



ISSN: 2036-5438

**Subnational Constitutions:  
The Belgian Case in the Light of the Swiss Experience**

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Perspectives on Federalism, Vol. 6, issue 2, 2014





## Abstract

Although Belgian federated entities do not have constituent power, Flanders has recently envisaged the adoption of a “proto-subnational Bill of Rights”, called the Charter for Flanders. This study briefly recalls that process, explains the legal nature of the resulting (unadopted) text, determines to what extent this text can be called “paralegal”, tries to show – in the light of the Swiss experience – what Belgium could gain from fully-fledged subnational Constitutions in terms of fundamental Rights protection and of legal certainty if such Constitutions were authorized and assesses the hypothesis of a linkage between the federated Charters debate, on the one hand, and the project to “update” title II of the Federal Constitution, *i.e.* the Belgian Bill of Rights, on the other hand.

## Key-words

Subnational constitutions, Belgium, Flanders, paralegality, update



## 1. Introduction

Belgium is known for its centrifugal federalism. In the current state of law, its federated entities do not have constituent power (Popelier 2012: 39, Lambrecht: this issue). However, in Flanders and Wallonia, two of these entities, works and reflections have recently been conducted about the possibility to adopt, *de lege lata*, subnational ‘proto-constitutional’ texts. In Wallonia, these works and reflections have been abandoned at an early stage<sup>I</sup>. In Flanders, on the contrary, they have led, in 2012, to a proposition of formally non-binding text, called the « Charter for Flanders » (Handvest voor Vlaanderen) and presented, as explained hereunder, as what one could call a Flemish “Bill of Rights”. This proposition, which has eventually not been adopted by the Flemish Parliament, shall be analysed in six steps. Firstly, the process that has led to its elaboration will be described. Secondly, the legal nature of the proposed text will be briefly and critically examined. Thirdly, the same text will be related to “paralegality”, a concept forged by the Belgian Professor Hugues Dumont. Fourthly, the added value of hypothetical Belgian subnational Constitutions in terms of fundamental rights protection<sup>II</sup> will be studied through a brief analysis of Swiss constitutional law. Fifthly, the advantages Belgium could gain from such Constitutions in terms of legal certainty shall be analysed on the basis of a dialectical theory of law. Finally, the merits of a connection between the federated constitutional debate and a reboot of the project to “update” title II of the federal Constitution will be assessed.

## 2. An ongoing process: the Flemish Charter project<sup>III</sup>

The first explicit manifestations of a Flemish “federated constitutionalism” date back to the second half of the 1990s. The publication, in 1996, of a book entitled “Proposition of Constitution for Flanders”, forms a significant figure of this ‘movement’ (Clement *et al.* 1996. Adde Bex 1994 and 2007). Even though it recognized the legal invalidity of such a “constitution” *de lege lata*, this study conceived, *de lege ferenda*, a model of federated fundamental law composed of seven institutional titles<sup>IV</sup> and one dedicated to fundamental rights<sup>V</sup>. In the continuity of a “discussion note” approved by the Flemish Government on the 29<sup>th</sup> of February 1996, the authors of that book were invited to present their work to



the Flemish Parliamentary Commission for State Reform and General affairs on the 16<sup>th</sup> of October 1996<sup>VI</sup>. Three years later, on the 3<sup>rd</sup> of March 1999, a resolution of the Flemish Parliament related to the State reform mentioned that Belgian federated entities should acquire their own constitutional autonomy<sup>VII</sup>. Addressed to the Flemish Parliament on the 8<sup>th</sup> of September and judged inadmissible 21 days later<sup>VIII</sup>, a petition called “a Constitution for a Flemish State” led this assembly to create a workgroup specifically devoted to the redaction of a text inspired by the dismissed petition. Six months after the submission of a project established by external experts consulted by this workgroup<sup>IX</sup>, the President of the Flemish Parliament proposed, in December 2002, a draft “Charter of Flanders”<sup>X</sup>, which was updated<sup>XI</sup> on the 23<sup>rd</sup> of March 2004<sup>XII</sup>.

After a long period of uncertainty<sup>XIII</sup>, the two versions of the draft<sup>XIV</sup> state that, if a Flemish Charter was to be adopted, it should preferably not take the form of a “decree”, *i.e.* a federated (binding) norm of legislative nature. As the president of the Flemish Parliament rightly underlines, “It would be misleading, in the current state of Belgian constitutional law, to give the shape of a decree to a list of principles concerning the rights of citizens and the main orientations of policy. Indeed, even if this decree were adopted with a broad factual majority in [a federated] parliament, one could not prevent that a smaller majority deviates from it later on. (...) Moreover, this decree would raise delicate legal questions of competence repartition, because the communities and regions are, according to [the Belgian constitutional Court]<sup>XV</sup>, not entitled to repeat rules from which they can not legally depart ([constitutional] Court, 20 December 1985)”<sup>XVI</sup>. As one of the authors of the aforementioned 1996 book rightly confirmed during another parliamentary hearing where he was invited, “if one chooses for a decree, than there is in any case the risk of a case before the [constitutional] Court or for competence objections to be invoked”<sup>XVII</sup>. On the basis of article 65 of the regulation of their assembly, the commented documents then retain the idea of a “resolution”, *i.e.* a non-legislative parliamentary legal text, exempt from the scrutiny of the aforementioned constitutional court. The first consequence of this lexical choice may prosaically be found in the official qualification of the analysed documents as “propositions of resolution”. As to the content, these propositions notably insist on fundamental Rights and on the related policy options that Flanders should follow, essentially echoing the relevant European and International legal sources and adapting



them to the competences of Flanders as a federated entity. In addition, the last articles of the texts mention elements such as the Flemish coat of arms, flag, anthem and “celebration day” (“feestdag”)<sup>xviii</sup>.

On the basis of a proposition of the Enlarged office<sup>xix</sup> of the Flemish Parliament founded on a note of its President<sup>xx</sup>, the plenary decided, on the 19<sup>th</sup> of October 2005, to establish a Commission “Flemish Constitution” within the assembly and chaired by its president<sup>xxi</sup>. After having been partly modified<sup>xxii</sup> and confronted to alternative propositions by two political parties<sup>xxiii</sup>, the 2004 version of the proposition of resolution endorsing a Charter of Flanders was taken in charge by this newly established Commission, which raised no major developments of the dossier. This situation changed on the 11<sup>th</sup> of July 2010, when the Flemish Minister President announced its government wanted to re-launch the ‘constituent’ process in cooperation with the assembly<sup>xxiv</sup>. Rapidly welcomed by the deputies<sup>xxv</sup>, that announcement led, after the dismissal of a parallel proposition<sup>xxvi</sup>, to the presentation, on the 23<sup>rd</sup> of May 2012, of a proposition of resolution (in fact elaborated by the Flemish government) containing a “Charter for Flanders” by the three leaders of the regional majority<sup>xxvii</sup>. Formally introduced to the assembly on the 30<sup>th</sup> of May, this proposition of resolution has not been adopted yet, due to a lack of political support by the opposition. This new proposition still included an entrenched Bill of Rights<sup>xxviii</sup> and took more openly inspiration from the Charter of Fundamental Rights of the European Union. Complemented by a comprehensive institutional part, it placed the dispositions related to the arms, flag, anthem and national day of the region in its first title (article 4), notwithstanding the fact that it referred to Flanders as a “nation” in its preamble.

