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Entanglements in Legal History: Conceptual Approaches

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Modern Constitutionalism and Legal Transfer: The Political Offence in the French *Charte constitutionnelle* (1830) and the Belgian Constitution (1831)

1. Modern constitutionalism and global legal history

In the historiography of public law and the institutional development of Western regimes, ‘constitutionalism’ is undoubtedly one of the leading concepts, as the idea of tempering regal and governmental powers has been present in the Western legal tradition for a long time. Western legal history has a long tradition of charters safeguarding the fundamental rights and liberties of the people, in which the 1215 Magna Carta is the textbook example. The 1689 Glorious Revolution in England even emphasized like no other before the idea of limited monarchy, as the *Bill of Rights* coined the essence of constitutionalism as an indispensable guarantee for “the true, ancient and indubitable rights and liberties of the people.” However, the adjective ‘modern’ is often added, since numerous scholars use the concept of modern constitutionalism to describe the global transformation of the institutional framework of the Western world during the last quarter of the eighteenth and the first half of the nineteenth century. There is a general agreement amongst scholars on the fact that the 1776 American Revolution marked the beginning of a new epoch. As the former colonies threw off the British yoke, the American revolutionaries advocated a political model that was no longer based on a divine order, but on natural law, stating that only the people themselves could render legitimacy to the institutional framework of a nation state. Hence, they established a complete reversal of the principles supporting constitutionalism. It is without a doubt that the epoch starting with the outbreak of the American Revolution marked a pivotal era in the history of public law. Opinions differ on what event marked the accomplishment of the rise of modern constitutionalism, but there seems to be a general consensus that it must be placed in the mid-nineteenth century,

when various constitutions were promulgated in the aftermath of the 1848 European revolutionary wave. There is a global acceptance that this *Sattelzeit*, as it was labelled by Reinhart Koselleck,¹ can be considered the cradle of modern public law.

Both historians and legal scholars have dealt with the rise of modern constitutionalism, as the drawing up of institutional fundamentals in a supremely ranked text still defines thinking about public law. Constitutionalism has even proven to be the most important element in recent history of public law, since all states, except for the United Kingdom, New Zealand and Israel, currently have a written constitution framing the fundamentals of their institutional framework and of the fundamental rights and liberties of their citizens. Hence, according to Karl Loewenstein, it is “safe to say that the written constitution has become the most common and universally accepted phenomenon of the contemporary state organization.”² Supranational organisations such as the European Union are even working on a constitutional text to enhance their legitimacy and Bruce Ackerman has even launched the concept of ‘world constitutionalism.’³ Since 1776, a large corpus of texts of almost 2000 texts has emerged that can be labelled ‘constitutions’, offering scholars and researchers a vast ocean of sources to dive into.⁴ Hence, one could argue that the rise of modern constitutionalism is one of the pillars of global legal history,⁵ especially when focusing on the history of public law and the way institutional frameworks have developed worldwide.

1 KOSELLECK (1970) XV.

2 LOEWENSTEIN (1961); LOEWENSTEIN (1965).

3 ACKERMAN (1997).

4 In 1954–1963, the Alfred Metzger Verlag published a bibliographical register in four volumes, with bibliographies of all constitutions and constitutional documents that were hitherto known (vol. I: Germany, vol. II: Europe, III: America, IV: Africa – Asia – Australia). See: MENZEL (1954–1963). There has been no systematic updating of this register, although some supplements were published in BRYDE/HECKER (1975) and HECKER (1976). Of course, many constitutional texts can be found nowadays on the internet, e. g. by Wikisource. As a result of the international research project “The Rise of Modern Constitutionalism, 1776–1849” a collection of almost 1500 constitutional documents (including draft bills) of this era has been made available. The project is led by professor Horst Dippel and the texts are available at www.modern-constitutions.de. K.G. Saur Verlag/De Gruyter has published several volumes with the annotated editions in hard copy.

5 CROSSLEY (2007); MAZLISH/BUULTJENS (2004); O'BRIEN (2006).

However, although the concept of modern constitutionalism seems to be globally accepted amongst scholars, the German legal historian Horst Dippel recently wrote that “our knowledge of its history is next to nothing,”⁶ as there is little reflection on its rise as a historical phenomenon. Of course, there is a vast literature on the subject of constitutionalism, as the legal scholars and political scientists have turned it into a research field of its own. The books and articles drawing up typological models of constitutions⁷ or questioning the essence and the meaning of a constitution as a legal or political phenomenon are countless.⁸ However, when it comes to grasping the historical essentials of the 1776–1849 era, things are less clear than one might expect, says Dippel. While he acknowledges that many scholars have already thoroughly dealt with the matter, he stresses that a fresh perspective is needed, since most comparative studies are based upon the concept of the nation state. Therefore, he advocates a new thinking on constitutional history and on its impact on the Western legal tradition, which surpasses the boundaries of national legal history.⁹ To grasp the conceptual foundations of modern constitutionalism as a political and legal phenomenon on itself, he believes new approaches are needed for a better comprehension of modern constitutionalism as a fundamental concept in the global understanding of the history of public law.

Of course, Dippel’s analysis of the existent historiography is rather bluntly formulated, and one cannot ignore the fact that some legal historians have already taken up the challenge of discussing these fundamentals. Most studies deal with the development of modern constitutionalism by describing the worldwide rise of the idea that the legal framework of every state is founded on a set of supreme legal principles that are consecrated in a text which is hierarchically superior to all other legal norms, and which precede every government. In these matters, they generally focus on the ‘classic’ key elements and principles. It is the sum of what are considered the quintessential elements of the public law of a nation, such as popular sovereignty, the different declarations of rights, the idea of limited government, the

6 DIPPEL (2005) 153.

7 WHEARE (1966); BRYCE (1905); LOEWENSTEIN (1965); STRONG (1960); VAN DAMME (1984).

8 SARTORI (1962), MORRIS-JONES (1965), MADDOX (1982), VAN MARSEVEEN/VAN DER TANG (1973); VAN DER TANG (1998).

9 DIPPEL (2005) 153–154 and 167–169.

constitution as supreme law, separation of powers, governmental accountability or judiciary independence.¹⁰ Hence, they present a rather homogeneous, sometimes even monolithic image of constitutionalism in the 1776–1849 era, especially because most studies focus on what ideas were copied from the notorious American and French constitutions. Hence, the historiography of modern constitutionalism seems to be predominantly focused on what all constitutions have in common, a search for the greatest common factors of modern constitutionalism.¹¹

2. Local history, constitutional singularities and the political offence

However, in order to understand the rise of constitutionalism as a part of global legal history, it could be useful to act upon Thomas Duve's *Gebot einer Priorisierung des Lokalen*.¹² His compelling suggestion that in order to contribute to a more global understanding of legal history, one must focus on local legal history, also applies to the history of constitutionalism.¹³ By examining the origins and the development of specific constitutional texts and the particular contexts in which they have originated, the history of the transfer of state models, institutional concepts and their underlying political thought offers several methodological opportunities. Obviously, they enhance their knowledge and the understanding of the particular events which at some point in legal history led to a new constitution. But this approach might be fruitful on a more general level, too. Since constitutionalism has

10 DIPPEL (2005)154–156.

11 DIPPEL (2005) 158. Paradoxically, Dippel has similar suggestions when advocating a new approach. Starting from a brief yet sharp analysis of the 1776 Virginia Declaration of Rights, he discerns ten principles that he considers elementary and that according to him cannot be left out without denying the essence of modern constitutionalism itself. Dippel enumerates: (1) sovereignty of the people, (2) universal principles, (3) human rights, (4) representative government, (5) the constitution as paramount law, (6) separation of powers, (7) limited government, (8) responsibility and accountability of the government, (9) judicial independence and impartiality, (10) the right of the people to reform their own government or the amending power of the people. Hence, in his opinion, this so-called 'constitutional Decalogue' is the great common denominator of all these constitutions, offering some sort of checklist that can be used for the analysis of all subsequent constitutions.

