

# The French-Dutch Heritage of the Belgian Constitution of 1830

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When Belgium acquired its independence in 1830 and adopted its own national constitution, a substantial part of the population and its leaders – at least, those who were in their late thirties or older – had become thoroughly acquainted with the concept and practice of a written constitution. The purpose of this brief contribution is to calendar the succession of French and Dutch constitutions which governed the Belgian territories and population between 1795 and 1830. In both cases, France and the Netherlands had already developed their own traditions of written constitutions, and those constitutions which predated their annexation of Belgium should therefore at least be referred to in this survey.

## *The last years of the Austrian Netherlands*

During the last centuries of the *Ancien Régime*, the legal status of the Southern

Netherlands had been mainly determined by international relations and to that extent by the law of nations<sup>1</sup>. At the Treaty of Utrecht (1713), the transfer from Spanish to Austrian Hapsburg sovereignty was primarily meant to strengthen the role of the country as a protective buffer against French expansionism and an advance defence line of the United-Provinces, but by the second half of the 18<sup>th</sup> century, when the traditional rivals France and Austria were faced with the assertive policies of other great powers which were threatening more directly their positions (England with regard to France, Prussia and Russia with regard to Austria), even that role had become questionable in the realignment of the European balance of power. In the domestic order, the provinces of the Austrian Netherlands remained, as already during the 15<sup>th</sup> century under the dukes of Burgundy, a personal union of distinct provinces. Each province had its own legal system and institutions, notwithstanding a growing central administration and



"Entrée du prince Frédéric d'Orange dans Bruxelles, le 1<sup>er</sup> septembre 1830", stampa coeva

government which tended, in several areas, to enact uniform, or common, legislation in the different provinces. The provinces could rely on their own "liberties and franchises", among which the Joyous Entry in the duchy of Brabant was the strongest legal expression of a particular legal status. It had been granted for the first time in 1356, and was to be reaffirmed – with some changes – by each sovereign (as duke of Brabant) at the beginning of his reign until the very end of the Austrian regime<sup>2</sup>. It was a written privilege and during the 18<sup>th</sup> century, it was not uncommon for it to be referred to as the "Brabant constitution". It also served a practical purpose, because the sovereign court of the duchy (the Council of Brabant) could object to ordinances from the central government (even enacted in the

name of the king or emperor) if the statute were found to be contrary to a provision in the Joyous Entry. The prerogative of the Brabant Council recalls that of the *Parlements* in Ancien Régime France, which could likewise express *rémontrances* against the recording of royal statutes and ordinances, but the similarity should not be drawn too far: the Brabant *représentations*, as they were called (i.e. formal objections against the enactment), could more readily be overruled by the sovereign; and whereas the French Parliaments would rely on unwritten fundamental laws which had been developed by themselves, or on considerations of general interest assessed by themselves, the objections in Brabant had to refer to specific articles of the Joyous Entry, which meant that both the Council

and the government had to take into account more rigid constraints of argumentation and textual interpretation. In any case, the Brabant Council maintained the practice of expressing its opposition to legislation which it deemed in violation of the "Brabant constitution" until the last years of the Ancien Régime<sup>3</sup>.

In the ecclesiastical principality of Liège, which was not incorporated in the Belgian Habsburg territories but remained a separate territory (*Reichsstand*) of the Holy Roman Empire, the Peace of Fexhe (1316) is another example of a medieval privilege which remained a written and formal authority of the subjects' freedoms and rights until the end of the Ancien Régime<sup>4</sup>. It guaranteed the liberties and customs, the due process of law against arbitrary interference from public agents, and the right of the Estates' assembly to revise, when necessary, the laws and customs of the principality. Several other late-medieval and early-modern documents, including (following the practice in the Empire) the "capitulations" agreed by the prince before acceding to his office, were regarded as constitutional acts<sup>5</sup>.

Only very few official written acts of authority can be said to have had a general constitutional significance for the Belgian provinces as a whole (excluding Liège): one of the best examples is probably the «Pragmatic Sanction» of 1549, which may be seen as an implementation of the attempts in 1548 to reform the Holy Roman Empire, when the "Circle of Burgundy" was created. Through the 1549 Act, Charles V established that all the Habsburg territories from the Burgundian heritage were to be governed by the same principles of dynastic succession,

thereby preventing their political division in the future.

### *The French Regime*

The Austrian Netherlands and Liège were annexed by a decree of the French Convention on 9 vendémiaire IV (1 October 1795)<sup>6</sup>. The first two written constitutions of the French Revolution (1791 (Bart *et al.* 1993), and 1793, Year III) were therefore never applicable in the Belgian territories, but the third written constitution, that of 5 fructidor III (22 August 1795) had shortly before been issued (Troper 2006). From 1795 onwards, and until the years 1814–1815 and Napoleon's defeat at Waterloo, the French citizens of the Belgian *départements* were subject to the constitutions of the *Directoire* (1795, Year III), of the Consulate (1799, Year VIII; 1802, Year X), and of the Empire (1804, Year XII).

