

Third Generation

Restoration Constitutions

Unrest breeds more unrest. The French constitutions of 1793 and 1795 and the new order exacerbated the contradictions and turmoil more than they ameliorated them. Even the revolutionaries' success in maintaining power and increasing support and acceptance of the new ideas, at home as well as abroad, failed to restore peace. The revolutionaries grew ever more radical, extreme, bordering on paranoid under the Jacobin-dominated Committee of Public Safety's Reign of Terror (1793–1794). Even a constitution brimming with lofty ideals, principles and rights has little power as a document when confronted by abuse of authority and popular rage. The Committee of Public Safety's successor, the five-man collegiate body called the Directory, had difficulty overcoming continuing internal disputes and costly foreign conflicts. Was the revolutionary order simply too new, implemented too abruptly or too far ahead of its time? It is hard to say. The revolutionary ideas did mobilise the French people, even resulting in military success. Yet, the ongoing internal conflicts due to sustained political strife weakened the French government on many different fronts.

The new constitution imposed by Napoleon after a coup d'état at the end of 1799 (the Constitution of the Year VIII) solved this problem in one fell swoop. Following the example of the Roman Republic, which was greatly admired at the time, France was to be led by a three-man Consulate. Like a latter-day Caesar, Napoleon Bonaparte held all real power, but the constitution gave France what it yearned for after ten revolutionary years: peace and order. Bonaparte was the First Consul; the other two consuls played a marginal role. Despite being the result of a seizure of power, the new order paid shrewd lip service to the past, enabling Napoleon to obscure its provenance. He allowed the widely admired Emmanuel Joseph Sieyès, one of the first revolutionaries who wrote the influential revolutionary pamphlet *What Is the Third Estate?*, to draft a constitution.¹ When a college of 500 delegates

¹ Published in January 1789, seven months before the outbreak of the revolution and an important source of inspiration for the events culminating in the Tennis Court Oath.

rejected it, Napoleon proposed his own text, which was approved by an overwhelming majority in a referendum.

Napoleon's constitution of the year VIII was a clever mix of old and new. It upheld the revolutionary confiscation of property, as well as the strict laws forbidding the return of émigrés (predominantly nobility). But, it also contained new 'stabilising' elements: a single-person executive, legislative power controlled by the consul, an influential administrative advisory body – the Council of State (*Conseil d'État*), composed of influential lawyers acting as a revamped privy council. The state finances were modernised, as was the rest of the state apparatus – in particular, the law and administration of justice.² The Constitution of the Year VIII is one of the first in Europe to focus on meritocratic administration by experts: capacity and skill served as the guiding principles for recruitment to government service, instead of birth or descent. The revolutionary motto *Liberté, Égalité, Fraternité* ('liberty, equality, fraternity') was, however, quietly dropped. Neither does it contain any reference to universal natural human rights; the new, sober state administration also dispensed with the Declaration of the Rights of Man and of the Citizen. Whilst French men still had nominal universal suffrage, it was no more than a sham democracy: the First Consul and his followers determined who would be admitted to the representative organs.³ Many even doubt whether the constitution of 1799 made France a constitutional state – a state governed by the rule of law – which had been a key revolutionary ambition.⁴

Much was – intentionally – unclear in the new constitution. Napoleon felt that:

A constitution should be short and obscure. It must be made in such a way as not to hamper the action of government.⁵

² In 1800, Napoleon convened a committee of eminent jurists including Jean-Étienne-Marie Portalis and Napoleon's fellow consul Jean-Jacques Régis de Cambacérès to draft a civil code codifying much existing customary civil law (including the Customs of Paris – a compilation of customary law maintained since 1510 – and much Roman-French law and Chancellor d'Aguesseau's decrees, maintained since c. 1731). The civil code was introduced in 1804. This is followed by the codification of the criminal code in 1810. Both codes were highly influential on private and criminal law in the nineteenth century in Europe and – due to colonisation – far beyond.

³ Of which, the senate was initially the most important.

