Inaugurating a Dutch Napoleon? Conservative Criticism of the 1815 Constitution of the United Kingdom of the Netherlands

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Abstract The 1815 constitution of the United Kingdom of the Netherlands established a deferential control on the sovereign power to declare war and conclude treaties. Following articles 57 and 58, international agreements could be concluded and ratified by the monarch, save for peacetime cessions of territory. The constitutional committee's debates treat the matter rather hastily. William I (1772–1843)'s role at the establishment of the Kingdom of the United Netherlands had been so decisive, that the advent of a less qualified successor seemed inconceivable. The monarch personified the common interest. Foreign policy, the privileged terrain of princes and diplomats, was judged unsuitable for domestic political bickering. Finally, the Estates Generals' budgetary powers were seen as an indirect brake on

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potential royal martial ardours. The incidental objections formulated by Jan Jozef Raepsaet, a Southern conservative publicist, show the more structural deficiencies of the constitution as a pact between the monarch and the nation. Leaning both on feudal law and law of nations doctrine, Raepsaet demonstrated how William I had been dressed in Napoleon's clothes. The King had a nearly unchecked competence in foreign affairs, beyond the usual Old Regime safeguards, contrary to Enlightenment criticism of autocratic rule. John Gilissen aptly labeled William I as a "monocrat". Vattel or Pufendorf's opinion on the ruler as a mere usufructuary seemed to have evaporated. Raepsaet's arguments on the inconsistent nature of Art. 57 and 58 are echoed in the 1831 Belgian constitution's Art. 67—subjecting most treaties to parliamentary consent—as well in Thorbecke's criticism of the document.

1 Introduction

The Constitution of the United Kingdom of the Netherlands of 1815 ranks as one of the restoration constitutions of post-Napoleonic Europe. Looked at from a distance, the text is the product of a creative moment of European statecraft. The Congress of Vienna (1814–1815) crafted a new state as the cornerstone of its system of collective security. The Catholic Belgian provinces united with the mostly Protestant Dutch, under the wings of a newly-created sovereign King, descendent from a German dynasty, the house of Nassau. The restoration had to incorporate some *acquis* of the French Revolution.[1] Even before the beheading of Louis XVI in 1793, the French monarch had agreed to the constitutionalization of the monarchy of Divine Right. If the monarchy could return after Napoleon, it would have to accept the presence of the nation.

The story of the 1815 constitution is at the crossroads of two theories on the limitation of monarchical power. On the one hand, Old Regime thinking on collective government, divided between the monarch and his loyal elites, as exemplified in Montesquieu's *De l'Esprit des Lois*, or in Fénelon's criticism of Louis XIV's authoritarian reign.[2] On the other hand, revolutionary theories of national representation, as embodied in Siéyes' writings. From a genealogical perspective, William I's constitutions of 1814 and 1815 contained many elements prevalent in the Belgian Constitution of 1831,[3] or of present-day constitutional orders. Yet, its modernity can also be questioned. The most evident angle of approach is that of the lack of balance between the legislative and executive power in the domestic field. This contribution proposes to add a less-studied, but crucial aspect of sovereignty: the right to wage war and conclude treaties. I argue that this case embodies all aspects of the ambiguous relationship between monarchical rule and national

[1] De Waresquiel (2015).

[2] Bély (1996, 243–257).

[3] 40% of all articles, see Gilissen (1979a, 405).

representation. If constitutional precedence was an issue, it counted as such for both sides. Both for those who favored a stronger restoration monarch, and for elite resistance to the acquis of the revolutionary and Napoleonic regimes.

If the discussions on the constitutional regime of foreign relations have been rather scarce, our attention should be aroused by the radical change in formulation between the 1815 constitution and the 1831 Belgian constitution, or, at an even further distance, the 1848 constitution of the Kingdom of the Netherlands.[4] At one end of this spectrum, political liberalism has introduced ministerial responsibility and the primacy of the legislative branch over the executive. Yet, surprisingly, some liberal criticisms echo those of more conservative, Old Régime-thinking.[5] In the middle, the 1815 constitution has put William I in Napoleon's clothes.[6] In the words of Cornelis Van Maanen (1769–1846), president of the highest jurisdiction in the North and William's minister of Justice, "*Den prins in den plaats van den Keizer stellen"* (putting the Prince in the Emperor's place).[7] William's monarchy was 'tempered' by a Constitution, but was in no way a representative regime.[8]

The discussion on power sharing in foreign affairs necessitates a synthesis of two strands in legal history. On the one hand, constitutional history. On the other, the history of international law. The main difference in narrative between these two angles lies precisely in the modern nature of restoration constitutions. Whereas the *acquis* of the French Revolutions seems evident in the domestic sphere, this is not the case for international relations. Looked at as a system of horizontal interaction between sovereign entities, international law did not undergo a fundamental transformation at the Congress of Vienna. The French Convention tried to subvert the principle of non-intervention between sovereign states, by calling for the liberation of populations all over Europe.[9] The Congress of Vienna had the exact opposite intention: the restoration of the *Droit public de l'Europe*.[10] Legitimate dynasties could return where they had been chased. Constitutional arrangements were an affair of every state distinctly. Intervention was approved in the following meetings of the Great Powers (Aachen, Verona, Laibach), when the repression of liberal revolts was on the agenda. Movements in Spain, Italy or Germany were forcefully struck down. The Fundamental Act of the German Confederation even forbade constitutional provisions undermining the monarch's right to rule.