Before the formal annexation (on 31 August), the Belgian territories had already been divided, along the principles of organisation of the Republic in general, into nine *départements*, subdivided into *cantons*. A Government Council was appointed to oversee the transition from a military occupation regime to the political and administrative incorporation into the *Grande Nation*. The new Constitution was introduced on 6 October, part of the French revolutionary legislation came into force immediately, but in many areas, the existing legislation was provisionally maintained. From 6 December 1796 onwards, the new French legislation became law in the Belgian *départements*, and a selection of some 438 earlier revolutionary statutes (dubbed the

*Code Merlin*) were also introduced. In 1797, the Belgian population for the first time had the opportunity to take part in parliamentary elections (for the partial renewal of the *Corps Législatif*), but the immediate tangible results of those elections, viz. a larger proportion of native Belgians holding administrative and judicial offices in their own constituencies were largely swept away by the coup of 18 fructidor V (4 September 1797). As a result of the fructidor coup, the issues which had already caused tensions during the first months of the *Directoire* regime – the continuing military occupation, aggravated by requisitions and conscription, the levying of new taxes, the lack of any effective economic policy, and, not least, anti-clerical measures – were further exacerbated and led to peasants' revolts in various parts of the countryside. The referendum for the Constitution of the Year VIII drew only a small proportion of the Belgian population, as at the time, the French military situation seemed uncertain and a new conquest by the Austrians and their allies could not be ruled out. In general, the Consulate did not bring any substantial improvement with regard to the representation of the Belgians in the central national political institutions in Paris, which remained as before comparatively low. In the Belgian territories, the *préfets* were as a rule native Frenchmen; only at the lower levels of the administration were Belgians more widely represented. The Concordat with the Roman-Catholic Church (1801), the judicial, administrative and tax reforms of the regime were generally welcomed, and the regime gained acceptance and favour after the peaces of Lunéville (1801) and Amiens (1802), but its ecclesiastical policies continued

nevertheless to cause unrest. Like the *préfets*, the bishops and higher clergy were mainly appointed among native Frenchmen, who often favoured a "neo-gallican" interpretation of the Concordat's terms and the controversial *articles organiques* added by the French government. By the time the regime had been converted into an imperial monarchy, however, some of the *Ancien Régime* elites – not least members of the old nobility – were more prone to join the Napoleonic administration. The last years of the regime antagonised both the conservative, pro-clerical segments of society, and the supporters of liberal policies. At the council of 1811, the critical statements from the bishops of Ghent and Tournai led to their arrest and dismissal. The grip of the police state tightened as the military situation worsened, individual freedoms and the press were increasingly subjected to restrictions, and a local *cause célèbre* clearly showed how the separation of powers had to give way when the regime's sense of state security was at stake. The adverse economic situation, the growing pressure of conscription even among the middle classes and higher taxes alienated ever larger groups of Belgian society.

In 1814-1815, before the threat of Napoleon's comeback had been finally averted, the Great Powers' decision to create a middle-sized kingdom combining the Northern and the Southern Netherlands under the Orange dynasty was taking shape. While the constitutional position of the Belgian territories remained uncertain, the conservative classes were putting forward their claims for a return to the "old constitutions", a claim the allied occupying authorities did not gainsay, causing concern among the liberal bourgeoisie. Ultimately,

the geo-strategic considerations of the Allied Great Powers, and foremost of Great Britain, at Vienna prevailed: a reasonably strong state had to be erected in order to form a first line of defence of the estuaries of the Rhine, Meuse and Scheldt against French expansionist policies.

In those circumstances, William Frederic of Orange saw his return to power in Holland as an opportunity to head a modernised centralised state, built on more substantial territorial, demographic and economic foundations than the former United Provinces of the late-eighteenth century. Under his authority, a document known as the "Eight Articles" were drawn up in 1814<sup>7</sup>. By that time, the Northern Netherlands, where French occupation had ended by the end of 1813, had been recreated as a sovereign kingdom with its own national constitution. The Eight Articles were primarily intended to demonstrate vis-à-vis the Great Powers that the Dutch regime was willing and able to work out a political and constitutional settlement which would both meet the strategic aims of the Congress of Vienna and ensure the stability of the enlarged kingdom. The articles provided *inter alia* that the 1814 Dutch constitution would be adjusted so as to organise an appropriate representation of the Belgian population in Parliament and to assuage the opposition of Roman Catholics in the South against what they perceived as Calvinist rule<sup>8</sup>. The issue of the recognition of religious marriages, in that context, became the focus of the tensions between the royal authorities and representatives of the Belgian Roman Catholic Church.

