MONARCHICAL SOVEREIGNTY AND THE LEGACY OF THE REVOLUTION: CONSTITUTIONALISM IN POST-NAPOLEONIC GERMANY[1]

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Abstract: Could monarchical claims for personal government be realistically reconciled with the legacy of the Revolution? This dilemma of the post-Napoleonic age gave rise to the concept of a genuinely 'monarchical' form of constitutional rule in Europe, which distinguished itself not only from absolutism and revolutionary constitutionalism, but also British parliamentarianism. Focusing on Germany and the states of Bavaria and Baden in particular, this article examines constitutional debates after 1814, and especially the role of the French *Charte constitutionnelle* as the prototype of 'constitutional monarchism'. Its role in the making of post-1814 German constitutions is highlighted with a view to assessing the *Charte*'s actual significance vis-à-vis other potential models, and identifying parallels as well as dissimilarities between the constitutional systems in France and the German states. In result, the paradigmatic role of the *Charte* for (Southern) German constitutionalism is confirmed; yet at the same time, fundamental differences are discernible with regard not only to the role monarchical-constitutional orders played in different national contexts, but also their status within long-term political developments in different countries.

Keywords: Monarchy; legitimacy; (monarchical) sovereignty; Germany; France; Bavaria; Baden

I. Introduction

"This is clearly the era of the Constitution"[3] was how the political thinker and practitioner Karl von Rotteck (1775-1840) characterised his age in 1830, an assessment equally true for the period immediately after the collapse of the French Empire. Perhaps the main challenge of the time was how to reconcile European monarchs' claim to preserve their sovereignty with post-revolutionary societies' expectations, especially of a constitutional state. At the Congress of Vienna – and in contrast to the widespread perception of the age after 1814 as having been "reactionary" – it was widely felt that the Spanish approach of rigid neo-absolutism was denying the *Zeitgeist* and therefore not a long-term solution.[4] In comparison, the example of the French Restoration under Louis

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[1] This article is largely based on findings of earlier works, in particular my monograph: Prutsch 2013.

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[3] Rotteck 1829-1835 Vol. 2 (1830), p. 172.

[4] In his final report on the Congress of Vienna, Talleyrand described the unanimous disappointment felt by the European powers on the way in which Ferdinand VII had returned as king to Spain in 1814: "Je n'ai vu aucun Souverain, aucun ministre, qui, effrayé des suites

XVIII (1755-1824), who was willing to provide constitutional guarantees to achieve a lasting settlement, seemed a much more appropriate and reasonable solution. It therefore comes as no surprise that the Bourbon Restoration project in 1814 was, as the Revolution itself had been, an act of European importance; an act which might now serve as a key to overcoming the revolutionary epoch permanently. The *Charte constitutionnelle* ("Constitutional Charter") played a pivotal role in this context: it was the foundation stone of the new regime and put forward possible solutions to reconciling the diverging aspirations of rulers and post-revolutionary society.[5] Indeed, the new monarchical-constitutional system made the monarch the dominant political power and declared him the sole holder of the *pouvoir constituant,* yet at the same time restricted the sovereign by a written constitution providing civil liberties and allowing citizens to partake in the political and legislative process. For this reason, the 'constitutional monarchism' exemplified by the French *Charte,* which might justifiably also be termed 'monarchical constitutionalism',[6] has frequently been considered to be a model for post-Napoleonic Europe in general and Germany in particular.

Indeed, there are good reasons to suppose that the *Charte* played a decisive 'model-role' for nineteenth-century Germany, which was facing particular challenges. At the end of French supremacy, political expectations were running high in the German states, while the governments of these states sought to counter the national movement through top-down policies. However, the success of any such policies depended upon their governments' ability to 'trade' constitutional guarantees, or at least promises of the same, by refusing to make concessions to the national movement. The German Federal Act, adopted 8 June 1815, thus pledged *landständische* constitutions for all the member states of the German Confederation.[7] The Federal Act went hand in hand with the existing need for political reform, particularly in Southern Germany, namely Bavaria, Württemberg, Baden and Hesse-Darmstadt. Created out of formerly independent

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que doit avoir en Espagne le système de gouvernement suivi par Ferdinand VII, ne regrettât amèrement qu'il ait pu remonter sur son trône, sans que l'Europe lui eût imposé la condition de donner à ces États des institutions qui fussent en harmonie avec les idées du temps." *Rapport fait au Roi pendant son voyage de Gand à Paris* (June 1815). In: Pallain 1881, pp. 436-484, citation p. 474. Indeed, this critical opinion was soon to be confirmed, for only six years after the advocates of the 1812-Cadiz-Constitution had been forced into exile, the revolution started in Spain.

[5] *Charte constitutionnelle* (4 June 1814). In: [BL] 1814-1848 Vol. 1 No. 133, pp. 197-207.

[6] Anderson/Anderson 1967, p. 39f., p. 78f. The use of the term 'monarchical constitutionalism' has a long tradition in German constitutional law (*monarchischer Konstitutionalismus*), namely as a synonym for the actual constitutional development of Germany and particularly of Prussia in the nineteenth century. See, e.g., Hintze 1911, p. 360f. However, 'monarchical constitutionalism' and 'constitutional monarchism' respectively also aptly characterise the constitutional situation in France and other states after 1814. More recent studies have taken a wider view of the meaning of these terms (see Kirsch 1999b), to also encompass Bonapartist regimes and constitutional monarchies dominated by parliament (such as the English system from 1689 onwards). In this study, however, the terms are used solely to characterise constitutional systems in which the leadership role of the monarch is uncontested ("monarchischer Konstitutionalismus mit Vorrang des Königs"; Ibid., p. 7).

[7] *Deutsche Bundesakte vom 8. Juni 1815.* Art. 13: "In allen Bundesstaaten wird eine Landständische Verfassung statt finden". In: Huber 1978 [1961], pp. 84-90, citation p. 88. The German noun *Landstände* or *Landtag* – the corresponding adjective being *landständisch* – traditionally signifies the assembly of (feudalistic) representatives of the estates of the realm, called together to advise and pass legislation.

territories and free cities, the task of administrative reform had already been undertaken during the Confederation of the Rhine. However, political integration still needed to be addressed. The promulgation of constitutions to engender patriotism and weld together different social groups was thus an obvious solution for the ruling classes – especially, since the Southern German states, which had seen a considerable increase both in territory and power during the Napoleonic age, faced the potential risk of becoming marginalised as Austria and Prussia sought to cement their leadership role in Germany.

Consequently, 'constitutional monarchism' following the model of the French *Charte* seemed to be a natural choice: a representative constitutional system meeting subjects' aspirations for legal guarantees and political participation, which would at the same time retain many of the monarch's traditional rights.[8] Notwithstanding, this does not imply a copy-paste process of the *Charte*: it was not the only tangible model at that time, and the power-political, socio-economic and political-cultural circumstances were different in France and Germany, respectively.

Against this background, the objectives of this article are to:

1) give an account of constitutional debates in post-Napoleonic Germany, and the role of (foreign) 'models' in particular;

2) ascertain the concrete role of the *Charte constitutionnelle* in the making of German post-1814 constitutions, focusing on the two case studies of Bavaria and Baden;

3) identify parallels and differences between the monarchical-constitutional systems in France and the German states, notably with regard to constitutional reality; and to

4) provide an overview of the overall significance of constitutional monarchism in the nineteenth century, particularly in Germany.

II. Constitutional Discourse in Germany after the Napoleonic Era

It would be misleading to assume that constitutional questions started to play a major role in German public discourse only after 1814. German intellectuals were taking part in examining Montesquieu and the 'English Constitution' from the middle of the eighteenth century onwards, and the American Revolution and the fundamental political changes it gave rise to also had an impact on the German *Bürgertum*, even though less directly than in other European states. Constitutional debate in Germany was fired by the French Revolution and especially the first Constitution of 1791. In the course of the French Revolution, voices speaking out for constitutional government became increasingly louder in Germany. This did not imply, though, that revolutionary

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[8] The assumption that Southern German constitutions were direct 'successors', if not 'copies', of the French *Charte* is commonly accepted in more recent literature. See Brandt 1998, p. 68f., Brandt 2002, p. 142, Fehrenbach 1996, pp. 13-24, explicitly p. 13, Kirsch 1999b, especially pp. 322-329, Schulze 2002, p. 63, Stein/Frank 2007 [1968], p. 8, et al. Years in square brackets refer to the year of the first edition (literature) or to the original year of publication (printed sources).

constitutionalism was seen as a beacon for the future. Quite the contrary: it was the radicalism of the French Revolution and the instability of the country's political system which gave rise to growing scepticism towards revolutionary ideologies. 'Reform of the existing' and 'moderation' were terms which dominated the German political language of the time. The concurrent demands for constitutions and the rejection of revolutionary constitutionalism outlived the Napoleonic age and became a decisive element of post-1814 discourse, too.

