



FEDERALISM AND INTERNAL CONFLICTS

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Constitutional Asymmetry in Multinational Federalism

Managing Multinationalism
in Multi-tiered Systems

Edited by

Patricia Popelier · Maja Sahadžić

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Federalism and Internal Conflicts

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Editors

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PREFACE

While constitutional asymmetry is an important feature of contemporary multi-tiered systems, it remains an under-developed topic in comparative federalism. It has been mainly discussed in political science. The proposed book fills this gap by giving a legal and comprehensive account of constitutional asymmetry.

In traditional federal theory, comparative studies focus on ‘model’ federal systems such as Germany, Canada, and the USA, ignoring new forms of multi-tiered systems. This global uni-dimensional perspective risks giving a biased picture of state structures and federal dynamics, unable to respond to the challenges of contemporary fragmenting states. By contrast, this book includes multinational multi-tiered systems world-wide, covering 15 legal systems, many of which are often ignored in comparative federal and constitutional studies. It also includes the European Union thus widening the scope of research to include systems that do not identify with traditional scholarship. Instead, this volume builds on a new approach of dynamic federalism, including systems all over the world, and enabling a comparative study of a phenomenon such as constitutional asymmetry that is not easily captured under traditional federal theory, which aspires symmetry for the sake of equality and stability. Through the country reports, the book aims at laying bare the close connection between constitutional asymmetries and regional identity, to the point that constitutional asymmetry is an inevitable feature of multinational multi-tiered systems. This would induce federalism scholars to rethink classic theory so as to fit in constitutional asymmetry instead of

regarding it as deviations from the ideal of symmetry. This way, the book is also marked by its responsiveness to contemporary challenges of constitutional engineering in multinational states.

The book contributes to comparative legal research by offering a set of 16 reports based on a template that includes comparative indicators and allows the testing of five hypotheses. The authors also take part in a wider project on constitutional asymmetry for which they fill in a detailed questionnaire to measure the extent of constitutional asymmetry. This questionnaire feeds the country reports.

Antwerp, Belgium

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Linking Constitutional Asymmetry with Multinationalism. An Attempt to Crack the Code in Five Hypotheses

Patricia Popelier and Maja Sahadžić

1 PURPOSE OF THE EDITOR'S VOLUME

In traditional federal theories, symmetry in the institutional design of the federation is considered an integrative factor. Implicit in these theories is the idea that the component units of a federation have equal relationships with each other and with the federal authority.¹ While in reality, all federal systems show asymmetrical features,² the degree of symmetry and asymmetry is considered an indicator of the degree of harmony or conflict within each system.³ One possible explanation for this is that asymmetrical solutions are considered an anomaly.⁴ Constitutional

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asymmetry, it is argued, risks to undermine equality, transparency and cohesion⁵ and threatens the long-term sustainability of a federal system.⁶ Symmetrisation processes are therefore encouraged to secure the stability of the political system.

At the same time, scholars have linked asymmetry with multinational federalism,⁷ presenting federalism and asymmetry as forms of ethnical conflict management.⁸ While different factors explain constitutional asymmetry and although asymmetric arrangements can also be observed in non-multinational federations, the link between multinationalism and constitutional asymmetry is of specific interest, for three reasons. First, it has been held that national and linguistic differences seem to generate more constitutional asymmetries compared to other factors.⁹ The power-sharing arrangements that are introduced to manage multinational conflicts, tend to focus on those groups that threaten to undermine the state's integrity and stability, thereby creating the non-advantaged regions as a third player.¹⁰ Second, the accommodation of diversity, as pursued by federalism, can both be conditional for the stability of a state and contain the seeds for instability.¹¹ This paradox is even more pressing in multinational states, as multinationalism has been identified as a factor of instability of federal states. This is because stability in these systems is founded on mutual relationships between a complex set of actors and processes.¹² Third, constitutional asymmetry has special relevance as part of identity politics, because identity questions such as language, religion or ethnicity are in principle non-negotiable issues.¹³ However, if constitutional asymmetry turns out to be an inherent part of multinational systems, the emphasis that traditional federal theory puts on symmetry and symmetrisation process, is ill-suited for a growing if not the major part¹⁴ of contemporary federal and quasi-federal systems.¹⁵

Yet, literature on constitutional asymmetry in general and in multinational political systems in particular, is scarce.¹⁶ Asymmetry has been discussed primarily by political scientists, mostly interested in political asymmetries. For legal scholars, however, constitutional asymmetry is of particular interest as a type of constitutional engineering. This volume's purpose is therefore to offer a systematic comparative study of constitutional asymmetry in multinational states. Its purpose is to study the correlation between constitutional asymmetry and multinationalism in multi-tiered systems through a comparative study based on country reports. It serves as a building stone for follow-up research to identify differences in constitutional asymmetries between multinational and

non-multinational systems, and to examine from which point on constitutional asymmetry is a threat to the stability of the political system.¹⁷

2 DEFINITIONS AND TERMINOLOGY

Before putting forward the hypotheses that structure the present volume, we define five key concepts for our study and choose, for the sake of uniformity, the terminology used throughout the book. These concepts are: (1) multinationalism, (2) multi-tiered states, (3) sub-national entities, (4) political and constitutional asymmetry and (5) strong and weak asymmetry.

