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**Movement towards a Flemish Constitution:
the Charter for Flanders, another failed attempt?**

by

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Abstract

A Constitution for Flanders has been preoccupying Flemish politicians and scholars for over twenty years. On 23 May 2012, the majority parties presented in the Flemish Parliament the Charter for Flanders. Since Flanders only has embryonic constitution-making power, this is *not* a proposal for a Constitution but merely a proposal for a resolution. As a (non-binding) resolution, the Charter has no legal implications, but rather an important political value. First, the text reveals a strong connection with the EU. The Charter's drafters interwove the fundamental right provisions in the Belgian Constitution with those in the Charter of Fundamental Rights for the European Union, which resulted in an expansive fundamental rights catalogue. Furthermore, the Charter contains a clear political commitment; 'it gives the impetus to a Constitution of Flanders in the framework of the constitution-making Flanders ought to acquire'. The Charter's preamble also confirms that Flanders is a nation with its own language and culture. The lack of participation of opposition parties and citizens in the drafting process was met with fierce criticism. The dossier slumbered in the competent commission without any parliamentary debate for two years. In 2013, the Christian Democratic Party announced that the dossier would be reactivated. However, this did not occur before the 'Mother of all elections' (regional, federal and European elections) in May 2014. As a consequence, the proposal for a Charter expired. It is unclear if the new Flemish Government composed of the Flemish-Nationalists, the Liberals and Christian-Democrats will revive the Charter for Flanders. Hopefully, this reactivation will at least be accompanied with intense parliamentary debates and textual clarifications. Especially, since the drafters consider the Charter a stepping-stone to a (legally binding) Constitution for Flanders.

Key-words

Subnational constitution, Belgium, Flanders, federalism, constitution-making autonomy



1. Introduction

For more than twenty years politicians^I and scholars^{II} in Flanders have debated the creation of a Flemish Constitution. The case of Flanders is part of a larger movement in several European countries, such as Spain, Italy and UK, towards creating or further developing subnational constitutions. This movement towards subnational constitution-making is linked with a movement towards more subnational autonomy and even independence. However, the possibility of subnational constitution-making is complicated by the fact that all these countries are undergoing centrifugal developments. Centrifugal federal systems are more likely to allow less subnational constitutional space than centripetal federal systems and are likely to have the residual powers—including subnational constitution-making powers—contained at the national level (Tarr 2011: 1136). These complexities are clearly visible in Flanders. Even though subnational constitution-making power has been discussed for over two decades, Flanders still only has embryonic constitution-making power.

The article first describes the, still unsuccessful, road towards a Flemish Constitution focusing on the latest proposal for a Charter for Flanders drafted by the previous Flemish Government. Second, the drafting process and the negative impact this process had on the Charter's chances of success are examined. Third, the article explains why the Flemish Parliament can only adopt a non-legally binding Charter, instead of a Constitution for Flanders, and expands on the Flemish demand, also raised in the latest Charter for Flanders proposal, that Flanders ought to acquire full constitution-making power. Fourth, the content of the Charter proposal of the previous Government is examined, especially its choice to use the Charter of Fundamental Rights of the European Union as its frame of reference. Lastly, the article evaluates the added value of such a non-legally binding Charter.



2. A long road to nowhere?

The road towards a Flemish Constitution—or at least Charter—has not only been rocky due to the lack of full constitution-making power. For over twenty years, the Flemish political parties have not been able to agree on the contents of a Charter for Flanders. Already in 1996, the Flemish Parliament extensively discussed a book providing a draft constitution for Flanders.^{III} Subsequently in 1999, the petition ‘A Constitution for the Flemish state’ was filed, signed by 24 000 Flemings.^{IV} Thereupon, the Extended Bureau^V decided to assign several Flemish constitution law experts to design a proposal of a ‘Flemish Basic Decree’.^{VI} Two texts were presented to the Flemish Parliament. On the one hand, there was a proposal of a special decree concerning the matters that fell within the constitutive autonomy of Flanders, which resulted in the special decree on the Flemish institutions of 7 July 2009. A decree of the Flemish Parliament is a Flemish law and has the same legal value as a law of the Federal Parliament; a special decree is a law voted with a two-thirds majority. The special decree on the Flemish institutions solely coordinated the already existing constitutive autonomy. On the other hand, the experts presented a proposal of resolution concerning the Charter of Flanders.^{VII} Then President of the Flemish Parliament De Batselier (socialist party SP.A) did not take on the proposal of the constitutional law experts. Instead, he presented his own discussion text ‘Charter of Flanders’ in 2002,^{VIII} but this text received little support from the other parties as they considered it too one-sided.^{IX} To draw up a Charter for Flanders, the Flemish Parliament decided in 2005 on the proposal of the Extended Bureau to found the Commission Flemish Constitution.^X However, the majority could not agree on any proposed text and as a result the Commission was discontinued.^{XI} Nonetheless, the development of a Charter quietly continued.

On the Flemish holiday 11 July 2010, then Minister-President Kris Peeters (Christian democrat party CD&V) announced that his team had written a Charter for Flanders, which he would present to the Flemish parliament at the start of the coming parliamentary year to discuss collectively.^{XII} As announced, this presentation took place in September 2010.^{XIII} However, it would take nearly two years before the majority parties at the time—Christian democrat party CD&V, the Flemish nationalist conservative party N-VA and the socialist



party SP.A—could agree on its content. Especially the demand of the N-VA to include that Flanders is a nation sparked much discussion.^{xiv} The year 2012 ought to create a break-through. The Christian democrat party CD&V wanted to adopt the Charter for Flanders no later than 27 September 2012, on the 700-year anniversary of the signing by duke Jan II of Brabant of the Charter of Kortenberg.^{xv} This was the first ‘constitution’ on the European continent that described the freedoms of citizens.

