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Subnational constitutions between asymmetry in fundamental rights protection and the principle of non-discrimination: a comparison between Belgium (Charter for Flanders) and Switzerland

by

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Abstract

This paper investigates the complex relationship between asymmetry and the principle of non-discrimination from the perspective of subnational *fundamental rights*. The research question of this paper concerns the compatibility of asymmetry in fundamental rights with the equality principle, looking at the so-called Charter for Flanders (*Handvest voor Vlaanderen*, in Flemish) in the light of the Swiss experience.

In the first part (section 2), this paper briefly explores the importance of subnational constitutions in multinational states, highlighting how subnational constitutions could incorporate cultural fundamental rights related to (sub)national identities. The paper analyses how cantonal constitutions in the Swiss Confederation protect cultural fundamental rights and how the project of the Flemish Charter promotes national identity in fundamental rights.

The second part of the paper (section 3) explores the limits, stemming from the equality principle, to the asymmetry of fundamental rights as derived from subnational constitutions in federal systems. While doing so, the paper focuses on the Swiss experience, looking at the relevant case law of the Swiss Federal Supreme Court and the decisions of the Federal Assembly concerning subnational fundamental rights.

Finally, the third part (section 4) of the paper is dedicated to the Belgian scenario. This part analyses how the principles inferred from the Swiss case may be applied to the Belgian scenario and to the Flemish Charter.

In the final remarks (section 5), the paper makes some considerations *de jure condendo* about the Charter for Flanders in Belgium and the asymmetry in fundamental rights in multinational states.

Key-words

federalism, fundamental rights, asymmetry, non-discrimination principle, subnational constitutions, cantonal constitutions, Charter for Flanders, Switzerland, Belgium

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1. Introduction: subnational constitutions in federal multinational states

Subnational constitutionalism could be used for different aims, and it is often used as 'number "42" in Douglas Adams' *The Hitchhiker's Guide to the Galaxy*' (Blokker et al. 2015: III), and thus as the answer to every type of question. However, what is of interest here is the issue of the subnational bill of rights as an instrument of asymmetry in federalism. This paper investigates the complex relationship between asymmetry and the principle of non-discrimination from the perspective of subnational *fundamental rights* (recalling the distinction between fundamental rights and human rights: Palombella 2007). In particular, the paper is about the asymmetry in fundamental rights generated by the subnational constitutions and its compatibility with the equality principle.

This paper does not enter the debate concerning whether federated constitutions should be considered as an essential characteristic of federalism (*ex pluribus* Gamper 2005: 1312, Gardner 2007, Delledonne et al. 2014; cf. Popelier 2012: 43; for an example of a federal state without subnational constitutions, think Belgium or Canada: Tarr 2009). What should be stressed is that, in a complex reading of federalism as a process (cf. Friedrich 1968; Wheare 1947; Watts 1999a; Elazar 1987; Burgess 2006) with many stages, the presence of subnational constitutions is surely an important step, but not a foundation stone. Indeed, if the constituent units have the power to enact subnational constitutions — i.e. they have constitutional autonomy ('Kompetenz zur Verfassunggebung', Kelsen 1925: 208) — the federalism to which they belong could be considered an advanced federalism.

In federalisms, the importance of subnational constitutions is due to the presence of provisions that highlight the national/cultural identity of the inhabitants of the constituent units, such as anthems, flags, and festivities (Häberle 2007, 2008), but also, and above all, to the presence of a subnational bill of rights that enshrines cultural fundamental rights. Ethical and cultural differences have played a critical role in the development of subnational constitutions and bills of rights, even in very culturally homogeneous countries such as the United States.[I]

Subnational constitutions with bills of rights that contain cultural subnational fundamental rights could be a good instrument of asymmetry to reinforce the unity of federal states. This leads to the existence of a competition between the federal bill of rights and the

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federated bill of rights (Weerts 2016: 179) or a 'charter duel' (Watts 1999: 958), but, especially, to the creation of asymmetry in the field of fundamental rights relating to the presence of subnational fundamental rights not covered by the Federal Constitution. 'There is undeniably a potential diversity in the sources of rights and liberties within the federal structures. This is reflected in the large variety of rights secured in state constitutions' (Fercot 2008: 306).

However, it seems to be the main role of asymmetry in federations to 'take account of the fact that within a state there are significant cultural or societal differences among the constituent units' (Tierney 2004:188). Of course, the asymmetry must be limited by conformity with the federal fundamental rights and the Federal Constitution because, as stressed (Auer et al. 2013b: 40; Martenet 1999: 420; Watts 2000: 954), subnational bills of rights may have just a complementary role in the protection of rights, and they must be coherent with the Federal Constitution.

Against this background, subnational constitutions could be particularly important for multinational states[II] that are trying to accommodate the multi-ethnic character of their constituent units, such as Belgium and Switzerland.[III] In particular, over the past two decades, the request for a subnational constitution has regularly emerged in Flanders. The research question in this paper concerns the compatibility of asymmetry in fundamental rights with the equality principle, looking at the so-called Flemish Charter (*Handvest voor Vlaanderen*, in Flemish)[IV] in the light of the Swiss experience. As a consequence, the project of the Flemish Charter will be analysed in the light of the Swiss experience in order to understand how much an asymmetry in fundamental rights would be compatible with the equality principle (i.e. the homogeneity clause/the supremacy clause) and if a potential and future enactment of the Flemish Charter would be coherent with the Belgian constitutions. Although Flanders lacks full constitution-making power, this analysis could be interesting, because Belgium is a legal system that is engaged in a continuing evolution (Arcq et al. 2012: 50 and ff.) and because the Flemish Prime Minister has recently claimed that the process for enacting the Charter must restart.[V] In this field, it must be underlined that the absence of a supremacy clause in the Belgian Constitution leads to the lack of a hierarchy between federal law and regional law, relegating the issue of the conflict of laws to a matter of competence. This particular aspect of the Belgian legal system could lead to wide forms of asymmetry, granting a large application of the Flemish fundamental rights with the only

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limits of the Belgian Constitution (articles 127(2), 128(2), 129(2), 130(2) and 134(2) of the Belgian Constitution. Cf. Delpérée 1999; Romainville and Verdussen 2015). For this reason, a comparison with the Swiss Confederation could be particularly useful, given the vast asymmetry conceded in the Helvetian legal system.

Methodologically speaking, some Belgian scholars (van der Noot 2014) have suggested that the Swiss experience could be a good comparative model to explore the sustainability of the asymmetry in fundamental rights derived from the project of the Charter for Flanders. Indeed, using the 'most similar cases logic' (Hirschl 2014: 245 and ff; cf. Théret 2005: 107 and ff.), it can be stressed that both legal systems are federal multinational states,[VI] are trying to accommodate the different *Weltanschauung* or cultures of their constituent units, lack a dual court system (only a few Swiss cantons have their own constitutional courts: Jura, Vaud, Nidwalden, and Graubünden), and have federal governments that are careful to share the governmental roles and powers among different ethnic groups. Moreover, the different ways of developing federalism probably would not affect the matter of subnational constitutions. Belgium and Switzerland have come to be federal states in different ways: the former from a top-down process (devolutionary system), the latter through a traditional federalisation process (aggregative system). As stressed (Tarr 2011: 1135; about the Belgian federalism cf. Verdussen 2005: 175), this could affect the degree of potential space allowed to subnational constitutions, but this trend could not be elevated to a general rule (Palermo and Kössler 2017: 126-127; on the contrary, other authors stress that subnational constitutions would emerge easily in a devolutionary system Cf. Popelier 2012: 45).

In the first part (section 2), this paper briefly explores the importance of subnational constitutions in multinational states, highlighting how subnational constitutions could incorporate cultural fundamental rights related to (sub)national identities. The paper analyses how cantonal constitutions in the Swiss Confederation protect cultural fundamental rights and how the project of the Flemish Charter promotes national identity in fundamental rights.

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2. The legal framework and the cultural fundamental rights in the cantonal constitutions and in the project of the Charter for Flanders

2.1. The Swiss case: the legal framework and the cultural identity of the fundamental rights enshrined in the cantonal constitutions

In Switzerland, there are two levels of 'constituent power', *rectius* constitutional autonomy: the federal one and the cantonal one. According to article 51.1 of the Federal Constitution, cantons must have their own written constitutions.

The main role in the protection and guarantee of fundamental rights was originally played by the cantonal constitutions. Switzerland was a typical example of an aggregative federalism. Only in 1999 did the federal state enshrine a complete bill of rights in the Federal Constitution (for a good summary of the evolution in the field of individual rights, see Weerts 2016). Indeed, in the Constitution of 1848 there was no place for individual rights[VII]; individual rights were guaranteed by cantons.[VIII] The asymmetry of individual rights was quite evident, but the federation began to ensure some levels of uniformity in the field of individual rights (starting from the equality principle in elections, the freedom of establishment, and religious aspects) by increasing the *a priori* check made by the Federal Assembly (federal warranty) on the cantonal constitutions (cf. Weerts 2016: 187-188). The full revision of 1874 did not include a full bill of rights, but it included other forms of checks on the uniformity of rights through the appeal to federal courts against any act that violates federal rights (i.e. it was an embryonic mechanism of judicial review).

In the 1960s the Federal Supreme Court began to 'reveal' the unwritten constitutional rights,[IX] which gained a binding nature. Finally, in 1999 the full revision of the Swiss

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Constitution included a complete bill of rights in the charter, but this did not mean that cantons stopped developing their own bill of rights.[X] The recent reforms and revisions of cantonal constitutions have within their goals the development of complete bills of rights and the reaffirmation of cantonal identity (Schmitt 2012:146).

Thus, the cantonal constitutions have their own bill of rights, sometimes recalling international human rights, sometimes including 'original' fundamental rights, and sometimes referring to the Federal Constitution. In any case, it is important to highlight the fundamental role that the subnational constitutions of the cantons have played in the development of the Swiss Bill of Rights.

> L'attention vouée par les constitutions cantonales aux libertés a été d'abord la cause, puis la conséquence de la subsidiarité de la protection fédérale de celles-ci. Ce sont les premières qui, avant même la création de l'Etat fédéral, garantissaient des droits et des libertés à leurs citoyens. La garantie fédérale s'est peu à peu développée et étendue, mais toujours en fonction des garanties cantonales: d'abord pour en combler les lacunes, puis pour les compléter, enfin pour les supplanter (Auer et al. 2000: 40).

