

# Sovereignty, Civic Participation, and Constitutional Law: The People versus the Nation in Belgium

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## Chapter 11

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### **Pulling the curtain on the national sovereignty myth: Sovereignty and referendums in Belgian constitutional doctrine**

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# 11 Pulling the curtain on the national sovereignty myth

## Sovereignty and referendums in Belgian constitutional doctrine

*Christophe Maes, Brecht Deseure,  
and Ronald Van Crombrugge*

### Introduction

The dominant interpretation of sovereignty in the Belgian Constitution holds that the National Congress consciously opted for national sovereignty as opposed to popular sovereignty. Followers of this interpretation argue that direct consultation of the people – most notably through referendums – is unconstitutional. Giving voice to the nation through legal decision-making is reserved exclusively for political representatives. Yet, it has been shown elsewhere that the national sovereignty interpretation is an anachronism (De Smaele, 2005; Deseure, 2016b; Geenens and Sottiaux, 2015). This chapter traces the development of the closely related subjects of sovereignty and referendums in Belgian constitutional doctrine from 1831 onwards. We will chart the different points of view on sovereignty from the nineteenth century until the definite breakthrough of the national sovereignty interpretation between 1893 and 1950, as well as the implications this development had for the perceived (un)constitutionality of referendums. We will also briefly address the more recent (post-2000) debates on citizen participation and their connection to the issue of sovereignty.

Our central claim is that there is not one well-defined, stable sovereignty interpretation which undergirds the Belgian Constitution. Instead, sovereignty has been defined and redefined on several occasions under the influence of societal circumstances and in service to political goals. Three major fields of conflict have subsequently shaped Belgian constitutional doctrine on sovereignty: (1) the rivalry between Catholics and liberals; (2) the rise of – and resistance to – emancipatory movements, including socialism; and (3) the post-Second World War reaction against communism. The cumulative effect of these reinterpretations has been to promote a conservative understanding of sovereignty, enabling the establishment to preserve the political status quo for its own benefit. The national sovereignty theory is the culmination point of this evolution. This theory is a myth, however, which denies historical contingency by projecting one specific conception of sovereignty back in time. Not only is the result historically and juridically inaccurate but it also obscures the rich and nuanced debates on sovereignty in Belgian constitutional doctrine as they developed over almost two centuries. We

conclude by reconnecting our understanding of sovereignty to these historical struggles, and by asking what lessons we can draw from them in light of modern concerns about democracy such as the rise of populism and the demand for more active citizen involvement.

### **The early Belgian era (1831–1839)**

The early Belgian period was characterised by political unionism: the two major political factions of liberals and Catholics – which later developed into regular political parties – continued the political alliance forged during the Belgian Revolution. The threat of an external enemy endured, as the Dutch king did not accept the peace treaty with Belgium until 1839. Despite mounting ideological tension between both factions, this resulted in internal political cohesion. A conservative tendency was clearly present in Belgian politics: in both the Catholic and liberal movements, the progressive wings lost prominence in favour of their more ‘social-conservative’ counterparts. Radical democrats, who had not wavered in their claims for a republican and more democratic government, were gradually sidelined (Witte, 2020). This tendency was reinforced by the policies of King Leopold I, who held restrictive views on political participation and defended a strong royal power, as well as by the ambitions of the Church to regain its grip on the clergy (Velaers, 2019, pp. 443–444; Viaene, 2001, pp. 148–149; Witte, 2020, pp. 180, 224–232, 344–345).

Given the prevalent political unionism, there was little need for explicit doctrinal statements on sovereignty. The early constitutional handbooks and commentaries remain very brief on the subject. They mainly point to a negative definition of sovereignty, interpreting article 25 of the Constitution (now article 33) as the negation of royal or divine sovereignty. There are no traces of an identification of article 25 with (representative) national sovereignty as opposed to (direct) popular sovereignty. The oldest existing handbooks trace the article back to the notion of sovereignty in the French Constitution of 1791, which they explained as popular sovereignty in a represented form (S.A., 1831, p. 40; Plaisant, 1832, p. vi; Rogron, 1836, p. i). There did seem to be agreement, however, on the fact that the National Congress had opted for a representative regime rather than direct democracy, though no link was made between this choice and the issue of sovereignty (see Chapter 9 on the relation between representation and sovereignty).

### **The era of national consolidation and the confessional feuds (1839–1893)**

#### *The political struggle between liberals and Catholics*

As the Belgian state gained stability after the peace treaty with Holland in 1839, internal political conflicts resurfaced. The end of unionism signalled a return to the liberal versus Catholic opposition which had dominated the period prior to the Belgian Revolution. A second major line of ideological division surfaced in 1850–1860 with the rise of socialism, which was pitted against both liberals and

Catholics. In the context of these evolutions, a wide array of interpretations concerning sovereignty emerged – though conservative understandings remained dominant. What is clear, however, is that today’s conceptual differentiation between national and popular sovereignty was not yet present during this period.

To be sure, a few individual authors differentiated national and popular sovereignty. In France, the political economist Simonde de Sismondi was the first to introduce a differentiation in his *Études sur les constitutions des peuples libres* of 1836 (Simonde de Sismondi, 1836). Concerned with the idea of an absolute ‘general will’ upon which political power rested, Sismondi believed unrestrained popular sovereignty to be illegitimate. The general will resulted from a conciliation of, or transaction between, the individual wills. Thus, Sismondi came to affirm that sovereignty did not belong to the absolute and indivisible people, but to the nation as “plural totality” (Simonde de Sismondi, 1836, p. 66 f. On this theme in Sismondi’s work, see also Paulet-Grandguillot, 2010). In Belgium, Heinrich Ahrens was the first to make the distinction in his *Cours de droit naturel ou de philosophie du droit* (Ahrens, 1892, orig. 1838). Ahrens, a native German, was a follower of Karl Krause’s organ theory. He saw the nation as a holistic entity spanning generations. National sovereignty implied that the unified and internally organised nation acted through its constituted organs. Popular sovereignty, on the other hand, was a product of social atomism. Based on the imperative mandate and on the universal franchise, it came down to a ‘sovereignty of the number’. Ahrens theory, however, had little influence on Belgian doctrine.<sup>1</sup>