### 3. Legal nature of the proposed Flemish Charter “resolution”

The process described hereabove is obviously nothing trivial. Among the issues it could raise, one might, for instance, include the question whether the draft resolution of 2012, assuming it was adopted by the Flemish assembly, would have satisfied the criteria generally required for a text to be called a parliamentary “resolution”. This question calls for a negative answer. Indeed, a resolution is generally defined, in a negative way, as a text adopted by a Parliament (or by one of its chambers, when there are several) and which is



not a “law”, be it in the formal or material sense. This definition fully corresponds to the meaning given to the word by the Flemish authorities: “In a resolution, the Flemish Parliament usually does recommendations to the Flemish Government on actions or policies that the government should take. A resolution implies no [legal] obligations for the Flemish Government, but has political authority (...)”<sup>XXIX</sup>. In other words, a resolution of the Flemish parliament is, with possible exceptions, addressed to the Flemish government and is, without possible exception, deprived of any binding effect in law.

The hypothetical resolution at stake would have deviated from this definition in at least two respects<sup>XXX</sup>. Firstly, it would have contained a catalog of fundamental rights supposed, by definition, to have direct or at least indirect effects on the population living on the territory of Flanders. Therefore, the scope *ratione personae* of the proposed resolution would have gone far beyond the Flemish Government alone. Secondly, the content of such a theoretical resolution would have been largely similar to the dispositions of the Charter of Fundamental Rights of the European Union<sup>XXXI</sup>, which came into force with the Treaty of Lisbon. As one knows, this European legal source benefits from a legal binding force on the territory of Belgium in the areas governed by the law of the Union. By partly reproducing its provisions, the discussed resolution would thus have been, at the same time, formally non-binding and materially similar to a binding source of Belgian law, notwithstanding the fact that it would not have been submitted to the *ratione materiae* limitations affecting the EU Charter. In view of the foregoing, it must be admitted that a Charter for Flanders based on the 2012 model would be materially closer to a constitutional standard than to a classical parliamentary resolution. Paradoxically enough, it would nevertheless remain formally exempt of any judicial review by the Constitutional Court.

#### 4. The potential Flemish Charter resolution as an example of “paralegality”?

At first, the interest shown by the Flemish parliament and Minister President for a Charter-like resolution might be considered surprising, be it from a legal or political point of view. It could however be partly explained with an appropriate theoretical tool. The



concept of “paralegality” precisely provides such a tool. Developed by Professor Hugues Dumont on the basis of the socio-legal theories of legal change elaborated by Professors Jean Carbonnier and André-Jean Arnaud (Carbonnier 1978: 213, Arnaud 1981), this concept refers to “standards which, even though unconstitutional, are considered legitimate and are actually practiced by a social movement or elite. Sometimes these standards remain outside of state law. (...) Sometimes these standards have successfully managed to establish themselves, despite their unconstitutionality, within the state legal order, be it at the legislative, regulatory or case law level” (Dumont 2012a: 639). As emphasized by Professor Dumont, an important feature of this form of unconstitutionality, in addition to being considered legitimate by a social movement or elite, is that it is not “accidental”. On the contrary, it constitutes a real, “major clash that affects properly structural data” and makes part of “an alternative principle, regime or legal order, not only contrary to a cardinal component of the whole State (...) constitutional system, but also able to put pressure on this system and, if necessary, to subvert it” (Dumont 2012a).

As this definition suggests, the notion of paralegality assumes the existence of an indisputably unconstitutional “practice” that the timely and ambivalent adoption of a Flemish Charter is obviously not. Furthermore, the maintained hypothetical character of a Charter-like resolution prevents, by definition, to empirically notice or confirm its ability to “put pressure on [the existing legal system] and (...) to subvert it”. For these reasons, it appears theoretically excluded to qualify that kind of text “paralegal” for the time being. Such an observation does not imply, however, that the promotion of a Charter, *i.e.* the interest its authors and supporters show for its adoption, is not of paralegal kind or inspiration. Three elements may be put forward in that regard. Firstly, a Charter resolution would result, although modestly, from the material exercise of a “substantial constitutional autonomy” that Belgian federated entities do not formally receive from a federal Constitution according to which all powers come from the Nation and are exercised in accordance with the Constitution<sup>xxxii</sup>. Thereby, such a text should, strictly speaking, be considered materially unconstitutional. Furthermore, it would also embody, although in a relatively inconspicuous way, a legally structural clash in regard to the constitutional limits of Belgian federalism<sup>xxxiii</sup>. Secondly, a Charter would very probably be considered legitimate by “a social movement or elite”. This support would, in this case, arise from the



so-called “Flemish movement”. In that regard, it is worth noticing that this movement, which exists since the nineteenth century and finds means of expression in a very large number of channels (like pressure groups, non-profit associations or political parties)<sup>xxxiv</sup>, had several representatives at the different stages of the proto-constituent process described here above<sup>xxxv</sup>. Thirdly, a resolution of the envisaged kind, far from being “accidental”, would, as shown by some parliamentary declarations<sup>xxxvi</sup>, call for a practice of reference to its provisions and could, moreover (and/or thereby), be presented as a first milestone on the road leading to the official recognition of federated constitutional autonomy by the Federal State. This extract of the preamble of the 2012 proposition illustrates this last point with an undeniable clarity: “(...) the accompanying text provides for an important political commitment, which forms the starting point for a Constitution for Flanders based on the constituent power that Flanders must acquire”<sup>xxxvii</sup>.

At this point, our analysis has shown that the adoption of a Flemish Charter resolution is currently neither likely nor consensual, be it legally or politically. The improbability and the many problems attached to such a hypothetical paralegal text (Lambrecht 2013: 368 and 369) do not necessarily imply, however (Warnez 2012: 144), that the establishment, in Belgium, of fully-fledged federated Bills of Rights, or even of “full option” subnational Constitutions, would be deprived *per se* of any added value from the legal-scientific point of view, be it in terms of fundamental Rights protection (Gardner 2008) or, more broadly, in terms of legal certainty. It is precisely what this paper intends to show in the two following sections. In order to do so, it will, especially as far as the issue of fundamental Rights protection is concerned, take the Swiss case as a source of inspiration. The reason for this choice is that, if one accepts to take foreign legal systems seriously, the way Swiss law addresses the discussed issue may provide particularly valuable information in that regard, notably because of a recent cantonal dynamism regarding constitutional Bills of Rights (Chablais 1999).