*The Dutch written constitutions: preliminaries*<sup>9</sup>

By 1815, when the Dutch constitution of 1814 was adjusted to take into account the incorporation of the Belgian territories, the Northern Netherlands had already been acquainted with a variety of modern, written constitutions. During the *Ancien Régime*<sup>10</sup>, the United Provinces did not have a written constitution, though some declarations and treaties were perceived as constitutional acts, such as the Union of Utrecht (1579), the declaration repudiating Philip II as sovereign (*Plakkaat van Verlatinge*, 1581), and the Dutch-Spanish peace at Munster (1648)<sup>11</sup>.

The first written constitution of the Netherlands goes back to the Batavian Revolution in 1795, backed by French military forces<sup>12</sup>, and led to the creation of the Batavian Republic as the first "sister-republic" of Revolutionary France and the adoption of its constitution in 1798 (*Staatsregeling des Bataafschcn Volks*, which can be translated more or less literally as: State-Ordination of the Batavian People)<sup>13</sup>. After the departure of the *stadhouder* William V (18 January 1795), the pro-Orange party was banned. The States-General were replaced in 1796 by a National Assembly (the "First National Assembly", 1 March 1796 - 31 August 1797), where three main political currents have been identified: "Unitarians", i.e. supporters of national sovereignty and a centralised government, "Federalists", who favoured the autonomy of the provinces, and "Moderates". A commission produced a first draft constitution (10 November 1796) (De Gou 1975), which was rejected, mainly for not carrying out substantially the

idea of a "single and indivisible" Republic. A new draft (30 May 1797) (De Gou 1983; vol. 2, 1984; vol. 3, 1985), which reflected a long-winded compromise inspired by the Moderates, was dubbed the "fat book" (*dikke boek*), for it contained no less than 918 articles. A referendum (8 August 1797) rejected, by a vast majority, that second draft. In the meanwhile, a new ("Second") National Assembly (1 September 1797-22 January 1798) had been elected and it set up a new commission to draft a constitution. After a French-backed coup (22 January 1798) which gave the Unitarians the upper-hand, the National Assembly was purged and sat as a Constituent Assembly. A new draft constitution was submitted on 6 March 1798 (De Gou 1988; 1990), which was ratified by referendum the following month (23 April). However, the Executive Regime (*Uitvoerend Bewind*) in the Batavian satellite-state of France proved as unstable as the *Directoire* itself and a new coup was staged a few weeks later (12 June). A provisional regime (both Executive and Parliament) was set in place and new elections were organised in order to put together a parliament ("Representative Body") controlled by Moderates. The new Executive Regime endorsed the coup of 12 June and maintained, at least in theory, the 1798 constitution.

Bonaparte's successful bid for power in 1799 resulted in renewed pressures from the French government on the Dutch regime to change its constitution. Within the Republic, calls for change had already been circulating among those who were dissatisfied with the regime's inability to work out the new state institutions upon which the Republic depended to achieve the ambitions of the new political regime.

Because the 1798 constitution ruled out any revision within a period of five years, the Executive held that «The people always retain the power to revise the constitution». When the Representative Body nevertheless opposed the change, a deadlock was only eluded by the decision of the Executive to submit their draft to a referendum. Although the draft was rejected by a majority of those who effectively cast their vote (1 October 1801), the Executive was able to present the referendum as an approval of the text<sup>14</sup> and a new political regime (known alternatively as the Batavian Commonwealth, *Bataafs Gemenebest*, although the style Batavian Republic continued to be used concurrently) replaced the first republican constitutional system (L. de Gou 1995).

Napoleon's strengthening personal rule and, after the pause during the short-lived peaces of Lunéville and Amiens, renewed warfare, also affected France's allies. In 1805, on the French emperor's insistence, the Executive (*Staatsbewind*) was reduced to a single person, R.J. Schimmelpenninck. The latter submitted his draft for a revised constitution to the emperor and, having obtained his approval, to the Batavian Legislative Body (L. de Gou 1997). Once again, the new draft was submitted to a referendum (8-16 April 1805); and, once again, the vast majority of non-voters was added to the number of supporters of the constitution<sup>15</sup>. Schimmelpenninck, as *raadspensionaris* (a somewhat opportunistic use of a title and office which had existed under the *Ancien Régime*), concentrated all the Executive powers, assisted by a State Council (similar to the French *Conseil d'État* during the First Empire), while the Legislative Body lost most of its effective political powers and influence.



Within a year, however, Napoleon had decided to re-establish the Batavian Commonwealth as a Kingdom ruled by his brother Lewis. The Batavian authorities were left no option – in spite of Schimmelpenninck's resistance – but to accept a treaty and the constitutional acts which revised the 1805 constitution. Lewis Napoleon was formally offered the crown of the new "Kingdom of Holland", as the country would now be called, a dignity he accepted on 5 June 1806. Commissions of the Council of State and of the Parliament subsequently wrote a draft of a new constitution for the kingdom, to which a constitutional Act was to be added (L. de Gou 1997). Both texts were voted by the legislative assembly and, on 7 August 1806, promulgated by the king.

