

**LAWMAKING PROCEDURE UNDER THE RULE
OF THE FEBRUARY PATENT :
THE AUSTRIAN PRESS ACT 1862 BETWEEN THE HOUSE
OF LORDS AND THE HOUSE OF DEPUTIES**

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I. The so-called February Patent

The so-called February Patent¹, sanctioned by emperor Franz Joseph on 26th February 1861, is one of the most remarkable documents in Austrian constitutional history : It can be seen as an intermediate station in the transformation from neoabsolutism to constitutionalism. This transformation became necessary because of the military defeat Franz Joseph had to suffer in Italy in 1859 and of the financial crisis, which was a consequence of the lost war. The bourgeoisie was willing to subscribe Government bonds to turn off the

¹ *Reichsgesetzblatt für das Kaiserthum Österreich* 1861/20. An official title doesn't exist – which was intentional by the emperor and his cabinet, see Horst Brettner-Messler, Hrg, *Die Ministerien Erzherzog Rainer und Mensdorff* (= Die Protokolle des Österreichischen Ministerrates 1848–1867, V/1, Wien, 1977) p. 69, 96. In the literature, the name « Februarpatent », sometimes « Februarverfassung » (February constitution), is common, see f.e. Edmund Bernatzik, *Die österreichischen Verfassungsgesetze*, Wien², 1991, Nr VIII ; Fritz Fellner, *Das « Februarpatent » von 1861. Entstehung und Bedeutung*, Mitteilungen des Instituts für Österreichische Geschichtsforschung 63, Wien, 1955, p. 549–564, especially 554 f ; Andreas Gottsmann, *Der Reichstag 1848/49 und der Reichsrat 1861 bis 1865*, in Helmut Rumppler / Peter Urbanitsch, Hrg, *Die Habsburgermonarchie VII*, Wien, 2000, p. 569–665, esp 622 ; Lothar Höbelt, *Parteien und Fraktionen im cisleithanischen Reichsrat*, ibidem, p. 895–1006, esp 895, and many others. Only Wilhelm Brauneder, *Die Verfassungsentwicklung in Österreich 1848 bis 1918*, ibidem p. 69–237, especially 154 f, uses the title « Reichsverfassung » (Imperial Constitution), and refers to Article VI of the February Patent, which deals with the « Verfassung unseres Reiches » (Constitution of the Empire). This is inadmissible, not only because « Verfassung unseres Reiches » is an other word than « Reichsverfassung » but also means something different than the Patent from 26th February 1861 : The term is used as a common name for the February Patent plus the so-called October Diploma plus some other Acts of the Emperor, which were the basic laws of the empire at that time. « Reichsverfassung » was only the official title of the Imperial Constitution of 1849.

financial collapse of the Empire, but it wanted participation in financial as well as in all internal affairs.

However, just in this critical situation, the emperor refused to return to constitutionalism and to renew the Imperial Constitution, which was abolished by the Emperor himself in 1851. A first attempt of an arrangement, the so-called October Diploma, designed by the minister of state Agenor Count Gołuchowski and sanctioned by Franz Joseph in October 1860, gave the bourgeoisie very little participation. It was generally rejected, and Gołuchowski had to retire. His successor became Sir Anton Schmerling, who was considered as moderate liberal¹.

Schmerling was the main architect of the February Patent, which declared itself as an implementation of the October Diploma, but which modified the October Diploma in several important points. In comparison to it, the February Patent meant an essential progress towards constitutional relations. However, also the February Patent was not a real constitution. As the liberal newspaper *Wanderer* remarked in 1864, Austria had « since 1861 ... a constitution without freedom of association, without jury courts, without freedom of press, without equality of confessional rights, lacking a reform of justice and administration² ». Not without reason : Franz Joseph had declared that, in his supreme expression of will, « with the fundamental constitutional laws of 26th February, the utmost permissible limit of restriction of sovereign power has been reached³ ».

Well, but what was this « utmost permissible limit of restriction » of the emperor's power at all ? There was a parliament, called Reichsrat, with a bicameral system : The first chamber was called « House of Lords » (Herrenhaus), the second « House of Deputies » (Abgeordnetenhaus) – just like the constitutional Prussian Parliament. So if neither the executive power nor the judicial power were regulated, at least the legislative power seemed to be regulated by the February Patent in a constitutional way. But also that was mere illusion : A typical constitutional bicameralism system is characterized either by one house for the peers and the second house for the people,

¹ Erich Zöllner, *Geschichte Österreichs* (Wien/München⁸, 1990) p. 405 ; Helmut Rumppler, *Eine Chance für Mitteleuropa. Bürgerliche Emanzipation und Staatsverfall in der Habsburgermonarchie. Österreichische Geschichte 1804–1914*, Wien, 1997.