12 DUVE (2012) 5.

13 DUVE (2012) 45–49.

become a pillar of public law worldwide, the study of specific mechanisms of legal transfer can offer broader insights that could facilitate ample reflection on the processes of legal transfer in the field of public law. In the end, this might lead to a more general understanding of the historical development of constitutionalism as a global historical phenomenon, even when focusing on elements in a rather ‘classic’ European context.

From this point of view, it might be interesting to take a look at the singularities of some constitutional texts. While scholars tend to focus on the accordances between constitutional texts in order to grasp the essence of modern constitutionalism, it is important to pay attention to those elements and concepts that are not common to most constitutions. As a consequence, these elements are not considered cornerstones of Western constitutionalism and they generally do not appear in comparative surveys. However, as their peculiarity makes them stand out, they could be considered indicators of a particular approach toward a constitution, or even mark a profound underlying shift or a substantial transformation of political thought. In this regard, this article aims to examine a specific part of the 1776–1849 era, namely the special position that was given to the political offence in the constitutions that were promulgated in the aftermath of the 1830 revolutionary wave.

In 1830, the revolutionary vibe had spread all over Europe, but a new constitutional regime was only established in France and Belgium. After the overthrow of the Bourbon regime, France became a constitutional monarchy with Louis-Philippe of Orléans on the throne. The newly born Belgian nation state established a similar regime after the schism with the Northern Netherlands. A new legal concept was introduced in both constitutional texts: the political offence or the *délit politique*. The French *Charte constitutionnelle* of 14 August 1830 was the first modern constitution to use this concept: its article 69, 1 stated that the French legislator had to ensure that both press offences and political offences could be tried by jury.¹⁴ This phrase inspired the Belgian Constitution of 7 February 1831, whose article 98 stated that a jury had to be sworn in for all criminal matters, as well as for

14 Art. 69, 1 of the *Charte constitutionnelle* stated: “Il sera pourvu successivement par des lois séparées et dans le plus court délai possible aux objets qui suivent: 1. L’application du jury aux délits de la presse et aux délits politiques.” Trial juries were introduced in the French legal system by the French revolutionaries, but their competence had been considerably restricted during the Restoration regime.

political and press offences.¹⁵ The Belgian Constitution even mentioned the political offence in another disposition, when its article 96 stated that in cases of political offences or press offences; proceedings can only be conducted in camera on the basis of a unanimous vote.¹⁶ To avoid the constitutional guarantees remaining hollow phrases through a lack of legislation, the Belgian text even copied the aforementioned French final article and assigned the Belgian legislator with the task of drafting a new press law and a new jury law as soon as possible.¹⁷ It was the National Congress itself who, just before its dissolution, fulfilled this assignment by promulgating a Jury Decree¹⁸ and a Press Decree, a clear indication of its sincere concern for political offenders and press offenders. Both Decrees established several additional guarantees for political offences, such as the abolition of custody for those accused of less serious political offences.¹⁹ On a more symbolic level, the National Congress imposed a rule stating that those accused of a press offence or a political offence did not have to sit on the dock like ordinary criminals, but that they should be given “une place distincte.”²⁰

The specific subject of the political offence is not randomly chosen, since its entry into the constitutions that were born out of the 1830 revolutionary wave was a novelty in the Western constitutional tradition. While several

- 15 Art. 98, nowadays art. 150, of the Belgian Constitution stated: “Le jury est établie en toutes matières criminelles et pour délits politiques et de presse.” Since 1999, the constitution states that a jury will not be sworn in for press offences inspired by racism or xenophobia. Since the jury trial was abolished during the Dutch regime, article 98 BC imposed its restoration in Belgium. While the jury trial was principally reintroduced for press offences and political offences, a jury had to be sworn in for criminal matters as well (referring to *crimes*, the category of the most severe felonies according to the 1810 French *Code pénal*), because several members of the Belgian National Congress considered it an additional guarantee for those at risk of the death penalty.
- 16 Art. 96, nowadays art. 148, of the Belgian constitution, stated: “Les audiences des tribunaux sont publiques, à moins que cette publicité ne soit dangereuse pour l’ordre ou les mœurs, et, dans ce cas, le tribunal le déclare par un jugement. En matière de délits politiques et de presse, le huis-clos ne peut être prononcé qu’à l’unanimité.”
- 17 Art. 139, 1 of the Belgian Constitution (now abolished) stated: “Le Congrès national déclare qu’il est nécessaire de pourvoir, par des lois séparées et dans le plus court délai possible, aux objets suivants: 1 La presse, 2 Le jury.”
- 18 Jury Decree of 19 July 1831 and Press Decree of 20 July 1831. The National Congress was dissolved on 21 July, after King Leopold’s accession to the Belgian throne.
- 19 Art. 8 of the Jury Decree of 19 July 1831; art. 9 of the Press Decree of 20 July 1831.
- 20 Art. 8 Jury Decree.

scholars have dealt with several forms of politically inspired crime, its constitutional protection is often neglected. The lack of attention given to the rise of the political offence as a legal and constitutional concept is rather remarkable, since the 1776–1848 era was an age of revolution and the ideas on the political offence proved to be modelled after the revolutionary experiences of the founding fathers of the new regimes. Hence, the first question is what the true constitutional meaning of the political offence was, why it appeared in these two constitutions and how it was conceived. The second question tends to focus specifically on the process of legal entanglements between France and Belgium in the 1830–31. Why was the political offence and the guarantee of jury trial adopted in the constitution of the newly born Belgian nation state and who supported this? What does it say about the actors supporting this introduction and what possible reflections can this offer on the processes of legal entanglement from a global perspective?

In this regard, a combination of heuristic tools could be useful. To get a better grasp of what the political offence meant to the architects of the French *Charte* and the Belgian Constitution, interesting perspectives are offered by the methodology of Bartolomé Clavero, who has worked on the history of constitutionalism in Latin America. In this regard, Clavero has severely criticized the classic Western approach of modern constitutionalism, especially in his book *Freedom's Law and Indigenous Rights* (2005), as it fails to acknowledge social realities, especially when the rights of indigenous people were concerned. In the first chapter on what he calls the Euro-American constituent moment, an era roughly corresponding to Kosellecks *Sattelzeit*, Clavero advocates a special awareness for textual context, the awareness of the legal historian for what was legally meant by the words used in the constitutional texts:

“The crux of the matter is the historical meaning of the very documents, the constitutional texts, as a way of access to, and not of deviation from, social reality. [...] In working terms, in order to understand constitutions, we must pay attention to law, to specific legal culture, we must turn precisely to documents and literature with legal authority in theory and in practice, to jurisprudence in its broadest sense. To understand constitutional texts, we must pay close attention to other legal texts, which form the first and principal context to make sense out of constitutional texts.”²¹

21 CLAVERO (2005) 54.

Clavero thus makes a particular plea for the study of legal discourse itself, the specific legal context of constitutional texts and the concepts used in these texts. In the case of the political offence and its guarantee of jury trial, this means the retrieval of the legal meaning of the political offence. In this regard, the process of legal entanglement between France and Belgium in 1830–31 comes to the fore: Why was this new constitutional concept copied by the architects of the new Belgian nation state? The process of legal transfer between Paris and Brussels needs further examination. Therefore, one must specifically pay attention to the actors behind the constitution. Their ideological background, their social profile, their *Bildung*, their professional networks, ... they all must be taken into account. Hence, linking the discourse on the political offence to the social background of the Belgian founding fathers should facilitate a better understanding of what lay behind the mechanisms of legal transfer.

