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1848/49: Frankfurt's Paulskirche as a Reference Site in German Constitutional History

Abstract:
The 19th century is – not only in Germany – the century of the positivisation of fundamental rights. It began in the constitutions of the southern German states (until 1820) and ended at the end of this "long" 19th century with the Weimar Constitution of 1919 (*Weimarer Reichsverfassung*). On this path, the year 1848 marks a very decisive date for the German tradition of fundamental rights. On the one hand, the catalogue of fundamental rights adopted by the Paulskirche Assembly can be understood as a reaction to the limited validity of fundamental rights in early constitutionalism (see I.) by developing fundamental rights as subjective individual rights (see II.). On the other hand, this catalogue of fundamental rights is the reference document against which later German constitutions had to be measured and still have to be measured today (see III.): The Constitution of the German Empire of 1871 (Bismarck *Verfassung*), which did not contain a catalogue of fundamental rights, as well as the Weimar Constitution of 1919 and the Basic Law of Bonn of 1949 (*Bonner Grundgesetz*).
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1. The Constitutions of the Southern German States

After the Congress of Vienna and the reorganisation of Europe following the Napoleonic Wars, constitutions came into force in four southern German member states of the German Confederation (*Deutscher Bund*); the German model of constitutional monarchy had thus come into being. These were the Constitution for the Kingdom of Bavaria of 26 May 1818[223] (although it should not be forgotten that this was already the second Bavarian constitution after the first constitution of 1808), the Constitution for the Grand Duchy of Baden of 22. August 1818,[224] the Constitution for the Kingdom of Württemberg of 25 September 1819[225] and the Constitution of the Grand Duchy of Hesse of 17 December 1820.[226] What these constitutions have in common is that they contain catalogues of fundamental rights, including the Bavarian Constitution of 1818, which will be discussed below by way of example.

Title IV of this constitution, which deals with "general rights and duties", regulates numerous civil rights, which even today should not be missing from any catalogue of fundamental rights. Title IV § 1 BayVerf 1818 links these rights to Bavarian citizenship, the acquisition and loss of which is first dealt with in the following norms. Subsequently, Title IV § 8 BayVerf 1818 regulates "The state grants every inhabitant security of his person, his property and his rights. No one may be deprived of his ordinary judge. No one may be prosecuted or arrested except in the cases determined by the laws, and in the form prescribed by law. No one may be forced to cede his private property, even for public purposes, except after a formal decision by the assembled Council of State, and after prior compensation, as such is determined in the decree of 14 August 1815."[227] Somewhat awkwardly formulated, of course, "life, liberty and property" can be recognised here from

223 Bayerisches Gesetzblatt 1818, p. 101 ff.
224 Regierungsblatt für das Großherzogthum Baden 1818, p. 101 ff.
225 Staats- und Regierungs-Blatt 1819, p. 634 ff.
226 Großherzogliches Hessisches Regierungsblatt 1820, p. 535 ff.
227 Der Staat gewährt jedem Einwohner Sicherheit seiner Person, seines Eigenthums und seiner Rechte. Niemand darf seinem ordentlichen Richter entzogen werden. Niemand darf verfolgt oder verhaftet werden, als in den durch die Gesetze bestimmten Fällen, und in der gesetzlichen Form. Niemand darf gezwungen werden, sein Privat-Eigenthum, selbst für öffentliche Zwecke abzutreten, als nach einer förmlichen Entscheidung des versammelten Staatsraths, und nach vorgängiger Entschädigung, wie solches in der Verordnung vom 14. August 1815 bestimmt ist.