## 5. What Belgium could gain from fully-fledged subnational Constitutions in terms of fundamental rights protection. Reflections inspired by the Swiss case

### 5.1. The legal status of cantonal Constitutions

In Swiss law, the constitutional autonomy of the cantons receives an explicit constitutional recognition. The first sentence of article 51, paragraph 1 of the Federal Constitution stipulates unequivocally that “Each Canton shall adopt a democratic constitution”. According to the second sentence of the same paragraph, such a cantonal constitution must have been accepted by the people, must be revised if the majority of the electorate demands it and must be guaranteed by the Confederation, this warranty being given if the text is not contrary to federal law. In other words, “the Federal Constitution determines, to some extent, the instrumental part of the formal cantonal constitutions. A canton is thus not legitimate to grant a Constitution containing only substantive rules” (Martenet 1999: 110). With this exception, the cantonal constitutional autonomy remains largely unspoilt by the federal constitution. This broad discretion given to the cantonal constituent forms an expression of the principle contained in Article 3 of the Federal Constitution, following which “The cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution (...)”. According to the historical and teleological interpretation usually retained, this provision does not establish a genuine sovereignty but only a high degree of autonomy.

### 5.2. The legal status of cantonal Bills of Rights

#### 1. *The limits of federal law*

The question whether the legal significance of the “substantial” dimension of the constitutional autonomy of Swiss cantons, *i.e.* mainly their faculty to formally consecrate constitutional Rights, is more than purely formal, deserves to be taken seriously. At first glance, this question seems to call for a negative answer. Indeed, Federal case law on concurrence of international, federal and cantonal Human Rights dispositions seems particularly reluctant to put federated provisions in position to get ‘real’ or ‘proper’ legal effects. To analyse this issue, three situations can be distinguished (Martenet 1999: 420 f.) and, in each case, accompanied by critical remarks.



Firstly, it follows from the October 6, 1976 “Buchdruckerei Elgg” decision of the Federal Tribunal<sup>xxxviii</sup>, as well as from the settled case-law which confirms it since then<sup>xxxix</sup>, that the cantonal fundamental Rights whose content is *equivalent* to the rights recognized in applicable federal and international sources receive “no autonomous meaning”. Also defended by a certain doctrine (Eichenberger 1986: 56; Aubert 1991: 124, Müller 1995: 31) and by the federal political authorities, the position of the High Court means practically that the cantonal provision at stake is not cancelled, but suspended as long as the scope of international and federal law is not reduced. Regardless of the artificiality it gets from the quite hypothetical nature of such a “range reduction”, the position of the Federal Tribunal is characterized by a very ‘textualist’ approach to cantonal, federal and international rights. In order to fulfil its role of sanction of cantonal rights, foreseen by Article 189 paragraph 1 letter d of the 1999 Federal Constitution, the Federal Tribunal can not neglect the fact that the application of the main methods of legal interpretation to *a priori* similar texts can sometimes lead to different results (Martenet 1999: 421). This is the cantonal constitutional judge’s responsibility to ensure the Federal High Court realizes that. This is not an insurmountable task. A decision made on the 11<sup>th</sup> of August 1975 by the Administrative Court of the Canton of Aargau in the field of freedom of the press can be seen as a significant precedent in this respect<sup>xl</sup>.

Secondly, a constant jurisprudence of the Federal Council, acting as guarantee provider of cantonal constitutions, states that the federal warranty “can not be granted where the canton, by an express and binding prescription, provides less protection than the Confederation by its written or unwritten constitutional rights”<sup>xli</sup>. According to a well-established doctrine (Martenet 1999: 429), this case-law should be abandoned for three reasons. First, it indirectly contradicts the freedom of the cantons not to consecrate fundamental rights in their formal constitution. Second, this case law disregards the maintained ability of individuals to invoke supra-cantonal law before the judge. Third, this jurisprudence is hard to conciliate with the practice of the Federal Council not to deny warranty to cantonal constitutions whose individual freedoms no longer meet federal standards due to the passage of time. The case law at stake is all the more reprehensible that the less generous recognition of a fundamental Right in a cantonal constitution is



likely, while respecting both the constitutional autonomy of the federated states and the principle of the overriding power of federal law, to provide an additional resource to the judge having to decide whether or not to validate a restriction of this Right by the cantonal authorities. Should one object that such an intra-federal diversity of status of fundamental rights is counteracted by a rather “homogenizing” international human Rights jurisprudence? At the European level, the existence of ECHR decisions recognizing a “regional margin of appreciation” to the Swiss cantons allows to doubt it<sup>XLI.II</sup>.

Thirdly, the decisional practice of the Federal Tribunal on the principle of favour is, to a certain extent, reluctant to recognize the possibly more protective character of cantonal Rights. This jurisprudential trend mostly arises from the rarity of such recognition and from a sometimes restrictive interpretation of fundamental Rights formally enshrined in federated constitutions, even at the cost of a breach of the express will of the federated constituent<sup>XLI.III</sup>. According to the Federal High jurisdiction, this type of restrictive interpretation must be understood as a reference to the responsibility of the cantonal judge to ensure the respect of cantonal Rights by federated authorities rather than as a refusal to acknowledge the more protective nature of these rights<sup>XLI.IV</sup>. If we look more closely, however, it is not certain that these two theoretically distinct attitudes do not converge in practice. One may think so for at least two reasons. On the one hand, the exercise of cantonal constitutional jurisdiction is limited, in most Swiss Federated States, to the sole hypothesis of the refusal, by cantonal executive and judicial authorities, to apply cantonal and, more rarely, federal rules considered contrary to superior law. In other words, cantonal constitutional justice follows, in a large majority of cases, a less ambitious – or more limited – model than its federal counterpart, for which the technique of abstract control plays a way more important role. On the other hand, the cantonal constitutional provisions enshrining fundamental Rights have traditionally played a marginal role in federated constitutional jurisprudence as reference norms. According to a certain doctrine, the main reason for this is that the cantonal constitutional judge largely “draws in and aligns on the jurisprudence of the Federal Tribunal covering, be it partially, the matter he has to settle. It's so much easier and faster. This prevents him from being contradicted by Lausanne judges, that he considers, especially due to his lack of experience, unmatched in terms of performance” (Auer 1990: 21). Jurisprudential reality confirms this analysis.



## 2. *Cantonal room for manoeuvre*

It follows from the foregoing that federal case law and, more broadly, federal law, do not do much to provide the substantial constitutional autonomy of the cantons a more than purely formal status. This does, however, not preclude the existence of such a status. According to many authors, the cantons themselves could indeed concretize this status by showing dynamism and innovation concerning the consecration and judicial protection of federated fundamental Rights. In recent decades, this type of dynamism and innovation has characterized the constitutional practice of many Swiss cantons. In a very large majority of cases, this movement was part of a broader wave of “total revision” of the cantonal constitutions (Bolz 1992).

