

On the Rise and Decline of the Monarchical Principle: Constitutional Vicissitudes in Spain and Germany

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Nation-state formation – Holy Roman Empire – Dissolution and realignment – Spain, fragmented – Reconquista – Charles V – Wars of succession – Centralisation under house of Bourbon – Napoleon – Spanish war of independence – History of the Cortes – Constitution of Cádiz – Weakness of Spanish Constitutionalism – German Confederation – Monarchical principle in Vienna Final Act – Old and new ideas of sovereignty – Metternich and fear of revolution – March revolution – Bismarckian empire as constitutional monarchy – Degeneration of the Reich – Exit the Kings – Enter Juan Carlos

INTRODUCTION

There are some two hundred states in the world. This may seem a lot, but it is still fewer than there used to be. Pre-French Revolution Europe was teeming with states and statelets in places where later large nation-states were to arise. In some places – for instance in England, France and Spain – the process of nation-state formation was already well under way as early as the late Middle Ages. Although in strictly legal terms Spain, for example, was to remain for some time a personal union of various kingdoms, Charles V (1516–1556) was nonetheless popularly referred to as *rey de España* or king of Spain by his contemporaries.

In Germany and Italy political fragmentation was to remain prevalent until the second half of the nineteenth century. Germany, known for centuries as the Holy Roman Empire of the German Nation, also covered the Low Countries or Netherlands, of which there were seventeen. Seventeen mini-states instead of the current three Benelux countries. The Northern Netherlands, already *de facto* independent for some time, formally gained independence from the Empire un-

* The author is a member of the EuConst Advisory Board. The present essay is a slightly adapted English translation of the author's farewell address as professor of comparative constitutional law at the University of Amsterdam, delivered some years ago. Most references to Dutch sources have been omitted.

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der the Peace of Westphalia (1648), the Southern Netherlands continuing to form part of the Empire until the end of the eighteenth century.

THE HOLY ROMAN EMPIRE

The Holy Roman Empire was a *Flickenteppich*, a patchwork of countless large and small, more or less independent political entities. If one were also to include the *Reichsritterschaften*, the miniscule estates of the Imperial Knights, there would be around 2,000. But even disregarding them still leaves a few hundred German states and statelets. Most were ecclesiastical or secular principalities, but in addition there were about a hundred so-called Free Imperial Cities, small city republics under oligarchic rule. By the end of the eighteenth century this number had shrunk to around fifty.

Even the most detailed historical atlas cannot depict all the entities, let alone provide insight into their complex relationships, often still very much based on feudal law.¹ Clearly, the smallest states were independent in name only. In practice, they were highly *anlehnungsbedürftig*, i.e., they were reliant on support from more important neighbours. But even numerous larger German states had little margin for pursuing in particular their own foreign policy and could really only side with or against the leading German state, namely Austria. Anyone deciding not to take the side of the Habsburg emperor ended up in the French camp or, later, in that of the Prussians.²

To us it is more or less obvious that the area of a state should form a contiguous whole, but in the past this was often not the case. Even very important states could take the form of *Streubesitz* (scattered possessions). A well-known example was the ecclesiastical electorate of Mainz, which was made up of scattered territories but which failed to establish a unified entity around the see of Mainz.³ The wondrous mosaic of German states and statelets carried on until the end of the eighteenth century:

Eighteenth-century Germany was (as Metternich would one day say of another land) a geographical expression rather than a country, its myriad states ranging from the Habsburg domains down to the estate of a *Reichsritter* (Imperial Knight), no larger than an English manor. There were duchies, margravates, principalities, counties, baronies, bishoprics, abbacies, free cities, each a sovereign domain –

¹ The 4-part *Großer Historischer Weltatlas*, 1978–1995, plus *Erläuterungen*, likewise in 4 parts, 1976–1996, compiled by a variety of specialists is a great help though. Also of great value is Yves Tissier, *Dictionnaire de l'Europe. Etats d'hier et d'aujourd'hui* (2002).

² Walter Fürnrohr, *Der immerwährende Reichstag zu Regensburg, das Parlament des alten Reiches. Zur 300-Jahrfeier seiner Eröffnung 1663*, 2nd edn. (1987), p. 9.

³ Hans Boldt, *Deutsche Verfassungsgeschichte*, part 1: *Von den Anfängen bis zum Ende des älteren deutschen Reiches 1806*, 3rd edn. (1994), p. 318.

Kaunitz referred to their rulers as ‘the humming-bird kings’. Yet though the Emperor held only nominal sway, no one ever forgot that he was the Emperor of the German nation... Vienna was the spiritual capital of Germany, every great German nobleman learning to speak the language of the Austrian court, *Schönbrunner Deutsch*.⁴

Under pressure from Napoleon the Holy Roman Empire was dissolved in 1806. In the meantime a large-scale political realignment had taken place in Germany, which resulted in there no longer being hundreds of German states but now only a few dozen.⁵ All save two ecclesiastical principalities had been abolished, as had been most of the Free Imperial Cities. Austria and Prussia, which had risen again after the fall of Napoleon, were – as in the past – by far the largest and most important. Also, there were now a small number of medium-sized states, but not all of the tiny ones had disappeared. Statelets like *Reuß ältere Linie* or *Schaumburg-Lippe*, for example, were smaller than the Isle of Wight. Prussia on the other hand was in the course of the nineteenth century to stretch ‘from the Meuse to the Memel’ or, in other words, from Königsberg (present-day Kaliningrad) on the Baltic to the border of the Netherlands.

DISAPPEARING AND EMERGING STATES

As already noticed, the phenomenon of *Kleinstaaterei* (large numbers of minor, even tiny principalities and city republics) also occurred in Italy. In both Germany and Italy it would be the second half of the nineteenth century before nation-states were formed, which considerably reduced the number of states in Europe. Elsewhere in the world on the other hand numerous new states came into being, mainly as a result of the process of decolonisation.

One of the great themes to single out in this evolution is the rise and decline of the so called monarchical principle. Between the medieval political organisation by way of estates and the modern one tending to popular sovereignty, this monarchical principle seems to have functioned as a bridge.

⁴ Desmond Seward, *Metternich. The First European* (1991), p. 5. The other land referred to in the quote is Italy, large parts of which belonged to the conglomeration of Habsburg territories and which Metternich for the rest considered to be a kind of Austrian protectorate: there was no need at all for an Italian state; Italy was merely a geographical concept.

⁵ See Dieter Reinhold, ‘*Untergang und Neugestaltung: Deutschland Zwischen Revolution und Napoleon*’, in *Deutsche Geschichte, herausgegeben von Heinrich Pleticha*, part 4: 1618-1815, *Vom Dreißigjährigen Krieg zum Ende des Deutschen Reiches* (1998), p. 336 et seq.

THE LAST SIGH OF THE MOOR

In the Middle Ages, Spain too was politically very fragmented. Following the fall of the caliphate of Córdoba in 1031, the Muslim part of the Iberian peninsula (*Al Andalus*) disintegrated into almost forty *reinos de Taifas*, tiny kingdoms/city states that were constantly at loggerheads with each other. The principal ones were Badajoz, Toledo, Sevilla, Granada, Córdoba, Murcia, Almería, Valencia and Zaragoza. The designation *Las Españas* alone shows that the Christian part of the peninsula was not a unified state either, but was likewise divided into various kingdoms. All these states and statelets were frequently engaged in war with each other in the most fickle combinations. The legendary hero Rodrigo Díaz de Vivar, known as El Cid Campeador (1043-1099), had no scruples about fighting one minute for the Moors and the next on the side of the Christians. In the early eighth century a swift campaign lasting only a few years had brought a very large part of the country into Moorish hands. A few small pockets of Christian resistance managed to hold their ground in the north, which was soon to form the base for the *Reconquista*, the reconquest of the Muslim part of Spain. This, however, was a very long campaign that would not be completed until 1492 with the fall of Granada, the last Moorish stronghold.⁶ The Catholic Monarchs (*los Reyes Católicos*) Isabella of Castile and Ferdinand of Aragon planted their colours on the Alhambra, church bells rang throughout Europe, and in Rome, to add to the rejoicing (and increase his chances of the papacy), the Spanish papal candidate Rodrigo de Borja (or Borgia as he is known in Italy) and his son Cesare organised a bullfight.⁷ The last Moorish ruler of Granada, whom the Spanish called king Boabdil, left for Morocco. Anyone leaving Granada en route to Africa will arrive at a bend in the road known as *El último suspiro del Moro*, the last sigh of the Moor. This is where Boabdil is said to have turned around and brushed away a tear on seeing his palace, the Alhambra, for the last time. His mother, not sparing him, snapped: '*Llora como mujer, lo que no supiste defender como hombre*' ('Cry like a woman for what you could not defend as a man').⁸

AN EMPIRE ON WHICH THE SUN NEVER SET

The marriage of Ferdinand of Aragon and Isabella of Castile (1469) had been a major step on the road to the unification of Spain. The situation in their time had become considerably clearer compared to the medieval fragmentation of Al

⁶ José Manuel Roldán, *Historia de España* (1984); Kees van Dooren and Otto Zwartjes, *Geschiedenis en cultuur van Spanje. Van steentijd tot verlichting* (1995).

