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JAMES HARVEY ROBINSON

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NOTE.

The text of the German Constitution, to which reference is made in the following pages, has been rendered into English, and furnished with a brief historical introduction by Professor Edmund J. James.

See publications of University of Pennsylvania, Political Economy and Public Law Series, Vol. I., No. 7. Philadelphia, 1890.

THE GERMAN BUNDESRATH.

A STUDY IN COMPARATIVE CONSTITUTIONAL LAW.

The chief use and significance of the study of the political institutions of other nations, lies not so much in the acquaintance with these themselves, as in the broader and more accurate view of our own institutions which we thereby gain. We first become conscious of peculiarities in objects long familiar to us through contrast with new and different ones. In recognition of this important psychological principle, that consciousness is intimately associated with and dependent upon contrast, I have attempted to give a picture of an institution quite foreign to our notions of government, not so much for the sake of familiarity with a distant and to us essentially unimportant organ of a foreign State, as to make clearer our notions of our own system.

Of the three great factors of government established by the Imperial Constitution of Germany, the *Bundesrath* or Federal Council, the Emperor, and the *Reichstag* or representation of the people, the Bundesrath is first in order of treatment in the constitution. Whether or no this be an intentional recognition of its preëminence,* certain it is that historically and legally the Bundesrath is the center and core of the existing form of government. Hence a study

* "Es ist bezeichnend dass die Reichsverfassung den vom Bundesrath handelnden Abschnitt vor jenen stellt welcher dass Bundespräsidium betrifft."—Seydel im Jahrbuch für Gesetzgebung, u. s. w., III., 274.

of this institution inducts one most quickly and easily into a knowledge of the entire constitutional system, and furnishes at once an explanation and a justification of many of the peculiarities which characterize it.

As the present German Empire is a federation made up of states which, previous to the formation of the Union, led an independent existence, each under its appropriate constitution, we naturally look for a reflection of the prevalent ideas of government on which the state constitutions are based, in the constitution adopted for the federation. In examining the twenty-five state constitutions, one finds twenty-two of them to be *monarchical* in form, while the three remaining ones only, those of the free cities of Lübeck, Hamburg and Bremen, are *republican*. A prevailing characteristic, then, of the states of the present German Empire, as distinguished, for instance, from those for which our constitution was formed in 1787, is that they are each subject to a monarch. Before considering the relation which exists between the monarchical institutions of the individual states, and the form of the central government, it will be necessary to consider briefly the constitutional position of the German princes, for on an understanding of this depends a clear idea of the imperial constitution.

According to the theory of German constitutional law, the whole power of the state is vested in the monarch. The various functions of government find their common center in his person. Without his consent or against his will nothing in the affairs of state may take place. "*Er vereinigt in seiner Person die Fülle staatlicher Hoheit und Macht.*"* This conception of the monarch, however, as

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* Meyer. Deutsches Staatsrecht, 2 Aufl., 202.

Schulze writes (Preussisches Staatsrecht, 2 Aufl., I., 153): "Das monarchische Prinzip nach seinem richtigen Verständnisse, nicht in seiner tendenziösen Verdrehung, wie es zu Zeiten des Bundes im Sinne des Absolutismus ausgebeutet wurde, verlangt nur: 'dass die gesammte Staatsgewalt, dem Rechte der Innehabung nach, in der

possessor of the whole power of the state, no longer includes the idea of unlimited right of self-determination in the exercise of it. He is bound to act in accordance with the provisions of the constitution: all his acts must be countersigned by a responsible minister; many of the most important functions of government, especially legislative, can only be exercised in co-operation with the representatives of the people. Still the monarch has both legally and practically the advantage over the people in any movement towards a more popular form of government. He has still the tradition of unlimited power behind him; the restrictions which the constitution has imposed are comparatively recent, in the chief state of the Empire, Prussia, being scarcely more than forty years old. The autocratic conceptions of the former *Bundestag* still linger in the dictum that where a doubt concerning the right to exercise a power arises, the presumption is always in favor of the monarch. This doctrine is, of course, based on the theory that such rights alone fall to the people as have been expressly granted them, all others remaining vested, as heretofore, solely in the monarch.* Over against the monarch the parliament appears simply as an instrument of restraint, limiting him in the exercise of certain of his powers.† In

Person des Staatsoberhauptes vereinigt bleibe, dass keine Funktion der Staatsgewalt von dem monarchischen Mittelpunkt losgelöst werde, dass in allen staatlichen Dingen nichts ohne und nichts gegen den Willen des Monarchen geschehen könne.'"