The road to a Charter seemed to reach completion when, on 23 May 2012, the majority parties in the Flemish Parliament presented the Charter for Flanders. Finally, the majority parties had reached an agreement on the contents of the ‘foundational document by and for Flanders’^{xvi}. This glorious moment for the majority parties and then Flemish Minister-President Kris Peeters, the driving force behind the Charter, was short-lived. Strong opposition, especially with regard to the drafting process, prevented such momentum. As a consequence, the glossy press presentation quickly turned into a damp squib. In the meanwhile, the anniversary-year in Kortenberg has been long terminated without the anticipated adoption of a Charter for Flanders. The Charter was never even placed on the agenda in the Commission for General Policy, Finances and Budget.^{xvii} The announcement of the Christian Democrat Party CD&V to reactivate the dossier was not followed up.^{xviii} As a result, the proposal expired when new elections were held in May 2014.

The future of the proposed resolution is unsure. The new government, led by Minister-President Geert Bourgois (N-VA), is composed of the Flemish nationalist conservative party N-VA, the Christian democrat party CD&V and the liberal democrat party Open VLD. Possibly the proposal has hit a dead end, especially since its driving force, former Flemish Minister-President Kris Peeters, has migrated to the federal level. Nonetheless, there are still indicators that the resolution could be revived. First, the Flemish nationalist conservative party N-VA won, as predicted, the elections with a landslide. They almost tripled their seating in the Flemish Parliament from sixteen to forty-three seats by obtaining 32% of the votes. As their final objective is the independence of Flanders, it is not unlikely that they will push for a resolution that establishes Flanders as a nation and that strives for the acquirement of full constitution-making power for Flanders. Second, the composition of the government is quite similar as that of the previous government with the socialist



party SP.A having swapped places with the liberal democrat party Open VLD. As the Open VLD was the only opposition party consulted about the content of the resolution prior to its presentation, they might not be against supporting the resolution. There are however also counter-indications. First, several provisions enshrine the current structure of the Belgian state, such as the federal nature of Belgium, while the N-VA clearly strives to dissolve the Belgian state at least into a confederal state. It might be considered counteractive to adopt a resolution that enshrines the federal nature of Belgium. Nonetheless, these provisions could easily be amended when presenting a new proposal. Second, the government policy statement does not mention introducing a resolution,^{xix} although no mention was made of such a Charter in the government policy statement of the previous government.^{xx} Third, politicians might decide that it is an unwisely time to initiate talks on a Charter for Flanders, since the sixth state reform is currently being executed without changing much with regard to the embryonic constitution-making power.^{xxi} They might fear that the Flemings are tired of state reform talk and instead focus more on a socio-economic policy. Also, as will become apparent further in the article, a too nationalistic resolution might be perceived as a hostile action by the French-speaking politicians, which in turn might endanger the functioning of the federal government. This might be deemed too risky, as the same Flemish parties are also part of the federal government. Especially, since the added value of a Charter is limited, Flemish politicians might not deem such a risk worthy.

3. An identity card of Flanders or a coalition document?

The press presentation of the Charter on 23 May 2012 immediately caused political commotion. The opposition parties were apparently not involved in the drafting process and did not even catch a glimpse of the text before it was presented to the press.^{xxii} The liberal democrat party Open-VLD was the only opposition party that was slightly involved in the drafting process, as then Minister-President Kris Peeters had requested their cooperation. The remarks of the Open VLD would be presented to the coalition partners and subsequently the Minister-President would give feedback to Open VLD. According to Open VLD, the latter never took place, which they claimed to be due to the time-consuming discussions amongst the majority parties on the inclusion of the word



‘nation’.^{xxiii} The proposed Charter was thus far from a majority-transcending document. Nevertheless, Open VLD did not rule out the possibility that it would support the text after a parliamentary debate.^{xxiv} Such a debate, however, never took place before the May 2014 elections, causing the proposal to expire. Furthermore, the right wing-liberals LDD^{xxv} and the green party Groen^{xxvi} declared from the outset that they had no intention of approving the proposed Charter for Flanders. The Flemish nationalist extreme right wing party Vlaams Belang even introduced its own proposal for a Flemish Constitution.^{xxvii}

Regrettably, the keywords in the drafting process of an ‘identity card of Flanders, with a timeless character’^{xxviii} did not appear to be transparency, a wide support and public participation. As a result, the opinion pieces evaluating the proposal for a Charter were not enthused.^{xxix} Even though the text is not a proposal for a subnational constitution, it does constitute according to the drafters an impetus to it: a kind of non-binding version. Due to the potential importance of such a document, it is problematic that neither the opposition parties (except the Open VLD in a late stage), nor the Flemish citizens were involved in the drafting process. Such an approach did not only result in a false start, but will also have an impact on the potential end result. As research has shown, actors involved in the early stages have a probable disproportional impact on the end result (Ginsburg et al. 2009: 204).

The drafters never raised the question of how the drafting process should take place, at least not openly. Nonetheless, they could easily have acquired inspiration from the approaches taken by other countries. Precisely the question of the appropriate drafting process has raised—and still raises—fierce debates abroad.^{xxx} A trend can be discerned towards more direct participation of the population in the drafting process of constitutions to strengthen their democratic legitimacy (Ginsburg et al. 2009: 205-208; Harvey 2001: 61; Donald 2010: 461). Such direct participation can, for example, take place through a consultation of specific, often vulnerable groups, e.g. South-Africa (Sarkin 1999: 70-72), but also on the basis of general discussion papers, e.g. UK^{xxxi} and Northern Ireland, or in a more limited manner, e.g. Canada (Donald et al. 2010: 6-21). Abroad, these participation mechanisms were often accompanied with extensive media coverage and information campaigns (Donald et al. 2010: 45-47). However, the press presentation of the Charter for



Flanders was not accompanied with the start of a consultation or information campaign. Perhaps as a consequence, media coverage of the Charter faded quickly. The paralysation of the adoption process in parliament, because of the strong protest against the Charter and even more so against its drafting process, might thus be a blessing in disguise. It offers an opportunity for the new government to approach the drafting process differently and strive for broader support by engaging the Flemish population or at least opposition parties.^{xxxii} Lingering more openly and more thoroughly over the right approach to creating a Charter for Flanders will be necessary to allow for the evolvement of the current proposal to a true identity card of Flanders.