3. The political offence, the freedom of the press and public opinion

At first sight, Clavero's approach seems rather unsuitable in the case of the political offence and the development of modern constitutionalism in the aftermath of the 1830 revolutionary wave. Apparently, there was little textual context. Since it was the first time in legal history that the term 'political offence' appeared in a normative legal text, it seems hard to retrieve its original legal meaning. Its entry into the text of the constitution was not even within the aims of the initiators of the revision of the former *Charte constitutionnelle* of 1814. The draft text of article 69 only mentioned the restoration of the jury trial for press offences. It was the intervention of Joseph de Podenas, a magistrate of the Royal Court of Toulouse, in the *Chambre des Députés* that provoked the introduction of political offence in the text of the *Charte*. He argued that slander or seditious appeals that were not expressed by means of the press should be tried by jury as well. He therefore successfully proposed extending the constitutional guarantee of jury trial for political offences.²² However, as the concept was a textual novelty, there was no understanding of its precise legal meaning. Hence, no definition of this particular concept was at hand. This lack of precision was

22 DUVERGIER (1838) 100.

even intended. As the political offence was inextricably bound up with the ever changing nature of modern politics, a fixed definition would not be apt enough to include all possible future events. Therefore, there was great reluctance to impose a definition and its inevitable restrictions: *omnis definitio periculosa*.²³ Hence, when the French law of 8 October 1830 drew up a list of offences that were considered political, this enumeration was certainly not meant to be delimiting. It only listed those offences, for the most part crimes against the internal and external security of the state, whose political nature was considered obvious.²⁴

The Belgian Constitution of 7 February 1831 copied several dispositions from the revised French *Charte*,²⁵ including the guarantee of jury trial for political offences, but the Belgian National Congress did not indicate what was precisely understood by a political offence. It did not provide a definition, nor did it draw up a list of political offences, such as French parliament had done by means of the law of 8 October 1830. The discussions of the Belgian constitutional assembly, were often called ‘vehement’ and ‘excellent’,²⁶ but due to time pressure, this was only the case when it came to a few controversial matters such as the position of the king or the role of the senate.²⁷ There was remarkably little argument in the discussions on the constitutional guarantees for the political offence. Apparently, its legal conception was already sorted out. Hence, the classic sources, such as the minutes of the French parliament or the Belgian National Congress, do not provide much information. Due to this lack of debate in the French *Chambres des Pairs* and the Belgian National Congress, there is only a fragmentary understanding of the constitutional conception of the political offence.²⁸

23 Art. 7 of the law of 8 October 1830 drew up a list of offences that included with the term *délit politique*: the crimes against the internal and the external security of the state, attempts and plots against the king and the royal family, crimes on inciting to civil war (chapters 1 and 2, title 1, book 3 of the Napoleonic criminal code); criticisms, censures and provocations against public authority in religious sermons, unauthorized correspondence with foreign powers on religious matters, illegal associations and meetings (section, 3, paragraph, 2 and, and section 7, chapter 3); and removing or defacing signs of royal authority and carrying, distributing and displaying seditious signs and symbols.

24 INGRAHAM (1979) 122–124.

25 GILISSEN (1967) 38–69.

26 KOSSMANN (1978) 151–160.

27 DE DIJN (2002) 227–245.

28 In addition, the true understanding of the *ratio* behind the restoration of the jury trial in Belgium was reinforced by the nineteenth century nationalist discourse on the construc-

Due to the lack of discussion in both parliamentary assemblies, applying Clavero's approach of a textual context of constitutions seems to be difficult at first sight, especially because the concept of the political offence was new in the Western legal tradition. However, an alternative approach is possible. The political offence appeared to be inextricably bound with the press offence, since all liberal constitutional measures applied to these offences as well. Apparently, both offences were somehow considered to be constitutional twin brothers, two categories that were essentially different from other 'ordinary' criminal matters, as they were specifically designated to be tried by jury. Hence, it is clear that in order to grasp the ratio behind the introduction of the political offence in modern constitutional discourse, one must pay special attention to the freedom of the press. Of course, guaranteeing the freedom of the press was not a constitutional novelty in 1830. One can say with confidence that the freedom of the press was the spearhead of civil liberties as they had been guaranteed since the rise of modern constitutionalism. The 1776 Virginia *Declaration of Rights* already stated that it was "one of the great bulwarks of liberty"²⁹ and the 1789 *Déclaration des Droits de l'Homme et du Citoyen* guaranteed the freedom of speech as "un des droits les plus précieux de l'homme."³⁰ Hence, the protection of writers, pamphleteers and journalists to freely express their views and critiques has been guaranteed in all subsequent constitutional documents, either generally, by safeguarding the freedom of speech, or specifically, by guaranteeing the freedom of the press. However, it is clear that both the French *Charte* and the Belgian Constitution were characterized by the special attention given to the freedom of the press, an issue that was politicised more than ever before. Both constitutions explicitly guaranteed the freedom of the press.³¹ When

tion and legitimization of the Belgian nation state. Scholars failed to acknowledge to the proper French sources, influences and ratios behind the 1831 constitution as they kept on stressing that the Belgian nation state and its people had an own identity – the opposite, especially when it came to the approach to civil liberties.

29 Section 12.

30 Art. XI.

31 Art. 7 *Charte constitutionnelle* (CC); art. 18 Belgian Constitution (nowadays art. 25). Both stated that censorship could never be introduced, expressing the idea that the government could not take any preventive measures. In an additional phrase, the Belgian Constitution stated that no security could be demanded from authors, publishers or printers and it installed a notable exception to the general principles of criminal responsibility: When the author was known and resident in Belgium, neither the publisher, the printer nor the

considering the aforementioned guarantees of the jury trial and the public nature of the court proceedings, it becomes clear that both constitutions safeguarded the freedom of the press on a dual level, by making the distribution of writings as free as possible on the one hand, and by establishing a liberal regime for the prosecution of those accused of abusing the freedom of the press or other civil liberties on the other.³² Apparently, to grasp the essence of the political offence, one must understand the concept of the press offence from a constitutional point of view.

The focus on the freedom of the press and its political understanding is hardly surprising when considering the background of the 1830 French and Belgian revolutions. There had already been severe opposition against Charles X in the spring of 1830 due to his dissolution of the *Chambre des Députés* and the *Garde nationale*, but it was the resistance to the so-called July Ordinances that caused the revolt which eventually put an end to the Bourbon regime. These ordinances, which were administered by the Minister of Foreign Affairs, Jules de Polignac, imposed several restrictions on French journalists, as they explicitly abolished the freedom of the press, reintroduced censorship and imposed an obligatory permission for all printers that could be withdrawn without warning.³³ With the support of some notorious liberals, several journalists of the opposition decided to neglect the ordinances, as they considered them to be a violation of the 1814 *Charte*.³⁴ After the closure of several printing presses and the seizure of several liberal newspapers, rioting started in the streets of Paris, which eventually led to the overthrow of the Bourbon regime and the revision of the *Charte*.³⁵

The French events were remarkably similar to what happened in the United Kingdom of the Netherlands. Since the Vienna Congress had reunited the Netherlands, the Hague regime had been subject to persistent

distributor could be prosecuted. This so-called ‘cascade-like’ responsibility was considered to be an excellent remedy against the ‘private’ censorship of editors, printers and distributors who feared being prosecuted as well.