John Locke's conception. The following regulation (Title IV § 9 BayVerf 1818) then concerns religion: "Every inhabitant of the kingdom is assured complete freedom of conscience; domestic prayer may therefore not be forbidden to anyone, whatever religion he may profess. The three Christian church societies existing in the kingdom enjoy equal civil and political rights. The non-Christian members of the faith have complete freedom of conscience, but they only receive a share in the civil rights to the extent that they are assured of the same in the organic edicts on their admission to the state society."[228]

The significance of such an early constitutional catalogue of fundamental rights, albeit a brief one, can only be accurately assessed if one considers the function of these fundamental rights in the constitutional structure. Otherwise, there is a danger of proceeding unchecked from a contemporary conception and interpreting these rights as defensive rights, rights of freedom or rights of participation vis-à-vis the state, which protected a civil sphere of freedom. The context in which these constitutions came into being is important here: they are not constitutions that were fought for through bourgeois revolutions, but products of monarchical reform.[229] This means that they can be described more as "constitutional letters" (*Verfassungsbriefe*) than as constitutions, even if it is not overlooked that Württemberg, with its constitution based on the estates, is a certain exception here, as is clear from the preamble[230] to this constitution, which explicitly refers to the consultations

228 Jedem Einwohner des Reichs wird vollkommene Gewissens-Freyheit gesichert; die einfache Haus-Andacht darf daher Niemanden, zu welcher Religion er sich bekennen mag, untersagt werden. Die in dem Königreiche bestehenden drey christlichen Kirchen-Gesellschaften genießen gleiche bürgerliche und politische Rechte. Die nicht christlichen Glaubens-Genossen haben zwar vollkommene Gewissens-Freyheit, sie erhalten aber an den Staatsbürgerlichen Rechten nur in dem Maaße einen Antheil, wie ihnen derselbe in den organischen Edicten über ihre Aufnahme in die Staats-Gesellschaft zugesichert ist.

229 Böckenförde 1976, p. 112 ff., p. 116.

230 Nachdem nun über den Entwurf einer den früheren vertrags- und gesetzmäßigen Rechten und Freiheiten Unseres alten Stammlandes, so wie der damit vereinigten neuen Landestheile zugleich aber auch den gegenwärtigen Verhältnissen möglichst angemessenen Grundverfassung die von der Stände-Versammlung hiezu besonders gewählten Mitglieder sich mit den von Uns ernannten Commissarien vorläufig beredet haben, und die hierüber erstatteten Berichte einerseits von Uns in Unserem Geheimen Rathe, andererseits von der vollen Stände-Versammlung vollständig und sorgfältig geprüft und erwogen, sodann die gesamten Wünsche Unserer getreuen Stände Uns vorgelegt worden sind, so ist endlich durch höchste Entschließung und allerunterthänigste Gegenerklärung eine vollkommene beiderseitige Vereinigung über folgende Punkte zu Stande gekommen.

with the participation of the estates. On the other hand, the aforementioned reference to John Locke already shows that the southern German monarchs appropriated the idea of innate, inalienable human rights in their constitutional letters, as it were. However, it was thus robbed of its revolutionary potential and used (or misused) as an instrument of securing power, in that the monarchs only accommodated the demand for the protection of human rights to the extent that was absolutely necessary to prevent revolutions. The monarchs of Bavaria, Baden, Württemberg and Hesse were in no need of social legitimation, but acted solely out of dynastic self-preservation interests.[231] It is true that freedoms were granted, but only to the extent that this was compatible with the monarchical principle.[232] The monarch remained the sovereign, the bearer of undiminished state power; again, the Bavarian constitution serves as an example, which regulates in Title II § 1 para. 1 BayVerf 1818: "The king is the head of the state, uniting in himself all the rights of state power [...]".[233] In exercising them, the monarch has merely voluntarily bound himself to certain rules. In the South German constitutions, therefore, it is precisely not the recognition of innate, inalienable human rights by the monarch that has taken place, but merely a monarchical grant ("the state grants", Title IV § 8 BayBerf 1818) of certain freedoms. [234]

