

# The Belgian Constitution: Modern Constitutionalism's Greatest Triumph?

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The Belgian Constitution is a somewhat obscure object. Horst Dippel famously wrote that the 1831 Constitution was, at the time of its birth, seen as modern constitutionalism's 'greatest triumph'<sup>1</sup>. This reputation was strengthened in the next decades, when drafters of constitutions in countries as varied as Greece, Piedmont-Sardinia, Prussia, Romania, and Spain used the Belgian Constitution as a reference point and as an important source of inspiration<sup>2</sup>. Many contemporary scholars have confirmed this exceptional status and describe the founding of Belgium's liberal monarchy as a key moment in European constitutional history. However, despite its attractiveness, surprisingly little is known about the Belgian Constitution, its drafting process, and its intellectual and political context. While other constitutions of the era are increasingly investigated, the Belgian one remains severely underresearched. And with most of the existent research published in Dutch and in French, international audiences remain shut out. Thus, the history of the

Belgian Constitution is one that remains in need of being recounted, even though — it should be added — several scholars have recently broken the ice and made promising forays into studying the Belgian Constitution anew.

It is also noteworthy that, despite its rich history, the 1831 Constitution plays hardly any role in public debates in Belgium. In other countries, most prominently in the United States, the Constitution remains an important source of inspiration for political and legal debates, providing these debates with a coherent normative and historical background that is well-known by all participants. Moreover, the constitution, the values embedded in it and the intentions of its drafters, in many countries function as a catalyst for national cohesion and — sometimes even exaggerated — patriotism. Nothing of the sort exists in Belgium.

We believe this state of affairs is highly regrettable and the purpose of this special issue is precisely to offer at least the germs of a remedy. More research is necessa-

ry in order to establish whether or not the exceptional reputation of the Belgian Constitution in nineteenth-century Europe was actually deserved. Was it 'not worth spilling so much blood for so little result', as revolutionary hero Louis de Potter commented about the constitutional draft, or did this document really open up a new era in constitutional history? Clearly, our aim cannot be to offer an exhaustive discussion of all aspects of the Belgian Constitution, nor will the questions asked here receive a conclusive answer in this issue. But we do hope to provide exciting samples of new and promising research on some of the Constitution's most salient aspects.

In this first article, we intend to do two things. First, we will provide background information about the Belgian Constitution and point out these features which, according to us, would justify greater scholarly attention to it. Second, we will provide an overview of the recent research on the 1831 Constitution. We will pay special attention to a large interdisciplinary project on sovereignty in the Belgian Constitution, a research project that is currently ongoing at the KU Leuven (Belgium). The workshop of which this special issue is the outcome, was organized under the auspices of this project.

1. *The Belgian Constitution as an answer to contemporary challenges*

Like every other constitution, the Belgian Constitution is the outcome of a specific set of historical circumstances. Relating these circumstances is necessary to understand the originality of this particular constitution. After the Napoleonic Wars the major

international powers decided to merge the Southern with the Northern Netherlands in order to create a buffer state against French expansion on the continent. The union of both territories under King William I's United Kingdom of the Netherlands was formally concluded with the Constitution of 1815, which was relatively liberal for its time. Yet the southern territories, where the mood was dominated by the Catholic Church on the one hand and by a liberal minded, mostly francophone bourgeoisie on the other, soon became displeased with William's interference in religious matters (particularly vexing for Catholics), with his linguistic policies (which left little room for French in public life), and with a perceived economic preference for the north. Their frustration was further fuelled by the King's autocratic aspirations and the constitutional interpretations in support thereof. In reaction, the southern opposition increasingly focused on ministerial responsibility and on the political inviolability of the King, hoping to limit the monarch's political authority through constitutional principles. William's staunch refusal to take any of these grievances into account, stretched the gap between North and South, yet a lack of unity in the South (where the ideas and interests of liberals, republicans, and Catholics hardly aligned) prevented these oppositional forces from weighing on the decision making process. However, a quick and unexpected rapprochement between Catholics and liberals changed the playing field, enabled the 1830 revolution and consequently led to the proclamation of an independent Belgian state.

This gave the Belgian revolutionaries the sudden and unique possibility to set up a new state and draft its constitution accor-

ding to their own views. Many of the protagonists were under thirty and/or had a past in the liberal opposition press. It may very well have been the first time in modern history that such a young and relatively inexperienced group received the opportunity to put their political ideas into practice on such a scale. In line with their “modern” ambitions, they opted for a rather democratic form of constitution-making. Elsewhere, the constitutional framework had often been imposed by a monarch or was the result of negotiations between the monarch and a representative body. The situation under William had taught the Belgians to distrust both types of constituent process. The Provisional Government, which had decreed Belgian independence in October 1830 and had successfully filled the void after the departure of the Dutch authorities, proceeded rather democratically. A constituent assembly was created by means of direct elections. This assembly would evaluate and seriously amend a preliminary constitutional draft drawn up by a Constitutional Commission. The elected assembly or “National Congress”, named in reference to the constituent bodies of the Brabant Revolution of 1790 and the American Revolution, convened from November 1830 until the inauguration of Leopold I as King of the Belgians on 21 July 1831. It was formally dissolved at the installation of the first regular Parliament in September 1831. On 7 February 1831, the National Congress adopted the Belgian Constitution, which was then promulgated on 11 February 1831<sup>3</sup>.