The situation in 1814/1815 was, nevertheless, slightly different to that of the late eighteenth century and was characterised by higher expectations. Napoleon's 'modernisation agenda', for example the Code Civil, had advanced administrative and legal reforms enormously. His reform politics had spilled over even to parts of Germany which were not under direct French control, and it seemed reasonable that such reforms would become permanent by casting them in a constitutional mould. Yet the experience of 'Napoleonic constitutionalism' was broadly negative, thus cultivating public desire to set up fundamental laws which could not be abused as an instrument of power-politics only. In addition, growing nationalist feeling strengthened public awareness that a constitution was a powerful tool for creating unity and therefore a means to boost Germany's role within the European concert of power. Finally, the notion of 'constitution' in the post-Napoleonic age was not only seen as an act of political reasoning, but also as recompense for the previous period of war and misery.[9] Public demand in Germany for constitutionalism was accordingly loud and clear in 1814/1815.

The number of foreign models available had significantly increased since the second half of the eighteenth century. In addition to the classical model of the 'English Constitution', there were now others to choose from. However, the actual views taken on the various potential models differed considerably, as did the reception they received and the way they were assessed. Basically, there were three types of foreign constitutional models present in contemporary debate:

- firstly, the large group of 'revolutionary constitutions', comprising not only the constitutional texts of the American Revolution (the constitutions of the American states since 1776 and the Federal Constitution of 1787) and French Revolution (1791, 1793, 1795, later the Consular Constitution of 1799 and the Imperial Constitution of 1804), but also the Spanish Constitution of 1812 or the Norwegian Constitution of 1814, based on the principle of the sovereign nation;

- secondly, the 'English Constitution', representing a specific case by means of the fact that the constitution was not laid down in writing (i.e., lack of constitution in the formal sense); and

- thirdly, the group of constitutions which can be characterised as 'constitutional monarchism', among them the *Charte constitutionnelle* (1814), but also the Constitution of the United Netherlands (1814/1815) and that of 'Congress Poland' (1815).

Revolutionary constitutions were struggling against widespread reservation, not to say hostility, towards popular sovereignty among most German intellectuals. Memories

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[9] The argument was often in terms of 'rights' and 'titles'. See, e.g., [Rheinischer Merkur] 1814-1816 No. 66 (2 June 1814), p. 2.

of the French Revolution gave rise to the idea that constitutional systems based on revolutionary principles were arbitrary, unreliable and hence inappropriate. French constitutional models had a particularly bad reputation in Germany, mainly because scepticism towards revolutionary constitutionalism as such coincided with the distinct Francophobia among Germans after the Napoleonic Wars. However, other revolutionary constitutions were similarly unable to gain public support. The main obstacle to an unbiased perception of these constitutions was the 'popular principle' on which they were actually based: either in the form of pure democracy, as in the case of the American Constitution of 1787, or at least the weakening of monarchical power, manifest in the Spanish Cádiz Constitution of 1812 and the Norwegian Eidsvoll Constitution of 1814. In addition, information available about most of these constitutions was vague and in short supply.

In contrast, knowledge about the 'English Constitution' was more widespread, despite the fact that this knowledge was based only on the works of Montesquieu (1689-1755), William Blackstone (1723-1780) and Jean Louis Delolme (1740-1806). The British constitutional system enjoyed a good reputation and was seen as a symbol of stability, tradition and political ethos. Indeed, its characteristics seemed to incorporate what Edmund Burke (1729-1797) had defined as the 'foundation of a fortunate polity', and its obvious stability throughout the Revolutionary and Napoleonic age was another reason for admiration.[10] Notwithstanding the positive connotation of the English Constitution among both liberals and conservatives, their views diverged when it came to the question as to whether this model should actually be imported as the legal basis for the constitutionalisation of Germany. While many liberals were inclined to agree, most conservatives highlighted its unique character and hence non-transferability. At the root of conservative scepticism was the conviction that the English Constitution was a splendid act of political reasoning for the British Isles, but too 'progressive' for the needs of Germany. The strong role of parliament compared to that of the monarch was regarded as unsuitable in light of the Germany's political past and present.

Under such circumstances, 'constitutional monarchism' and above all the *Charte constitutionnelle* seemed to be an even better model than the English Constitution. The *Charte* guaranteed a constitutional form of government and granted liberal rights in line with the English Constitution, but at the same time preserved monarchical sovereignty. But what might be an attractive model in theory, was not necessarily the perfect model in practice. Reservation towards the *Charte* was based not on doubt regarding its theoretical meaning or actual content, but on distinct Francophobia. The invasion by French revolutionary as well as imperial armies was not easily forgotten, particularly by those who had participated in the *Befreiungskriege*. Furthermore, since liberalism and nationalism during the *Vormärz* were closely entwined, it would be expecting the impossible if Germans east of the Rhine had looked longingly and admiringly towards France as a source of (constitutional) progress. In reality, the stronger the will toward national unification was, the wider the ostensible gap separating France from Germany

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[10] Throughout the eighteenth century liberal-minded men throughout Europe had considered England as *the* political model. This attitude became so deeply ingrained in the minds of many contemporaries that it persisted well into the nineteenth century. In comparison, the role of German "'Anglo-Saxon traditionalists,' who loved to think of the English as *Stammesgenossen*, the tribal blood-brothers and natural allies of the Germans" (Eyck 1957, p. 339) was certainly less important, even though not entirely irrelevant for the existing Anglophilism in Germany.

became.[11] Thus, no matter how appealing the *Charte constitutionnelle* may have been for the German intelligentsia in its anti-revolutionary mood and faith in the infallibility of authority, it nevertheless suffered under the overwhelming prejudice against everything French. Other monarchical-constitutional alternatives such as the Constitution of the United Netherlands and that of the Kingdom of Poland did not meet with such bias. However, they were practically non-existent in the German debate and consequently had no chance of becoming real models.

This observation underlines one general characteristic of German constitutional discourse after 1814/1815: the fragmentary knowledge of foreign constitutions and political systems in general. Therefore it comes as no surprise that other potentially interesting constitutions such as the Swedish of 1809 – neither clearly 'revolutionary' nor 'monarchical' – went unnoticed to a broader public. For the most part, knowledge about other constitutions and constitutional systems was mediated. Studying foreign legal systems in detail or even to experience other political systems in practice was the privilege of only a few, which quite often meant that a constitutional and political ideal was confused with existing practice.[12] Moreover, 'intercultural knowledge' was also hindered by the fact that personal contact between contemporary political thinkers across borders was rare, even among liberals.[13] If there was a Republic of Letters, it was mainly within national borders.

Uncertainty towards and the general lack of interest in many foreign models, together with the missing 'international link' in constitutional debate, favoured an atmosphere in which constitutional 'prototypes' were not even considered as being suitable models for lasting political solutions. Yet, they did assume the role of a 'stockpile' of arguments for personal political purposes. At the same time, the language of the *landständische Verfassung*, which swamped the press around 1814/1815, embodied the emerging trend of self-referential political discourse. The term *landständische Verfassung* itself was very vague, but it did suggest German genuineness and originality; thus, growing demands for 'national constitutions' were satisfied. These

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[11] Heinrich Heffter once explained the preference for England and the simultaneous repudiation of France in post-Napoleonic Germany as "Fernliebe aus Nachbarhass" (Heffter 1950, p. 64).

[12] The most prominent example of such misunderstandings is the reading of Montesquieu. He had made it quite clear that he was interested in the 'spirit' of the laws, and thus also the 'spirit' of the English laws and English liberty: "Ce n'est point à moi à examiner si les Anglais jouissent actuellement de cette liberté, ou non. Il me suffit de dire qu'elle est établie par leurs loix, & je n'en cherche pas davantage." Montesquieu 1950 [1758; OV 1748]. XI 6, p. 221. By many of his contemporaries, however, his appraisal of the English Constitution was interpreted as a precise description of existing realities. The same disparity between the actual intentions of the author and his reading can be seen in the case of Blackstone (Blackstone 1765-1769).

