Friedrich Gentz, Memorandum on “Estates Constitutions” (1819/1844)

Abstract

The Prussian-born Friedrich Gentz (1764–1832) was an enthusiastic supporter of the French Revolution in its early days, but his views evolved, and he went on to become a central figure in an emergent German and European conservatism. Gentz burnished his conservative credentials in 1793 with his translation into German of Edmund Burke’s *Reflections on the Revolution in France*. He continued to shape conservative politics as a publicist and servant of the Habsburg government in succeeding decades. This 1819 memorandum by Gentz addresses the contentious question in German federal politics of whether representative constitutions were to be introduced in the German states, and if so, in what form. A compromise had been reached in 1815 at the Congress of Vienna, where it was established in Article XIII of the German Federal Act [*Deutsche Bundesakte*] that “Estates constitutions will occur in all German states.” Intentionally left open was the thorny question of how to interpret the term “landständische Verfassung,” which translates as “estates constitutions” or “estate-based constitutions.” That question prompted differing opinions from commentators at the time and has divided historians ever since. For liberals, the term opened the door to modern-type representative bodies and constitutional monarchies, whereas the conservative Gentz wanted to close that door and strictly limit the powers that such bodies could have and the forms they could take. At the time of the ministerial conferences of the German states at Carlsbad in 1819, Gentz supported his employer Prince Metternich’s position on estates constitutions with the memorandum featured below. Estates or diets, Gentz believed, should be divided into separate houses for the distinct estates or *Stände*, whose members were to represent the interests of that social group in a corporatist vision of society, as opposed to representing the populace of the state as a whole, as in a liberal individualist conception of society and parliamentary conception of politics. Gentz’s 1819 memorandum was eventually republished twenty-five years later, in 1844, by the liberal opposition politician Carl Theodor Welcker (1790–1869), who supplied notes subverting Gentz’s claims and wrote a rebuttal that followed Gentz’s essay in Welcker’s collection. The interpretation of estates constitutions remained crucial in the constitutional debates between governments and opposition movements in many German states during the 1840s, including Prussia.

Source

Subsidiary Supplement
(to the Seventh Protocol[1])
On the difference between estate-based and representative constitutions[2]
Written by the Imperial and Royal Aulic Councilor von Gentz

The proper interpretation of Art. 13 of the Federal Act was and remains today a subject of eminent importance, although many questions depending upon it have already been decided de facto and unilaterally.

What matters is to define with the greatest possible precision the concept of *estate-based* constitutions and the distinction between them and what we currently understand by *representative* constitutions.

In order to do so, it is necessary first to provide a *definition* of each of these constitutions, and to elucidate them by more closely defining their *fundamental character*, origins, *sphere of activity*, the characteristics generally attributed to them and finally their relationship to the *overall constitution of*

Germany.

1. Definition

Estate-based constitutions are those in which members or delegates acquire a right of participation in legislation for the state or individual branches thereof through existing *corporate bodies*, and by consultation, consent, remonstrance or some other form defined by the constitution.

The term *estate-based constitution* has never had any other meaning, as long as there has been a German language and history, and the 13th article of the Federal Act therefore cannot refer to any other [!][†] [3]

Representative constitutions, in contrast, are those where the persons destined for direct participation in legislation and in the most important business of the state administration do not, or do not exclusively, represent the prerogatives and the interests of individual estates but rather are called to represent the *mass* of the people.

In an *estate-based constitution there is nonetheless representation*, and one could call it a representative constitution if this word had not in recent times acquired its own specific meaning, which can no longer be applied to estate-based constitutions. It is only in this now-dominant meaning that the difference, or perhaps the opposition, between estate-based and representative constitutions arises.

2. Fundamental character

Estate-based constitutions rest on the natural basis of a well-ordered civil society, in which the conditions and rights of the estates emerged from the peculiar position of the classes and corporations to which they are attached and were legally modified over the years, without curtailing the essential rights of sovereign rulers.

Representative constitutions are always based in the final instance on the inverted notion of the supreme sovereignty of the people, and necessarily lead back to this concept, however carefully it may be concealed. [†]

For that reason, estate-based constitutions are by their very nature conducive to the preservation of all true positive rights and all true freedoms that are possible within the state.