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[4]Van Sas and Te Velde (1998).

[5]Witte (2016a).

[6]Reproach by Van Hogendorp to Van Maanen, Koch (2013, 241); Thorbecke judged that the French period had been of greater importance to the Dutch state than anything achieved after 1813 or before 1848, Worst (1992).

[7]Van Hogendorp, *Geheime Aanteekeningen*, quoted by Colenbrander (1908), I, xliii. This can be explained by a 'lack of schooling in public law' in the Northern delegation. See further in this chapter on the seemingly ill-thought through design of the constitution to William I's benefit. Bornewasser (1983b, 228).

[8]Bornewasser (1983b, 233); See further De Haan et al. (2013).

[9]Steiger (2015, 170), Bélissa (1998).

[10]Gentz (1806).

Starting from this opposition, one would expect the provisions of the 1815 constitution to allot a greater competence to the national representation, to the detriment of the monarch. Conversely, it would not come across as illogical for Old Régime doctrine and case law to consecrate the King's exclusive right to govern international relations. In the following paragraphs, I will first sketch the general characteristics of the 1815 constitution (2) and its international context (3), before turning to the right to conclude treaties and to declare war, as seen from the angle of the law of nations (4). In domestic opposition to Dutch centralizing ideas, the figure of the conservative catholic publicist Jan Jozef Raepsaet should attract our attention (5). Finally, I will briefly consider the differences with the situation post 1831 (conclusion).

2 The Dutch-Belgian Constitution of 1815

The adoption of the 1814 Constitution in the North guided institutional developments. Whereas the North had known a decentralized, almost confederal system under the Dutch Republic (1585–1795), the Batavian Revolt of 1795 had turned this upside-down, by installing a centralized regime.[11] This type of administration was alien to the constitutional traditions of the South, which relied on privileges and freedoms, regularly invoked against the monarch. The opponents to Joseph II (1741–1790) and the French Revolution clung to a system of a '*liberté sage et bien ordonnée*', not to '*ces droits pompeux et extravagans de l'homme, que les Français ont proclamés que pour les fouler aux pieds*'.[12] Yet, in the eyes of 19th century liberals, such as the legal scholar Thorbecke (1798–1872), the constitution of 1814 was nothing more than '*a Napoleonic regulated state with a constitutional façade*'.[13] A radical change had thus taken place.

The merger of North and South was legitimized with historical arguments. Yet, the divergent options taken at crucial instances of the early modern and revolutionary periods turned this into a hybrid and ill-conceived memorial reconstruction. The constitution maintained the precedence among provinces adopted under Emperor Charles V (1506–1555), referred to the Southern tradition of inaugurations, mirroring a tradition of contractual monarchy, but chose a radically different path in its essential provisions. The emphasis on provincial autonomy in the preamble, as if a return to the situation of 1572 would have been possible, was only symbolical.[14] In reality, central administrative supervision put these authorities, erstwhile the most powerful in both North and South, under tutelage (art. 155). Gijsbert Karel Van Hogendorp (1762–1834), who had invited William to return to the North in 1813,[15] would soon see his invented tradition evaporate. Van Maanen's centralized bureaucracy would take over.

[11] Van Sas (2005).

[12] Colenbrander (1908, I, XXXIX).

[13] Bornewasser (1983a, 208).

[14] Bornewasser (1983a, 216), Judo and Van de Perre (2016).

[15] Bornewasser (1983a, 213).

The text adopted in July 1815 by the Joint Constitutional Committee was considerably longer (234 articles against 146 in the 1814 Constitution[16]), but did not differ on fundamental points. A specific prescription for the monarch's submission to the national representation was lacking.[17] Legislative powers were jointly exercised by the monarch and the Estates-General (Art. 105), representing the nation as in the French 1791 constitution (Art. 77). Yet, the repartition between the executive (where the King acted alone) and legislative branches had been left to constitutional practice. A few situations were directly attributed to the Estates-General, but they constituted exceptions.[18] Conformable to e.g. the 'Monarchical principle' enshrined in Art. 57 of the Vienna Final Act on the German Confederation,[19] the King had the residuary competence to act in all cases not explicitly attributed to the legislature.[20]