Nevertheless, even if only granted by the monarch, these fundamental rights already mark a sphere that should be withdrawn from monarchical rule. These fundamental rights therefore already served to moderate and limit this power, even if only to a comparatively small extent. Thus, the classic defensive function of fundamental rights already appears in them. Defensive rights, however, that not every individual citizen could assert. A corresponding constitutional jurisdiction did not yet exist and would hardly have been compatible with the monarchs' claim to power. The fundamental rights thus functioned first and foremost as programme sentences (*Programmsätze*). They only came into being at all through the concretisation in private law,[235] thus required, as it were, the activation by the legislature. It was only through this that the citizen's sphere of freedom was actually established. The defensive function of fundamental rights was exhausted in

231 Grimm 1987, p. 308 ff., p. 311 f.
232 Hilker 2005, p. 314.
233 Der König ist das Oberhaupt des Staats, vereiniget in sich alle Rechte der Staatsgewalt [...].
234 Grimm 1987, p. 308 ff, p. 312.
235 Grimm 1988, p. 133.

this objective dimension, this function of an objective limit to state power, an objective guideline for legislation.[236]

Accordingly, there can be no question of subjective individual rights in the German constitutional legislation of the early 19th century. Only this view corresponds to the character of these early constitutional constitutions, which were not based on the model of treaty (which admittedly prevailed in contemporary constitutional law doctrine[237]), with which the individual citizens would have transferred their rights (and not certain inalienable rights, which the state consequently had to respect). Rather, the monarchical principle with the granting of fundamental rights by the monarch as the born sole holder of state power. Subjective rights that the individual could assert against the state and thus against the monarch are not compatible with such a system. Although some formulations of the Bavarian constitution are reminiscent of Locke's model, it is based on a completely different concept.

However, research on constitutional history shows that in constitutional reality, fundamental rights nevertheless took on a life of their own, as it were, because these fundamental rights awakened a need for citizens' active participation.[238] In the literature on constitutional history, the constitutional monarchy is generally regarded as a transitional form that had to lead to a further development towards popular sovereignty and parliamentary democracy. The constitutional monarchy was, as it were, a compromise between the monarchical principle and popular sovereignty, which developed tensions that had to be resolved in the long run.[239] This thesis is confirmed by an examination of the early constitutional fundamental rights.[240] For these, too, were designed for expansion and further development. These fundamental rights were thus, as it were, the oil that could fuel the tensions between the monarchical principle and the democratic principle. In the end, according to Hilker, it was the fundamental rights that sharpened the question of legitimacy.[241] For the monarch had not made a binding commitment, but he had stirred up expectations, made a promise. And as long as this

236 Hilker 2005, p. 327 ff.
237 Grimm 1987, p. 308 ff, p. 312.
238 Hilker 2005, p. 347.
239 Böckenförde 1976, p. 112 ff.
240 Hilker 2005, p. 348.
241 Hilker Berlin 2005, p. 343.

promise is not completely fulfilled, the legitimacy of the monarch becomes more and more questionable.

2. Subjectivisation of fundamental rights in the Paulskirche

In other words, the path towards subjectification (*Subjektivierung*[242]) of fundamental rights had long since begun in the 1840s, when the National Assembly, elected after the March Revolution of 1848, met for the first time in the Paulskirche in Frankfurt on 18 May 1848 and from the very beginning claimed for itself the sole competence for constitution-making in the German nation state that was now to be established.[243] This assembly thus saw itself, as it were, as the parliament of a German state in the process of being established, and in this function also swiftly set up a provisional central government.[244]

As early as 3 July 1848, the Assembly began its deliberations on fundamental rights at,[245] thereby already showing the importance it attached to these rights. The safeguarding of civil liberties was to take precedence over the solution of the – ultimately unsolvable – questions of state organisation law of a German nation state (which in retrospect was to prove very unwise).[246] Before a constitution was fully drafted, the fundamental rights were therefore already put into effect on 27 December 1848,[247] before they were then included as the second part in the constitution of 28 March 1849 (*Paulskirchenverfassung*)[248], which was never able to take effect[249] and had already failed at the time of its promulgation because the Prussian King Wilhelm IV had made it clear that he would not accept the office of head of state (Emperor of the Germans) provided for in the constitution.[250] He did