Nowadays, the cantonal constitutions must be coherent with the obligation of the democratic principle of organisation and must be guaranteed (*procédure de garantie fédérale)* by the Federal Assembly (for a deep analysis, see Martenet 1999: 451 and ff). This last issue requires the respect of federal law as claimed by article 51.2 of the Constitution, according to the principle of federal law supremacy. The Federal Assembly must make this *a priori* check (*procédure de garantie fédérale – ex* art. 172.2), in which it controls the coherence of a new cantonal constitution or of any modification of a cantonal constitution (i.e. full revision or partial constitutional amendment) with the Federal Constitution (the Federal Assembly rarely denied the guarantee/warranty. Cf. Auer et al. 2013a: 581; Grisel 1996).
The Federal Assembly decree deliberates on the compatibility of a federated (i.e. cantonal) constitution with the Federal Constitution. This means that, in the field of fundamental rights, it decides about the conformity of cantonal fundamental rights to the federal Bill of Rights. The main role in this procedure is played by the Federal Council, which gives the Assembly a message (*feuille fédérale*) about the issue of conformity (cf. Martenet 1999: 454). The Federal Supreme Court considers the decisions about conformity contained in the decrees as binding, so it cannot dispute the compatibility of the federated rights with the

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Federal Constitution until some modifications of the written or unwritten Federal Constitution occur.[XI]

The Federal Supreme Court (*Tribunal Fédéral*) is the second organ that has to control the compatibility of fundamental cantonal rights with the federal Bill of Rights, according to article 189 of the Constitution (cf. Martenet 1999: 251 and ff.). Thus, cantonal constitutions in the field of fundamental rights must respect the catalogue of federal fundamental rights, the unwritten constitutional rights, and the international human rights (Palermo and Kössler 2017: 328).

Concerning the topic of cantonal fundamental rights and cultural identity, it must be stressed that the existence of cantonal rights is linked to both the issue of sovereignty (art. 47.1 Const.) and the fact that cantons are states with their own cultural tradition and history (Häberle 1997: 112).

In the origin of the Confederation, the role played by the cantonal constitutions was more evident in the defence of cultural fundamental rights (i.e. rights that were recognised and so enshrined in just some constitutions). Of course, this was particularly evident in the early days of the *Republique Helvetique* (1798–1803), when some cantons (for an in-depth analysis, see Monnier 2007) guaranteed religious freedom for Catholics or Protestants (depending on the religion of the majority of the cantonal citizens), the equality principle (the most progressive cantons) or free movement, and economic freedoms (the most industrialised cantons). The cultural asymmetry was particularly evident also in the Napoleonic Era and in the so-called Regeneration (for a more detailed study, see Weerts 2016: 185-190). Most progressive cantons enshrined in their constitution important political rights and civil rights —freedom of expression, property rights, freedom of association, freedom of the press, freedom of trade, freedom of education (Kölz 2006: 358-373; Martenet 1999: 158 and ff.) — linked to their ideas of what the state should be and what their people consider to be individual rights (i.e. their national tradition and culture). Cultural asymmetry of fundamental rights was highly relevant in this phase, especially because the Federal Constitution of 1848 did not contain a catalogue of fundamental rights. Indeed, as already seen, a complete catalogue of fundamental rights was only developed, at the federal level, with the case law of the Federal Supreme Court and with the revision of 1999. In addition, the Bill of Rights of 1999 actually met some difficulties linked to the absence of cultural consensus in Switzerland about considering some rights as fundamental rights. Before the

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revision of 1999, some amendments containing primarily social rights, such as the right to housing or the right to education, were rejected by some cantons (Weerts 2016: 194). As a result, these types of rights exist solely in some cantonal constitutions.[XII] In this domain, it is worth stressing that 'a general characteristic of positive rights is that they reflect the «constitutional identity» (Verfassungsidentität) of subnational units, even if they «often promise more than they are able to provide»' (Fercot 2008: 317).

In 1965, the 'Awakening of Cantonal Constitutions' (Weerts 2016) began, during which many cantons 'revised' their constitutions and bills of rights according to their cultural identities. This is well expressed in the statement contained in the *Message du Conseil fédéral concernant la garantie de la nouvelle constitution du canton d'Unterwald-le-Haut*, according to which the canton Unterwald-le-haut enacted that 'la nouvelle constitution découle du besoin «de rapprocher derechef le peuple et sa constitution d'adapter les institutions démocratiques aux circonstances de l'époque et de créer les conditions propres au développement de la paix politique et confessionnelle, ainsi qu'au progrès économique et social»' (*Message du Conseil fédéral à l'Assemblée fédérale concernant la garantie de la nouvelle constitution du canton d'Unterwald-le-Haut* (Du 24 juin 1968), FF 1968 II 49). This statement shows how the people of this canton need rights closer to their culture and tradition. After the 'awakening', almost all cantons developed new constitutions with a full-fledged catalogue of rights, and in the 1990s they developed 'audacious' bills of rights, which enshrined innovative rights not included in the Federal Constitution, such as the right of access to official documents, the right to demonstrate in public, the right to education, the right to housing, the right of every woman to material security before and after childbirth, *et cetera*, or widened the federal fundamental rights. In addition, it has to be stressed that even if the majority of cantonal constitutions enshrine rights that have an equivalent at the federal level, 'Elles ont souvent une histoire qui leur est propre et qui peut conférer au droit ou à la liberté en cause un sens particulier, même si leur lettre reprend la formulation fédérale correspondante' (Auer et al. 2013b: 40). Finally, sometimes there is a process of 'mutual learning' between the Federal Constitution and the cantonal constitutions as well as between the different cantonal constitutions (Palermo and Kössler 2017: 330).

In conclusion, many cultural fundamental rights still exist in the cantonal constitutions — fundamental rights not considered by the Federal Constitution because of the lack of consensus within the whole federation and that are deeply linked to the history, tradition,

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and culture of a canton—. On the contrary, some federal rights might also not be considered important enough to be included in the cantonal constitutions. However, this would affect the federal equality clause: federal rights must be applied even if they are not culturally compatible with the culture of the cantons, as a consequence of the supremacy clause.

2.2. The Belgian case: the legal framework and the cultural identity of the fundamental rights enshrined in the Flemish Charter

In Belgium, federated constituents have limited constitutional autonomy (Peiffer 2017). Nonetheless, the Flemish Government aims to enact the so-called Charter for Flanders, a sort of 'proto-subnational Bill of Rights'. Even though the sixth state reform (Goossens and Cannoot 2015; Nihoul and Barcena 2011) did not change much concerning the constitution-making power of the subnational units (i.e. it did not increase their constitutional autonomy), the development of this possible new form of asymmetry in the Belgian legal system is interesting. Indeed, the Charter could be an instrument of asymmetry not only in subnational constitutional rights but also in a larger sense (cf. Nagel and Requejo 2011): in Wallonia, the project of a proto-constitutional text (*Proposition de décret spécial instituant une Constitution wallonne*, Doc. Parl., session 2005-2006, document n°367) was abandoned at an early stage (Peiffer 2017: 56 ; cf. Popelier 2012; Nihoul and Bárcena 2011 : 235).

At the present time, the Charter could not be a real subnational constitution, and some authors have highlighted what limited legal value its provisions could have (Lambrecht 2014: 148; van der Noot 2014: 276)[XIII] or its possible enactment as a decree and not a simple resolution (Peiffer and Sautois 2013: 105), but what is of interest here is to understand if a potential and future enactment would be coherent with the Belgian Bill of Rights.

Historically speaking (Lambrecht 2014; van der Noot 2014), this process began in 1996 with the book '*Proposition of Constitution for Flanders*' (*Proeve van Grondwet voor Vlaanderen*, in Flemish) written by Clement et al. (Clement et al. 1996), which anticipated the debate about a Flemish constitution. This book marked a milestone in the debate about the Charter of Flanders; as a matter of fact, the Flemish Government invited the authors to present it, and in the ensuing years, a petition asking for a constitution was signed by 24,000 Flemings and

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two texts were developed. In 2010, the Flemish PM Kris Peeteres (CD&V) decided to launch a new phase (van der Noot 2014: footnote XXVII): the Charter was presented by the majority parties (CD&V, N-VA and SP.A) to the press on 23 May 2012, but it was not voted or debated on by the Parliament. Currently, the process seems ready to start again, as claimed by Flemish Prime Minister Geert Bourgeois (N-VA)[XIV] and his majority (N-VA, CD&V and Open Vld).

The Charter[XV] has not yet been enacted, but it addresses important issues about the Flemish national identity (for example, art. 4 - arms, flag, national anthem and holiday) and it has a large Bill of Rights. The Preamble of the Charter states: '*This charter is a timeless text that sets out the background to which the pursuit of an autonomous Flanders, in Belgian and European contexts, is taking place, in accordance with the subsidiarity principle*' (author's translation from the Flemish). Thus, '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' (Lambrecht 2014: 147). Finally, it is true that the current text does not have a subnational constitutional value, but some potential consequences could be inferred concerning a legal system that is engaged in a continuing evolution. 'The improbability and the many problems attached to such a hypothetical paralegal text do not necessarily imply, however, that the establishment, in Belgium, of fully-fledged federated Bills of Rights, or even of «full option» subnational Constitutions, would be deprived per se of any added value from the legal-scientific point of view, be it in terms of fundamental Rights protection or, more broadly, in terms of legal certainty' (van der Noot 2014: 279). It is also true that the Charter should be considered in a different way from how useful a true and full-fledged subnational constitution could be (Lambrecht 2014: 156), but *de iure condendo*, a reflection about its potentiality could be beneficial.

Regarding the matter of the fundamental rights enshrined in the Charter for Flanders, it must be underlined that from the beginning, the 'propositions notably insist on fundamental Rights and on the related policy options that Flanders should follow, essentially echoing the relevant European and International legal sources and adapting them to the competences of Flanders as a federated entity. In addition, the last articles of the texts mention elements such as the Flemish coat of arms, flag, anthem and «celebration day» («feestdag»)' (van der Noot 2014: 275). In this nation-building process, the fundamental rights play an important role, even if they are not as developed as they are in

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the Swiss case: '*The Charter for Flanders is an overview of the main principles of the organization and functioning of the Flemish democratic rule of law. These principles determine what Flanders stands for, which are the rights and freedoms guaranteed in Flemish society*' (Preamble of the Flemish Charter – author's translation from the Flemish).