This created a *besluitenregering* (government by decree), one of the main causes of the Belgian insurrection of 1830.[21] A supplementary lacuna was William's right to deliver dispensations with regards to legislative acts, after consulting the highest court of the realm, the *Hoge Raad*. This was conceived as an exceptional clause, for cases where the delegates of the Estates would not be able to meet in time. Even more, due to William's *conflictenbesluiten* ('conflict of attribution'-decrees), issued in 1822, the King excluded judicial review of administrative acts, claiming the competence for himself, as head of government. Provincial Governors had the duty to intervene in court cases where the judge threatened to scrutinize administrative acts, and order for the case to be conferred to the King.[22] Regarding the relationship of the executive branch to the Estates-General, ministerial responsibility was not a case of the national representation, but the King's affair. Prevention of abuse relied on the personal discretion of the monarch, and on nothing more.[23]

The Constitution of 1815 was rejected by the assembled 'notable' figures in the South.[24] 796 negative and 527 positive votes were however turned around in a

[16]Raepsaet (1838, 273–300).

[17]Alen (1984, 664).

[18]Alen (1984, 665).

[19]Bornewasser (1983b, 234).

[20]Gilissen (1979a, 402).

[21]Gilissen (1979a, 404), note 1 cites 1710 royal and 1075 ministerial decrees published in the official journal *Pasinomie*, against 381 laws voted by the Estates-General. See also Koch (2015).

[22]William took this decision against the majority of his Council of State, which he clearly saw as an Ancien Régime-council *a latere principis*, wherein the (qualitatively) *sanior pars* could ultimately prevail over a quantitative majority, Bornewasser (1983b, 242). Governors were agents of William's central administration, and counterbalanced the provincial estates. This system had been explicitly excluded by the Constitutional Committee in 1815. See Alen (1984, 692).

[23]Alen (1984, 666).

[24]Since a national representation had been lacking, an assembly of 1604 'notable' figures, representing grosso modo 0.02% of the population, had been composed on the advice of Van der Capellen, William I's governor-general Bornewasser (1983b, 232). Raepsaet derided this assembly's composition: '*on y voyait accolés à quelque peu de personnes comme il faut, des noms inconnus dans l'arrondissement, des petits commis de bureau, des gens qui ne possédaient pas un*

more favourable result for the monarch (934 pro, 796 contra[25]). William declared the constitution adopted on 24 August 1815. Yet, the Southern ecclesiastical authorities as well as the nobility rejected the constitutional system.[26] The recognition of freedom of conscience (Art. 190), in the line of Joseph II's reforms, or the insufficient checks on monarchical power, in a Montesquieuan sense, went against their interests. Most of the Belgian provinces had rejected the document, save for the districts of Hasselt, Leuven, Liège, Verviers, Luxemburg, Neufchâteau and Diekirch.[27] Louis Hymans (1829–1884), liberal member of parliament talked of the Belgian people being abducted by the Great Powers, and delivered to the greedy Dutch sovereign as a '*troupeau de moutons*'.[28]

The joint Constitutional Committee, which had met in The Hague in Spring 1815, consisted of a haphazard and divided Southern delegation and a more robust Northern bloc. Cornelis Van Maanen (minister of Justice), Frederik Roëll (future minister of the Interior, 1767–1835), Cornelis Theodorus Elout (1767–1841, future minister of Finance) and Gijsbert Karel van Hogendorp defended the outcome of the 1814 constitution. Among the Belgian delegation, the more conservative members François-Théodore de Thiennes (future president of William I's First Chamber, 1745–1822) and Raepsaet offered opposition, but were not able to prevail on issues of paramount importance. Raepsaet even left the Committee's sessions on 19 June 1815, eleven days before the end of negotiations.[29]

The final version (13 July 1815) saw the creation of a First Chamber within the Estates-General, wherein the King could appoint forty to sixty members over 40 for life, on the basis of their merit, birth or fortune (Art. 80[30]). This chamber, nicknamed '*la ménagerie du roi*',[31] only had the competence to approve or to reject texts coming out of the Second Chamber. This chamber of 110 deputies was elected

pouce de terre, des personnes mal notées, des juges, des administrateurs destitués du temps des Français pour corruption et concussion, etc.' Raepsaet (1838, 186).

[25]Colenbrander (1908, II, 615–617).

[26]Letter by Bishop de Broglie of Ghent to the clergy of his diocese, Raepsaet (1838, 358). William I added 281 abstentionists to the 527 votes in favour of the constitution, as well as 126 votes motivated on religious grounds. William I motivated this by pointing to the second of the 1814 eight articles, installing an equal treatment between the different religions in his Kingdom, Gilissen (1979, 402), Bornewasser (1983b, 232).

[27]In Ypres and Antwerp, not a single vote was cast in favour of the Constitution. In Turnhout and Namur, only one. The assemblies in Mons and Brussels rejected the text with a slight margin. Ghent, Courtrai or Tournai overwhelmingly turned it down. Etienne De Gerlache (1785–1871), a catholic nobleman, was a member of the Estates-General's Second Chamber (1824–1830). He presided over the commission in charge of the draft of the 1831 Belgian Constitution, was elected in the House of Representatives (1831–1832) and ended his career as president of the Belgian Court of Cassation (until 1867). His words are, of course, to be interpreted through the lens of Belgian 19th century patriotism. See De Gerlache (1842, I, 310).