### *The lack of consensus and the discourse of the ancient constitutions*

A uniform vision on sovereignty did not develop before the end of the nineteenth century, as the diversity of opinions during this time period shows. Article 25 continued to be explained as the negation of royal or divine sovereignty. Furthermore, most scholars explained sovereignty as omnipotence (Britz, 1865, pp. 57–58; Destriveaux, 1849, pp. 30–34, 40–46; Stecher, 1851, pp. 18–19; Thonissen, 1844, pp. 103–104; Van Hoorebeke, 1848, p. 16; Wyvekens, 1854, p. 9).<sup>2</sup> Others still associated article 25 with the idea of mixed government (Docquier, 1856, p. 10; Masson and Wiliquet, 1885, p. 39; Wyvekens, 1854, pp. 11, 14–15). Despite the divergence of interpretations, a specific narrative pertaining to the Constitution dominated in the middle of the nineteenth century: that of the ancient constitutions (Deseure, 2016a; Marteel, 2006). It was generally believed that the ancient constitutions of the former Southern Netherlands had their origin in a reciprocal social contract with the monarch. Depicting the

1 The limited influence of Ahrens’s theory can be found in the writings of his student and successor at the philosophy chair of the University of Brussels, Guillaume Tiberghien (Tiberghien, 1844; 1875).

2 A more Rousseauian version of inalienable yet unrestricted sovereignty was given in De Fooz (1859, pp. 30–31, 49–50, 57–58).

Constitution as a ‘national product’ was politically useful, since the emphasis on authenticity and continuity was a way to legitimise the country’s independence (Delbecke, 2007, pp. 373, 389; Deseure, 2016a; Raxhon, 1989, pp. 32–35).

At the same time, this discourse was deployed as a propaganda tool by the different political parties. Liberals stressed that popular sovereignty underlaid the social contract, as well as individual liberties (Faider, 1842, pp. 146, 155; Kupfferschlaeger, 1871, pp. 1524–1541; Waille, 1838, pp. 150–151). They focused on the history of the cities which had functioned as liberal bastions against Catholic hegemony (Polain, 1844, p. 286; Vandenpeereboom, 1873, pp. 256–257). For Catholic writers, meanwhile, the ancient constitutions allowed them to deny that the origin of the modern liberties lay in the French Revolution. Especially after the revolutions of 1848, they argued that the constitutional liberties were of national origin and derived from the liberties guaranteed under the ancient constitutions by stable, traditional, and Catholic institutions. In the same move, the ancient constitutions served to disavow popular sovereignty, social equality, and universal suffrage. The Belgian Revolution, and the Constitution it produced, was not based on the principle of popular sovereignty, nor on the modern liberties of the French Revolution. It resulted from William I’s breach of Catholic values and traditions, which the ancient constitutions embodied (De Gerlache, 1852, pp. 65–73; Van Den Broeck, 1859, pp. 4–5). Prompted by French expansionism under Napoleon III, this narrative of ancient constitutionalism enjoyed a renewed wave of popularity in the 1870s. Although it became less prominent afterwards, it remained an important element in constitutional law handbooks well into the twentieth century.

### *The elitist liberal interpretation of sovereignty and the rise of the democratic movement*

Aside from the discourse of the ancient constitution, the middle of the nineteenth century was marked by the struggle between the democratic emancipatory movement and the socially conservative establishment. Despite the disagreement on the details of the concept of sovereignty in Belgian doctrine, there did exist a consensus that it was to be interpreted in a social-conservative and elitist manner. Catholics and liberals alike made sure to consolidate their political position in response to the challenge coming from the new democratic movements. Whereas the Catholics openly attacked the idea of popular sovereignty and the belief that it entailed universal suffrage, this was much more difficult for the liberals, for whom this principle continued to be the source of state legitimacy. However, from 1850 on, French Doctrinaire ideas slowly made their way into liberal circles. The liberal politician Ernest Vandenpeereboom was the first to explicitly promote Doctrinaire liberalism in the Belgian context. In a typically Doctrinaire manner, he explained article 25 as an expression of the sovereignty of reason. Referring to the French Doctrinaire frontman François Guizot, he argued that capacity was the basis upon which suffrage restrictions were reasonably permitted. Vandenpeereboom believed that the Belgian constituent assembly of 1830–1831

had followed this point of view “in the name of reason, as well as in the name of doctrine” (Vandenpeereboom, 1856, pp. 25–26 with reference to Guizot, *Histoire*, II, lesson XV, pp. 301–304). However, he did not yet differentiate popular from national sovereignty.

In contrast to the ideas of these Doctrinaires, who disconnected the will of the electors from the will of the representatives, a number of liberals and liberal Catholics stressed the importance of a ‘reflexive’ relationship between the constituted powers and the people or the electors. According to these scholars, the legislative chambers were certainly not alone in the exercise of sovereignty. Despite the rejection of the imperative mandate, the electorate was always in a position to judge the actions of the legislator (Bivort, 1849, pp. 29, 34; Thonissen, 1844, p. 167; Verhaegen, 1859, pp. 100–102). Alongside this, a minority of progressive liberals promoted the idea of enlarging the censitary suffrage to a suffrage based on capacity. Rejecting the elitism of French Doctrinaire liberalism, they supported the idea of a gradual democratisation of the political system as human reason progressed. Education was the obvious road towards enlightenment and, as a result, political emancipation (Stecher, 1851, pp. 17, 31; Tempels, 1873, pp. 440–441; Voituren, 1876; 1878, pp. 1–4). Around the same time, a new movement emerged in Catholic circles which tried to strike a connection with the social movements. Competing with liberal and social democratic movements and driven to a certain extent by strategic considerations, this Christian-democratic movement tried to reconvert and to redirect a part of the masses to its cause (Witte, 2007, p. 10; 2003).

