



**The need for sub-national constitutions in federal  
theory and practice.**

**The Belgian case**

by

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## Abstract

Comparative constitutional scholarship identifies sub-national constituent power as one of the defining features of federal systems. Moreover, according to public choice theory, devolutionary federal systems are expected to favor the creation of sub-national constitutions. For these reasons, the absence of real constitutional power for the sub-states in Belgium appears to be an anomaly. The research question of this paper explores the validity of this approach. More generally, the question is: how important is it in a federal state for sub-states to have their own sub-national constitutions? Arguments pro and contra are analyzed and applied to the Belgian case. I argue that sub-national constitutionalism is a matter of political balance between national and sub-national powers, rather than a principle of federal theory

## Key-words

Sub-national constitutions, federal theory, Belgium, devolutionary systems



## Introduction

Belgium is a federal state, composed of two types of sub-states: communities and regions. The very first article of the Belgian Constitution informs the reader of this feature of the Belgian state structure. Nevertheless, the Belgian sub-states do not or only embryonically possess constituent power. Moreover, Flanders is the only sub-state demanding more constitution-making power. The first section of this paper will describe this current state of affairs in Belgium. It will mainly consider the question of whether Belgium is an anomaly in federal theory. The research question in this paper therefore is of a more general nature: how important is it in a federal state for sub-states to have their own sub-national constitutions? For this purpose, Belgium is used as a case-study.

At first sight, the absence of sub-national constitutions in Belgium seems counter-intuitive, for two reasons. Firstly, comparative constitutional scholarship identifies sub-national constituent power as one of the defining features of federal systems (Gardner 2008: 325). Secondly, according to public choice theory, devolutionary federal systems, such as the Belgian one, are expected to involve the creation of sub-constitutions (Ginsburg and Posner 2010: 1601, 1624). As will be argued in the second section, however, the Belgian situation is less remarkable than one would expect. The question can then be reversed. Why should sub-states, such as Flanders, strive for constitutional power? Before looking into these reasons, in section four, I will first make clear in section 3 that sub-constitutional powers are not self-evident. The next section, in turn, will try to identify more arguments for the added value of sub-national constitutions. The last section will conclude that subnational constitutions are a matter of political balance between national and sub-national powers, rather than a principle of federal theory.

### 1. The Belgian case: state of affairs

#### 1.1. Legal position

Belgium was founded in 1830 as a unitary state. Although a devolutionary trend in Belgium started in 1970, the constitution has only since 1993 declared Belgium to be a



federal state, consisting of six sub-states: <sup>I</sup> the Flemish Community, the French Community, the German-speaking Community, the Flemish Region, the Walloon Region and the Brussels Region. The federal structure is unique in that Communities and Regions are two types of overlapping sub-states, differing as to the set of competences transferred to them. Communities are competent to regulate matters concerning education, culture, person-related matters and the use of languages, while Regions are competent for a detailed list of other responsibilities, mainly social-economic and territory-bound matters. Communities and Regions overlap as to their territory: the territory of the Flemish Community overlaps with the territory of both the Flemish Region and the territory of the Brussels Region, the territory of the French Region overlaps with the territory of the German Community and the French Community minus Brussels, while the territory of the French Community overlaps with the territory of the French Community and the Brussels Region.<sup>II</sup> The institutions of the Flemish Region, however, have merged with the institutions of the Flemish Community, making for one Flemish Parliament and one Flemish Government, competent in the Brussels Region only in the case of Community matters.

The state reform of 1993 also granted an embryo<sup>III</sup> of constitution-making power to some (but not all) sub-states. This does not imply the absence of sub-national constitutionalism. As has been observed in literature, national and sub-national constitutions are interconnected, in the sense that the less complete the national constitution is, the more important sub-national constitutions are, and *vice versa*. Hence, sub-state constitutional arrangements can be entrenched in more “complete” national constitutions (Williams 1999: 635; Williams and Alan Tarr 2004: 4; Beaud 2007: 190 -198). This is the case in Belgium. The most important constitutional aspects are regulated by the federal constitution and federal laws. The federal constitution contains a list of fundamental laws, and establishes a number of principles concerning the institutional design of the sub-states, such as the principle of a parliamentary system, direct and periodic elections, a legislature of five years for parliament without the possibility of earlier dissolution,<sup>IV</sup> and criminal proceedings against members of sub-state governments. Further details are left to the federal law maker. In most cases, a special majority is needed, consisting of a majority in both the French and the Dutch language group in the federal Parliament, the total number of votes in favor, cast in both language groups, having to



equal at least two thirds of the votes cast. In other cases, and especially when the institutional design of the German Community is concerned, an ordinary law suffices. Hence, federal laws describe the competences<sup>V</sup> of the sub-states, as well as the institutional arrangements. It comes as no surprise that the institutional design of the sub-states mirrors the federal institutional design, minus a few exceptions.<sup>VI</sup>

The Belgian constitution does allow the federal law-maker to designate, in a law adopted by a special majority, those matters relating to the election, composition and functioning of the parliament and to the composition and functioning of the governments of the Flemish Community, the French Community and the Walloon Region, which are regulated by the sub-state parliaments by law adopted by a two-thirds majority.<sup>VII</sup> Four observations can be made.