⁷ See Michael Mallet, *The Borgias. The Rise and Fall of a Renaissance Dynasty* (1972), p. 100.

⁸ See also Manuel Ríos Mazcarelle, *Diccionario de los Reyes de España* (2003), p. 357.

Andalus and Las Españas. Now there were only five kingdoms: Castilla, Portugal, Aragón, Navarra and Granada, albeit that *la Corona de Aragón* was actually a personal union of four separate mini-states, viz. Aragón, Cataluña, Valencia and Mallorca. In the person of the Habsburg prince Charles, grandson of Ferdinand and Isabella and likewise grandson of the Holy Roman Emperor Maximilian I and Duchess Mary of Burgundy, a large number of political heritages were united: in Spain, in Burgundy, and in the Empire. Charles was Lord of the Austrian hereditary lands, Lord of the Netherlands, Emperor of Germany and, as we saw, was already referred to in Spain – somewhat prematurely – as *rey de España*.

Under Emperor Charles V (Charles I in Spain) and his son Philip II Spain developed into the West's mightiest power, forming together with its extensive colonial possessions *un imperio en el que no se ponía el sol* (an empire on which the sun never set).⁹ The British were later to repeat what the Spaniards said: 'the sun never sets on His Majesty's dominions'. No wonder the Spanish see the sixteenth century as *el Siglo de Oro* (their golden age). Politically speaking, however, the country was already past its prime when, with the death of the childless Charles II in 1700, *la casa de Austria* (the house of Habsburg) died out in Spain. This event resulted in the Spanish war of succession (1701-1714), which shook not only Spain but all of Europe as well. Wars of succession, closely linked to a patrimonial view of the state, in which state power was deemed to be private property, were a regular occurrence in the eighteenth century.¹⁰ The dynastic heirs fought over the political inheritance as if it involved private rights. In our case, Louis XIV of France based his claims on Charles II's will and on the fact that his mother and his

⁹ See the map in *Crónica de España* (1988), p. 416.

¹⁰ See on *Erbfolgekriege* (wars of succession) as *zeittypisch* (phenomenon typical of a period) of the seventeenth and eighteenth centuries Boldt, *supra* n. 3, p. 202; in the chronological overview at the end of his book Boldt refers to the disputed succession in the provinces of Cleves and Jülich (1609-1614), the Palatine war of succession (1688-1697), the Spanish war of succession, the Polish war of succession (1733-1735), the Austrian war of succession (1740-1748) and the Bavarian war of succession (1778-1779). Even around 1900 Germany's *Bundesfürsten* (federal princes), among them Emperor William II, could get terribly het up about the *Lippescher Erbfolgestreit*, the question of who should succeed to the miniature federal state of Lippe-Detmold (160,000 inhabitants). See Hans Riehl, *Als die deutschen Fürsten fielen* (1979), p. 285 et seq. Returning from a sea voyage to the Middle East the imperial yacht 'Hohenzollern' moored off the coast of Syracuse for a few days in Nov. 1898. His then foreign minister Bülow describes disapprovingly in his *Denkwürdigkeiten* (memoirs) how the Kaiser spent 'the whole day walking up and down the promenade deck of the "Hohenzollern" with me in order to discuss undisturbed the political issue to which he gave most prominence' ('den ganzen Tag auf dem Promenadendeck der "Hohenzollern" mit mir auf und ab ging, um die für ihn im Vordergrund stehende politische Frage ungestört zu besprechen'). In a spot as historic as this Bülow called 'the unending deliberation of this typical case of German *Kleinstateerei* doubly petty' ('das Hin- und Herreden über diesen typischen Fall deutscher Kleinstateerei doppelt kleinlich'). See Bernhard Fürst von Bülow, *Denkwürdigkeiten*, part 1 (1930), p. 266.

first wife had been Spanish princesses, while the Austrian Habsburgs thought the inheritance should go to them. Given that the result of this conflict would have far-reaching consequences for the balance of power in Europe, a European-scale war soon arose. In the end it was the house of Bourbon (*la casa de Borbón*) – in the person of Philip of Anjou, grandson of Louis XIV – that ascended the Spanish throne. Under the Bourbons the administration of the country was centralised. Aragon and Catalonia were punished for having chosen the wrong side in the War of Succession and had to adapt their laws and institutions to those of Castile, which occupied a position of hegemony in Spain. In the second half of the eighteenth century, the era of the Enlightenment, numerous reforms were introduced, especially under Charles III (1759–1788), who as an enlightened despot was one of the best kings Spain ever had. His son and successor Charles IV (1788–1808) was a nonentity and, together with his entourage – including his favourite and prime minister Manuel Godoy – would be pushed aside by Napoleon.¹¹

THE INTRUDER: PEPE BOTELLA

In 1808 the French occupied Spain, and Napoleon – as was his wont – placed a member of his family on the throne here, too. In this case it was his oldest brother Joseph (in Spain José), former king of Naples. The biting sarcasm with which the eminent Dutch historian Jacques Presser describes the entire rapacious, mafia-like Bonaparte clan – Joseph, Lucien, Louis, Jérôme, Élisa, Pauline, Caroline, Laetitia Ramolino (*Madame Mère*), Uncle Fesch – is unforgettable.¹² Napoleon himself towers way above this collection of mediocrities, and not just because of his undisputed genius in numerous fields, but also because of his untrustworthiness, mendacity, criminal nature and blood-thirstiness. In an admirable understatement the Duke of Wellington summed up the Emperor, deciding that he ‘wasn’t a gentleman’.¹³

It goes without saying that the Spaniards did not take kindly to this French king, José Bonaparte, who had been foisted on them. They called him *El intruso* (the Intruder). Another of his nicknames was *Pepe Botella* (Joe Bottle), taken from the four-line verse (*copla*) dedicated to him: ‘Pepe Botella, To work – full throttle! I can’t right now, I’ve been on the bottle’.¹⁴ This may have been a good-natured

¹¹ It is impossible here to go into the extremely complex happenings in the period from mid-March to early June 1808. See, *inter alia*, Raymond Carr, *Spain 1808-1975*, 2nd edn. (1982), p. 79 et seq., and Jeroen Oskam and Arantxa Safón, *Geschiedenis en cultuur van Spanje. De wortels van het beden* (1993), p. 62 et seq.

¹² J. Presser, *Napoleon. Historie en Legende*, 2nd edn. (1950), p. 93-119.

¹³ Seward, *supra* n. 4, p. 36.

¹⁴ *Pepe Botella, baja al despacho; -no puedo ahora- que estoy borracho*. I reproduced this rhyme earlier in Lucas Prakke and Constantijn Kortmann (eds.), *Constitutional Law of 15 EU Member States* (2004),

satirical rhyme, the reality of the occupation and the waging of war in Spain was horrifying, as one can read in Presser. Even today the memories remain, and travellers to Spain regularly get to hear about the atrocities and destruction perpetrated by Napoleon's troops, *los soldados de Napoléon*. Except for his disastrous Russian campaign in 1812, the invasion of Spain is deemed to be Napoleon's biggest mistake. This was mainly because of the unexpected mass resistance of the Spanish people. Consequently, the war was not limited to a series of battles between enemy armies but took on the characteristics of a guerilla war, which turned out to be impossible for the French to win, not even following the personal intervention of Napoleon and very large troop reinforcements. The attitude of the Spanish is reminiscent of Churchill's famous words in his Dunkerque report to the House of Commons (4 June 1940). Anticipating a German invasion, Churchill said:

We shall not flag or fail. We shall go on to the end...we shall defend our island, whatever the cost may be, we shall fight on the beaches, we shall fight on the landing grounds, we shall fight in the fields and in the streets, we shall fight in the hills; we shall never surrender.

To replace the existing government bodies, which had lost all their authority because – unlike the people – they had not dared to offer resistance to the French, *Juntas* (governing councils) were spontaneously formed throughout the country. A *Junta Suprema Central Gubernativa* (central governing council) met in Aranjuez, south of Madrid, in September 1808 to coordinate the conduct of the war and to develop a vision for the future. Ahead of the advancing French armies the *Junta Central* later moved to Seville and finally to Cádiz, one of the few places in Spain that were to stay out of French hands for the entire War of Independence (1808–1814). It was there that the pretty large *Junta* transferred its powers to a five-man *Regencia*. Just as in their hour of national need the French in 1789 had decided to fall back on the almost forgotten institution that had not met since 1614, the *États-Généraux*, so now the *Regencia* proceeded to convene a meeting of the Cortes.

LAS CORTES DE CÁDIZ

Meetings of the Cortes had come into being in the Middle Ages in *Las Españas*, the Christian kingdoms of Spain. Initially, only prelates and noblemen attended these gatherings, the towns and cities joining later. In Castile, for example, 48 towns and cities could send a representative. The king convened the Cortes from time to time in a town in the kingdom in question; in Castile this was often Burgos,

p. 734. I occasionally borrow from my chapters in this book on Austria, Spain and the United Kingdom without mentioning the source.