On the basis of the broad constitutional autonomy granted to Helvetic federated entities, the 26 cantonal constitutions provide, since their initial adoption, for the possibility of their total revision in the provisions relating to their revision procedure. In general, such a total revision may be requested by the cantonal legislative authority (Grand Council) or by popular initiative. If the total revision is requested, a preliminary popular vote decides whether it must take place and, if so, whether the text should be written by the Grand Council or by a constituent assembly<sup>XLV</sup>. Since 1960, 23 out of 26 cantons have made a total revision or have adopted a new fundamental law. Half-cantons of Obwalden and Nidwalden opened the floor by totally revising their constitutions in 1965 and 1968. Although it is not a complete revision, the creation of the canton of Jura in 1977 led to the adoption of its constitution the same year. The next cantonal constituent experiences were all total revisions. They respectively took place in Aargau in 1980, Basel-Land and Uri in 1984, Solothurn in 1986, Thurgau and Glarus in 1988, Berne in 1993, Appenzell Outer-Rhodes in 1995, Ticino in 1997, Neuchâtel in 2000, St. Gallen in 2001, Vaud and Schaffhausen in 2002, Graubünden in 2003, Fribourg in 2004, Zurich and Basel-Stadt in 2005, Lucerne in 2007, Schwyz in 2010 and Geneva in 2012. To date, only Appenzell Inner-Rhodes, Zug and Valais have not followed this trend. This last canton, however, expressly chose in 1997 to perform the total revision of its fundamental law “step by step”, *i.e.* through a series of partial revisions<sup>XLVI</sup>.



It would of course be difficult to give a complete image of the several evolutions generated by these constituent moves in Swiss fundamental Rights law. Some particularly striking examples may however be considered representative of the legal benefits cantonal constitutions may produce in this field. With due regard to its limited nature, this paper shall focus on two of these examples, respectively grounded in the law of Neuchâtel and Bern.

The first aforementioned example illustrates the possibility, for federated constitutions, to foster the deepening of the protection of one determined Right. Following the example of the very innovative Berne constitution of 1993, the new fundamental law of Neuchâtel enshrines, in its article 12 II, the freedom to choose a form of common life other than marriage. Concretely, this Right aims at consolidating the legal status of non-married partners in a certain number of cantonal matters, for instance by giving them the right to consent to a medical intervention on the partner or the right to benefit a favourable succession tax rate as member of a couple. In a decision taken in 1997, *i.e.* a few years before the adoption of the new constitution of Neuchâtel, the Federal Tribunal had considered that a 30% difference between the succession tax rate applicable to married and unmarried couples was not discriminatory<sup>XLVII</sup>. By consecrating the discussed freedom, the constituent of Neuchâtel indirectly but clearly encouraged the cantonal legislative power or, at least, the cantonal or federal judiciary, to better the fiscal situation of non-married couples in that regard by lowering this rate difference (Aubert 1998: 27). This encouragement has been heard by the legislative, as the current lowered rate difference shows<sup>XLVIII</sup>.

A second example of the added value of cantonal Constitutions in the field of Human Rights law, more precisely in relation to the procedural issue of acceptable restrictions to protected freedoms, may be found in article 28 of the 1993 Berne Constitution. As confirmed by a more than constant case law of the European Court of Human Rights related to the second paragraph of articles 8 to 11 of the Convention, such restrictions may only take place when a legal base allows it, when prevalent private and public interests justify it and when the principle of proportionality is respected. In Berne, the commented article does not only posit this rule as a general principle for the application of cantonal



constitutional Rights, but also adds that the notion of “legal base” must be understood in the formal sense<sup>XLIX</sup>, which is not required in Strasbourg. The degree of precision that must be reached by the required formal law can, furthermore, be appreciated by the judge in charge on the basis of the criteria exposed in the preparatory works of the disposition. Finally, the constitution itself identifies the exceptional situations in which the legal base condition may be considered satisfied in absence of any formal law (“general police clause”). Concretely, such a legal regime partly channels the appreciation power of the judge, fully conforms to the European sources of Swiss law and fruitfully raises the level of protection of a majority of cantonal Rights by protecting them from restrictions deprived of any formal legal base. The fact this disposition has been imitated in many other cantons as well as in the new Federal Constitution of 1999 may be analysed as a significant hint of the potential of federated entities as driving forces of Human Rights Law, at least in a federal context.

### 5.3. *De lege ferenda* considerations. Milestones for a Belgian reflection

#### 1. *The legal status of hypothetical Belgian federated Constitutions and Bills of Rights*

In Belgium as in several other countries, the – legally virtual – idea of federated “Constitutions” is generally considered with particular cautiousness<sup>I</sup>. The same goes for subnational Bills of Rights and the provisions they contain, as if the latter couldn’t be more than ‘mere’ non-binding – or ‘soft law’ – principles<sup>LI</sup>.

In our view, such cautiousness could and should be tempered to the extent the concept of Constitution is not monolithic but gradual. One could for instance conceive the kind of federated text at stake as a Constitution in the “broad” formal and the “strict” material sense<sup>LII</sup>. This would at the same time be more in line with a logic of constitutional pluralism (Gardner 2008: 332; DelleDonne and Martinico 2011: 16 and 19 *in fine*) - perfectly compatible with the “ethnocultural” pluralism that some relate to the emergence of federalism in Belgium (Gardner 2008: 334) - and a dialectical theory of legal sources<sup>LIII</sup>. This is at least a first lesson that one can draw from the Swiss case, in which this gradual approach is *de facto* prevailing. The scope of this lesson should however not be overextended as far as the relation between such texts and federalism is concerned: as rightly underlined by professor Patricia Popelier, Federalism can perfectly exist without



subnational Constitutions, which are by no means “inherent” to the former but rather form a decisive “indicator” of it (Popelier 2008: 43 and 44).

*2. The relationship between the federal and federated rights and the case for subnational Bills of Rights in Belgium*

As far as Rights are concerned, a first line of arguments that could be raised in Belgium against a federated Bill is that it would (Delpérée 2002: 12) or, at least, could<sup>LIV</sup> be discriminatory to provide citizens with different levels of protection according to the part of the country where they find themselves. Notwithstanding the fact most national judges reject this argument –sometimes referring to the principle of subsidiarity of European and International Human Rights law (Verdussen 2001) –, the commented Swiss experience, as well as the American “New judicial federalism” (Williams 1999: 633; Gardner 2008: 333; Dinan 2012), teaches that such level variations are by no means discriminatory insofar they rather upgrade Sub-states by making them “laboratories” or “workshops” (Häberle 1994) for Rights protection *above* a maintained common federal “floor”<sup>LIV</sup>.