The constituent debates within the Congress reveal that most congressmen were well acquainted with a wide range of classical and contemporary works in political theory. But it was certainly French political

thought, the terms and concepts associated with Montesquieu, Benjamin Constant and Felicité de Lamennais, that received the highest esteem in Congress<sup>4</sup>. French liberal ideas had been eagerly absorbed by the Southern opposition in the period from 1815 to 1830, and the Catholic liberalism of Lamennais had facilitated the Belgian Catholics’ support for a liberal constitutional project.

Despite this rather general approval for French liberal ideas, the constituent debates also revealed a number of deep-seated tensions<sup>5</sup>. The Congress was deeply divided on such topics as governmental form, the role of the monarch, the composition of the legislative chambers, and the extent of individual rights. On the one hand, this division of opinions testifies to the diversity of the represented groups. The ideological spectrum ranged from progressive republicans, over fashionable liberals all the way to a number of reactionary Catholics. But these tensions can also be related back to philosophical and political oppositions that were already present in Enlightenment political thought and that had only been reinforced after the events of the French Revolution. Four tensions at least structured the debates.

A first tension is that between continuity and tradition on the one hand, versus change and innovation on the other. The Belgian revolutionaries openly aimed for a clear-cut break with William’s dysfunctional constituted order<sup>6</sup>. The emergence of nation-states and social progress necessitated improvement of the political institutions as well. However, mindful of the French Revolution, the Belgian founding fathers were well aware that the 1789 vision of a social *tabula rasa*, based on abstract

rationalism and bloated concepts, would prove even more harmful. Consequently, debates in the National Congress abounded with references to purported Belgian traditions, customs, and *moeurs*. The congressmen liked to describe the Constitution, not just as a *performative* act (the act of “constituting” the new Belgian nation), but also as a *constative* act, that is, as a way of confirming the pre-existence of a Belgian nation with its specific nature and aspirations. The reference to a Belgian identity helped to legitimate the insurrection against the existing order. It also supported the choice for more “conservative” and time-tested institutions as moderating and stabilizing factors within the newly conceived legal order<sup>7</sup>: the founding fathers selected most constitutional elements from existing constitutions and renowned European publications. They saw this “conservatism” as a strength of the new constitutional edifice, for «when it comes to the institutions of a country, nothing is worth the risk of escapes»<sup>8</sup>. They even stated that they hardly cared for innovation but only wished a balanced political organization that promised the protection and the freedom of the citizen<sup>9</sup>. At the same time, these “conservative” references to “national customs, habits and institutions” can be read as part of a rhetorical strategy that served to legitimize the congressmen’s individual preferences and to persuade hesitant colleagues. It is for instance striking that allusions to “Belgian customs and habits” were not only made by advocates of the constitutional monarchy and the bicameral legislative system. Progressive supporters of the republic and the unicameral system equally exploited such references in defence of their case<sup>10</sup>. The reattachment to France was advocated

on the same basis<sup>11</sup>. And during the discussion on the royal candidates the argument was even introduced by the supporters of the German Duke of Leuchtenberg and the advocates of the French Duke of Nemours alike<sup>12</sup>. Thus, rather than the expression of a genuine conservatism, the multiple references to tradition, customs, and *moeurs* might well be mere symptoms of a then fashionable Montesquieu-esque way of reasoning. Moreover, all this “conservative rhetoric” hardly prevented the congressmen from introducing genuine innovations.

The issue of tradition vis-à-vis innovation was closely related to a second tension, namely the tension between stability and freedom. The very purpose of the Belgian Revolution was to free the citizens from an oppressive public authority, and the Constitution needed to safeguard that freedom. Moreover, the Belgian founding fathers were, by and large, sympathetic towards the modern liberties and the principle of “equality before the law” as established by the French Revolution. At the same time, they were terrified by the instability, the violence, and the excesses which that Revolution had produced. Even for the small but vocal minority of progressive radicals, absolute individual freedom and complete social equality reeked of political destabilization and social turmoil. Thus, the congressmen sought a specific middle ground between freedom and stability. Their paramount concern was always to find an adequate balance between these apparent opposites in the institutions of the new state.

A third tension, related to the latter, was the one between representation and participation. Does freedom necessarily involve effective self-governance and participation

in political power? Or should freedom be reduced to the individual enjoyment of civil rights in the private sphere? The French Revolution transferred sovereignty from the monarch to the people and reversed the top-bottom legitimation into a bottom-up logic<sup>13</sup>. Still, for the congressmen the French Revolutionary application of Rousseau's theories had proved too radical as it prompted structural socio-political instability. The congressmen therefore searched for a political system which curbed democracy's immanent risks, while upholding the political community as the source of legitimacy of the legal order.