⁴ Thornhill argues that the Napoleonic constitutions did indeed preserve the revolutionary achievements of the French constitution of 1791 in particular, including the idea of the rule of law. 'Even after the constitutional reforms of 1802, when the authoritarian powers of the Napoleonic executive were reinforced, it is doubtful whether Bonapartist rule fell completely outside the pattern of constitutional governance. Indeed, his elevation to imperial grandeur after 1804 did not mean that Napoleon governed wholly without parliamentary checks, and his regime preserved (albeit highly limited) countervailing powers in the state [...] At Napoleon's first accession to power, however, the constitutional dimensions of his regime were clear and pronounced.' Thornhill 2011, p. 223. He precedes to argue that in several respects '[...] Napoleonic government remained within the category of constitutional rule.' Thornhill 2011, p. 225. For a less sanguine appraisal, cf. Bernard 2017.

⁵ In the original French: 'Il faut qu'une constitution soit courte et obscure. Elle doit être faite de manière à ne pas gêner l'action du gouvernement.' Soullier 1852.

This Napoleonic constitution attempted to reconcile the old and the new, and fuse good, trusted administrative traditions and the legitimacy and authority of a time-honoured administrative culture with the new ideas on freedom and governance bound to the law. It was to be widely imitated, even after the fall of the French Empire in 1814, when all of Europe had become acquainted with the new ideas. There was a proliferation of constitutions designed according to this synthesis of old and new elements. They were particularly popular in the Europe of kingdoms in the first period of the restoration after 1815. These early-nineteenth-century constitutions were not monarchical constitutions along eighteenth-century lines, but rather 'restoration constitutions'; partial restoration of venerable institutions (monarchy) and familiar (religious and secular) authority, but bound in new relations.⁶ Royal power was not so much limited as recast, re-established and redesigned as part of a strong state with a strong executive.⁷ The new dispensation entailed both limitation (conditional and limited allocation of authority) and reinforcement of power.⁸ It is a form of instrumental constitutionalism. The constitution centralised state power and restructured the state system and administration.⁹ Some reassuring old furniture in a new house, you might say.

An early example is the 1807 Constitution of the Kingdom of Westphalia. Napoleon imposed this constitution on the Confederation of the Rhine after his victory at Austerlitz. This first German Constitution – the result of the Treaties of Tilsit – established the new kingdom of Westphalia. It was an unprecedented innovation. It had hitherto been inconceivable to simply create kingdoms or monarchies, which were God-given, and it required at the very least incumbent spiritual and secular leaders' recognition. None of which bothered Napoleon in the slightest. The conqueror of a new Europe established new kingdoms, installed kings, crowned himself king of Italy and then emperor of the French in a ceremony at Notre-Dame de Paris, with Pope Pius VII a passive onlooker. This was a profound affront to the crowns of Europe.¹⁰

The Westphalian constitution had marked revolutionary features.¹¹ It introduced freedom of religion, equality before the law, economic freedoms and abolished many of the aristocracy's privileges as well as serfdom. Government operation was also organised according to the new principles. It instituted the tripartite separation of powers, modernised the administration of justice and codified and modernised private law (the law governing relations between citizens) along French lines. Even though the artificial kingdom of Westphalia was short-lived (expiring in 1813), its

⁶ Cf. Meadwell 2001, especially p. 173.

⁷ Cf. Thornhill 2011, p. 228 who talks of the 'restoration constitution' to indicate the French post-Napoleonic constitution.

⁸ Thornhill rightly characterises this type of constitution as 'monarchy limited and intensified'. Thornhill 2011, p. 228–240.

⁹ Thornhill 2011, p. 220.

¹⁰ Lawday 2007, chapters 8 and 9, especially from p. 147.

¹¹ Cf. Grothe 2005, p. 1–19 on p. 6.

constitution has had profound and lasting influence in Germany. It was a source of inspiration for the Bavarian constitution of 1808 and the constitution of the Grand Duchy of Frankfurt of 1810,¹² influenced German officials and intellectuals long after 1813,¹³ and had consequences up to 1848.