A second line of arguments is that it would be hard for federated entities to consecrate Rights in a more original or protective way than the federal constituent (Popelier 2012: 49). A twofold answer may be given here. First, the main issue to be dealt by a hypothetical Belgian federated constituent would probably not be material Rights, but “transversal clauses”, especially in the event such clauses would remain absent from the Federal Constitution (Brems 2007). Second, the diverging and changing<sup>LVI</sup> interpretations given to material rights like, for instance, linguistic freedom, could be a case, as it was some Swiss cantons, for constitutional nuancing at the federated level above the limit represented by the aforementioned federal “floor”.

A third possible argument is that the introduction of federated Bills of Rights in Belgium is neither “urgent” nor “necessary” (Popelier 2012: 46; Gardner 2008: 341 and 342). Further, the very “added value” of such sub-national – and even national (Popelier 2012: 49) - Bills would be arguable. In our view, this arguments translate a pragmatist approach to law that must not hide the fact, more or less openly assumed in the commented Swiss cantonal experiences, that legal phenomena are always caught between



the “cost-benefit” logic of effectivity, the “ideal” logic of legitimacy and the “formal-technical” logic of legality (Ost and van de Kerchove 2002). It is precisely between these three poles that the requirement of legal certainty, which forms the object of our next section, deserves to be apprehended.

## 6. What Belgium could gain from fully-fledged subnational Constitutions in terms of legal certainty. Insights from a dialectic theory of law

### 6.1. Legal certainty rethought

Among the several elements that one could attribute – or oppose – to the “added value” of hypothetical Belgian subnational Constitutions, the formulation of a dialectically adjusted answer to the requirement of legal certainty may be pointed out as a figure of particular importance. Before attempting to circumscribe such a formulation – and in order to justify its interest for the examined case –, a preliminary synthesis of the theoretical debate from which the underlying reflection emerges deserves to be briefly undertaken.

More than “mere” food for abstract thought, the requirement or, in more Kantian terms, the “regulator ideal” of legal certainty, has become, with the emergence of increasingly complex and intricate legal sources and discourses, a key figure in the case law of most national and supranational jurisdictions, including of course the Courts of Strasbourg<sup>LVII</sup> and Luxembourg. As a recent doctoral research (Van Meerbeeck 2014 [*infra*: VM]) has shown it with particular clarity – and to take only one example –, this last praetorium, even though the contours of its jurisprudence on the topic remain “blurry” when considered as a whole (VM: 138), tends, in several rulings, to privilege a “cartesian” and “political” approach to legal certainty. According to such an approach, the satisfaction of the discussed requirement ideal-typically calls for a comprehensive and top down effort, by the polity, to free the legal system of all elements susceptible to harm the postulated clarity of the general and abstract texts composing it and the predictability of their “application”, in order to favour the optimal carrying of public action (VM: 370 f.). As the author of the aforementioned research rightly suggests, such an approach to law can, without high risks of error, be associated to the pyramidal paradigm and to the “myths”



(VM: 374) that the “pure” legal theory defended by Kelsen eloquently embodies. In the aftermath of the so-called “pragmatic turn” of legal thought, notably characterized by a decisive critic of the clear text theory and by the relativisation of the hierarchical and systemic principles as milestones of the legal “field” (VM: 352 f., esp. 362), the defence of the aforementioned “Cartesian” views tends to become an uncomfortable exercise. Rooted in a philosophical legacy going back to the Greeks (VM: 382), this evolution provides the discussed author with firm theoretical grounds to defend an alternative, “fiduciary” and “subjective” conception of legal certainty. This concretely leads him to a (much) more “supple” or “soft” comprehension of this requirement, defined, in the voluntarily and expressly “interpersonal” perspective of what he calls a “case thought”, as the responsibility, for the judge, to give every case he settles the chance to be an “event”, *i.e.* an occasion to make law evolve after having met its limits in a particular and concrete situation, in order to favour the optimal protection of the individual (VM: 612 f.).

This fiduciary and subjective approach to legal certainty undoubtedly brings a stone to the edifice of a law “in network” – or even a centrifugal law – that would remain careful to preserve, in the name of a “finality” or orientation that would be and remain its own, an overall coherence and previsibility for the benefit of the citizen<sup>LVIII</sup>. By no means should it, however, be considered as an ending point: its conceptor himself very humbly underlines that his approach to the topic does not form a last word on it but rather translates a “particular vision of society and law” (VM: 646), announcing others yet to come and always already open to debate. The question then raises how to take up the torch and continue to think legal certainty after or, rather, in the light of its “fiduciarisation”. A possible answer can be formulated on the basis of a dialectical theory of law, which aims at making the various dimensions of this concept emerge from the tensioning of the opposing views related to it, thereby embracing a logic of “included third”<sup>LIX</sup>. In this case, the mobilisation of such a theory leads to envisage that the effort to satisfy the regulatory ideal at stake would derive from the interplay between the flexibility and continued openness for reassessment of established solutions characterizing a fiduciary “case thought”, on the one hand (rediscussion pole), and the general and abstract reaffirmation of the founding rules and principles of the legal system when they blur or evolve, on the other hand (stability pole)<sup>LX</sup>.



## 6.2. The case of Belgian Subnational Constitutions

Even if it may not reveal “self-evident” in the field of EU law – even though this assertion would certainly deserve to be considered very carefully –, the effect of the aforementioned “stability pole” in the Belgian legal order might prove to be more than crucial. This essentially stems from the growing gap, recently deepened by the sixth State reform<sup>LXI</sup>, between the materially expanding scope of the constitutive autonomy of federated entities and the formal maintaining of the paralegal nature of hypothetical subnational legal systems. Be it from an institutional perspective or, maybe more critically, in the field of fundamental rights, one can at least point the limits of the Belgian tendency to conceal this kind of gaps, as well as the sometimes drastic interpretation conflicts it generates, behind the convenient screen of the “pragmatic” intervention of federal constitutional case law.

Although regularly blamed for ‘crossing the limits’ of legal interpretation to play a role of shadow legislator –or even constituent –, Belgian<sup>LXII</sup> constitutional judges sometimes publically assume such intervention in the name of their responsibility to preserve the Belgian legal order, be it from political cleavages<sup>LXIII</sup> or from a potential disorder derived from the plurality of its sources<sup>LXIV</sup>. Instead of framing the reflection around the democratic aspects of the question, one could depict this attitude as partially reflecting a “straightforward” fiduciary approach to legal certainty. In our view, this approach would maybe win to make place for a dialectical “revisitation” of the “Cartesian” model, ultimately incarnated, as was the case in Switzerland, by a renewed vigour of the federal derived constituent combined with the establishment of legal texts inspired by subnational constitutionalism<sup>LXV</sup>. In Belgium, such a revisitation has been partly envisaged at the federal parliamentary level in the first half of the noughties. The state of advancement of that enterprise forms, with the possibility of its inscription in a more genuinely federal perspective, the object of the next (and last) section of this paper.