A fourth concern was the dialectic between unity and pluralism. The French Revolution had operated on a unitary understanding of the nation (legitimizing a new body politic in opposition to the monarch) and furthered the centralization of power in the state (completing an evolution that, on certain readings, had been going on for centuries). After 1793, observers started to denounce the uniformity, the centralization, and the theoretical abstractions that had opened the door to the excesses of the Terror. The Belgian congressmen were familiar with such analyses. They understood that unity was necessary for the survival of the new state, that divisions and particularisms could lead to institutional impotence, and that stability and efficiency required the centralization of power<sup>14</sup>. But in their considerations on unity, the majority of Belgian congressmen were much more pragmatic than their French peers. There did not seem to be a real need for the same conceptual rigidity. This does not come as a surprise, considering that the Belgian Revolution was not directed against the monarchy as an institution, but against



*The crown rests on the constitution; detail of the statue of Leopold I in Bruxelles*

the authoritarian politics of one particular monarch. Moreover, the Union of Oppositions against William was supported by the liberal bourgeoisie, the catholic nobility and the clergy alike. Consequently, the National Congress wished for a unitary nation that only empowered the state in such a way that it could protect the citizen and that it would maintain the ideological syncretism. Yet, contrary to what has often been contended in historical and legal scholarship, the Belgian drafters' commitment to pluralism was not purely pragmatic, nor was it the mere outcome of a lack of conceptual rigidity<sup>15</sup>. Their determination to found the Belgian State was also grounded on a solid

and positive commitment to pluralism and division of powers, linked with an affirmative understanding of modern society as inevitable divided<sup>16</sup>. This also explains the popularity of Benjamin Constant among the congressmen. Constant's liberal theory, developed during the Restoration period, aimed to protect the individual against the state through the formation of an autonomous opinion in society and the autonomous judgement of the individual<sup>17</sup>.

Debates in the Belgian National Congress were played out on the field that is opened up by these four tensions. The Constitution that resulted from it, and which effectively combined older elements with new ones, can, by and large, be read as an attempt to formulate adequate answers to these concerns. It secured the essential principles of modern constitutionalism, such as individual rights, the entrenchment of the constitution and its recognition as the paramount law, sovereignty emanating from the political community (instead of the monarch), limited and representative government, separation of powers, judicial independence and impartiality<sup>18</sup>. Some of these features had – deliberately or not – been lacking in previous constitutional documents, allowing for power concentration into the hands of a few and legitimating authoritarian rule by means of a “constitutional front”<sup>19</sup>. Following Napoleon's rule and especially William's regime, the Belgian congressmen were well informed of how a constitution could be exploited as a “constitutional façade” for autocratic rule<sup>20</sup>. They understood very well that it was not simply a matter of drafting a supreme law that would guarantee the rights of citizens against the abuse of power through the classical checks and balances<sup>21</sup>. The result

was a unitary yet decentralized state with a sophisticated and balanced governmental system<sup>22</sup>. This system guaranteed stability through various constitutional institutions (a representative and accountable government; a bicameral legislative system; the king as *pouvoir neutre*; jury trial for criminal, political and press offences) as well as extraconstitutional mechanisms (a free press; an unhampered educational system; a certain autonomy for municipal authorities), while upholding the legal order's legitimacy through substantial respect for the citizen's individual rights. It is significant in this regard that the Belgian Constitution was amended for the first time in 1893, no less than sixty-two years after its promulgation in 1831. This consideration is all the more remarkable as the constituent labour was accomplished not only under great international pressure but also in an extremely short period of time.

## 2. *State of the art*

In light of these remarkable features, it is surprising that the Belgian Constitution has not been the object of more sustained academic research. In his chapter in the *Handbuch der europäischen Verfassungsgeschichte* (2012), Johannes Koll points out that there is no real tradition of writing constitutional history in Belgium<sup>23</sup>. In most Western countries, research into national constitutional history has developed into an autonomous field of study. In Belgium, aspects of the history of the Constitution are generally scattered over the domains of political science, political history and legal history, with little exchange between them. Today,

John Gilissen's two-volume *Le régime représentatif en Belgique*, published in the 1950's, is still the only comprehensive overview of Belgian constitutional history available<sup>24</sup>.

Nevertheless, although the history of the Belgian Constitution is still largely a history in need of writing, the field is far from barren and new terrain has been charted over the last decades. One can even speak of a modest boom in recent years. What characterizes this new research is its willingness to use methodologies that have been developed internationally in the fields of intellectual history, constitutional thought, and political theory, among others, and apply these contemporary modes of thinking to shake up received and mostly outdated ideas on the Belgian Constitution. In the field of Belgian national historiography, the shadows of Charles Faider, Henri Pirenne, and other nineteenth century grandees still loom large. In the field of constitutional interpretation, as practiced in Belgian law schools, many of the best available sources equally date to the nineteenth century and many contemporary handbooks echo commonplaces that have never been the object of serious scrutiny. It is only in recent years that some long-standing historical and legal narratives are being reconsidered and that a greater diversity of voices can be heard. In what follows, we single out a number of research strands that have greatly enriched the debate and identify some pressing research challenges for the future.

### 2.1. *Political context*

A first and rather important development, is that the Constitution's political prehistory is finally receiving the attention it deser-

ves. The Constitution was not created in a vacuum. Rather, its coming into being resulted from a complex interplay in the political, social and intellectual spheres during the fifteen years of union between Belgium and the Netherlands. The political context of the years leading up to the creation of the Constitution are now far better known. Recent years have seen an upsurge in publications about the Constitution's predecessor, the 1815 Fundamental Law. Celebrations of the latter's bicentennial in 2015, and of the United Kingdom of the Netherlands itself in the years 2013-2015, have been an incentive for research into the legal, political and intellectual climate in the United Kingdom of the Netherlands<sup>25</sup>.