The Westphalian constitution was one of the first in a wave of constitutions to inundate the world at the start of the nineteenth century. They tried to create a new order based on new, enlightened insights.¹⁴ This includes the influential constitution of Cádiz (1812), which transformed Spain and the Spanish Empire into a constitutional monarchy based on new liberal principles for two years.¹⁵ Like its Westphalian counterpart, its short lifespan belies its abiding influence. It was briefly reinstated between 1820 and 1823, during the *Trienio Liberal* – three years of regained freedom after an uprising in 1820 – and re-emerged for a third time – briefly – in 1836 and 1837, whilst the Spanish constitution of 1837 was being drafted,¹⁶ which itself is regarded as an attempt to restore the constitution of Cádiz.

But the Constitution of Cádiz has had the greatest influence chiefly outside Spain. After the liberal revolution of 1820, Portugal adopted a constitution in 1822 based on the liberal Cádiz approach; it affirmed the separation of powers, a role for parliamentary representation, fundamental freedoms, and a modern legal system. This Portuguese constitution was in its turn an important step towards newly independent Brazil's constitution, which was adopted in 1824. The greatest consequence of the Constitution of Cádiz was on the new independent republics that supplanted the former Spanish colonies in Latin America between 1809 and 1833. This includes the constitutions of Chile (1833),¹⁷ the Republic of Colombia (*Constitution of Cúcuta*, 1821), the Federal Republic of Central America (1824), Bolivia (1831) and Uruguay¹⁸ (1829).¹⁹ The venerable Constitution of Cádiz continued to be a key source of inspiration for constitutional development in Latin America throughout the nineteenth century.²⁰

¹² Grothe 2005, p. 10.

¹³ *Ibid.*

¹⁴ Cf. For a historical overview, Constitutions of the World Online, which presents the results of the project *The Rise of Modern Constitutionalism, 1776 – 1849* www.modern-constitutions.de/nbu.php?page_id=f430314067d0b98efac2049c65113d41 (Consulted on 30 April 2018).

¹⁵ Its official title is the Political Constitution of the Spanish Monarchy (*Constitución Política de la Monarquía Española*) Cf. Mirow 2015.

¹⁶ In its turn, it was replaced by the more liberal constitution of 1845.

¹⁷ This constitution, which includes many recognisable elements of the French *Thermidor* constitution of 1795 (authoritarian presidentialism and an oligarchic parliamentary system), survived until 1925, making it to this day South America's longest-surviving constitution. Gargarella argues that this is mainly due to its clever design: 'On the one hand, the Constitution organised its system of rights according to the needs and demands of the Catholic Church: Only the Catholic Church was recognised and accepted [...]. On the other hand, the Constitution made all the different institutional powers dependent on the will of a hyper-powerful president.' Gargarella 2016, especially p. 100.

¹⁸ Cf. Bewes 1920, p. 60–63.

¹⁹ Cf. Sabato 2018, p. 38–40.

²⁰ Mirow 2015, chapter 6, especially p. 237–238.

A SERIES OF CONSTITUTIONAL MONARCHIES

The need for formative constitutions on the European continent grew even stronger after the fall of Napoleon. Restoration constitutions came to be regarded as the remedy for shaping the changed relations of a new Europe devised at the Congress of Vienna (1814–1815). The nineteenth century was to see the flowering of constitutionalism in Europe.²¹ Constitutions were regarded for almost a century not only as instruments of political change, but also as instruments capable of averting political tensions in a rapidly changing world. In his book *Phantom Terror*,²² Adam Zamoyski lucidly describes how post-Napoleonic generations lived in incessant dread. Nothing seemed sacred, certain or safe after the Jacobin and Napoleonic carnage. Zamoyski argues that Europe endured a protracted crisis between 1789 and the democratic revolutions of 1848. Rulers were bedevilled by political paranoia and were constantly fearful of the danger of insurrection, subversion of the current social order and (Jacobin) terror, which they feared could break out at any time. A strong monarchical and constitutionally-anchored authority was regarded as the only effective remedy to persistent danger of this kind.²³ These constitutions used legal rules to codify law from venerable traditions and mix them with new ones and by this ‘constitute’ and cement pacifying legal, social and political orders. This made a constitution more than collection of legal rules or political principles: it established the nature of the nation and described its ‘constitution’. As part of the judicious and measured peace of 1815 (the ‘Concert of Europe’ organised at the Congress of Vienna), old empires and monarchies continued, and were sometimes re-established or newly invented. This was often affected with a constitution. It would be superfluous to mention all of them here; most failed to survive to the present.