## **The call for democratic reform and the emergence of the national sovereignty doctrine (1893–1921)**

### *The constitutional reform of 1893*

The elitist theories that eventually came to dominate the Belgian understanding of sovereignty first appeared in the debates on the reform and improvement of the representative system that took place at the end of the nineteenth century (François, 1985, pp. 573–574). Movements for democratic emancipation prompted anxiety about the preservation of the parliamentary system (De Smaele, 2002, pp. 114–121), while the diversity of the social body – which was not reflected in parliament – increasingly became an object of attention for reformers and politicians (De Smaele, 1999, pp. 345–346).

The Belgian Workers’ Party (BWP), founded in 1885, quickly became a powerful voice in the struggle for the social betterment and political representation of the working class. The introduction of universal suffrage was its single most important demand (Puissant, 2007, pp. 98–99; 2004; Reynebeau, 2009, pp. 94–95; Stengers, 2004, p. 253). The BWP saw universal suffrage as a means to defend the interests of the groups it represented, as opposed to the general interest. Such a definition of the representative mandate ran counter to the ‘functional’ definition of election defended by the majority of interpreters of the Belgian

doctrine, according to whom the vote is not an individual right but rather a function to appoint those best placed to reveal the will of the nation as a whole.

A combination of social unrest, mass demonstrations, and general strikes finally convinced the established powers that constitutional reform, including an extension of suffrage of some kind, was no longer avoidable. The public debate in the early 1890s on constitutional reform focused on three issues, notably: the representation of interests, proportional representation, and the introduction of the referendum (De Smaele, 1999; Röttger, 2005; Velaers, 2007). It is in these debates – and those on the referendum in particular – that a novel conception of national sovereignty surfaced for the first time.

Universal suffrage, as demanded by the social democratic movement, quickly proved to be unattainable. Since the social democrats were not yet represented in parliament, a compromise needed to be found between Catholics and liberals and between the various tendencies within these parties. Different forms of censitary suffrage, capacitary suffrage, and corporative representation were considered. A compromise was finally found around the proposal of Albert Nyssens, a professor of law at the Catholic University of Leuven and later minister of industry. Nyssens came up with ‘multiple universal suffrage’: one vote for each adult male, supplemented with one or two additional votes depending on wealth and capacity. Nyssens’ proposal was not purely informed by strategic considerations. He believed the gradual enlargement of suffrage to be a logical and inevitable outcome of the constitution’s choice for a representative regime based on popular sovereignty (Nyssens, 1890, p. 8).

The reform of voting rights was only one of several avenues which were explored in order to improve the representative system. Another one was the introduction of the referendum. The initiative in this regard was taken by King Leopold II. Just like the Catholic establishment, the king had consented to open the procedure for constitutional reform in order to avoid serious social upheaval.<sup>3</sup> He expected the enlargement of suffrage to result in a reinforcement of parliamentary authority at the expense of the executive power. At the same time, he feared the breakthrough of socialism in parliament. As he described his own role as that of the “truthful guardian and protector” of the interest of the state,<sup>4</sup> he sought to strengthen the royal powers as a way to guarantee the stability of the state institutions (Senelle et al., 2004, p. 30). His preferred option for doing so was the introduction of a referendum on royal initiative, which would have enabled the king to bypass and overrule a parliamentary majority if necessary (Orban, 1908, p. 514; Witte et al., 2003, p. 399).

The proponents of this proposal (e.g. the Catholic prime minister Auguste Beernaert, doctrinal liberals like Emile Banning, and progressive liberals like Emile de Laveleye and Paul Janson) argued that the balance between the different state

3 For a more detailed discussion of this procedure and its connection to the issue of constituent power, see Chapter 9.

4 See Leopold II’s letter of 31 December 1891 (Van der Smissen, 1920, pp. 101–102).

powers had been thrown out of whack by the increase in parliamentary authority. According to them, parliamentary omnipotence was not what the framers had envisaged. Such a regime reduced all the guarantees for the protection of individual rights and undermined the institutions which the framers had set up to this end, e.g. the monarch as neutral power, the balance of the constituted powers, ministerial responsibility, etc. (e.g. Banning, 1899, pp. 11, 20–27, 32–40, 50; De Laveleye, 1897, p. 394). So, a new balance had to be achieved. A consultative referendum was considered useful in this respect since it would allow the electorate to settle conflicts between the chambers or between the chambers and the king. For the progressive liberal De Laveleye, this would allow the king to truly become a neutral power, as originally intended. The royal referendum would reactivate the royal veto, which had fallen into disuse. By consulting the nation, the king would be in a position to make sure that legislation reflected the real interests and opinion of the country:

Or the project of law, against which popular manifestations have arisen, will be ratified by *referendum* by a majority of voters. Then the advocates of the sovereignty of the people will have to bend before the clearly expressed will of the people; or the majority rejects the project, which would prove that it was genuinely unpopular. In this case, it would be good that the constituted powers would acknowledge the opposition of the real country.

(emphasis from the original author. De Laveleye, 1897, p. 402)

For Prime Minister Beernaert, the referendum was a way to moderate the democratic powers and integrate them into the political system. Although the nation had delegated its powers under the Constitution, he claimed that it retained the right to be consulted on important matters.<sup>5</sup> Beernaert anticipated the argument of the referendum's unconstitutionality by stressing its consultative nature. Additionally, he argued that the referendum would act as a useful corrective on the (at that time) majoritarian electoral system, where alternating liberal and Catholic governments were systematically reversing the measures taken by their predecessor. This kind of immobilisation could be prevented by consulting the nation in a referendum. Others, such as Catholic member of parliament Frans Schollaert, argued that the parliamentary right of investigation (old article 40 of the Constitution) provided a constitutional basis for the introduction of a consultative referendum. This right followed from parliament's legislative initiative and principally admitted that the legislative assembly could inform itself through consultation with the electorate. Similar arguments were formulated by Émile Dupont and Eugène Goblet d'Alviella.<sup>6</sup>

<sup>5</sup> *Hand.* Kamer 1891–1892, p. 507, 2 February 1892, Beernaert.

<sup>6</sup> *Hand.* Kamer 1892–1893, p. 1904, 13 July 1893, Schollaert; *Hand.* Senaat, 1892–1893, p. 498, 3 August 1893, Dupont; *Hand.* Senaat, 1892–1893, p. 499, 3 August 1893, Goblet d'Alviella.