The influence of the Fundamental Law on the formation of the Belgian Constitution, for instance, has been studied by Els Witte. She shows how the use of the Fundamental Law as a weapon of opposition by Belgian members of the Estates General was instrumental in setting the stage for the constituent debates of 1830-1831<sup>26</sup>. Of great relevance to Belgian constitutional history is Peter van Velzen's dissertation on ministerial responsibility, which was among the most hotly debated issues in the controversies between the opposition and the government<sup>27</sup>. This and other constitutional bones of contention also figure in Jeroen van Zanten's book on political discussion during the reign of King William I<sup>28</sup>. The political climate of the United Kingdom of the Netherlands has been analysed in depth by Niek van Sas, while Jeroen Koch's biography of William I presents new information on the political role of the Kingdom's first monarch<sup>29</sup>.

By highlighting the political controversies that divided the United Kingdom of the

Netherlands between 1815 and 1830, these publications allow for a better understanding of the Belgian oppositional demands and for the dynamics inside the constituent assembly.

## 2.2. *Intellectual origins*

A second development, closely related to the first one, is that a new interest in the intellectual origins of the Constitution is gaining ground. It seems that, until very recently, the received ideas of national historiography did not allow for a critical interrogation of the intellectual and philosophical background of the constituent debates. That has changed, as the debates are now being analyzed on a much more conceptual level. It is true that the Congressmen themselves warned against the dangers of basing the Constitution on abstract and theoretical systems<sup>30</sup>. Yet their constitutional decisions inevitably reflect contemporary modes of thinking. And, as the constitutional debates as well as their own writings amply demonstrate, the Congressmen were very well versed in the works of Constant, Sieyès, Montesquieu and other political theorists of the day. The current return to these and other intellectual sources is therefore more than welcome.

A new standard in this field has been set by Stefaan Marteel with his 2009 dissertation *Inventing the Belgian Revolution*<sup>31</sup>. Based on a wealth of intellectual and political sources, he traces the intellectual developments in the various strands of the Belgian opposition. His detailed and nuanced reconstruction of liberal and Catholic political thinking between the Brabant Re-

volution (1787-1790) and the Belgian Revolution fills a major lacuna.

In a similar vein, Vincent Viaene's dissertation on the relations between Belgium and the Holy See has shed new light on Catholic political thinking in relation to the Constitution, especially in the years after 1831<sup>32</sup>. Montesquieu's influence on the constituent debates is the subject of an article by Annelien De Dijn, in which she labels the spirit of the Constitution as one of pragmatic conservatism<sup>33</sup>. Despite a general desire to adapt the new Constitution to the customs and national character of the Belgians, the founding fathers rejected a literal continuation of the Old Regime constitutional traditions. The supposed influence of ancient constitutionalism on the genesis and the later reception of the Constitution has furthermore been treated in articles by Marnix Beyen, Brecht Deseure, and Stefaan Marteel<sup>34</sup>. The political-theoretical sources of the political system instated by the Constitution are the subject of various publications by Henk de Smaele. Arguing that the Constitution should be seen as a compromise between the pluralistic liberalism of English origin and the unitary republicanism of the French tradition, he points at the originality of the constitutional construction of 1831<sup>35</sup>.

As a result of these developments, the creation of the Belgian Constitution now seems less due to a sudden touch of divine inspiration on the part of the members National Congress. We can see the many continuities that exist between the unionist program expressed in the Constitution and the Liberal and Catholic thinking of preceding decades. The chronological evolutions within both ideological blocks are far better documented, and a great deal of diversity



within each block has been brought to light. At the same time, this new work on the Constitution's intellectual origins allows us to assess more accurately the innovations and novelties introduced by the Belgian founding fathers. But a lot of work remains to be done. It can only be hoped that related conceptual issues, such as parliamentarism, representation, participation, republicanism and liberalism, to name only a few, will soon enjoy the same attention. Likewise, the precise influence of the great political thinkers on the constituent debates merits a lot more attention.

### 2.3. *After 1831*

Thirdly, it is high time for historians of the Belgian Constitution to look beyond 1831. Some of the high-strung praise for the Constitution's liberal character and individual freedoms is quite out of place when compared to actual practice after 1831. It sometimes seems as if there are two Belgian Constitutions: the one that was written in 1831 with highly liberal ambitions, and the one that was put into practice after 1831. A systematic comparison between the legal and the real country, to which Roberto Dagnino refers in his article in this issue, is thus highly relevant. Advances have certainly been made. Els Witte's many publications on early Belgian history show that constitutional theory and reality are two quite different things. She describes the first decades of the reign of Belgium's first king, Leopold I, as «a semi-parliamentary system with a monarchical counterpart»<sup>36</sup>. Such an assessment checks all too celebratory narratives intent on presenting the Belgian Constitution as the birth certificate

of parliamentary government. Nothomb's and Lebeau's glowing speeches to the National Congress on the balance of powers under the new Constitution are frequently cited, and rightly so. But reading them without taking into account actual political practice after 21 July 1831 might be misleading about the reality of early constitutional government.

Henk de Smaele's research into the role of electoral parties is very instructive in this regard. De Smaele's analysis draws on the ideological and political-theoretic underpinnings of the Constitution as well as on the actual functioning of Belgium's early constitutional government<sup>37</sup>. De Smaele shows that the political program of unionism was strongly informed by a centrist opinion which valued an executive notion of government above ideological party programs. Unionist governments, backed by the conservative forces of throne and altar, did not rely on precise parliamentary majorities and managed to stave off the breakthrough of political pluralism in the liberal sense for several decades. In a different vein, Bram Delbecke investigated the history of press legislation in Belgium from the point of view of the personal liberties enshrined in the Constitution<sup>38</sup>. Here again, the theoretical and ideological background of constitutional law are weighed against its implementation in normal legislation and political practice in the course of the nineteenth century.