Firstly, not all sub-states dispose of institutional autonomy. More specifically, until now,<sup>VIII</sup> the German Community and the Brussels Region lack any form of constituent power;<sup>IX</sup> the former because of insufficient political significance (Nihoul and Bárcena 2011:219; Pas 2004:168); the latter because of an excess of political significance. As the Flemish political parties always fear that a strong Brussels Region would provide for French-speaking dominance in the overall federal system, they generally opposed autonomy for the Brussels Region on an equal footing with the other sub-states.<sup>X</sup>

Secondly, the making of a subnational constitution in Belgium requires two steps. In the first part of the process, the special majority law needs to designate the specific institutional matters which can be regulated by the sub-national parliaments.<sup>XI</sup> Hence, the federal lawmaker decides on the actual extent of the sub-national institutional autonomy. This is atypical, as in most federal states sub-national constituent power is provided by the constitution (Gardner and Ninet 2011: 505). In the second part of the process, the sub-national parliaments can regulate these matters by means of a law adopted by a two-thirds majority. There is no consensus as to the question of whether the federal lawmaker can (Peeters 2005: 53) or cannot (Rimanque 1993: 186) afterwards redraw institutional competences.<sup>XII</sup>

Thirdly, the institutional autonomy is limited both in quantity and importance. First of all, the Constitution limits the autonomy to elections, as well as the composition and functioning of the parliament and government. Secondly, most matters designated by the special law concern minor issues, such as the expenses of the members of parliament or the



designation of the main location of an electoral district, issues the constitutional nature of which can be put to doubt (Rimanque 1993: 185). More important matters, such as the designation of electoral districts, are accompanied by substantial limitations or conditions, such as respect for the proportionality principle and regional borders. Remarkably, the political agreements recently concluded in the framework of the sixth state reform, express the intention to allow for the introduction of regional advisory referenda concerning regional “interests”. If “interests” are not restricted to regional “competences”, these advisory referenda have an important discordant potential, adding instability to Belgian federalism.

Fourthly, in so far as the sub-national institutional autonomy does concern important matters – such as the functioning of the government and its relation with parliament - the question has been posed whether the requirement of a mere two thirds majority of the votes cast, abstentions not included, entails a sufficiently strong entrenchment for the execution of constituent power (Peeters 2005: 51; Rimanque 1993: 185). This practice, however, is in line with Ginsburg and Posner’s (2010: 1600) hypothesis, according to which sub-national constitutions generally require weaker amendment procedures due to a reduction of agency costs. More surprising in the Belgian case is that even minor issues require a qualified majority.

## 1.2. The Flemish longing for a sub-national Constitution

The constituent autonomy of the sub-states has remained limited, due to the distrust (Peeters 2005: 39; Uyttendaele 1993: 221) of French-speaking parties, fearing the Flemish craving for its own constitution as a sign of a separatist agenda. This has not prevented the Flemish Parliament and Government from forming initiatives aimed at the construction of a Flemish Constitution, containing both institutional autonomy and the declaration of fundamental rights.<sup>XIII</sup> In 1996, the Flemish Parliament discussed a governmental discussion paper presenting the prospect of the enlargement of institutional autonomy and the laying down of fundamental principles regarding the relationship between citizens and government.<sup>XIV</sup> In 1999, the Flemish Parliament expressed its demand for full-fledged constitutional power, implying more institutional autonomy, in the first of five resolutions which have been crucial for the position of Flemish political parties in the negotiations on



further state reform.<sup>xv</sup> In 2002, three experts assigned for this purpose by the Flemish Parliament presented their draft of a Flemish constitution, bringing together the sub-national stipulations issued by the Flemish Parliament in execution of its institutional autonomy and the federal stipulations open to amendment by the Flemish Parliament.<sup>xvi</sup> Although this document is only a coordination of existent provisions concerning the elections and the composition and functioning of the Flemish Parliament and Government, such a ‘Flemish Charter’ was described in the 1996 discussion paper as a symbol heralding the enlargement of constituent powers. Another expert was designated to analyze which constitutional provisions should be submitted to amendment in order to realize the establishment of fully-fledged constitutional power.<sup>xvii</sup> Draft resolutions and proposals were also initiated in Parliament based upon expert advice regarding a Flemish Charter on fundamental rights (Rimanque 2003-2004: 1001, 1016). In 2005, a parliamentary commission, “Flemish Constitution”, was established in order to draft a Flemish Charter, laying down the fundamental principles of Flemish government, rights and policy.<sup>xviii</sup> A Special Flemish Decree of 7 July 2006 (*Moniteur belge* 17 October 2006) coordinated the regulations enacted in execution of the Flemish constituent power. According to Nihoul and Bárcena (2011: 232), this law illustrates a more comprehensive vision on the Flemish side, compared to the rather casuistic approach in Wallonia. In 2010, the Flemish Minister-President handed over to the president of the Flemish Parliament a draft Charter for Flanders, containing a collection of fundamental rights laid down in the federal Constitution and the EU Charter.<sup>xix</sup> Hence, the Flemish aspirations clearly concern fully-fledged constitutional power, exceeding the mere demand for institutional autonomy.