[28]Hymans (1869).

[29]Meyer to Raepsaet, The Hague, 30 June 1815, Raepsaet (1838, 322–323).

[30]Stevens (2016).

[31]Romein (1961, III, 65).

indirectly by the provincial estates. Although the South was demographically predominant, seats were evenly split between North and South.[32] The provincial estates were divided in electoral colleges for nobility, cities, and the countryside. Provincial borders, as established first by the Treaty of Münster in 1648 (which separated parts of Flanders and Brabant) and consequently by the French annexation of 1795 (which partitioned the province of Flanders) were not altered, mainly as a consequence of the re-opening of the Scheldt. The Estates-General and government would become alternating between Brussels, the traditional administrative high point of the Habsburgs, and The Hague, ancient capital of the county of Holland.

3 International Context

> *Prenez la nouvelle Constitution de Hollande, huit articles de Londres et vingt-quatre personnes dont bien six ont de la conscience et de l'instruction. Mettez tout cela ensemble hermétiquement fermé à La Haye; secouez bien à plusieurs reprises, observant de choisir un tems bien chaud et surtout bien orageux. Laissez fermenter pendant environ deux mois et vous retrouverez les huit articles de Londres, la nouvelle Constitution de Hollande et les 24 personnes, le tout un peu froissé. Et la liqueur est faite, il faut la boire*.[33]

The constitution's preamble affirmed that William's sovereignty over the Low Countries was a purely domestic affair. The peace treaties that 'pacified Europe', negotiated in Vienna while the Committee was meeting in The Hague, were of a purely declaratory nature. Yet, the specific development of events from 1813 to 1815 cannot be understood without a clearer view of European diplomacy. When William of Orange proclaimed himself sovereign in the Belgian provinces (1 August 1814), the monarch pointed to the 'magnanimity of Europe's sovereigns' and the political system they had projected to design as the main cause of the extension of his own power.[34] Even if the creation of the United Kingdom may appear novel, it was a logical consequence of several earlier designs to employ the Southern Netherlands as a stabilizer of international relations.

From the separation of the Netherlands on (1568–1648), the Southern Netherlands had become a military contact zone between France, the Dutch Republic and the German space. Ruled at a distance from Madrid, their physical defense had become near-impossible and too expensive. Subsequent plans of partition between France and the Dutch, between Britain and the Dutch, or the creation of an "independent canton republic" did not materialize. Yet, from 1698 on, the Dutch obtained the right to occupy several fortresses. The 1715 Barrier Treaty made their presence a precondition to the transfer of sovereignty to Emperor Charles VI of Habsburg.

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[32]Bornewasser (1983b, 232). The 1814 constitution counted 55 seats for the Northern provinces of Guelders, Holland, Zeeland, Utrecht, Frise, Overrijssel, Groningen, (North-)Brabant and Drenthe. The 1815 constitution added the same number for the more populous Belgian provinces, counting 3.25 million inhabitants against just two in the North, Romein (1961, III, 65).

[33]Anonymous pamphlet against the union of North and South, 1815. Anon (1815) *Pourquoi faut-il une nouvelle constitution*? (Royal Library, Prints, II 86.908 A 1/5).

[34]Raepsaet (1838, 348–349).

William of Orange's sovereignty as prince was recognized for the North in 1813. An 'extension' was part of a deal between Britain and the Dutch. Britain was the active promotor of William's ascent to the first rank of European monarchs. William needed compensation in two regards. First, as dispossessed German ruler. This legitimized his sovereignty over Luxemburg, which had traditionally been part of the Southern Netherlands, as Grand-Duke. In this quality, William counted as a member of the German Confederation.[35] Second, as head of state of Holland, which lost the Cape colony to Britain during the Napoleonic Wars.[36] By extending William's sovereignty to the Meuse, Britain would interpose a neutral buffer between France and the spectacularly aggrandized Kingdom of Prussia.[37] The Eight Articles of London, adopted in June 1814 in a diplomatic conference with Britain, Prussia, Russia and Austria, imposed a "perfect amalgam" for the union of North and South, imposing the necessary amendments to the 1814 constitution.[38] This would prove to be rather illusory. William could not pursue his state-building adventure without this international support. Whereas his own father had been chased in 1787 and only restored with Prussian help, William of Orange obtained more 'with a single penstroke, than the big sword of his ancestors William the Silent, Maurice or Frederick Henry had ever done'.[39] Consequently, the construction, establishment and first years of the United Kingdom were also those of a 'special relationship' of tutelage under British aegis.[40] Dutch affirmations of the contrary—the Dutch people had spontaneously invited William to return-emphasized this fragility.[41]

4 The Right to Declare War (Art. 57-58)

The 1815 constitution has drawn attention from scholars for its domestic implications. The creation of a First Chamber, the role of Provinces or the recognition of many freedoms and liberties allow for a continuity or a more genealogical approach with regards to present-day positive law. Yet, one of the most essential attributions of sovereignty remains outside the perimeter of discussions: the right to wage war and conclude treaties. William's sovereignty could only be full in the arena of European sovereigns when the constitution defined the extent to which the monarch could represent the state externally.