The history of a Constitution is more than the history of constitutional provisions, as the cited examples show. Only by carefully reconstructing political practices in the decades after its promulgation can the real impact of the document be established. Such an analysis ideally takes

into account theoretical origins, political-ideological power relations and political practices. It is therefore highly desirable for interpreters of the Constitutions to look further than the Constitution's genesis and critically analyse its actual implementation and its effects after 1831.

#### 2.4. *Comparative approach*

Our knowledge of the Belgian Constitution could be substantially enriched by comparative work, that is, by studying the various elements of the 1831 Constitution (and its subsequent life) in direct dialogue with other constitutions. Sadly, this remains almost entirely to be done. In recent years, the comparative approach has been gaining ground in the fields of constitutional history and theory; there has been a host of comparative, cross-border investigations into the history of modern constitutions<sup>39</sup>. The Belgian Constitution has been included in several of these comparative endeavours, but Belgian scholars seem not to have this approach high on their priority list. To be sure, the textual origins of the Constitution's 139 articles have been established years ago, including all the borrowing and adapting of articles from other constitutional texts<sup>40</sup>. Yet there is more to comparativism than just textual origin. The international political and legal context of the Constitution deserves a lot more attention. Two excellent examples of this approach are included in this issue (Prutsch and Van den Berg). But there clearly remains a lot of work to be done in this domain, for instance in order to verify the often repeated claims of Belgian national historiography

as to the unique character of the Belgian Constitution within continental constitutional law, or to give Belgian constitutional theorists a more solid grip on their object of research. A more thorough and systematic comparative investigation is therefore highly desirable.

#### 2.5. *Constitutional theory*

A fifth research strand, that also remains largely to be developed, is to connect the normative intentions underneath Belgium's 1831 Constitution with contemporary political and legal debates. In other countries, especially in the United States, constitutional theorists have made major steps in this regard. Important thinkers include Bruce Ackerman, Alexander Bickel, Ronald Dworkin, Richard Posner, and Cass Sunstein. In Belgium, such work hardly exists. There are, of course, exceptions, such as the work of Toon Moonen (on constitutional interpretation), Patricia Popelier (on democracy), and Jan Velaers and Jogchum Vrielink (on freedom of expression)<sup>41</sup>. All in all, however, the wealth of the founding fathers' ideas, which could certainly enrich our thinking on many of Belgium's most pressing constitutional and political issues, remains largely untapped in the contemporary debate.

#### 2.6. *Sovereignty*

The concept of sovereignty merits separate attention in this overview. This is true for two reasons. First, the meaning of sovereignty in the Belgian Constitution is one of

the few subjects in the field to have stirred a lively debate in recent years. According to the received interpretation, as can be found in handbooks of public law and in case law of the Belgian Council of State, Art. 25 (now Art. 33) of the 1831 Constitution enshrined the concept of national sovereignty, as opposed to popular sovereignty. In writing that “all powers emanate from the nation”, the Belgian founding fathers would have attributed sovereignty to the *nation* (a fictitious, transgenerational entity comprising all generations of Belgian citizens) and not to the *people* (the currently existing generation of citizens). This interpretation relies strongly on Raymond Carré de Malberg’s conceptual opposition between national sovereignty (*à la Sieyès*), with the nation being exclusively represented by Parliament, and popular sovereignty (*à la Rousseau*), which can endorse direct democracy and where representatives would only act under imperative mandate of their voters. On the basis of this argumentation, and notwithstanding increasing calls for greater citizen participation (such as referendums or deliberative democracy), most Belgian law scholars as well as the Council of State resist steps towards more direct forms of citizen participation.

Henk de Smaele was the first to question this reading of Art. 25 of the 1831 Constitution, arguing that it did not originate with the Constitution’s drafters but only emerged later on in the nineteenth century<sup>42</sup>. Raf Geenens and Stefan Sottiaux situate the emergence of this interpretation in the second half of the twentieth century and they propose a different reading of the drafters’ understanding of sovereignty, namely a “negative” one, influenced by Benjamin Constant. Rather than *constructing* a strong

state or empowering the sovereignty people, they wanted to *restrain* power. Thus, the Belgian constitution would be about blocking and limiting the exercise of sovereignty, most importantly by dividing and distributing it instead of concentrating it in one point or attributing it to one entity<sup>43</sup>. Brecht Deseure has found that the term popular sovereignty enjoyed wide acceptance in 1830–1831. It was being freely used in the Provisional Government and the National Congress, alongside and interchangeably with national sovereignty. In spite of the opinion professed by Belgium’s first king, the revolutionary leaders were anything but ‘a herd of mad democrats’ however. Their bourgeois profile and their very restricted view on voting rights rather suggest the contrary. In the context of the Belgian Revolution, popular sovereignty should first and foremost be understood as a repudiation of the monarchical principle and as a legitimation of power from below, not as the conceptual counterpart of national sovereignty<sup>44</sup>. Ulrike Müßig situates the sovereignty concept enshrined in 1831 at the transitional stage between the monarchical principle of the Old Regime and modern popular sovereignty. In her view, the Belgian Constitution is marked by a unique cohabitation of popular sovereignty and constitutional monarchy. The subsequent emergence of parliamentary government resulted not from constitutional provisions but from a slow development in political practice<sup>45</sup>. Marnix Beyen and Els Witte have both enriched the discussion by using the techniques of discourse analysis to pinpoint the meaning of the terms sovereignty and nation in parliamentary and public debates<sup>46</sup>. In their contribution to this special issue, Jan Clement and Mieke Van de