32 VELAERS (1990) 139.

33 LEDRÉ (1969) 97–99.

34 Art. 8 *Charte* 1814.

35 In the aftermath of the *Trois Glorieuses*, there was considerable debate whether the new Orleanist regime simply needed a reinforcement and a revision of the old 1814 *Charte* or whether a whole new constitution was necessary. Eventually, a modified version of the 1814 *Charte* was promulgated.

critique from the Southern provinces. Although the 1815 Dutch Constitution guaranteed the freedom of the press,³⁶ legal practice was different, especially at the end of the 1820s, when the Dutch Minister of Justice, Cornelis-Felix Van Maanen, who was the Dutch counterpart to Polignac, insisted on taking a hard line on the Southern opposition press. Press law got more and more severe and several leading opposition journalists were prosecuted for criticizing the regime and were severely sentenced by the professional judges.³⁷ When in the summer of 1830 the news spread about the Paris events, this provoked several riots in Brussels. A small group of liberal bourgeoisie successfully managed to turn this commotion into a battle against the Hague government, which eventually led to the independence of the Belgian nation state. Amongst the leaders of the revolutions were several journalists and lawyers, who played an important part in the revolt as well.³⁸

This revolutionary context had a great influence on the understanding of the press offence, and as a consequence, of the political offence as well. In the opinion of most scholars, the entry of the political offence into the constitutional discourse in the aftermath of the revolutionary wave was more a historical than a legal matter.³⁹ Of course, one cannot deny the important role of journalists and lawyers and the impact of the fact that several opposition leaders had been sentenced by professional judges, but this mere interpretation is somewhat one-dimensional, as it fails to explain its constitutional dimension. One must ask why the architects of both nation states considered the political offence a part of the institutional framework, why it was reckoned among the essentials of the political structures that were elaborated and guaranteed in both the French *Charte* and the Belgian constitution.

36 Art. 227 of the 1815 Dutch Constitution.

37 DE BAVAY (1869) 1393–1402.

38 DELBECKE (2009) 138–142.

39 VELAERS (1990) 93.

4. The distinction between civil society and politics

Following Clavero's maxim of focusing on the textual context of constitutions, one needs to answer the question, how the adjective 'political' was embedded in contemporary legal thought, especially considering the fact that the concept *délit politique* was a novelty in a normative legal text. It is thus important to retrieve what it exactly meant in that specific era. Of course, since the Belgian constitutional dispositions on the political offence were modelled after the French *Charte*, one must especially take a close look at the French legal literature of that time. In this regard, the writings of the French Restoration liberals prove to be essential. It was the Italian jurist and philosopher Gaetano Filangieri who launched the concept of the political in the 1780s.⁴⁰ He was the first to discern the "délits contre l'ordre politique" as a distinct criminal category, stressing the political component. Filangieri had been one of the leading thinkers of the Neapolitan Enlightenment, but his intellectual legacy received great attention in France during the 1820s due to the translation of his work by Benjamin Constant, probably the most influential liberal thinker of the Restoration era. Constant also commented on Filangieri's political writings.⁴¹ Apparently, the translated ideas of the latter on the subject of the political offence were very influential, as they echoed in the discourse of various French Restoration liberals of the time. The most striking example is the memorandum of Joseph Simeon, who commented on the text in the *Chambre des Pairs* that eventually became the law of 8 October 1830, in which he expressly mentioned the influence of Filangieri's ideas.⁴² Notwithstanding the fact that their writings and speeches employed several expressions, such as "crime politique," "délit politique" and "délit contre l'ordre politique," which competed for favour during the 1820s,⁴³ it is clear that the 'political' aspect of a certain category of crimes became an issue, as they considered those offences in need of a more lenient criminal approach. Guizot even published a brochure in 1822 in which he advocated the abolition of the death penalty in political matters.⁴⁴

40 DREYFUS (2009) 168–171.

41 CONSTANT (1822).

42 DUVERGIER (1838) 100–105.

43 DREYFUS (2009) 155–163.

44 GUIZOT (1822).

During the Restoration era, the growing awareness of a distinction between crimes that were political, and those that were not, was coherently embedded in the political thought of the leading liberals. Sophie Dreyfus recently pointed out that this political thought was marked by a substantial shift, which was decisive for the conception of the political offence. The distinction between political and non-political crime originated as a consequence of the focus on the distinction between two spheres: the social sphere of the autonomous civil society on the one hand and the political sphere of the institutions on the other. For the Restoration liberals, this distinction was an essential element in their struggle against despotism. They considered it indispensable for safeguarding the liberty of the individual citizen, which was the ultimate goal of each political system. Obviously, they abhorred the absolutist power of the Ancient Regime, but on the other hand they were particularly conscious of the risks of the radical consequences of the Rousseaus *volonté générale* as well. As they had witnessed the excesses of the Jacobin regime and the corruptive effects of direct political participation for every citizen, they feared the recurrence of a society in which the political sphere and civil society coincided. Therefore, they advocated a clear distinction between them. Rather than the immediate participation of every citizen in the political decision making process itself, they preferred a system of parliamentary representation, as it offered the best chances for the individual, offering him the possibility to focus on his own business. Unlike in ancient times, every citizen had to work to earn his living in modern society, making the immediate participation in the administration and the rule of the nation practically infeasible. By delegating political power to a group of professional politicians, the conception of political representation involved the rise of a political class, as parliamentarism was considered indispensable from a socio-economical point of view as well. They ruled, so citizens could focus on their own affairs, while being controlled on a temporary basis by means of elections.⁴⁵ Hence, the establishment of a representative parliamentary democracy was the core of their constitutional discourse.

45 DE SMAELE (2002) 110–112. This idea was put forward by Constant in his famous speech given in the Royal Atheneum in 1819, *De la liberté des anciens comparée à celle des modernes* (1819).

However, as constitutional parliamentarism implied the delegation of political power from civil society to the institutional level of representative institutions, new institutional risks and possible threats to the freedom of the individual originated. In this scheme, it was of great importance that civil society had at all times the possibility to remain in control of what happened on that political level. If not, despotism, tyranny and abuse of power would be inevitable when parliamentary control failed. In the *Ancien Régime*, royal power was counterweighted by the traditional checks and balances attributed to the nobility, but in a post-revolutionary levelled society of equals, a different instrument was needed to avoid despotism. Therefore, the idea of governmental accountability was omnipresent in their ideas. To protect the rights and liberties of the individual against the abuse of the powers that were transferred to the political institutions, several guarantees and mechanisms of institutional protection were advocated by the French Restoration liberals and their ambitious epigones in the Southern provinces of the United Kingdom of the Netherlands.⁴⁶ Within this scheme, checks had to be established on a dual level. It was primarily the duty of the parliament to control the executive powers, which explains their deep concern for ministerial responsibility. However, most liberals argued that these mere intra-institutional guarantees were not sufficient, since the rise of a political class increased the risk of alienation and corruption of the parliamentary representatives. Despite institutional safety valves such as the separation of powers or ministerial responsibility, there was little certitude that they would be adequate enough to protect the people from sheer despotism or tyranny.