The Bill of Rights is deeply influenced by the Charter of the Fundamental Rights of the European Union, the European Convention of Human Rights (ECHR), and the rights enshrined in the Belgian Constitution,[XVI] but it is also a cultural self-presentation of the Flemish people. Indeed, the Flemish Bill of Rights includes rights that are not completely enshrined in the Belgian Constitution and that clearly belong to the Flemish national culture as developed in the last decades and to which belongs also a strong Europeanism. Included in the Charter for Flanders are some (not all) rights derived from the Charter of Fundamental Rights of the European Union that are a cultural choice and an expression of Flemish culture. In this regard, for example, articles 15 and 16 of the Charter widen the equality principle and include the affirmative actions in the contest of the non-discrimination principle. Particular care is dedicated to the rights linked to the industrialisation of the region, especially the right to work, the right of enterprise, and economic freedoms (on the rights of workers, see articles 31–35; on the rights of enterprises, see articles 42 and 50). In addition, there is the development of rights correlated to the digital society, such as the right of consumers (article 41), the right to data protection (article 21), the constitutionalisation of the right of intellectual property (article 43), and the right of the media (article 24). In the end, there is the reinforcement of some rights, often derived from the EU Charter, such as artistic freedom (article 26) and social rights (articles 36 and 40). Above all, strong attention is paid to the rights of disabled people (article 49) and the elderly (article 48). As already seen, social rights are among the greatest sources of division between legal systems.

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3. The balance between asymmetry in fundamental rights deriving from subnational constitutions and the principle of non-discrimination

3.1. Interactions between the federal Bill of Rights and federated ones: the birth of asymmetry in fundamental rights and its consistency with the principle of non-discrimination

There are four possible interactions between federal fundamental rights and federated fundamental rights (cf. Palermo and Kössler 2017: 344): i) the same content; ii) the widening of federal rights; iii) different rights; and iv) the minor extension of the federated rights.

The first category occurs when a *federated* right is the same as enshrined in the *federal* Bill of Rights (i.e. it has equivalent content). This interaction does not involve a form of asymmetry in fundamental rights as long as the federated rights are interpreted in the same way as the federal ones. Conversely, if they are interpreted in a different way — usually in the presence of a dual court system — there is an overlapping with the second or the fourth interaction (it is the so-called *New Judicial Federalism*: Tarr 1994. Cf. Palermo and Kössler 2017: 335).

The second interaction happens when the federated right somewhat widens (i.e. gives more protection) the guarantee provided by the Federal Constitution. This category is called in this paper the 'widening of federal fundamental rights', meaning an expansion of the protection of federal rights due to subnational bills of rights. This category could be controversial and complex, because it is important to understand what the untouchable core of a right is, whether it could not be widened or modified.[XVII] The untouchable core of a right depends on its different frameworks and definitions in the various legal systems. A good example of the impact on the essential core of a right could be found in the topic of same-sex marriage. For example, in some legal systems, such as the Italian one, marriage is a union between a woman and a man (See Constitutional Court decision n. 138/2010), and so a subnational constitution probably could not widen this right without infringing on the core of the right to marriage. On the contrary, for example, in the United States there is no such literal interpretation of the right to marriage as traditionally thought. Thus, as happened in the near past, the state constitutions and the national Supreme Courts widened the notion of the right to marriage, granting this right to gays and lesbians. 'This

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has occurred when states have sought to occupy constitutional space by creating state constitutional rights broader than what was available under the federal Constitution' (Fercot 2008: 309).[XVIII] Finally, this consensus led to the judgment *Obergefell v. Hodges*, 576 U.S. (2015), which ruled that the federated bans on gay and lesbian marriage are unconstitutional. In order to better understand this point, it could be useful to recall Wellman's theory of rights (Wellman 1985, 1995). According to the American scholar, each right is composed of a *defining core*, which is fundamental and characteristic of the right (in some way, the central core), and some *associated elements*, which are correlated aspects.[XIX] It seems to me that only these latter elements can be subjected to a widening.[XX] Of course, the definition of the core and of the associated elements of a right can change according to the social conscience, as the US experience of abortion has showed.[XXI]

This complex second category was clearly enounced in a decision of the US Supreme Court, which stated, 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution. They also are free to serve as experimental laboratories, in the sense that Justice Brandeis used that term […] State courts, in appropriate cases, are not merely free to— they are bound to—interpret the United States Constitution. In doing so, they are *not* free from the final authority of this Court' (*Arizona v. Evans,* 514 U.S. 1 (1995).[XXII] A good example of this phenomenon is given from the widening of free speech made by the California Constitution, in respect to which the US Supreme Court 'held that the First Amendment (…) does not *ex proprio vigore* limit a State's authority to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution' (*Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)).

The third interaction occurs when a federated right is not included in the Federal Constitution.[XXIII] This last interaction is the most asymmetrical, because it grants some rights as fundamental just to residents in a particular subnational unit. For example, in the United States 'the right to vote for African-Americans, women, and eighteen-year-olds were pioneered in state constitutions before their incorporation into the federal charter. So too were provisions guaranteeing equal protection of the laws, banning poll taxes, and prohibiting the sale or use of alcohol' (Tarr 2011: 1147). This form of asymmetry has to

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respect the federal rights, and, as a consequence, the federal rights cannot be contradicted or distorted by fundamental rights contained in the subnational constitutions.

Finally, the fourth interaction is when a subnational constitution does not cover or gives less protection to a federal fundamental right. This is a classic case of antinomy between rules that is resolved by the application of the supremacy clause (and so it does not create an asymmetry).[XXIV] This fourth interaction cannot exist in a federal state (an exception in this trend is the Canadian Notwithstanding Clause. See Palermo and Kössler 2017: 331); the antinomy is resolved through the application of the Federal Constitution (i.e. of federal fundamental rights).

In conclusion, the first three interactions are able to create an asymmetry in fundamental rights. Two preliminary considerations have to be made: *in primis*, the first interaction is able to create an asymmetry in the case there is an interpretation of the equal right that can lead this interaction to overlap with the second category and thus widening a federal fundamental right (this could happen if there is a dual court system)[XXV]; *in secundis*, from the practical point of view, it has to be claimed that the subnational rights could have a role in the field of competences of the subnational units.

However, the asymmetry contains a hidden issue of equality and discrimination; as stressed, the presence of different rights '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' (Delledonne and Martinico 2010: 911). The line between an acceptable and sustainable asymmetry and an intolerable discrimination is thin, and it is remitted to the care of federal organs that must guarantee the equality principle (Palermo and Kössler 2017: 130 and ff). Indeed, it is important to maintain the standards provided by the Federal Constitution: 'if a state's protection of individual rights droops too low (…) The federal Bill of Rights is the floor whereas the state bills of rights are the ceiling. The state can reach above the floor but cannot drop below it. The room in between is where it is all worked out' (Beasley 1995: 695) Thus, it can be said that the equality principle is respected every time *federal rights* are respected. The federal Bill of Rights should indeed be considered as the minimum standard that guarantees the equality principle in the federation (Palermo and Kössler 2017: 341-342): it is the so-called *Mindeststandardlehre* theory in Germany (See BVerfGE 96, 345 [365]; 36, 342 [361]) or the 'lowest common denominator', quoting Judge Robert Utter.[XXVI]

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> In such cases, however, courts have normally judged that the federal charter of rights, insofar as there is a conflict, must prevail. What provincial charters of rights can do, however, is to supplement or extend the rights available to their own citizens and minorities beyond those set out in the federal constitution (Watts 2000: 985; cf. Henrard 2004).

In this domain, the ECHR has stressed that 'La diversité des législations internes, propre à un État fédéral, ne peut jamais constituer, en soi, une discrimination, et il n'est pas nécessaire de la justifier. Prétendre le contraire serait méconnaître totalement l'essence même du fédéralisme' (CEDH, Cour (Plénière), 22 oct. 1981, n° 7525/76. Cedh, Affaire Dudgeon C. Royaume-Uni, 22 octobre 1981, 7525/76).

In this sense, it can be stressed that subnational constitutions finally play the role of promoter of rights not considered as fundamental rights by the major part of the population (or, on the contrary, they would be enshrined in the Federal Constitution). These rights lack 'common consensus', using the words of ECHR. They are rights of philosophical, cultural, and political minorities, in a broader sense. This vision seems to be correlated with the idea of subnational constitutions and bills of rights as *laboratories of new rights*, as suggested by Judge Brandeis.[XXVII] Subnational rights could become cultural rights of the whole federation, and as a consequence be enshrined in the Federal Constitution, or they could not, and remain subnational rights.

The following section presents an analysis of the equilibrium and the balancing process in the Swiss legal system as a prototype case. It is stressed that the lack of a dual court system[XXVIII] could be problematic for the existence of asymmetry; however, the Swiss legal system shows that it is surmountable.

3.2. The Swiss case: how much asymmetry in fundamental rights is tolerable?

As already seen, the asymmetry in fundamental rights was in some way linked to the history of the Swiss Confederation. In the period following the Constitution of 1848, the equal treatment of Swiss citizens was initially developed just in regard to some rights, and then it was progressively increased with the role played by the Federal Assembly and by the Federal Supreme Court (with the development of unwritten rights). The final stage was the Constitution of 1999, with the inclusion in the Swiss Constitutional Charter of the federal

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Bill of Rights. As seen in section 2, for a long period the rights of the Swiss people were deeply linked with their residence in cantons, but nowadays the equilibrium reached between the federal and cantonal constitutions retains a degree of asymmetry in the protection of fundamental rights. The cantonal fundamental rights are those 'qui garantissent des droits individuels aux citoyens et sont, à ce titre, directement applicables' (ATF 136 I 241, 248.) or 'réservent au citoyen une sphère de protection contre les interventions étatiques' (translated from the German. ATF 131 I 366, 368).