Valladolid or Toledo. The king of Aragon sometimes convened a combined meeting of the Cortes of Aragon, Catalonia and Valencia, which on account of its favourable location was usually held in the unprepossessing town of Monzón. During the Middle Ages the various Cortes met hundreds of times, but in the seventeenth and especially the eighteenth century they fell virtually into disuse. In 1724 a meeting of *Cortes Generales* for the whole country was held for the first time, but that was about the end of it.¹⁵

It was clear that during the French occupation the Cortes could not be convened on a regular basis: 'The Deputies were appointed irregularly and in different ways, which was explained by the extraordinary circumstances.'¹⁶ However, through improvisation a meeting was successfully convened in September 1810 which was attended not only by representatives of the various parts of *La Península* (the motherland), but also of virtually every Spanish colony in America.¹⁷ The only thing this group had in common with a medieval meeting of the estates was, however, the name Cortes. It was not a meeting of the estates, but a national representation which at its very first gathering embraced the revolutionary principles of national sovereignty, separation of powers and new representation. For numerous reasons that cannot be discussed here, the group was in fact anything but representative of the real Spain as it was in those days.¹⁸ This naturally made itself felt in the undertaking on which they immediately embarked: the drafting of a constitution.

LA CONSTITUCIÓN DE CÁDIZ

The Constitution of Cádiz was promulgated in 1812 and is deemed to be Spain's first constitution. Although in 1808 Napoleon had sent his brother Joseph on his way with a constitution drafted in the French town of Bayonne, the *Estatuto de Bayona*, this document was barely able to function during the War of Independence and, being a document of French origin, is not acknowledged by the Spanish as their first constitution.

¹⁵ Bartolomé Bennassar, Joseph Pérez, J.P. Amalric, E. Témime, *Léxico histórico de España Moderna y Contemporánea* (1982), p. 64 et seq.; *Crónica de España* (1988), p. 516; J.H. Elliot, *Imperial Spain 1469-1716* (1963). More general: Richard Bonney, *The European Dynastic States 1494-1660* (1991); S.E. Finer, *The History of Government from the Earliest Times* (1997).

¹⁶ 'La designación de los Diputados a las mismas se realizó de manera anómala y desigual, explicable por la situación del país', Joaquín Tomás Villarroya, *Breve historia del constitucionalismo español* (1985), p. 12.

¹⁷ María Teresa Berruzo, *La participación americana en las Cortes de Cádiz 1810-1814* (1986). For a detailed and illustrated description of life in the beleaguered city of Cádiz at the time of the Cortes see Ramón Solís, *El Cádiz de las Cortes. La vida en la ciudad en los años de 1810 a 1813* (1987).

¹⁸ Oskam and Safón, *supra* n. 11, p. 69 et seq.

In this light it may seem strange that in later years there was so much debate about the extent to which the *Constitución de Cádiz* or *Constitución gaditana* was more or less a copy of the French constitution of 1791.¹⁹ Why should a constituent assembly of free Spaniards meeting in one of the few remaining areas unoccupied by the French pay any attention to a constitution drafted twenty years earlier in the enemy's country? One should, however, remember that in those days constitutions were a very new phenomenon and that the Spanish elite were quite familiar with revolutionary events and documents in France. Moreover, the French constitution of 1791 had been a constitution for a monarchy and the people meeting in Cádiz also wanted to maintain the monarchy. For this reason the American constitution of 1789 was of far less use as a model. Anyway, although it is an established fact that the French constitution of 1791 played a great part in Cádiz, the Constitution of Cádiz is by no means a copy.

It is impossible to discuss here, even in broad outline, the highly detailed *Constitución gaditana* (which numbered 384 Articles).²⁰ It provided for a Cortes consisting of one house elected in multistage elections which no longer represented estates but the nation as a whole. Although the king had extensive powers, all his decisions had to be counter-signed by a minister, thus providing a potential basis for political ministerial responsibility. The Constitution contained few fundamental rights and, despite the liberal principles on which it was based, it specifically ruled out religious freedom: 'The religion of the Spanish people is and always will be the Catholic, apostolic, Roman, the only true one. The nation will protect it through wise and just laws and prohibits the practice of any other' (Article 12).²¹ The almighty Catholic Church had taken good care of itself! The opening words of the Constitution show that it was promulgated in the name of 'Ferdinand VII, by the grace of God and the Constitution of the Spanish Monarchy, king of the Spanish lands',²² whereas Article 179 stated: 'The king of the Spanish lands is Ferdinand VII of Bourbon, who currently reigns'.²³ These last three words had to be taken with a large pinch of salt, because Ferdinand and his brother Charles were held prisoner for six years by Talleyrand at his castle in Valençay (1808–1814) on the orders of Napoleon.²⁴ Who was this Ferdinand?

¹⁹ Villarroya, *supra* n. 16, p. 17–18; John A. Hawgood, *Modern constitutions since 1787* (1939), p. 50 et seq.

²⁰ See R. Garófano and J.R. de Páramo, *La constitución gaditana de 1812*, 2nd edn. (1987). Also, *Materiales para el estudio de la Constitución de 1812. Edición al cuidado de Juan Cano Bueso, Letrado Mayor del Parlamento de Andalucía* (1989).

²¹ 'La religión de la nación es y será perpetuamente la católica, apostólica, romana, única verdadera. La nación la protege por leyes sabias y justas y prohíbe el ejercicio de cualquier otra.'

²² 'Don Fernando VII, por la gracia de Dios y la Constitución de la Monarquía española, rey de las Españas.'

²³ 'El rey de las Españas es el Señor Don Fernando VII de Borbón, que actualmente reina.'

²⁴ According to Presser, *supra* n. 12, p. 397, during his exile Ferdinand ('a loathsome person', p. 395) personally embroidered a bedspread with figures of the Holy Virgin. According to the *Crónica*

EL DESEADO

He was the oldest son of Charles IV and an arch opportunist and schemer, but through a strange twist of fate the majority of the people saw him as a kind of saviour from the hated administration of Manuel Godoy, and later the French.²⁵ Hence his nickname *El deseado* (the Desired). However, Ferdinand in his turn wished to have nothing to do with the Constitution drawn up in his name. He was a narrow-minded and very authoritarian person who objected strongly to the principles of national sovereignty and separation of powers incorporated in the Constitution. When in 1814 he was restored to the throne he had already briefly occupied in 1808, he promptly abolished the Constitution. In 1820 he was to be forced to accept it after all, but three years later managed to free himself of it again with the aid of a French expeditionary force and ruled until his death in 1833 as an absolute monarch (*la década ominosa*). So although the Constitution of Cádiz in practice failed to achieve much more than the Estatuto de Bayona, it nonetheless remained a document of great authority in the Ibero-American world.

El deseado was succeeded by his three-year-old daughter Isabella II. His brother Charles, though, thought the French system of succession introduced in Spain by the Bourbons, which barred women from succeeding to the throne, was still in force and declared himself king of Spain. This dynastic conflict was to spread insidiously like a moorland fire throughout the nineteenth century, with occasional violent flare-ups (Carlist wars). And it was for dynastic reasons that Isabella married her full cousin Francisco de Asís de Borbón. This marriage was not short of difficulties (to put it mildly), as Isabella was a nymphomaniac and her husband homosexual and impotent. Isabella let it be known that 'On our wedding night he wore more lace than I did' (*En la noche de bodas, llevaba más puntillas que yo*).²⁶ Isabella bore eight children and the whole of Spain racked their brains as to which of Isabella's dozens of lovers were the fathers of these children: they included generals, opera singers, marquesses, ministers and soldiers, but according to James Michener the father of her son and heir Alphonse XII must have been an American dentist named McKeon who, the gossips said, 'did a lot more at the palace than fill teeth'.²⁷

de España (1988), p. 602 (*El dorado exilio de Valençay*) it was not Ferdinand or Charles, but their Uncle Antonio Pascual, who had also been taken to Valençay, who wielded needle and thread, and for *un dosel de plata para la iglesia de Valençay* (a silver baldequin for the church of Valençay). Duff Cooper, *Talleyrand* (1932), p. 291-292 says of the Spanish princes' sojourn in Valençay: 'The unwilling visitors had proved bad tenants. One of them had devoted his leisure to designing wolf-traps, and had turned his bedroom into a workshop... On one occasion they had nearly burnt down the whole château as a result of holding an auto-da-fé of the complete works of Voltaire and Rousseau.'

²⁵ Oskam and Safón, *supra* n. 11, p. 64.

²⁶ *Crónica de España*, *supra* n. 24, p. 1016.

²⁷ James A. Michener, *Iberia. Spanish travels and reflections* (1982), p. 303-304.