242 Gerber 1852, 33.
243 Kotulla 2006, marginal no. 275.
244 Reichsgesetzblatt 1848 page 3.
245 Kotulla 2006, marginal no. 280.
246 Kröger 1988, p. 72.
247 Reichsgesetzblatt 1848 p. 49 ff.
248 Reichsgesetzblatt 1849 p. 101 ff.
249 Kotulla 2006, para. 300 ff.
250 Prettenthaler-Ziegerhofer 2013, p. 76.

not want to be emperor by grace of a democratically elected parliament.[251] "In an effort to secure freedom before unity had yet been won, the Frankfurt National Assembly gave away freedom and unity at the same time."[252]

The catalogue of fundamental rights in the constitution of 1848/49 was very extensive and detailed, not only in comparison to the state constitutions that had come into force up to that time, but also in comparison to the catalogues of fundamental rights in the German constitutions of 1919 and 1949 (§§ 130-189 PKV). These fundamental rights were not human rights, because § 130 PKV decrees as a head norm that the following rights are guaranteed to the "German people". Accordingly, similar to the Bavarian Constitution of 1818, the constitution initially regulated in Article I of the catalogue of fundamental rights (§§ 131-136 PKV) who should belong to the German people as well as the legal positions flowing directly from citizenship, such as the right to vote or the right of settlement.

Before regulating the rights of freedom, Article II (§ 137 PKV) first standardises the principle of equality; this model will later be followed by the Weimar Constitution (Art. 109 WRV) and the Basic Law (Art. 3 GG). "Germans are equal before the law."[253] (Art. 137 para. 3 PKV). This wording could be linked to Art. 18 of the Hessian Constitution of 1820. While the provision "All Hessians are equal before the law"[254] forms the only paragraph of this article, two paragraphs precede the general requirement of equality in the Constitution of 1848: "(I.) Before the law there shall be no distinction of estates. The nobility as a class is abolished. (II.) All privileges of class are abolished."[255] At the same time, however, this constitution was intended to order the continuation of the monarchy (as a constitutional monarchy) and not to establish a democratic state. Nor was a privileged position for other princes or members of estates assemblies to be excluded.[256] Here, the tensions in the construct of the constitutional monarchy become abundantly clear.

This is followed in Article III ff. (§§ 138 ff. PKV) by the rights of freedom. § Section 138, paragraph 1 of the PKV states at the outset: "The freedom of the

251 Zippelius 1994, p. 115.
252 Huber 1988, p. 774
253 Die Deutschen sind vor dem Gesetze gleich.
254 Alle Hessen sind vor dem Gesetz gleich.
255 (I.) Vor dem Gesetze gilt kein Unterschied der Stände. Der Adel als Stand ist aufgehoben. (II.) Alle Standesvorrechte sind abgeschafft.
256 Hilker 2005, p. 355.

person is inviolable."[257] This formulation will become legally binding with Art. 114 para. 1 sentence 1 WRV in 1919 and has been found in the Basic Law (Art. 2 para. 2 sentence 2 GG) since 1949. However, not in such a prominent place. Hilker[258] sees in it the programmatic statement that it was "no longer just about the protection of individual rights, but about a sphere in which the state was only allowed to intervene in exceptional cases and which had been shielded by judicial rights. Part of this freedom was the "full freedom of faith and conscience" (Art. 144, Paragraph 1 PKV), a guarantee that clearly went beyond the guarantee of the Bavarian King from 1818 and was finally to become legally binding in Article 135, Sentence 1 WRV. Every confession was protected, not just the three Westphalian Christian confessions, and "in common domestic and public practice" (Art. 145, Paragraph 1 PKV). Civic rights or the ability to hold certain offices were no longer tied to membership of a particular religious community. Not only freedom, but also property as the basis for action, especially of the emerging bourgeoisie, was now to be comprehensively protected: "Property is inviolable."[259] (Art. 164 para. 1 PKV). This guarantee was flanked by regulations on expropriation, which was to be carried out "only for considerations of the common good, only on the basis of a law and against just compensation" (Art. 164 para. 2 PKV). Here too, therefore, we no longer encounter only individual guarantees of the monarch, but the protection of fundamental rights to safeguard the sphere of civil liberty. In order to ensure the activation of fundamental rights, Parliament provided strict deadlines for the adaptation of legislation to fundamental rights. These regulations can be found in the Introductory Act of 27 December 1848,[260] where adjustments were ordered "within six months" or at least "as soon as possible".