## **2. The absence of sub-national constitutions: assessment in the light of constitutional theory**

The absence of sub-national constitutions in Belgium is not in line with conventional assumptions in constitutional theory. According to constitutional theory, sub-national constituent power is a distinctive feature of federal systems (Section 2.1.). Moreover, public choice theory expects that sub-national constitutions emerge, particularly in devolutionary federal systems (Section 2.2.).



## 2.1. Subnational constituent power as a distinctive feature of federal systems? Traditional vs dynamic constitutional theory

As mentioned in the introduction, constitutional theory identifies sub-national constituent power as one of the main distinctive features of federal systems. In federal theories at the beginning of the twentieth century, this was part of an endeavour to distinguish federal systems from territorial decentralized systems without abandoning a central sovereignty concept (Jellinek 1921: 489-491; Kelsen 1925: 193). In comparative constitutional theory it is observed that sub-national constitutionalism exists in most federal states. In the ‘Hamilton tradition’, forms of states are classified in categories of unitary, federal and confederate states according to their institutional features.<sup>xx</sup> Based on comparative analysis, the existence of sub-national constitutions and sub-national constitution-making power is also regarded by Belgian academics as a determining element of federal systems (Bex 1994: 12; Ergec 1994: 55-58; Judo 2006: 260; Vande Lanotte and Goedertier 2010, 226; Veny et al. 1991: 51). Others regard sub-national constitutionalism as a “necessary” and “essential” feature of federal systems. Bex (1994: 17) detects a “fundamental contradiction” in the concession of sub-national autonomous regulatory power on the one hand, and the denial of institutional autonomy on the other.

This theory, however, is not entirely convincing, for three reasons.

First of all, as the concept of sovereignty is beginning to fade as a paradigm for constitutional theory in the case of federal and other multilevel systems (Beaud 1998: 83-122 and 2007: 39-55), the need to distinguish federal from territorial decentralization is less urgent.

Secondly, the ‘Hamilton approach’ has become an “epistemological obstacle” in constitutional discourse (Gaudreault-Desbiens and Gélinas 2005: 5), which is not only far from reality, but also hinders insight into the dynamics of forms of state as a continuous process to restore a balance of power. In modern federal theory, federal states are understood as a dynamic process in search of a proper balance between autonomy of the federated states on the one hand, and efficiency of central government on the other hand (Lenaerts 1990: 207; Pinder 2007: 14). When extended to general constitutional theory, the distinction between federalism, regionalism and devolution remains merely a matter of gradation. In this dynamic approach, states are defined as permanent fields of tension



between integration and differentiation (Couwenberg 1994: 102-104). This leads to the enumeration of indicators, which position states on a gliding scale from unitary states to confederate organisations (Hooghe et al. 2008: 123-142; Popelier 2008: 427-433), by measuring autonomy of sub-entities on the one hand, and central cohesion or integration on the other. The existence of sub-national constituent power, being only one of many indicators, is in itself not determining for the categorizing of a state. A state might find itself positioned on the left side of the scale for one indicator and on the right side for another. This agrees with the observation that in reality, a specific institutional construction results from a ‘package deal’ meant to maintain a certain balance in relations of power (Jackson 2005: 148-151). Hence, the observation that a so-called regional system, such as the Italian one, provides for more sub-national constituent power than the Belgian federal system, is not unsettling in the light of constitutional theory. Nor is the absence of sub-national constituent power in contradiction with the existence of autonomous regulatory power. Other indicators might provide for compensation. Even in traditional doctrine, this “compensation” is sometimes diminished to the ‘participation of sub-states in federal constitutional law-making concerning their institutional design and competences’ (Van Damme 2008: 274). In Belgium, there is a minimalist participation of the sub-states as such, but on the other hand, the French and Dutch linguistic groups, which define the entire state organisation, both dispose of a veto power.<sup>XXI</sup>

Finally, the identification in comparative constitutional scholarship of sub-national constituent power as a distinctive feature of federal systems is based upon false empirical observations. Sub-national constituent power is present in a majority, though not in all federal systems, e.g. Canada or India (Williams 1999: 630). Moreover, the presence of sub-national constituent power is often linked with the integrative nature of most federal systems, originating from independent states with pre-existing constitutions. Belgium, on the other hand, is a devolutionary system, originating from a unitary state with a pre-existing central constitution. In this system, sub-national competences, including eventual constitutional powers, are attributed to the sub-states. Hence, the attribution of constituent powers, instead of being an essential part of federalism, is part of the ‘package deal’.



## 2.2. Constitutional powers in devolutionary federal systems

The question then remains why sub-national constitutionalism has only been minimally included in the Belgian ‘package deal’. This runs counter to expectations in public choice theory. According to Ginsburg and Posner, sub-national constitutionalism tends to become stronger in devolutionary federal systems. Their argument is that if the central state loses power, the loss of restrictions on the exercise of these powers at the federal level should – from the perspective of agency control - be compensated by greater restrictions in the constitutions of the sub-states (Ginsburg and Posner 2010: 1601). This argument applies all the more as devolutionary federalism often comes with a system of attribution of competences based upon exclusivity. In Belgium, moreover, the sub-states are positioned on an equal level with the federal state. For this reason, federal interference, which, according to the authors, compensates for weaker sub-national constitutions in integrative federal systems, does not decrease the risk of agency costs in the Belgian sub-states.

