Carl Welcker, Additions to Gentz's Memorandum (1844)

Abstract

Carl Theodor Welcker (1790–1869) was a leading liberal publicist and politician of the Vormärz period; he was particularly notable as the co-editor, together with Carl von Rotteck (1775–1840), of the liberal encyclopedia the *Staats-Lexikon*, and as a parliamentarian in the state of Baden. To sway public opinion and pressure conservative governments, Welcker and other liberals of his day took to publishing and commenting on important government documents. As the debates over constitutional and parliamentary reforms in the German Confederation intensified in the mid-1840s, Welcker compiled a collection of such documents and commentaries in an attempt to influence those discussions. The collection included a landmark memorandum by Friedrich Gentz laying out the conservative position of allowing only very limited constitutions and representative bodies at the time of the Carlsbad Decrees, thus helping to expose the conservative machinations behind the repressive political conditions that still held sway in the German states. Welcker inserted subversive notes into the published version of Gentz's memorandum and then authored his own point-by-point rebuttal, which he published as a follow up piece. Welcker above all argued that traditional estates bodies of the past had already possessed much greater powers and a more national sense of representation than Gentz had claimed. As the exchange makes clear, interpretations of history were also important for contemporary political debates, as both sides attempted to claim the legitimation of historical precedent for their own programs.

Source

Addition to the Subsidiary Supplement to the Seventh Protocol
By C. Welcker

Friedrich v. Gentz was undoubtedly a writer endowed with splendid, enviable talents; his earlier writings, even those that he wrote as a mature man and admirer of Burke and the British constitution, so persuasively defend the noblest British principles of civil liberty and finally, his inspiring pen worked so powerfully against Napoleonic rule that it is difficult to read the preceding treatise without a feeling of sadness. It is painful to see how the same man later abused his divine gifts as a lackey of the powerful in order to muddy the truth with the cleverest but most wrong-headed sophistry, to reverse the *true* liberation of his fatherland and the fulfilment of sacred princely promises and thereby create the greatest disadvantages and perils for his German and above all perhaps his most immediate homeland. (See *Staatslexicon*: Gentz). Thus, he worked at first covertly and then publicly in his treatise against the freedom of the press, which was written shortly before the Congress of Carlsbad and was most likely available to its members, and in this treatise against the representative constitution.

By now, nearly everyone has seen through the historical, philosophical and practical excessiveness and deceptiveness of confusing the estate-based constitution promised in Article 13 with merely caste-like feudal aristocratic estates. But in the absence of a free press, and since the steering of Germany's destiny has largely fallen into the hands of diplomats not trained in history, philosophy, or jurisprudence, and indeed at times has been determined by wholly ignorant and muddled courtiers, this terminological confusion has, largely in secret, done immeasurable damage that continues to this day.

This treatise begins straight away with a scholastic definition whose truly audacious impudence foists historically and juridically untrue fundamental ideas upon the entire subsequent account of the promised estate-based constitution and the representative constitution generally desired by the nation. In order to achieve its aim of transforming the estate-based constitution in Germany into ineffective and

outmoded feudal estates, it contains a whole series of historical *inaccuracies*, which are now almost universally recognized as such, and whose utter baselessness has also been demonstrated from the original documents in the following articles: *German History* [*deutsche Geschichte*], *German Federal Law* [*deutsches Bundesstaatsrecht*], *Constitution* [*Grundvertrag*], Taxation [*Beeten*] in the *Staatslexicon*, and above pp. 16 ff. and 67 ff.

According to the documentary evidence (see sections 1 and 2), the princely pledges during the Wars of Liberation and in all negotiations surrounding the Confederation and Article 13 of the Federal Act referred to the reestablishment of the German civil rights and liberties of the nation and its tribes in a manner in keeping with the times. And it was only in this sense, and without thinking of the outmoded, extinct, anachronistic feudalistic estate divisions and corporations, or even breathing a word of them, that provincial diets were promised.

