



Volume 3. From Vormärz to Prussian Dominance, 1815-1866
Excerpt from the *Staats-Lexikon* entry: "Constitution" (1845-48)

In the entry "Constitution," published in the *Staats-Lexikon* (1845-1848), Carl von Rotteck carefully distinguishes between constitutional and absolutist forms of government, the forms between which Europe would ultimately have to choose. Von Rotteck was Professor of Jurisprudence at the University of Freiburg and co-editor of the *Staats-Lexikon*, a dictionary of political terms, which included entries by proponents of constitutional government and authors affiliated with political liberalism.

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Thus, the constitutional system, as it has taken shape since the beginning of the North American and the French Revolutions, the latter of which had a more direct impact on Europe, is in theory completely, and in practice at least approximately, in conformity with the system of a purely rational constitutional law [*Staatsrecht*], applied everywhere to current or historical circumstances.

1) The leading tenet of this system is as follows: The authority of the state is a social authority, accordingly an authority emanating from the whole and continuously belonging to it; i.e., it is nothing other than the overall will of society's members acting within the spheres determined by the social contract. Therefore, any authority that is lordly, any that emanates from property rights, any that comes directly from Heaven, any based on a patriarchal title, etc., or on any title other than the social contract is out of the question; or at least that authority, even if it originally emanated from another title and is now historically and lawfully extant, must be formally and substantively regulated and limited in such a way that, through its activity and orderly interaction with the governed, the rule of the general will will be realized as faithfully and as reliably as possible.

2) To this end, the first and most indispensable requirement is a lively spokesmanship for the whole of the governed, and that is – since what we have in mind here, at least chiefly, if not exclusively, are those states that, as a result of their considerable size, presumably cannot assemble the whole of their citizens in a single community of state – a representative body charged with such spokesmanship, which represents the whole [community] in nature and truth, and thus is freely elected.

3) Between this regional or popular representation and the instated regional government there must exist such a division of powers, or such a relationship of the forces of activity and resistance, that the rule of the true, sensible, and enduring general will is preserved as much as possible, and the domination of any individual will, or any will that is momentarily misled or only seems to represent the general will, is prevented.

4) This is achieved most reliably by the transfer or delegation of the overwhelming part of the legislative power, including the right of taxation, to the national representative body and, by contrast, that of the administrative power to the instated government; both, however, should not be without the controlling or inhibiting or accountability-demanding authority essential to two respective bodies that alternately confront each other and are called to common action.

5) Alongside the legislative and the administrative authority, and actually independent of all authorities, there must be an authority that decides in concrete cases on contentious or doubtful laws, i.e., that articulates findings that are purely scientific or left to the discretion of impartial powers of judgment concerning that which – in accordance with existing legislation – is either law or not law and which therefore is to be applied and executed as such by the constituted authorities. The establishment of courts that are independent and as reliable as possible is accordingly another main component of a constitutional order.

6) To maintain the honesty of the representative body of the people and the direction of the government appropriate to the purpose of its installation, the people and each individual among the people must unconditionally be at liberty to acquire information about public affairs and the course of their administration. Public opinion, which is almost equivalent to the rational general will, should everywhere be allowed to be developed and articulated without hindrance, and the facts concerning it, which it has the right and the calling to express, should be brought to notice undisguised and unadulterated. Publicity for government resolutions as well as for the minutes of the assembly of estates or parliaments and freedom of the press are therefore components of a constitutional order.

7) The concept of a social union, and the general will which animates this concept, presumes the equality and liberty of the members of society. The constitutional system therefore prescribes equal rights of participation in the benefits of the state, the same (legal and juridical) guarantee of personal liberty and of lawful possession and inheritance for all, the regular entitlement of all qualified to offices and titles, and also, on the other hand, the same obligation by law, the same subjugation to the same lawfully constituted and exercised authorities, and the same (i.e., corresponding to the degree of protection received for property and inheritance) participation in the burdens of the state.