Taking the possible interactions between fundamental federal rights and cantonal rights into consideration, the positions of the Federal Assembly (after the proposal of the *Conseil Fédéral*) and of the Federal Supreme Court seem to show a quite clear trend. In the first scenario — the equal protection of a right given by the Federal Constitution and by a cantonal one — the Federal Assembly has highlighted that the cantonal fundamental rights do not have a law-value if they cover the same rights of the Federal Constitution or the unwritten fundamental rights.[XXIX] Thus, the equivalent cantonal rights guaranteed by the Federal Constitution are just 'monuments' (Aubert 1967: 632) linked to the past history of the cantons. This issue was confirmed by the Federal Supreme Court, which claimed that if the cantonal rights are not more protective than the corresponding federal rights, they do not have any legal value (ATF 121 I 267, 269; cf. Auer et al 2013b: 38 ; Fercot 2008: footnote 21). This is true until the federal (or international) right remains in effect: if a federal right is abrogated, the cantonal equivalent will re-emerge. As stressed by some authors (van der Noot 2014: 281-282; cf. ATF 121 I 267, 269-272), the Federal Supreme Court often interpreted in a very textual way the cantonal rights as being similar to federal ones so as to try to limit their application. Finally, the first scenario is not problematic because it does not create any asymmetries.

Regarding the second scenario — the major protection of a cantonal right compared to the same right in the Federal Constitution — some authors (Auer et al. 2013a: 38) have highlighted how the Federal Supreme Court has often chosen not to discuss the issue by refusing the petition in case of a lack of motivation[XXX] or by saying that the cantonal right does not widen the federal one.[XXXI] In any case, sometimes the Federal Supreme Court also has to recognise the larger protection provided by cantonal constitutions. For instance, this happened in the case of the right to compensation for illegal imprisonment as contained in article 4 of the Canton of Valais (which widens the unwritten federal right to

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compensation, granting it for every illegal detention),[XXXII] in the case of the personal freedom protected in a broader way by article 12 of the Constitution of the Canton of Geneva (which widens the right to personal freedom),[XXXIII] and in the more protective discipline of the prohibition of retroactivity enshrined in article 5 of the Constitution of the Canton of Nidwalden.[XXXIV] The larger protection is sometimes recognised also by the Federal Assembly; for example, this occurs in the case of the right of petition included in article 12 of the Constitution of the Canton of Thurgovie.[XXXV] In this sense, as previously said, it has to be highlighted that the Federal Supreme Court considers the interpretation given by the Federal Assembly as binding. Sometimes, on the other hand, the Federal Assembly limits the possibility to widen some rights, because they would affect the central core of some federal fundamental rights. This was the case of the attempt to grant a married couple similar protection for 'other forms of cohabitation than marriage or than family in the traditional sense, whilst federal law only recognises the right to marry. This time, the federal government still considered that this type of cantonal provisions may have an autonomous scope on the condition that they go beyond the case law defined by the Federal Court Regarding the choice of other forms of life in common, the federal government directly made it clear that the scope of this provision has to be interpreted in the context of the division of competences. It considered that such an article cannot produce effects on the marriage, but on the exercise of personal rights or in procedural law. Thus, the provision cannot deploy any effect on the relations of civil law and unmarried couples; the effects of marriage cannot be extended to cohabitation' (Weerts 2016: 199).[XXXVI]These principles were affirmed in both the '*Message concernant la garantie de la constitution de Berne*'[XXXVII] and the '*Message concernant la garantie de la constitution d'Appenzell Rhodes-Extérieures*'.[XXXVIII] The aforementioned cantonal rights affect the core of a federal right in a matter of federal competence; thus, the Federal Assembly censured this type of widening.

This second scenario leads to a form of asymmetry in fundamental rights. The residents in some cantons can enjoy more extensive fundamental rights protection due to the cantonal constitutions, which offer a broader protection than the corresponding federal rights. This is not just an issue of asymmetry *de facto* but is an asymmetry *de jure* that has great impact on the life of Swiss citizens. The hidden question is about the equality principle: undoubtedly, some citizens inside the federation enjoy a deeper degree of protection of their rights, but,

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as we have seen, the Federal Assembly and the Federal Supreme Court consider this asymmetry as legitimate. Indeed, the issue about equality (linked to the supremacy principle) rises only when a federal fundamental right is contradicted or distorted (in its core) by a cantonal one.

The third category concerns the presence of different fundamental rights that are not enshrined in the Federal Constitution. This is the main source of asymmetry, because the second category is deeply linked to a matter of interpretation. In the second scenario, the Federal Supreme Court could limit the application of cantonal rights with a restrictive interpretation of their provisions.

Cantons have developed original rights that are not included in the Federal Constitution and derived from the national culture of the cantons: the freedom of manifestation (art. 8 JU, art. 19 BE, art. 20 NE, art. 21 VD, art. 32 GE - art. 24 FR), the right to family life (art. 9 SO, art. 8 JU), the right to a free choice of a different form of life than marriage (art. 12 NE, art. 14 VD, art. 14 FR, art. 22 GE, art. 13 ZH), the right to housing (art. 22 JU, art. 29 BE, art. 38 GE, art. 13 TI), the right to scholarship and education (art. 10 SG, art. 29 BE), protection of maternity (art. 35 VD, art. 33 FR) and of children (art. 13 TI, art. 13 VD, art. 23 GE), the right to work (art. 19 JU), and the right to a clean environment (art. 19 GE). Of course, these cantonal fundamental rights have a greater impact when they are developed in fields where cantons have exclusive competence.[XXXIX] These cantonal rights were considered coherent with the federal system by the Federal Assembly and by the Federal Council, and/or they were considered not in contrast with the federal fundamental rights by the Federal Tribunal. A good example is the '*Protection contre la fumée passive*' enshrined in article 176 of the *Constitution de la République et canton de Genève*, which creates the protection against passive smoking (then granted also by the federal laws about tobacco[XL]). According to the Federal Supreme Court, the constitutionalisation of this right 'fait ainsi partie des dispositions plus strictes que les cantons peuvent adopter, conformément à l'art. 4 de la loi fédérale' (ATF 136 I 241). This provision was previously controlled by the Supreme Court in the occasion of the popular initiative (*initiative populaire*): the Federal Supreme Court (ATF 133 I 110) considered that the right of protection from passive smoking does not affect the federal labour legislation, the federal protection of the right to life, or the right to personal freedom, and it respects the proportionality test.

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Other examples are those regarding the Bern and the Appenzell Ausserrhoden constitutions. The Federal Assembly[XLI] has accepted the innovative rights included in the Constitution of Bern and in the Constitution of Appenzell Ausserrhoden, such as the right to access public documents, the right to demonstrate in public, and some innovative social rights. Finally, another good example is that of the Neuchatel Constitution, which, considering the jurisprudence of the Federal Supreme Court that did not claim as discriminatory a very different fiscal regime (tax rate) between married and non-married couples (ATF 123 I 241), enshrined in its article 12 a right to choose a form of common life different from marriage. This fundamental right caused a new cantonal legislation providing a 10% reduction of the tax rate (van der Noot 2014: 284). However, sometimes the rights enshrined in the cantonal constitutions would affect the minimum standards guaranteed by the Federal Constitution, and so they are not compatible with the Federal Constitution. In the last analysis, they would impact on the equality principle, breaking the equal treatment of Swiss citizens that is given by the respect of federal fundamental rights. Occasionally, the Federal Assembly[XLII] has censored the cantonal fundamental rights because they restricted federal fundamental rights, as happened with article 141 of the Geneva Constitution concerning religious freedom and political rights: in the name of the right to have neutral institutions, article 141 of the Constitution of 2006 excluded ecclesiastics from the possibility of becoming a member of the *Court des Comptes*. This was considered against the anti-discrimination principle as stipulated by the Federal Constitution.

Regarding the fourth interaction — the lack or the less protection of rights provided by the cantonal constitutions — it has to be underlined that the cases are rare and passé[XLIII]; a good example is the denial of the right to vote for women in the Canton of Appenzell Innerrhoden. The check on the asymmetry could be made by the Federal Supreme Court after the federal warranty, as in the case of the right to vote denied to women by the Constitution of the Canton of Appenzell Innerrhoden. The Supreme Court stated that the Federal Assembly could not dispute this suppression of the right to vote (or, better, this different idea of the right to vote) because at that time (1971) there was no constitutional disposition, such as article 4.2 of the Federal Constitution (adopted in 1981). So, the Supreme Court can reduce asymmetry in fundamental rights, according to the evolution of

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the fundamental federal rights, coherently with the supremacy clause; however, before modification at the federal level, this type of asymmetry was untouchable.[XLIV]

From all these arguments, it seems clear that the equality principle is respected in Switzerland by the respect of the minimum standard given by the Federal Constitution and its Bill of Rights. Thus, the constituent units may widen the fundamental rights of their people without legally impacting on the equality principle. This seems to be confirmed by the fact that cantonal constitutions could also not recognise some rights included at the federal level (as happened for articles 6–12 Cost. TI) and could remand to the federal Bill of Rights or to an international treaty (as happened for articles 7 and 8 Cost. GR), but the federal rights remain applicable. So a smaller protection of rights than at the federal level is possible, but in the end, the federal right rises and substitutes for the less protective cantonal right.[XLV]

In conclusion, even if the cantonal constitutions are a secondary and complementary source of fundamental rights, they still create an asymmetry in fundamental rights that impacts on the equality principle. As stressed, 'le principe d'égalité dans la loi trouve une *limite institutionnelle* dans la structure fédérale des Etats' (Auer et al. 2013b: 495). This is true for both ordinary legislation and subconstitutional protection of rights. As a consequence, cantonal constitutions must respect the federal Bill of Rights, as disposed by article 35 of the Swiss Constitution (Auer et al. 2013a: 61).

However, this concerns the minimum standard, the core of a right. A right could be widened or changed in some parts with no violation of the equality principle as it is developed in federal states. Thus, it is clear that, as claimed by many scholars (Auer et al. 2013b: 40 ; cf. Martenet 1999: 420), cantonal fundamental rights have just the role of a complementary source in the field of fundamental rights. This complementary source, on the one hand, creates asymmetry, and, on the other hand, it does not break the equality principle given by the minimum standard of the Federal Constitution. 'In Switzerland the Federal Council (Conseil Fédéral) and the Federal Assembly, like the Federal Tribunal, refuse to recognise the validity of any cantonal provisions that are less protective than the corresponding federal provisions; a solution largely approved by the majority of authors. State constitutions can therefore only guarantee protections that are «at least equal» to the federal Constitutional «requirements»' (Fercot 2008: 311).[XLVI]

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The Swiss asymmetry in fundamental rights protection was also considered not to be in contrast with the ECHR by the European Court of Human Rights in *Müller e.a. v. Switzerland*. The case was about the freedom of artistic expression, which was guaranteed in a different way in the cantons and was particularly weak in the Canton of Fribourg: 'The applicants claimed that the exhibition of the pictures had not given rise to any public outcry and indeed that the press on the whole was on their side. It may also be true that Josef Felix Müller has been able to exhibit works in a similar vein in other parts of Switzerland and abroad, both before and after the «Fri-Art 81» exhibition (see paragraph 9 above). It does not, however, follow that the applicants' conviction in Fribourg did not, in all the circumstances of the case, respond to a genuine social need, as was affirmed in substance by all three of the Swiss courts which dealt with the case' (ECHR., Müller e.a. v. Switzerland, 24 may 1988 *(Application no. 10737/84)*)[XLVII] Thus, the ECHR recognises the possibility of asymmetry in fundamental rights in federal systems.