The opponents of the referendum, in turn, argued – somewhat unsurprisingly – that it was not compatible with the representative regime established by the Belgian Constitution. Fierce opposition to the proposal was voiced in parliament by the Catholic leader Charles Woeste and Doctrinaire liberals such as Walthère Frère-Orban and Jules Bara. They rejected the referendum because it risked disfiguring the parliamentary system by locating power directly with the people.<sup>7</sup> Leopold II, meanwhile, was accused of using the referendum as an instrument to realise his ideal of Caesarism and royal despotism. For the first time, the idea that Belgian government was exclusively representative in nature was explicitly stated. Frère-Orban argued in parliament that sovereignty in Belgium was therefore not reconcilable with plebiscites.<sup>8</sup> Moreover, he explicitly differentiated representative sovereignty from the direct, popular sovereignty desired by the progressives and radicals:

The Constitution [...] formally condemns the sovereignty of the people, which you affirm. The Constitution says it is true that the Belgians are equal before the law and that all the powers emanate from the nation, i.e. it does not recognize the regime which has been called “of divine origin”. Yet, [the Constitution] adds [...] that these powers are exercised in a manner that it determines. In which manner are the origin of the powers and the powers themselves determined? This is what the Constitution says in explicit terms. [...] Furthermore, she defines the powers and the manner of their exercise, which excludes in the most absolute way your interpretation of the sovereignty of the people.

(*Hand. Kamer 1892–1893*, p. 1032, 23 March 1893, Frère-Orban)

This passage shows that Doctrinaire liberals now clearly made a distinction between a mediated form of sovereignty, on the one hand, and an unmediated one on the other. Showing a remarkable affinity with the French Doctrinaires, Frère-Orban identified the first form with the “theory of the numbers”, according to which the referendum and universal suffrage followed. He rejected this form in favour of “the insights of reason”, which were to be found in the representative regime.<sup>9</sup>

The ideological entente between Catholics and Doctrinaire liberals against direct democracy seemed complete (De Smaele, 1998, pp. 29–31; Raxhon, 2007, pp. 37–38). Jules Van den Heuvel, a professor of public law at the Catholic University of Leuven and later Catholic minister of justice, published an extensive refutation of the referendum and of universal suffrage. He argued against

7 *Hand. Kamer 1892–1893*, p. 1036, 23 March 1893, Frère-Orban.

8 “*Le régime [représentatif] sous lequel nous vivons exclut la législation directe par le corps électoral. [...] L’application d’une telle mesure renverserait toute l’économie du régime représentatif et parlementaire*” (Letter of Frère-Orban of 23 December 1891, published in *L’Indépendance belge*, ‘Le referendum royal. Une lettre de M. Frère-Orban’, 30 December 1891, no. 363).

9 *Hand. Kamer 1892–1893*, pp. 1033–1034, 23 March 1893, Frère-Orban.

the total uprooting of the constitutional system by the introduction of these measures, the risk of personal government by the king based on plebiscites, the loss of prestige and authority for the constituted powers, and the impossibility of consistent policy-making due to the whims of the electorate (Van Den Heuvel, 1892; 1898). Similar arguments were advanced by the Catholic aristocrat and communal politician Fernand de Zerezo de Tájada (Zerezo de Tájada, 1891, esp. pp. 1–3, 20, 23).

It is obvious, however, that this rejection by the established parties of direct citizen participation was not purely based on principle, but also on strategy. Woeste indicated as much when he stated that the proposed reforms went against the tradition and principles of the existing systems as well as against the interests of the conservative party.<sup>10</sup> The more moderate Van den Heuvel joined this position, fearing that universal suffrage and the referendum would allow social democrats and republicans to attack the parliamentary system (Van Den Heuvel, 1892, pp. 24–25, 161). Further government initiatives towards the introduction of referendums failed due to this broad opposition (Lejeune and Regnier, 1985, pp. 23 with references in n. 33–35; Orban, 1906, pp. 123–124).

### *Fruitless attempts at further democratisation*

Several additional attempts to introduce referendums were made in the decades following the constitutional revision of 1893. In 1899, social democrats and progressive liberals proposed to organise a national referendum on the subject of the introduction of proportional representation.<sup>11</sup> Two years later, the progressive liberal Paul Janson filed a similar proposal for a national referendum on the introduction of universal single suffrage and proportional representation.<sup>12</sup> In both cases, the progressive opposition tried to organise a referendum as a way to bypass the parliamentary majority blocking their proposals to change the political system. The arguments of the 1893 debate were largely repeated, and both proposals were subsequently defeated in parliament.<sup>13</sup>

The situation was different in 1919–1921, when a government of national unity sought to revise the Constitution as part of the country's post-war modernisation. In 1919, the government single-handedly introduced universal male suffrage in the face of communist agitation and massive social disruption (and in direct contravention of the written Constitution). This radical move was justified by liberal minister Henri Jaspar (backed by the liberal constitutional scholar Paul Errera) through the argument that the circumstances of the war, which among other things prevented regular elections, had already created an unconstitutional political situation. Errera's Catholic counterpart Léon Dupriez added that the

10 *Hand. Kamer 1892–1893*, p. 1336, 20 May 1892, Woeste.

11 *Parl. St. Kamer 1898–1899*, p. 229.

12 *Parl. St. Kamer 1900–1901*, p. 192.