Everywhere people thought of modern *popular representation* and *constitutional representative constitutions*, which, as the Hanoverian plenipotentiary expressly explained with regard to Article 13 and with reference to the English constitution, are founded upon historic German law, which princes such as the kings of Prussia, Bavaria, and Württemberg have formally and legally and repeatedly promised their peoples, which all princes expressly pledged even to the conquered Poles in the first article of the Acts of the Congress of Vienna, and which the conquered French, Belgians and Dutch were granted at the time upon the advice of the princes. Herr von Gentz wishes to retroactively deprive only the triumphant good Germans of the wages of their supreme loyalty and bonhomie with a misrepresentation of the princely pledges and deceptive phantasmagoria, and to transform them into feudal estates or postulant provincial assemblies, which are worse than no estates or provincial assemblies at all!

It is also utterly wrong to state that "*as long as there has been a German language and history*" the common treatment of civil rights or liberties in the Reich and through the estate-based constitution of the individual German states, whose restitution the princes promised and accordingly guaranteed in the Federal Act, existed only in Herr von Gentz's feudal estates. His territorial estates consist, namely, of only the later feudal estates of the prelates, knights and cities, which are completely outmoded and now fallen into crumbling ruins. In his view, this is the constitution "directly made by God Himself," which emerged from the specific corporative rights of the estates, and was intended *exclusively* to represent them, but by no means all citizens or the entire country and people and their rights and interests!

According to him, the older German territorial estates constitute an absolute contrast to the representative constitutions, to their elections, in which citizens of the state participate at least partially, and to their representation of the whole empire or country or the entirety of its citizens, to their alleged emergence from violence and despotism and to the unmonarchical and destructive consequences of their and all basic state contracts.

Instead, however, all German imperial and estate-based constitutions, all imperial and provincial diets and imperial and territorial estates emerged from the Old Germanic contractual peace associations or collective suretyships [*Gesamtbürgschaften*] of *all* free persons for freedom and property, from their communal legislation, jurisprudence and defense (see above pp. 16 ff.). The German territorial estates in particular emerged from the same associations in the individual districts or counties, duchies, provinces or lands, which were originally more autonomous, and later subordinated themselves to the empire as subdivisions and regained their independence partially with the emergence of state sovereignty and completely with the transformation of the empire into a confederation.

The true historical and juridical core and essence of German civil rights and liberties and of the German legal situation has consisted since time immemorial in the abovementioned right of all free citizens, the nation or the empire and the district or provincial association of the tribal assembly or the country, in the free legal personality of the whole and its members, in their free consultation and approval of their legal

conditions, especially also their taxes and laws.

In former times among all Germanic peoples, including in Germany, *all* free men usually exercised these rights *directly and personally* in the provincial, district and tithe assemblies. This was also the case in Germany, even in later times frequently in the free courts or administrative districts, for example in the Saxon and Frisian lands, in the Tirol and also in the cities.[1]

Early on, however, they often exercised them through representation, through freely elected representatives like the jurors in the people's courts, the representatives at the old Saxon provincial assemblies or also like the free men who entrusted themselves to a patron when threatened with the law of the strongest and now, as the ancient Lex Ripuaria (*de homine ingenue repraesentando*) puts it, were represented by him vis-à-vis the tribal community. In contrast, they too handled their legal situations towards their patrons and among themselves *directly and personally* in free court, men's and peasants' assemblies and associations, in a completely contractual manner.[2]

To be sure, the hardship and violence of the law of the strongest and feudal anarchy increased the private protective associations and gave them a hereditary duration, thereby reducing the direct participants in the imperial as well as provincial and national assemblies. They also caused those direct participants as well as the inhabitants of the state more generally to engage in mutual protection and the exercise of their rights in new associations, which in part evolved into corporative estates, and in this form differed from one another through their agreements, particular walks of life and special rights in society. Thus, one distinguished between the immediate peasants and villeins, the free peasants and bondmen, the townspeople, the guilds, the ministeriales, vassals, knights, doctors, prelates, counts and princes. Only within a gradually spreading higher culture did the need arise in turn to exercise the old national rights and liberties more completely once again and in a free form of political commonwealth. And it was precisely this need and the *genuine historical German legal principles that destroyed the temporary* phenomena of the law of the strongest, feudal anarchy and despotism, villeinage, the caste-like separation of the estates and also, in this transitional period, the princely lack of restraint that arose temporarily at times on the ruins of the old feudal forms. This law of the strongest and its nature, aristocratic feudal anarchy and despotism — the privileges of that feudal nobility which in every Germanic state more than all the other estates together not merely oppressed the citizens, but also dethroned and murdered emperors, kings and princes, Herr v. Gentz, the astute councilor and recorder of the princely congresses, now wishes to portray it as directly established by God Himself! He wants human power to reestablish it after it has been overcome by history and by the divinely guided free aspiration of the civilized nations!