[13] In the years after 1814/1815, there are but a few instances of a close relationship and ideological cross-fertilisation between German liberals and their counterparts in other European countries, particularly France. One of the exceptions that prove the rule was Karl von Rotteck, who had some interesting correspondence with both Constant and Lafayette. Rotteck was much impressed by Constant's political theories and Lafayette's political activities and drew repeatedly on Constant's works. He actually included several references to these treatises in his own *Staatsrecht der konstitutionellen Monarchie* (Aretin/Rotteck 1824-1828). Constant, on his part, generously acknowledged these quotations and spoke of Rotteck's work, some of which he translated into French, as more important than his own (see Eyck 1957, p. 334). But almost all other German liberals who at this time wrote political treatises omitted specific references to their French contemporaries.

demands went hand in hand with doubts about the transferability of constitutions in general. There was suspicion as to whether constitutions generated in one country could be implemented in another. The 'historico-genetic' argument was that differing political, social, economic and cultural contexts would hinder any such implementation. Such arguments were often put forward regarding the English Constitution given its common-law character,[14] but could also be generalised:

> The actual wording of a constitution and legislation may be the same in different nations; but they never produce the same results, which are more the outcome of the spirit and character of the people. Words can be transferred but not the spirit, which only develops and evolves in and through life.[15]

This type of criticism was countered by distinguishing between those constitutional elements which had a unique national character and those which were 'generally transferable'. Hence, a constitution was seen to not solely comprise individual traits, but also a nucleus which could be universally applied. Nevertheless, objections could not be dispelled, and the idea that a constitution was the product of specific national conditions was to remain a crucial element in the constitutional discourse over the next few decades.[16]

Apart from any theoretical discussion on the (non-)transferability of a certain constitutional model, a no less important question was whether a transfer could take place within the framework of existing political realities. Despite the fact that most German intellectuals were themselves closely involved in state administration or worked for politicians, the ideas and objectives of intellectuals and state authorities were not necessarily the same. The former tended towards the legalisation of state power and the extension of political rights. The latter, however, wanted consolidation of rule, which had to be accomplished with a minimum of political concessions.

The need to transform politics and polity had become clear during the Napoleonic age, resulting in a range of reform processes throughout Europe including Germany. Demands for reform, however, had not been fully met and at the end of the Napoleonic era, German rulers could no longer turn a blind eye to the 'constitutional problem'. During the Congress of Vienna, the promise to set up constitutions in all German states was finally put down in writing in the German Federal Act. This promise, however, was so vaguely expressed – "All Confederal states will be given a *landständische* constitution" (Art. 13) – that it was neither clear nor certain when, how or if it would be fulfilled at all. Nonetheless, prospects for constitutionalisation were better than ever before, especially in those German states confronted with burning domestic and foreign policy challenges like the Southern German *Mittelstaaten* ("medium-sized states"). The question which

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[14] Not only conservatives, but also some of the German liberals had doubts in this direction. See, e.g., Wilhelm 1928, pp. 175-193.

[15] Friedrich Murhard in: [Allgemeine politische Annalen] 1821-1824 Vol. 10 (1823), p. 71.

[16] Above all, conservative political thinkers continued to stress the 'non-transferability' of models. See, e.g., Friedrich Julius Stahl in 1845, who considered the English Constitution to be "ausser aller Vergleichung und aller Nachahmung für andere Staaten" (Stahl 1845, p. 35). For states other than Great Britain itself, such a constitution would only mean misfortune and confusion.

remained was what these new constitutions should actually 'look' like. While it was certain that 'revolutionary constitutionalism' would attract the ruling classes even less than the intelligentsia, the ruling monarchs were presumably more open to foreign models in general and French-style constitutional monarchism in particular, given the fact that for them the constitutional question was more a pragmatic than a 'national' one, and 'class-consciousness' after all more important than 'national consciousness'. Given the character of the German *Bund* as a confederation, the actual path to be travelled in constitutional affairs was eventually to be decided at the level of the individual states.

In what follows, two case studies – namely the Kingdom of Bavaria and the Grand Duchy of Baden, which were the first German territorial states to receive formal constitutions – are taken into closer consideration with a view to assessing the actual significance of the *Charte* and constitutional monarchism in their respective constitutionalisation processes.

III. Constitutional Transfer – Bavaria and Baden as Case Studies

The political 'points of departure' for Bavaria and Baden were quite similar when the Napoleonic order collapsed. Both countries had undergone tremendous upheaval during the previous years, which had brought them considerable gains in territory, population and political power, but posed new challenges, too, such as political integration and the preservation of state sovereignty. To master such challenges successfully, comprehensive reforms had been introduced, fundamentally shifting the domestic distribution of power in favour of a centralised *Staatsabsolutismus* ("state absolutism").[17] In addition, Bavaria and Baden had initially made efforts to establish modern constitutional systems by proclaiming written constitutions; efforts, however, which had remained incomplete, as in Bavaria (where a Napoleonic constitution had been proclaimed in 1808, yet without its representative body being never convened), or even without any immediate results, as in Baden. By 1814, the geopolitical situation in Europe had fundamentally changed, but the arguments for setting up modern constitutions were more convincing than ever. Therefore it was just a matter of time before the constitutional debate would be resumed in Bavaria and Baden.

This was the case in the second half of 1814, when formal constitutionalisation processes were initiated, shortly after the proclamation of the *Charte*. Yet the trigger for constitutionalisation was not so much the French Constitutional Charter itself, as the forthcoming Congress of Vienna and the impending deliberations on the political future of Germany. Besides the aim to complete the integration process initiated by the reforms of the Napoleonic age and the need to consolidate public finances, the issue of a federal constitution (*Bundesverfassung*), which posed a possible threat to both Bavaria's and Baden's own constitutional plans, was and continued to be the prime catalyst for promoting constitutionalisation. The thwarting of Austro-Prussian plans to re-establish traditional forms of cooperative government in all German states by setting up an authoritative, binding federal constitution, establishing a loose confederation with only the vague prospect of a *landständische* constitution, were certainly a partial success. There was still no guarantee that attempts would not made to supplement the notorious article 13 of the *Bundesakte* or to impose constitutional orders from outside. The most

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[17] For the terminology see, e.g., 1983, Demel 1993.

effective way to foil any such ambition was therefore for each state to spur on its own constitutions, thus pre-empting any such attempts.

Unlike these practical constraints, immediate popular agitation in Bavaria and Baden played only a minor role in pushing forward the constitutional movement. A *Verfassungsbewegung* in the wider meaning of the term was only identifiable in Baden, and even there only for a limited period, namely in late 1815 and early 1816. The results were modest and did not leave their mark on the constitutional texts of 1818.[18] Much more important than such movements in the two states was the subtle but nevertheless prevailing 'constitutional tenet' in German public opinion and the printed press; that is, the conviction that a constitution was a natural and basic prerequisite of the time. In this respect, the setting up of constitutional forms of government could be postponed by the rulers, but no longer be rejected *per se* in the long term without risking public uproar.

Tellingly, it was also the parallelism of the constitutionalisation processes in Bavaria and Baden which was relevant for bringing forward constitutional deliberations. It might be overstating the point to talk about a "constitutional race",[19] but it is certainly true that the parallel constitutional endeavours had a catalytic effect: power-politically, given unsettled territorial disputes between the two neighbouring Southern German countries, and for prestige, too, since becoming the first territorial state with a written post-Napoleonic constitution was at stake. The role of such considerations, particularly in the final phase of constitutionalisation, should not be underestimated. This final phase was initiated in both countries by a change at the ministerial level which took place in 1817: the dismissal of Maximilian von Montgelas (1759-1838), who had largely determined Bavarian policies since 1799 and the appointment of a more liberal cabinet; in Baden, the recall of the reform-oriented Sigismund von Reitzenstein (1766-1847). Only after these reshuffles could new constitutional commissions be entrusted with drawing up a written constitution.