[35]Van Sas (1981, 283).

[36]Van Sas (1981, X, 280).

[37]Prussia equally obtained the right to occupy the fortress of Luxemburg. Although William was its ruler, the Grand-Duchy served as a common buffer against France, Bornewasser (1983b, 225).

[38]And thus not its replacement by an entirely new text, Raepsaet (1838, 128). For a published version of the text, see Ibid., VI, 253–256.

[39]De Gerlache (1842, I, XV).

[40]Van Sas (1985).

[41]Van Sas (1981, 285).

Within the range of possibilities, from full royal control to full parliamentary participation, the 1815 constitution stands out as a more authoritarian restoration constitution. The preamble already indicated that the Committee had not thought it wise to limit William's foreign competence, in view of the monarch's personal wisdom and good conduct in foreign affairs. As such, this reasoning, in continuity with the 1814 Northern constitution, fails to incorporate the possibility of a less capable successor. This is even more surprising in view of the traditional distrust against the monarch in the Low Countries. Philip II of Spain was chased in the North, Joseph II was declared destitute in the South.

Art. 57 (Art. 37 of the 1814 constitution) delegated the right to declare war or make peace to the King. Only the information considered appropriate for the security of the Kingdom could be communicated to the Estates-General. Art. 58 (Art. 38 of the 1814 constitution) conferred the right to conclude and ratify all alliances and treaties onto the King. The Estates-General had a right to be informed, but nothing more. The only exception, added in 1815, constituted in the cession of territory in peacetime, which required the approbation of the nation's representatives. In wartime, decisions could be so urgent, that the monarch could not be hindered.

Raepsaet argued that this was contrary to the most distinguished authors of the law nations. Yet, Willem Queijsen (member of the Council of State, 1754–1817) opposed that the royal decision to separate a part of his territory from the rest, could not become subject of political games within the national representation. If the Estates-General could be in a position as to prevent the King from concluding a treaty, and oblige him to continue a fight against his own wishes, Queijsen added, he would not be the Head of Government any more, and be deprived of his royal dignity.[42] Van Hogendorp nuanced this position. William I would not be completely unrestrained in his foreign policy actions. War was the most costly of all state activities. Precisely the budget had been listed as one of the rare specific competences of the national representation. Extraordinary expenditures such as war did not fall within the decennial vote of the ordinary budget.[43] Moreover, tying foreign policy to parliamentary consent would have gone further than the British system. The King's negotiations and treaties fell under the Crown Privilege, as Van Hogendorp thought. David Armitage's analysis of parliamentary debates after the United States of America's Declaration of Independence seems to provide support for this thesis. The names of Pufendorf and Vattel were depicted as '*lubrications and fancies of foreign writers*'.[44]

From an external point of view, the right to wage war had been subject to theological *bellum justum*-theories up to the middle of the 17th century. The *auctoritas* or authority to wage war was confined to the supreme heads of the Christian world, in an attempt to rein in aggression. Yet, the confessional fragmentation of Europe multiplied the number of sovereign actors. Early modern law of nations-theory constructed a new set of norms, consisting essentially of a digest

[42]Queijsen, meeting of 12 May 1815, Van Maanen (1887, 40).

[43]Bornewasser (1983b, 230), Van Sas (1981, 289).

[44]Armitage (2012, 135–153).

of state practice. They did not automatically derive from theological concepts. The age of 19th century "positivism", as it is often described[45] or criticized by present-day legal theorists[46] was in the first place a product of continuity with 17th and 18th century categories. Both naturalist and realist authors were common, from Zouche and Rachel to Wolff and Pufendorf, or from Vitoria and Suárez to Moser and Martens.[47] The dichotomy between authors according priority to state practice or to the world of ideas is eternal. The Vienna Congress is attributed a milestone role in the history of international law for the installation of a collective security-system. Yet, this position is subject to criticism. The institutional innovations of 1815 were scarce.[48] The system ultimately collapsed due to the incessant waves of internal challenges, or what contemporaries called the resurgence of the French Revolutionary heritage as the 'nationality principle'. Doctrinal evolutions from Klüber (1762–1837) to Bluntschli (1808–1881) should be seen as a continuum, with the latter starting point still entrenched in Old Regime reasoning and exempla.

Whereas the 1815 constitution gives a blanco mandate to the King, most Old Regime theorists had pleaded for bottom-up limitations on royal power, through national representation. Grotius,[49] Pufendorf and Vattel[50] closely associated the social *corpus* with important external decisions. Cutting off part of the population from the others, with whom they had been associated in the same society, would be impossible for Pufendorf.[51] A moral *corpus*, such as a state, was only the result of its members' consent. Only their intention could guide the judgement of external actions. Who could argue that the founders of any society between men would have committed the folly to attribute the competence to alienate *ad libitum*? In case of occupation by a third power, the population could exercise its natural right to revolt.