4. A stepping-stone to a Constitution for Flanders?

4.1. A Charter, not (yet) a subnational Constitution

Contrary to most sub-entities of federal states, the Flemish parliament is not competent to adopt a Constitution, or rather a Basic Decree,^{xxxiii} for Flanders (see amongst others Berx 1994; Rimanque 2004: 1001; Clement et al. 1996: 27-36; Popelier 2012: 38-41). This is due to Flanders' very limited constitution-making power, often referred to as merely embryonic.^{xxxiv} Since 1993, the Flemish Parliament, the Walloon Parliament and the Parliament of the French Community dispose of embryonic constitution-making power, named 'constitutive autonomy', regarding both the elections, the composition and functioning of their parliament (Art. 118§2 Belgian Constitution) and the composition and functioning of their government (Art. 123§2 Belgian Constitution) (Judo 2006; Velaers 2014a: 257). The Flemish Parliament has exercised its constitutive autonomy fully in the special decree of 7 July 2006 on the Flemish institutions and has been pushing for a considerable time for the expansion of its constitutive autonomy.^{xxxv} After the world's longest government formation (541 days) and a severe political crisis, the previous federal government shaped the sixth Belgian state reform. This reform, which is currently being executed, provides some changes to the constitutive autonomy of the subnational entities. First, the Parliament of the German-speaking Community and the Brussels-Capital Region have also been granted constitutive autonomy (Velaers 2014a: 257-260; Velaers 2014b: 966-976).^{xxxvi} Second, the constitutive autonomy has been slightly expanded, introducing for example the competence to determine additional composition regulations for their



respective parliaments and additional competences to regulate the regional elections, including the power to determine the duration of the term of their respective parliaments and the date of their regional elections (Velaers 2014a: 257-271).^{xxxvii} Nevertheless, no compromise was found on extending the subnational constitution-making power substantially.

Also, the state reform introduced a type of direct democracy at the subnational level. Regions can hold a non-binding plebiscite (Art. 39*bis* Belgian Constitution). The introduction of the competence to hold non-binding ‘referenda’ can have an impact on the type of democracy and consequently on the constitutional principles that underlie the political system. However, strict limitations were put in place. A regional plebiscite can only be held concerning matters within the region’s competences and not, for instance, on the introduction of a Flemish Constitution or the conversion of the Belgian State to a confederal state. Furthermore, the new article explicitly prohibits holding a plebiscite on matters that require a two-thirds majority, namely precisely those matters that concern the constitutive autonomy of the regions. To ensure compliance, the regions have to first submit the subject of the plebiscite to a control procedure before the Constitutional Court before they can organise one (Velaers 2014a: 243-257).

Despite Flemish demands, Flanders’ constitution-making power still does not surpass its embryonic character. For that, the constitution-making power of Flanders should reach much further than the current limited and fragmented institutional autonomy. Even after the sixth state reform, the scope of full constitution-making power is thus much more extensive than the constitutive autonomy granted to Flanders. Fully-fledged constitution-making power encompasses the power to both shape the organisation and functioning of its subnational public institutions (institutional autonomy) and to determine the relationship between these institutions and its citizens (including their fundamental rights) (Clement et al. 1996: 31). The lack of such full constitution-making power is attributable to the centrifugal character of the Belgian federalisation process (Peeters 2005: 38-39; Pas 2004: 168; *a contrario* Berx 1994: 193-194).

Because of this, the term ‘Charter’ was chosen at the beginning of the new millennium, after the example of the other (at the time) not legally binding Charter: the Charter of



Fundamental Rights of the European Union.^{xxxviii} Even though the Charter of Fundamental Rights of the European Union is now legally binding, the term ‘Charter’ remained a logical choice. The ‘Charter for Flanders’ departs from the Charter of Fundamental Rights of the European Union, because this is the most recent synthesis of the communal values of the member states of the European Union.^{xxxix}

Due to the lack of constitution-making competence, the Charter for Flanders was submitted as a resolution proposal. In a resolution, the Flemish Parliament usually makes recommendations to the Flemish Government regarding measures or policy options the Flemish Government should make. On the advice of Rimanque, politicians considered it expedient not to opt for a decree, because legally it could not be prevented that later on Parliament decides to deviate from it with a simple majority (Rimanque 2004: 1001). More importantly, the initiative could not be couched in a special decree or in a normal decree, since the content of the proposed Charter severely transgressed the limits of the constitutive autonomy of Flanders (Judo 2011: 258). Remarkable and hardly compatible with the nature of a resolution, is that the Flemish Government shaped the Charter instead of the Flemish Parliament. Only in the last phase, when the Charter was already drafted, the Charter was handed over to the President of the Flemish Parliament. As a result, the Flemish Government lets the Flemish Parliament make recommendations to the Flemish Government, which were drafted by the Flemish Government itself. A resolution contains no legal obligations for the Flemish Government, but has solely political authority. As a result, the preamble confirms that the Charter does not promulgate any legal rules.^{xl} The text is hence primarily symbolic.