If agency control is at the heart of this reasoning, however, there is no necessity for these restrictions to be included in sub-national constitutions, provided that the sub-national authorities are submitted to federal constitutional law. Ginsburg and Posner (2010: 1593) define amendment procedures as an indicator to distinguish strong constitutions from weak constitutions. In Belgium, restrictions on sub-national authorities are so strongly entrenched in federal constitutional and quasi-constitutional law, that they are not able to amend them of their own accord.

Thus, leaving out of account the question whether the public choice theory is generally valid, the Belgian case does not disprove it.

## 3. Arguments against the transfer of sub-national constitutional powers

It follows from the former section that the existence of sub-national constitutions cannot be claimed to be essential to federal systems. Also, restrictions in federal law explain why the absence of sub-national constitutions in the devolutionary Belgian federal system does not increase the risk of agency costs. Other arguments support opponents of sub-



national constitutions. These arguments relate to both fundamental aspects of constitutionalism, i.e. institutional organization and fundamental rights.

### 3.1. Institutional autonomy

As for institutional organization, Ginsburg and Posner (2010: 1598) state that sub-national constitutions are in general weaker than federal constitutions, i.e. they are easier to amend and they lay down weaker voting rules, e.g. by preferring ordinary majority, direct democracy and unicameralism. The authors (at p. 1594) consider this the result of a reduction of agency risks, due to four factors. The first - the stakes are lower because of the transfer of powers to the federal level - and the second – federal monitoring – do not apply to the Belgium system. They express a distrust of federal authority compared to sub-national authorities which are considered to be more democratic. In devolutionary systems such as Belgium, however, powers are transferred from the federal level to the subnational level. Therefore, the stakes at the subnational level increase, while federal monitoring becomes weaker, which suggests that there is less need for federal monitoring. The other two factors, however, can be applied to the Belgian situation. Firstly, sub-states risk losing citizens, business and capital to other states if they adopt bad policies. Secondly, the population of a Belgian sub-state is smaller and generally more homogeneous than many equivalent political entities elsewhere.

The authors' assumption (at p. 1597) is that in the end, sub-national constitutions will merely duplicate federal constitutional rules. In Belgium, indeed, Judo (2006: 261-262) notes "with some irony" that the first act of constituent power exercised by the Flemish Parliament consisted in the duplication of the federal regulation regarding offices incompatible with parliamentary membership.

The question arises why newly created sub-states in devolutionary systems would strive for their own constituent power, if, from the perspective of agency costs, there is no urgent need for a set of rules which is distinct from the federal constitution and difficult to adjust. The same is true if we translate the perspective of agency costs into more principled terms of constitutionalism, in the sense of giving protection against arbitrary use of government power (Gardner 2008: 327). There is no need for sub-national constitutions to protect citizens against government interference, since guarantees are entrenched in both



the federal constitution and international treaties. In Belgium, every interested citizen can ask the Constitutional Court to review Acts of federal or subnational parliaments against the constitution or fundamental rights treaties. Moreover, the European Court of human rights provides for additional judicial protection.

However, Ginsburg and Posner's arguments do not explain why sub-states should *not* have institutional autonomy. They merely explain why sub-national institutional rules are not necessarily included in a constitutional act which is difficult to amend. In fact, they do admit that the institutional design at sub-state level might differ from the federal level, precisely because fewer restrictions are needed. In Belgium, the federal institutional design applicable to the sub-states in general mirrors the federal institutional design. The exceptions to that observation reduce restrictions: sub-national parliaments are unicameral instead of bicameral, they do not contain language groups (apart from the Brussels Parliament), and deviations from the ordinary majority requirement are rare. The question then remains why subnational states shouldn't be allowed to decide themselves on the level of protection against the risk of agency costs.

In Belgium, specific reasons explain why the thought of sub-national constitutions makes politicians nervous. These specific reasons lie in the devolutionary and bipolar nature of the Belgian federal system, creating a dynamic towards separation, and in the overlap of territory.

The bipolar nature of the system relates to the linguistic cleavage in Belgium between Flemish and French-speaking communities.<sup>xxii</sup> This linguistic cleavage – accompanied by differences in culture and preferences - incited the devolutionary trend in Belgium and is mirrored in the federal institutional design, featuring linguistic groups in administration, parliament, government, Council of State and Constitutional Court. Moreover, the regionalization of economic policy – originally a Walloon demand – has led, as Van Goethem (2011: 40) puts it, to “a radically different socio-economic profile for both regions” with a “visibly poorer Wallonia”. As a result, the French-speaking and the Flemish sub-states oppose each other, rather than defending common interests against the federal level.<sup>xxiii</sup> In literature, sub-national rivalry is considered a threat to sustainable federalism (Gardner and Ninet 2011: 493). The devolutionary and bipolar dynamic explains why the French-speaking community fears the promotion of policy competition between the sub-states and considers the Flemish aspiration for its own constitution to symbolize a hidden