Vattel offered a complementary angle. Conformably to the French theory of limits on monarchical power through the *lois fondamentales*, no 'Prince or sovereign can naturally been called the owner of his State. He is only its caretaker. The dignity of head of state does not confer the right to alienate'.[52] Vattel's affirmation of the ruler's competence as the beneficiary of a usufruct was in line with French domestic constitutional tradition in the Old Regime.[53] In 1713, the Parliament of Paris used this principle to oppose Louis XIV's wish to have his grandson abdicate his natural right of succession to the French throne. The Revolution did away with

[45]García-Salmones (2013).

[46]Koskenniemi (2001).

[47]Brown Scott (1911–1953).

[48]Jarrett (2013, 358).

[49]Haggenmacher (2013).

[50]Jouannet (1998), Chetail and Haggenmacher (2011).

[51]Pufendorf (1735).

[52]Vattel (1758, I, 226–227).

[53]See also Raepsaet's use of Grotius, *De iure belli ac Paci*s, III, XX, nr.5 as introduction to the 'Observations d'un Belge sur le sort éventuel des Pays-Bas Autrichiens' Raepsaet (1838, 220): The monarch does not hold his authority from a right of full property, but only in usufruct.

this, as the *people-roi* was now governing itself. Louis XVIII, who succeeded his brother Louis XVI in 1814, was able to lift this old theoretical limit on monarchical power. In spite of the allegation of the perpetuity of the Bourbon dynasty across political regimes, Louis XVIII was freer than his predecessors had been.[54]

Specific cases in European diplomatic history corroborated these ideas. In June 1720, George I of Britain promised the cession of Gibraltar to Philip V of Spain. The British monarch communicated a letter through his secretary of state James Stanhope. The cession would take place *du consentement de mon parlement*. In the eyes of Philip V, this constituted an enforcable international promise. Yet, George I retrenched behind the impossibility to act without the consent of Parliament, arguing that territorial cessions required the application of the "King in Parliament"-principle.[55] Likewise, after Charles XII's destructive defeat in the Great Northern War, the Swedish *Riksdag* modified the constitution in such a way as to impose the participation of the Estates in peacemaking.[56]

5 Leave Us as We Are: Jan-Jozef Raepsaet the Constitution as a *Pactum*

> C'est une maxime de sagesse et de prudence dans un Législateur, que celle qui porte: Laissez-nous tels que nous sommes.[57]

Raepsaet, the Constitution's main conservative critic, was trained *in utriusque juris* at the University of Louvain, where he obtained prizes for rhetorical excellence. It is no surprise that he considered history and literature as essential handmaidens for the exercise of the legal profession. He claimed that Flemish customs of public law went back to the seventh century.[58] His career as revolutionary and icon of protest turned around completely. He became a member, and even president of the *Conseil Général* in the Department of the Scheldt. Later on, he was even called up as a member of the *Corps Législatif* in Paris.[59] Although Raepsaet seemed to have spent his time mainly on studying in the various libraries of the capital, his enrolment in the Napoleonic system is not without significance. Pledging allegiance to the parvenu-Emperor of France, or being present at his self-coronation in the Notre Dame, where the pope was humiliated, did constitute a rupture with the Old Régime-traditions Raepsaet advocated throughout his Austrian period.

Raepsaet was a specialist of feudal law. An elaborate essay on inaugurations in the Southern Netherlands ranks among his main publications. This text was written on purpose, in order to tie William I to the Old Regime idea of contractual

[54]Mansel (2004, 210–211), Evans (2016, 30).

[55]Dhondt (2015, 238).

[56]Vattel (1758, II, 256), Mattéi (2006, 152).

[57]Raepsaet (1838, 227).

[58]Dhondt (2001, III, 21).

[59]As one of the 26 Belgian members. Devleeshouwer (1983, 200).

monarchy.[60] Raepsaet personally met William I in September 1814. During six quarters of an hour, Raepsaet recalled popular dissatisfaction, the virtues of the old constitution and government and the ideal new system.[61] A meeting between these two figures was logical. During the Revolt against Joseph II, Raepsaet had been advocating that the constitutions of the County of Flanders, a disparate hodgepodge of incidental documents and declarations, held the same rank as that of the Duchy of Brabant. Under the Austrian restoration (1790–1792), Raepsaet was charged with the draft of a new constitution for Flanders.