SPANISH CONSTITUTIONALISM

In conclusion just a few remarks on the experience gained with constitutions in Spain following the Estatuto de Bayona and the Constitución de Cádiz. Well, this experience was not very positive. Constitutions were drafted, introduced, suspended and abolished in regular succession. In the politically very restless nineteenth century in Spain it was virtually impossible for the idea of constitutional government to take root, no *sentimiento constitucional* (constitutional sentiment) developed. The country was well-nigh permanently plagued by palace and other revolutions, by military coups (*pronunciamientos*) and mutinies, and by the smouldering dynastic conflict between Isabelinas and Carlistas. Moreover, where electoral fraud was the order of the day, the question was bound to arise as to whether constitutions and representative bodies could indeed function in this country. In the twentieth century, following the civil war (1936-1939), General Franco answered this question in his own way. Don Francisco Franco Bahamonde, Leader of Spain and the Crusade against Communism, Chief of State and Supreme Commander of the Nation's Armed Forces²⁸ ruled without a constitution and with an organically composed applause machine as parliament. I will return briefly to Spain at the end.

DEUTSCHE BUNDESAKTE 1815

After the fall of Napoleon the political cards in Europe were shuffled anew at the Congress of Vienna (1814-1815). The comprehensive final act, the *Kongreßakte*, contained a new arrangement for Germany in the form of a concise document containing only twenty articles, the Act of German Confederation or *Deutsche Bundesakte* of 8 June 1815. As we have seen, the Holy Roman Empire no longer existed and the number of German states had been drastically reduced. The said Act founded a confederation of German states, consisting of 35 sovereign principalities and the four remaining free cities of Lübeck, Frankfurt, Bremen and Hamburg. This international union of German sovereigns and cities had a single organ of government, namely a conference of plenipotentiaries meeting in Frankfurt am Main and presided over by Austria which was officially named the *Bundesversammlung* (Confederal Assembly), but was usually called the *Bundestag* (Confederal Diet).

The Act of German Confederation contained an article that could be construed in different ways and gave rise to great differences of opinion. This Article 13 read as follows: 'All Confederal states will be given an estates-based constitu-

²⁸ 'Don Francisco Franco Bahamonde, Caudillo de España y de la Cruzada, Jefe del Estado y Generalísimo de los Ejércitos de la Nación.'

tion.^{29, 30} Was this supposed to mean a modern constitution on the lines of that of America and France, based on the principles of popular sovereignty, separation of powers and protection of fundamental rights? Or was it rather a codification of the estates-based state (*Ständestaat*) as it had developed in the German states and in which the position of the estates had gradually been eroded by monarchical authority? The Austrian minister Metternich in particular did his utmost, and with success, to minimise the significance of Article 13. On 1 August 1819 he had a meeting at Teplitz in Bohemia with his Prussian colleague Hardenberg. They agreed that the obligation to introduce a constitution did not apply to Austria and Prussia as compound states (*Gesamtstaaten*) but only to their territorial units, Austria's crown lands (*Kronländer*) and the Prussian provinces.³¹ Metternich also managed to convince Hardenberg that Article 13 precluded constitutions based on the principle of popular sovereignty and so should be interpreted rather in terms of the old estates (*altständisch*). Metternich's advisor Friedrich Gentz had argued this in a memorandum.³² Shortly afterwards the two ministers reached agreement in Carlsbad with the ministers of eight other German states considered trustworthy, on the text of a number of repressive laws, the Carlsbad Decrees (*Karlsbader Beschlüsse*), which were to be ratified by the *Bundesversammlung* in Frankfurt.

When Austria and Prussia were at loggerheads, which they frequently were, decision-making in Frankfurt stagnated; when they were in agreement, things went smoothly. The Carlsbad Decrees were consequently rubber-stamped by the *Bundesversammlung*.³³ In 1820 Metternich achieved another success. At a conference of ministers of members of the German Confederation in Vienna, the provisions of the *Bundesakte* were elaborated and specified in an anti-democratic and anti-liberal sense in the so-called Vienna Final Act (*Wiener Schlussakte*), which numbered 65 articles. Article 57 nailed down the monarchical principle (*monarchisches Prinzip*), the opposite of the principle of popular sovereignty.

MONARCHICAL PRINCIPLE

The said Article 57 of the Vienna Final Act read as follows:

²⁹ 'In allen Bundesstaaten wird eine Landständische Verfassung stattfinden.'

³⁰ Ernst Rudolf Huber, *Dokumente zur Deutschen Verfassungsgeschichte 1803-1933*, 4 parts (1978-1990), part 1, p. 88. 'Confederal states' in Article 13 means 'Member states of the German Confederation' ('*Gliedstaaten des Deutschen Bundes*').

³¹ Rudolf Hoke, *Österreichische und Deutsche Rechtsgeschichte* (1992), p. 298-299.

³² See on this intriguing figure Golo Mann, *Friedrich von Gentz: Geschichte eines deutschen Staatsmannes* (1947).

³³ See the four federal laws (*Bundesgesetze*) of 20 Sept. 1819 in Huber, *supra* n. 30, part 1, p. 100 et seq., and Heinrich Lutz, *Zwischen Habsburg und Preußen. Deutschland 1815-1866*, *Siedler Deutsche Geschichte* part 8 (1998), p. 47.

Since the German Confederation, with the exception of the free cities, consists of sovereign princes, the entire authority of the state must, in accordance with this basic principle, remain united within the head of state, and only in the exercise of specific sovereign powers can the constitution prescribe the participation of the estates.³⁴

No sovereignty of the people, no separation of powers: that, clearly, was the message. Even so, it is a strange text. If certain of a sovereign's powers can only be exercised with the cooperation of a parliamentary body, then it would appear the entire authority of the state is not concentrated in him. Moreover, the independence of the judiciary had already been widely accepted for some time, as had the exercise of royal powers on the proposal of and subject to countersignature by ministers. It is not so easy for us now to feel the tension that existed in the early nineteenth century between old and new ideas of sovereignty,³⁵ which often resulted in people being torn between two alternatives. For example, as we saw in the constitution of Cádiz Ferdinand VII was referred to as king of Spain by the grace of God and the constitution of the Spanish monarchy (*por la gracia de Dios y la Constitución de la Monarquía española*), the latter being based on the sovereignty of the people. What was it precisely: divine right or national sovereignty? Metternich, however, was very pleased with the formulation of the monarchical principle, which could render very useful service in all manner of interpretation issues and was well-suited – and that is what it was mostly about – to placing the sovereign and his ministers at the centre and keeping parliaments, if there were any, at a distance.³⁶ The strong emphasis on the monarchical principle in the German lands resulted in a specifically German version of the constitutional monarchy (*konstitutionelle Monarchie*). Consequently, the parliamentary system with, at its core, the rule of confidence did not make its entrance there until about 50 years after it had done in many other European countries.³⁷ Metternich had something he could hold onto: *in dubio pro rege*.³⁸

³⁴ Huber, *supra* n. 30, part 1, p. 99. 'Da der Deutsche Bund, mit Ausnahme der freien Städte, aus souveränen Fürsten besteht, so muß, dem hierdurch gegebenen Grundbegriffe zufolge, die gesamte Staatsgewalt in dem Oberhaupt des Staats vereinigt bleiben, und der Souverän kann durch eine landständische Verfassung nur in der Ausübung bestimmter Rechte an die Mitwirkung der Stände gebunden werden.'

³⁵ Cf. Finer, *supra* n. 15, p. 1567-1608.

³⁶ Oskar Lehner, *Österreichische Verfassungs- und Verwaltungsgeschichte*, 2nd edn. (1994), p. 161; Wilhelm Braunerder, *Österreichische Verfassungsgeschichte*, 6th edn. (1992), p. 89: 'The question of whether a monarchical constitution embodies the principle of monarchical legitimacy or that of popular sovereignty is decisive for interpreting and filling gaps.' ('Die Frage, ob eine monarchische Verfassung das Prinzip der Monarchischen Legitimität oder das der Volkssouveränität verwirklicht, ist entscheidend für Auslegung und Lückenfüllung.')

³⁷ Hans Boldt, *Verfassungsgeschichte*, part 2: *Von 1806 bis zur Gegenwart*, 2nd edn. (1993), p. 194-205: *Die deutsche konstitutionelle Monarchie*. During the empire (1871-1918) the parliamentary system was

AL QAIDA IN THE VORMÄRZ ERA?

Clemens Wenzel Lothar Nepomuk von Metternich-Winneburg-Beilstein was born in Koblenz in the ecclesiastical electorate of Trier in 1773 as a scion of a noble Rhineland family. He moved to Vienna, ‘the spiritual capital of Germany’, where he married a granddaughter of Kaunitz, Maria Theresa’s former chancellor, and entered the service of Austria.³⁹ He pursued a diplomatic career and was, among other things, Austria’s ambassador in Dresden and Paris, in which city he had a brief affair with Caroline Murat, one of Napoleon’s sisters. From 1809 to 1848 he was Austria’s foreign minister, from 1821 holding the honorary title of chancellor of state (*Staatskanzler*).⁴⁰ During the Napoleonic period he played a very important role. At the Congress of Vienna and during the first few years after he was the leading European statesman.