Putte contribute to the ongoing debate on sovereignty by claiming that the national sovereignty interpretation is more convincing than many recent authors assume; according to them, there are good reasons for holding on to it. The controversy over sovereignty in the Belgian Constitution is far from being resolved, but the liveliness of the debate, as well as its interdisciplinary nature, are to be applauded.

There is also a second reason for paying special attention to the notion of sovereignty. Sovereignty is at the center of an ongoing research project at KU Leuven (Belgium), a project of which this special issue is an outcome. The core aim of this project is precisely to put into question the "national sovereignty" doctrine and to construct a more accurate interpretation of the conception of sovereignty that underlies the Belgian Constitution<sup>47</sup>. This aim is realized by pursuing four different objectives. i) We are creating a conceptual map of the different understandings of sovereignty present within Francophone philosophical debates around 1831, so as to get a clear grasp of the different meanings of sovereignty available to the 1831 drafters. ii) We then use this conceptual map to gauge the definition(s) of sovereignty present in the Belgian National Congress. Drawing on a wide range of source materials (debates from the National Congress, newspapers...), we take a fresh look at the concept of sovereignty as intended by the drafters. Intermediate results point at the overwhelming influence of Benjamin Constant in this regard, although other positions were also present. iii) The consequences of the drafters' understandings of sovereignty for citizen participation in politics will be explored by making use of normative theories of democracy. To

what extent does an altered understanding of sovereignty create room for more or different forms of citizen participation? iv) Finally, we investigate the concrete legal implications of this 'reconstructed' interpretation of sovereignty with regard to the introduction of forms of direct democracy.

In this truly interdisciplinary way, the project aims both to elucidate the historical, legal and philosophical meaning of one of the central concepts of the Belgian constitution, and to explore its implications for a highly relevant debate in contemporary society. As such, the project hopefully contributes to restoring the Belgian Constitution to the place it deserves in today's political and legal debate.

### *Conclusion*

Notre constitution est, de toutes, la plus libérale, la plus généreuse [...]. Confiante et sans arrière-pensée, elle est l'expression sincère de nos idées et de nos mœurs. Elle nous donne toute la liberté que nous pouvons supporter sans péril [...] en établissant sur des bases solides les grands et féconds principes qui doivent toujours rester debout [...]. Faites dans un esprit de juste défiance envers les théories hasardeuses, elle n'est pourtant point un calque servile des constitutions de nos voisins. [...] Elle renferme des combinaisons neuves sans être téméraires et se montre tant ensemble hardie et circonspecte<sup>48</sup>.

The editors of the influential liberal newspaper *Le Politique* did not hide their joy when the Belgian Constitution was adopted on 7 February 1831. According to them, Belgium's Constitution opened up nothing less but a new era in European history. The Belgian charter fulfilled the promises of true

liberty under a monarchical government proffered by the French July Revolution (but, tragically, denied to the French) and the Belgian Revolution. *Le Politique's* enthusiasm over the new Constitution is hardly surprising, since its former editors (Devaux, Lebeau, Nothomb, Rogier) were among the most prominent constitutional drafters. After years of difficult opposition against the autocratic regime of William I, the roles were now quite reversed.

In its celebration of the work of the National Congress, the newspaper touched upon many of the core characteristics of the document. Interestingly, several of the elements mentioned still belong, up to this day, to the standard narrative on the historical meaning and distinctive character of the Belgian Constitution of 1831. It is called the freest of all European constitutions; it is said to be based on infallible principles yet to have steered clear of risky theoretical abstraction; it is recognized to have been influenced by the constitutions of surrounding countries; nevertheless, it is claimed to offer a completely new and genuinely original institutional construction which effectively combined freedom and stability. The longevity of the Constitution's interpretation since the revolutionary moment is remarkable, but it should also warn us against a possible lack of criticism vis-à-vis this narrative.

We think this danger can be avoided by understanding the Belgian Constitution as the product of a specific place and time (and the newspaper fragment points in that direction, too). By placing it back in its original historical, political, social, intellectual and legal context, we may be able to gain a more nuanced view of this seminal yet severely under-researched constitutional document. In this article we have tried to show that it is helpful to understand the Constitution's specificity as a response to a series of contemporary challenges in society. In order to achieve this goal, we have touched upon a number of research topics that have recently enriched our knowledge of the Constitution to a greater or lesser degree, and which we hope will be further developed in the future. In doing so we hope to have provided the reader with sufficient context for the next articles in this special issue, which all in their own right constitute important contributions to a history still largely in need of writing.

1 H. Dippel, *Modern Constitutionalism, an Introduction to a History in Need of Writing*, in «The Legal History Review», LXXIII, n. 1-2, 2005, p. 165.