² *Wanderer* No 361, dated 21st December 1841, Morgenblatt 1.

³ Kommission für Neuere Geschichte Österreichs, Hrg., *Die Österreichische Zentralverwaltung* III/4 (Wien, 1971) No 28.

like British parliament, or by one house for the states and the second house for the people, like the US-Congress. In Austria, the House of Lords consisted of spiritual and temporal lords as well as of members with life-time tenure, appointed by the crown, just like the British House of Lords. But the Deputies, who sat in the second chamber, were not elected by the people, but they were members of the Provincial Diets, elected by them into the second chamber of Austrian Reichsrat. So, the House of Deputies was rather to be comparable with the US-Senate than with the British House of Commons, and the whole Austrian system was a mixture between British and American bicameralism, with no representation of the people, but with « two first chambers¹ ».

II. The drafts

However, bourgeoisie reconquered just a lappet of power in the Empire of Austria, and the legislation of the following years fulfilled just the most urgent wishes of Liberalism. First of all, censorship had to fall and freedom of press had to be brought back to Austria. Just a few weeks after the sanction of the February Patent, in March 1861, the minister of state, Sir Schmerling, gave order to the Chief Public Prosecutor in Vienna, Georg Lienbacher, to draft a Government Bill for the new Press Act. As Lienbacher himself reported some years later, he had not been given several instructions about conception and contents of the draft: « The new era and its requirements, the new men in the government and the direction pursued by them with all firmness of character and the experiences since 1848 were a distinctly speaking programme ». It may be added that the fact to entrust a public prosecutor with the elaboration was an indication for this institution to get more influence within the Press Law than before².

¹ See in detail Wilhelm Brauneder, *Austrian's Bicameralism 1861–1873: Two « First Chambers »*, in Wilhelm Brauneder, *Studien I: Entwicklung des öffentlichen Rechts* (Frankfurt, 1994) 127–139; Bernd Rottenbacher, *Das Februarpatent in der Praxis. Wahlpolitik, Wahlkämpfe und Wahlentscheidungen in den böhmischen Ländern der Habsburgermonarchie 1861–1871* (= Europäische Hochschulschriften III/910) (Frankfurt et al, 2001).

² Georg Lienbacher, *Historisch-genetische Erläuterungen des österreichischen Pressgesetzes und des Gesetzes über das Strafverfahren in Presssachen vom 17. Dezember 1862 sowie der Amts-Instruction zu beiden Gesetzen* (Wien, 1863) 37. The following is merely a sum-up of my habilitation thesis *Die Entwicklung des Preßrechts in Österreich bis 1918. Ein Beitrag zur Österreichischen Mediengeschichte* (Wien, 2004). See ibidem for more details, especially 450 ff.

Already on 4th April 1861, Lienbacher could present his draft to a commission assembled in the ministry of justice, headed by the new minister of justice Lord Adolf von Pratobevera himself; after his falling ill, it was headed by Lord Theobald von Rizy. Most important member of the commission, however, was undoubtedly Julius Glaser, professor for criminal law at the University of Vienna¹. Right at the beginning of the deliberations it was decided on motion of Lienbacher that the « revision of printed matters before publication » had to be dropped. After clarification of this fundamental question – it meant abolishment of pre-censorship² –, the draft was discussed section by section. As the new law should disclaim not only pre-censorship but also most of other preventive methods for controlling the press, it became necessary to give special attention to the repressive methods for controlling the press, especially the criminal law. The commission recognized that it would be necessary to put into force together with the Press Act an amendment to the Penal Code of 1852. Lienbacher and Glaser were requested to draft this amendment; Lienbacher should formulate anew the political delicts, Glaser the facts of insultations in points of honour. Lienbacher remarked later that the connection between Press Act and Penal Code Amendment was « fatal ». The amendment became soon the centre of public interest and protracted considerably the passing of the Press Act³.

On 5th May the deliberations in the ministry of justice came to an end. Both drafts were assigned to the state Council, the successor of formerly imperial council, which has been crown council in the era of neoabsolutism, but with less political power. Two members of state council, Eduard Quesar and Ludwig v. Fliesser, modified some passages of the drafts, mostly in a very conservative way⁴. At least, the drafts came from state council to ministerial council, where other

¹ The protocoll is archived in Österreichisches Staatsarchiv, Allgemeines Verwaltungsarchiv, Justizministerium, Karton 1514 Nr 47 ½; see Olechowski, *Preßrecht*, 451.