The Napoleonic kingdom of Holland was not to be the ultimate stage of the French era for the Netherlands. From December 1809 onwards, the French Empire annexed several southern territories of the kingdom. On 9 July 1810, what was left of the kingdom was incorporated into the Empire as a whole, an annexation which was further confirmed by an enactment (*sénatus-consulte organique*) of 14 December in the same year. French institutions and legislation were introduced, including the constitutional acts of the Empire, viz. the constitution of the Year VIII, as amended in 1802 and 1804, and which were supplemented by constitutional (or, following the phrase used in French public law, "organic") enactments. At that stage, the Belgian and Dutch territories were reunited as French *départements* under Napoleon's French imperial rule.

### *The Dutch constitution of 1814*

The departure of the French administrators and troops, during the last months of 1813, paved the way for a provisional government (*Algemeen Bestuur*) which invited the Prince of Orange to accept the sovereignty over The Netherlands – the territorial boundaries of which remained uncertain, pending the outcome of the Congress of Vienna (Luiten van Zanden, van Riel 2000, Chapters 3 and 4). By Proclamation of 2 December 1813, the Prince accepted the sovereignty and promised to give the country a constitution. The new sovereign<sup>16</sup> established a commission which was to take as the starting-point of its proceedings a sketch of constitutional principles written by G.K. van Hogendorp, one of the principal leaders of the movement which had ensured the return of the Prince. At that stage, the issue was raised once more whether the new state would be organised along the lines of the pre-1795 situation, i.e. as a decentralised union with a large measure of provincial autonomy, or rather inspired by the French revolutionary and Napoleonic model of a highly centralised political system. Although the result of the commission's (and later of the drafting committee's) work has been characterised as a compromise, the newly established state was clearly much indebted to the modern notion of a nation-state in which the central institutions, not least the monarchy, enjoyed greater and more permanent powers than the Generality had ordinarily exercised under the Old Regime Republic. The draft constitution was not submitted to a referendum, but to a selection of some 600 prominent members of the Dutch society. On 29 March 1814, 474

members convened in Amsterdam in an assembly deemed to represent the «United Netherlands». A large majority – only 26 delegates voted against the draft – expressed their approval of the constitution. The result of the vote was transmitted to the sovereign, who promulgated the constitution the same day.

The 1814 constitution (Colenbrander 1908) was a combination of modernity (as understood in the immediate aftermath of the Napoleonic regime) and continuity (at least, attempting to maintain a link with the past of the United Provinces). The break with the Old Regime is most clearly expressed through the exclusive concentration of the sovereignty in the hands of the Prince<sup>17</sup> and in the primacy of the institutions, both the Executive and the States-General (the Parliament), which represented the United Netherlands as a whole. Defence, taxes and justice were also areas which the constitution explicitly entrusted to the sovereign state. Although the members of the States-General were to be appointed by the Provincial States (i.e., assemblies), the constitution dictated, in contrast to the rule and practice in the United Provinces and to some extent still during the first years of the Batavian Republic, that they would act and vote independently, without consulting the provincial assembly which had appointed them, nor be bound by any mandate from that assembly. The oath of the members of the States-General clearly also expressed the primacy of the State's interests.

The Provinces were thus no longer, as they had been in the United Provinces, sovereign actors. Their very existence, or at least their representative bodies, was now based on the constitution of the new state<sup>18</sup>. Nevertheless, the status accorded to

the provinces, most of which substantially retained their pre-revolutionary territory (art. 54), was a concession to calls to re-establish the old provincial identities. Even though the authors of the constitution had clearly brushed aside any idea of a (con)federation, retraining the provinces within the constitution as an important level of administration was, in some way, an acknowledgement of provincial particularism. The provincial assemblies, as already noted, designated the members of the States-General, but if they were members of the provincial States, the latter membership ceased, as was any position which would have made them accountable towards the provincial authorities (art. 61). The constitution made it clear that members of the States-General were to represent the Dutch people as a whole<sup>19</sup>. Any ties with the provincial authorities which were reminiscent of the old system where delegates in the States-General were bound by an "imperative mandate" were now abolished. The members of the provincial assemblies were required, witness the oath the constitution imposed, to observe «first and above all» the constitution of the United Netherlands (art. 82). The functioning of the provincial authorities was also to be supervised by the state authorities. The administration of watercourses was deemed to be, as a matter of primary «national» interest (art. 127, one of the rare uses of the phrase «national» in the constitution), and as such it was a prerogative of the sovereign (art. 127 ff.), although a considerable degree of administrative powers was granted to the provinces.