* "Er [the monarch] behält die Präsumtion der Berechtigung: es stehen ihm alle diejenigen Befugnisse zu, welche ihm nicht ausdrücklich entzogen, den anderen Organen des Staates dagegen nur die, welche ihnen ausdrücklich eingeräumt sind."—Meyer, Deutsches Staatsrecht, p. 202. See also p. 242. Compare Schulze, Deutsches Staatsrecht, I., 477, who expresses a somewhat divergent view.

† "Der Landtag erscheint nicht als Mitträger der Staatsgewalt neben dem Monarchen, sondern als ein beschränkender Factor, an dessen Mitwirkung dieser bei Ausübung einzelner seiner Functionen gebunden ist. Es stehen ihm daher nur diejenigen Rechte zu, welche ihm ausdrücklich beigelegt sind."—Meyer, Deutsches Staatsrecht, p. 242.

it are vested none of the sovereign powers of the state, for these are one and all attributes of the prince. For example, no bill becomes law because concurred in by both branches of the legislative body, even one proposed by the ministry itself and accepted without amendment by the representatives of the people. The sanction of the monarch first transforms a bill into a law binding on the subject. To grant this sanction the monarch is in no way bound; expressed in the usual negative form, he has an absolute veto.

These legal conceptions correspond with the actually existing condition. The government (*Regierung*), *i. e.*, the prince and his immediate ministers, stand over against the representatives of the people (*Volksvertretung*) in sharp contrast. The opposition has been mellowed by no such gradual changes as meet us in the history of England. The German prince *rules* as well as *reigns*. Parliamentary government is unknown, and would in fact ill correspond alike with the prevailing conditions and the accepted theories. The ultimate determining factor in the State is not the will of a party, but the supposedly impartial decision of the monarch, who is above all parties.* It is significant for the correct judgment of the relation between monarch and people that the initiative, although no longer legally,† is still practically in large measure confined to the monarch. The "*Regierung*" has taken the initiative so long that it continues to do so, even under the altered conditions. The

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* In regard to the possibility of conflict between the Landtag and the ministry, Schulze observes: "In einem solchen Falle, ist der Monarch welcher im konstitutionellen Staate über den Parteien stehen und auch seinem eigenen Ministerium gegenüber eine vorurtheilsfreie Stellung bewahren soll, recht eigentlich zu einem persönlichen Eingreifen berufen, um den Staatsverderblichen Konflikt zu lösen." Deut. Staatsr., I., 495.

For the opinion of Wm. I. on this point see Sybel: "Die Begründung des Deutschen Reiches," II., 284–5.

† In some of the lesser German states, the iniative is still confined to the crown.—See Meyer. Staatsrecht, 463.

people are in general satisfied with knowing and opposing what they do not want, and too little intent on determining what they do require.*

In view of what has been said, it will not be surprising if we find the monarchs, as such, playing an important role in the Empire, as well as in their own dominions. So important and universal a characteristic of the individual States as the prevailing monarchical form of government could hardly fail to exercise a marked influence on the form of the federal constitution. The Imperial Constitution is indeed, as will appear later, based on and interpenetrated by the monarchical idea. Nevertheless, and in spite of the title *Emperor* borne by one of the chief organs of State, we may not regard the present German federation as a *monarchy*. Such a view is from a legal standpoint quite false and wholly out of consonance with the accepted notions in Germany itself. *Politically*, the King of Prussia exercises in many respects an influence analogous to that which would fall to a monarch of the Empire supposing such to exist. Legally, however, the Emperor and the King of Prussia, although the same person, are to be carefully distinguished. The title "Kaiser," which William accepted in 1871, is somewhat misleading, for it is associated with much that does not belong to the position in the State which it now designates.† In fact, we have here to do with an en-

* See Westerkamp "Über die Reichsverfassung," 127–8, who criticizes the "wesentlichen negativen Haltung der Landesvertretungen." He quotes Carl Schurz (p. 128, note) in substantiation of the asserted difference which exists in this respect between our own country and the German states.

† Comparing the Roman and the holy Roman Empire with the present German one, Held writes: "Wollte man die Aehnlichkeiten unter diesen drei Kaiserreichen noch so hoch anrechnen, so müsste man doch zustehen dass die rechtlichen Verschiedenheiten unter ihnen zu gross sind, als dass sie unter sich im Verhältniss der Rechtsnachfolge stehen könnten, da nicht bloss das Recht des Kaisers nach Ursprung und Gehalt, sondern auch das Object des Kaiserthums in jedem der drei Fälle im wesentlich anderes ist."—*Das Kaiserthum als Rechtsbegriff.* Würzburg, p. 35.