4.2. ‘The constitution-making power that Flanders ought to acquire’

An important symbolic statement in the proposed Charter, reconfirming previous demands, is that the Charter ‘postulates an important political commitment, which forms the impetus for a Constitution for Flanders in the framework of the constitution-making power that Flanders ought to acquire.’^{xli} The former majority parties (CD&V, N-VA and SP.A) emphasize with this statement once more their desire to evolve from embryonic to full-fledged constitution-making power for Flanders.^{xlii} Such an evolution requires the inclusion of an express provision in the Belgian Constitution that grants constitution-



making power to (some of the) regions and/or communities (Clement et al. 1996: 29-30). Another option, which avoids such an explicit provision, requires two phases: first the Federal Government would need to create 'legal space' for the constitution-making power of the subnational entities and only after that the subnational entities could adopt and promulgate a subnational constitution. To achieve such a 'legal space' the federal lawmaker and constituent power would need to abolish the provisions in the Belgian Constitution and in the special law of 8 August 1980 to reform on the composition and functioning of the institutions of the subnational entities, creating a legal lacuna. If this is coupled with a simultaneous transfer of residual competences to the subnational entities, these entities implicitly obtain the constitution-making power. As a result, they could fill this legal lacuna with a subnational constitution.

The French-speaking parties have met the urge towards a Constitution for Flanders with distrust. They fear that this is part of a (hidden) Flemish separatist agenda (Popelier 2012: 41, 47-48; Berx 2007: 239; Peeters 2005: 39). This is clearly the case for the Flemish nationalist party N-VA and the Flemish nationalist extreme right wing party Vlaams Belang. These parties account for 49 of 124 seats in the Flemish Parliament (N-VA 32% and Vlaams Belang 6%) and 36 of 150 seats in the House of Representatives (N-VA 22% and Vlaams Belang 4%). The other Flemish parties emphasize that obtaining constitution-making autonomy is merely a logical step in the federal development of Belgium.^{XLIII}

In Belgian scholarship, constitution-making autonomy of subnational entities and the competence to adopt one's own (subnational) constitution is traditionally considered as an essential characteristic of federalism (Vande Lanotte & Goedertier 2010: 226; Judo 2006: 260; Berx 1994: 12; Berx 2007: 241; Ergec 1994: 55-58) or at least as the logical consequence of the goal of federalism, namely the possibility for regions of a federal state to organise themselves autonomously (Clement 1996: 28). However, in this journal Popelier has rightly refuted that this is a necessary characteristic of federalism (Popelier 2012: 43-44). Instead she employs a dynamic perspective on forms of state (Popelier 2008; see also similar Sala 2013). The problem with a static view on forms of state is that it fails to match the political reality of a country. Furthermore, a static view offers no insight in the true dynamics of a federal state (Popelier 2008: 421). Federal states can better be



understood as dynamic processes undergoing a continuous search for a balance of power between the federal level and the subnational entities. According to such a dynamic view, the division between federalism, regionalism and devolution is a question of gradation where multiple indicators mark where a state is situated on the sliding scale from a unitary to a confederalist state (Popelier 2012: 44). Popelier identifies sixteen indicators that measure the degree of autonomy of territorial entities (differentiation) and five that measure their coherence in a more global way (integration) (Popelier 2008: 427-433). In essence, the dynamic view emphasizes that a state does not need to fully meet a certain 'model' to be called a federal state. As a consequence, Belgium can be considered a federal state, even if the subnational entities lack full constitution-making power (Popelier 2008: 433). Subnational constitution-making power is merely one of the many indicators and the lack of this competence is in itself not determining for the categorisation of a state form.

Although the static model of forms of state has an important pedagogical function, too much emphasis on this model can make it evolve into a normative framework supporting political discourse (Popelier 2008: 416). Thus, one must be wary of being too fixated on the so-called 'perfect' federal state (Popelier 2008: 422). This ideal model can, as a result, shift from being solely descriptive to becoming normative. This is precisely what has occurred in the Flemish political discourse. The Flemish political discourse relies on this static model of federalism to justify and solidify its demand that Flanders ought to acquire full constitution-making power. For example, the Flemish Government's point of view in the 2008 'Octopus negotiations' was that 'constitution-making power is nothing more than a logical evolution in a federal state.'^{XLIV} Consequently, a Charter for Flanders is considered as a next step in the growth process to a mature and profound (con)federalism.

Popelier rightly concludes that the issue of subnational entities having or lacking constitution-making power is not so much a question of federalism, as it is one of historical and political reasons. Acquiring full constitution-making power is thus not essential for the federal nature of a state; rather it is one of the potential elements in a political package deal (Popelier 2012: 44). Historical reasons, namely the centrifugal nature of Belgian federalism, underlie the absence of subnational constitution-making power. Political sensitivities and balances of power explain why full subnational constitution-making power has failed to



crystallize in Belgium. These political sensitivities were clearly noticeable in the news coverage of the Charter proposal in the French-speaking media. The central question in their news coverage was if the Francophones should be worried or feel attacked by this initiative. The president of the Walloon Parliament, Patrick Dupriez, declared that this initiative was not surprising, considering the predominance of the nationalist movement in the north of the country.^{XLV} The input of the nationalist movement can also be detected in the content of the proposed Charter. The Flemish nationalist party N-VA wanted to include the definition of Flanders as a nation into the main articles of the Charter. The symbolic issue of including the term ‘nation’ into the Charter caused, however, much dispute. After lengthy negotiations a compromise was made; the symbolic issue of the self-definition of Flanders as a nation was settled through including it in the preamble.^{XLVI}

Political sensitivities can also be detected on the Flemish side. There has been great hesitation of Flemish politicians to grant constitution-making autonomy to the Brussels-Capital Region and the German-speaking Community because of the preference for a dual federal state structure (with a Flemish and Francophone component) (Nihoul & Bárcena 2011: 234; Popelier 2008: 54; Clement 1996: 37).^{XLVII} As above-mentioned, only since the 2012-2014 sixth Belgian state reform, the Brussels-Capital Region—except for the existing protection mechanisms for the Flemish minority—and German-speaking Community have also been granted constitutive autonomy (Velaers 2014a: 257-260; Velaers 2014b: 966-976). The Flemish nationalist party N-VA was very critical of this reform expressing disbelief during parliamentary debates that the Flemish majority parties had allowed such a development.^{XLVIII}

5. A patchwork Charter

The proposed Charter for Flanders primarily copies and bundles already existing provisions from the Belgian Constitution, the Charter of Fundamental Rights of the European Union and other (special) laws and decrees.^{XLIX} The corresponding articles in these documents are indicated after each article in the Charter. The Charter counts 120 articles and is divided in six parts: Title I ‘Flanders, sub-state of Belgium’, Title II ‘Rights and freedoms’, Title III ‘The powers’, Title IV ‘The cooperation’, Title V ‘Foreign affairs’



and Title VI 'Finances'. The Charter mirrors to a great extent the structure of the Belgian Constitution.