Innovative Restoration

On that day an Assembly representing the United Netherlands’ convened at the Nieuwe Kerk in Amsterdam to consider a draft prepared by a Royal Constitutional Committee.²⁴ The authoritarian and bad-tempered Justice Minister Van Maanen – who had served under Napoleon rule and was versed in it – had already let it be

²¹ For an insight into the proliferation of constitutions in the nineteenth century, cf. Dippel 2004.

²² *Phantom Terror: The Threat of Revolution and the Repression of Liberty 1789–1848*, Zamoyski 2014.

²³ Cf. Constant 1997 (orig. 1806–1810).

²⁴ The first Constitution of 1814 was prepared by a constitutional committee established by William I – who had proclaimed himself Sovereign Prince of the United Netherlands at the end of 1813 – and chaired by Gijsbert Karel van Hogendorp. The latter had been working in secret on a draft constitution for a sovereign principality of the United Netherlands during the final years of French rule. This basic text was opportune, greatly expediting the matter. A complete text was produced in March 1814 – less than four months after William had embarked in the Netherlands and agreed to act as its sovereign prince.

known that there was to be no discussion. Of the 600 notables invited, 474 were present; the newly arrived prince spoke and Van Maanen, who had been a member of the constitutional committee, gave a brief explanation of the constitution's design. Then it was put to a vote without debate or further ado: Ayes 448, Noes 26. Everything was done and dusted within an hour and a half.

Typical of the period, the 1814 Constitution enshrines a mix of old and new elements. It clearly bound government to the law,²⁵ recognised the 'invaluable advantages of civil freedom and personal safety' and granted a number of fundamental freedoms (prohibition of arbitrary arrest, access to justice),²⁶ freedom of religion and confession.²⁷ It furthermore recognised a role for the people in governing the state²⁸ and separated governmental power into executive,²⁹ legislative³⁰ and judicial³¹ branches. This 1814 Constitution, like the other constitutions in the post-Napoleonic period, focused on strong central authority and strong monarchical rule. Numerous articles conferred the Sovereign Prince and from 16 March 1815 King William I³² supreme governmental power and other important executive responsibilities, including supreme authority over colonies and overseas state assets³³ and finances,³⁴ authority over foreign affairs (including conclusion and ratification of treaties),³⁵ issuing currency,³⁶ command of the fleet and armed forces,³⁷ and the

²⁵ The 1814 Constitution is permeated with this idea. The whole concept of the document is that state powers are bound to the rules contained in it – constitutional law and the law based on it. The constitution's intention to bind to the law is explicit in article 72 and article 104, but in general is implicit in the rest of the document.

²⁶ All from article 101 of the 1814 Constitution.

²⁷ Articles 134 and 135 of the 1814 Constitution. Other forms of freedom of expression, such as the freedom of the press, petition and so on were only introduced in 1815 Constitution of the United Kingdom of the Netherlands at the insistence of the southerners.

²⁸ Article 52 of the 1814 Constitution is the most 'venerable' and stable provision in the Dutch Constitution: 'The States General shall represent the entire people of the Netherlands.'

²⁹ The 1814 Constitution conferred the Sovereign Prince executive authority in many areas. This authority extended beyond merely implementing laws. The Constitution also conferred many general implementation responsibilities and powers to the monarch. Cf. Articles 36, 37, 39, 41 and 50 of the 1814 Constitution.

³⁰ Cf. Articles 68 to 71 of the 1814 Constitution.

³¹ Cf. Articles 101 and 105 of the 1814 Constitution.

³² The European powers at the Congress of Vienna decided to grant William this elevation. The Congress decided to unite the Northern and Southern Netherlands (approximately contiguous with present-day Belgium) under the newly established crown of the Kingdom of the Netherlands. King William I was also made Grand Duke of Luxembourg by the same decision. A proclamation in the Government Gazette of 16 March 1815 (Bulletin of Acts & Decrees 27) informed the people of the Netherlands of the new situation. From that moment, the Netherlands was a Kingdom. William I was officially inaugurated in Brussels on 21 September 1815, after the adoption of the 1815 Constitution.