But who was involved in the formation of the Bavarian and Badenese constitutions and what role did transfer and reception of (foreign) constitutional ideas and practices play? In actual fact, only a few people were directly involved in formulating the text of the constitution in either of the states, and even these were either senior state officials or members of government. The level of professionalism among the members of the constitutional commissions was considerably lower than in modern-day constitutionalisation processes. In order to be appointed a commissioner, juridical expertise was not a prerequisite; qualification criteria were service to the crown and whether one enjoyed the favour of the monarch. In this respect, the constitutionalisation processes in Bavaria and Baden were in keeping with the mores of the time, and similar to the drafting of the *Charte*.[20] But irrespective of this, the lack of

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[18] The two constitutions were officially published in the Bavarian and Badenese law gazettes in June and August 1818: *Verfassungs-Urkunde des Königreichs Baiern* (26 May 1818). In: [GKB] 1818-1873 (6 June 1818), column 101ff.; *Verfassungs-Urkunde für das Grossherzogthum Baden* (29 August 1818). In: [BRB] 1817-1844 1818 No. XVIII. Printed versions of the Bavarian Constitution of 1818 in, e.g., [Verfassungsgesetze] 1894 [1863], pp. 1-25, Huber 1978 [1961] No. 53, pp. 155-171, Wenzel 2002 [1990], pp. 23-41; of the Badenese Constitution in, e.g., Weech 1868, pp. 99-110, Huber 1978 [1961] No. 53, pp. 171-186.

[19] See Weis 2003, p. 116.

[20] For details on the history and drafting of the *Charte* see Sellin 2001, pp. 41-273. See also Prutsch 2006, pp. 13-55.

constitutional know-how was not an obstacle. Available archival sources circumstantiate that most of those taking part in preparing the constitutions had at least rudimentary knowledge not only of law, but also of contemporary constitutional debate and other constitutions of the time. In the end, however, the actual skills of the commissions did not play a paramount role, since the final drafting of both the Bavarian and Baden Constitution in 1818 was dominated by two individuals who each had expert juridical knowledge and had excelled in previous constitutional deliberations: Georg Friedrich von Zentner (1752-1835) in Bavaria, who had actively accompanied the kingdom's constitutionalisation process for years,[21] and Karl Friedrich Nebenius (1784-1857) in Baden, who had penned an earlier constitutional draft (1816) which had attracted a great deal of attention.[22] The influence of those two men was all the more important since unlike King Louis XVIII in France, Maximilian I Joseph, King of Bavaria (1756-1825), and Karl, Grand Duke of Baden (1786-1818), showed no desire to be actively involved in the drafting of the constitutional text. Their role was confined to formulating general guidelines for the future constitutions.

Nebenius in particular had plenty of scope for experimenting, as he was not under any obligation to align the new constitutional text with a particular predecessor, nor was he compelled to endow the future constitution with any specific form or character. In contrast, Zentner was more restricted in his role and activities: the new Bavarian Constitution was to be in line with the constitutional deliberations of previous years, hence also indirectly with the (Napoleonic) Constitution of 1808, and additionally take into account the wishes of the Crown Prince. Against this background, the chances of the Badenese Constitution being more innovative than its Bavarian counterpart were higher. Moreover, foreign constitutional models were likely to have a more important role in Baden than in Bavaria. The personal backgrounds of Zentner and Nebenius were not insignificant in this respect. Zentner had been socially conditioned in the second half of the eighteenth century, gaining his reputation as an expert in constitutional matters and a scholar of the (former) imperial constitution. His legal-philosophical views continued to be tainted by his critical distance to modern constitutional paradigms, including the concept of representative government. Nebenius, in contrast, belonged to a younger and less biased generation of thinkers. In preparing for the draft of the Baden Constitution, he had intensively studied foreign constitutional systems over a number of years. But even in Nebenius' case there were only a limited number of constitutions which could seriously be taken into consideration. Any so-called 'revolutionary' constitution was flatly rejected as were any other constitutional systems which emphasised the principle of popular sovereignty. This was mainly for ideological reasons, but also due to apprehensions that 'democratic' constitutions would endanger state unity and the authority embodied in the crown. Even the idea of imitating the English Constitution was out of the question as far as implementing the British parliamentarian system was concerned. In this regard, the perception and evaluation of each of the main protagonists in the constitutionalisation process unerringly reflected the mood of general constitutional discourse of the time. In juxtaposition to that

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[21] An overview biography in [Allgemeine Deutsche Biographie] 1875-1912 Vol. 45 (1900), pp. 67-70. On his activities as a Bavarian statesman between 1799 and 1821 see Dobmann 1962, regarding his role for the Bavarian Constitution in particular pp. 127-151.

[22] For a biographical overview see Weech 1875 Vol. 2, pp. 99-105. As for Nebenius' (political) life and work see also Andreas 1913, Beck 1866, Böhtlingk 1899. A critical biography of Nebenius is still missing.

discourse, however, Nebenius recognised the monarchical-constitutional system of the French *Charte* for what it basically represented: the only conceivable model which provided both a modern form of constitutional government and preserved monarchical sovereignty at the same time. Zentner recognised the obvious advantages of constitutional monarchism, too, but simply as a means to concentrating state power in a constitutional form. As a result, the Bavarian Constitution united the heritage of 'constitutional monarchism' with somewhat anachronistic privileges for the nobility and *neuständische* forms of representation. The role of the *Charte* as a 'model' was therefore not identical in Bavaria and Baden.

However, it is not only in this regard that existing categories and concepts of 'model', 'transfer' and 'reception' need to be redefined. Existing comparative and transfer studies in the field of constitutional history commonly deal with 'models' as a rigid category, implying a straightforward and purposeful linking of A and B; but a closer examination of the drafting process and text of the Bavarian and Baden Constitution of 1818 reveals that – at least in the context of early (German) constitutionalism – the idea of 'model' needs to be perceived more as a vague, blurred and indistinct category.

There is no doubt that legal 'imports' from abroad and especially from the *Charte* played an important role for setting up the constitutional texts of Bavaria and Baden, as the vast number of textual resemblances and even literal parallels. Yet the concrete paths of transfer and reception are intricate. In many cases, 'models' functioned only as 'broker', either for another constitutional text, or for constitutional common sense, that is for elements which had become integral parts of a more or less universal Western image of 'constitution'.[23] In both cases, 'model' had only a relative meaning. Likewise, the notion of transfer and reception remained blurred in that in most cases it was not a matter of simply imitating provisions and institutions, but a complex process of converting, supplementing and adapting what already existed. This clearly resulted in peculiar outcomes: in some respects they went beyond their predecessors and in others lagged behind.

One example is the first chamber, which was of quite a different nature and character in Bavaria and Baden to the one in France. In all three cases, it was undoubtedly an aristocratic body, seen as a necessary counterbalance to the lower house. But whereas the first chamber was conceived, primarily, as an instrument to reconcile the members of the Napoleonic Senate with the Restoration regime in France, in the Southern German states it served as a means to compensate the (mediatised) nobility for their political marginalisation and thus had a slightly neo-feudalistic touch.[24] It was not only the purpose which was different, but also the actual composition of the upper house; appointment procedures and competences varied between France and the Southern German states as well as between Bavaria and Baden itself. One peculiarity of the Baden Constitution, to provide a good example, is the way in which the first chamber's competences in financial affairs were regulated. Unlike in France, and even Bavaria, the Badenese upper house only had the authority to accept or reject financial bills *in toto* but had no power to amend or effect changes (cf. § 60). In this respect, Nebenius' text apparently followed the example of the English

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[23] The substratum of this 'constitutional topos', like the idea of a 'balanced constitution and bicameralism, was for a good part of English origin, but no longer wholly perceived in a national framework and exclusively linked to Great Britain.