separatist agenda. The bipolar nature of the Belgian system also explains why, as noted above (Section 1.1.), the Flemish politicians fear an autonomous Brussels Region, on an equal footing, including constituent powers. At first sight, it may seem ridiculous that sub-states are denied the right to decide for themselves small institutional matters such as name giving.<sup>xxiv</sup> So, for example, an amendment of the federal constitution was needed in order to change the name of sub-national representative bodies from “council” into “parliament”. On the other hand, a recent intention on the French-speaking side to change the name of the French Community into “Fédération Wallonie-Bruxelles”, was met by indignant reactions on the Flemish side, regarding this as a provocative claim on Brussels by the French-speaking parties (Moonen 2011: 16). This demonstrates that even naming can be a sensitive matter in Belgium, for which entrenchment in federal law offers guarantees to both linguistic parties.

Finally, the overlap of territory constitutes an obstacle for complete institutional autonomy. The most striking example is the territory of the Brussels Region, which also forms part of both the Flemish and the French Communities. For this reason, when a competition was launched for the best essay on a proposal for a fully-fledged Flemish Constitution, the contest winners explained that in order to redesign the Flemish institutions, they also had to propose amendments in the constitutional structure of other sub-states (Clement et al. 1996: xv). Therefore, where institutional autonomy is actually given to the Belgian sub-states on substantial issues, this is mostly on a conditional basis, requiring respect for institutional balances regulated on the federal level.

### 3.2. Fundamental rights

Flemish aspirations are not limited to institutional autonomy. Apparently, the Flemish Community also aspires to enact a Flemish fundamental rights charter. The question then arises as to the added value of such an act.

Delledonne and Martinico (2011: 19) warn of the incorporation of fundamental rights in subnational charters “because it could produce asymmetries in the guarantees of rights, providing the ground for differentiated policies, which in turn could discriminate between citizens because of their belonging to one specific region rather than another”. National enactment of fundamental rights, however, does not hinder the creation of differentiated



policies. For example, the constitution may leave the implementation of fundamental rights, especially in the field of social, economic and cultural rights, to the sub-states. Every government should, nevertheless, respect the core of fundamental rights. The Belgian Constitutional Court considers that any violation of a fundamental right constitutes at the same time a violation of the equality and non-discrimination principle. This was important particularly when, prior to 2003, the powers of the Constitutional Court were limited to the review against power-allocating rules, rights concerning education and the equality and non-discrimination principle laid down in Articles 10-11 of the Belgian Constitution. The Constitutional Court could still review indirectly possible cases of breaches against fundamental rights, linked to Articles 10-11 of the Constitution. In that case, the Constitutional Court skipped the comparability test.<sup>xxv</sup> This strategy is still used by the Court in order to review cases involving fundamental rights protected by an international treaty and not by the Constitution.<sup>xxvi</sup> If the message is clear – the fundamental nature of rights entails their enjoyment by every citizen – it is difficult to envisage a sub-national charter of rights recognizing rights for some citizens and not for others, depending on whether they live in one sub-state or another.

The argument can be carried even further, to the extent that the added value of a national charter of fundamental rights can be put to doubt. In Belgium, every court can review laws, including primary legislation, against international treaties. Moreover, the Constitutional Court, *via* Articles 10 and 11, reviews Acts of Parliament against fundamental rights protected by international treaties. Constitutional rights are interpreted in the light of international treaties and particularly in the light of the European Treaty of human rights and the case law of the European Court of human rights, resulting in a europeanisation of constitutional rights (De Wet 2008: 276-282; Popelier 2011: 154-156).

A national charter of fundamental rights, of course, may contain rights which relate to country-specific peculiarities or dynamics. Most fundamental rights protected by the Belgian Constitution, however, are mirrored in international treaties. There are only a few exceptions, such as the neutrality of education. It is, however, difficult to imagine fundamental rights specific to one region in Belgium and not to another. In general, as Gardner (2008: 326) notes, “rights-protective provisions of sub-national constitutions seem merely to duplicate similar provisions contained in the national constitution”. Also, the Flemish Charters which have been constructed up until now (without formal legal force)



generally duplicate fundamental rights protected by the national constitution or international treaties.

According to Brems (2007: 382), the enactment in the national constitutions of fundamental rights, already protected by international treaties, only has added value when the constitutional clause adds wider protection. In that case, dynamics between national and international mechanisms may result in an overall improvement of fundamental rights protection. Regarding the national-sub-national relations, the phenomenon experienced in the US, where overlapping sub-state constitutional rights are interpreted to provide more expansive protection, is called “new judicial federalism” (Williams 1999: 633). The enactment of non-overlapping fundamental rights is considered by DelleDonne and Martinico (2011: 19) as “a sort of a process of mutual learning between levels of government which permits an improvement in the guarantees of fundamental rights”. It remains doubtful, however, whether fundamental rights protection in Belgium is in urgent need of this kind of national-sub-national dynamics. There already exist sufficient mechanisms to keep national fundamental rights protection up-to-date, due to the protection offered by the European Court of human rights (ECtHR) and the fact that constitutional rights are interpreted by the Constitutional Court in the light of international treaties in general, and the case law of the ECtHR in particular. It seems unlikely that people are more inclined to view sub-national units, rather than national and transnational institutions, as playing a significant role in the protection of human rights (Gardner 2008: 342).