13 *Hand. Kamer 1898–1899*, p. 2847; *Hand. Kamer 1900–1901*, p. 1669.

parliamentary majority of the time could no longer be said to reflect the true national opinion, since it had been elected before the war (Haag, 1976, p. 172). This debate is interesting because it suggests that, at least for some constitutional scholars, elections alone do not legitimise parliament. Both its composition and its decisions need to express the will of the nation as it exists at that moment. Among the measures proposed by the government of national unity was the introduction of a so-called *référéndum de partage*. Under this proposal, referendums could be called in cases of disagreement between the chambers, when a legislative proposal was contested by a significant minority and when the king deemed it necessary.<sup>14</sup> The proposal concerned both referendums on ordinary legislation and on constitutional revisions. Articles 26 and 39 of the Constitution would be amended to make the change possible. Remarkably article 25 (at least the first paragraph) remained out of the picture. This suggests that the connection between national sovereignty and the representative regime on the one hand, and the principle that “all the powers emanate from the nation”, on the other, was still not present. The government’s proposal, as well as four additional proposals for the revision of article 26, was nevertheless defeated in parliament: they (narrowly) failed to reach the two-thirds majority required for constitutional amendments.<sup>15</sup>

After this period, and with the introduction of universal male suffrage, interest in the introduction of referendums waned. Particularly in social democratic circles, the referendum had primarily been conceived as a corrective of the existing representative system and its exclusive nature. With the introduction of universal suffrage (and the earlier adoption of proportional representation in 1899), the socialist party was able to obtain a landslide victory in the 1919 elections. Now constituting a regular political party, it became less concerned with direct political participation than it had been before, which shows once more the intimate connection between political strategic motives and positions on matters of constitutional principle.

## The post-war era (1950–1985)

### *The Royal Question and Belgium’s first and only referendum*

As we have seen, the modern conceptual differentiation between national sovereignty and popular sovereignty only came about in 1893 in the context of the debates on constitutional reform and the introduction of the referendum on the royal initiative in particular. It is important to note that for the time being, this conceptual opposition occupied a minority position. In most cases, the terms national and popular sovereignty continued to be used interchangeably. A sizeable number of handbooks still explained article 25 as a manifestation of popular sovereignty (Boon, 1940; Brants, 1937; De Hoon, 1927; De Putter,

14 *Parl. St. Kamer* 1918–1919, no. 329, p. 2.

15 *Parl. St. Kamer* 1920–1921, p. 207, 6 April 1921; *Hand. Kamer* 1920–1921, p. 1400, 31 May 1921.

1944; Noterdaeme, 1956; Vauthier, 1931). The national sovereignty interpretation, however, gradually gained support over the course of the first half of the twentieth century (e.g. Dor and Braas, 1935, pp. 161, 157 with reference to Raymond Carré de Malberg; Errera, 1909, pp. 117–119; Orban, 1906, p. 276, with reference to Frère-Orban, 1908, pp. 3–8, 26–27; Speyer, 1927, pp. 30–33, 45–46; Vanden Bossche, 1925, pp. 547–550), until finally becoming the dominant doctrine in the aftermath of the referendum on the Royal Question which was held in 1950.

The post-war period in Belgian politics was characterised by attempts at political normalisation, as well as by a revival of Belgian patriotism. The collective experience of the war became embodied in the abstract ‘nation’ and the idea of a ‘Belgian community’, terms which became omnipresent in political discourse (Conway, 2012, p. 246). The interbellum scepticism towards parliamentary institutions now made way for a wholehearted celebration of democratic representative institutions. “Outside of parliamentary democracy”, Prime Minister Achiel Van Acker declared in 1945, “there only exists escapades, misery and perils”.<sup>16</sup> It is somewhat surprising therefore that Belgium’s first – and to date, only – national referendum was held in this context.

The political crisis which led to the organisation of this referendum erupted in 1945 with a power struggle between parliament, which was dominated at the time by the social democrats, and King Leopold III, who was supported by the right-wing Catholics. When the king surrendered to Germany in May 1940 (becoming a German prisoner of war for the remainder of the conflict), the government declared him unable to govern. Shortly after Leopold III’s liberation, discussion arose about his return to power. The revelation of his sympathies for Hitler as well as his stubbornness and autocratic attitude only worsened his relations with the social democrats, who promptly passed legislation to make sure that the decision on the king’s return remained exclusively with parliament (Gérard-Libois and Gotovitch, 1983, p. 25). In response, Leopold toyed with the idea of a referendum in order to circumvent parliament. Intent on electoral gain, the Catholics publicly supported this idea. Their strategy paid off, and having attained a parliamentary majority, they could now impose the organisation of a referendum (Theunissen, 1984, pp. 27–28). A majority now considered the organization of a referendum without altering the Constitution possible, but on the conditions that it would remain an exceptional, one-time event and that the result of the referendum could not bind parliament. One month later, on 12 March 1950, the electorate was asked whether “King Leopold III should retake the exercise of his constitutional powers”. The referendum revealed deep linguistic and regional disagreements within the country.<sup>17</sup> The king and the Catholic majority in parliament nevertheless interpreted the result as the ‘will of the majority’, and thereby

16 As cited in Conway (2012, p. 251).

17 Of the Flemish population, 72% voted for the king’s return, whereas in Wallonia and in Brussels the return only received 42% and 48% of the votes, respectively.

as the national will. However, when they made preparations for the king's return, deadly riots broke out. Revolution and civil war now threatened the government, and the king was compelled to step down on 16 July 1951 in favour of his son, Baudouin (Senelle et al., 2004, pp. 120–121).

Very quickly, the impact of the Royal Question became apparent in Belgian legal scholarship. Leopold III's inclination towards autocratic governance, if need be with the direct support of the electorate, urged several constitutional scholars to reach back to the 1891–1893 arguments against the plebiscitary monarchy. However, whereas they were initially concerned with the limitation of royal power, their attention would shift in the light of the emergent communist threat. Gradually, the legal scholarship would come to associate national sovereignty with Western democracies, which they contrasted with the popular sovereignty defended by Marxist regimes (cf. *infra*).