On a few other issues, the 1814 constitution made further concessions



to tradition and harked back to the pre-revolutionary regime: thus, a re-establishment of the status of nobility in the provinces (apart from the sovereign's prerogative, to create nobility, art. 42) was ordered by the constitution (art. 77); for the electoral boards in the cities the constitution referred to the old system as it prevailed in past times (art. 79: «*gelijk van ouds in vele Steden bestonden*»), and the chapter on common defence started with an article referring to the Union of Utrecht (art. 121) and also re-instated the old citizens' associations in charge of maintaining the peace (art. 125). Finally, the sovereign's religion was to remain the reformed Church, which also enjoyed special constitutional protection and benefits, even though the constitution proclaimed that all religions were to be equally protected and that no discrimination could be exercised with regard to access to public offices.

### *The Dutch-Belgian constitution of 1815*

The union of the Belgian territories with the Dutch state founded in 1814 was formally a decision of the allied Great Powers, agreed by separate treaties with the United Netherlands and confirmed in the Final Act of the Congress of Vienna (9 June 1815). The Dutch sovereign, authorised by the allied powers, had already been administering the Belgian territories since June 1814. The revision procedure of the 1814 constitution could not strictly be applied in order to introduce a new constitution which, as required, had to accommodate the specific needs of the Belgian population. The king<sup>20</sup> appointed a committee consisting

of twelve Dutch and twelve Belgian commissioners who reported on 13 July 1815 and submitted a new draft constitution (Colenbrander 1909). The ratification of the text inevitably had to follow a different procedure in the North and in the South. In the United Netherlands, a state already existed, constitutional powers had been institutionalised and functioned. According to the 1814 provisions, the numbers of members in the States-General had to be doubled for a change in the constitution (*viz.* from 55 to 110), and the 101 members attending the Northern constituent assembly accepted the new draft. The situation was more complicated in Belgium, which had no representative body at the time. The administration in the Belgian *départements* appointed 1604 prominent personalities who were called to vote on the same draft. Of the 1323 votes effectively cast, 796 opposed the constitution submitted by the Dutch government. The latter applied a slightly sophisticated variation on the counting techniques already repeatedly used under the French regime: the 281 Belgian non-voters were added to those who had voted in favour of the draft, and the negative vote of 126 representatives who had declared that their vote was inspired by the provisions on religious matters was nullified. Even that "arithmétique hollandaise", as the mode of calculation would be derisively dubbed among Belgian opponents, did not add up to the two-thirds majority which the 1814 text had required for changing the constitution, partly because the vote in Belgium had been entrusted by the Dutch administration to a much larger number than that of the Dutch delegates. In any case, the king declared that a substantial majority of the population in both parts of the country as a whole had

expressed their agreement with the new constitution, which was therefore deemed to be ratified (24 August 1815).

The 1815 constitution<sup>21</sup> strengthened the features of the central state. The state was now styled as Kingdom of the Netherlands with the king as head of state. The latter was no longer explicitly presented as the holder of the sovereignty, a term which appears to have been shunned by the drafters. Thus, whereas art. 1 of the 1814 constitution clearly stated that the sovereignty had been vested in Prince William Frederic of Orange-Nassau, art. 12 replaced the word "sovereignty" by "Crown". In the 1814 constitution, the sovereign's oath formula contained the pledge to honour and uphold the constitution (art. 28); by contrast, in the 1815 version of the oath (art. 53), the King swore that pledge to the Dutch people (*aan het Nederlandse volk*). The Dutch people, according to both constitutions (1814: art. 52; 1815: art. 77), were represented by the States-General. They were now organised in two distinct chambers: a Second Chamber, consisting of 55 representatives from the Northern provinces and 55 representatives from the Southern provinces; the First Chamber was to include between 40 and 60 life peers, appointed by the king. The Second Chamber's sessions were normally to be public (art. 108). The principle of the government being answerable to Parliament («governmental responsibility»), raised during the preliminary Dutch-Belgian discussions of the draft constitution, was opposed by the king and not included in the final text. The king's powers were now listed, in the French version, under the heading of «Royal Prerogative» (art. 56 ff.). Some of the references to the *Ancien Régime* already included in 1814 remained

in the 1815 text; in the chapter on defence, a reference to the "spirit" of the Pacification of Ghent (1576) was added to that to the "principles" of the Union of Utrecht. The new chapter on religion (art. 190 ff.) was more neutral than in the previous version, and no longer referred explicitly to the Reformed Church; the freedom and equal status of all existing religions in the realm was guaranteed.