Considering the case law of the Belgian Constitutional Court mentioned above, it remains difficult to differentiate between rights and rights protection in national – sub-national relations, on a more fundamental level than merely implementation policies. On the other hand, no principled objection can be discerned against conferring to the sub-states the power to declare fundamental rights which are already protected in the national constitution or in international acts which bind the Belgian state. Gardner (2008: 335-336) even discerns added value of sub-national constitutions duplicating the federal charter, in that they provide a guarantee of protection if the national power fails to sufficiently protect a right. The author sees advantages in this system, especially in the case of shared competences. In Belgium, however, most powers are granted on the basis of exclusivity.



#### 4. Arguments in favor of the transfer of sub-national constitutional powers

In an article on sub-national constitutions in Belgium, Berx (2007: 248-254) gives four reasons in favor of the creation of sub-national constitutions in Belgium: avoiding a federal debate on intrinsic sub-national matters, avoiding degradation of the concept of a constitution, the promotion of transparency and the symbolic function of the constitution. These arguments imply an additional argument, namely the particularity of institutional preferences, as will be explained below. Pas (2004: 169) adds still another argument, referring to the value of competition. In this section, the merits of these arguments are analyzed.

The second and third arguments can be discussed very briefly, as they are less convincing.

**Avoiding degradation of the concept of a constitution.** Berx derives an argument from the observation, noted above (section 1.1.), that many of the institutional aspects, conferred to the regulating power of the sub-states, concern only minor issues. The author (2007: 251) considers that both the two-third majority and the terminology of a “sub-national constitution”, downgrades the meaning of the concept of a constitution. Berx, however, does not explain why substantial sub-national constitutional competences should, in her view be conferred on the sub-states. She seems merely to be expressing subjective disappointment as to the embryonic nature of the transfer of sub-national constituent power in Belgium. Besides, as noted above (section 1.1.), the Flemish Community, the French Community and the Walloon Region are also competent to regulate a number of more substantial constitutional matters, even to the degree that it was questioned whether the two-third majority provides for sufficient entrenchment.

**Transparency.** The third argument stresses the fragmented nature of Belgian sub-national constitutions, the regulations whereof are spread out over the federal constitution, federal laws and sub-national regulations. Berx (2007: 251) considers this dubious from a democratic point of view, as it is difficult for the citizen to have access to the sub-national constitution. Again, this argument criticizes the phased sub-national constitution-making procedure in Belgium, but does not explain why sub-states should dispose of constituent power. Moreover, sub-states can establish coordinated versions of the sub-national



constitution in the form of a resolution, as has been done in Flanders (Section 1.2.). Also, the claim that citizens are in need of an accessible sub-national constitution may be overrated. For example, inquiries have highlighted the low-visibility of sub-national constitutions in the United States (Williams 1999: 637).

More interesting are other arguments, including the possibility that sub-states might have particular preferences for their institutional design.

Particular preferences for institutional design. According to Gardner (2008: 334), ethno-cultural self-determination by subpopulations in a federal system “may lend plausibility to the premises of sub-national constitutionalism.” Therefore, although it was stated above that in general, sub-national constitutions will most often duplicate the national constitution, for certain aspects sub-states, based upon subpopulations, might have specific preferences. This is clearly the case in Belgium (Clement et al. 1996: 28; Pas 2004: 169). For example, while article 1 of the Belgian Constitution states that Belgium is a federal state composed of Communities and Regions, there is a Flemish preference for an institutional design based upon Communities, whereas a Region-based structure is preferred on the French-speaking side.

However, the federal constitution and constitutional law takes these differences into account, providing for a tailor-made design (Peeters 2005: 39, 44). For example, Flanders has made use of the option to merge the institutions of the Flemish Community and the Flemish Region, providing for one Flemish Parliament and one Flemish Government,<sup>xxvii</sup> whereas on the French side the parliament and government of the French Community still function apart from the parliament and government of the Walloon Region. The French Community, for its part, makes use of the possibility to transfer some of its competences to, on the one hand, the Walloon Region, and, on the other hand, the French Community Commission in Brussels.<sup>xxviii</sup> Likewise, the political agreements concluded in the build-up to the sixth state reform, while bringing sub-state, federal and European elections together, allow for the sub-states to hold the regional elections at a separate date, as a reply to the Flemish fear that simultaneous federal elections may overshadow regional elections. If federal law leaves room for sub-national constitutional preferences, the need for sub-national constitutions diminishes.

Avoiding a federal debate on intrinsically sub-national matters. Berx (2007: 249), while admitting the tailor-made nature of the sub-national design in federal constitutional



law, questions the entrenchment of this design in federal law, because it gives each language group participatory and even veto rights regarding the sub-national constitutional structure of the other language group (also Uyttendaele 1993: 221).<sup>xxix</sup> Thus, one group can make amendments in the institutional design of the other group's sub-national structure dependent upon concessions regarding other matters external to the institutional debate (Berx 2007: 249). This is especially problematic in Belgium, as the bipolar structure evokes regular conflict and deadlock (Pas 2004: 166).