The main protagonists in this shift were the professors of constitutional law André Mast (at the University of Ghent) and Pierre Wigny (at the Catholic universities of Leuven and Namur). The impact of the crisis on constitutional thought was already noticeable a few months after the referendum, when Mast published his 'Overview of constitutional law'. In this handbook, Mast made a sharp distinction between national and popular sovereignty, which he associated with representative and direct democracy, respectively (Mast, 1950, pp. 66–67). According to him, the Belgian National Congress had deliberately opted for national sovereignty. This meant that sovereignty resided in the complex, intangible, and transgenerational nation. For Mast, it was precisely this abstraction that enabled a democratic regime to impose limits on, and to prevent abuses by, accidental majorities. The counter-image to this view of democracy was provided by what Mast termed 'Rousseauian' democracy, that is, popular sovereignty, where sovereignty belonged to the mass of individuals. Surprisingly, Mast concluded that this regime did not exclude representation. Nor did national sovereignty necessarily entail representative government (Mast, 1950, p. 69; 1953, p. 74). For Mast, popular sovereignty rather meant that sovereignty became personified in the representative assembly and more specifically in the momentary parliamentary majority. Since the parliamentary majority represented the people's will, no checks or balances could limit its powers (Mast, 1950, pp. 66–67). This was Mast's main critique of popular sovereignty. Consequently, for Mast, popular sovereignty was not so much a problem of direct democracy as a problem of unchecked parliamentary power. In fact, Mast's critique seems to have been directed mainly against any governmental institution – whether it be the king or parliament – which tried to impose its will through the direct intervention of the electorate. The fear of a plebiscitary monarchy, in particular, seems to have been a concern for Mast.<sup>18</sup>

18 Especially Mast's reference to Charles Woeste's views on sovereignty (instead of references to the constitutional debates of 1830–1831) catch the eye, as they were explicitly directed against the possibility of a plebiscitary monarchy (Mast, 1950, pp. 82, 84).

Mast's contemporary colleague Wigny further developed the national sovereignty doctrine. Just like Mast, Wigny dismissed popular sovereignty. In his view, a Rousseauian interpretation of popular sovereignty attributed a fraction of the highest power to all citizens. As a result, popular sovereignty entailed direct or semi-direct democracy with an imperative mandate for the representatives (Wigny, 1952, p. 224). Wigny contrasted this with national sovereignty, where power lies with the nation, "considered in its indivisible and global consistence" (Wigny, 1952, p. 225). Wigny found support for the Belgian case in Carré de Malberg's organ theory, which asserted that "far from presupposing a pre-existing will, the organ establishes this will and this juridical person [the nation]" (Carré de Malberg, 1922, p. 228). This was the system Wigny recognised in the Belgian Constitution's sovereignty clause, and which he attributed to the framers.

### *Anticommunism and the shift in the conception of sovereignty*

After the Royal Question, the views of both men gradually shifted in response to changing political circumstances. As Olga Bashkina recently observed, the Belgian sovereignty debate became influenced by growing international tensions as the world stage became divided between the two geo-political spheres of Western democracies and the communist Soviet Union (Bashkina, 2018, pp. 162–163). The outbreak of the Korean War in June 1950 resulted in a national anti-communist campaign in Belgium, led by the Catholic party (Gerard, 2016, p. 59). This Cold War context also affected the understanding of sovereignty as legal scholars increasingly sharpened the contrast between national and popular sovereignty, eventually resulting in two antagonistic conceptions of sovereignty. Carré de Malberg's binary conception of national and popular sovereignty proved particularly useful to this end (Bashkina, 2018, p. 163).

While Mast had first identified popular sovereignty with unconstrained parliamentary power, during the 1960s he gradually came to associate the term with the totalitarian pseudo-democracies of the Soviet regime (Bashkina, 2018, p. 163). According to Mast, a "classical democracy" built on national sovereignty entailed respect for individual rights and constitutional limitations to the exercise of state power. On the other hand, a "popular democracy", based on a Rousseauian understanding of popular sovereignty and on the Marxist ideal of a classless society, paid exclusive homage to the absolute authority of "the People". The latter knew no limits and inevitably led to the usurpation of state power and eventually to dictatorship (Mast, 1981, pp. 22–24; 1967, pp. 21–22).

Similarly, Pierre Wigny gradually complemented his distinction between national and popular sovereignty with an anti-communist interpretation of these concepts. Using a comparable terminology to Mast, Wigny opposed Western "classical democracies" to communist "popular democracies" (Wigny, 1956, pp. 11–13). Only the former provided true government by the people and for the people, thereby securing the plurality of opinions under permanent control of the nation (Wigny, 1969, pp. 44–46). Stalinist regimes, on the other hand, established

dictatorship in French Jacobin fashion and on the basis of Rousseauian principles (Wigny, 1973, p. 41). Just like Mast, Wigny now wielded national sovereignty as an instrument to denounce the theoretical legitimization of communist regimes.<sup>19</sup>

Even though these eminent constitutional scholars managed to set the standard in Belgium on the notion of sovereignty for the second half of the twentieth century, it took quite some time before their views achieved the status of a majority consensus. Several legal scholars continued to use national and popular sovereignty interchangeably, or refused to distinguish between both interpretations (De Meyer, 1982; Vliebergh, 1973). In time, however, these viewpoints became a minority. The discussion came to a decisive end with a 1985 opinion issued by the Council of State, which settled the national sovereignty doctrine as the standard for the next decades.<sup>20</sup> Additionally, it also permanently settled the question of the constitutionality of referendums. From that point on, a large consensus existed among legal scholars that referendums were incompatible with the existing constitutional structure and that in order to introduce them a constitutional revision was required. Importantly, however, while the opinion became one of the most important legal sources in support of the national sovereignty doctrine, it omitted any reference to the circumstances (the Royal Question and anti-communist sentiment) which had helped to shape it. Later handbooks too omitted this aspect of history, further decontextualising the concept of national sovereignty and (wrongly) attributing it to the framers.

### **The contemporary debate (the 2000s onwards)**

The 1985 opinion handed down by the Council of State thus temporarily closed the legal debate on sovereignty and referendums. Contemporary legal doctrine acknowledged the Council's point of view (Alen, 2000, p. 73; Delpérée, 2000, p. 163; Geudens, 2000; Rimanque, 1999, pp. 100–101; Uyttendaele, 1994; Velaers, 2001, p. 165; Velu, 1986). This did not mean, however, that the question of the referendum disappeared from the political agenda. On numerous occasions over the decades following the Council's decision, new efforts were made to introduce referendums. In the meantime, a series of state reforms transformed Belgium from a unitary state into a federal one, consisting of three territorial regions and three linguistic communities. Most often, the proposals for the introduction of referendums were not intended to alter the democratic system in a durable way, but rather concerned *ad hoc* specific issues that were politically contentious at that time, such as European integration or Belgian federalism (Velaers, 2019). Several of these proposals gave the Council of State the

19 This corresponded with contemporary actions of his political party, which tried to silence the national communist movements through legal channels. See e.g. Kwanten (2001, pp. 424–427).