³³ Cf. Article 36 of the 1814 Constitution.

³⁴ Cf. Article 40 of the 1814 Constitution.

³⁵ Cf. Article 38 of the 1814 Constitution.

³⁶ Cf. Article 41 of the 1814 Constitution.

³⁷ Cf. Article 39 of the 1814 Constitution.

right to declare war and make peace.³⁸ There were great expectations of strong government. Several of the drafters had had first-hand experience of the French Empire's effective governance from the Netherlands' incorporation into the empire in 1806.³⁹ It contrasted sharply with the atrophied and ineffective governance that had blighted the late Dutch Republic. However much the drafters wanted a restoration in form, they certainly did not want to tamper with the innovation of French-style governance along Napoleonic lines.

Meanwhile in Norway...

Norway's first constitution also dates from this period. It was adopted on 17 May 1814, about two months after the adoption of the Dutch Constitution. The rapid pace of political development meant that it was done post-haste. Norway had hitherto been part of the Kingdom of Denmark, which had allied itself with France – against the wishes of the Norwegians. After the French defeat at Leipzig in autumn 1813, the Norwegians had a brief outburst of national consciousness thanks to a Swedish naval blockade of the Danes. At a summarily convened Constituent Assembly (*Riksforsamlingen*) in Eidsvoll, the Norwegians proclaimed their own kingdom under regent Christian Frederik and give themselves a constitution. The adventure only lasted a few months, as Norway entered into a personal union with Sweden in November 1814 – which part of the Constituent Assembly had incidentally called for in the spring. It would take another 91 years for the Norwegians to secede from Sweden and reclaim their actual independence, although they kept their 1814 constitution on record and intact during the time of the union. The Norwegians mark the events of 1814 by celebrating Constitution Day on 17 May. This instance clearly illustrates how constitutions and nation-building go hand in hand.

The Dutch Constitution of 1814 was also rapidly overtaken by facts on the ground. The European powers convened the Congress of Vienna to hammer out how to organise a post-Napoleonic Europe after Napoleon. They decided in March 1815 to merge the former Dutch Republic and Austrian Netherlands into a buffer state to frustrate French imperial ambitions. The decision was mainly impelled by the Hundred Days – Napoleon's final military campaign⁴⁰ after his return from exile on Elba. Constitutional arrangements went less smoothly this time; much had to be hurriedly improvised in the new kingdom. The revised Constitution of 1815 proved

³⁸ Cf. Article 38 of the 1814 Constitution.

³⁹ Such as the influential C.F. (Cornelis Felix) van Maanen, who had been Louis Napoleon's Minister of Justice and Police (from 1807) and also served as the new kingdom's Minister of Justice between 1814 and 1842. He was not unique. Several members of the 1814 Constitutional Committee had also served in the French (and sometimes even the Batavian) era and later served as ministers in the new kingdom, including G.W. (Gustaaf Willem) baron van Imhoff, C.Th. (Cornelis Theodorus) Elout and W.F. (Willem Frederik) baron Röell.

⁴⁰ Culminating in the Battle of Waterloo and Napoleon's final defeat on 18 June 1815.

to be a hard-won compromise.⁴¹ Mutual misunderstanding and distrust resulted in a voluminous text abounding in impenetrable and ambiguous compromise texts. Eighty years later, the Dutch constitutional lawyer Buijs complained that it ‘distinguished itself by nothing so much as the laxity of its editing’.⁴² The process was beset with irritation and frustration. Part of the reason was certainly the prospective king’s imperiousness. Having already been proclaimed king by the European powers in Vienna, he was less accommodating towards the southerners than he had been towards the northerners in 1813 and 1814 when he was still unsure of his position. Cultural differences also played a role. This sleight of hand is known to posterity as *Arithmétique hollandaise* (Dutch arithmetic). The 1815 Constitution was ill-starred. The United Netherlands was to disintegrate within fifteen years, with the outbreak of the Belgian Revolution in 1830. This was not thanks to the constitution or its troubled inception, but it certainly did not help prevent the rift.