Representative constitutions, in contrast, consistently tend to replace civil order and subordination with the specter of so-called *popular liberty* (i.e., *universal despotism*), and the ineradicable divinely created differences of estate and rights with the mania for universal equality of rights or universal equality before the law, which is no better.[†]

3. Origins

Estate-based constitutions emerged from the existing basic elements of the state, which were not man-made, and evolved along with the development of those elements, and can and must move towards increasing perfection without any forcible violation of existing rights, in the same way in which they were formed.[†]

Representative constitutions are the fruit of external force or arbitrariness; of violence, when rendered necessary by previous revolutions, and of arbitrariness, when resolved without external force out of false motives of statecraft.[†]

The first path led to the representative constitutions of England and France. The state had been completely dissolved by a long series of civil wars or usurpations destructive to law.[†] In such moments of

hopeless disruption nothing remains, once the rage of the unleashed elements has been forced somewhere to a standstill, but for those who legitimately held power before the storm erupted, or who acquired it in the course of events in something at least resembling legal form, to seek to establish a new order of things.

If this occurs with justice and wisdom, with a conscientious preservation of existing conditions, and especially according to the principle of the old orders and rights, to maintain as far as possible what could be salvaged from the general shipwreck, a state of affairs can emerge that will serve not only to calm the waters, and to reconcile many competing claims, but also lead to great shared strength, and to a lifting of spirits and splendid prosperity.

The phenomenon is so similar to those that we often encounter in the physical world after terrible devastations that it does not entitle us to reach any conclusions that disrupt the legislation of the civilized world, and only madness or malice will want to burn down towns and villages in order to erect an elegant edifice upon their ruins.

We must not fail to recognize, however, that such constitutions generated by violent revolutions can never deny their origins, and that the struggle with the hostile forces they appear to have vanquished, and the restless, convulsive movement it causes, persist even at the moments of their finest flourishing and fullness. For that reason, only very *large* and *very powerful* states,† where the government is and must be strong enough to assert itself against constant resistance, and where it also finds an ever-ready support in the higher classes who are tied by the prerogatives of property to the status quo, live with constitutions of this kind.

Smaller states, lacking the one or the other necessary counterweight, but usually both, inevitably perish under a representative system.†

In those instances where representative constitutions do not spring from the irresistible force of circumstances, they can only be the product of *despotism*. Whether to avoid momentary embarrassments or out of fear of the arbitrary organs of a wildly exploding public opinion, or, finally, in the mistaken good intention of becoming the benefactor of his country, the ruler decides to undertake the bold attempt to bring together the preexisting political components of the state, which he did not create and which are not subject to his omnipotence, according to an arbitrary principle, and thus to create what is known nowadays as a *constitution*. He executes this decision either out of his *own absolute power*, or through a formal contract with his subjects. In the latter case, where the *irrational principle of the supreme sovereignty of the people* is directly and expressly recognized, the constitution itself is *stillborn*,† since no constitution is compatible with this principle. In the former case, it can uphold the appearance of life for some time because, as long as the old authorities exist, if only in truncated form, the memory of their former dignity and the shadow of the old order of things can more or less counteract the progression of the disintegrating powers.

This, however, is also the entire difference between these two modes of generating a constitution. The essential stain of despotism attaches no less to that generated by absolute power than to the other, and the originally deficient legal title of the constitutional legislator can be neither concealed nor ameliorated by the fictitious consent of the people. The consequences are the same, although they develop more slowly in the one case and more rapidly in the other.