Metternich feared revolutions and worked above all to maintain peace and stability in the Germany of the Confederation. In doing so he did not shrink from taking draconian measures. The policy of stability (*Stabilitätssystem*) of which he was the principal architect left very little room for personal freedom, displaying all the characteristics of a police state. Metternich, midnight in Central Europe (*Metternich, Mitternacht über Mitteleuropa*), said the liberals.

In his youth Metternich and his brother Joseph were sent to Strasbourg to learn French. In this former imperial city – where he took fencing lessons from the same teacher as the French lieutenant Napoleon Bonaparte, who had just left – he witnessed the mob rule that occurred on the outbreak of the French Revolution.⁴¹ In the Napoleonic era he saw the horrendous misery of war from close by. In 1813 he was in Dresden, one of Europe’s most beautiful cities, where he had been ambassador. Now, however, the injured lay in rows in the streets in the filth while amputations were performed in public in the squares. Heaps of amputated body parts – fingers and other limbs – lay around as toys for the street urchins.⁴² Later that year he visited the battlefield at Leipzig shortly after the battle.⁴³ So Metternich had his memories.

In the period from 1815 to 1848, which the Germans refer to as *Vormärz*, i.e., the period preceding the March revolution of 1848, revolution was lurking around

not accepted either at imperial or at state level. This did not happen until the Weimar Constitution (*Weimarer Reichsverfassung*) of 1919.

³⁸ Boldt, *supra* n. 37, p. 198.

³⁹ See for the international composition of the civil service of the multi-ethnic Habsburg state Heinz Schilling, *Höfe und Allianzen. Deutschland 1648-1763*, *Siedler Deutsche Geschichte*, part 6 (1998), p. 337.

⁴⁰ Seward, *supra* n. 4, p. 124.

⁴¹ *Ibid.*, p. 6.

⁴² Presser, *supra* n. 12, 464.

⁴³ Harold Nicolson, *The Congress of Vienna* (1946), p. 61.

every corner according to Metternich. And he was not entirely wrong. Secret revolutionary societies were active in various places in Europe, for example in Italy where the Carbonari were striving for Italian unity. The Greeks rebelled against the Turks, the Belgians against the Dutch, the Poles against the Russians, the French against Charles X, and even in England there was something brewing with the so-called Chartist Movement. And in Germany itself there was the gathering of students held at the Wartburg in 1817 (*Wartburgfest*), the Kotzebue murder (1819, which Metternich seized on to issue the Carlsbad Decrees), the destruction of the castle of the reactionary Duke of Brunswick (1830), the national democratic festival at Hambach Castle (1832) and the storming of the Frankfurt guardhouse (1833).⁴⁴ For Metternich it was an indubitable fact that all this was being controlled by a sinister secret committee in Paris, although its existence has never been proved.⁴⁵ He considered it his task to make an all-out stand against this international conspiracy. This explains his aversion to constitutions, which he saw as revolutionary crowbars. Constitutions had come into being in two waves in various member states of the German Confederation, after the fall of Napoleon and following the 1830 July revolution in Paris. These constitutions often displayed a mix of old and new forms of the estates-based state (*altständisch* and *neuständisch*). But Austria and Prussia did not join in, remaining absolute monarchies with no constitution and no popular representation, founded firmly on the monarchical principle. But then another wave arrives, that of the 1848 revolution.

THE MARCH REVOLUTION

Even before revolution broke out in Paris in February 1848 and shortly afterwards in various German capitals the first steps had been taken to reform the German Confederation. Now, however, these reforms were swiftly overtaken by events. The reform work was no longer a matter of negotiations between German governments – in the first place as always those of Austria and Prussia – but was entrusted to a constituent assembly, the *Deutsche Konstituierende Nationalversammlung*, which was elected on the basis of universal male suffrage and met in May 1848 in the Church of St Paul, the *Paulskirche*, in Frankfurt am Main. But neither Berlin nor Vienna could any longer avoid a constitution. The emperor of Austria and the king of Prussia backed down and convened a constituent assem-

⁴⁴ *Fragen an die Deutsche Geschichte. Wege zur parlamentarischen Demokratie*, illustrated commentary on the permanent *Historische Ausstellung im Deutschen Dom* in Berlin, 19th edn. (1996), p. 49, 50, 79, 81.

⁴⁵ Desmond Seward refers several times to this Al Qaida spectre of Metternich's. He warned Tsar Alexander of the threat of a new French revolution in Europe: 'It is in Paris, Sire, that the great furnace exists...' (p. 116), '...secret committee at Paris.' (p. 135), '...grand revolutionary committee' at Paris.' (p. 145) 'There exists in Europe only one issue of any moment and that is revolution.' (p. 139), 'worldwide Carbonarism' (p. 153), etc.

bly. In Vienna it was the *Konstituierender Reichstag*, opened in July 1848 in the Winter Riding School, which had been hurriedly fitted out for the purpose. In Berlin, the *Preussische Konstituierende Nationalversammlung* met in May 1848 in the White Room of the Royal Palace.

What had become of Metternich, the great adversary of the then Al Qaida network, the President Bush of this era? He had had to sneak out of Vienna in March 1848 like a thief in the night, and was told shortly after that it would be better for him to leave the country. After an uncomfortable journey of roughly ten days by coach and train he arrived in Holland sick and exhausted.⁴⁶ In The Hague he had a three-hour meeting with the future queen Sophie, whom he did not impress: 'Politically he knows less than nothing, he is no statesman', she wrote to her friend Lady Malet.⁴⁷ Well, I ask you! Metternich went to England, not returning to Vienna until 1851.

Despite the complication of the Frankfurt National Assembly immediately appointing itself as the highest authority in Germany, and hence assuming a governing role, it did succeed in March 1849 in presenting a constitution transforming Germany into a federal state. The work would prove to be in vain, though. Following the initial success of the revolution in Austria and Prussia as well, it ultimately lost the day there in late 1848. And due to the simple fact that the power in Germany lay in Berlin and Vienna and not in the Paulskirche in Frankfurt, the constitution became a dead letter when the king of Prussia declined the office of head of state (*Reichsoberhaupt*) with the title German Emperor (*Kaiser der Deutschen*) so as not to snub Austria, but also because in his view the whole procedure was wrong. He might have wanted to accept an imperial crown from the hands of his peers, the other German princes, but not from the people. The monarchical principle once more raised its head!⁴⁸ And so in the end nothing changed and the

⁴⁶ Seward, *supra* n. 4, p. 246: 'The little party travelled as inconspicuously as it could, by train and coach (their two vehicles being put on board the train when necessary).'

⁴⁷ Hella S. Haasse and S.W. Jackman, *Een vreemdelinge in Den Haag*. From the letters of Queen Sophie of the Netherlands to Lady Malet (1991), p. 69.

⁴⁸ Cf. Boldt, *supra* n. 37, part 2, p. 156: 'the decision was, however, also supported by the strict legitimist stand, which prohibited acceptance of a crown from the hands of the people. *Although throughout history dynasties have repeatedly been founded in this way* (italics added), as witnessed by the most recent example of Belgium with its monarchy founded in 1831, in those tense times an enthronement like this could easily be interpreted as abandonment of the monarchical principle and as capitulation to the revolutionary axiom of the sovereignty of the people – with repercussions for the position of the German monarchs in general' (*'getragen war die Entscheidung aber auch von einer streng legitimistischen Einstellung, die es verbot, eine Krone aus den Händen des Volkes entgegenzunehmen. Zwar sind Dynastien in der Geschichte immer wieder auf diese Weise begründet worden, das jüngste Beispiel Belgien mit seiner 1831 gegründeten Monarchie zeugte davon, doch konnte in jener spannungsgeladenen Zeit eine solche Inthronisierung leicht als Aufgabe des monarchischen Prinzips und als Kapitulation vor dem revolutionären Grundsatz der*

Bundestag in Frankfurt resumed its duties: the German Confederation had another twenty years to go.

On his way back to Vienna in the summer of 1851, Metternich stopped for a few months at his country house Schloß Johannisberg am Rhein, which he had received as a gift from the allies as thanks for his great services in the Napoleonic period.⁴⁹ Here he met Germany's coming man, the recently appointed Prussian envoy to the Bundestag, the young diplomat Otto von Bismarck. Metternich's own role in Germany and Europe had been played out. He lived on in his villa on the Rennweg in Vienna until 1859. Shortly before his death he was visited by his protégé Baron von Hübner. Looking back on his life, he told Hübner: 'I was a rock of order' (*ein Fels der Ordnung*). When Hübner said goodbye, he repeated, as if to himself, 'Ein Fels der Ordnung'.⁵⁰

BISMARCKIAN EMPIRE

In the period now dawning the rivalry between the old leading German power Austria and the increasingly more important Prussia, a rivalry that had existed from as early as the second half of the eighteenth century reached a climax. If the constitution drafted in the Paulskirche had come into effect, it would almost certainly have resulted (for reasons that cannot be discussed here) in the Austrian empire (which comprised not only German, but also extensive Slav, Hungarian and Italian possessions) splitting off from Germany. This was avoided by the failure of the constitution, but it now became the objective that Bismarck, who had been appointed prime minister of Prussia in 1862, was to strive for with great energy and political genius.