8) Among the rights based upon the constitutional citizen's claim to liberty and equality are, above all, the freedom to worship their God (so long as this does not consist in actions that are inherently contrary to law or morality or order and security) and the freedom of emigration, i.e.,

of disassociation from the state, of which the constitutional citizen is namely just a free member, but not a serf.

9) The property of the state may only be used for public purposes approved by the general will, and its administration stands under the constitutional supervision of the representative body of the people. Possessions to which princely houses (and governing persons and families altogether) are entitled under private law naturally remain free from such control; moreover, care is taken to provide for the dignified maintenance of the monarch and his house through an appropriate Civil List* (and appanage etc.) allotted to the state domain.

10) The constitutional monarch is not answerable for his person. However, all bearers of his authority (actually all government or state servants) are answerable – not only to every higher office in their immediate or larger circle and ultimately to the king himself – but rather, and indeed chiefly, to the ministers or highest state servants, and also to the representative body of the people, in the true and lawful exercise of the powers given to them; and a state court of justice created for the crimes and offenses discussed here must be recognized. The members of the representative body of the people, however, since they are just expressing opinions in this capacity, but not actually exercising a real power, merely involved in resolutions by voting, but without being obliged to execute the same, are not answerable in this sphere of their calling, nor is the people itself, in whose name they appear and whose thinking, wishes, and will they are entitled and obliged to express according to their free convictions.

We now wish to contrast these main tenets of the constitutional system – which, for the time being, have only been summarized and are subject to additional comments in the course of this treatise – with the corresponding tenets of the absolutist system.

1) The state is a sum total of persons who are subjugated to one and the same higher authority. By no means does this higher authority emanate from a contract, least of all from a social contract; instead it is either crude lordly power, or that which is based on the possession of land and property or even factual endurance, or is at least bestowed by heaven, and is certainly a power deriving directly therefrom. Between the different members of the state, i.e., the subjects, there is no other connection than that of those partaking in a common relationship, for example, between the servants of the same lord, between the children of the same father, or between those obeying the same master.

2) Here, then, a whole [community] entitled to express its will and a representative body are entirely out of the question. The will of the lord and master or of the head of state established by heaven is the sole source of all law and the sole rule for everything that should or should not happen in the state.

* Taxpayer's money used to support the household of the head of state – trans.

3) Between the totality of subjects and the head of state, there is no other relationship than one in which the former obeys unconditionally and, in much the same way, the latter commands. A division of powers between government and people is therefore out of the question, even though the government could be multi-branched, i.e., could consist of numerous participants, or even if (since absolutist theory also applies to democracy) the entire governing power should reside within a single community of state, whose decisions are then certainly not subject to any control or any limitation on the basis of the rights of an individual citizen.

4) Absolute power, whether entrusted to One or to Some or to All, is undivided as well as unrestricted power. It is the state, and apart from it there are only those who obey unequivocally. It promulgates laws and it executes them exclusively and without outside participation.

5) Therefore the judicial power also belongs to its domain; and in each case, it is entitled to establish and organize the courts acting in its name as it pleases and also to activate, as it sees fit, special courts alongside ordinary [ones] for special cases or subjects.

6) Neither the people nor any individual among the people is entitled to any right to information about public affairs. These public affairs are exclusively the prerogative of the government, which makes them known [to the general public] to the extent it sees fit. It, the government alone, is also entitled to judge what is beneficial or not beneficial to the public good, i.e. to itself, since it represents the public good. It neither recognizes nor tolerates public opinion, as it might establish limitations or give direction to its administration. Accordingly, it also withholds unauthorized opinions of individuals or matters of state, indeed all statements that incur its displeasure for whatever reason, by censorship and prohibition, and suppresses every attempted communication of facts or teachings that would be considered disadvantageous to its interest should they become known.