While this argument is valid on the one hand, other arguments explain why the Belgian institutional debate is, for the largest part, conducted on the federal level. It was demonstrated above that even harmless-seeming institutional matters, such as name-giving, can become sensitive matters in the relations between the two dominant language groups in Belgium. Therefore, it is appropriate for the other language group to keep a say in these matters.

This counter-argument, however, does not explain why until for a long time, even the slightest constituent power was denied to the German-speaking Community, which is not part of the sensitive and delicate institutional balance based upon the struggle between the French and the Flemish language group. Moreover, as the federal parliament only contains a Dutch and a French language group, guaranteeing only one seat in the Senate to a member of the German-speaking Community, the German-speaking Community was not even permitted to participate in the construction of its own institutional design. Recent political agreements, however, provide for the conferring of sub-constituent power to both the German-speaking Community and the Brussels Region.

The symbolic function of the constitution. Berx (2007: 254) presents the symbolic nature of the constitution as a function determining its content. Pas (2004: 169) uses this as an argument for the construction of sub-national constitutions, when he claims that sub-national constitutions are “necessary”, because they “express the fundamental choices of a society”. Thus, sub-national constitutions in devolutionary federal systems function as a symbol of sub-national state construction. As Delledone and Martinico (2011: 3) observe, it is also the case in Spain and Italy that sub-national constitutions have the purpose “of claiming sovereignty rather than simple authority, or to challenge in a way the central sovereignty of the super-state”. Hence, if the Flemish Community strives for constitution-making powers and invests in resolutions declaring a Flemish fundamental charter, the



main reason can be formulated in terms of a political struggle for power. The earlier argument claiming that sub-national institutional issues should not be part of federal negotiations external to the institutional debate, can also be regarded from this perspective. A sub-national entity with specific institutional needs is stronger when engaging in institutional bargaining, if these needs are not included in the federal package deal.

Sub-national constitutions in Belgium are a sensitive issue precisely for these symbolic and political reasons. It has been explained above (section 1.2.) that the French-speaking parties fear that a Flemish constitution stands as a symbol for a separatist agenda rather than expressing sub-national autonomy in a federal structure. The symbolic nature of the constitution explains why the Flemish parties, while aiming towards the construction of a Flemish Constitution, deny the Brussels Region even the slightest form of constituent power (section 3.1.). As Nihoul and Bárcena (2011: 234) noted, while the Flemish have aspirations for constituent powers and the French-speaking parties do not, paradoxically the latter demand constitutive autonomy for the Brussels Region and the German-speaking Community, while the Flemish parties, until recently, refused this. The reason for this is a difference in preference regarding the structure of the Belgian federal state, composed of two communities (the Flemish wish) or three regions (the Francophone wish).

Sub-states as laboratories. In this article, the dynamics between state and sub-states has already been mentioned regarding the evolution of fundamental rights. This argument has also been used regarding institutional design. Gardner (2008: 331) formulates this in terms of “an arena of intergovernmental contestation” or competition. In Belgium, Pas (2004: 169) notes that subnational constitutions may provide for fresh ideas for the modernization of the federal constitution. This argument gains strength with his observation that “the social, economic, and political dynamics in Belgian society have almost completely shifted to the regions and communities, as a consequence of the deadlock on the federal level”. Until now, the sub-states have not shown many signs of creativity in this regard, but this may be due to the limited scope of their constituent autonomy. In this respect, the conferring of the power to introduce regional referenda may operate as lever for new forms of government. The introduction of referenda at the federal level, however, remains doubtful given the fact that it is difficult to reconcile with the bipolar and consociational architecture of Belgian federalism (Popelier 2005: 115-116).



## 5. Conclusion

While there are no principled reasons for the existence of sub-national constituent power, there also seem to be no strong principled objections. It is less urgent for sub-states to entrench guarantees against the risk of agency costs or arbitrary interference by the government in a constitution, when these guarantees are already entrenched in federal constitutional and quasi-constitutional law, leaving room for sub-state peculiarities. There is no need for the recognition of fundamental rights at the level of sub-states. Indeed, the principle of equality and non-discrimination even opposes the recognition of new fundamental rights in sub-national constitutions, based upon the principle of equality and non-discrimination. However, there is no principled objection against the declaration in sub-national constitutions of fundamental rights which are already protected in national or international acts. In the end, the existence of sub-national constitutions may even offer some added value if it succeeds in creating constitutional dynamism.

Therefore, sub-national constitutionalism can better be explained as a matter of history and politics, rather than as a matter of federal principle. In Belgium, historic reasons for the (quasi) absence of sub-national constitutions relate to the devolutionary nature of Belgian federalism, originating from a unitary state with a national constitution. Political reasons for both the absence of sub-national constitutions and the presence of Flemish aspirations for a Flemish constitution, can be explained as a struggle for power, which is intensified by the bipolar conflict model which shapes the Belgian federal state. The symbolic function of constitutions plays an important part in this struggle, along with the fact that in Belgium, due to the overlap of territories, the institutional design of one sub-state may impact on the institutional design of another sub-state.