The preamble is a drawn out and little inspired text, starting off with the controversial phrase that Flanders 'forms a nation with its own language and culture' and finishing with the proposition that the Charter an 'impetus forms for a Constitution for Flanders'. Title I 'Flanders, sub-state of Belgium' confirms firstly that the purpose of the Charter is not connected to the independence of Flanders. Article 1 explicitly states that 'Flanders is a sub-state of the Federal State Belgium and is a part of the European Union.' Especially with the rise of the Flemish nationalist party N-VA, this clause might be one of the first ones to be amended in a future proposal. The N-VA's ultimate goal to create an independent Flanders and is currently trying to push for the development of Belgium into a confederal state. Furthermore, Title I states that Flanders is bound by the federal Constitution and international and European law (Art. 2) and that Brussels is the capital of Flanders (Art. 5). The reference to Brussels is a clear political choice to regard Brussels as a part of Flanders in the construction and fortification of a dual federal state structure (Clement 1996: 297-298).

Title II 'Rights and freedoms' comprises 51 Articles. The Charter of Fundamental Rights of the European Union is used as a frame of reference, given that the Charter of Fundamental Rights of the European Union is 'a contemporary synthesis which for the first time brings together all traditional civil and political rights, as well as economic and social rights in one single text'.¹¹ In addition, fundamental rights of the Belgian Constitution are woven into the text (e.g. freedom of education and the ban on censorship). The choice for the Charter of Fundamental Rights of the European Union is an important ideological choice. Currently, the ECHR as interpreted by the European Court of Human Rights plays a central role in the Belgian fundamental rights protection (Lambrecht 2013: 312-315). The Charter of Fundamental Rights of the European Union only has a limited EU scope. If the proposal for a Charter would evolve into a subnational constitution, the legal effect of the Charter of Fundamental Rights of the European Union would substantially increase.

Interestingly, the Commission of Venice in its opinion on the Hungarian Constitution advised against a (partial) incorporation of the Charter of Fundamental Rights of the



European Union. First, interpretations by the Court of Justice of the European Union could diverge from those given by the Hungarian Constitutional Court. Expanding the legal effect of the Charter of Fundamental Rights of the European Union can furthermore result in the Constitutional Court being inclined to follow the case law of the Court of Justice of the European Union and, as a consequence, sacrificing a part of the constitutional autonomy of the member state.^{LI}

Another issue with transferring the Charter of Fundamental Rights of the European Union is its focus on the EU sphere, which does not always translate smoothly to a subnational context. For example, the proposed Charter converted Article 12§2 EU Charter ‘Political parties at Union level contribute to expressing the political will of the citizens of the Union’ to ‘Political parties contribute to expressing the political will of the citizens’ (Art. 25 proposed Charter). This provision concerns the importance of ‘forming European political awareness’ (Art. 10§4 TEU) and is not just transferable. The question thus arises what the purpose is of a similar provision in the Flemish Charter. In Germany, a similar provision exists (Art. 21§1 GG). However, this provision is embedded in other provisions that enable amongst others the German Federal Constitutional Court to declare an anti-democratic party unconstitutional. Such an embedment or clarification is absent in the proposed Flemish Charter. Also, the focus on the Charter of Fundamental rights of the European Union has led to an excessive emphasis on the EU. For example, it includes that ‘every person may direct oneself in Dutch to the institutions of the Union’ (Art. 50§d) and ‘the right to petition the European Parliament’ (Art. 52 proposed Charter).

Furthermore, the fusion of two catalogues of rights—the Belgian Constitution and the Charter of Fundamental Rights of the European Union—led to a drawn-out and sometimes cluttered text. Hopefully, this will be remedied in a new proposal. This has also led to unnecessary duplications. For example, Article 8 stipulates ‘human dignity is inviolable’ (Art. 1 EU Charter) and Article 28 states ‘everyone has the right to live a dignified life’ (Art. 23 Belgian Constitution). Especially given that the didactic value and clarity of the document were used as arguments to underline the added value of a Charter,^{LII} a new proposal of a Charter for Flanders will hopefully take these issues into consideration.



With regard to the other chapters, Title III ‘The powers’ describes, after some general provisions, the composition, functioning and legal position of the Flemish Parliament and the Flemish Government, the elections of the Flemish Parliament, the decree-making and executive power and the local and decentralised institutions. Title IV concerns cooperation, including cooperation agreements, with other communities and regions and the international cooperation and representation. In Title VI ‘Finances’ the proposal stipulates that Flanders binds itself to a principled balance of budget and progressive taxation.

6. Added value of a Charter?

The question as to the added value of a Charter for Flanders resolution must be distinguished from the question as to the added value of a subnational constitution (Popelier 2012: 51-54; Clement 1996: 28; Berx 2007: 248-251). Contrary to a subnational constitution, a resolution has no legal value, but only political authority. Due to the lack of instrumental value (when it can be used to advance a particular right or set of rights) with the limited subnational space available, the focus is mainly on its symbolic value. Most importantly, the proposed Charter has a specific political purpose, namely the intention of transforming this rather symbolic document into one with an instrumental value. The proposed Charter for Flanders ‘postulates an important political commitment, which forms the impetus for a Constitution for Flanders in the framework of the constitution-making power that Flanders ought to acquire.’^{LIII} It also stipulates that ‘Flanders forms a nation with its own language and culture’. Furthermore, the drafters of the proposed Charter chose the Charter of Fundamental Rights of the European Union (in combination with the Belgian Constitution) as a basis for fundamental rights protection in Flanders. However, in parliamentary debates the usefulness of a mere symbolic Charter was questioned, instead it was raised that Flanders should perhaps devote itself to obtaining full constitution-making power so it can adopt a proper subnational Constitution.^{LIV}

A second added value raised by the drafters is that a Charter would be ‘a “statement” against the negative image of some people abroad of Flanders.’^{LIV} Although one can question if a non-binding Charter could have a real impact on the international image of Flanders.