In order to safeguard the rights and liberties of the individual against the authorities, a fundamental and indefeasible guarantee outside the institutional framework was needed as well. In this regard, the concept of public opinion played a specific role. When scrolling the numerous publications of the French Restoration liberals, one immediately notices the important role attributed to this notion. A thorough reading reveals how the leading liberal voices were preoccupied with the idea of public opinion as a constitutive element of public law and how they conceived the role and the juridical protection of political offenders and other critics of despotic regimes. The concept of public opinion was a cornerstone of French liberal restoration

46 DE DIJN (2008) 168–169.

thought, as it was profoundly discussed by various thinkers of that time.⁴⁷ Constant, Guizot, Royer-Collard, Rémusat, Chateaubriand, ... they all invoked this notion in their writings, speeches and treatises to stress the need for a permanent extra-institutional corrective on the institutional framework of the nation, in order to avoid the corruption of the regime and the rise of despotism. The preoccupation with the concept of public opinion was clearly present in the liberal discourse in the Southern Netherlands as well. The most important opposition journal, the *Courrier des Pays-bas*, considered it “la règle suprême” of the nation,⁴⁸ or “ce qu’elle a de plus sacré.”⁴⁹

The concept of public opinion was profoundly embedded in the French republican tradition⁵⁰ as it originated in the second half of the eighteenth century, of the political and sociological evolution of the Western world.⁵¹ Since its emergence, the concept of public opinion was represented as the ultimate point of reference for those who governed and reigned. As every political decision had to be assessed and evaluated in light of public opinion, it was considered the alpha and omega of politics. The idea of a superior tribunal, whose judgment on the political decisions was ultimate and final, still reverberated in the debates of the Restoration period.⁵² Antoine de Guérard de Rouilly, a liberal who is nowadays almost forgotten, even wrote a treatise on “la toute puissance de l’opinion.”⁵³ To them, using the concept of public opinion was not just a reference to the democratic roots of political power, but a true political instrument, a fundamental and infeasible guarantee outside of the institutional framework. A vigorous and conscious public opinion was considered the modern, post-revolutionary alternative and a necessary counterbalance to protect the nation from despotism.⁵⁴ Parliamentary representation and public opinion were considered two

47 DE DIJN (2008) 123–128.

48 *Courrier des Pays-bas*, 4 July 1829.

49 *Courrier des Pays-bas*, 21 August 1829.

50 COWANS (2001); JAUME (1992). To give evidence of the bottom-up conception of political power, one can also refer to art. 25 of the Belgian Constitution that stated that “all powers emanate from the nation and they are exercised by the manners laid down in the constitution.” (nowadays art. 34).

51 BAKER (1990); OZOUF (1988) 1–21. Obviously, their writings were inspired by the ideas of Jürgen Habermas and his *Strukturwandel der Öffentlichkeit* (1962).

52 ROSANVALLON (1985); DE DIJN (2008) 167–168.

53 GUÉRARD DE ROUILLY (1820).

54 DE DIJN (2008) 124–125.

subsidiary ‘tribunals.’ The first one functioned within the institutional framework, the second outside of it. When writing on the freedom of the press, Filangieri argued:

“Il existe dans chaque nation un tribunal invisible en quelque sorte, mais dont l’action est continue et plus puissante que celle de la loi, des magistrats, des ministres, et du prince, un tribunal qui, dirigé par de mauvaises lois, peut devenir une source d’abus et d’erreurs de tout genre, mais que les bonnes lois peuvent rendre l’organe de la justice et de la vertu; c’est ce tribunal, dont la puissance est invincible, qui nous montre surtout que la souveraineté est constamment et réellement dans le peuple, et qu’il ne cesse pas de l’exercer, quoique l’autorité immédiate en soit placée dans les mains de plusieurs ou d’un seul, d’un sénat ou d’un roi. Ce tribunal est celui de l’opinion publique.”⁵⁵

The idea was clearly expressed in a piece by the French writer and political thinker François Chateaubriand when he argued that “dans un gouvernement représentatif il y a deux tribunaux : celui des chambres où les intérêts particuliers de la nation sont jugé; celui de la nation même, qui juge en dehors les deux chambres.”⁵⁶

Therefore, it was of great importance that the gap between political institutions and civil society could be bridged at all times and that the vigorous public opinion could express itself freely on what happened in politics. The quotes above indicate that according to the Restoration liberals, the press played a crucial role in these matters, as it gave a common voice to the political interests of the individual citizens. It was the only instrument of resistance left when all institutional safeguards were failing. Journalists were the watchdogs, the protectors of the interests of civil society, since it was their task to evaluate the workings of the institutions and criticize them when necessary. They were considered the gatekeepers of liberal public opinion. As they had to bridge the gap between civil society and political institutions, their task was essentially a matter of two-way communication. Writing articles about politics was not merely a question of evaluating politics and passing this information on to civil society. It was also a matter of reporting on ideas and framing the interests that existed in the society, in order to inform the political class about what moved the citizens. Therefore, as the press was the *porte-parole* of civil society, safeguarding its freedom was of the utmost importance. This idea was widespread among Restoration

55 FILANGIERI (1822) I, 14.

56 *Courrier des Pays-Bas*, 1 January 1829.

liberals and although they differed on the exact elaboration of the freedom of the press and its limits,⁵⁷ both Guizot, Royer-Collard, Rémusat, Chateaubriand and Constant agreed on the principle that the press had to be primarily regarded as “an extra-institutional institution,” a political force that could only be considered in its relationship with political institutions. Constant even clearly stated that public opinion was of vital importance to the effectiveness of constitutionalism and therefore could not exist without the freedom of the press: “Il n’y a point de durée pour une constitution sans opinion publique, et il n’y a point d’opinion publique sans la liberté de la presse.”⁵⁸

It was clear that the protection of the press as means of interaction between public opinion and the political institutions marked a substantial shift in the evolution of modern constitutionalism in the aftermath of the revolutionary wave of 1830. Royer-Collard expressed a similar point of view when he stated that by guaranteeing the freedom of the press, the French Constitution had guaranteed the autonomy of civil society and its individuals: “Ce n’est qu’en fondant la liberté de la presse, comme droit public, que la Charte a véritablement fondé toutes les libertés, et rendu la société à elle-même.”⁵⁹ Since the press offence was the equivalent of the political offence in the constitutions that originated in the aftermath of the 1830 revolutionary wave, concern for the freedom of the press is therefore essential for grasping the legal meaning of the latter. Just like the press offence, the political offence was inextricably bound up with an ascending and democratic conception of political power in the French liberal tradition which contrasted with the imminent absolutist aspirations of the Bourbon dynasty.

5. The press offence, the political offence, the jury trial and public proceedings

In light of Clavero’s suggestion to retrieve the textual context of a constitution, the political conception of the freedom of the press indicates why the political offence was regarded as the constitutional twin brother of the

57 For an overview of these tendencies and their opinion on the freedom of the press, see: JAUME (2012).

58 Quoted in: JAUME (1997) 407.

59 Quoted in: DE DIJN (2008) 127.

press offence and why this particular offence cannot be understood without ample reference to the aforementioned distinction between civil society and political institutions. While the freedom of the press was of great importance for journalists and writers to fulfil their role as the guardians of the interest of civil society, it was not absolute. Freedom of the press could be abused as well. Civil society itself could be harmed by criminal offences such as libel and criminal provocation and therefore, journalists and writers had to respect certain boundaries as well. Their task was to criticize the malfunctioning of the institutions, rather than questioning their legitimacy. Journalist were ought to criticize despotism or abuse of power, but they were not entitled to undermine the authority of the institutions themselves, as this could lead to chaos and disorder. The respect for the institutional framework as it was guaranteed by the constitution had to be respected at all times: the rights of parliament, the authority of the law, the position of the head of state, ... could not be questioned if this was not in accordance with the interests of society and its citizens.