It is impossible to describe here the complex manoeuvres and three short wars⁵¹ that ultimately produced the desired result: a so-called smaller German (*kleindeutsche*) federal state excluding Austria, with the king of Prussia as emperor (*Kaiser*). When the newly formed state was formally proclaimed in the Hall of Mirrors in the Château de Versailles on 18 January 1871 not everyone was equally pleased. King Ludwig II of Bavaria – who, incidentally, had accepted substantial remuneration from Bismarck for his cooperation⁵² – dressed in mourning attire on the day in

Völkessouveränität verstanden werden – mit Rückwirkungen auf die Stellung der Monarchen in Deutschland überhaupt!)

⁴⁹ The Schloß (in the Rheingau, west of Wiesbaden) was occupied until her death in July 2006 by Princess Tatiana von Metternich.

⁵⁰ Seward, *supra* n. 4, p. 263. According to Helmut Rumpler, *Österreichische Geschichte 1804-1914* (1997), p. 306, Hübner was probably an illegitimate child of Metternich's.

⁵¹ A war between Germany and Denmark (1864), between Prussia and Austria (1866) and between France and Germany (1870-1871).

⁵² He needed lots of money to build his fairytale castle Schloß Neuschwanstein. Bismarck paid Ludwig from the *Welfenfonds*, the fortune confiscated by Prussia from the Guelfs, the dynasty of the

question because he was absolutely certain that Bavaria had now been downgraded to a Prussian vassal state.⁵³ Strangely enough, King William I of Prussia, now German emperor, was not happy either and in the Hall of Mirrors treated Bismarck frostily and with disdain. He sensed in his new title of German emperor, which was to precede that of king of Prussia, the demise of the kingdom of Prussia, founded on 18 January 1701.⁵⁴ Whether Prussia dominated the empire or, on the contrary, was gradually swallowed up by an empire that managed to maintain its independence in the face of Prussia is a question that exercises historians to this day.⁵⁵

How was this *Deutsches Reich* – as the new state was referred to in the constitution (*Verfassung des Deutschen Reiches*) of 16 April 1871 established under Bismarck's direction – how was this empire made up? It was, as has been said, 'a federal state with a confederal head' (*ein Bundesstaat mit staatenbündischer Spitze*),⁵⁶ thus expressing the idea 'that not a monarch and his ministers should be the real leader of the empire, but the collective governments meeting in the Federal Council',⁵⁷ so something on the lines of the Council of the European Union. There was only one imperial minister, the chancellor.⁵⁸ The chancellor chaired the Bundesrat and was

kingdom of Hanover, which Prussia had annexed in 1866 because in the war fought that year they had taken the side of Austria. See *Deutsche Geschichte, herausgegeben von Heinrich Pleticha*, part 5: 1815-1918, *Restauration und Bismarckreich* (1998), p. 249.

⁵³ Ingeborg Koch, *Die Bundesfürsten und die Reichspolitik in der Zeit Wilhelms II.* (1961), p. 5: '...König Ludwig II. von Bayern, der anlässlich der Reichsgründung Trauerkleidung angelegt hatte und nie von der Überzeugung abließ, zum Preussischen Vasallen geworden zu sein.'

⁵⁴ Peter Mast, *Die Hohenzollern. Von Friedrich III. bis Wilhelm II.* (1994), p. 212.

⁵⁵ Karl Erich Born, *Von der Reichsgründung bis zum Ersten Weltkrieg, Gebhardt Handbuch der deutschen Geschichte*, part 16, 16th edn. (1999), p. 12 et seq.; see also Christoph Vondenhoff, *Hegemonie und Gleichgewicht im Bundesstaat. Preußen 1867-1933: Geschichte eines hegemonialen Gliedstaates* (2001).

⁵⁶ Boldt, *supra* n. 37, part 2, p. 179. Through the loss of Austria, dynastic developments and various annexations made by Prussia in 1866, the Empire was made up of only 25 'federal states' (*Bundesstaaten*), viz. the kingdoms of Prussia, Bavaria, Saxony and Württemberg, the grand duchies of Baden, Hessen, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg and Saxony-Weimar-Eisenach, the duchies of Anhalt, Brunswick, Saxony-Meiningen, Saxony-Altenburg and Saxony-Coburg-Gotha, the principalities of Reuß ältere Linie, Reuß jüngere Linie, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Lippe-Detmold, Schaumburg-Lippe and Waldeck, and the free cities of Hamburg, Bremen and Lübeck. The imperial province (*Reichsland*) of Alsace and Lorraine, taken from the French in 1871, later also gradually acquired the status of *Bundesstaat*. For numerous particulars about 'life at the minor courts' ('*aus dem Leben an den kleinen Höfen*') and for bizarre examples of complex scattered territories (*Streubesitz*) see Roland Vocke, 'Die deutschen Fürstentümer 1871-1918', in *Deutsche Geschichte* (Heinrich Pleticha), part 5, p. 246 et seq.

⁵⁷ 'daß nicht ein Monarch mit seinem Ministerium eigentlicher Leiter des Reichs sein sollte, sondern die Gesamtheit der im Bundesrat versammelten Regierungen.'

⁵⁸ There have been eight: Prince Otto von Bismarck (1871-1890); Count Georg Leo von Caprivi (1890-1894); Prince Chlodwig zu Hohenlohe-Schillingsfürst (1894-1900); Prince Bernhard von Bülow (1900-1909); Theobald von Bethmann-Hollweg (1909-1917); Georg Michaelis (July-Nov. 1917); Count Georg Friedrich von Hertling (Nov. 1917-Sept. 1918); Prince Max von Baden (Oct.-Nov. 1918). Most of them, but not all, were Prussian.

tasked with explaining and defending in the Reichstag the imperial decisions which he had to countersign. The Reichstag was elected on the basis of universal male suffrage but did not have the power to dismiss the chancellor. When dividing powers between the empire and its member states Bismarck had been guided by the principle of unity where necessary and liberty where possible (*in necessariis unitas, in dubiis libertas*),⁵⁹ which in every respect agrees with the principle of subsidiarity of the European treaties. So for that reason too the empire was not a constitutional monarchy like its member states: the entire authority of the state was not united in the emperor, he was not the *Träger der gesamten Staatsgewalt*, but had only those powers the constitution conferred on him.

The shelf-life of the original construction proved to be short. Initially the Bundesrat did indeed fulfil the central role assigned to it, but the weight fairly soon shifted to the chancellor and his deputies (known as state secretaries or *Staatssekretäre*), the latter not mentioned in the constitution. Together they started to form a kind of imperial government. The federal setup faded, the Bundesrat went downhill fast. Thus, contrary to the intention of the constitution, the empire took on the form of a constitutional monarchy after all. Although the Reichstag gradually acquired more authority and influence, the parliamentary system still did not become accepted.

The entanglement of institutions between the empire and its dominant member state Prussia was extremely complex. The king of Prussia was also the German emperor, so said the constitution. Although the constitution did not prescribe it, in practice the positions of Prussian prime minister and chancellor of the empire were also virtually always united in one and the same person. So this person not only had to appear in the Bundesrat and the Reichstag, but also in the Prussian Diet, which was composed of a house of representatives (*Abgeordnetenhaus*) and a house of lords (*Herrenhaus*).⁶⁰ Also, to mention just one other point, in order to encourage proper coordination it was customary to appoint various state secretaries as members of the Prussian council of ministers (*Staatsministerium*), too. According to some, this flooding of Prussia with state secretaries (*Staatssekretarisierung Preußens*) resulted eventually in Prussia's interests being subordinated to those of the empire, while others tend more to the view that the hegemonic superstate of Prussia had succeeded in bending the empire to its will.⁶¹

⁵⁹ Bülow, *supra* n. 10, part 1, p. 123.

⁶⁰ In his capacity as mayor of Cologne Konrad Adenauer was for a short time a member of the *Herrenhaus*, which existed until 1918. See Marion Gräfin Dönhoff, *Kindheit in Ostpreußen*, 13th edn. (2002), p. 35.

⁶¹ Golo Mann, *Deutsche Geschichte des 19. und 20. Jahrhunderts*, 1947 (11th edn. 2008), p. 500: 'Bismarck had imparted a certain degree of unity to the entire irrational apparatus; after him everything fell apart' (*'Bismarck hatte dem ganzen irrationalen Apparat noch leidliche Einbeit gegeben; nach ihm fiel alles auseinander'*).