The growing opposition to William I's rule in the Belgian provinces during the 1820s brought together an unlikely alliance of the mostly conservative Roman Catholics and the more progressive, and largely anti-clerical, liberals. That "monstrous" alliance (*monsterverbond*, i.e. in the sense of a politically unnatural coalition) was able to cooperate on a series of issues which addressed parallel, if not altogether shared, concerns, some of which focused on constitutional principles. Thus, the Roman Catholic Church, which fundamentally distrusted a Calvinist king and rejected the notion of equal status for all religions, was faced with a government policy which, for example on the issue of the seminaries and the appointment of bishops, generated very much the same tensions between Church and State as those which the Church had already faced under Napoleonic rule. It gradually recognised in the constitutionally guaranteed freedom of education a potentially powerful tool to recover some of its former influence on the masses, or at least on the social elites, in its traditional Belgian strongholds. The liberals, who developed during the late 1820s around certain newspapers a more coherent ideology and programme of fostering constitutional liberties, needed the Catholics in order to gain sufficient

leverage for an effective opposition to the Government. Some of their arguments show that their call for constitutionally protected liberties were referring to both an idealised notion of freedoms enshrined in the ancient Belgian charters of medieval times, and to their perception of more contemporary Whig constitutional developments in England. The issue of the government ministers being politically "responsible" to Parliament, which the king saw as an unacceptable infringement of his authority, remained a recurrent source of tension. In addition, the opposition of the late 1820s also increasingly focused on a number of constitutional demands, which the Belgian Constituent of 1830–1831 accordingly met by recognising explicitly the corresponding liberties in the constitution, in reaction to their alleged violation or disregard under the Dutch regime. Among those issues, which were often the subject of petitions to Parliament – the right of petitioning would be another right forcefully recognised by the Belgian Constituent<sup>22</sup> –, the freedom of education, of the press, of the use of language (the French-speakers felt disadvantaged by the official Dutch linguistic policies) (Thonissen 1879, p. 104), and the requirement of an independent judiciary (and, another recurrent call, the re-establishment of the jury<sup>23</sup>) were among the most important demands put forward. The liberal opposition also clashed more generally with the king's different concept of his royal prerogatives and the implementation of the constitution. The parliamentary experience of the 1820s had also highlighted some crucial weaknesses in the position of Parliament vis-à-vis the Executive: as already mentioned, the king's refusal

to accept governmental responsibility, but also the subservience of the First Chamber to the king, the ten-year period for which the ordinary budget was voted (combined with the lack of accountability of the public finances' administration), the restrictions on Parliament's faculty to propose amendments to bills, and the representation of the nobility as an order, or at least a distinct electoral body.

*The Belgian National Congress and the Constitution of 1831*

The National Congress, the constituent assembly elected in the Belgian territories which revolted against the Dutch royal rule, was presented with two draft constitutions<sup>24</sup>. The discussions took place from 25 November 1830 until 7 February 1831: a comparatively short space of time, during which several parts of the main draft (written by a commission set up by the provisional government) were easily accepted, and the remaining controversial issues fairly quickly settled<sup>25</sup>. Among the latter, one of the questions for which greatly diverging opinions were expressed was that of the choice for either a single-chamber Parliament, or a bicameral system; and, as a majority opted for a bicameral Parliament (the French revolutionary experience of a unicameral system was still fresh in everyone's minds), what would be the character of the First Chamber (styled Senate): some representatives were inspired by the English House of Lords, others by the *Chambre des Pairs* of the 1814 French Charter (i.e. Life Peers appointed by the King), still others by the reforms of the latter in the

recent 1830 French Charter. An influential current within the National Congress saw in the establishment of a Senate the means to check any excessively radical tendencies a single Chamber of Representatives might display, but also to develop further the need to maintain a balance between the monarchy and the Lower Chamber. In the end, the outlook of the Belgian senate in the 1831 constitution proved highly conservative, as the conditions for eligibility were such (40 years of age, and a high threshold with regard to the tax-rate) that nationwide only some 700 citizens were qualified.

The at the time comparatively far-reaching liberties guaranteed by the constitution can to a large extent be explained, as already noted, as a reaction against the authoritarian features of the Dutch regime, but also because of the Church's conversion to the idea of the constitutional freedoms of religion, worship and education, which built a common ground with the liberal currents, even though the latter tended to be hostile to the Church. The conversion was probably not overmuch influenced by the liberal orientation represented by Lamennais, but possibly more so by the Church's experiences with the powers of the modern state's control and interference under the French and the Dutch regimes, and the realisation that, freed from such interference, their hold on large segments of the population would be more effectively protected. Even so, the Church's position would remain throughout the 19<sup>th</sup> century hindered by the restrictions on the implementation of the freedom of association, a freedom which entailed in the view of many the risk of a new development of the *mainmorte*.

In contrast to the Dutch constitution, the foundation of the sovereignty was squarely vested in the nation («All powers issue from the Nation», art. 25) and, as a corollary, the king's powers were restricted to those granted by the constitution – no royal prerogative based on an unwritten tradition or body of laws was acknowledged. In addition, the need for parliamentary approval for the annual budget and for the size of the army, also to be determined annually, implied that the government was forced to retain the confidence of a majority in Parliament, and that it was thus politically answerable to Parliament. The cooperation between the Executive and Parliament was ensured by including both in the legislative process.