In Raepsaet's mind, the United Kingdom of the Netherlands was of a double nature. On the one hand, the creation of a new state corresponded to the necessity of a *titre légal* in the Public Law of Europe. The diplomatic creation of the Kingdom can thus never be seen in a solely domestic perspective. International circumstances are co-creators and are never of a purely declaratory nature. Foremost in the case of the '*théâtre naturel des guerres du continent*'.[62] If the Great Powers had consented in the transfer of the Southern Netherlands from Spain to Austria in 1713–1715, the same ought to apply a century later.[63] Loyalty did not reside in his faith in the House of Habsburg, but in his loyalty towards institutions. Raepsaet's incidental laments on the Vienna Congress, where '*on se serait permis de traiter de nous et sans nous, par un simple article* […] *sur des bases convenues avec le prince d'Orange, avant qu'il ne fut notre souverain*' should thus not be overstressed.[64]

On the other hand, Raepsaet argued that a change in international circumstances could not invalidate internal traditions. The old constitutions of the Southern Netherlands were the compass of political action.[65] They had been reaffirmed time and time again, in 1715 as well as in 1790.[66] Louis XIV had even conserved them when he conquered parts of French-speaking Flanders.[67] Raepsaet even went so far as to deny any unification intention to the Spanish and Austrian rulers of the Southern Netherlands.[68] The *Code Civil* of Napoleon had only been a vain attempt to abolish the formal authority of Roman law, ordinances and customs. Their spirit

[60]Cornelissen (1841, XXII).

[61]A proposal to sit on the monarch's Council of State was declined. After his Napoleonic responsibilities, Raepsaet preferred the calm of his local Oudenaarde.

[62]Raepsaet (1838, 127, 205).

[63]Raepsaet (1838, 225).

[64]Raepsaet (1838, 177). See as well his accusations of corruption against the British ambassador Clancarty, who would have obtained the marquisat of Heusden (near Ghent) in exchange for an unequal burden-sharing between North and South. See, on this topic: Judo (2007).

[65]See also Anon (1814).

[66]Convention relative to the Affairs of the Austrian Netherlands between Austria and Great Britain, the Netherlands and Prussia, The Hague, 10 December 1790, Parry (1969–1981, vol. 51, 71), Raepsaet (1838, 212).

[67]Raepsaet (1838, 240).

[68]Raepsaet (1838, 242).

had been explicitly acknowledged by the Code's authors as the true inspiration.[69] Uniformisation of regions as different as Frise, Hainault or Flanders would be doomed beforehand. A commercial code, for instance, had never been necessary in the heyday of Bruges, Ghent or Antwerp. Even more, the customs of the stock exchange had travelled to Amsterdam![70]

Raepsaet's plea for upholding the spirit of Old Regime diversity was perfectly congruent with the conservative perspective of the legitimacy-principle of the Vienna Congress. Customs and traditions provided internal stability, whereas treaties consecrated the external aspect of sovereignty, starting with state recognition. William's use of an assembly of appointed "notables" to endorse the constitution, seemed outright absurd. The Belgian nation had no other representatives but the three orders of the traditional estates in every province.[71] Happiness and opulence were the logical consequences of the good government of ancient constitutions.[72] Certainly in contrast with the chaotic succession of constitutions in France. Even more, its countryside nobility had always been perceived by the population as protectors, benefactors and "fathers" of the villages under their jurisdiction.[73]

Raepsaet was not a mere advocate of a return to the Old Regime. He did integrate the necessity of a new state. There was an explicit need for a '*centre de circonvallation*' to the North of France.[74] Even more, if a change in statehood would turn out to be beneficiary to the Southern Netherlands, the constitution could and ought to be modified. William's attempt to regenerate the XVII provinces was, after all, an adaptation of Charles V's Pragmatic Sanction (1549), which considered the Low Countries as a single inheritance. Yet, within this new framework, Raepsaet pleaded for a return of the societal forces that had been present since the Middle Ages. Or, in more fashionable 18th century terms, for a cooperation of elites as defended by Montesquieu.[75] The estates' cooperation in legislative power, or the administration of the treasury was as self-evident as that to wage war or conclude peace. In modern terms, we could call him an advocate of subsidiarity and multi-level governance within the composite United Kingdom of the Netherlands. A common constitution was necessary, but integration did not need to go beyond

[69] '*Suivant cet avis, le code n'est qu'une analyse de la loi romaine*; *l'on accorde force de loi à l'analyse de la loi, mais on refuse force de loi à la loi même*; *et tandis qu'on accorde force de loi à l'analyse, on reconnaît qu'elle est insuffisante sans le concours de la loi qu'on a abolie*.' The code would furthermore generate nothing but disorders: '*ces codes, qui ne laissent guère que droit romain ou la force de la raison écrite, autorisent un juge à trouver sa raison meilleure que celle de Papinien*.' Raepsaet (1838, 243).

[70] Raepsaet (1838, 250), De ruysscher (2009).

[71] Raepsaet (1838, 121).

[72] Raepsaet (1838, 227).

[73] Point made by de Thiennes and de Mérode. Raepsaet (1838, 151).

[74] Raepsaet (1838, 221).