The press offence was thus a *délit d'opinion*, an unlawful critique on a regime. This conception of the press offence was the starting point for a growing focus on the intentions of the perpetrator, and not on the criminal act itself.⁶⁰ This finding is essential for making the link with the political offence, as both press offenders and political offenders were considered idealists who were driven by noble and unselfish motives, striving for a better society. They were essentially different from ordinary criminal offenders, who were considered to act merely out of self-interest. However, unlike the press offender, the political offender did not express his critiques by words, but by deeds. The concept of the political offence did not just emerge in the political debates merely to protect critical expressions that were not fully covered by the freedom of the press, such as seditious speeches. It was meant for revolts, insurrections and other acts of resistance, a very important element in a time where the next revolution seemed to be just waiting to happen.⁶¹ These political offences were not just a breach of the legal order, but they questioned this order itself by attacking it. Press offences and

60 DREYFUS (2009) 456–458.

61 This is clearly noticeable in the French law of 8 October 8, whose art. 7 drew up a list of all offences that were considered 'political.' The first category contained all offences mentioned in the first two books of the 1810 criminal code, which penalized all offences against the security of the state.

political offences were clearly related, as they were both considered criminal acts against the constitutional regime. The only way to judge them correctly was by considering the political motives of the offender, rather than by focusing on the criminal acts themselves. Filangieri wrote:

“Les délits politiques sont ceux qui troublent l’ordre déterminé par les lois fondamentales d’un Etat, la distribution des différentes parties du pouvoir, les bornes de chaque autorité, les prérogatives des diverses classes qui composent le corps social, les droits et les devoirs qui naissent de cet ordre.”⁶²

One must therefore stress that the conception of the political offence was inspired by the French Restoration liberals’ emphasis on the autonomy of civil society and its clear distinction from political institutions, as the political offence was precisely an act committed out of dissatisfaction with the regime.

However, the possibility of judicial intervention by the authorities in press and political affairs could lead to abuse of power and despotism.⁶³ Hence, press offenders and political offenders were entitled to due process, which offered the best guarantees. In this matter, the jury trial was considered indispensable. It was repeatedly stated that only “twelve men good and true” could judge in press affairs, and to a greater extent, political affairs. When perusing the liberal discourse of the 1820s, one cannot miss the constant praise for the jury trial. During the Restoration regime, both Benjamin Constant, Pierre-Paul Royer-Collard and Charles de Rémusat had repeatedly stressed the importance of the participation of laymen in press affairs and political affairs. In France, press offences had been tried by jury from 1819 until 1822, and both laws had provoked considerable debate.⁶⁴ Once again, the French ideas on the subject were also omnipresent in the Southern Netherlands. As King William had abolished the participation of

62 Quoted in: DREYFUS (2009) 171.

63 To avoid free debate being disturbed, a double guarantee was advocated. On the one hand, authorities were not allowed to take preventive measures such as censorship or bail, which implied that by no means could action be taken before the writings were actually published. This was of the constitutionalist tradition of Constant, as the elitist liberal tendency of the so-called Doctrinaires of Guizot, Royer-Collard and Rémusat believed that a certain control was allowed in order to protect the citizens from radical views to which they might easily succumb. Constant and his disciples, however, advocated pluralism and discussion as an instrument of legitimate resistance to unjust laws. JAUME (2012) 48–52.

64 For an excellent outline of the discussions on the jury trial in France during the Restoration era: JAUME (1997) 351–405.

laymen in the administration of criminal justice at the birth of the United Kingdom of the Netherlands,⁶⁵ there had been a strong demand for the restoration of the jury trial for fifteen long years, which obviously had been strengthened as the leading opposition journalists had been sentenced by professional judges at the end of the 1820 s.

As press offences and political offences were acts of critique against the institutions and the offenders claimed to have acted out of interest for civil society, it was considered imperative that these were judged in light of public opinion. This can be illustrated by numerous quotes. In January 1830, shortly after proceedings started against Louis De Potter and his fellow insurgents for the publication of his critical *Lettre de Démophile au Roi*, the *Courrier des Pays* had already briefly put why the restoration of the jury trial was essential in press affairs, as it was “le véritable interprète des sentiments et des opinions du pays.”⁶⁶ It is clear that this quote reflected the ideas of the French Restoration liberals on the jury trial.⁶⁷ They reverberated during the sessions of the Belgian National Congress. When the restoration of the jury trial was discussed, Barthélémy de Theux de Meylandt, a leading member of the constitutional assembly, concisely expressed that in order to judge political offences and press offences correctly, “il faut être répandu dans la société, la vie retirée du juge ne lui permettant pas de bien connaître l’opinion.”⁶⁸ This quote reveals that the jury was principally considered a ‘positive’ guarantee, safeguarding a judgment that corresponded as much as possible with the ultimate political benchmark, public opinion. Hence, it was not a mere reaction against the competence of professional judges in controversial cases, as these quotes clearly indicate that popular jurors were regarded as a panel that could offer the most genuine reflection of public opinion. As press offences and political offences were often highly controversial, a fair verdict could only be obtained by testing them against the prevailing ideas and values of the nation. Joseph Raikem, the future Minister of Justice after the promulgation of the Belgian Constitution, said that in

65 The jury trial was introduced in the Southern Netherlands by the French regime, but William’s decree of 6 November 1814 abolished the participation of laymen in the administration of justice.

66 *Courrier des Pays-bas*, 7 January 1830.

67 JAUME (1997).

68 HUYTTENS (1844) 3, 594.

case of a jury trial “la décision sera regardée comme celle de la société même.”⁶⁹ Since political offences and press offences were considered to be judged against the backdrop of public opinion, the judicial system had to be fit enough to take into account its changes, shifts and evolutions. This was by no means an abstract consideration, as the idea had emerged in an age of revolution in which regimes changed quickly and the tumultuous series of political events easily provoked shifts in public opinion. As in the Court of Assizes, the members of the jury were renewed for every session, its composition was the most current and recent reflection of public opinion.

Since the founding fathers of the Belgian nation state were preoccupied with securing a fair trial to those accused of a press offence or a political offence, the constitution offered an additional guarantee. As the restoration of the jury trial was a judicial consequence of the rise of public opinion as a key element of institutional thought, it was obvious that public opinion needed to have access to these trials, even when political offenders and press offenders were tried by jury. This implied that all trials were to be held in public, not only as an expression of the liberal belief in the constructive nature of free debate and the right to a due process, but as a measure to make sure that public opinion could inform itself about the proceedings in the cases of those who claimed to have stood up against despotism. This was evidently inspired by the recent trials against the heads of the opposition in the South, which were often held in camera. Therefore, article 96 of the constitution stated that all court hearings were public, unless such public access endangered morals or the peace. If such was the case, the court had to declare so in a judgement. After the submission of an amendment by de Theux de Meylandt,⁷⁰ it was stated that proceedings could not be conducted in camera on the basis of a majority vote, but when it came to press offences and political offences, this was only possible on the basis of a unanimous vote.⁷¹ Apparently, judging political offences and press offences in light of public opinion was not only a matter of engaging twelve jurors, but also about facilitating public opinion itself to be informed on the proceedings.

69 HUYTTENS (1844) 3, 577.

70 HUYTTENS (1844) 3, 229.

71 Currently art. 148 BC.

6. The political offence and the bourgeoisie in the Southern Netherlands

Since the legal meaning of the political offence indicated a substantial shift in political thought, one must ask what mechanisms lay behind the transfer of this political model from the French *Charte* to the Belgian constitution. It is hardly surprising that the 1830 French liberal revolt led to a constitution that largely incorporated the ideals of French Restoration liberalism, yet it is fascinating to see what mechanisms led to their *adaptatio* by the Belgian constitutional assembly. However, the discussions of the Belgian National Congress are even less revealing on the constitutional conception of the political offence than the minutes of the French parliaments. The words spoken by Jean-Baptiste Nothomb, who was, despite his young age, one of the most influential members of the Belgian National Congress, are very revealing, since he told his colleagues that the discussion on the matter was “guère une question de texte, une difficulté de rédaction.”⁷² Apparently, there had already been great debate in the Southern Netherlands during the years preceding the revolution.⁷³ The ideas of the National Congress on the matter were already clear-cut and no further discussion or explanation was needed. In order to understand this lack of debate, one must bear in mind that among the members of the constitutional assembly, there was a highly influential group of young liberals. It was largely a generation of enthusiastic bourgeoisie, who were generally about 30 years old at the break of the revolution. They had been brilliant law students with a particular interest in French political thought. During the 1820s several leading members of this group combined their career at the bar with political journalism, and most of them had found out to their cost just how far-reaching the repression of the Southern opposition press was.⁷⁴ This common past in the opposition press of the South is of great importance, because the numerous articles they had published in these journals offer detailed insights into their political thought that was lacking in the discussions of the National Congress. When going through these well-written and elaborated texts, one immediately notices the references made to French Restoration liberalism.⁷⁵ Clearly, this

72 HUYTTENS (1844) 1, 651.

73 MARTEEL (2009) 151–205.

74 DELBECKE (2009) 149–150.

75 Ironically, it was King William himself who had somewhat facilitated this intellectual turn

generation was very well read in political theory and contemporary liberalism due to several factors. Ironically, it was King William himself who had somewhat facilitated this intellectual turn towards French political thought.