[24] See, e.g., Hazzi 1819, p. 69f.

constitutional system, where the House of Lords had the right to block, but not to alter, fiscal bills.[25] The limitation of the first chamber solely to a *faculté d'empêcher* without granting a *faculté de statuer*[26] meant there was the risk that an agreement between the two chambers could be hampered and no bills passed at all. To avoid such legislative stumbling blocks, the Baden Constitution provided for a special procedure if the upper house rejected a fiscal bill. In such a case, the individual 'yes' and 'no' votes of both chambers would be put together to reach a decision:

> § 61. If the majority of the first chamber does not support the resolution of the second, the assenting and dissenting votes of both chambers will be put together and counted, and the absolute majority of all the votes will determine the resolution of the *Stände.*

The origins of this innovative provision, which could not be found in the English Constitution or in the French *Charte*, remain unclear. It may have been the Swedish Constitution of 1809, which served as an inspiration,[27] or it could have been the Norwegian Constitution of 1814, which Nebenius had evidently studied despite the fact that it was widely unknown to his contemporaries.[28]

At all events, these and other country-specific characteristics and shifts of emphasis in the respective constitutional texts merely underline the complexity and individuality of constitutionalisation processes. This individuality was rooted in a number of factors, among them the 'personal momentum', represented by those involved in the drafting. No less important were the divergent historical starting points for the various processes of constitutionalisation and specific conditions. Due to such factors, even the key element of constitutional monarchism, the monarchical principle, did not necessarily have the same meaning in France and Southern Germany.

In France, Louis XVIII, on the defensive, had enacted the *Charte* not so much because he endorsed constitutionalism, but rather to protect himself and the Restoration from political ruin. The German princes, however, were intent on passing a constitution to consolidate and secure their states, as well as their own authority and sovereignty. In France, the objective of the 'monarchical principle' was to re-establish the traditional authority of the crown, which had been replaced by new forms of rule in the previous decades. In Germany, the situation was the exact opposite. The

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[25] Montesquieu's argument (*Esprit des lois*, XI 6) was that in view of its hereditary power, the upper house was likely to put its own before public interests. Thus, in areas where the probability of corruption was high, such as financial affairs, the first chamber should only have a right to obstruct. See Montesquieu 1950 [1758; OV 1748], Ibid., p. 213f. Even though there are no immediate indications in Nebenius' papers for that, it is likely that § 60 was modelled on the English Constitution.

[26] This terminology goes back to Montesquieu. See ibid., ibid., p. 214.

[27] Due to its corporative character, the Swedish *Regeringsform* of 1809 provided a rather complicated procedure in case of disagreement on fiscal bills. If no solution could be found among the estates, the absolute majority of the individual votes should bring about a final decision (cf. § 69 of the *Regeringsform*).

[28] In Norway, 'head-voting' was not only applied for controversial money bills, but for all bills which had not passed the *Lagthing* after two attempts. In such cases, a two-thirds majority was needed (cf. § 76).

monarchical principle here symbolised defending the powerful political standing which the monarchs had gained during the Revolutionary Age: the preservation of a modern achievement against the traditional order. In point of fact, the *Charte* marked the (temporary) conclusion of a revolutionary development, yet had a revolutionary touch itself.[29] In the Southern German states, however, the transition from absolutistic to constitutional systems lacked the character of abrupt change. These variations were reflected in slight, but nonetheless momentous differences concerning the interaction between the legislative bodies.[30]

In view of French constitutional experiences, including the doctrine of the sovereign nation, it was only natural that the *Charte* could not express the legislative preponderance of the ruler in the same way as in Bavaria and Baden, where an absolute ruler conceded participatory rights to its people and their representatives. Accordingly, in Bavaria and Baden the two chambers were not equal partners of the monarch in the legislation. Parliament was seen as a tangible, but nevertheless dependent state body with no *imperium* whatsoever, and 'law' basically as the sovereign will of the monarch.[31] The constitutional texts reflected this particular understanding. Article 15 of the *Charte* left no doubt that, at least formally, "The legislative power is exercised collectively by the King, the camber of peers, and the chamber of deputies of the departments". In contrast, the idea of law as a collective will of both parliament and monarch was missing in the Bavarian and Badenese constitutional documents. Unlike the French Constitution, the constitutions of Bavaria and Baden did not even make the politico-theoretical distinction between *ius* and *exercitium*, according to which the substance of all legislative power was the tenure of the crown, while its execution could be left to other institutions. Instead, the two constitutions presume that both *ius* and *exercitium* are in the hands of the sovereign, manifest in the fact that the constitutional documents only make reference to the right of the chambers to pass bills in terms of "approval" (*Zustimmung*, see, for example, Bavarian Constitution section VII § 2 and 3; Baden Constitution, § 53, 64 and 65). "Approval", however, is obviously not the same as 'substantial participation' and describes the relative strength of the constitutional body most clearly: the crown appears as sole legislator, the *Landtag* as a subordinated, not to say 'alien' element in the system. Legislative and executive power is thus not separated, but united in one hand.[32]

Even outwardly, the constitutions of Bavaria and Baden hence broke with Montesquieu's concept of a separation of powers, which "in the *Charte* still eked out an existence in a corner".[33] In keeping with the logic of this system, the legislative fields, in which the chambers had right of approval, were enumerated in the Southern German constitutions,[34] while the *Charte* applied the general maxim that all bills had to be

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[29] See Sellin's terminology of the "geraubte Revolution" (Sellin 2001).

[30] See Heinrich 1948, pp. 63-65.

[31] See also Jellinek 1964 [1887], p. 314.

[32] See Oeschey 1944, especially p. 387.

[33] Heinrich 1948, p. 64.

[34] Cf. section VII § 2-19 and section X § 7 of the Bavarian, § 53, 57-59, 64 and 65 of the Badenese Constitution.

passed by parliament.[35] Even though *de facto* the vast majority of bills were subject to the *Zustimmungsrecht* of the *Stände* both in Bavaria and Baden,[36] their being specified still expressed that there was a legal sphere left in which the crown had absolute and unrestricted prerogatives.[37]

On the whole, the general conditions for the development of 'constitutional life', and the definition of the relations between monarch and parliament in particular, remained different in France, Bavaria and Baden, despite the fact that in all three countries monarchical-constitutional systems had undoubtedly been established by 1818. This was all the more the case since the texts of each constitution left scope for interpretation by politicians, and provided a flexible framework within which politics could be pursued. Thus, it is worthwhile to comparatively examine the development of 'constitutional practice', before turning to some concluding remarks.

IV. The Practice of Constitutional Monarchism: France and (Southern) Germany in Comparison

The most obvious difference between Southern German and French post-Napoleonic constitutionalism is the continuity of the monarchical-constitutional systems in Bavaria and Baden beyond 1830. The July Revolution in France, in contrast, marked an abrupt breach with the political order of the Restoration, despite the fact that the monarchy as such and even important parts of the Constitution basically outlasted the regime change for almost two more decades until the Revolution of 1848. The main reason, however, why Louis' *Charte* of 1814 was short-lived compared to the *Verfassungs-Urkunden* of Bavaria and Baden, cannot be reduced to any simple formula. Nor can the individual political developments be explained exclusively with the actual content and political guarantees of the different constitutional documents. It was more that a set of variables determined constitutional life and practice in France, Bavaria and Baden after 1814/1818.

The actual reasons behind the drawing up of a constitutional document had been diverse in nature. In France, the main objective of the *Charte* had been to provide a legally anchored compromise between 'Revolution' one the one side and 'Reaction' on the other and thus create the prerequisites for the lasting restoration of the Bourbon monarchy. In contrast, the main mission of the constitutions in the Southern German states had been to serve as an 'integration tool', namely creating a 'state consciousness'. Thus, these constitutions basically founded what would soon become criticised by German nationalists as 'particularism'.

The perception of each constitutional document was different, too. In France, the *Charte constitutionnelle* of Louis XVIII was one in a line of constitutions and opened yet

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[35] Cf. Art. 18. The only exception to the rule were the emergency powers of the king, regulated in article 14 of the *Charte*.

[36] That was since the constitutional texts stipulated that not only fiscal bills and bills aiming at an amendment or change of the existing constitution were subject to the parliamentary approval, but also all bills concerning "die Freyheit der Personen oder das Eigenthum der Staatsangehörigen" (section VII § 2 of the Bavarian Constitution; § 65 of the Badenese Constitution is literally identical).