20 R.v.St., afd. Wetgeving, advies van 15 mei 1985, *Parl. St. Kamer*, 1983–1984, 783/2. See Chapter 1 on this milestone opinion.

opportunity to repeat its jurisprudence: there exists a tension between the representative nature of the Belgian Constitution and the direct democratic nature of referendums; and in any case, the referendum cannot be introduced without explicit constitutional basis.

Perhaps the most serious attempt (apart from the post–First World War debates) to incorporate referendums into the Belgian Constitution came in the early 2000s, with the formation of a government coalition between liberal, social democratic, and green parties. A notable aspect of this coalition’s programme was the stated aim of renewing and deepening Belgian democracy, most obviously through ‘direct democratic’ instruments such as referendums or popular initiatives. While this proposal generated much discussion and disagreement, there was a widespread consensus among legislators and experts alike that introducing referendums necessitated a constitutional amendment, thus cementing even further the Council of State’s position. Disagreement nevertheless existed as to whether non-binding referendums also required an explicit constitutional basis. Part of the legal profession, especially scholars upholding a living constitutionalism approach to the interpretation of the sovereignty clause, took a sceptical stance (e.g. Bourgaux, 2015; De Witte, 2003, pp. 352–353; Lejeune and Regnier, 1985, pp. 31–32; Popelier, 2004, pp. 118–123; Vande Lanotte et al., 2015, pp. 208–212). In the end, however, this effort to introduce referendums – like all the ones before it – failed.

The next important development occurred in 2014, when democratic reform was one of the topics of Belgium’s Sixth State Reform. As part of the eventual compromise, a new article 39 bis was inserted into the Constitution. This article created a constitutional basis for non-binding referendums, though exclusively at the level of the regions. The possibility of also holding referendums at the federal level was considered a step too far as it continued to evoke strong fears that this would pit Belgium’s different linguistic communities against each other. Thus, the referendum on the Royal Question, as well as the memory of the conflicts it generated, continued to cast their shadow on constitutional debates. Yet, for the sovereignty debate, the adoption of article 39 bis nonetheless constituted an important evolution, since the inclusion of this provision in the Constitution shows that parliament did not consider the national sovereignty doctrine – which continues to be the majority position in legal thought – a sufficient reason to refrain from giving referendums a place within the Belgian Constitution. Unlike during the pre-war constitutional debates, in 2014, the sovereignty issue did not feature in the parliamentary discussions, which focused mostly on technical issues – such as which policy issues should be placed beyond the reach of the referendum.<sup>21</sup> But the impact of article 39 bis should not be overstated either. The article as such has little in the way of specific legal consequences, since it merely provides the *possibility* for the regions to start using referendums. It is up to each region to decide whether or not to make use of this possibility. So far, only the

21 *Parl. St. Kamer*, 2010–2014, 2966/003; *Parl. St. Senaat* 2010–2014, 2372/3.



region of Wallonia has adopted the necessary enabling legislation to do so, but as of yet no referendums have taken place under this law.<sup>22</sup>

### The value of sovereignty today

While the practical impact of the national sovereignty doctrine may have somewhat lessened in light of these constitutional developments, it continues to hold a strong influence over the legal thinking on democracy in Belgium. In general, legal scholars and practitioners remain hostile to active citizen involvement and see participation and representation as polar opposites. Contemporary legal handbooks continue to present the choice as one between national and popular sovereignty, the former synonymous with representation and the latter with participation, with the Belgian Constitution clearly falling on the side of the former (e.g. De Schepper, 2018, pp. 14–18; Keunen and Bijmens, 2017; Schram, 2015, p. 110). As the previous discussion has shown, to present these concepts in this way is highly misleading and strips them of their historical context. Throughout the constitutional history of Belgium, the concept of sovereignty has been used to highlight different distinctions, often in service of the political needs of that specific moment: reason versus mob rule, parliamentarism versus monarchical plebiscitarianism, liberal versus Marxist democracy. By stripping the national sovereignty doctrine of this context and the historical struggles in which it arose, its elitist consequences are legitimised. It presents the theory as an objective, originalist reading of the Constitution rather than as a political instrument which was used at several stages in Belgium’s political history to deny new democratic rights. Strangely, even legal scholars and practitioners who now question the historicity of the classic distinction still refuse to dismiss it entirely and eventually revert back to it by arguing that constitutional practice has corroborated the national sovereignty doctrine – thus switching between originalism and living constitutionalism (e.g. Alen, 2015, pp. 7, 44; Velaers, 2019, pp. 6–7).

These elitist consequences become especially obvious when we contrast the Council of State’s view on representation with recent theories of representation. An important argument used by the Council to defend the incompatibility between direct participation and representation is the fact that referendums could possibly generate discordance between the will of the population as expressed directly in a referendum and the will of the population as expressed in parliament. However, in contrast to what is argued by the Council of State, a representative system does not require the “complete conformity between the will of the citizens and their representatives”.<sup>23</sup> Contemporary theorists of representation, such as Nadia Urbinati, have emphasised how the unbridgeable distance between representatives and citizens is crucial for democracy’s proper functioning. It is this distance which creates the space for critical reflection on the part of citizens and

22 See Chapter 12 for a more detailed discussion of the Walloon referendum legislation.

23 R.v.St., afd. Wetgeving, adviezen van 15 mei 1985, *Parl. St. Kamer*, 1983–1984, 783/2.

enables them to exercise democratic control on the use of state power (Urbinati, 2006). Members of parliament should therefore not be presumed “*iuris et de iure*” to represent the will of the people, as the Council of State argues. Rather, the opposite is true. Michael Saward rightly states that the possibility to contest any claim to represent someone or something is the essence of democratic representation (Saward, 2010). A representative’s authority is best protected, not by hiding the disagreements between elected representatives and their constituents behind juridical abstractions such as the idea of the ‘nation’, but rather by recognising the inevitable gap that separates representatives from the represented. One way to recognise this gap is by providing citizens with tools that allow them to enter into a dialogue with representatives and which give them the feeling that their perspective has been taken into account.