Popular elections, which are inseparable from the representative system, however they may be limited to the purely arbitrary conditions of active and passive suffrage, are, in any case, especially in smaller or fragmented states, the next step to *demagogy*, and through it to repeated upheavals, under which legitimate power must sooner or later succumb.†

4. Sphere of influence

In the case of *estate-based* constitutions, the role of the estates in legislation, both with regard to the topics and the form of their participation, can be more or less extensive. The extent will be dictated in part by previously existing legal conditions, in part by regular legal arrangements, and in part by the free wisdom of the ruler. The scope of estate prerogatives can change when conditions change; even the internal structure of an estate-based constitution can, to the degree it occurs by legal means, undergo alterations and reforms as time goes on and requirements change. In such constitutions, however, the participation of the estates can and must never go so far that the sovereign ceases to be the supreme legislator, and if the estates have a right to oversight over this or that branch of the state administration as part of their legislative role, the exercise of this right must always reach its limits at the point where *they could hinder the government* in any of its essential functions.†

In *representative* constitutions not only is the legislative power split into various quite disparate components, but the unity of the state administration is so fragmented and broken by the rights granted to the people's representatives, which are subject to every random interpretation, and to some extent by continual impositions and interventions, that it is often difficult to tell in such constitutions who actually rules.

In the theory of the representative system, the alleged principle of the *separation of powers* has pride of place; a principle that, when left to itself, must necessarily lead, always and everywhere, to the utter destruction of all power and sometimes to pure *anarchy*,† and whose effects in large territorial monarchies can only be avoided because the holders and administrators of so-called executive power know how to reunite the scattered fragments of political authority in their own hand by artificial and not always innocent means.

Whether, by the way, the representative body forms *one* or *more* chambers, whether it consists of elected or, in part, of hereditary or appointed members, is of no consequence for the fundamental concept of this system,† especially when the theory is expanded such "*that every chamber and every member of each chamber, without any regard to special conditions or prerogatives, is to be regarded solely as representatives of the whole*."[4] In its consequences, the difference between one and two chambers can only be significant where there is still some possibility of a counterweight to popular representation. In *large* monarchies, which learn with constant effort, skill and good fortune to live with the representative system, the existence of two chambers undoubtedly offers an important and effective guarantee.

In *smaller* states it is nothing but a temporary palliative; the upper chamber is never powerful enough to serve as a support for the throne, and the superior might of the element representing the people means mutual ruin for both.†

5. Attributes

Wherever the representative system gained the upper hand, the *dual responsibility of ministers*, towards the monarch and towards the people or their representatives, the public nature of negotiations, *unrestricted freedom of the press and the right to petition, etc*., were regarded as its necessary attributes, and there can also be no doubt that they are closely connected with the basic character of the system (the supremacy of the so-called will of the people).†

Nevertheless, one needs no particular acuity of mind to grasp the *incompatibility of such institutions with the primary conditions* of a *monarchical* form of government.† Some of them are so very dangerous that, even in the greatest monarchies, they maintain a continuous tumult that makes life as difficult for the government as the weightiest of its positive business.† Where are the authorities in weaker states to find the means and energies they need to hold their own in a never-ending internal war, against hostilities

that return daily, now openly, now covertly? Thus, for example, the *public nature of deliberations in the parliament*, when taken as far as the daily announcement of the full content of debates, is a direct step towards the degradation of all authority and the demise of all public order, all the more surely as, so long as that institution exists, any other restriction upon the unfettered character of the press must become impossible or useless.†

All these and similar accessions of the representative constitution are foreign† to *estate-based* constitutions or associated with them only by chance and never without mitigating modifications.

6. Relationship to the German Federal Union

In Germany's present situation, *estate-based* constitutions, whatever their arrangements, can *never* contradict the *basic relationships* and *conditions* of the German Confederation.† In such constitutions, as was noted above, the monarch does not cease to be the supreme† legislator† and head of the overall state administration. Everything connected with the external security of his state and the associated negotiations with other states remains subject to his unrestricted authority.† If the Federal Diet [*Bundestag*] is to deliberate collectively over topics touching upon the internal legislation of individual federal states, nothing can stop individual rulers from consulting their estates, to the degree that their concurrence must be in accordance with the constitution. He alone, however, is the recognized organ of his state in the College of Princes, and although he is obliged to see to it that what has been proposed or resolved for the good of the entirety of the German Confederation does not violate the private interest of his country, and does not *contravene* its specific constitution, *one cannot imagine a case* in which a monarch would not be authorized to agree to what he himself and his fellow estates recognize at the center of their joint consultations to be necessary or salutary.†

The resolutions taken from this center must be regarded in all German states as valid and binding, without the intervention of any other authority; they have, with respect to their origins, a rank above all state laws, and each prince reserves the legal prerogative to accept nothing at the Federal Diet that is incompatible with his position vis-à-vis the estates and the good of his subjects.