² Censorship in neoabsolutism was made possible by the obligation of the redacteurs to bring an issue of each newspaper to the public prosecutor just one hour before publishing, compare § 3 of the Preßordnung 27th May 1852, Reichsgesetzblatt für das Kaiserthum Österreich 1852/122; Olechowski, *Preßrecht*, 388 ff.

³ Lienbacher, *Historisch-genetische Erläuterungen*, p. 38.

⁴ The protocoll is archived in Österreichisches Staatsarchiv, Haus-, Hof- und Staatsarchiv, Jüngerer Staatsrat, Karton 3, No 203/1861.

deliberations were held¹. Autumn was coming, but the works weren't finished.

In the meantime, the newspapers speculated about the new Press Act. It was rumoured that the Act would be very rigorous. The newspaper *Die Presse* reported to have learned by an «unlucky incident» of the new draft, and «an icy shower ran through us reading the new Press Act²». And it was the state council who seemed to be guilty. The liberal juridical newspaper *Gerichtshalle* remarked: «It is easy to understand that the minister of justice Pratobevera who is inspired with the best will to help building up a constitutional state, has to come into conflict with the State Council and therefore it becomes explainable why the important government bills are so long in coming in the House of Deputies». Already on establishment of the State Council it had been clear that it would not be able to bring «fresh life into our legislation³».

In the House of Deputies the government bill was expected with growing impatience. Many of them supposed that the hesitation of the government was just a tactical reluctance. At last the House of Deputies itself took the initiative, and on 2nd October, it decreed unanimously to constitute a committee of twelve members which should draft both a «law for regulation of the conditions of the press» and a «law for proceedings in cases of punishable acts committed by the press⁴».

The government had to approve this measure, but there was no more time to waste. On the same day, a session of the ministerial council was held, and Lord Rizy was charged to obtain immediately the emperor's sanction to the government bill, which was completed just in these days. The next day, the emperor came personally to the session of the ministerial council for a last discussion. But then things got going: on 4th November, minister of state Sir Schmerling presented the draft for the Press Act, and minister Joseph Lasser (in representation of the deceased minister of justice Pratobevera) presented the draft for the Penal Code Amendment as a government

¹ The protocoll is published in Stefan Malfèr, Hrg, *Die Ministerien Erzherzog Rainer und Mensdorff* (= Die Protokolle des Österreichischen Ministerrates 1848–1867, V/2, Wien, 1981, MRZ 927 (accumulated protocol of the sessions from 17th, 18th, 20th and 26th September 1861).

² *Die Presse* No 211, 4th August 1861, Morgenblatt 1.

³ *Gerichtshalle* Nr 37, 16th September 1861, p. 299.

⁴ *Stenographisches Protokoll des Abgeordnetenhauses*, 1. Session, p. 1507, 1510-1513.

bill in the House of Deputies. There, the Penal Code Amendment draft was assigned to a newly created commission, the Press Act draft to the already elected committee¹.

The Press Act committee splitted the government bill in two laws, one for the substantive part and the other for the procedural part of the draft, in accordance with the original direction of the committee. So there were already three drafts to be discussed in parliament, although none of these Acts could stand alone and they all gave only sense together.

Only the proper draft for the Press Act itself was unproblematical, it could be finished in the House of Deputies till December 1861. More problems gave the draft for the Press Procedural Act, which should introduce a special criminal trial for punishable acts committed by the press. This was important, because the general Code of Criminal Procedure of 1853 followed the principles of inquisitorial procedure, and a modern procedure was wished very urgently just for political and press trials. The main question was, if the judgement should be passed by an ordinary court or by a jury court. The deputy Franz Taschek elaborated a draft including a press jury, which was accepted by the Press Act committee in December. But when the draft came into the plenum of the House of Deputies, the deputy Josef Waser warned that « justice might become a maid-servant of politics » if press jury becomes implementated, and the plenum decided in a voting call to recommit the draft to the committee. Now a much shorter draft without jury courts was decreed and passed the plenum in March 1862².