[37] On the 'decomposition' of the legislative spheres see Jellinek 1964 [1887], p. 110.

another chapter in the eventful political life of the country since 1789, resulting in a more pragmatic than effusive reception of the new constitutional document, particularly at home. But even among the voices praising the *Charte* as a stabilising factor for the post-Napoleonic political order in Europe there were those questioning whether the new constitution and the Restoration regime as such would be able to survive at all. In contrast, the enactment of the constitutions in Bavaria and Baden met with rapturous applause all over Germany, especially among the *(Bildungs-)Bürgertum*, since the constitutionalisation of these two countries was a beacon for all other German states. Reactions to the Southern German *Verfassungen* were almost unanimously positive, praised as guarantors of civil and political liberties, even heralds of a new era. After the initial excitement had abated, however, criticism set in and became more pronounced, especially with regard to the Bavarian Constitution, which was clearly less innovative and progressive than its Badenese counterpart. However, even in the case of Bavaria, fundamental criticism, especially in terms of natural law, remained more the exception than the rule. Rather than replacing the *Verfassungs-Urkunde*, the aim was to remedy existing deficiencies. Dissimilar to France, radical alternatives to the existing monarchical-constitutional system could not as yet be even envisaged. Under the existing *Realpolitik* framework, a monarchical-representative constitutional system was the only goal which at that time was possibly conceivable. This was clearly reflected in reactions to the Southern German constitutions by those German governments who had as yet no constitution, above all Austria and Prussia. Unlike other European powers, who viewed the document as a tangible sign of stability, Austria and Prussia could hardly conceal their displeasure at the two Southern German constitutions, especially since they thwarted Austro-Prussian political ambitions in Germany.

The actual test for all the constitutional documents was putting them into political practice and in establishing a fully-functioning legislative frameworks and political culture. It is significant that in all three states, France, Bavaria and Baden, constitutional life began turbulently, characterised by squabbles between the executive branch and parliament over limits of power, even though the underlying reasons were not exactly the same. In France, the first parliamentary session after the second Restoration (1815/1816) was marked by the unorthodox confrontation between government and reactionary *ultras* in the Chamber of Deputies. In contrast, more conventional debates between government and liberals in the second chamber dominated the proceedings at the first parliamentary sessions (*Landtag*) in Bavaria (1819) and Baden (1819/1820).

In Southern Germany, the clash between crown and second chamber was particularly passionate because of the disparity between the individual positions. As far as the crown was concerned, the enactment of the constitutions had been a pragmatic necessity to conclude the state-absolutistic reform and consolidation politics of the Napoleonic age.[38] Hence, the *Ständeversammlung* was a necessary evil, which should function as an auxiliary instrument of monarchical government. The parliamentarians, on the other hand, considered the *Landtag* to be a crucial element in shaping the political will of the people and an equal partner of the crown, at least in legislation. Correspondingly, the crown was eager to interpret the constitutional texts in a formalistic way, while the parliamentarians referred to the 'spirit' of constitutional

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[38] In the terms of Ernst Rudolf Huber, the constitutions complemented "administrative integration" with "parliamentary-representative integration". Huber 1967 [1957], p. 317.

government, which in their eyes meant a separation of power, substantial political participation and constantly 'perfecting' the constitutions. Conflict was pre-programmed: the fight for 'the right of interpretation' went hand in hand with substantial power struggles, especially over the budget. This clash was due to the legislative competences of the *Landtag* in financial affairs, being in line with the tradition of the former estates, whose prerogative had been the granting of new taxes.

In France, the main fields of conflict were – and continued to be – electoral and press law, traditional trouble spots of French constitutional life since 1789.[39] Moreover, the question of ministerial responsibility was gaining ground, too. Although these issues were important in Bavaria and Baden, they were far more central in Bourbon France.

After initial turbulences, parliamentary life both in France and Southern Germany entered calmer waters, but in different ways. In France, Louis XVIII made use of his prerogatives and dissolved the rebellious chamber in 1816, but did allow for a 'parliamentary culture' to develop and hence a *modus vivendi* both for the crown and the chambers. In Southern Germany, the crown reacted with coercive measures by restricting the liberals' manoeuvring space, and by manipulating the composition of the second chamber. Election 'rigging', a main feature in the repertoire of governmental constitutional politics in France, continued to be an essential element in Southern German constitutional policy and practice, too. Yet even more drastic actions was considered by the Crown: in Baden a far-reaching revision of the Constitution and in Bavaria the repeal of the whole document. In the end, such revisions did not take place due to the resolute opposition of the 'constitutional factions' in both governments and the incalculable risks involved, also owing to sheer power-political considerations: the *Verfassungs-Urkunde* was a cornerstone of Bavaria's and Baden's sovereignty, thus any attempt to downgrade the constitutional documents would be nothing short of an assault on the political autonomy of the two states.

Differently from Restoration France, where the domestic constitutional development was relatively unaffected by foreign politics,[40] in the Southern German states the *Deutsche Bund* remained a determining factor for constitutional policies. The role which *Bundespolitik* actually played in the Badenese and Bavarian *Verfassungspolitik* was somewhat ambivalent. On the one hand, the German Federation was perceived as a threat to state sovereignty, leading to partially successful emancipating efforts which were aimed at preventing direct intervention of the federal level in the constitutions of its member states. This is particularly the case of Bavaria as the most influential German power after Austria and Prussia. Having said that, however, the *Bund* was also a welcome and powerful instrument of the authorities in Bavaria and Baden, being used to steering domestic political life, for example by legitimising repressive measures such as restricting freedom of opinion and expression with reference to federal obligations and by codifying the monarchical principle in the

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[39] See Kirsch 1999a, p. 167f.

[40] It would be misleading to reject the idea that foreign political considerations played a role in French constitutional life during the Restoration. In 1830, for example, it was not least Charles' hope that French intervention in Algeria would strengthen the acceptance of his regime and boost public support for the July Ordinances. Yet compared to the German states, the foreign political dimension was of minor importance only.

Wiener Schlussakte of 1820.[41] Its Article 57 stipulated, taking up the corresponding provisions of the Bavarian and Badenese constitutions:

> Since the German Confederation, with the exception of the Free Cities, consists of sovereign princes, the entire state authority must, according to the basic principles provided thereby, remain united with the head of state, and by means of a *landständische* constitution, the sovereign can only be required to collaborate with the *Stände* in exercising certain rights.[42]

There is no doubt that the main battlefield of constitutional practice between 1814 and 1830 remained parliament, that is the bargaining and/or struggle between government and chambers, in particular the second chamber.[43] Nevertheless, constitutional life was also active outside of parliament and involved the people to a lesser or greater extent.[44] One important element in this regard was the press. In France, the limits on freedom of expression in political writing were comparatively low, and discourse both at parliamentary and press levels were clearly distinct and mutually reinforcing. At the end of the Restoration period, the highly professionalised French press had in fact become an important political player and was even able to set the political agenda.[45] In Bavaria, the press played a less immediate role, mainly due to the fact that freedom of the press had only been partly achieved. Still, even here, journalism contributed to 'sensitising' the public to constitutional issues. In comparison, the press in Baden remained 'weak' throughout the 1820s, but this was more than compensated for by another means of public politicisation, namely liberal suffrage. Badenese franchise was highly advanced for its time: in France, the *Charte* effectively restricted the involvement of the people by limiting it to the richest only. In Baden, however, most adult men had the right to vote; a fact that propelled constitutional awareness among large parts of the Badenese population. Thus, at least Badenese constitutionalism was able to gain the status of a truly 'popular' phenomenon.

In France and Southern Germany the governments made an effort to promote and further the creation of a popular constitutional culture through 'propaganda' in the broadest sense of the word, including writing, coins, monuments or (constitutional) festivities.[46] These efforts were particularly intensive in France, especially under

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[41] In this respect the German Confederation played a similar role to today's European Union: an authority to which the buck can be passed when measures prove to be unpopular.

[42] *Schlußakte der Wiener Ministerkonferenzen* (15 May 1820). In: Huber 1978 [1961], pp. 91-100.

[43] The conflict between Charles X and the Chamber of Peers in the second half of the 1820s, and Ludwig I and the *Kammer der Reichs-Räthe* in 1827 are exceptions that prove the rule. On the whole, the first chambers served as fervent supporters of governmental policies. Thus, they basically failed to live up to the politico-theoretical model of an independent, aristocratic chamber capable of holding the balance between the king and the popular second chamber. On the role of first chambers in post-Napoleonic constitutional systems see Vincent 1911. For France in particular see de Dijn 2005.

[44] For Southern Germany see, e.g., Speitkamp 1996 especially pp. 37-42.

[45] See Rader 1973. On agenda-setting research in general see McCombs/Shaw 1993.

[46] For an overview of cultural politics during the Restoration see Kroen 1992.