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<sup>I</sup> Two other entities (the French Community Commission and the Common Community Commission) have some autonomous powers in Brussels and can therefore be considered additional sub-states, but they will not be dealt with in this paper as this would make the paper more complex than is necessary, considering their minor importance compared to the regular sub-states.

<sup>II</sup> As the French and the Flemish Community are both competent to regulate community matters and are both competent to act in Brussels territory, in order to avoid conflicts of competence, they can only regulate unilingual institutions in Brussels. The regulation of community competences applied to bilingual institutions and persons is left to the Common Community Commission (person-related matters) and the federal state (other community competences).

<sup>III</sup> Term used in the parliamentary debates, cf *Annales* House of Representatives, 1992-1993, 8 February 1993, n° 32, p. 1286; *Parl. Doc.* House of Representatives, 1992-1993, n° 725/6, 66.

<sup>IV</sup> According to the political agreements concluded in the build-up to the sixth state reform, the sub-states will be conferred a limited right to decide on the exact date of the elections, thereby allowing them to deviate from the elections for the European Parliament and, in the future, the federal elections.

<sup>V</sup> The Constitution makes the Communities competent for cultural matters, education, person-bound matters and the use of languages, with some restrictions, but, except for education, the special federal law enumerates which specific matters fall under these categories. The Constitution is silent about the substantive competences of the Regions.

<sup>VI</sup> For example, unlike the federal Parliament, the parliaments in the sub-states are not bicameral. Furthermore, only the federal and the Brussels Parliament contain two language groups, as this is not necessary in the other, more homogeneous sub-states. Moreover, the sub-states do not acknowledge a King as head of state.

<sup>VII</sup> Art. 118 § 2 and 123 § 2 of the Belgian Constitution.

<sup>VIII</sup> The political agreements concluded in the build-up to the sixth state reform, mention the conferring of constituent powers to the German speaking Community and the Brussels Region.

<sup>IX</sup> Declarations for the revision of the constitution in 2003, 2007 and 2010 envisaged to include these entities as barrier of constituent autonomy but have never lead to any result (Judo 2011: 246-247).

<sup>X</sup> See also M. Nihoul and F-X Bárcena (2011: 219) for this reason, despite specious arguments referring to the international position of Brussels and its status as capital.

<sup>XI</sup> For an overview of these matters, see Berx (1994: 183-190) and Rimanque (1993: 183-185).

<sup>XII</sup> According to Judo (2006: 268) a minor reduction already occurred.

<sup>XIII</sup> For an overview until 2007, see <http://www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/index.html>.

<sup>XIV</sup> Discussion paper on further state reform, approved by the Flemish Government on the 29<sup>th</sup> of February 1996 and discussed in the Flemish Parliament. See *Parliamentary Documents*, Flemish Parliament (1995-1996) n° 253/1, at p. 14

<sup>XV</sup> *Parliamentary Documents*, Flemish Parliament (1998-1999) n° 1339.

<sup>XVI</sup> Report submitted by J. Velaers, K. Leus, F. Judo and P. Van Orshoven, <http://www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/528.pdf>.

<sup>XVII</sup> Report submitted by K. Rimanque, <http://www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/529.pdf>.

<sup>XVIII</sup> PV 17 October 2005, [http://www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/vp\\_ub\\_17\\_oktobe\\_r\\_2005.pdf](http://www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/vp_ub_17_oktobe_r_2005.pdf). This resulted in not more than a hearing and a couple of resolution and proposals.

<sup>XIX</sup> It lasted until 2012 before a proposal for a resolution for 'a Charter for Flanders' was initiated in Parliament (Flemish Parliament, 2011-2012, Doc. No. 1643). However, several political parties oppose the document, because they have not been consulted and criticize the text either for presenting Flanders as a 'nation' in the preamble or for its lack of legal value.

<sup>XX</sup> The term refers to one of the authors of *The Federalist* who emphasized the institutional requirements for the establishment of an American federal state, see Pinder (2007: 2).

<sup>XXI</sup> This is *de jure* the case in so far as the institutional design of the sub-states is regulated in special majority law, and *de facto* the case in so far as it is regulated in the federal constitution. The German-speaking minority, however, is ignored in this construction.



XXII For a historical account see Van Goethem (2011: 21-43).

XXIII Recent developments bring an exception to light: regarding the completion of the Dexia dismantlement proceedings, and more specifically the management of the holding covering the Dexia municipality shares, the position of the Regions is opposed to the position of the federal government.

XXIV See for a similar case in Italy G. Delledonne and G. Martinico (2011: 8-9).

XXV E.g. Const. Court No 16/91, 13 June 1991.

XXVI E.g. Const. Court No 171/2008, 3 December 2008; Const. Court No 142/2009, 17 September 2009.

XXVII The Brussels members have no voting right for regional matters, as the Flemish Region, unlike the Flemish Community, has no territorial competence in Brussels.

XXVIII The Walloon Region has no competence in Brussels. Therefore, the same competences are also transferred to the French Community Commission, which is created as a decentralized body for the implementation of French Community laws, but which functions as an autonomous sub-state for these matters transferred to it by the French Community.

XXIX A striking example occurred in 1988, when the Flemish wish to have a proportional Flemish government required agreement of the French-speaking language group.

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