At this time the House of Lords had already received the draft for the Press Act and assigned it to a commission for further treatment. The commission modified the draft in some aspects and remarked in its report on 5th of February that the Press Act should only become effective together with the rules of press procedure and the Penal Code Amendment, « as it doesn't seem prudent that the existing press rules become ineffective and to give up all preventive measures against excesses of the press without regulating all their circumstances so that a possible misuse by the press can be accordingly thwarted in

¹ Malfèr, *Protokolle*, 425 (Protocoll of the session from 3rd October 1861, MRZ 939).

² See for further Details Olechowski, *Preßrecht*, 456 ff, see also Ingeborg Trenkler, *Der Kampf um die Preßgesetzgebung in den beiden Häusern des österreichischen Reichsrats*, phil. Diss., Wien, 1953, 5 ff.

every direction by the adequate repressive measures¹ ». The plenary assembly debated about the draft and returned the Press Act with several modifications back to the House of Deputies, first of all without being bound to the accomplishment of the other two laws.

III. Controversy between the two houses

As the parliamentary standing orders² determined in § 10, the draft had now to come and go between the two houses until a full consensus was given between them. So the draft was again assigned to the press committee, once again discussed in the plenary assembly and once more passed on to the House of Lords. There were renewed deliberations, but now the House of Lords repeated the proposal already brought forward by its commission, that the Press Act should only be enacted together with the rules of press procedure and the Penal Code amendment. This was inasmuch problematical as the House of Deputies had rejected two important regulations of the Penal Code Amendment, especially the prohibition to publish an indictment or a piece of judicial evidence before the end of a trial, and the prohibition to publish speculations regarding the possible outcome of a trial. The government had vigorously demanded these prohibitions, as the Press had considerably influenced the outcome of the procedure against a bank director by its report in 1860³.

In this way a violent dispute flared up as to the rules of procedure which could be interpreted as a comparison of fighting strength of the two Houses of Reichsrat which were legally in equal legal force because of the cited § 10. The House of Deputies held the opinion that the House of Lords could only reject a draft or accept it with or without modification, a conditional acceptance being inadmissible. Therefore it was stated on 22nd May « that the House of

¹ The report of the commission is not published, but archived in Parlamentsarchiv, Bestand Abgeordnetenhaus, 1. Session, Karton 22, 1425.

² Gesetz vom 31. Juli 1861 in Betreff der Geschäftsordnung des Reichsrates, Reichsgesetzblatt 1861/78.

³ See the anonymous brochure (written by Georg Lienbacher) *Die Preßfreiheit und die Regierungsvorlage eines neuen Preßgesetzes für Oesterreich*, Wien, 1861; Walter Berka, *Kriminalberichterstattung zwischen Medienfreiheit und Medienverantwortung: Zur Geschichte der „Lasser'schen Artikel“*, in Erika Weinzierl / Karl R. Stadler, *Zur Geschichte der richterlichen Unabhängigkeit in Österreich*. Symposion am 25. und 25. Oktober 1986, Justiz und Zeitgeschichte VI, Wien, Salzburg 1987, p. 397-437.

Deputies was not entitled to begin at present with the deliberation of the press law draft put aside by the House of Lords¹ ».

In journalism this development had a cushioning effect. The newspaper *Die Presse* considered the new Press Act « receded into a dim distance² ». Not before 8th July, the president of the House of Lords, Prince Karl v. Auersperg, declared that the differences between the two Houses « had escalated to a conflict that ought to be helpful to protect the regulations of the standing order, even to the constitution itself » but if this conflict goes on, « the rules of the press urgently desired would suffer³ ». So the House of Lords and the House of Deputies agreed to build a mixed commission of both houses to solve the problems⁴. This commission was able to find unanimously accepted solutions to the dissenting opinions to the Press Act. In the same way all differences concerning the Press Procedural Act and of Penal Act Amendment could be settled partly by unanimous and partly by several voices-solutions.

What were the main points of controversy between the two houses ? First of all, the right to confiscate newspapers was disputed fierly. Should it be a right of the police, of the public prosecutor or only a judicial right ? Lienbacher's draft regulated that the right to confiscate should be only a right of the police, but each confiscation had to be confirmed by the judge. The state council amended that the public prosecutor should have the right to give instruction to the police to confiscate newspapers. The House of Deputies held the opinion that police should only confiscate because of formal delicts like a missing masthead, but not because of a criminal content of the newspaper. The deputy Georg Isseczeskul declared that the rule of law forced them to give the right to confiscate to the judges exclusively. However, that was not the sight of the House of Lords. A big discussion began, and in the end, the mixed commission came back to the text version of the state council⁵.

¹ Parlamentsarchiv, Bestand Abgeordnetenhaus, 1. Session, Karton 22, 1932.