Louis XVIII, where measures to strengthen the public standing of the *Charte* went hand in hand with the need to (re)gain historical legitimacy for the Bourbons, and Bavaria, where 'constitutional' and 'state patriotism' could be fruitfully linked. In Baden, this 'synergetic effect' was not exploited to the same degree, and governmental efforts to 'steer' constitutional culture in a particular direction kept a rather low profile until the 1830s. The determining factor for the acceptance and stabilisation of any of the constitutional orders, however, remained the public perception of the political system's output, which differed between the political class and the population. Hence, it is difficult to establish direct links between 'public opinion' and elite-centred constitutional discourse in parliament or in the press.

What is characteristic for post-Napoleonic constitutional life in all three cases is the central role of individuals, and it comes as no surprise that the sovereign as 'leading actor' on the political stage of monarchical-constitutional systems was the most decisive. Key policy changes in the timeframe of this enquiry were preceded by a change of monarch: in France 1824, in Bavaria 1825, and in Baden 1830. The actual role of each monarch differed from country to country. In general, one might say that Louis XVIII had a more pragmatic style of government than his counterparts in Southern Germany. His undoctrinary approach to politics and his will to act as a ruler not involved in day-to-day politics allowed a parliamentary regime to develop within the frame of constitutional monarchism. At the same time his approach strengthened the basis for the Bourbon Restoration, whose fragility had been proved by Napoleon's Hundred Days. Charles X was later incapable of continuing the legitimisation strategy of his older brother, Louis XVIII. As a passionate believer in unrestricted monarchical rule he mistook restoration for reaction and replaced consensus with confrontation. Charles' political style was an anachronism and in the end disastrous both for the monarchical-constitutional system and his dynasty. When the latent conflict between crown and deputies grew into an open constitutional conflict in early 1830, Charles ignored the longsighted advice of Louis XVIII that "you, Kings, my Successors, as you seek to create the happiness of your subjects, [...] never forget that your duty to them involves above all upholding the law and making yourself respected"[47] and violated the constitution, convinced that he was serving the "security of the State".[48] By breaking the imagined treaty between nation and king, thus perverting rule to despotism, Charles X had prepared his own fall and put an end to the high-risk venture to base the post-Napoleonic constitutional order on the principle of monarchical sovereignty.

In the Southern German states, with their state-absolutistic traditions, establishing monarchical-constitutional systems had been a less hazardous undertaking. The systemic need for concessions was not comparable to France, since the introduction of constitutional government itself indicated progress, and in view of this the monarchs in Bavaria and Baden had strong reservations about actual or assumed limitations of their role in politics. In both countries the cabinet system remained fragmentary, the style of government personal and paternalistic. Basically, the Southern German rulers remained more 'enlightened despots' than 'constitutional monarchs'. Hopes for liberalising the political system and a new era of reform were nourished by the accession of Ludwig I to the Bavarian (1825) and Leopold I to the

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[47] [AMAE MD France] 646, fol. 42ʳ.

[48] Polignac 1845, p. 291.

Badenese throne (1830).[49] But the 'liberal turn' was only a short-lived episode, which after a few years returned to a traditional-conservative understanding of rule and government and a restrictive interpretation of the constitutional documents.

Nevertheless, even in Southern Germany autocratic forms of monarchical government were not seriously regarded as being a long-term solution. The divergence between the monarchs' claim to power and the reality of rule became ever wider, particularly, since the French July Revolution had electrified the liberal movement and strengthened its self-confidence all over Europe. The middle classes, whose social and economic ascent could not be ignored, strove for a substantial share in political participation and were ever less willing to unreservedly accept monarchical and governmental claims. The level of public expectation grew to such an extent that even though there was still no appetite for republican experiments, the understanding of 'monarchy' was undergoing radical change. The monarch might still be accepted as 'head of state' and perhaps even sovereign, but he was no longer automatically accepted as 'ruler' and designer of state politics. Traditional forms of legitimacy were worn out, and rational elements were gaining ground. Progressively, legitimacy of rule stood and fell with the ability of those in power to comply with the demands of the time. 'Good governance' became a crucial criterion for the acceptance of a constitutional order and the stability of a dynasty. Professionalising the *politischer Betrieb* ("business of politics")[50] seemed an obvious way of meeting these challenges; the withdrawal of the monarch from frontline politics to a back-seat role of 'authority in reserve' was another alternative to reduce the vulnerability of the Crown. This, however, suggested a parliamentary regime which no longer allowed the monarch to draw up the political agenda personally, or be actively involved in politics. It implied a downgrading of the monarchical principle and the road to the 'Anglicisation' of constitutional systems. Except perhaps for Louis XVIII, none of the rulers in France, Bavaria or Baden was actually prepared to make such concessions. Transforming the monarchical-constitutional systems by evolutionary means was thus not accomplished. Unlike the administration, the standard of work in the legislative remained, in many cases, 'amateurish', its output unsatisfactory due to the perpetual polarisations between crown and chambers and the lack of tools to hand to resolve conflicts. In France, it was the July Revolution that bolstered the parliamentary regime lastingly by overthrowing the existing Bourbon monarchy altogether, while in Bavaria and Baden true parliamentarisation remained a desideratum far beyond 1830.

In the wake of the French July Revolution, the seeming political tranquillity in Germany and Metternich's hope to achieve stabilisation by means of 'constitutional paralysis' proved to be deceptive. Yet a policy change did not take place. Instead, the German Confederation introduced even harsher reactionary measures, both with regard to fundamental rights and the scope of constitutional government. Whilst the *Zehn Artikel* of 5 July 1832 were a means to suppress the popular national and constitutional

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[49] It is worth noting that the July Revolution of 1830 had different effects on Ludwig and Leopold: while the Bavarian King felt vindicated in his growing reservations against liberalisation by the events in France, the same events powered the liberal turn under the new Badenese Grand Duke Leopold, followed by a cabinet reshuffle, free elections and the productive *Landtag* of 1831.

[50] See Weber 1980 [1922], pp. 828, 832, 848, 859f.

movement by further curtailing civil liberties,[51] the *Sechs Artikel* of 28 June 1832 set out to interpret existing constitutions more rigidly than ever and to keep parliamentary opposition in check:[52] not only the right of petition of the *Landtage* (Art. 1) and their budgetary competences (Art. 2), but also freedom of speech in the chambers and the publication of parliamentary protocols were restricted (Art. 5). The *Sechzig Artikel* of 12 June 1834 further specified the reactionary measures, and underlined that "Art. 1. Any [...] claim aimed at a separation of state power is untenable with the state law of the states united in the German Federation and cannot be applied to any German constitution". The Confederal governments would thus "in no case grant an expansion of *ständische* powers incompatible with sovereign rights". If *Landstände* "Art. 2. [...] in the intent of expanding their powers should prompt doubts concerning the meaning of specific points of constitutional documents, then the governments will adhere to the corresponding interpretation of the basic principles given above".[53] The prospect of liberalising existing constitutional systems in the German Confederation by evolutionary means now looked grim, and the gap between governmental constitutional policy and public expectations widened almost irretrievably.

Metternich's *Vormärz* system was finally shattered in the Revolution of 1848, which gave vent to widespread vexation about reforms having come to a complete standstill in the previous decades. While some of the immediate political effects of the Revolution were reversed, the reverberations were to be far-reaching. The revolutionary wave of 1848 provided the impetus for German national unification and a democratisation of the German political landscape in the second half of the nineteenth century. This did not imply, though, that the concept of constitutional monarchism was blurred into insignificance. On the contrary: the monarchical principle, which had been established for the first time in the French *Charte* of 1814, later taken on in the Bavarian and Badenese constitutions of 1818 and codified as the nucleus of the *Bund* in the *Wiener Schlussakte* of 1820, was to be an enduring heritage, remaining a – if not *the* – decisive factor in German constitutional history during the nineteenth century.

5. Conclusion and Outlook

As in Europe in general, constitutionalism was a key political issue in post-1814 Germany, too, and high on the agenda for the general public and monarchs alike. The collapse of the Napoleonic order in 1814 certainly symbolised a victory over revolutionary principles, yet there remained no doubt that the clock could not be put back or the heritage of the Revolutionary and the Napoleonic age negated. But could monarchical claims for personal government be realistically reconciled with the legacy of the Revolution? This dilemma did give rise to the concept of a genuinely 'monarchical'

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[51] *Zweiter Bundesbeschluß über Maßregeln zur Aufrechterhaltung der gesetzlichen Ordnung und Ruhe in Deutschland* (5 July 1832). In: Huber 1978 [1961], p. 134f.