Third, a subnational Charter allows for specific accents that are not expressed at the (inter)national level. Most remarkable in the proposed Charter is the choice to largely duplicate the fundamental rights catalogue of the Charter of Fundamental Rights of the European Union and to inscribe the obligation of a principled balance of budget and progressive taxation. Beyond that the Charter for Flanders is primarily a coordination exercise of different already existing documents and expresses few new accents.

Fourth, when presenting the Charter, its function as a timeless identity card was emphasized. Such a foundational document would create transparency and clarity of what Flanders represents and within which legal framework Flanders operates. As a consequence, it would have a didactic value. Nonetheless, one can wonder, especially considering the above-mentioned coordination problems, if coordination is truly the best path to transparency (Judo 2011: 256-257). Furthermore, the statement that the proposed Charter merely coordinates is false. Rather than merely clarifying within which legal framework Flanders operates, the proposed Charter goes much further. The legal effect of the Charter of Fundamental Rights of the European Union is currently limited to when Belgium is implementing Union law (Art. 51§1 EU Charter). The ideological choice of the drafters to primarily base the proposed Charter on the Charter of Fundamental Rights of the European Union has an important symbolic value, but does not reflect the current legal framework. In addition, it is doubtful if the drafting process of the proposed Charter was the proper road to lead to a timeless identity card for Flanders. To conclude, the presentation of the Charter was not accompanied with an information campaign that could solidify its didactic value. The lack of such campaign or media coverage contributed to the absence of a constitutional momentum, which probably resulted in the (temporary) silent death of the once noisily presented Charter.

In conclusion, a Charter for Flanders has limited added value. It has a clear symbolic value emphasizing the goal of obtaining constitution-making power for Flanders. Potentially it could have a didactic value, although the proposed Charter needs revision to be able to function as a didactic document. Moreover, one can wonder if the coordination mechanism is the best way to achieve transparency and clarity of what Flanders represents.



Instead, it appears to lead to a rather confusing document. Besides, the proposed Charter cannot be considered to be a coordination document as it goes much beyond mere coordination by basing itself on the Charter of Fundamental Rights of the European Union. If future drafters intend to truly create a timeless identity card for Flanders, they will also need to severely reconsider the drafting process.

7. Conclusion

A Constitution or at least a Charter for Flanders has preoccupying Flemish politics and scholarship for over twenty years. On 23 May 2012, the majority parties presented the Charter for Flanders. Finally, there appeared to be movement in this lingering dossier. However, the lack of participation by other political parties and the Flemish citizen caused strong criticism. After slumbering for two years in the competent Commission without any parliamentary debate, the submitted Charter expired. The announcement of the CD&V that the dossier would be reactivated, was never followed up. After the ‘Mother of all elections’ in Belgium in May 2014, a new Government is in place. If the new Government has plans to reactivate this dossier, it will hopefully pay more attention to the drafting process. Even if a Charter would finally be adopted, it would have no legal implication. As a (non-binding) resolution, it primarily has an important political value. The drafters of the Charter for Flanders closely connected Flanders to the EU, which is remarkable in a time of rising Euro-scepticism. An explanation for this could be that the EU framework creates a sort of safety net that facilitates the pursuit of further autonomy or even independence.^{1VI} Furthermore, the drafters clarify in the preamble that the Charter is merely a stepping-stone to a (binding) Constitution for Flanders.

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^I For example the information dossier ‘Flemish Constitution’ (Vlaamse Grondwet) of the Flemish Parliament, www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/index.html (closed off on 16 March 2007) and continued by the information dossier ‘Flemish Charter’, www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamshandvest/pers.html.

^{II} For example, Clement et al. 1996; Rimanque 2004; Senelle 2008.

^{III} Hoorzitting over de Proeve van Grondwet voor Vlaanderen [Hearing on the Draft of a Constitution for Flanders], *Parl. Acts* Flemish Parliament 1996-97, n° 527/1.

^{IV} Verzoekschrift betreffende ‘Een Grondwet voor een Vlaamse staat’ [Petition concerning ‘A constitution for a Flemish state’], *Parl. Acts* Flemish Parliament 1998-99, n° 101/1.



^V The Extended Bureau (*Uitgebreid Bureau*) coordinates the political functioning of the Flemish Parliament. It amongst others determines the agenda of the plenary meetings and coordinates the operation of the commissions. The Extended Bureau sits weekly and is composed of the Bureau and the fraction presidents of the recognised political fractions.

^{VI} The foundational note that sketches the political frame within which the experts had to operate can be found here: www.vlaamsparlament.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/527.pdf.

^{VII} This proposal was published in Rimanque 2004.

^{VIII} Voorstel van resolutie Handvest van Vlaanderen [Proposal of resolution Charter of Flanders], *Parl. Acts* Flemish Parliament 2002-03, n° 46/1.

^{IX} See X., 'De Gught veegt Vlaams handvest van tafel [De Gught brushes Flemish charter aside], *De Standaard* 17 December 2002; B. Eeckhout, 'De Batselier schrijft "Vlaamse grondwet" met SP.A hand [De Batselier writes "Flemish constitution" with an SP.A hand]', *De Morgen* 17 December 2002.