[75] Dhondt (2001, VI, 201).

what was required to maintain '*la considération et l'influence dans la Balance de l'Europe* […] *nécessaires pour nos intérêts commerciaux et politiques*'.[76]

Raepsaet saw the new Constitution as a *Pactum* between the monarch and the representative forces in society. Consent was explicit in the inauguration ceremony. The monarch should be recalled regularly of the theoretical foundations of his powers. He relied explicitly on Grotius and Vattel to sustain this point.[77]

In sum, William's sovereignty relied on two elements: '*titre légal*' (internationally conferred) and '*anciennes lois et coutumes*.'[78] Unfortunately for him, the advantages of French-style centralized administration had conquered the minds of his interlocutors, passive Belgians and vigorous Dutchmen alike.[79] This was perceivable to the ultimate degree: the award of a near-unlimited competence in foreign affairs, designed to fit one single man, irrespective of his successors.[80]

6 Epilogue: The Eclipse of the Monarchical Principle

The Belgian Constitution of 1831 broke with the specific deficiencies of William I's constitution. The revolt of local elites and young graduates was a consequence of the unequal distribution of favours and positions within the army and administration.[81] The document approved in February 1831 by an elected National Congress explicitly turned the order of priorities upside down. William's sovereignty had preceded the constitutions of 1814 and 1815. The Belgian people, represented in Congress, established the nation's sovereignty before any ruler could personify or represent the state. Establishing this sovereignty, however, in view of the Southern Netherlands' delicate position on the European chessboard, was an external as well as an internal affair. France applauded the reduction of the buffer state designed against it in 1814–1815. Britain could support the liberal principles behind the insurrection, as far as Belgium would observe a strict neutrality.

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[76]Raepsaet (1838, 222).

[77]This is no surprise. Vattel's popularity in 19th century thought is a corollary of the political structure of the Republic of Neuchâtel. Vattel's home state was ruled at a distance from 1707 on. Consequently, Vattel advocated local sovereignty throughout his work, Dhondt (2015b). See also the use of Bynkershoek by Raepsaet on the question of wartime indemnities for the civilian population, Raepsaet (1838, 126, 222–224).

[78]Raepsaet (1838, 222), adding Montesquieu's conservative appreciation of custom as the source of a nation's felicity, and Grotius' similar point of view, confirmed by the 'authority' of Cicero.

[79]Olcina (2010, 36).

[80]Raepsaet (1838, 163): '*que le roi, par diverses considérations, et surtout dans la situation actuelle du royaume, pourrait se trouver personnellement trop faible pour résister aux instances pressantes de puissances voisines.*'

[81]This ran against article 11's promise of equal treatment between the King's subjects for appointments in public service, Witte (2016b).

The ill-reflected general delegation of powers to the monarch uncoupled the administrative Napoleonic tradition from the popular legitimacy made necessary by the French Revolution. As the constitution's preamble stated, the 'person of the monarch', had been the object and purpose of negotiations. This is striking, compared with the criticism addressed to Joseph II. We shall only quote erstwhile insurrection leader Hendrik Van der Noot (1731–1827)'s '*Si nous avons un prince c'est afin qu'il nous préserve d'avoir un maître*.'[82] The nation was not consulted in the South. Individual freedoms and liberties were numerous, but the urge to ensure 'the freedom of persons, the security of property, and all civil privileges', was not very different from the recipe used by Napoleon to urge figures as Raepsaet to participate in the French regime.

Although little discussed during the National Congress session, Art. 67 of the 1831 Belgian Constitution put brakes on monarchical power in foreign affairs. This was a consequence of the now generalized primacy of the legislative branch. Art. 67 should be seen in the context of judicial review by courts and tribunals of acts of the executive branch, or the introduction of ministerial responsibility.

This general liberal tendency can be found in Thorbecke's commentary on the 1815 constitution, which appeared in 1839. The distinction between wartime and peacetime territorial cessions was absurd and without meaning, according to the Dutch constitutionalist, who had taught in Ghent, as well as in Leiden.[83] The overarching structure of the constitution commanded to treat any alteration of territory as an outright modification of the document itself. Practically speaking, the monarch's hands would equally be tied in wartime, since the national representation had the—theoretical—possibility to oppose a modification of the constitution.

Diplomatic practice attributed a larger role to Belgium's new King, Leopold of Saxe-Cobourg. Thanks to his political and military experience, as well as his ties to both ruling houses in London and Paris, the monarch's negotiating position was without comparison to that of civil ministers or diplomats. Parliamentary control of the settlement of the nation's borders was a fiction. In his commentary on the Belgian constitution, Thonissen stated that most diplomatic information was generically unsuitable for divulgation in the public arena.[84] Jean Stengers equaled Leopold I's mental conception of foreign policy to that of an Old Regime prince.[85] Yet, the domestic legal architecture behind the exercise of his competences differed substantially from that of "monocrat" William I.[86]

[82]Dhondt (2001, V, 42).
[83]Thorbecke (1839, 69).
[84]Thonissen (1844, 202).
[85]Stengers (1996, 248).
[86]Gilissen (1979b, 131).

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