4. Consideration about the project of the Flemish Charter: a sustainable solution?

This section analyses the project of the Flemish Charter, looking at the Swiss experience and the Belgian Constitutional Court jurisprudence concerning the equality principle, which 'est l'un des fondements d'un Etat de droit démocratique' (Belgian Constitutional Court decision n. 17/2009).[XLVIII] As noted by Lagasse (2017: 2), on the one hand, the Belgian legal system is fighting a battle against discriminations, but on the other, it is engaged in a process that increases differentiation between individuals (i.e. residents in different constituent units) due to federalism. Regarding the principle of equality, the Constitutional Court has claimed that it has to be balanced with the principle of federalism, and, as a consequence, some forms of diversity could be acceptable considering the competence and the respect of the constitutional fundamental rights:

> Une différence de traitement dans des matières où les communautés et les régions disposent de compétences propres est la conséquence possible de politiques distinctes permises par l'autonomie qui leur est accordée par la Constitution ou en vertu de celle-ci. Une telle différence ne peut en soi être jugée contraire aux article 10 et 11 de la Constitution. Cette autonomie serait dépourvue de signification si le seul fait qu'il existe des différences de traitement entre les destinataires de règles s'appliquant a une même

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> matière dans les diverse communautés et régions était juge contraire aux articles 10 et 11 de la Constitution (Belgian Constitutional Court decision no. 139/2003).[XLIX]

This idea is particularly clear also in the words of the *Conseil d'Etat*:

> Les droits fondamentaux (...) définis par des normes juridiques supérieures ne sont pas des matières en soi, mais des principes qui doivent être respectés par les différentes autorités pour régler les matières qui leur sont attribuées. Lorsque le mise en œuvre d'un droit fondamental de l'espèce requiert une règlementation complémentaire, ou lorsqu'il est estimé nécessaire de concrétiser la portée de pareil droit fondamental concernant une matière déterminée, c'est à l'autorité compétente pour cette matière qu'il appartient d'édicter les règles nécessaires (*Conseil d'Etat* decision no. 28197/1 1999).[L]

In order to evaluate the compatibility of the current Flemish project with the Belgian fundamental rights, the four previously mentioned categories are used. First of all, it must be stressed that the Charter does not contain very radical and original solutions (in this sense, see also Popelier 2012: 49), but it widens — most of the time only in the text and not in a substantive way — the rights enshrined in the Federal Constitution, and sometimes it gives 'constitutional' protection to rights that are already protected by federal law, regional law, or EU laws. This last issue does not reduce the importance and the presence of asymmetry in fundamental rights, because a constitutionalisation could grant protection in the case of abrogation of the other sources of the right or could orient the action of the Flemish Government imposing stricter limits compared to the federal ones. Indeed, the Charter could bind the regional government to enact coherent law in the competences given to communities and regions. The lack of a hierarchy among federal law and regional law, and the provision of article 141 of the Belgian Constitution allow to speculate about the great impact that this disposition could have in terms of effective application of this asymmetry of rights.

Thus, by using the aforementioned categories, it can be said that sometimes the Charter 'covers' the same rights as the Federal Constitution; sometimes it widens the federal rights; and other times it 'creates' new fundamental rights. At the same time, it never provides less protection or no protection compared to the Belgian Constitution.

A good example of the first category is article 14 of the Charter. The formal equality of Belgians is claimed in a similar way by article 14 of the project and by article 10 of the

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Belgian Constitution. This category can also be observed when the Charter seems to grant a larger protection of rights, such as in the case of the principle of non-discrimination. Indeed, article 15 of the project includes a larger number of cases of banning discrimination (language; religion or belief; political or other ideas; belonging to a national, ideological, or philosophical minority; ability; birth; disability; age; or sexual orientation) compared to the smaller text of article 11 of the Federal Constitution ('To this end, laws and federate laws guarantee among others the rights and freedoms of ideological and philosophical minorities'), yet the project just recalls the Constitutional Court case law without any widening of the principle of non-discrimination.[LI] Therefore, certain specifications seem to be enacted just to comply with some deep cultural ideas of the Flemish people.

If the interpretative method developed in the Swiss legal system is applied, this category should not be considered problematic; these rights should be interpreted in the same way as federal rights,[LII] above all because and as long as this interpretation would be made by the Belgian Constitutional Court.

The second category is well represented in the Charter. Many rights are more protective than the federal ones. However, it is important to highlight that most of these widenings follow the Constitutional court's case law or the European Court of Justice's or the ECHR's, as in the case of the equality between women and men included in article 16 of the Charter. Article 16 follows in a broader way (i.e. granting in all areas, including employment, occupation, and reward, the equality between women and men) article 11 of the Belgian Constitution. This specification is important, but its actual larger application is uncertain: the Constitutional Court has yet stressed that a 'strict scrutiny' has to be applied in this matter[LIII] and that 'la Constitution attribue une importance particulière à l'égalité entre hommes et femmes' (Belgian Constitutional Court decision n. 159/2004). Sometimes, however, the widening is genuine, and it could be useful to understand the possibility of asymmetry in fundamental rights. This is the case of the affirmative actions explicitly provided by article 15[LIV] of the project and in the special issue of gender equality by article 16[LV] of the project. On the so-called affirmative actions, the Belgian Constitution is silent, except for gender equality in elective and public mandates (Art. 11bis of the Constitution), and the Constitutional Court is quite prudent about that (Renauld and Van Droooghenbroeck 2011: 600; Belgian Constitutional Court decisions n. 9/94, 42/97,

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157/2004). These provisions could find application in the regional competences concerning labour policies (job placement, employment programmes, economic migration, *et cetera*, and public employment), the welfare state (social housing, financial support for housing, taxation, *et cetera*), or the regulation of enterprises (agriculture, sea fishing, *et cetera*).
Another interesting article is article 54 of the project, which provides stronger protection to free movement (for every citizen of the EU) and that in some way, through this constitutionalisation, widens article 12 (right to personal freedom) of the Belgian Constitution, which does not explicitly enshrine free movement as an autonomous fundamental right but considers it as part of personal freedom (Renson 2011: 751). Other examples of widening are article 43 (right of property), which adds the protection of intellectual property compared to article 16 of the Federal Constitution (right of property)[LVI]; article 25 of the project (freedom of association - right of assembly), which highlights, seeming to give it a broader protection, the right to associate in trade unions and political parties, in contrast with articles 26 (right of assembly) and 27 (right of association) of the Constitution[LVII]; or the religion freedoms of article 23 of the project, which widens articles 19–21 of the Belgian Constitution. An interesting example is that of due process. The Flemish Charter is rich with provisions about fair trial (articles 17, 18, 19, 20), inspired by the EU Charter and the ECHR. This is interesting because these provisions reinforce, from a constitutional point of view, some rights not completely enshrined in the Belgian Constitution (articles 12, 13, 14), even if they are enforced by the application of the ECHR and the EU Charter. These articles could impact on, for instance, juvenile law enforcement, first-line legal assistance, or *maisons de justice*. Finally, another interesting widening is linked to economic rights. In the field of the rights of workers and enterprises, the project seems to guarantee in a constitutional way larger rights compared to the Federal Constitution, such as the right to strike or the right to sign collective contracts.[LVIII] In the field of the right of enterprises (articles 42 and 50 of the project), article 50 also protects enterprises in front of administrative authorities.[LIX]
All these widenings could have a concrete role only in the case of a) coherency with the supremacy clause (so, no contrast with the Belgian Constitution); b) application in the field of regional competences, where they may influence the regional legislator; or c) gaps in federal legislation in the concurrent competences.[LX] Thus, hypothetically, the respect of these rights could be demanded from the Flemish Government by the Flemish residents

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and could widen the protection given by the Federal Constitution. On the other hand, none of these widenings seem to be in contrast with the current Belgian constitutional rights.

Regarding the third category, some 'new' rights can be found in the project. For example, some provisions grant protection to rights such as artistic freedom (article 26),[LXI] the right to inform and the media system (article 24),[LXII] the protection of the consumer (article 41), or the right to data protection (article 21),[LXIII] which are not considered by the Federal Constitution, just the EU Charter. The constitutionalisation of these rights leads to reinforcement of them from a constitutional point of view; if the international, European, or federal right would be abrogated, they could play a role in the protection of individuals. Currently, their actual application would be limited. For example, it would be possible to have some forms of financial aid for arts linked to the competences of the region and of the community, but surely not a broader protection from criminal censorship in the case of morality (the criminal matter belongs to the exclusive federal competence, with some reservations that do not matter in this field). The right to inform is important, but as for the regulation of media, the actual and current competence of the Region of Flanders could not grant a great difference from the current legislation. This is certainly true also for the protection of personal data and the protection of consumers, which could be improved just in the field of competence of the region. However, what could be a herald of deep asymmetry is the issue of social rights. Some new fundamental rights, such as the right of the elderly (article 48) and the right of people with disabilities (article 49), could be a trump card. Indeed, the Charter could affect the budget choices in the field of welfare and management of public spaces (education, transportation, assistance to persons, spatial planning, *et cetera*), which is partially within the competence of the regions,[LXIV] and in the healthcare sector. Finally, these provisions could just be applied in the field of regional competence, in which they could represent a real instrument of asymmetry granting to Flemish residents 'regional fundamental rights' that must be respected by the regional authorities.[LXV] Of course, this would be possible if an efficient system of judicial review was developed.