[52] *Bundesbeschluß über Maßregeln zur Aufrechterhaltung der gesetzlichen Ordnung und Ruhe in Deutschland* (28 May 1832). In: Ibid., p. 132f.

[53] *Schlußprotokoll der Wiener Ministerkonferenzen* (12 June 1834). In: Ibid., p. 137-149. Only the articles 3-14 (arbitral jurisdiction in the Federation), 42-56 (surveillance of the universities) and the article 57 (prohibition to dispatch official documents in case of criminal procedures) were made public. The rest of the protocol remained secret, revealed only in 1843 when it caused quite a stir and a great deal of public anger.

form of constitutionalism: initially in France, where the need to come to terms with the revolutionary past was acute, but soon also in Germany, and Southern Germany in particular.

In the wake of French military success, the Southern German princes had profited from the dissolution of the Holy Roman Empire and Napoleon's policies, having been able to consolidate their power. At the same time, they had managed to be on the winning side after changing allegiance during the German Campaign in 1813. There was nevertheless a real need for political action to be taken: on the one hand, because public expectations were high. Especially among the middle-class(es) interest in constitutional matters had been gradually growing since the second half of the eighteenth century, and after the victory over Napoleon, *Verfassung* was essentially on everyone's lips. This was not least since from the side of the German governments, the *Befreiungskriege* had been accompanied by promises – at least implicitly – of political reform for the people. The omnipresent language of *landständische Verfassung*, without a clear understanding or agreement as to what the term actually meant, was the clearest expression of the 'constitutional mood' of the time. On the other hand, there was a set of pragmatic political motivations in favour of initiating a formal constitutionalisation process, ranging from the need to complement the state-building process by constitutional means, to the desire to foil hegemonic aspirations by Austria and Prussia and safeguard the power and sovereignty of the federal states within the newly-founded German Confederation.

Against this background, there was little emotionally-based reservation against foreign influences among the German rulers, particularly in the Southern states. Pragmatic considerations of securing and stabilising political power were central, and thus the chances of foreign constitutions and especially the French *Charte* serving as a model in the constitutionalisation processes were accordingly better. The appeal of the *Charte* is not particularly surprising: considering that – favoured by the political context and the prevailing conservative-monarchical mood at the time – revolutionary constitutions seemed out of the question, the English Constitution was regarded as being either too 'home-grown' or handing over too much competence to parliament. With *landständische Verfassung* rather a slogan than a real model, constitutional monarchism as exemplified by the *Charte* was simply 'constitutional common sense' and the only real alternative if a formal written constitution was the goal.

Nevertheless, 'German constitutionalism' after 1814 proves to be anything but a homogenous phenomenon, given the fact alone that the political priorities and the framework conditions in the individual German states were different. This applies both to the overtly diverging interests of the (Southern) German middle-sized states and those of Austria and Prussia, with the latter abstaining from fostering modern representative constitutions, choosing to focus on 'containing' their respective constitutional movements. Even in states, like Bavaria and Baden, opting for a monarchical-constitutional system along the lines of the French *Charte*, differences are discernible. A mix of tradition, imitation and innovation characterises the constitutionalisation processes, resulting in the Bavarian and Badenese constitutions eventually sharing certain traits both with each other and the *Charte*, yet at the same time preserving their own singularity and individuality. In many cases, certain 'analogies' proved to be merely an expression of commonly acknowledged constitutional principles. If transfer actually did take place, then usually through a careful selection process of those constitutional principles and elements deemed suitable for the Badenese or Bavarian conditions. This process was often not direct, but via a third

document (for example the *Charte* via the Constitution of Württemberg in Bavaria or via the Constitution of Congress Poland in Baden), or by means of transformation and adaptation. Even the monarchical principle itself, the very nucleus of constitutional monarchism, was open to variation, either formulated warily, as in France, or more rigidly, as in Southern Germany.

The repercussions of establishing (monarchical-)constitutional orders in the south of Germany were at all events considerable and long-lasting: Southern German constitutionalism served as an incentive for constitutional movements elsewhere in Germany, prompted reform projects, but also triggered counter-reactions and counter-measures, most clearly in the German Confederation itself. One could go so far as to interpret the constitutional politics of the German great powers and the German Confederation during the *Vormärz* period as a reaction to and a coming to terms with Southern German constitutionalism. The setting up of modern representative systems in Bavaria and Baden put pressure on other German states to act. Austria and Prussia viewed the 'progress' in Southern Germany with unease since developments there were contrary to their own notions of a post-Napoleonic order. While in the Southern German states constitutions were enacted in order to strengthen state sovereignty and integrate citizens into the political system by means of representative assemblies, Austrian and Prussian policies aimed at restricting the sovereignty of the members in the *Bund* and at achieving a political order based on government action, state bureaucracy and limited *(alt)ständische* constitutions. From 1818 onwards, Austro-Prussian endeavours aspired to minimise the impact of Southern German constitutionalism at the federal level: by repressing civil liberties, namely the freedom of opinion and expression, and by implementing restrictive rules for interpreting existing and setting up future constitutions.

In the long-run, however, all these endeavours were in vain, and constitutional monarchism based on the monarchical principle – reclaiming sovereignty exclusively for the crown – became *the* model for Germany's constitutional development in the nineteenth century: under the pressure of the revolutionary movements of 1830 and 1848 respectively, basically all German states became 'monarchical constitutional' following the *Charte* model. Paradoxically and equally as ironically this was at a time when constitutional monarchism in France had lost in significance.

Although it might be too simplistic to maintain that German developments and Western European parliamentarianism remained separate entities both ideologically and constitutionally for almost a century,[54] it is overtly clear that a substantial transition from constitutional monarchism to parliamentary monarchy did *not* take place in Germany until after the First World War, neither in political theory nor practice. Despite growing parliamentary power, a legislative initiative involving both parliament and king, the extension of suffrage and the professionalization of political life in the second half of the century, the legal and practical predominance of monarchical power remained fundamentally unchanged in all German states. The legislative output of the monarchical-constitutional systems, which in the second half of the nineteenth century had become Germany's 'constitutional standard', was not necessarily flawed.[55]

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[54] See Gangl 1975, p. 53. On general criticism of the German "Sonderwegsthese" see, e.g., Blackbourn/Eley 1984.

[55] In point of fact, the constitutional reality proved that political, social and economic reforms could be effectively tackled even in monarchical-constitutional systems.

Notwithstanding, no country could cloister itself away long term from the fundamental processes in progress of setting up and legitimising political power, which made constitutional monarchism increasingly appear an anachronistic, or at least daring, endeavour.

Despite the fact that the monarchical-constitutional systems established in France, Germany and other parts of Europe were not doomed to failure *a priori*, the adaptability and reformability of these systems clearly had limits. The more politics developed into a mass phenomenon and the more omnipresent the public desire to be actively involved in the political process was, the more antiquated the concept of unrestricted monarchical sovereignty and authority became. As tradition lost its role as a cohesive device of monarchical rule, the more unstable the legitimacy of that rule became and the more exposed the monarch was likely to be to public discontent and criticism. The dilemma was, basically, that in order to equip monarchical-constitutional systems to withstand and surmount the challenges of the time, the only reasonable way to go about it was by allowing uncompromising democratisation and parliamentarisation, and by withdrawing the monarch from the political frontline. The need for such parliamentarisation and de-politicisation was recognised in contemporary political thought by writers such as Benjamin Constant (1767-1830), François-René de Chateaubriand (1768-1848), or Robert von Mohl (1799-1875). If consistently applied, however, this meant monarchs had to forgo their dominant position, the typical feature of constitutional monarchism. In other words, the only way to reform constitutional monarchism long term was by means of a fundamental change in governance, which would inevitably deprive the system of its very soul.

In this respect, constitutional monarchism was more or less forced to be a transitional phenomenon; an 'independent' type of constitution, but one with a clear 'expiry date'. This role was actually corroborated by historical reality: monarchical-constitutional systems remained episodes of the nineteenth century, which had not existed in the eighteenth century and only lasted until the First World War.

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