## 7. Reframing the debate. For an enlarged reboot of the project to “update” Title II of the Belgian Constitution

As indicated above, the Flemish constitutional “movement” has known, ten years ago, an equivalent in the federal parliament. Between the 13<sup>th</sup> of December 2004 and the 11<sup>th</sup> of December 2006, a working group established within the Chamber of Representatives of Belgium has indeed delivered an in-depth “review” of Title II of the Constitution, *i.e.* the Belgian “Bill of Rights”. At the end of this period of little less than two years, this effort led, with the substantial assistance of the academics and “experts” Jan Velaers and Sébastien Van Drooghenbroeck, to the production of two final reports. With a total length of about 550 pages, these documents related, on the one hand, to “transverse clauses on human rights and freedoms”<sup>LXVI</sup>, *i.e.* clauses related, for instance, to the restriction or derogation from these Rights considered as a whole and, on the other hand, “human rights guaranteed by the Constitution in view of international instruments of protection of fundamental rights”<sup>LXVII</sup>. As stated in the preamble of the experts note which opens the first of these two documents, the “review” in question fell within the broader context of “a reflection on the 'modernization' / 'Update' / 'Recodifying' of title II of the Constitution (...), on the model of what [had] been done for example by the Swiss constituent in 1999 or by the drafters of the Charter of fundamental Rights of the European Union (...)”<sup>LXVIII</sup>. After the official publication of that first outcome, this reflection has been – temporarily?– put on hold. It must at least be noted that the constitutional amendments proposed in the aforementioned reports have, until now, not been made, undertaken or even envisaged by any derived (pre)constituent (“*pré-constituant dérivé*”).

Openly inspired by the regulatory ideal of legal certainty (Van Drooghenbroeck 2001b: 147 f.), this federal project, even though its promoters never envisaged its enlargement to the promotion of subnational Constitutions, would gain a lot from such a broadening and would, furthermore, form a particularly appropriated vehicle for it. There are two main reasons for this<sup>LXIX</sup>. Firstly, the undeniable support from which the second project benefits in the northern part of the country, especially – but not exclusively – in the ranks of the Flemish movement, could, in case of linkage of the two projects, provide the first one with a way forward and, thereby, with means to stave off the characterised unwillingness of the



derived constituent to undertake long term and comprehensive enterprises (Van Drooghenbroeck 2001b: 152). Secondly, the defence – and, ultimately, the carrying out – of a federal “update” would constitute an ideal occasion to address the issue of federated Constitutions, to the extent their validation by the derived constituent remains the unavoidable preliminary to their potential establishment, by means other than paralegal, in the Belgian legal system (Popelier 2012: 40; Lambrecht, this issue). If this second argument does not contradict the concept of “update”, which deliberately makes room for modernisation or innovations of that kind<sup>LXX</sup>, it would still require an exceeding of the narrow limits of the already cited title II of the Constitution. Such an exceeding is overtly defended by the upholders of a federal update, due to the fact that the title at stake does not contain all constitutional dispositions related to fundamental Rights (Van Drooghenbroeck 2001b: 151), notwithstanding the other fact that the very nature of (re)codification projects implies a tendency to cover a maximum part, if not the entirety, of the envisaged legal field (de Béchillon 1998: 175). As Sébastien Van Drooghenbroeck transparently summarizes it, it would thus be indicated, if an update was to be considered, “to advise the pre-constituent to proceed like its Swiss counterpart, by opening, ‘as a precaution’, the review of all provisions of the Constitution” (2001b: 151).

At first glance, a plea for the “total revision” of the federal fundamental law may appear highly preoccupying from the specific perspective of the revision procedure consecrated by article 195 of the same legal act. It must at least be noted that this particular type of constitutional writing is not formally mentioned by the supreme source of the Belgian legal order. Should this silence be interpreted as an insuperable obstacle to the already mentioned update? According to a majority of authors, this question constitutionally calls for a positive answer. The main reason for this would be that the text of the first sentence of article 195 uses the singular to enunciate, in all its linguistic versions, that “such” (“telle” in French, “zodanige” in Dutch, “eine” in German) constitutional provision can be declared revisable by the legislature. By doing so, the original constituent would have banned all revision other than “partial” (Delpérée 2000: 77). This classical reading is not undisputed. Indeed, some authors do not share the view according to which a total revision should automatically be considered as a constitutional “revolution” or a threat, by the “synchronic people”, to the “diachronic people”. In fact,



they believe that this formulation only requires the derived constituent to formally identify each article he intends to revise, without posing any quantitative threshold regarding the list of dispositions at stake<sup>LXXI</sup>. In our view, this formality would even not be required if a total revision was envisaged in Belgium. There are at least three reasons for this absence of procedural obstacle to the kind of update we advocate. Firstly and to reason by *reductio ad absurdum*, if the singular formulation at stake was to be taken seriously, only “one-article” declarations of revision should be considered valid – especially due regard to the German version of the text –, which would of course constitute a rather counterfactual interpretation. Secondly, the “duty to preserve the general economy of the Constitution”<sup>LXXII</sup>, that one could identify as an aspect of the historical *ratio* of the analysed formulation, would nowadays be better respected by a comprehensive reshaping of the whole text than by what Marc Verdussen (Verdussen 2006. *Adde* Velaers 2006) calls constitutional pointedness – “pointillisme constitutionnel”, in French. Thirdly, it would be excessively formalist and pragmatically arguable to prevent the derived constituent from total revision when bluntly unconstitutional behaviours such as implicit revisions and “grafts” have practically become its daily bread – or rather its bad habit. Besides, it is far from certain that a total revision limited to its more « formal » dimension would be radically different from the constitutional coordination procedure, organised by article 198 of the fundamental law (Bourgaux 2003).

