declared forfeited by an ordinance of 7th of July 1933 (RGBl I, 462).

All property of the communist and socialist party was ceased and liquidated by the laws of May 16, and July 14, 1933 (RGBl I, 293 and 479)

All not socialist parties were forced to dissolve "voluntarily"¹¹
Thus dissolved:

The Deutschnationale party on June 6, 1933

State party (democrats) on 28th June

Bavarian party (catholics)

on July 4

and Deutsche Volkspartei (liberals)

Zentrum (catholic outside Bavaria) on 5th of July

- b) By law of July 14, 1933 (RGBl I, 479) it was prohibited to form new parties for all infractions severe punishments were proclaimed.
- c) On 1st of December 1933 a law was enacted "for securing the unity between the party and the state" by which the party was granted all rights of a public corporation. Hitler's representative in the Party leadership and the chief of staff of the SA were appointed members of the council of ministers.