7) The absolutist government, to be sure, demands the same kind of obedience from all its subjects, but it also asserts the right to confer as many privileges and dispensations as it likes to estates or classes of individuals, whether this be a mere relationship based on favor or for any purpose corresponding to its interest. But, as far as liberty is concerned, its very concept is antagonistic to that of absolutism. It expresses an independent right; and in the absolutist state there is no other [right] than that resting on the will of the lord and master; and the only thing that is independent is the authority of the state itself.

8) Therefore, also in regard to worshiping God, every subject is obligated to render homage to the confession prescribed by the absolutist authority; and toleration of a confession other than the one that the holder of the highest authority himself professes is merely a product of his grace. There can be just as little question of an independent right of emigration. The person born on the territory of the state, i.e., of the government, or having immigrated there, is a

bondsman or serf of the state authority and cannot ever leave the dominion without the permission of the same authority, which can be freely granted or refused.

9) There is no state property as defined by constitutional theory. All so-called public property is a possession of the government or its current head. The power to dispose over it is therefore unlimited, whether for personal or public purposes. Thus, personal purposes need not be restricted to a Civil List, and as far as both personal and public purposes are concerned, the property of all subjects can be used to cover exigencies, as determined by the ruler, by the taxation he freely decrees. In much the same way, he is entitled to the authority to dispose as he pleases over [his] subjects' personal services in peace and war, meaning also military service, as much and as long as he pleases.

10) The servants of the lord and master are answerable to him alone, and whoever acts according to his, the lord's, will is accountable in this to no one in the world. By contrast, answering to him, the lord, are all those who, under whatever title, might have expressed displeasure concerning the conduct of his government or who might have even dared to place any obstacles in the way of his decrees. –

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Which of the two systems will reign in Europe, the constitutional or the absolutist? If one considers the drift of current diplomacy (visible despite the most careful attempts to mask it), if one considers the ministerial tendencies in most countries, if one adds to that the oriental tone, which becomes increasingly evident in the officialese and the courtly ceremonial, the servility of the newspapers (which is more than enough to make even those in power nauseous!), and the worshiping phrases with which reporters describe the most insignificant meetings, activities, or pronouncements of princely folk or their entourage, even the delight of entire populations over a brief appearance of such a person in their city or district, etc., then one would believe that absolutism is not only on the road to power, but has already completely secured it. But if one looks beyond the official pronouncements and well-serving praises and – beyond the reach of censor's scissors – takes in the spoken statements of thinking people, the judgments and views of all classes, even the simplest citizens and country folk, and especially the spirit of the public – unmistakable to the attentive observer, even if it only reigns in silence – then one is overcome by the conviction that it is impossible for the foundations of absolutism to endure, at least in Western Europe, and that, if limited or passionate statesmen think to introduce it anyway, then it can only be a matter of time before revolution is the unavoidable consequence. Only human wickedness stands on the side of absolutism; the constitutional system has human understanding and virtue on its side. Hopefully, the latter will be stronger than the former and the regimes themselves, after they have taken stock of the situation, will prefer to befriend the peoples' understanding and virtue rather than entrust themselves to human wickedness (that is, of the boot-lickers). Apart from reasons which pertain to their relation with their own people, the regimes have a strong interest in this, the strongest interest, for reasons pertaining to foreign

relations. If absolutism were to gain undisputed dominance over Europe, then violence would take the place of law, including international law, which means that the independence of smaller or weaker states vis-à-vis the larger ones would be threatened. Then it would make no difference at all to a subject (for there would be no more citizens) which sovereign he would have to obey and render taxes and services to. In any event, the moral power which is the only thing capable of correcting the imbalance between smaller and bigger states would be killed, and then every small state would be annexed the minute a stronger neighbor so fancied, or divided up among several stronger neighbors. Against this double danger, namely against the danger of revolution and republicanism (for all states) and (for small states) the danger of losing one's independence to a foreign power, there is no other means of protection than the acceptance of the constitutional system.

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C. v. Rotteck

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