Concerning the fourth category, there is no trace of it in the Flemish project. Thus, none of the Flemish fundamental rights seem to be in contrast with the federal constitutional rights or federal law, so an eventual and possible binding nature of the

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Charter would not affect the equality principle as expression of the supremacy clause and of the minimum standards.
As claimed:

> C'est l'idée que les droits fondamentaux ont vocation à représenter le substrat minimal de toute collectivité qui, au-delà de ses clivages et de ses particularismes, aspire à se perpétuer en tant que communauté viable. Par leur rattachement à l'ordre constitutionnel, ils transcendent ainsi tout à la fois la collectivité fédérale et les collectivités fédérées. La coexistence au sein d'un même Etat de plusieurs groupes, plus ou moins différents, ne saurait occulter la nécessité d'un fond commun de valeurs partagées (Verdussen 2005: 182).

In conclusion, the Charter of Flanders seems to be able to play a role as a complementary source of fundamental rights with a binding value just for the regional lawmaker, but at the same time it is able to recognise and grant more protective rights to the residents in Flanders within the limits of the equality principle. The aforementioned principle of the complementarity is already claimed by article 57 of the Charter, which states, '*No provision of this charter may affect the protection of fundamental rights, as provided for in the federal constitution and in international treaties binding for Flanders*' (author's translation from the Flemish).

The Flemish Region should acquire the full 'constitution-making power' (*rectius* – a full constitutional autonomy)[LXVI] in order to enact a 'real' subnational constitution, and its actual application would be determined by the development of an efficient system of judicial review.

5. Final remarks

If it is true that the subnational constitutions are not the *number 42* of Douglas Adams's book, it is also true that 'constituent units may provide greater opportunities for groups who are outnumbered nationally to participate in politics, to have their rights recognized, and to advance their common concerns. Contemporary trends point toward expanding recognition and autonomy for groups in multilingual, multicultural, multiethnic and multinational states, sometimes as the only alternative to either political frustration or secession. Sub-national constitutionalism can provide a way to respond to demands for

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recognition and self-rule' (Tarr 2011: 1148). Instead of what happens in other European multinational federalisms such as Italy or Spain (Delledonne and Martinico 2010), in Switzerland subnational constitutions provide cultural fundamental rights not enshrined in the Federal Constitution, and so they create a level of asymmetry in the field of fundamental rights. This asymmetry is acceptable and sustainable until it does not affect the principle of equality. In Switzerland, the federal constitutional supremacy was interpreted as limiting cantonal autonomy in the development of their own fundamental rights just when they affect the federal fundamental rights, considered as a minimum standard. This occurs when some federal fundamental rights are contradicted by the federated constitutions or when the core of federal rights is distorted by a cantonal provision. If these principles may be applied to the project of the Charter for Flanders, it should be stressed that the Charter would be compatible with the equality principle, as expression of the minimum standards (of course, the devolvement of a mechanism to apply the supremacy clause and the homogeneity clause would be needed[LXVII]). The current Charter enshrines some interesting rights that are able to create an asymmetry in fundamental rights, which can bind the regional legislator. These considerations *de jure condendo* are linked to the need for a real 'constituent power' for the regions and an efficient system of judicial review. From a theoretical point of view, the project as currently conceived does not seem to infringe on the equality principle. Finally, it can be suggested that this new form of asymmetry could help the Belgian federalism to work better, accommodate some demands of the Flemish people, and undermine secessionist pushes,[LXVIII] confirming the 'tailor-made design' (Peeters 2005: 44) of the Belgian federalism. In addition, it could not be excluded that these rights could one day be adopted by the Federal Constitution: 'It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country' (Justice Brandeis, dissenting opinion, *New State Co. v. Liebmann* (1932)).

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I 'For example, an ideology of subnational constitutionalism clearly guided the Texas Supreme Court when it claimed in a 1992 case that the Texas Constitution must be understood, unlike the U.S. Constitution, to «reflect Texas' values, customs, and traditions,» and must therefore be interpreted in view of the «experiences and philosophies» of the state's founders'. Gardner (2007: 3). Cf. Elazar (1987: 10); Williams (2009).

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[II] '(..) increasingly prevalent ethno cultural justifications for federalism may suggest that subnational constitutions often, or even typically, reflect distinctive values and choices of subnational populations, a situation consistent with the widespread existence of subnational constitutionalism'. Gardner (2007: 8).

[III] 'Perhaps the basic political right, particularly for internal nations within multi-national countries, is the right of self-determination--the power to determine the fundamental character, membership, and future course of their political society. This right of self-determination is inevitably limited when nations are constituent members of a larger political entity, but it is not effaced' Tarr (2009: 185). 'Some federations such as Switzerland, Nigeria, and Belgium, as well as quasi-federations such as Spain-were designed to recognize and accommodate the multiethnic character of the population and provide space for the expression of diversities' Tarr (2011: 1137). Cf. Saunders (1999).

[IV] The more recent version of the Charter is available at http://www.standaard.be/extra/pdf/Handvest%20voor%20Vlaanderen.pdf.

[V] Flandersnews.be, *Flemish PM wants Flemish constitution*, 07/03/2016, (http://deredactie.be/cm/vrtnieuws.english/Politics/1.2593534). There are also more recent statements reported in Peiffer (2017: 56).

[VI] Cf. Tarr et al. (2004), in which Belgium and Switzerland are considered as *multinational federations*. Some Swiss scholars using the concept of *Willensnation* contest the qualification of the Swiss system as a multinational country: Cf. Frenkel (1993). Anyway, Switzerland seems to have all the characteristics of a multinational country (Kymlicka (2011) and Ipperciel (2007: 48)).

[VII] 'Only few rights were included such as 'Equality before the law (Article 4), the right of establishment (Article 41), freedom of the press (Art. 45), freedom of association (Art. 46) the right of petition (Art. 47), freedom of Christian worship (art. 44), the right to "natural justice" and the prohibition of extraordinary courts (art. 53). A revision of Art. 41 and 48 was adopted in 1866'. Weerts (2016: 186, footnote 43).

[VIII] See 'Rapport de la Diète aux vingt-deux cantons suisses sur le projet d'acte fédéral par elle délibéré à Lucerne, Genève, 15 December 1832, p. 44-45': 'les cantons conservent leur souveraineté pour ce qui concerne leur system constitutionnel (..) Elles devront garantir au pays les exercice de droits politiques'.

[IX] The unwritten rights are, as reported by Weerts: 'Right to property (Federal court, decision Keller, 11 May 1960, ZBl, 1961, p. 69), freedom of expression (Federal court, decision Sphinx-film SA v. Conseil d'Etat du canton de Neuchâtel, 3 May 1961), personal freedom (Federal Court, decision Kind X. v. X. und Zivilgericht des Kantons Basel-Stadt, 20 March 1963), language freedom, (Federal Court, decision Association de l'école française und Mitbeteiligte v. Regierungsrat und Verwaltungsgericht Zürich, 31 March 1965), freedom of assembly (Federal court, decision Nöthiger und Pinkus v. Polizeirichteramt der Stadt Zürich, 24 June 1970), right to the basic requirements (Federal court, decision V. v. Einwohnergemeinde X. 27 October 1995)'. Weerts 2016: 191, footnote 63. For a deep analysis see Rossinelli (1987).

[X] Since the adoption of the Constitution in 1999, 11 cantons have adopted new constitutions (nine of them have developed their own bill of rights): 'cantons and their citizens can undoubtedly continue to express their creativity. The adoption of the federal Bill of Rights in 1999 has not dampened their willingness to enshrine their own fundamental rights in their own fundamental text'. S.Weerts (2016: 205).

[XI] *Ex pluribus*: 'Selon la jurisprudence actuelle, le Tribunal fédéral n'examine en principe pas la conformité avec le droit fédéral des dispositions constitutionnelles cantonales auxquelles l'Assemblée fédérale a donné sa garantie. Il est fait exception à ce principe dans les cas où la règle de droit supérieur n'était pas encore en vigueur lors de l'octroi de la garantie (ATF 111 Ia 239 consid. 3 p. 240; cf. ensuite ATF 116 Ia 359 consid. 4b p. 366), ou lorsqu'il s'agit de tenir compte d'une évolution de principes de droit constitutionnel non écrit qui aurait eu lieu dans l'intervalle (ATF 121 I 138 consid. 5c/aa p. 147)'. ATF 131 i 126.

[XII] 'In the field of social rights, cantons are innovative. They go further than the first generation of cantonal revisions and the Federal Constitution. The canton of St. Gallen offers protection that allows children to receive assistance as soon as the school attendance causes disadvantages due to the location of their homes, to disability or for some social reasons. St. Gallen's constitution also guarantees the right of persons, having completed their compulsory education, to receive assistance for their education or their development in accordance with their own financial resources and those of their parents. The constitution of the canton of Vaud grants rights in education and training that exceed the federal guarantee for an adequate education. It guarantees also the right to appropriate emergency housing and the right of every woman to material security before and after childbirth'. Weerts (2016: 202).

[XIII] Recalling what was written by Lambrecht (2014: 148) and by van der Noot, (2014: 276). About the matter of its enacting as a decree and not a simple resolution cf. Peiffer and Sautois (2013: 105).

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[xiv] Flandersnews.be, *Flemish PM wants Flemish constitution*, 07/03/2016, (http://deredactie.be/cm/vrtnieuws.english/Politics/1.2593534). The process will be influenced by the electoral results of the forthcoming elections.

[xv] The more recent version of the Charter is available at http://www.standaard.be/extra/pdf/Handvest%20voor%20Vlaanderen.pdf.

[xvi] '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'. Popelier (2012: 42). '*The rights and freedoms contained in this Charter for Flanders are derived from the Charter of Fundamental Rights of the European Union and the Federal Constitution. The Charter for Flanders leaves the Charter of Fundamental Rights of the European Union, as it is the most recent synthesis of the common values of the Member States of the European Union*'. Preamble of the Flemish Charter (author's translation from the Flemish).

[xvii] '(..) in spite of the supremacy clause, state supreme courts can deduce from their constitutions some individual rights that do not exist at the federal level or they can interpret state constitutional rights more «liberally» than their federal counterparts, insofar as such an interpretation would not contradict any right secured at the federal level'. Fercot, (2008: 313).

[xviii] See Baker v. State, 744 A.2d 864 (Vermont, 1999); Baehr v. Lewin, 74 Haw. 648, 852 P. 2d 44 (Hawaii, 1993); cf. Williams (2002). This phenomenon could also be observed in the topic of sodomy laws, which were considered as a federated state's dominion until the decision *Lawrence v Texas*; after that decision, sodomy laws must be considered as not coherent with the US Constitution. See. J.A., Gardner, *In Search of Subnational Constitutionalism (September 19, 2007)*, Buffalo Legal Studies Research Paper No. 2007-016, 2007, p. 29. Cf. Fercot (2008: 322).