Only in this way is the *continued existence of a German Confederation conceivable*,† and no truly estate-based constitution may or will contain stipulations that actually or even only apparently contradict the existence of that highest guarantee of peace and German autonomy.†

As soon as *representative* constitutions exist in Germany, everything takes on an altered form. The *irreconcilability* of the representative system in individual federal states with the rights and duties conferred upon the German Federal Diet is perfectly obvious.

With a determination and openness for which we even owe them gratitude, the most zealous supporters of popular representation have provided us with the strongest arguments for this.[5]

These arguments are perfectly apt, consistent and, *proceeding from their foundations*, incontrovertible. No one can bring into an alliance with another more rights and more power than he possesses independent of this alliance. A prince whom the constitution of his country or the express or de facto interpretation thereof declares to be a *component of the legislative power*, and who is answerable to the bodies representing the people for each of his administrative measures, cannot, however, participate in the resolutions of a *pure* college of princes without the participation of these bodies. What an individual monarch cannot manage at home likewise cannot be permitted to German rulers of German states when they come together somewhere, whether in person or through their instructed envoys.†

This clear statement of the oracle of popular doctrine is a death sentence for the *federal assembly*, even

in the unlikely case that all German states convert to a representative system. But it likewise cannot survive if a segment of its members rules with provincial estates, another with popular representation, a part according to monarchical and another to democratic principles, part as constitutional monarchs and another as constitutional machines.†

Sensible of the impossibility of this whole, but at the same time determined to sacrifice every other right, every other interest, every previous pact, the security of Germany and the peace of Europe to the *idol of popular representation*, various avowed friends of the representative system have proposed augmenting the federal assembly with a *chamber of people's deputies.* To be sure, no one who is not in favor of a general revolution or does not believe it to be inevitable will listen to such proposals.† The truth, however, is that we are at the *breaking point*, and but *one path promises to avert disaster*.

If the German princes do not now agree upon an *interpretation and execution* of Art. 13 of the Federal Act that is consistent with safeguarding their rights and their crowns, with the true welfare of their peoples and the preservation of the German Confederation, and if we cannot hold out the hand of *suitable* and *decent* return† to those who missed the only true and admissible meaning of this article when forming their constitutions, all that remains to the rest of us is to bid the confederation farewell. Once this word has been spoken, all further reflections become superfluous.

NOTES

[1] This, and the six following essays, were not attached to the minutes as main supplements, but were only handed over to the Redaction Committee, which was appointed by the [Carlsbad] Conference to draft the main proposition to be submitted by the Presidium of the Federal Assembly. They are therefore included here as supplements, the first to the seventh protocol, the six others under numbers 1 to 6 to the eighth protocol. Editor's note [Johann Ludwig Klüber]

[2] The essays on this subject, for and against, found with these protocols, are shown above, in note 2 to the seventh, and note 1 to the eighth protocol. Editor's note [Johann Ludwig Klüber]

[3] All notes to all sentences of this supplement that are marked with this symbol (†) include the same commentary. Therefore, we do not repeat it in each instance, but rather express it here once and for all. The substance of that commentary is that all of those sentences *are historically and legally incorrect and nothing but bold and sophistical distortions of history and of legal and practical truth*, as the addition to this supplement will prove. W.[elcker]

[4] This sentence, which was not yet known even in England and France (!), was formally pronounced in the Baden Chamber of Deputies. See their meeting of June 19, 1819. Note in the original—The constitutional oath of the members of both houses says this, too. Constitutional document § 68. W.[elcker]

[5] See the negotiations in Baden's Second Chamber, the committee report of Deputy Winter, the writings of Dr. Paulus in the Rotteck archive, Dr. Wieland's statement about the army [*Bundesarmee*], etc. Note in the original.

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. 220–29. Available online at: http://mdz-nbn-resolving.de/urn:nbn:de:bvb:12-bsb10559817-5

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