Particularly impressive, however, is the inconspicuous provision of § 126 letter g PKV: "The jurisdiction of the Reichsgericht includes [...] actions brought by German citizens for violation of the rights granted to them by the Constitution."[261] Details were to be regulated by an Imperial Act, which, however, never came into being. This is an early form of the constitutional complaint (*Verfassungsbeschwerde*) regulated under the Basic Law in Germany (and numerous

257 Die Freiheit der Person ist unverletzlich.
258 Hilker 2005, p. 355 f.
259 Das Eigenthum ist unverletzlich.
260 Imperial Law Gazette 1848 p. 49.
261 Zur Zuständigkeit des Reichsgerichts gehören [...] Klagen deutscher Staatsbürger wegen Verletzung der durch die Reichsverfassung ihnen gewährten Rechte.

other states).[262] It is precisely this regulation that shows that the fundamental rights provided for by the Paulskirche Constitution were rights with which every individual citizen should be able to protect himself effectively against encroachments of state power. It is therefore a question here of the protection of fundamental rights, which are no longer granted by the monarch and the constitution, but are recognised by it (in contrast to the early South German constitutions) as pre-constitutional, subjective individual rights.

3. After 1848/49

Numerous individual German states had welcomed the legal guarantee of fundamental rights and also published the law auf December 1848, but not the large states such as Prussia, Austria or Bavaria. Against the background of the new constitutional situation, this was de jure insignificant, but de facto a problem. The model of recognising pre-constitutional fundamental rights could not be implemented against these states. When the revolution was crushed and the old constitutional order of the German Confederation was restored, mainly at the instigation of Austria, the law of 27 December 1848 was formally abolished by federal decree of 23 August 1851.[263] The introduction of fundamental rights was to be abolished in all member states (the German Confederation did not have its own legislative competence in this matter and was therefore dependent on the action of the legislators of the individual states).

On the other hand, the constitution of Prussia,[264] which was revised on 31 January 1850, remained in force and now contained a catalogue of fundamental rights for the first time. However, this was again a catalogue of rights that the monarch granted his citizens (against revolutionary efforts) in voluntary self-restraint, not the recognition of pre-constitutional rights. Nor was the subjective-individual dimension of fundamental rights developed. The German Reich, which in 1871 did not emerge from a bourgeois revolution but from "blood and iron", was based on a constitution that had the character of

262 Huber 1988, p. 835; Willoweit 2005, p. 304.

263 Bundesbeschluss über Maßregeln zur Wahrung der öffentlichen Sicherheit und Ordnung im Deutschen Bund of 23 August 1851 (so-called Bundesreaktionsbeschluss), Huber 1986, no. 2. Bundesbeschluss über die Aufhebung der Grundrechte des deutschen Volkes of 23 August 1851, p. 2.

264 Collection of Laws 1850, p. 17 ff.

a confederation of princes, as the preamble shows.[265] Accordingly, this constitution only contained a part on organisational law, but not a catalogue of fundamental rights. The granting of such rights in the course of voluntary self-restraint was the responsibility of the respective monarch and was to be regulated in the constitutions of the federal states (*Landesverfassungen*).