One of the most decisive elements for the intellectual development of this generation had been King William's reform of higher education at the start of his regime. As going to law school was the most obvious career choice for the young bourgeoisie, the shift in the programmes marked by William had a profound impact on their *Bildung*. In the new universities of Ghent, Leuven and Liège, established in 1817, reading law was no longer exclusively about the study of classic Roman law. There were courses on matters of public law, too, especially on constitutional law, political theory and natural law, which were taught by young foreign professors, such as Jacques-Joseph Haus in Ghent and Leopold Warnkönig in Liège. They were familiar with the writings of contemporary liberal authors such as Jeremy Bentham, Adam Smith, Jean-Baptiste Say and Benjamin Constant and eagerly spread their ideas from the pulpit. Their lessons must have made a great impression on this generation of young students:

“L'indépendance des pouvoirs, la responsabilité ministérielle, les avantages du jury, les effets de la presse libre, l'affranchissement de l'industrie furent enseignés dans la chaire professorale, au pied de laquelle se pressait une jeunesse électrisée par ce genre d'instruction.”⁷⁶

However, being a law student was not only about attending lectures. As they were students, these bourgeois youngsters continued their discussions in bars, pubs and *salons*, striking up long lasting friendships. For instance in Liège, Paul Devaux, Jean-Baptiste Nothomb, Charles Rogier and Joseph Lebeau must have argued several times in the *Café de la Comédie* about the necessity and feasibility of introducing a new liberal regime in the Netherlands. They met in bars, read in *cabinets de lecture*, read pamphlets and journals and discussed books on various political matters. According to his biographer, when reading the debates of the 1789–1791 French *Assemblée Constituante*, Nothomb was reported to have even said ironically “Qui sait si je ne siégerai pas moi-même dans une pareille assemblée?”. After graduation, most of these

towards French political thought, since the first years of his reign were marked by a considerable lenience towards liberals from abroad, especially French journalists and young German professors.

76 Quoted in: RUZETTE (1946) 10.

young liberals joined the bar, a professional milieu in which there was great interest for all things French, a consequence of the Napoleonic legal heritage.⁷⁷ Hence, they kept running into each other in the ins and outs of the courthouses and had plenty of opportunities to continue their political discussions. Even their choice of *patron* was often inspired by their ideology, for instance in the case of the future diplomat and politician Sylvain Van de Weyer, who chose to be a trainee of Pierre-François Van Meenen, an expert in French constitutional law who even had studied in Paris.⁷⁸

The most remarkable milieu in which this young bourgeois elite was engaged after their education was the urban press scene of Brussels and Liège, the two epicentres of Francophile liberalism. Like the reform of legal education, the rise of the political press in the Southern Netherlands had been somewhat a consequence of King William's early liberal attitude, too. After the Napoleonic regime's rigid governmental control on the press, King William had refused to maintain the severe press policy of the former French emperor, nor did he want to immediately establish an official governmental journal. Hence, the Brussels press scene had lay fallow, allowing journalists of all kinds to establish new journals. In this process, the lead had often been taken by several French Bonapartists and republicans who had fled Paris for political reasons. Since then, the political and cultural frame of reference of the Brussels bourgeoisie was modelled after Parisian standards, as these *refugiés* had brought along a lively culture of debate and discussion, with their own journals being modelled after the example of their Parisian counterparts. Obviously, they never lost interest in what happened in their homeland, so they reported thoroughly about the ins and outs of French politics in the Restoration era. Hence, the ideas that were put forward at the time in the Parisian *salons* resounded in Brussels shortly afterwards.⁷⁹

As these young bourgeois lawyers joined the editorial boards of these journals at the end of the 1820s, they found themselves amongst some of the

77 Since the introduction of the Napoleonic codes, legal culture in the Netherlands had been dominated by French law. The Hague regime tried to introduce new codes, but never succeeded in doing so during the 1815–1830 era. Moreover, the domination of French law (and French legal culture) was even emphasized by the fact that there was no copyright law prohibiting making copies, so French law was widely spread, profoundly influencing Belgian legal culture at the time. HEIRBAUT / GIERKENS (2010) 19–28.

78 VERMEERSCH (1981) 512–516.

79 DELBECKE (2009) 151–152.

most acute political philosophers of this generation. The member lists of these boards read like a *who's who* of the contemporary liberal scene in the Southern Netherlands. In Brussels, there were several liberal papers, such as *Le Belge*. However, the most notorious liberal newspaper was without any doubt the *Courrier des Pays-bas*, which has already been quoted several times. This liberal journal once had sought for the support of the Dutch government in its struggle against Catholicism, but since its board of editors was replaced in the summer of 1828, the journal grew into the most authoritative voice of the Southern liberal opposition against William's regime. During the turbulent political events in the years preceding the revolution, when several journalists of the Southern opposition were prosecuted for their critical writings, the opposition increased with each trial and critiques became more fierce, provoking more severe press laws and more trials. This dialectic process of oppression and opposition offered numerous occasions to the journalists to express their political views on several subjects. Going through the successive volumes of opposition journals such as the *Courrier des Pays-bas* and *Le Belge* is highly informative, as the collaborators on these journals had put their views and opinions in numerous long articles, texts and brochures.⁸⁰

According to these articles, the aforementioned liberal 'ascending' conception of the foundations of political power proved to be of great influence in the Southern Netherlands during the 1820 s. The Southern liberals took it as an argument in support of their view on the institutional identity of the United Kingdom of the Netherlands, which was much discussed in those days. Although the so-called 'Dutch amalgam' had had a proper constitution since 1815, there was considerable debate on the nature of the institutions and the position of King William and his government. According to William and his ministers, the United Kingdom of the Netherlands was a classic monarchy, established by God and only tempered by the constitution. This top down interpretation, referring to the political foundations as they had been established during the Ancien Régime, differed greatly from the institutional view of the liberal opposition. Being adherents to the French liberal tradition, they considered the United Kingdom of the Netherlands a proper parliamentary monarchy, established on the grounds of the 1815 Constitution. They abhorred every form of despotism, whether it was

80 VERMEERSCH (1981) 481–495.

enlightened or not. To them, William's royal power was not limited by the constitution, on the contrary, it was founded on it. Louis De Potter formulated this view in a very pointed way in his famous *Lettre de Démophile au Roi*, which led to a severe sentence.⁸¹ It was the central thesis of his famous open letter to King William:

“Vous parle, Sire, de monarchie tempérée par une loi fondamentale! C'est un mensonge odieux et perfide; c'est pis, une absurdité. Une loi fondamentale ne tempère rien, elle fonde: avant elle, rien n'était; depuis elle, tout est légitimement, et ne l'est que par elle, sans elle, rien ne serait; et nous, Sire, nous faisons partie de ce tout; et l'état que nous composons avec vous, et vous même le faites également. Vous n'êtes, Sire, que par la loi fondamentale, et en vertu de la loi fondamentale; votre pouvoir, vos droits, vos prérogatives viennent d'elle et d'elle seule.”⁸²

Hence, as they were profoundly influenced by the political thought of the French Restoration liberals, the idea of a substantial division between the sphere of civil society and the sphere of political institutions was the basis of their ideology, too. Pierre-François Van Meenen, one of the few older people in these circles of liberal youngsters, emphasized in 1816 the importance of “la distinction entre l'ordre civil et l'ordre politique.”⁸³ As a result, the idea of a vigorous public opinion as the benchmark of all political activity, the necessity of safeguarding the freedom of the press, the need for a jury trial in controversial political matters, ... all the elements were present in the discourse of these young liberal bourgeoisie.