[xix] 'A right is complex in that it is constituted by a number of Hohfeldian elements in addition to its defining core. It is a complex because these associated elements belong to the right only by virtue of their essential relation to that core'. Wellman (1985: 91-92).

[xx] These last aspects can be widened, but never restricted. For example, Wellman identifies the defining core of the freedom of speech as follows: 'The defining core of the constitutional right to free speech is the legal liberty of each individual to publish (..) his or her sentiments, ideas, or opinions (..) The scope of this core liberty is limited by specific exceptions, including speech that is libelous or obscene and speech that creates a clear and present danger of substantive evils' (Wellman 1995: 192). So, if this is the US 'core' right with its limits, the federated constitutions cannot, for example, eliminate the limit of obscenity (the free speech, in this case, would be widened by affecting the defining core of the federal rights). But a widening would be possible concerning the associated elements; for example, '(2) the legal claim of each individual against federal and state governments that they not prevent or hinder the exercise of the core liberty of free speech by any form of previous restraint;' (Wellman 1995: 193), individuated by Wellman as an associated element, could be widened by positive rights: the state could give financial aid to economically weak thoughts (e.g. in the field of the press).

[xxi] Think about the different space of action of national constitutions conceded before and after the *Roe v. Wade* decision and the different idea of the core of the right to abortion. See, for instance, the decision *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) regarding informed consent, and the judgment *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) concerning state funds, facilities, and employees in the abortion operations. Finally, consider *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and the standard of undue burden; *Gonzales v. Carhart*, 550 U.S. 124 (2007) regarding partial-birth abortion; and *Whole Woman's Health v. Hellerstedt*, 579 U.S. (2016) reinforcing the idea of undue burden.

[xxii] Cf. *Michigan v Long* 463 US 1032 (1983). Cf. for a theoretical analysis Brennan (1977).

[xxiii] 'the state constitutional rights revealing the greatest diversity among federal systems are those rights that are «independent» from – different from – federal protection. These more restrictive or more expansive rights show a real diversity which is often ignored and misrepresented'. Fercot (2008: 309).

[xxiv] 'As for Switzerland, in the field of the equality clause or the prohibition of discrimination, some cantonal constitutions are very succinct, for example the constitutions of Schaffhausen and Fribourg, which affirm solely that «nobody should be discriminated against». Older constitutions often lack clarity: for example, the Valais constitution of 1907 contains a brief provision specifying that «every citizen is equal before the law» (Article 3). Four constitutions are even silent on, or only refer to the equality between men and women. The impact of «more restrictive constitutional rights» is generally limited in the federal context, because insofar as there is a conflict between two norms, it is resolved by Article 31 of the German constitution, Article VI § 2 of the American Constitution or Article 49 of the Swiss constitution'. Fercot (2008: 310).

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[xxv] Tarr (1994). As will be exposed in the Swiss legal system, the lack of a dual court system avoids the widening of cantonal rights that use the same form of the federal rights. In general 'With regard to the contents, a constitution regulates issues that are constitutional in nature, such as the system of government, the composition, election and function of the legislature and the executive, instruments of direct democracy, the organisation of local government and often further elements such as (sub-)national identity, the use of language(s) and fundamental rights, at least in addition to those guaranteed by the national level. To be considered as such, a (subnational) constitution generally needs to differ from (subnational) ordinary legislation in both form and substance and to express a margin of its own authority, not being a mere specification of the national constitution' Palermo and Kössler (2017: 129 and 335).

[xxvi] 'The fourteenth amendment to the United States Constitution, which applies the federal constitution to the states, only establishes the minimum degree of protection that a state may not abridge'. *Alderwood Assocs. v. Washington Envtl. Council* 96 Wn.2d 230 (1981) (State supreme court of Washington 1981).

[xxvii] 'It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country'. Justice Brandeis, dissenting opinion, *New State Co. v. Liebmann* (1932).

[xxviii] Cf. Gardner 2007: 29. 'While a dual judiciary would seem to be the logical corollary of the dual polity inherent in the federal principle as traditionally formulated, a number of federal systems have concluded that a fully dual system of courts is not necessary as long as the independence of the judiciary from the executives and legislatures of both levels of government can be assured'. Watts (2000: 958).

[xxix] 'Selon la doctrine et la jurisprudence, les droits fondamentaux figurant dans les constitutions cantonales ont une portée autonome pour autant qu'ils offrent une protection qui dépasse celle qui est assurée par le droit fédéral (ATF102 la 469 ss; FF 1989 III 696 et 833). Cela signifie qu'en matière de droits fondamentaux, les cantons peuvent garantir la même protection que la Confédération ou étendre cette protection. Il s'ensuit également que la garantie fédérale ne saurait être accordée lorsque le canton prévoit de manière impérative une protection moins étendue que ne le fait la Confédération par le biais de ses droits fondamentaux écrits ou non écrits'. *Message concernant la garantie des constitutions révisées des cantons de Zoug, de Bâle-Ville, de Schaffhouse, des Grisons, de Thurgovie et de Vaud du 8 avril 1992*.

[xxx] The aforementioned authors (Auer et al 2013a : 38) reported the following case law in order to support their thesis: ATF 118 ia 427; ATF 115 ia 234, 246.

[xxxi] The same authors (Auer et al 2013a : 39) cited the following decisions: ATF 121 I 267; ATF 119 ia 53, 55; ATF 112 ia 398, 411; ATF 108 ia 64; ATF 104 ia 480.

[xxxii] '(..) côté d'une violation de sa liberté personnelle, telle qu'elle est garantie par le droit constitutionnel fédéral non écrit et par l'art. 5 CEDH, le recourant invoque la violation des dispositions du droit cantonal relatives à l'indemnisation du prévenu victime d'une arrestation et d'une détention injustifiées.
a) Aux termes de l'art. 4 al. 3 Cst. cant., l'Etat est tenu d'indemniser équitablement toute personne victime d'une arrestation illégale. Par ailleurs, l'art. 114 ch. 1 CPP val. prévoit que le prévenu mis au bénéfice d'une décision de non-lieu peut recevoir une indemnité «en raison de son arrestation et de sa détention ou pour d'autres motifs». Selon la jurisprudence interprétant ces dispositions, il faut entendre par arrestation illégale la détention préventive injustifiée, par exemple parce qu'il n'y a pas de motif d'arrestation ni de détention. Elle peut aussi se révéler telle après coup. Il peut donc y avoir obligation - et non simple faculté - d'indemniser une personne détenue de façon injustifiée non seulement en cas d'atteinte illicite mais aussi en cas d'atteinte licite à la liberté personnelle'. ATF 113 Ia 177.

[xxxiii] 'Les dispositions auxquelles il se réfère sont plus précises que les principes découlant directement de la garantie constitutionnelle de la liberté personnelle; le défaut de base légale qu'il invoque doit donc être apprécié en fonction des dispositions constitutionnelles et légales genevoises, ces dernières dispositions s'appliquant concurremment avec les principes découlant de la garantie précitée'. ATF 104 ia 297.

[xxxiv] 'Die kantonale Verfassungsnorm gewährt dem Berechtigten insofern einen weitergehenden Schutz als das Bundesrecht, als sie nach der Auslegung des Verwaltungsgerichts keine Ausnahme vom Rückwirkungsverbot zuzulassen scheint'. ATF 101 ia 82.

[xxxv] 'La conception du droit de pétition (§ 12), qui (comme les nouvelles constitutions des cantons d'Argovie, de Baie-Campagne, de Soleure et de Glaris) confère un droit à obtenir une réponse à une pétition, va plus loin que le droit fédéral'. *Message concernant la garantie de la constitution révisée du canton de Thurgovie*, FF 1989, III, 833.

[xxxvi] Cf. 'Un canton ne peut pas réglementer un domaine qui fait l'objet d'une compétence fédérale exclusive. Il peut toutefois assumer des tâches qui relèvent d'une compétence fédérale concurrente, non limitée, dont la

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Confédération ne fait pas entièrement usage. Ces normes constitutionnelles ont alors, par rapport au droit fédéral, une portée plus restreinte que le laisse supposer leur libellé. Toutefois, tant qu'elles couvrent une compétence cantonale qui est susceptible d'une interprétation conforme au droit fédéral, la garantie fédérale doit leur être accordée' *Message concernant la garantie de la Constitution d'Argovie du 15 avril 1981 du 15 avril 1981,* FF 1981 II, p. 254.

[xxxvii] 'L'article 13, 2e alinéa, de la nouvelle constitution garantit le libre choix d'autres formes de vie en commun que celle du mariage ou de la famille au sens traditionnel du terme. Cependant, dès lors que, selon l'article 64, 2e alinéa, de la constitution fédérale, la législation civile est de la compétence de la Confédération, cette disposition ne peut déployer aucun effet sur les rapports de droit civil de couples non mariés; ainsi, par exemple, les effets du mariage ne sauraient être étendus au concubinat'. *Message concernant la garantie de la constitution de Berne du 6 décembre 1993*, FF 1994 I, p. 403.

[xxxviii] 'L'article 10 garantit, outre le mariage et la vie de famille, le libre choix d'une autre forme de vie en commun. Or, conformément à l'article 64, 2e alinéa, de la constitution fédérale, la Confédération légifère dans le domaine du droit civil; cette norme cantonale ne peut donc pas déployer d'effets sur les relations de droit civil des couples non mariés et étendre par exemple les effets du mariage à l'état de concubinage. En revanche, elle pourrait avoir des effets par exemple sur l'exercice de droits proches des droits de la personnalité ou dans le cadre du droit procédural'. *Message concernant la garantie de la constitution d'Appenzell Rhodes-Extérieures du 10 janvier 1996*, FF I 1996, p. 967.

[xxxix] 'Nevertheless, in spite of the fact that there are virtually no longer any areas in which the cantons have exclusive competence, cantonal constitutional rights still have great actual relevance: they can influence the jurisprudence of the cantonal constitutional jurisdictions and of the Federal Tribunal. Furthermore, they are all part of the national «constitutional identity»'. Fercot, 2008: 318.

[xl] 'A juste titre, les recourants ne se prévalent pas de la loi fédérale du 3 octobre 2008 sur la protection contre le tabagisme passif (RS 818.31), entrée en vigueur le 1er mai 2010'. ATF 136 I 241.