^X Hoorzittingen over een Vlaamse Grondwet [Hearings on a Flemish Constitution], *Parl. Acts* Flemish Parliament 2005-06, n° 813/1.

^{XI} None of the following proposals were approved: Voorstel houdende het Handvest van Vlaanderen [Proposal regarding the Charter of Flanders], *Parl. Acts* Flemish Parliament 2005-06, n° 623/1; Voorstel van resolutie betreffende de Grondwet voor Vlaanderen [Proposal of resolution concerning the Constitution for Flanders], *Parl. Acts* Flemish Parliament 2005-06, n° 747/1; Voorstel van bijzonder decreet houdende de invulling van de Vlaamse constitutionele autonomie [Proposal of special decree regarding the completion of the Flemish constitutive autonomy], *Parl.St.* VI.Parl. 2005-06, nr. 632/1; Voorstel van resolutie betreffende een proeve van grondwet voor de toekomstige onafhankelijke Vlaamse staat [Proposal of resolution concerning a draft of the constitution for the future independent Flemish state], *Parl. Acts* Flemish Parliament 2005-06, n° 726/1.

^{XII} For the speech, see www.krispeeters.be/actua/toespraken/11-juli-speech; V. Douchy, 'Peeters gaat voor Vlaamse Grondwet [Peeters is going for a Flemish Constitution]', *De Standaard* 11 July 2010.

^{XIII} G. Tegenbos, 'Vlaanderen krijgt Handvest [Flanders gets a Charter]', *De Standaard* 29 September 2010, 8. For the text, see www.standaard.be/extra/pdf/HANDVEST1.pdf.

^{XIV} G. Tegenbos, 'Vlaams Handvest struikelt nog over één woord [Flemish Charter still trips over one word]', *De Standaard* 4 July 2011, 5. Also in Catalonia including the self-definition as a nation caused severe discussion, see Orte and Wilson 2009: 427 and Muro 2009: 460.

^{XV} X., '700 jaar na Charter van Kortenberg', *De Standaard* 24 May 2012, 6.

^{XVI} Press statement by the cabinet of the Flemish Minister-President, www.krispeeters.be/sites/kp.warp.be/files/persmededeling_handvest_voor_vlaanderen.pdf, 2.

^{XVII} www.vlaamsparlament.be/Proteus5/showParlInitiatief.action?id=672429.

^{XVIII} B. Dewaele, 'CD&V haalt Vlaams Handvest van onder het stof [CD&V dusts off Flemish Charter]', *De Standaard* 19 March 2013.

^{XIX} Government policy statement of the Flemish Government 2014-2019, www.vlaamsparlament.be/vp/informatie/pi/pdf/vlaams_regeerakkoord_140723_.pdf.

^{XX} Government policy statement of the Flemish Government [Regeringsverklaring van de Vlaamse Regering], *Parl. Acts* Flemish Parliament 2009-10, n° 31/1.

^{XXI} For an overview of the changes to the constitutive autonomy of the communities and regions with the sixth state reform, see Velaers 2014a: 255-258.

^{XXII} Plenaire vergadering [Plenary meeting], *Parl. Acts* Flemish Parliament 2012-13, n° 35, 39-40; n° 36, 8-9; X., 'Handvest voor Vlaanderen: oppositie hekelt aanpak meerderheidspartijen [Charter for Flanders: opposition flays majority parties' approach]', *De Standaard* 23 May 2012.

^{XXIII} See X., 'Aanzet tot Vlaamse grondwet is klaar [Impulse to Flemish constitution is ready]', *Knack* 23 May 2012.

^{XXIV} X., 'Open VLD sluit steun aan Handvest niet uit na debat in parlement [Open VLD does not exclude support after debate in parliament]', *De Standaard* 30 May 2012.

^{XXV} X., LDD: "Onbegrijpelijk dat NV-A federale staat in Handvest betonneert" [LDD: "Incomprehensible that NV-A fixates federal state in Charter"], *De Standaard* 30 May 2012.

^{XXVI} F. Watteuw, 'Groen gaat "Vlaamse Grondwet" niet mee ondertekenen [Groen is not going to cosign "Flemish Constitution"]', *De Morgen* 30 May 2012.

^{XXVII} Voorstel van resolutie betreffende een proeve van grondwet voor de toekomstige onafhankelijke Vlaamse staat [Proposal of resolution concerning to draft of a constitution for the future independent



Flemish state], *Parl. Acts* Flemish Parliament 2011-12, n° 1396/1.

XXVIII Quote of Minister-President Kris Peeters' in amongst others X., 'Aanzet tot Vlaamse grondwet is klaar [Impulse to Flemish constitution is ready], *Knaak* 23 May 2012 (author's translation).

XXIX For opinion pieces on the Charter, see M. Reynebeau, 'Een Handvest voor Vlaanderen. We zijn dus een natie [A Charter of Flanders. So we are a nation.], *De Standaard* 28 May 2012, 40; S. Samyn, 'Tristesse', *De Morgen* 24 May 2012, 2; D. Castrel, 'Vlaamse grondwet neemt slechte start [Flemish Constitution made a bad start]', *GVA* 24 May 2012, 54; Storme 2012.

XXX With regard to sub-national constitutions, see for example Delledonne and Martinico 2012. With regard to national constitution, see for example Donald 2010: 461-464; Ginsburg et al. 2009.

XXXI For all the work of the Commission on a Bill of Rights and their discussion papers, see www.justice.gov.uk/about/cbr.

XXXII The necessity of creating support as broad as possible when reactivating the dossier was also mentioned by the leader of the CD&V fraction in the Flemish Parliament, see B. Dewaele, 'CD&V haalt Vlaams Handvest van onder het stof [CD&V dusts off Flemish Charter], *De Standaard* 19 March 2013.

XXXIII 'Basic Decree' (in Dutch *Gronddecreet*) refers to the term used in the note of the Extended Bureau of the Flemish Parliament that charged experts with the task of drafting a Basic Decree for Flanders, see www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/527.pdf.