### Conclusion

This brief outlook of the consecutive written constitutions which were introduced in the Belgian territories under the French and the Dutch regimes shows that by the time of their independence, the Belgians had been directly acquainted with a variety of constitutional systems expressing the succession of government systems which had developed in France, and then in the Netherlands, since the mid-1790s. The Dutch constitution of 1815, itself the result of parallel, but distinct, developments which reflected French influences but also specific Dutch political currents, was the first which offered the Belgians a system of government and Parliament in which they had an opportunity to contribute significantly – in spite of the Dutch king's personal rule – to the emergence of

constitutional conventions. Although the Belgian National Congress which acted as constituent included only a relatively small number of representatives who had sat in the Belgian-Dutch Parliament, the experience of the former written constitutions which had governed the country and the political practice during the previous fifteen years played a substantial role in the National Congress's approach to the constitution the commissioners were to draft – if only, as with so many written constitutions since the late 18<sup>th</sup> century, because the new constituent wished to react against what was perceived to be the shortcomings of the regime which had been ousted. These cumulative layers of constitutional experiences ought to be taken into account in order to understand the work of the drafters of the 1831 constitution, without minimizing the importance of their – often, stated – perception of other constitutional systems, to which the Belgians had not been subjected (in particular the American federal and state constitutions, the French constitutions of 1791 and 1793, the French Charters of 1814 and 1830, and, perhaps to a lesser extent, the written constitutions introduced in various German territories from 1814 onwards).

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<sup>1</sup> For a general survey of the situation in the Southern Netherlands (and of the principalities of Liège and Stavelot) on the eve of the French annexation, it is still useful to refer the reader to the detailed study of Poulet 1875. Poulet offers both a general assessment and a specific outline for each territory. His approach is inevitably to some extent determined by 19th-century constitutional concepts; the book is subdivided thematically, following the major topics and categories of constitutional law as perceived in his day. This categorisation can to a large extent still be used by present-day historiography; moreover, Poulet's analysis is historically strongly documented through statutory and doctrinal sources (which can be complemented by later Belgian historiography on the history of institutions for a better understanding of political and constitutional practice). For a recent general textbook on the history of public law in Belgium, in a wider European perspective and offering an outline from ancient times until the present day: Martyn, Opsommer 2008.

<sup>2</sup> For the original text: van Bragt 1956; among the many studies, see Van Uytven 1969, pp. 23-30; Finger 2004, pp. 23-40. Also: Poulet 1863.

<sup>3</sup> The Joyous Entry also played a role

during the 'Brabant Revolution' of 1789-1790 which involved Brabant and several other Belgian provinces. It was spurred on by the reform policy of Joseph II during the 1780s, which was partly directed against traditional secular and ecclesiastical vested interests. The opposition, which was therefore largely inspired and backed by a conservative political agenda, led to an insurgency in the autumn of 1789. In Brabant, the emperor was repudiated by the insurgents for having violated his oath to the Joyous Entry and for having abolished Brabant privileges. Several other provinces joined the revolt and united, early 1790, in a confederation called "*États belgiques unis*", comprising Flanders, Brabant, Mechlin, Belgian Gelderland, Hainaut, Namur and Tournai). The independence movement was, however, deeply divided between conservative anti-reformist forces and those who supported the French Revolution. As a result of these divisions, the Austrian forces easily reconquered the Belgian territories by the end of 1790 and re-established the Habsburg regime.

<sup>4</sup> Hansotte 1987.

<sup>5</sup> Contrary to the "Brabant Revolution", the Revolution in Liège of 1789-1791 was mainly inspired by contemporary French revolutionary developments and ideas. In August 1789, a revolt

forced the prince-bishop to repeal a statute of 1684 which had concentrated political power in the hands of the prince, the cathedral chapter and the nobility. The flight of the prince led to a proclamation of a republican regime, which led to an intervention from Prussia acting on behalf of the maintenance of peace within the Empire and the Westphalian Circle. In January 1791, Austrian forces, after having brought down the Brabant insurrection, reinstated the prince-bishop. A «constitutional edict» of 10 August 1791 sought to restore «the ancient and precious constitution» to its state before the revolt. During the following years (1792-1795), the French-Austrian war gave exiles from Liège an opportunity to plead successfully the cause of incorporating the Liège territories into France.

<sup>6</sup> A first occupation by French revolutionary forces took place in November-December 1792 and lasted until Austria regained control after the battle of Neerwinden (18 March 1793). The Austrian restoration came to an end after the French victory at the battle of Fleurus (26 June 1794). The transfer of sovereignty was formally recognised in the Treaty of Campo Formio (1797).

<sup>7</sup> See the text (in French) in Colenbrander (éd.) 1909, pp. 27-28.