[xli] *Message concernant la garantie de la constitution de Berne du 6 décembre 1993*, FF 1994; *Message concernant la garantie de la constitution d'Appenzell Rhodes-Extérieures du 10 janvier 1996*, FF I 1996, p. 967. Both messages highlight some problems associated with the widening of federal rights, but, excluding social rights, they do not discuss the new rights, because these new rights do not affect the federal rights and do not contradict them.

[xlii] 'la distinction effectuée va à l'encontre de la tendance au pluralisme, qui empreint aujourd'hui notre société et se traduit dans la composition des autorités. Elle conduit à disqualifier les ecclésiastiques par rapport aux autres citoyens, à les stigmatiser sans motif valable. La clause de laïcité prévue à l'art. 141, al. 3, de la Constitution genevoise constitue une discrimination au sens de l'art. 8, al. 2, Cst.'. *Message concernant la garantie de la Constitution révisée du canton de Genève*, FF 2006 8337.

[xliii] 'At the end of the nineteenth century, rejections of cantonal constitutions were often pronounced, particularly because the cantons disregarded equal political rights'. Biaggini (2004: 220).

[xliv] 'Folgerichtig gilt der Grundsatz für das gesamte spätere übergeordnete Recht. Im vorliegenden Fall war der am 14. Juni 1981 angenommene Art. 4 Abs. 2 BV im Zeitpunkt der Gewährleistung von Art. 16 KV durch die eidgenössischen Räte in den Jahren 1971 und 1979 noch nicht in Kraft und konnte daher nicht berücksichtigt werden. Die Frage, ob Art. 16 KV, wie er bisher von der kantonalen Praxis verstanden wurde, mit dem späteren, die Gleichstellung von Mann und Frau ausdrücklich verankernden Verfassungsrecht vereinbar ist, kann und muss daher geprüft werden'. ATF 116 Ia 359.

[xlv] See ATF 106 Ia 267 [271]. 'Si l'article 5 ne devait pas couvrir tous les aspects de ce droit fondamental protégés par le droit fédéral, la législation et la jurisprudence cantonales devront donc, comme par le passé, se reporter à la jurisprudence du Tribunal fédéral' *Message concernant la garantie de la constitution du canton de Glaris*, FF 1989, III, 706. 'Cela signifie que les cantons peuvent garantir la même chose ou plus que la Confédération, mais également que la garantie ne peut pas être octroyée lorsque le canton, par une prescription expresse et contraignante, accorde une protection moins étendue que la Confédération par ses droits constitutionnels écrits ou non écrits (..) Les limitations des droits fondamentaux (§ 8) doivent tenir compte de l'étendue de la protection accordée par le droit fédéral (..) Le paragraphe 6, chiffre 1, ne s'exprime pas en ce qui concerne le contenu particulier de ce droit fondamental; la législation et la jurisprudence cantonales devront donc comme par le passé suivre à cet égard la jurisprudence du Tribunal fédéral'. *Message concernant la garantie de la constitution révisée du canton de Thurgovie*, FF 1989, III, 833.

[xlvi] The decisions reported are the following: Cf. FF (Feuilles fédérales), 1987, II, p. 626 at p. 632; FF, 1989, III, p. 706 at p. 711; FF, 1989, III, p. 833, 839-840; FF, 1994, I, p. 401 at p. 407; FF, 1996, I, p. 965 at p. 970-971.

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[XLVII] ECHR., Muller e.a. v. Switzerland, 24 may 1988 *(Application no. 10737/84)*. In a more recent case, the Court has indirectly affirmed the possibility of asymmetry in fundamental rights: 'For this reason the management of public billboards in the context of poster campaigns that are not strictly political may vary from one State to another, or even from one region to another within the same State, especially a State that has opted for a federal type of political organisation. In this connection, the Court would point out that certain local authorities may have plausible reasons for choosing not to impose restrictions in such matters (see *Handyside v. the United Kingdom*, 7 December 1976, § 54, Series A no. 24). The Court cannot interfere with the choices of the national and local authorities, which are closer to the realities of their country, for it would thereby lose sight of the subsidiary nature of the Convention system (see *Case «relating to certain aspects of the laws on the use of languages in education in Belgium»* (merits), 23 July 1968, p. 35, § 10, Series A no. 6)'. ECHR., Mouvement raélien suisse v. Switzerland, 13 july 2012, (*Application no. 16354/06*).

[XLVIII] *Contra*: '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'. Popelier (2012: 55).

[XLIX] See also Belgian Constitutional Court decision no. 37/1992, no. 33/1995, no. 78/1997, and no. 85/1999. As already seen, the same principle was adopted in the Swiss legal system, where the Federal Supreme Court also affirmed: 'A supposer donc que les causes mentionnées par la recourante présentent de fortes similitudes avec sa situation personnelle, la circonstance, inhérente au fédéralisme, que les mêmes dispositions légales aient été appliquées différemment par des autorités de cantons différents (pour autant qu'elles respectent le cadre légal), n'est constitutive ni d'une violation de l'interdiction de l'arbitraire, ni du principe d'égalité de traitement'. ATF 2C_832/2016.

[L] On the matter of the application of fundamental rights made by the subnational units, see Peiffer (2017: 56).

[LI] 'le texte constitutionnel ne comporte aucune liste de motifs de discrimination qui seraient interdits, par opposition à d'autres motifs de distinction qui seraient, eux, autorises. *A priori*, toute le différence de traitement, sur la base de n'importe quel critère, peut constituer une discrimination interdite par la Constitution'. Renauld and Van Drooghenbroeck (2011: 583). The decision reported is the decision number 15/2009. Belgian Constitutional Court decision n. 15/2009.

[LII] This uniformity in the matter of judicial interpretation occurs already in the field of regional laws: 'En appliquant les normes fédérées, les juridictions les interprètent souvent, en cas de difficulté, à la lumière du prescrit de la norme supérieure – la Constitution fédérale – et tendent des lors à imposer des standards uniformes limitant le marge de manouvre des collectivités'. Verdussen and Bonbled (2011: 261). It occurs, above all, concerning the application of the ECHR: see Belgian Constitutional Court decision no. 136/2004.

[LIII] 'Le contrôle de la Cour est plus strict si le principe fondamental de l'égalité des sexes est en cause'. Belgian Constitutional Court decision n. 166/2004.

[LIV] '*The principle of equal treatment does not prevent Flanders, in order to ensure full equality in practice, maintain or adopt specific measures to address disadvantages related to sex, race, colour, ethnic or social origin, genetic characteristics, language (..)*'. Art. 15 of the Charter (author's translation from the Flemish).

[LV] '*B. The principle of equality does not prevent measures being taken or taken, with specific benefits being put in favor of the under-represented gender*'. Article 16 of the Charter (author's translation from the Flemish).

[LVI] In the Belgian legal system, intellectual property is recognised as a right by federal law. See Paques and Vercheval (2011: 792). Thus, the larger protection is due to the constitutionalisation of this right.

[LVII] These rights are recognised in Belgian law, but they are not recognised as constitutional rights. Cf. Schaus (2011 : 1084). See Belgian Constitutional Court decisions no. 64/2009 and *Conseil d'Etat* decision no. 12521/1967.

[LVIII] '*Employers and employees or their respective organizations have the right to negotiate collective bargaining at the appropriate levels, collective employment contracts and, in the event of conflicts of interest, collective action to defend their interests, including strike*'. Article 32 of the Charter (author's translation from the Flemish).

[LIX] '*A. Everyone is entitled to his business being treated impartially, equitably and within a reasonable time by the institutions, bodies and agencies of the Flemish government*'. Article 50 of the Charter (author's translation from the Flemish).

[LX] Regarding the 'hidden' concurrent competence Cf. Popelier and Lemmens (2015: 26). Concerning the 'compétence parallèle' in the field of application of fundamental rights, see also Verdussen and Bonbled (2011: 248 and ff).

[LXI] In the past, the protection of artistic expression was guaranteed by the case law of the *Conseil d'Etat* but only as a *species* of the larger *genus* of free speech and not from a constitutional point of view. See *Conseil d'Etat* decision n. 191.742/2009. 146.226/2005.

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[LXII] Cf. about the freedom to inform and the media system: Belgian Constitutional Court decisions n. 194/2009. See Jongen and Dony, (2011: 848).
[LXIII] According to some scholars, the right to data protection can be directly reconnected with article 22 of the Constitution. Degrave and Poullet (2011: 1012, footnote 44). Indeed, the federal law and the same article 22 should be connected with the ECHR's jurisprudence. Id.: 1016.
[LXIV] Considering also the limits determined by the Belgian Constitutional Court in the field of article 23 Cost. Cf. ex pluribus decision no. 103/2015.
[LXV] Consider that since 1999 the federal fundamental rights are also protected by constituent units. Verdussen (2005: 188-189).
[LXVI] The enactment of the Charter could be made possible or by an amendment of the Constitution or by the abrogation of some constitutional provisions and the special law of 8 August 1980, leaving a space of action for the Flemish Parliament. For an in-depth analysis on this point, see Lambrecht (2014: 150-151). Cfr. Peiffer (2017: 54).
[LXVII] As stressed also by the authors of the *Proeve van Grondwet voor Vlaanderen*: 'La Cour constitutionnelle (telle que nous la proposons) peut vérifier si les constitutions des États fédérés sont compatibles avec la Constitution fédérale, et on devrait trouver dans la Constitution fédérale une disposition dite d'homogénéité, contenant des conditions de fond auxquelles doivent satisfaire les constitutions des États fédérés'. Brassinne (1997: 4).
[LXVIII] Also if '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'. Popelier (2012: 54); Peiffer (2017: 56); Nihoul and Barcena (2011: 234); Lambrecht (2014:152-153). In this field it has to be stressed that in the book *Proeve van Grondwet voor Vlaanderen* 'Les auteurs se défendent d'avoir fait un exercice en vue d'un éventuel séparatisme; bien au contraire, ils situent la Flandre comme une «deelstaat» ou «onderdeel» de l'État fédéral «Belgique» signifiant par-là que la Flandre est une partie de l'État fédéral, ou plus précisément une composante de celui-ci'. (Brassinne 1997: 11). And this only 'federalist will' seems to have inspired the parties that have supported the attempts to enact the Charter (apart for N-VA e Vlaams Belang): Lambrecht (2014:151). Finally, the Charter is clear in declaring '*Flanders as a federated state of Belgium*' (Title I) (author's translation from the Flemish).

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