WILHELMINE GERMANY

Ultimately, the first emperor and the first chancellor got on well together. From 1871 to 1888 they formed a team that proved able to withstand even considerable differences of opinion. The Prussian Junker Bismarck 'was his entire life aware that his family had already been land-owners in the Marches for a few hundred years before the Hohenzollern were given them in fief in 1415 by some far-away emperor.'⁶² Nevertheless, the Prussian monarchy meant a lot to him and he had developed a kind of liking for the aged emperor William I.⁶³ The latter for his part knew that Bismarck was the founder of the empire (*Reichsgründer*) and that the empire was referred to as the Bismarckian Empire. Bismarck was 'more important than me' (*wichtiger als ich*).⁶⁴

But then in 1888 there appeared on the stage, in the person of his grandson William II, a new leading man who was mainly obsessed by one idea: Bismarck must go, and go as soon as possible. 'I'll give the old man six months to catch his breath and then I shall govern myself', he told the court chaplain.⁶⁵ It took a little longer, but in March 1890 he invited Bismarck to tender his resignation. He did not do so himself, but had the bad news given to Bismarck by his chief of staff Lucanus, whom Bismarck himself had recommended to William as a kind of spin doctor *avant la lettre* with the words, 'He'll pull the chestnuts out of any fire for you'.⁶⁶

To a certain extent enabled in this by the developments in the empire outlined above, William II strove for 'personal rule' (*ein persönliches Regiment*). Much has been written about the idiosyncratic personality of the new emperor, who was a walking contradiction.⁶⁷ An immeasurable overestimation of his own abilities yet inner uncertainty, courteous yet rude, highly intelligent yet lacking any awareness of reality, etc. His mother feared the worst for the future, telling Donna Laura Minghetti, the mother-in-law of the later chancellor Bülow: 'My son will be the ruin of Germany'.⁶⁸ Prince Chlodwig zu Hohenlohe-Schillingsfürst was worried

⁶² Michael Stürmer, *Das ruhelose Reich. Deutschland 1866-1918*, Siedler Deutsche Geschichte, part 9 (1998), p. 237, 'Bismarck war sich zeitlebens bewusst, daß seine Familie schon ein paar hundert Jahre in der Mark begütert war, bevor die Hohenzollern 1415 damit belehnt wurden von einem fernen Kaiser'. 'The Marches' are the Brandenburg Marches, the heart of the Hohenzollern territories.

⁶³ Mast, *supra* n. 54, p. 213-214.

⁶⁴ Stürmer, *supra* n. 62, p. 238.

⁶⁵ Mast, *supra* n. 54, p. 229. 'Sechs Monate will ich den Alten verschmaufen lassen, dann regiere ich selbst.'

⁶⁶ Bülow, *supra* n. 10, part 1, p. 61. 'Der holt Ihnen die Mütze aus jedem Dreck.'

⁶⁷ See in this respect Mast, *supra* n. 54, p. 231. The most dangerous thing Bismarck found about the emperor was that 'one minute he is open to none, the next to any influence and puts words into action straightaway, with the result that there is no constancy' (*daß er dauernd keinem, momentan jedem Einflusse zugänglich ist und alles sofort zur Tat werden läßt, womit jede Stetigkeit aufhört*). In his memoirs Bülow goes on non-stop about the emperor's whims.

⁶⁸ Bülow, *supra* n. 10, p. 79: 'Mon fils sera la ruine de l'Allemagne.'

as well. As prime minister of Bavaria in the period 1866-1870 he had had to deal with the not quite normal King Ludwig II and when in 1894, advanced in years, he became chancellor he feared that something similar was now hanging over him in the Reich. He repeatedly and insistently put to foreign secretary Bülow the pressing question: 'Is the emperor insane?' (*Ist der Kaiser geisteskrank?*). Bülow did not think so, but like all the other Prussian and imperial ministers he had his hands full with the emperor. He considered holding the emperor in check the chancellor's principal task.⁶⁹

William II attached great value to his position of commander-in-chief of the armed forces (*oberster Kriegsherr*), which was anchored in the constitution and was outside the scope of the chancellor's responsibility. He was mad about military display and uniforms, and did not mind changing clothes a dozen times a day, indeed he looked upon it as a treat.⁷⁰ Something else he found very important were the regular imperial manoeuvres (*Kaisermanöver*), and especially the manoeuvre attacks (*Manöverattacken*), in which a carefully choreographed leading role was always set aside for the emperor, but which militarily were of no value. His bellicose behaviour and blustering speeches inevitably created the impression that the emperor was war hungry, but the consensus today is that behind this martial display and the playing at soldiers in peacetime hid an essentially pacifist personality.⁷¹

⁶⁹ Ibid., p. 140, 179, 269, 354, 491. On p. 354 Bülow writes: 'at no time did habituation dull my senses to the risks to the country inherent in the emperor's nature' (*daß keine Gewöhnung mich je abgestumpft hat gegen die Gefahren, die in der Natur des Kaisers für das Land lagen*) and on p. 491: 'Like almost all of the German sovereigns, like Bismarck, like almost all of our elder statesmen, King Albert (viz. of Saxony, L.P.) considered the proper treatment of the emperor to be the chancellor's principal task' (*Wie von fast allen deutschen Fürsten, wie von Bismarck, wie von fast allen unseren älteren Staatsmännern wurde auch von König Albert die richtige Behandlung des Kaisers als die wichtigste Aufgabe des Reichskanzlers angesehen.*)

⁷⁰ Virginia Cowles, *The Kaiser* (1963), p. 133.

⁷¹ On William and military affairs see Bülow, *supra* n. 10, part 1, p. 57, 77, 128, 354, 365, 444, 570, 623, and part 3, p. 291. In wartime everything changed and the commander-in-chief was soon sidelined by the real military leaders. As early as Nov. 1914 Wilhelm said to Prince Max of Baden: 'The general staff tell me nothing and don't ask me, either. If people in Germany imagine that I command the army, they are sorely mistaken. I drink tea and saw wood and go for a walk, and then I find out from time to time that this and that has been done, just as the gentlemen please.' (*Der Generalstab sagt mir gar nichts und fragt mich auch nicht. Wenn man sich in Deutschland einbildet, daß ich das Heer führe, so irrt man sich sehr. Ich trinke Tee und säge Holz und gehe spazieren, und dann erfahre ich von Zeit zu Zeit, das und das ist gemacht, ganz wie es den Herren beliebt.*) So says Mast, *supra* n. 54, p. 240, and he continues: 'The emperor of Germany and king of Prussia had become superfluous. William II had never had any military significance... In the end the emperor was nothing more than a mere "idea", as General Quartermaster Wilhelm Gröner put it in 1918.' (*Der Deutsche Kaiser und preußische König war überflüssig geworden. Wilhelm II. hatte niemals militärische Bedeutung gehabt... Am Ende war der Kaiser nur noch eine bloße "Idee", wie es 1918 der Generalquartiermeister Wilhelm Gröner ausdrückte.*)

On the face of it the emperor was the incarnation of the monarchical principle and his every effort was aimed at reinforcing that impression: 'There is only one lord and master in the Reich and I will tolerate no other' (*Einer nur ist Herr im Reich, keinen anderen dulde ich*).⁷² In reality his influence was limited, for one thing because the Reichstag was increasingly exerting its powers.⁷³ And it was impossible to halt modern developments in the member states either, although the monarchic forms and institutions were retained. The courtesies were observed, including those in the relationship between the Reich and its member states. For example, Bülow describes in detail how, following his appointment as chancellor, he went to visit various German capital cities: 'As soon as business permitted, I entered upon my tour of the larger German courts',⁷⁴ namely those of the kingdoms of Bavaria, Württemberg and Saxony, and the grand duchies of Baden and Hessen-Darmstadt.⁷⁵ But a few years earlier the diplomat Count Anton Monts, Prussian envoy in Munich, had written to Bülow about the realization that 'if Berlin falls, the monarchies here in Munich, Stuttgart and Greiz will also collapse like a house of cards'.^{76, 77} At the end of the First World War the time had come and the monarchical principle took a severe beating.

EXIT THE KINGS

In July 1918 Russia's imperial family was murdered by the Bolsheviks. On 10 November 1918, following nerve-racking talks at German High Command in Spa, Emperor William II went into exile in the Netherlands, where on 28 November he signed his abdication at Huis Amerongen.⁷⁸ On 11 November 1918 the Austrian emperor Charles I signed – in pencil and hence erasable – a proclamation in which he renounced participation in the affairs of state in German-speaking Austria. After nightfall, two rented cars took the emperor and his family to their hunt-

⁷² Koch, *supra* n. 53, p. 27. For a collection of William's verbal grandstanding see *Die Chronik der Deutschen* (1995), p. 685 and p. 690.

⁷³ Despite denigrating remarks made by the emperor, such as the following, contained in an uncoded telegram to chancellor Bülow following the announcement of the 1903 election result: 'It is a matter of complete indifference to me whether there are red, black or yellow monkeys jumping around in the Reichstag cage' (*Es ist mir vollständig gleichgültig, ob in dem Reichstagskäfig rote, schwarze oder gelbe Affen herumspringen*) see Bülow, part 2, p. 7.

⁷⁴ 'Sobald es mir geschäftlich möglich war, trat ich meine Rundreise bei den größeren deutschen Höfen an.'

⁷⁵ Bülow, *supra* n. 10, p. 476 et seq.