It was only after the abolition of the monarchy following Germany's defeat in the Great War in autumn 1918 that it was possible to continue along the line of development of the Paulskirche. With the Weimar Constitution,[266] a constitution came into force in 1919 that was based on the principle of the sovereignty of the people (Art. 1 para. 2 WRV) and in which the basic rights as subjective rights (and basic duties as subjective duties) could be developed accordingly (regulated in Art. 109 ff. WRV). However, the Constitution lacks an explicit definition of this character of fundamental rights. Article 107 of the draft Constitution of 18 June 1919 had read: "Fundamental rights and duties shall be the guiding principles and limits for legislation, administration and the administration of justice in the *Reich* and in the *Länder*."[267] The final version no longer contains such a provision.[268] In contrast to the constitution of 1848/49, there was also no provision for a court to which every individual citizen could complain about the violation of a fundamental rights by state action. Therefore, jurisprudence was given the task of determining the legal nature of fundamental rights. It was assumed that the legal nature of each fundamental right was to be determined independently, depending on its wording.[269] The views held ranged from the predominantly held assumption that these fundamental rights were very largely merely "programme sentences" (*Programmsätze*), i.e. guidelines for policy, to the idea that the (or at least individual) fundamental rights contained directly applicable law.[270] The Weimar Constitution thus fell short of the standard of subjective individual rights regulated in 1848/49.

The Basic Law of 23 May 1949 is – even after the reunification (*Wiedervereinigung* 1990) – the valid German constitution. Unlike the constitutions of

265 Cf. Haardt 2019, p. 213 ff.
266 Reich Law Gazette 1919 p. 1383 ff.
267 Die Grundrechte und Grundpflichten bilden Richtschnur und Schranken für die Gesetzgebung, die Verwaltung und die Rechtspflege im Reich und in den Ländern.
268 Cf. Stern 1988, p. 123.
269 See only Anschütz 1930, p. 453 ff.
270 Gusy 1993, p. 163 ff.

1848/49 and 1919, it places the fundamental rights section before the provisions of state organisation law as the first section. This seems strange, since the state must first be constituted by means of provisions of organisational law before this state can then be assigned the function of protecting pre-constitutional fundamental rights. After the devastating events of the Nazi era, the role of fundamental rights was to be strengthened in this way. However, this alone would not necessarily have resulted in a more effective position for constitutional guarantees. In order to make fundamental rights – without exception – more than programme sentences or guidelines for politics, a corresponding norm was needed in the constitution itself. Article 1 para. 3 of the Basic Law ("The following fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law."[271]) established the catalogue of fundamental rights as directly binding law for all three branches of state power.

Moreover, if one wanted to emphasise the character of fundamental rights as subjective individual rights, the possibility had to be created that every citizen could complain about a violation of fundamental rights by state organs before a supreme court, which could initiate all necessary measures to remedy this violation of rights. The model for this was not only section 126, letter g of the PKV, but also the Bavarian Constitution of 1919 (*Bamberg Constitution*), where a constitutional complaint was regulated for the first time in an effective constitution: "Every citizen and every legal person having its seat in Bavaria shall have the right of complaint to the State Court if they believe that they have been harmed in their right by the action of an authority in violation of this Constitution."[272] (Art. 93 para. 1 sentence 1 BayVerf 1919). In the Federal Republic of Germany, this task is still assigned to the Federal Constitutional Court (*Bundesverfassungsgericht*), which was founded in 1951 (§§ 90 ff. BVerfGG, since 1969 Art. 93 para. 1 no. 4a GG). Thus – more than a hundred years after the bourgeois revolution of 1848/49 – the standard of fundamental rights that the deputies of the Paulskirche had striven for was finally achieved.

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271 Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.

272 Jeder Staatsangehörige und jede juristische Person, die in Bayern ihren Sitz hat, haben das Recht der Beschwerden an den Staatsgerichtshof, wenn sie glauben, durch die Tätigkeit einer Behörde in ihrem Recht unter Verletzung dieser Verfassung geschädigt zu sein.

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