² *Die Presse* No 179, 1st July 1862, Morgenblatt 1.

³ *Stenographisches Protokoll des Herrenhauses*, 1. Session, 890.

⁴ The members of this mixed commission were : Prince Karl v. Auersperg, Lord Thaddäus Lichtenfels, the evangelical superintendent Adolf Haase, Lord Giovanni Resti-Ferrari, the catholic archbishop Othmar Cardinal Rauscher and Count Anton Auersperg from the House of Lords as well as Eugen v. Mühlfeld, Eduard Herbst, Josef Waser, Ignaz Kuranda, Johann Demel and Leopold Klauudy from the House of Deputies.

⁵ Olechowski, *Preßrecht*, 567 ff.

A second important point concerned the Press Procedural Act. As has been told already, the ordinary Criminal Procedure Act followed principles of an inquisitorial trial, which was not opportune for offences against the Press Act. The accusatory principle had to be re-established and the role of the public prosecutor had to be forced. Lienbacher, who was public prosecutor himself, made a stand for this new principle of course. But in this point, the House of Deputies was more conservative than Lienbacher and the ministry of justice: The deputies considered it necessary to maintain an inquisitorial preliminary trial. The mixed commission considered that a preliminary trial could but need not be held¹.

A third point of controversy concerned the right of persons who had been attacked in an article, to reply in the following issue of the same newspaper with a counterstatement. The Press Act of 1852 had considered that in case of refusal of a counterstatement, the public prosecutor had the right to force the editor of the newspaper to accept it. As Lienbacher was a public prosecutor himself, he maintained this principle in his draft. But the House of Deputies meant that the question, whether or not a counterstatement should be accepted, was a question of law. And only the judge had to decide about questions of law. So the House of Deputies established a contradictory juridical procedure between the person, who wanted to publish a counterstatement, and the editor of the newspaper. The House of Lords argued that this procedure would be very complicated and would take too much time and re-established the rules of Lienbacher's draft. At last, House of Lords and House of Deputies agreed that a person, who wanted to publish a counterstatement should have the right to choose between a contradictory procedure in face of the judge and a non-contradictory procedure in the face of the public prosecutor².

Conclusion

In October 1862, the mixed commission came to an end. Its drafts were sent first to the House of Deputies. There, a last vivacious debate developed concerning the regulation of the Penal Code Amendment after which the public prosecutor in case of defamation of an public servant could prefer an official charge. Lienbacher later reported that « the convincing refutation of the excellent speaker of the

¹ Olechowski, *Preßrecht*, 632 ff.

² Olechowski, *Preßrecht*, 653 ff.

parliament and of the court, Mühlfeld, the quiet and strictly impartial examining words of minister Lasser, spiced with subtle sarcasm and the speech full of solemn earnestness held by state minister Sir Schmerling produced an enormous effect »¹. In fact, however, Schmerling put considerable press on the House of Lords pointing out that « the government with its point of view ... could quietly expect the development of this affair ». All the tools of the neoabsolutistic press regime were on government's disposal, « and if it would not be for the urgency of the matter itself, we could not use the words more quietly on another occasion 'We can wait!' »². Later on the press reproached him to have derided the parliament, but the words didn't miss their effect.

For now, on October 22nd, the motion of the mixed committee was completely accepted by the House of Deputies, in some parts in voting by call. On the following day, the House of Lords agreed without a debate. The Press Act, the Press Procedural Act and Penal Code Amendment had been sanctioned by the emperor only at the end of the parliament's session on 17th December 1862. In the emperor's speech from the throne on 18th December – due to the wish of Schmerling – the Press Act should be mentioned saying that « this powerfully acting element of the governmental society should be able to put to effect its strength in a beneficial way ». But this passage has been cancelled by the emperor³. However, on 23rd January, 1863, the three statutes were published in the *Reichsgesetzblatt* and came into force 45 days later⁴. The first major conflict between the House of Lords and the House of Deputies had come to a happy end.

¹ Lienbacher, *Historisch-genetische Erläuterungen*, 45.

² *Stenographisches Protokoll des Abgeordnetenhauses* 1. Session 4177 ; see Höbelt, 2000, p. 902.

³ Stefan Malfèr, Hrg, *Die Ministerien Erzherzog Rainer und Mensdorff* (= Die Protokolle des Österreichischen Ministerrates 1848–1867, V/5, Wien, 1989, introduction, XII.

⁴ Olechowski, *Preßrecht*, 462.