XXXIV This term was used in Verslag voor herziening van de grondwet [Report for review of the constitution], *Parl. Acts* House of Representatives 1992-93, n° 725/6, 66: 'According to the minister, this constitutive autonomy forms an embryo of constitution-making power concerning the subnational entities.' (author's translation)

XXXV See the resolution of the Flemish Parliament, *Parl. Acts* Flemish parliament 1998-99, n° 1339/2.

XXXVI The constitutive autonomy granted to the Brussels-Capital Region is limited in two ways. First, the constitutive autonomy is not applicable to the guarantees granted to Dutch-speaking and French-speaking in the Parliament and the Government of the Brussels-Capital Region. For these matters, the special federal lawmaker remains competent. Second specific majorities are required to exercise the constitutive autonomy in the Brussels-Capital Region. Every ordinance requires not only a two-third majority, but also a majority in each language group.

XXXVII Special act of 19 July 2012 to amend the special act of 8 August 1980 to reform the institutions concerning the extension of the constitutive autonomy of the Flemish Community, the Walloon Region and the French Community, B.S. 22 August 2012. See also *Institutioneel akkoord voor de zesde staatsbervorming [Institutional agreement for the sixth state reform]*, 11 oktober 2011, www.lachambre.be/kvvcr/pdf_sections/home/NLdirupo.pdf, 9, 11-12

XXXVIII See Rimanque 2004: 1001; Voorstel van resolutie Handvest van Vlaanderen [Proposal of resolution Charter for Flanders], *Parl. Acts* Flemish Parliament 2002-03, n° 46/1.

XXXIX Voorstel van resolutie betreffende het Handvest voor Vlaanderen [Proposal of resolution concerning the Charter of Flanders], *Parl. Acts* Flemish Parliament 2011-12, n° 1643/1, 8 (author's translation).

XI. Ibid.

XI.I Ibid, 8 (author's translation), see also 2.

XI.II See already the resolution of the Flemish Parliament, *Parl. Acts* Flemish parliament 1998-99, n° 1339/2, 3.

XI.III See for example, Voorstel houdende het Handvest van Vlaanderen [Proposal regarding the Charter of Flanders], *Parl. Acts* Flemish Parliament 2005-06, n° 623/1, 3-4; Caluwé, at the time CD&V fraction leader, in M. Goethals, 'Zeg zeker niet grondwet, maar zeg handvest [Definitely do not say constitution, but say charter]', *De Standaard* 24 May 2012.

XI.IV The 'Octopus negotiations' took place in spring 2008 to draft the contours of the new Belgian state reform. The name originated from its original eight members; later on the commission was extended to eighteen Belgian senior politicians of several political families. For the Flemish Government's point of view, see <http://nieuwsbrief.cdenv.be/actua/persberichten/octopusoverleg-toelichting-minister-president-kris-peeters-op-werkgroep-staatshe> (author's translation).

XI.V X., 'Charte pour la Flandre: "Il n'y a pas lieu de se sentir agressé tout de suite"', *Le Soir* 23 May 2012; X., 'Finalisation de la "Charte pour la Flandre"', *Le Vijf* 23 May 2012; F. Grosfilley, 'La "constitution flamande" avance doucement mais surement', *RTL blog* 23 May 2012; C. Laporte, 'Une charte pour la Flandre', *La Libre* 26 May 2012.

XI.VI G. Tegenbos, 'Vlaams Handvest struikelt nog over één woord [Flemish Charter still trips over one word]', *De Standaard* 4 July 2011, 5.



^{XLVII} See also Vanlouwe (N-VA), Report, *Parl. Proc.* Senate 2013-14, n° 5-1752/3, 15-16: ‘Lors du débat relative à la revision de la Constitution de 1992-1993, les partis politiques, ceux-là mêmes qui proposent la modification actuelle, déclaraient que l’extension de l’autonomie constitutive à toutes les communautés et régions était rejetée afin de ne pas compromettre la pacification communautaire à la base de toute la revision de la Constitution. Eu égard à cette situation, il a été dit que les partis flamands ne souhaitaient pas que Bruxelles devienne une région à part entière, disposant d’une forme limitée d’autonomie constitutive. [...] M. Vanlouwe maintient que l’ensemble des propositions relatives à l’autonomie constitutive ouvre à nouveau la porte à un processus visant à mettre la Région de Bruxelles-Capitale sur un pied d’égalité avec la Région wallonne et la Région flamande.’

^{XLVIII} Ben Weyts (N-VA), Report, *Parl. Proc.* House of Representatives 2011-12, n° 2291/003, 43.

^{XLIX} Proposal of resolution concerning the Charter of Flanders [Voorstel van resolutie betreffende het Handvest voor Vlaanderen], *Parl. Acts* Flemish Parliament 2011-12, n° 1643/1, 2.

^L Ibid.

^{LI} See European Commission for Democracy through Law, *Opinion on three legal questions arising in the process of drafting the new constitution of Hungary*, nr. 614/2011, CDL-AD(2011)001, www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29001-e, 7-8.

^{LII} See then Flemish Minister-President Kris Peeters (CD&V), Plenary assembly, *Parl. Proc.* Flemish Parliament 2010-11, 29 September 2010, n°3, 7; then Flemish Minister-President Kris Peeters (CD&V), Plenary assembly, *Parl. Proc.* Flemish Parliament 2010-11, 29 September 2010, n° 4, 40.

^{LIII} Ibid, 8 (author’s translation), see also 2.

^{LIV} Sven Gatz (Open VLD), *Parl. Proc.* Flemish Parliament 2010-11, 29 September 2010, n°3, 6.

^{LV} M. Goethals, ‘Zeg zeker niet grondwet, maar zeg handvest [Definitely do not say constitution, but say charter]’, *De Standaard* 24 May 2012.

^{LVI} With regard to Scotland see Walker 2013: 7.

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