## 8. Conclusion

It appears from the Swiss part of this contribution – *i.e.* part 4 – that even in a national context characterized by a deeply rooted centripetal dynamic, the constituent activism of federated entities may, although restrictively, prove legally beneficial in terms of fundamental Rights protection. Furthermore, the innovative cantonal enshrinement of constitutional Rights promisingly demonstrates the political compatibility of the classically opposed aspirations of federalism and Human Rights protection (Woehrling 2007). It remains, however, that the progressive Helvetic tendency described here above could rely on a very favourable background, not only composed of constitutional flexibility and aggregative federalism, but also made of inter-cantonal emulation and of more punctual elements such as windows of opportunity opened by events like, for instance, the territorial



modification of a canton (Jura, Berne) or a ‘round’ anniversary of its entry into the Confederation (Vaud). As shown in the legal and political analysis carried out in parts 1 to 3 of this study, the current equivalent of similar developments in the Belgian or, more specifically, in the Flemish case, appears relatively limited. This does not mean, however, that the advantages linked to the establishment of subnational Constitutions – or Bills of Rights – will always remain inaccessible within the Belgian legal order. It is indeed not prohibited to hope that Belgian federalism will achieve, in the medium term, a sufficient maturity to let itself be inspired by the finest achievements of its foreign equivalents. The extent to which such an evolution could constitute, in a future to be determined<sup>LXXIII</sup>, the condition of possibility of the long waited “update” of the second title of the Federal Constitution, *i.e.* the (aging) Belgian national Bill of Rights, can not be underestimated. Defended in part 6 of this paper, that idea provides, at least – and as shown in part 5 –, constitutional law research with an original way to address the question of legal certainty and, more broadly, with an occasion to re-think the very role and nature of Constitutions in an increasingly “networked” legal paradigm.

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<sup>I</sup> See *i.a.* proposition de décret spécial instituant une Constitution wallonne, *Doc. Parl.*, Parl. wallon, sess. ord. 2005-2006, n°367.

<sup>II</sup> On the relevance of such a focus on subnational fundamental rights, see *i.a.* Gardner 2008: 334 *in fine*.

<sup>III</sup> For a detailed account, see Lambrecht 2014.

<sup>IV</sup> Title 1 Foundations, Title 3 The Powers, Title 4 The decentralised authorities, Title 5 Finances, Title 6 Cooperation, Title 7 General dispositions, Title 8 Revision of the Flemish Constitution.

<sup>V</sup> Title 2, Rights and Freedoms.

<sup>VI</sup> Parl.St. VI.Parl. 1995-1996, n°253/1, p. 14.

<sup>VII</sup> Parl.St. VI.Parl. 1998-1999, n°1339/3, p. 3, n° “8°”.

<sup>VIII</sup> This decision was taken after three meetings which respectively took place on the 12th and the 21st of October as well as on the 9th of November 1999. The first author of the petition and his legal counsellor, prof. Mathias Storme, were heard during the second of these meetings.

<sup>IX</sup> The proposed experts were Jan Velaers (UA), Kaat Leus (VUB), Frank Judo (KUL) and Paul Van Orshoven (KUL).

<sup>X</sup> Parl.St. VI.Parl. 2002-2003, n°46/1.

<sup>XI</sup> The platform [www.vlaamshandvest.be](http://www.vlaamshandvest.be) was one of the tools mobilised for the participation of citizens to this update.

<sup>XII</sup> Parl.St. VI.Parl. 2003-2004, n°46/1.

<sup>XIII</sup> This period lasted from 1996 to December 2002.

<sup>XIV</sup> The full version of the commented documents may be found on the following website:



- <http://www.vlaamsparlament.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/index.html>
- <sup>xv</sup> At the time, this jurisdiction was still officially called the “Court of Arbitration”.
- <sup>xvi</sup> De Batselier, Discussion text written in December 2002 and reproduced on the 10<sup>th</sup> of January 2003, with small adjustments, in Parl.St. VI.Parl. 2002-2003, n°46/1. See especially p. 3 and 4 of the latter document (our translation).
- <sup>xvii</sup> Van Nieuwenhowe *in* Parl.St. VI.Parl. 2005-2006, n°813/1, p. 16 (our translation).
- <sup>xviii</sup> They also indicate that “every child receives, before the end of its obligatory education, an exemplary of the text of the Charter of Flanders and of the Federal Constitution”. In the 2004 version of the proposition, see articles 68 and 69.
- <sup>xix</sup> PV Enlarged Office, 17<sup>th</sup> of October 2005. As explained by Lambrecht 2013: 360, the role of this “office” is to “coordinate the political working of the Flemish Parliament” (our translation). See also Lambrecht 2012: 20.
- <sup>xx</sup> Note, 13<sup>th</sup> of October 2005.
- <sup>xxi</sup> Hand. VI.Parl. 2005-2006, 19 oktober 2005, p. 38.
- <sup>xxii</sup> Parl.St. VI.Parl. 2005-2006, n°623/1, p. 1-78.
- <sup>xxiii</sup> Voorstel van Bijzonder Decreet houdende de invulling van de Vlaamse constitutionele autonomie, Parl.St.VI.Parl. 2005-2006, n°632/1, p. 1-6 (VLD, now Open VLD); Voorstel van resolutie betreffende een proeve van grondwet voor de toekomstige onafhankelijke Vlaamse staat, Parl.St. VI.Parl. 2005-2006, n°726/1, p. 1-21 (Vlaams Blok, now Vlaams Belang).
- <sup>xxiv</sup> [www.krispeeter.s.be/actua/toespraken/11-juli-speech](http://www.krispeeter.s.be/actua/toespraken/11-juli-speech), cited by Warnez 2012: 1.
- <sup>xxv</sup> Hand. VI.Parl. 2010-2011, 29 september 2010, p. 6-8.
- <sup>xxvi</sup> Voorstel van resolutie betreffende een proeve van grondwet voor de toekomstige onafhankelijke Vlaamse staat, Parl.St. VI.Parl. 2011-2012, n°1396/1, p. 1-23 (Vlaams Belang).
- <sup>xxvii</sup> Parl.St. VI.Parl. 2011-2012, n°1643/1, p. 1 to 36.
- <sup>xxviii</sup> On the notion of “entrenched Bill of Rights”, see Darrow and Alston 1999: 484 and f.
- <sup>xxix</sup> <http://www.vlaamsparlament.be/vp/informatie/begrippenlijst/resolutie.html> (our translation). *Adde* Rimanque *in* Parl.St. VI.Parl. 2005-2006, n°813/1, p. 11.
- <sup>xxx</sup> On the fact that this resolution was *de facto* elaborated by the Flemish government and thus not by MPs, see Lambrecht 2014.
- <sup>xxxi</sup> *Ibidem*.
- <sup>xxxii</sup> Article 33 of the Belgian Constitution (our translation).
- <sup>xxxiii</sup> For reflections on these limits in the specific field of linguistic freedom, see Weerts, to be published: 587 of the polycopied version.
- <sup>xxxiv</sup> For an overview, see WILS 2009.
- <sup>xxxv</sup> For instance, the first author of the petition brought before the Flemish parliament in 1999 precisely presented himself as a representative of this movement. Besides, one of the three majority parties that have supported the 2012 proposition, namely the NVA, considers itself closely linked to this movement.
- <sup>xxxvi</sup> See, for instance, Parl.St. VI.Parl. 2005-2006, n°813/1, p. 15, where one of the authors of the aforementioned 1996 book insists on the necessity for the Rights to be formulated in a legally realistic way, so that the authority or the judge can protect it efficiently.
- <sup>xxxvii</sup> See also Lambrecht 2014.
- <sup>xxxviii</sup> ATF 102 Ia 468.
- <sup>xxxix</sup> For a synthesis, see ATF 108 Ia 155, esp. 157.
- <sup>xl</sup> This decision has been published in *ZBl*, 1976, p. 36 and f. (see in particular p. 38). *Adde* Kälin 1987: 246.
- <sup>xli</sup> FF 1989 III 839 and 840, with our accent and translation.
- <sup>xlii</sup> ECHR., *Müller e.a. v. Switzerland*, 24 May 1988, Series A, n° 133, § 36: “It may (...) be true that Josef Felix Müller has been able to exhibit works in a similar vein in other parts of Switzerland and abroad, both before and after the “Fri-Art 81” exhibition (see paragraph 9 above). It does not, however, follow that the applicants’ conviction in Fribourg did not, in all the circumstances of the case, respond to a genuine social need, as was affirmed in substance by all three of the Swiss courts which dealt with the case.”. *Adde* ECHR., GC, *Mouvement raélien suisse v. Switzerland*, 13 July 2012, § 64.
- <sup>xliiii</sup> See ideal-typically ATF 121 I 267, 269-272.
- <sup>xliiv</sup> *Ibidem*, 272.
- <sup>xlv</sup> See for instance the Constitution of Neuchâtel, art. 101.
- <sup>xlvi</sup>