- <sup>8</sup> The articles ruled out any confederation and anticipated the creation of a unitary state (the «reunification» would be «intime et complète de façon que les deux pays ne forment qu'un seul et même État»), without any internal customs or commercial barriers, and a contribution by the State "in general", i.e. as a whole, to crucial works of defence, whether military or against the sea.
- <sup>9</sup> For a convenient collection of the successive late-18th and 19th-century Dutch constitutions and related texts in a single volume, one may refer to one of the editions of: Bannier 1936, for which I have used my copy of the edition: Zwolle, W.E.J. Tjeenk Willink. For a more recent publication including most relevant texts, but without contextual information: de Boer, Sap (eds.) 2007. For scholarly use, the series of publications of the *Rijks Geschiedkundige Publicatieën* which will be referred to for each (draft) of constitution, and which include the preliminary sources of the drafting, offer the fundamental source-material for any historical research.
- <sup>10</sup> Fruin [H.T. Colenbrander, ed.] 1922; Fockema Andreae 1982.
- <sup>11</sup> For a brief introduction, together with colour pictures of sample pages from these documents (and also from the 1798, 1814 and 1815 constitutions), see *In 21 stappen vrij onverveerd. Constitutionele topstukken van het Nationaal Archief* (The Hague, Nationaal Archief; Hilversum, Uitgeverij Verloren, 2009).
- <sup>12</sup> On the French influences on foreign constitutional developments during the French Revolution and the First French Empire, cf. the contributions in Jacobs, Kubben and Lesaffer (eds.) 2009. Of particular interest for the Netherlands are the contributions by J. Roosendaal, *La genèse de la Constitution batave de 1798, un produit français*, pp. 9-14; Kubben, *A Tale of Dwarfs and Giants. The Batavian Republic and the Franco-Anglo Peace*, pp. 151-172; but also, on an important aspect of the Dutch constitutional debate during that period, but which I am not addressing in this paper: B. Jacobs, 'Farewell to the American Dream. Dutch Interest in American Constitutional Developments in the Early Nineteenth Century', pp. 15-30.
- <sup>13</sup> For a recent scholarly status quaestionis of various aspects of the 1798 constitution: Moorman van Kappen and Coppens (eds.) 2001. See also several contributions in: Moorman van Kappen and Coppens (eds.) 1997.
- <sup>14</sup> Of the 416,419 citizens who enjoyed the franchise, 52,219 voted against the draft and 16,771 in favour. The Executive did not mention the last figure (votes which had not been cast were counted as vote in favour of the proposed constitution), but announced that only 52,219 votes of the 416,419 strong electorate had opposed the draft.
- <sup>15</sup> The franchise included 353,332 voters, of whom 14,093 voted in favour of, and 136 against the draft.
- <sup>16</sup> The state was perhaps in all but name a kingdom, certainly a hereditary monarchy, but the 1814 constitution avoided designating the state as such; instead, it refers consistently to the country as the "United Netherlands" (*Verenigde Nederlanden*), while the head of state is styled *Souvereine Vorst*, which may be translated as "sovereign prince" or, simply, "sovereign" (the Dutch word *vorst* is commonly translated as "sovereign", which of course becomes inadequate in combination with the epithet "sovereign").
- <sup>17</sup> For a very biased historical and political argument against the *stadtholder's* powers written by an influential foreign observer representing the enlightened ideology and agenda on the eve of the French Revolution, cf. Mirabeau's 1788.
- <sup>18</sup> Not only the term "kingdom", the term "national" has also been (mostly) avoided in the constitution. Art. 53 stated that the Dutch people consisted of the inhabitants of the provinces, the list of which, and their territorial boundaries, defined by the constitution (art. 54). Art. 73 created the provincial representative bodies, cf. its use of the future tense: «There will be States [i.e. *representative assemblies*] of the provinces or countries [*Landschappen*]».
- <sup>19</sup> On the origins of this principle in the Netherlands, and its later constitutional developments: Veen 1994.
- <sup>20</sup> The Dutch sovereign had anticipated the decision of the Great Powers in Vienna and had (with their approval) assumed the title of king on 16 March 1815.
- <sup>21</sup> Of which an official French translation was published. The original version was in Dutch. The French text is included in the edition by Bannier 1936, pp. 285-349.
- <sup>22</sup> The right to submit petitions was already mentioned in the 1815 Constitution (art. 181), which was seen to be inspired by art. 364 of the French Constitution of the Year III. See art. 21 and 43 of the Belgian Constitution (1831), and the commentary by Thonissen 1879, pp. 98-100.
- <sup>23</sup> However, demands to establish a separate jury for indictments was rejected, cf. the brief historical references in Thonissen 1879, p. 295.
- <sup>24</sup> For the transcripts of the National Congress's proceedings: Huytens (ed.) 1844-1845, voll. 5. Many of these documents, as well as a useful bibliography (with some of the essential works partly or entirely reproduced) are to be found on the website [www.unionisme.be](http://www.unionisme.be).
- <sup>25</sup> Apart from the commission's draft, a second draft was

also considered during the discussions. Both drafts and the final text voted by the Congress can be found in: Neut 1842, which reproduces the essential *travaux préparatoires*, but following the sequence of the Constitution's articles.