⁷⁶ 'daß, fällt Berlin, die monarchischen Kartenhäuser hier in München, in Stuttgart und Greiz nachstürzen.'

⁷⁷ *Ibid.*, p. 42.

⁷⁸ Huber, *supra* n. 30, part 3, p. 292 et seq. *Das Ende der deutschen Monarchie*, including on p. 312 the abdication proclamation (*Abdankungserklärung*) of Emperor William II and on p. 313 et seq. a fascinating report of proceedings at German High Command in Spa on 9 Nov. 1918 (*Protokoll über die Vorgänge im Großen Hauptquartier in Spa am 9. Nov. 1918*).

ing lodge Eckartsau on the Marchfeld, where in 1278 Rudolf von Habsburg had laid the foundation for the Habsburgs' power base with a resounding military victory over Ottokar of Bohemia.⁷⁹

As Count Monts had foreseen, the fall of the emperor of Germany and king of Prussia led to the collapse of all the other German monarchies.⁸⁰ Particularly painful was the course of events in Bavaria:

King Ludwig III of Bavaria owed the fact that he was the first of the German monarchs to flee the throne of his fathers to the incompetence of his ministers, and in circumstances that were anything but dignified. There was no-one who would have dared to take in the king and his seriously ill queen. His entourage sent him off at night by car. The car fell into a ditch and had to be pulled out by a farmer with the aid of a cow...⁸¹

King Frederick Augustus of Saxony bade farewell to his people with the words, 'Well, sort your damn business out yourselves' (*So macht denn Euern Dreck alleine*). The sad part about it was that various German courts, assuming they would survive the world war, had to the last minute carried on as of old pursuing their dynastic political interests by striving to expand their territories.⁸² Compared with

⁷⁹ Richard Reifenscheid, *Die Habsburger. Von Rudolf I. bis Karl I.* (1994), p. 18, p. 351, p. 352; Dorothy Gies McGuigan, *Familie Habsburg 1273 bis 1918* (1994), p. 625-626. On 24 March 1919 the former emperor and his family left Austria as exiles by train heading for Switzerland. A moving account of this is given by Stefan Zweig, *Die Welt von Gestern*, 33rd edn. (2002), p. 323 et seq. From Switzerland Charles made two attempts in 1921 to regain his Hungarian throne, which resulted in him being banned to the island of Madeira. Not as far as St. Helena, granted, but not exactly next door either. In Feb. 1938 his son, Otto von Habsburg-Lothringen, made a vain attempt at a comeback for his family from his place of exile in Steenokkerzeel near Brussels. In Doorn, former emperor William II also hoped for a restoration of the monarchy, but took no action. Almost as old as the Habsburg dynasty was that of the Osmands, rulers of the Ottoman or Turkish empire. They also had to step down after the First World War: in 1923 Mustapha Kemal Pascha became president of the Republic of Turkey.

⁸⁰ Hans Riehl, *Als die deutschen Fürsten fielen* (1979); Richard M. Watt, *The Kings Depart. The Tragedy of Germany: Versailles and the German Revolution* (1968).

⁸¹ Bülow, part 3, p. 304. 'König Ludwig III. von Bayern dankte es der Unfähigkeit seiner Minister, daß er als erster der deutschen Fürsten fluchtartig den Thron seiner Väter verlassen mußte, noch dazu unter Umständen, die alles eber als würdig waren. Es fand sich niemand, der ihn und die schwerkranke Königin aufzunehmen gewagt hätte. Seine Umgebung schickte ihn nachts im Auto fort. Das Auto fiel in einen Graben. Ein Bauer mußte geholt werden, der mit Hilfe einer Kuh das Fahrzeug wieder flott machte...'. For further details on the deposition of Bavaria's Wittelsbach dynasty see Hans and Marga Rall, *Die Wittelsbacher. Von Otto I. bis Elisabeth I.* (1994), p. 360.

⁸² Bülow, *supra* n. 10, p. 142: 'A desire for expansion and hunger for lands had been inherent in every German ruler and dynasty for centuries and they flared up briefly once more just before their collapse, not only in the West, but also in the East, where Kurland, Finland, Lithuania aroused their desire.' ('Vergrößerungstrieb und Ländergier waren allen deutschen Fürsten und Dynastien seit Jahrhunderten eigen

this, the final act of the former German sovereigns is more commendable: a letter to Britain's King George V requesting him not to prosecute William II as a war criminal before an international court.⁸³ To end on a positive note: 'Most of the German sovereigns returned to their lands and lived with their families among their former subjects.'⁸⁴

ENTER JUAN CARLOS

As has already been noted Franco ruled without a constitution, although over the years seven important laws were enacted, which were referred to as *Leyes Fundamentales* or Fundamental Laws. But under Franco there was even less constitutional government than there had been before. The Fundamental Laws acted more as an ideological business card than as a constitution. One of these laws was the 1947 Law on Succession to the Headship of State (*Ley de Sucesión en la Jefatura del Estado*). Every dictator is faced with the question of how things are to carry on after him. Franco was a monarchist. During ceremonies in the Throne Room (*Sala del Trono*) in the royal palace in Madrid he never sat on the throne but remained standing in front of it. Although the Caudillo had more power than any Spanish king had ever had, a king he was not.

It was Franco's view that the monarchy should be restored in Spain. For this reason he wrote in Article 1 of the Law on Succession: 'Spain...is a State...which, in keeping with its tradition, declares itself to be constituted as a Kingdom.'⁸⁵ So the country was once again declared to be a kingdom, but for the time being one without a king as Franco simply remained Caudillo. However, not even caudillos

und flackerten kurz vor ihrem Zusammenbruch noch einmal auf, nicht nur im Westen, sondern auch im Osten, wo Kurland, Finnland, Litauen die Begierden reizten'. Koch, *supra* n. 53, p. 29 and 135 et seq. writes *inter alia*: 'The last-minute efforts made by the federal states to increase their power and carry through the expansion of their dynastic territories assumed grotesque forms' ('*Die Bestrebungen der Bundesstaaten, noch in letzter Minute Macht und Landvergrößerungen ihrer Dynastien zu fördern und durchzusetzen, nahmen groteske Formen an*').

⁸³ The letter, dated 1 Aug. 1919, is printed in Koch, *supra* n. 53, p. 149. The kings and princes wrote, *inter alia*, 'We do not wish to remind Your Majesty that the English royal house is also one of our circle' ('*Wir wollen E.M. nicht daran erinnern, daß auch das Englische Herrscherhaus unserer Mitte entstammt*'), and warned against harming the monarchical principle, which had been hallowed down the centuries: 'the main thing now is to steer the seriously endangered monarchical principle safely into better times' ('*es gilt, das jetzt so schwer bedrohte monarchische Prinzip in bessere Zeiten hinein zu retten*'). See also Cowles, *supra* n. 70, p. 407 et seq. and Harold Nicolson, *King George V* (1952), p. 337, which reproduces an apparently later version of the letter, which is in English and differs somewhat.

⁸⁴ Koch, *supra* n. 53, p. 150: '*Die meisten deutschen Fürsten kehrten in ihre Länder zurück und lebten mit ihren Familien unter ihren ehemaligen Landeskindern*.' See also *Deutsche Geschichte* (Heinrich Pleticha), part 5, p. 251: 'No heads rolled and people mostly parted without animosity or personal hatred' ('*Es rollten keine Köpfe, und meistens trennte man sich ohne Groll und persönlichen Haß*').

⁸⁵ '*España...es un Estado...que, de acuerdo con su tradición, se declara constituido en Reino*.'

are blessed with eternal life, but as regards who ‘in that case’ was to become king, Franco kept everyone on tenterhooks. When in July 1969 he finally decided in favour of Don Juan Carlos Victor María de Borbón y Borbón, grandson of King Alphonse XIII, who had fled in 1931, it was a bitter pill for his father Don Juan de Borbón y Battenberg, who was living in exile in Portugal and who, dynastically, was naturally first in line. Franco died in 1975. It was not until well after Juan Carlos had ascended the throne that his father waived his rights, at a ceremony held in Zarzuela Palace (14 May 1977). The new Spanish constitution subsequently determined that the Spanish crown would devolve to the descendants of Juan Carlos, ‘legitimate heir of the historical dynasty’ (*legítimo heredero de la dinastía histórica*). It was not the dynasty that was declared legitimate, that was only ‘historical’, which is hard to deny. In this historical dynasty it was Juan Carlos then who was the legitimate successor, as was true following Juan de Borbón’s renunciation of his rights. So although the monarchical principle did not prevail by its own virtue, but by virtue of the constitution which, as the preamble states, is based on the will of the people (and consequently was adopted by referendum), it remains a fact that in Spain the monarchy was recently re-introduced, and that is not an everyday occurrence.⁸⁶



⁸⁶ Cf. W.H. Roobol, ‘De avondschemer van de Europese monarchie’, in L. Prakke and A.J. Nieuwenhuis (eds.), *Monarchie en Republiek* (2000), p. 112.