2 See esp. J. Gilissen, *La Constitu-*

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- 4 M. Magits, *De Volksraad en de opstelling van de Belgische grondwet van 7 februari 1831. Een bijdrage tot de wordinggeschiedenis van de Belgische konstitutie*, unpubl. doct. thesis, Arts, VUB, 1977, vol. 1, p. XIX.
- 5 Due to the destruction of the Parliament's library by a fire in 1883, the minutes of the committee meeting of the National Congress are missing. The minutes of the plenary meetings of the Congress were however published in detail in different papers and were collected by the jurist and later secretary of the Parliament, Emile Huyttens. As a result of his accurate references and by lack of other primary historical sources, Huyttens' corpus is unanimously considered as the authoritative primary source on the congressional debates. See Magits, *De Volksraad* cit., pp. 1-8; E. Huyttens, *Discussions du Congrès National de Belgique 1830-1831*, Brussels, Société Typographique Belge, 1844, vol. 1, pp. VIII-X.
- 6 S. Marteel, 'Inventing the Belgian Revolution'. *Politics and Political Thought in the United Kingdom of the Netherlands (1814-1830)*, Unpubl. Doct. Diss., European University Institute, Florence, 2009, p. 411; N. van Sas, *Het politiek bestel onder koning Willem I*, in N. van Sas, *De metamorfose van Nederland: van oude orde naar moderniteit, 1750-1900*, Amsterdam, Amsterdam University Press, p. 434.
- 7 A. De Dijn, *A Pragmatic Conservatism. Montesquieu and the Framing of the Belgian Constitution (1830-1831)*, in «History of European Ideas», XXVIII, 2002, pp. 227-245.
- 8 Huyttens, *Discussions* cit., 25/11/1830, De Gerlache, vol. 1, p. 324.
- 9 E. Descamps, *La mosaïque constitutionnelle. Essai sur les sources de la Constitution Belge*, Louvain, Peeters, 1891, p. 51.
- 10 E.g. Huyttens, *Discussions* cit., 22/11/1830, Goffint, vol. 1, p. 250; ivi, 13/12/1831, Van Snick, vol. 1, p. 398. See also B. Deseure, *From Pragmatic Conservatism to Formal Continuity. Nineteenth-Century Views on the Old Regime Origins of the Belgian Constitution*, in «Journal of Constitutional History / Giornale di Storia Costituzionale», n. 32, 2016, pp. 257-277.
- 11 E.g. Huyttens, *Discussions* cit., 07/01/1831, de Robaulx, vol. 2, p. 44; ivi, 08/01/1831, Pirmez, vol. 2, p. 55; Ivi, 11/01/1831, Blargnies, vol. 2, p. 85; Ivi, 12/01/1831, David, vol. 2, p. 124.
- 12 E.g. Ivi, 02/02/1831, Abbot Verdun, vol. 2, pp. 408-409, footnote (I); ivi, 03/02/1831, Count d'Arschot, vol. 2, p. 434; ivi, 03/02/1831, De Gerlache, vol. 2, pp. 443-444.
- 13 L. Wintgens, *Sovereignty and Representation*, in «Ratio Juris», XIV, n. 3, 2001, pp. 272-274.
- 14 E.g. Lebeau, who acknowledged that a federative system lacked the efficiency and the «energy» of a central authority and the homogeneity it engendered in the national «habits» and «opinion». Huyttens, *Discussions* cit., Lebeau, 20/11/1830, vol. 1, p. 211.
- 15 E.g. De Dijn, *A Pragmatic Conservatism* cit.; A. Mast, *Overzicht van het Grondwettelijk Recht*, Brugge, Die Keure, 1967, p. 27, n. 20; J. Velu, *Droit Public*, Brussels, Bruylant, 1986, vol. 1, p. 78, n. 56.
- 16 Nothomb identified two classes of people in society, each with different interests – «those who sell their labour, and those who pay for it». He insisted on attributing those classes a separate place in the representative system. See also ivi, Henry, 14/12/1830, vol. 1, 457.
- 17 L. Jaume, *La théorie de l'autorité chez Benjamin Constant*, in «Historical Reflexions», XXVIII, n. 3, 2002, pp. 458, 460-462.
- 18 Yet, some of those essentials were introduced in a "disguised" form in order to placate its opponents. Dippel, *Modern Constitutionalism* cit., pp. 164-165.
- 19 Ivi, p. 161.
- 20 «From where did our revolution begin? from a semi-absolute government that only wished for the appearances of a representative government.», Huyttens, *Discussions* cit., 27/12/1830, Le Hon, vol. 1, p. 661.; See also ivi, 24/12/1830, Morel-Blanneel, vol. 1, pp. 626-627; ivi, Brabant, 18/07/1831, vol. 3, p. 578 with reference to Napoleon.
- 21 Ivi, 22/12/1830, De Gerlache, vol. 1, p. 589.
- 22 The Belgian state had a central government, but the provinces and municipalities weren't purely territorial subdivisions. Afraid of the Jacobin centralism, the latter were also conceived as (subordinate) governments. A. Alen, D. Haljan, *International Encyclopedia of Constitutional Law: Belgium*, Kluwer, Malines, 2013, p. 36.
- 23 J. Koll, *Belgien*, in W. Daum et al. (edited by), *Handbuch der europäischen Verfassungsgeschichte im 19. Jahrhundert. Institutionen und Rechtspraxis in gesellschaftlichen Wandel*, vol. 2: 1815-1847, Bonn, Dietz, 2012, pp. 485-542.
- 24 J. Gilissen, *Le régime représentatif avant 1790 en Belgique*, Brussels, La renaissance du livre, 1952; J. Gilissen, *Le régime représentatif en Belgique depuis 1790*, Brussels, La renaissance du livre, 1958.
- 25 Most directly related to our subject is: A. Alen, A.W. Heringa, D. Heirbaut and C.J. Rottevel Mansveld (edited by), *De Grondwet van het Verenigd Koninkrijk der Nederlanden van 1815*, The Hague, Boom Juridisch and Bruges, Die Keure, 2016. Other relevant texts appeared in: I. de Haan, P. den Hoed, H. te Velde (edited by), *Een nieuwe staat. Het begin van het koninkrijk der Nederlanden*, Amster-