From a cursory glance, this looks like a conflict between a strictly trustee-based view of representation and more contemporary approaches to representation. However, when seen in light of the historical struggles which shaped the sovereignty debate in Belgium, it becomes clear that these tensions were part of the debate since the beginning. The idea that representation cannot exist in isolation but needs to be connected to the broader realm of public opinion has always been present in Belgian constitutional doctrine. By incorporating the lessons of these struggles in our understanding of sovereignty, it thus becomes possible to gain a richer, more nuanced understanding of this concept which is fit for modern times and transcends the stale distinction between popular and national sovereignty.

Before concluding, we would like to highlight two particular lessons which appear especially instructive in light of current concerns about democracy. The first is that sovereignty entails a negative aspect. The negative aspect of sovereignty implies that no political actor, be it in the person of the king or even parliament itself, can legitimately claim to embody the nation or the people as a whole. This, as we saw, was one of the purposes attributed to the sovereignty clause by the framers of the Belgian Constitution. Yet, it is a lesson worth relearning given the rise – in several Western democracies – of populism, the core premise of which is precisely its claim to embody the ‘will of the people’ (Mudde, 2017; Rummens, 2017). Though the national sovereignty doctrine and populism hold different conceptions of state power, legitimacy, and representation, they are aligned on one crucial point which makes the national sovereignty doctrine vulnerable to being instrumentalised by a populist majority in parliament: they both deny the gap that exists between representatives and the represented. In populism, the will of the people is said to exist independently from its representation in politics. However, since the people is conceptualised as a homogeneous whole speaking with one voice, its will can be embodied by the populist party or leader itself, which is therefore seen as the only legitimate representative of the people (Arditi, 2003; Urbinati, 2014, p. 113). In contrast, the national sovereignty doctrine denies that there is any sort of pre-existing will of the people. Rather, this will is constructed by parliament itself. Yet, there exists an irrefutable presumption (“*iuris et de iure*” in the words of the Council of State) that the will of parliament is indeed the will of the people; which is why any challenge through referendums

must be avoided. While the national sovereignty doctrine is conscious of the fact that the equation between the will of the people and the will of parliament is a legal fiction, this matters little in practical terms: it still renders the collective will of the representatives incontestable for the represented. As a result, in the hands of a populist majority, the national sovereignty doctrine is likely to become just another tool to foreclose any contestation of their claims to represent the will of the people. In contrast, re-incorporating the negative aspect of sovereignty in our understanding of this concept would provide the necessary conceptual tools to deflect these populist claims: while a majority in parliament may exercise power in the name of the people, it cannot claim to constitute or embody the people itself, the exact meaning of which remains forever beyond the grasp of state institutions.

A second lesson concerns the communicative aspect of sovereignty. As we saw, the choice for a representative system of government never implied that representatives had to perform their representative role in isolation and unconnected from public opinion. While it is the task of representatives to legislate, they are free to consult the public when performing this task. Nor was the outcome of the representative process presumed to be infallible (as the national sovereignty doctrine assumes). As the lengthy debates around the turn of the nineteenth century show, the idea that the representative system sometimes needs correcting was very much alive. While we certainly do not have to adopt the solutions contemplated at that time to address failures of representation, such as the referendum on royal initiative, the concerns expressed in those debates remain relevant today. Especially in times of growing popular dissatisfaction with how democracy operates, it is not a far stretch to argue that a conception of sovereignty which emphasises the right of citizens to criticise, contest, and if need be correct the judgements of representatives is better suited to respond to these popular concerns than a conception of sovereignty based on the presumption that the will of parliament is the correct and irrefutable interpretation of the popular will.

## Conclusion

This chapter explored the historical development of the concept of sovereignty in Belgian constitutional doctrine. It became clear that the theory of national sovereignty did not exist in 1830–1831 but only developed from the late nineteenth century on. Nor can we speak of a unified and consistent theory, since national sovereignty came in different forms and varieties which gradually developed in response to specific political conflicts. We saw that popular sovereignty was treated with hostility out of a conservative fear for social-emancipatory movements and ‘mob rule’, although a systematic differentiation with the concept of national sovereignty was initially absent. Early formulations of national sovereignty appeared from 1893 onward, in response to the threat of personal rule by the king occasioned by Leopold II’s aspirations to extend his power via plebiscite. Both concerns continued to inform the sovereignty debate in the twentieth century. Belgium’s one-time experience with a referendum in the post-war Royal Question provided the final catalyst for establishing the doctrinal dichotomy between national

sovereignty and popular sovereignty, between representative government and direct democracy. Not long afterwards, Cold War polarisation between Western and communist societies contributed to grafting the opposition between constitutional liberalism and popular totalitarianism onto the same divide. The Council of State's momentous 1985 opinion thus canonised an interpretation which was fairly recent and certainly did not originate in the constituent moment.

In a sense, the intellectual shifts and the appropriation of specific intellectual frameworks (e.g. the Doctrinaires' sovereignty of reason versus sovereignty of numbers, or Carré de Malberg's national sovereignty versus popular sovereignty) are the natural consequence of the essentially contested nature of the concept of sovereignty. Yet, as the national sovereignty doctrine solidified into the majority position, the contested nature of the concept – and the historical conflicts which shaped it – became obscured. This evolution was not innocent, since it helped legitimise the elitist consequences of the national sovereignty doctrine (such as the unconstitutionality of referendums) by dressing them up as the original intention of the framers. By pulling the curtain on the national sovereignty myth and laying bare its political roots, this chapter aimed to re-establish the contestable nature of sovereignty. In particular, we showed how this context-sensitive, historical approach provides a much more versatile understanding of sovereignty. This reading of sovereignty not only abandons the elitist view on representation inherited from bygone days but is also more receptive to the introduction of participatory elements, which we think are better adapted to deal with today's democratic challenges.

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