Imposed constitutions – as the constitution of the United Netherlands of 1815 was to a certain extent – usually have little binding force, and have difficulty coming to life, so to speak. This may explain why hardly any attempts were made to defuse the rising tensions between the Northern and Southern Netherlands between 1830 and 1839 by revising the constitution and – thereby – reorganising relations. The pre-existing constitutional order had little effect on the Belgian Revolution. The southerners – the Belgians – were unconcerned about its legal details when they seceded in 1830. They acted as if the whole Constitution of 1815 was simply non-existent to them anymore; they did not bother amending or revising it, neither did they wish to discuss bilateral matters with the rump Netherlands. It was largely left to the great powers of Europe (with a superannuated Talleyrand in a leading role)⁴³ to decide

⁴¹ In the Northern Netherlands, the 1815 constitution was prepared and adopted as a revision of the 1814 constitution. In the Southern Netherlands, the constitution was presented to the population in a kind of referendum and thence to a popular assembly in Brussels. As said, this could not have been done in any other way – the southerners were not yet part of the constitutional order. Although the Dutch tried their best to engage their Belgian counterparts in the preparations, the Belgians kept opposing and voting down drafts for the revised Constitution of the Kingdom. In a new, final attempt to get it adopted delegates of the Belgian people were invited to great constitutional assembly Brussels to vote on it yet again. The king and his party were furious with the backtracking Belgians – who were perhaps not so much manipulative and devious as politically inexperienced (ruled by foreigners for more than 200 years) and disorganised. They had trouble coordinating their position and struggled to respond to royal pressure. Perhaps they chose the only sensible option; they stayed away. One sixth of the delegates at the great constitutional assembly in Brussels – mostly southerners – did not attend in silent protest. This created a major problem in both terms of quorum and majority for the already enraged royal camp. They decided to get ‘creative’ by adding the votes of the absentees to the ayes in order to get the 1815 Constitution adopted. And even though the southerners have ever since called this form of manipulation ‘*Arithmétique Hollandaise*’ (Dutch Arithmetic) the constitution of the United Kingdom of the Netherlands was duly enacted on 24 August 1815 in Brussels. Cf. Voermans 2018, p. 12–13.

⁴² My translation of Buijs 1883 (Dutch original), p. 229.

⁴³ This French statesman, who had played an active role in and survived the French Revolution, Directory, Consulate, Empire and restored monarchy, was 76 years-old by this time. Lawday 2007, chapter 21 (*Last Performance*).

how to deal with the consequences of the Belgian secession, partly thanks to Dutch obduracy. In a way, the Belgian case was referred back to the Congress of Vienna, where the idea of a United Kingdom of the Netherlands had been born.⁴⁴ The existing constitutional order toppled under the weight of political developments. This fate was shared by many post-Napoleonic constitutions: many of them were revoked from 1818 onwards.⁴⁵

The same fate also awaited France's imposed constitution, the Charter of 1814 which – under the guise of mediaeval privilege – had 'restored' the Bourbon monarchy and created a constitutional monarchy. The reactionary king Charles X was deposed in July 1830 and replaced by the 'citizen king' Louis Philippe and a more liberal constitution.⁴⁶ There were uprisings and revolutions throughout Europe in 1830, which the anti-Napoleonic allies succeeded in suppressing. In a remarkable pattern, revolts broke out simultaneously in nineteenth-century Europe. The next stop would be the one of the Revolutions of 1848.

⁴⁴ The Talleyrand partition plan for Belgium, partially based on ethnic borders, was very modern. It was rejected by the other great powers. The Free State of Antwerp would have deprived the industrialising and richest part of Belgium – the francophone area, now called Wallonia – from access to the sea.

⁴⁵ The year of the Congress of Aix-la-Chapelle, the first of a series of conferences convened by the great powers of the Congress of Vienna. This system, called the Concert of Europe, continued until the 1840s. The period from 1815 to 1848 is also known as the *Age of Von Metternich* – after the influential Austrian chancellor Prince Klemens von Metternich, the linchpin in the Concert of Europe. A paranoid fear of insurrection and revolution led to political and civil liberties being curtailed in favour of strong and effective monarchical rule. Zamoyski 2014.

⁴⁶ After a brief three-day revolution on 27, 28 and 29 July, known as the *Trois Glorieuses*.