- dam, Prometheus Bert Bakker, 2014; R. Aerts, G. Deneckere (edited by), *Het (on)Verenigd Koninkrijk, 1815-1830* >2015. Een politiek experiment in de Lange Landen, Rekkem, Ons Erfdeel, 2015; F. Judo, S. Van de Perre (edited by), *Belg en Bataaf. De wording van het Verenigd Koninkrijk der Nederlanden*, Antwerp, Polis, 2015.
- 26 E. Witte, *De Grondwet van het Verenigd Koninkrijk der Nederlanden (1815) en het ontstaan van de Belgische Constitutie (1831)*, in Alen e.a., *De Grondwet* cit., pp. 15-44. See also B. Deseure, *Constitutional Precedence and the Genesis of the Belgian Constitution of 1831*, in U. Müßig (edited by), *Reconsidering Constitutional Formation II: Decisive Constitutional Normativity. From Old Liberties to New Precedence*, Studies in the History of Law and Justice, Berlin, Springer International Publishing, 2018, vol. 12, 211-256. For a complete overview and critical assessment of the recent historiography on the United Kingdom of the Netherlands, see: E. Witte, *Tweehonderd jaar Verenigd Koninkrijk der Nederlanden: tussen verdeeld herdenken en hernieuwd herschrijven*, in «Belgisch Tijdschrift voor Filologie en Geschiedenis», XCIV, n. 2, 2016, pp. 277-312.
- 27 P.L.G. van Velzen, *De ongekende ministeriële verantwoordelijkheid*, Nijmegen, Wolf Legal Publishers, 2005.
- 28 J. van Zanten, *Schielijk, winzucht, zwaarhoofd en bedaard. Politieke discussie en oppositievorming, 1813-1840*, Amsterdam, Wereldbibliotheek, 2004.
- 29 Van Sas, *De metamorfose* cit.; J. Koch, *Koning Willem I, 1772-1843*, Amsterdam, Boom, 2013.
- 30 De Dijn, *A Pragmatic Conservatism* cit., p. 228; W. Van den Steene, *De Belgische grondwetscommissie (oktober-november 1830): tekst van haar notulen en ontstaan van de Belgische grondwet*, Brussels, Koninklijke Vlaamse Academie voor Wetenschappen, Letteren en Schone Kunsten van België, 1963, p. 37.
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- 32 V. Viaene, *Belgium and the Holy See from Gregory XVI to Pius IX (1831-1859). Catholic Revival, Society and Politics in 19th Century Europe*, Turnhout, Brepols, 2001.
- 33 De Dijn, *A Pragmatic Conservatism* cit.
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- 35 H. de Smaele, *Eclectisch en toch nieuw. De uitvinding van het Belgisch parlement*, in «Bijdragen en Mededelingen tot de Geschiedenis der Nederlanden», CXX, n. 3, 2005, pp. 408-416.
- 36 E. Witte, *De evolutie van de rol der partijen in het Belgische parlementaire regeringssysteem*, in «Res Publica», XXII, n. 1-2, 1980, p. 96.
- 37 H. de Smaele, *Politieke partijen in de Kamer, 1830-1914*, in E. Gerard, E. Witte, E. Cubin and J.-P. Nandrin (edited by), *Geschiedenis van de Belgische Kamer van Volksvertegenwoordigers, 1830-2002*, Brussels, Kamer van Volksvertegenwoordigers, 2003, pp. 131-157.
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- 41 T. Moonen, *Het Grondwettelijk Hof en de interpretatie van de Grondwet: een perspectief op argumenten en legitimiteit*, Unpubl. Doct. Diss., Law, Hasselt, 2014; P. Popelier, *Democratisch Regelgeven*, Antwerpen, Intersentia, 2001; J. Velaers, *De Bepalingen van de Vrijheid van Meningsuiting*, Antwerpen, Maklu 1991; J. Vrieling, *Van haat gesproken? Een rechtsantropologisch onderzoek naar de bestrijding van rasgerelateerde uitingsdelicten in België*, Antwerpen, Maklu, 2010.
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- 43 R. Geenens and S. Sottiaux, *Sovereignty and Direct Democracy: Lessons from Constant and the Belgian Revolution*, in «European Constitutional Law Review», XI, n. 2, 2015, pp. 293-320.
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- <sup>47</sup> More information on this project can be found here: <<https://hiw.kuleuven.be/ripple/research/sovereignty>>.
- <sup>48</sup> «Le Politique», n. 35, 10 February 1831, pp. 3-4.