[http://www.vs.ch/Data/vos/docs/2013/10/2013.11\\_Révision%20CC%20Libertés%20individuelles%20et%20droits%20fondamentaux\\_RAPP\\_COM.pdf](http://www.vs.ch/Data/vos/docs/2013/10/2013.11_Révision%20CC%20Libertés%20individuelles%20et%20droits%20fondamentaux_RAPP_COM.pdf).

XLVII ATF 123 I 241.

XLVIII This rate difference has, more precisely, been reduced of 10 %. For more details, see <http://www.ne.ch/autorites/DFS/SCCO/successions-donations/Pages/taux-imposition-successions-donations.aspx>.

XLIX See also Constitution of Berne, art. 69.4, second sentence on delegations of power.

L Delledonne and Martinico 2011: 4 (“the phrasing of subnational constitutions tends to be ‘less constitutional’ than the language of the federal ones”) and, about in the Italian and Spanish Cases, 15 (« we are dealing with clear examples of ‘constitutionalism without constitution’ »).

LI On the Spanish case, see Delledonne and Martinico 2011: 15, citing Spanish Constitutional Court, *sentencia* n° 247/2007.

LII See *i.a.* Dumont 2012b.

LIII On this theory, which gradually conceives sources between pure (formal) statism and pure (material) dynamism as well as between pure empirism and pure ‘idealism’, see X., *Les sources du droit revisitées. Volume 4: théorie des sources du droit*, Bruxelles, Anthemis-Presses de l’Université Saint-Louis – Bruxelles, 2013.

LIV On that topic, see Popelier 2012: 48 and 49 as well as Delledonne and Martinico 2011: 19.

LV See Verdussen 2005: 189. For a link with the new mechanism of regional referenda in Belgium, Popelier 2012: 54; Delledonne and Martinico 2011: 3 *in fine*. Compar. Gardner 2008: 338 *in fine* and 339; Delledonne and Martinico 2011: 2 *in fine*.

LVI On the issue of legal certainty, see *infra*.

LVII See in particular the leading cases of ECHR, *Marckx v. Belgium*, 13 June 1979, n°6833/74, § 58 and ECHR, *Sunday Times*, 26 April 1979, n°6538/74, §47 and 49. For a detailed analysis, see Van Drooghenbroeck 2001a: 667-683.

LVIII On the theory of law as a network, see Ost and van de Kerchove 2002. On the relationship between legal certainty and the potential “finalities” of law, see OST, *A quoi sert le droit? Etsi jus non esset?*, to be published.

LIX In favour of such a theory, see Ost and van de Kerchove 2002: 36 f.

LX For a presentation of such poles as constituent parts of the finalities of law, see Ost, *op. cit.*

LXI For an overview, see Velaers *et al.* 2014.

LXII For Italian and Spanish echoes, see Delledonne and Martinico 2011: 3 and 16.

LXIII For examples in the field of linguistic Rights, see Dumont 1985. About education rights, see El Berhoumi 2013.

LXIV For a discussion of cases in which the Belgian constitutional Court used the “conciliatory conform interpretation” technique to diminish the higher level of Rights protection provided by a constitutional disposition with a view to making this disposition comply with international Human Rights law, see Delgrange 2014: 156 f. See also Popelier and Van de Heyning 2011.

LXV The idea, discussed hereunder, according to which the regulator ideal of legal certainty could or should be partly protected, in Belgium, from excessive judicial activism through the linkage of “the ‘update’ (title II of) the Federal Constitution”, on the one hand, and of “the (subsequent) adoption of subnational Constitutions”, on the other hand, presupposes that the latter may be considered without excessively ‘complicating’ the general economy of the legal system and, thereby, without – involuntarily and paradoxically – harming the regulator ideal at stake. On that topic, see. *i.a.* Clement *et al.* 1996: 65.

LXVI *Doc. parl.*, Ch., sess. ord. 2004-2005, n°2304/001.

LXVII *Doc. parl.*, Ch., sess. ord. 2006-2007, n°2867/001.

LXVIII *Doc. parl.*, Ch., sess. ord. 2004-2005, n°2304/001, p. 4.

LXIX On the federal constitution as a mean to avoid conflict by preserving an opportunity for federated entities to debate on sensitive matters, see Popelier 2012: 53.

LXX *Doc. parl.*, Ch., sess. ord. 2004-2005, n°2304/001, p. 5: “Il parait impossible, au-delà d’un certain stade, de ‘codifier à droit purement constant’”.

LXXI Masquelin 1972: 104; Orban 1908: 706 (“Il nous semble donc certain que (...) la procédure de révision pourrait être étendue à un nombre illimité d’articles” – although this author paradoxically and arguably adds that “Ce que l’article 131 [195 actuel] n’autorise pas, c’est la révision totale de la Constitution, la mise en question de la Constitution tout entière”); Van Drooghenbroeck 2001b: 151.

LXXII One could also invoke a “duty of reserve” or the dworkinian concept of “intergrity”.

LXXIII On the institutional ‘fatigue’ in contemporary Belgian politics as an obstacle to short term realisation of



a (sub)national constitutionalist project, see Lambrecht 2014 (*this issue*). On other potential obstacles of that kind, see Popelier 2012: 41, 47, 54 (distrust of the French-speaking as an expression of the so called linguistic cleavage, especially due regard to the ‘symbolic’ function of constitutional texts) and 48 (overlap of territory of several Belgian federated entities). Adde Delledonne and Martinico 2011: 1 and 2 (risk of attempt to the symbolic function of the national Constitution).

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