While the influence of French Restoration liberalism is obvious and the means by which these ideas were transferred to the Southern Netherlands have been mapped out, the interests of this particular group of young liberals cannot be explained without referring to the social position of this group of “de jeunes avocats, de jeunes journalistes, pleins de zèle pour la liberté [...] qui brûlaient de faire l'essai de leurs théories?”⁸⁴ They all were part of the middle class. They were highly educated and rather affluent, but they had no access to true political power. Although the French revolution had abolished all privileges, political power was still in the hands of the

81 De Potter, who had already been sentenced in 1828 to eighteen months of imprisonment and a 1000 florin fine for criticizing the government, was sentenced to eight years of banishment for plotting against the government.

82 *Courrier des Pays-Bas*, 23 December 1829.

83 MARTEEL (2009) 193–198.

84 GERLACHE (1839).

landed nobility as a consequence of their immense wealth. Restoration liberal thought proved to be a means of breaking through this glass ceiling. The distinction between the political level of the institutions and the extra-institutional level of civil society and its public opinion therefore offered considerable possibilities in that it moved the ultimate core of political power to a sphere to which this intellectual elite actually had access. Hence, by advocating the freedom of the press and stressing the role of the journalist as a political watchdog, this generation was claiming its own political power. There was even more. In their discourse, the idea was imminent that the very best of these journalists could make the change-over from the sphere of civil society to the sphere of political institutions, as they were very well acquainted with what moved public opinion. This was indicated rather clearly by a quote from the writer François-René de Chateaubriand, published in the *Courrier des Pays-bas*:

“Que les ministres soient des hommes de talent; qu’ils sachent mettre de leur part le public, et les bons écrivains entrèrent dans leurs rangs et les journaux les mieux faits et les plus répandues les soutiendront; ils seront cent fois plus forts, car ils marcheront avec l’opinion générale.”⁸⁵

Hence, when the 1830 revolt led to the independence of the Belgian nation state and a new constitution had to be drafted, they used their martyrdom as victims of the oppressive Dutch regime in a very clever way to turn this political model into a constitutional reality. In sum, the entry of the political offence into the constitutional discourse of the Southern Netherlands was not just a result of their struggle against despotism, it was a matter of facilitating the upward social mobility of a small ambitious elite of young bourgeoisie.

7. Conclusion

This article started with a reference to a recent appeal made by Horst Dippel, who has argued that although modern constitutionalism is a frequently invoked concept to describe the transformation of public law in the Western world, there is little understanding about the rise of modern constitutionalism as a political and historical phenomenon. In 1830, as the notion of the political offence first appeared in the modern constitutional discourse, this

85 *Courrier des Pays-bas*, 4 January 1829.

was taken as a starting point for a more in-depth analysis of the French *Charte* and the Belgian constitution, which granted the guarantee of jury trial for political offenders, and according to the Belgian constitution, provided additional guarantees for publicity. By examining its relationship with the press offence, the legal meaning of the political offence was retrieved. Essentially, the political offence was an attack on the political order, inspired by a sense of political distrust of the offender, who considered the institutions to be no longer in accordance with public opinion. As political offences were considered to be essentially different from ordinary criminal offences, they revealed the clear distinction between political institutions and an independent civil society.

The rise of the political offence in the modern constitutional discourse seems to have indicated a shift in the evolution of modern constitutionalism that is most noteworthy. Apparently, in 1830, modern constitutionalism was not only a matter of a supreme law drawing up the essentials of an institutional system in which governmental powers were counterweighted by several other checks and balances and about guaranteeing the classic liberties in order to protect the individual against abuse of power. Besides these classic institutional safeguards, which largely fitted in Montesquieu's scheme of the *trias politica*, the constitutions that emerged out of the 1830 revolutionary wave offered a protection of public opinion as an extra-institutional force, which had to ensure that civil society could never lose its control over political institutions. Granting an advantageous regime to political offenders and press offenders was more than just the introduction of an additional element in the constitutional framing of the struggle against despotism: it marked a profound shift in the political thinking about the nature of this struggle itself. As constitutionalism distinguishes between the laws establishing the state and the laws established by the state, the entry of the political offence into the constitutional text therefore implied its protection in a norm superior to the institutions themselves.

The relationship between the 1830 French *Charte* and the 1831 Belgian Constitution indicated that other countries were highly receptive to these ideas, as they had been put by the leading French Restoration liberals. They were enthusiastically received in the Southern Netherlands, where a small group of young liberals considered them to offer the best arguments for disputing the top-down interpretation of the 1815 Dutch Constitution by the Hague regime. However, this process of legal transfer was inspired by a

particular motivation, as the aim for the embedding of the political offence in the Belgian Constitution was the brainchild of a young and ambitious bourgeois elite. This was a small but influential group, who got in touch with French liberal thought in law school, and subsequently, due to their contacts at the bar and through their press activities. Even though their experiences in the opposition press had enhanced their awareness of the importance of the protection of press offenders, it was the idea of a clear distinction between civil society and political institutions that really moved these youngsters. As the Belgian revolution had had a successful outcome, they managed to gain the political power which they had longed for. Hence, the constitutional embedding of the political offence was the result of a plea for their own upward social mobility.

This case study of Franco-Belgian legal transfer aims to contribute to a better understanding of modern constitutionalism as a part of global history. At first sight however, its global dimension seems to be rather insignificant, since it deals with two countries in the centre of Europe. Obviously, as the political offence appeared in several subsequent European constitutions, the analysis of what happened in 1830–31 could serve as a point of reference for a better understanding of these constitutions.⁸⁶ However, when one aims to leave the classic Eurocentric approaches of legal history behind and tries to understand modern constitutionalism from a more global perspective, one cannot leave the old continental history out. Therefore, even when bearing in mind the European character of this case, it can be viewed within a more global understanding of modern constitutionalism. The entry of the political offence into both the 1830 French *Charte constitutionnelle* and the subsequent 1831 constitution was a clear example of a process of legal transfer from a country with an influential legal culture, France, to a small country

86 The idea of the exceptional position of both political offences and press offences proved to be extremely influential in the aftermath of the next revolutionary wave that moved through Europe. In 1848, when establishing the Second Republic, the new French Constitution once more stated that only political offences and press offences could be tried by jury. The protection of political offenders was even taken to a next level, as the death penalty was abolished in political matters (chapter II, art. 2). Several constitutions, such as the 1837 Spanish Constitution (art. 2), the 1848 Luxemburg Constitution (art. 48, 90, 92), the 1848 *Frankfurter Reichsverfassung* (art. 179 § 2) and the 1848 Sicilian Constitution (art. 84) followed the example and guaranteed the jury trial for political offences or press offences safeguarding as much publicity as possible in political proceedings.

on its periphery, Belgium. There are countless similar phenomena in legal history, especially when the transfer of state models is concerned. The analysis of why and how several groups have used constitutionalism as an instrument to enhance their own social position could therefore offer a fruitful perspective, even for examining similar phenomena outside of Europe. Therefore, even the analysis of legal entanglements within a classic European context could offer informative models that might contribute to a global understanding of modern constitutionalism.

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