All of the additional arguments in favor of restoring outmoded differences of status and privileges and in opposition to the modern free development of the state and of representation in the provincial and imperial estates borrowed from that vanished period of transition are also utterly false and at once non-historical and non-legal.

It is untrue that even in the Middle Ages, in reality and according to principle, the German imperial and territorial estates, in a genuine and absolute contrast to a true imperial and provincial representation, emerged solely from the special estates of society, the clergy, the nobility and the towns, and took part in the public negotiations of the country's affairs representing their own estates, rights and interests exclusively.

Instead, it is widely acknowledged that the estate-based constitutions rest on the selfsame legal foundations as the constitution of the imperial estates, as expressed in the famous legal aphorism, which sovereigns invoke on their own behalf, "What the emperor is capable of doing in the empire, the prince is capable of doing in his land." Both were completely rooted in the same old German rights of the freemen (see above pp. 16 ff.). The shared constitution of the empire thus all the more naturally and organically

became the prototype for the territorial state constitutions. No honest man, however, who has seen even one-hundredth of all German imperial and estate-based basic agreements and negotiations with his own eyes, will be able to deny the following sentences:

The first consists of the representative character of even the earlier Germanic and German estates. It states that the imperial and territorial estates appeared and spoke as representatives of the *entire fatherland*, "*the German nation,*" "*the empire,*" "*our dear German fatherland,*" or of the specific "*Bavarian and Württembergian land*," that they elected their sovereigns and did so in many lands, for example, in Holstein, Lauenburg and Bohemia until a very late date, consistently in the case of the emperors, and when the heirs elected along with them died out they always confirmed the succession, or chose between those fighting over the succession, negotiated and amended the basic agreements of the territorial states, issued complaints and swore to defend what was often described "as the rights and welfare of all inhabitants of this land," or "All, whether noble or non-noble, townsman or peasant," or declared themselves authorized and duty-bound to bring suit against the sovereign at the imperial courts for violating the basic agreements and abusing his governmental power or territorial sovereignty; finally, that they were also frequently expressly referred to as representatives; for instance, the old Württembergian territorial estates were called the country's *corpus repraesentativum*.[3]

The *second* principle consists of the now *recognized legal foundation*, rooted in the basic agreements, and the definition of the rights of the government, the territorial estates and the subjects. This legal contractual basis—which is clearly enunciated not merely in all German imperial and estate-based but also in all Germanic constitutional laws, the contract, even where perhaps the first actual emergence was based on violence, or where religious consecration and the grace of God were upheld—is something that no one who wishes to appear in any way competent merely to discuss Germanic and German history and constitutional conditions can completely deny. Only in our most recent times have some ambiguous notions of the contractual basis misled the ignorant and certain authors as well. But even now it is in the main only quixotic dreamers who seek to deny this most universal, well-documented truth, which pertains to all Germanic and German and indeed all free peoples of this earth.[4]

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NOTES

[1] See the documentary evidence in the article Constitutional Law [*Landesstaatsrecht*] in *Staatslexicon*.
[2] See the article Allodium in *Staatslexicon.*
[3] See the documentary evidence in the article *German Constitutional Law* [*deutsches Landesstaatsrecht*] in *Staatslexicon*.
[4] See the references in the article Basic Treaty [*Grundvertrag*] in the *Staatslexicon* and above on page 16 ff.

Source: Johann Ludwig Klüber and Karl Welcker, *Wichtige Urkunden für den Rechtszustand der deutschen Nation mit eigenhändigen Anmerkungen von Johann Ludwig Klüber, Aus dessen Papieren mitgetheilt und erläutert von C. Welcker.* Mannheim: Verlag von Friedrich Bassermann, 1844, pp. 230–36. Available online at: http://mdz-nbn-resolving.de/urn:nbn:de:bvb:12-bsb10559817-5

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