2.1 *Multinationalism*

Following Stepan, multinational systems in this book are defined as systems in which significant groups voice important political autonomy claims for territorial entities based on linguistic, religious, cultural or ethnic identities.¹⁸ Hence, for a system to be identified as multinational, three criteria must be fulfilled: (1) the system consists of one or more groups that distinguish themselves on the basis of identity; (2) they are territory-based; and (3) they claim important autonomy, or even threaten separation. Multinational states that incorporate national groups—for example after migration or occupation—do not qualify if these groups are not situated within the same territory (or territories) and do not claim political autonomy on the basis of their identity. On the other hand, it suffices if some but not all national groups are territory embedded. The country reports in this edited volume give ample illustrations of the variety in this respect. For example, in Ethiopia, more than 80 ethnic groups can be discerned, but only five are territory embedded. In China, national and ethnic groups can be located within a specific sub-national entity, but only the Tibetans constitute the majority population within their entity. In Belgium, all linguistic communities have their own sub-national entity, but one sub-national entity is an (unbalanced) mixture of two linguistic communities.

This definition explains why Switzerland is not included in our selection. In literature, Switzerland is sometimes categorized as a multilingual but mono-national state based on its common national identity, whereas others refer to it as a multinational state because of its linguistic heterogeneity.¹⁹ Stepan argues against labeling Switzerland a multinational

state because Protestant and Catholic differences are linguistically cross-cutting, power-sharing is not built around a single language, and no significant political party advocates secession.²⁰

2.2 *Multi-tiered States*

We are interested in how constitutional asymmetry accommodates diversity within one state (or state-like organizations) in multinational political systems. This includes states that fall outside the traditional conception of federal states,²¹ to include all systems with multiple tiers of government, combining the central level with sub-national entities with important public policy powers.²² While states such as Indonesia, Italy and the United Kingdom do not regard themselves as federal, they do experience devolution processes that are borne out of tensions between autonomy claims by territorial sub-entities on the one hand, and the need for integrity of the entire state on the other. This way, they share with traditional federal systems the idea of diversity within unity as a constitutional and institutional device.²³

For our selection, we applied two limitations. First, we are only interested in multi-tiered systems with sub-national entities that (also) have statute-making powers, as this distinguishes them from systems of mere administrative decentralisation, where sub-national entities act as executive agents of the central authority.²⁴ Second, we excluded peripheral constituent units, i.e. unitary states that incorporate only one sub-national entity with a different status,²⁵ as well as dependencies, overseas territories and sub-national entities that are disputed territories, because they do not affect the operation of the federal system in a notable way.²⁶ Iraq seems an exception at first sight, as only the Kurdistan Region is an autonomous sub-national entity. However, Kurdistan is not a merely peripheral entity, but at the heart of political controversy in Iraq. Also, the constitution allows for the establishment of other autonomous regions. Finally, the governorates have substantial administrative and financial autonomy.

2.3 *Sub-national Entities*

Multi-tiered legal systems use different terms to designate constituent units. For example, in the United States they are called ‘States’, in South Africa they are called ‘Provinces’, in Germany and Austria ‘Länder’, in Switzerland ‘Cantons’, in Bosnia and Herzegovina ‘Entities’,

and in Belgium two types of constituent units are distinguished, called ‘Regions’ and ‘Communities’. More generic terms that are used in literature include sub-states or sub-state entities, federal entities, etc. In this book, we use ‘sub-national entities’ as a generic term, as opposed to the ‘central level’ or ‘central authority’. This way, we include multi-tiered systems that are not considered federal in the traditional sense. Country-specific terminology is used when specific sub-national entities are referred to.

2.4 *Political and Constitutional Asymmetry*

Asymmetry refers to territorial differences within a multi-tiered system. The nature of this variation is basically twofold: some differences are factual, others are entrenched in the constitutional system.²⁷ In literature, different labels are used for this dichotomy: *de facto* or political asymmetry as opposed to *de jure*, legal, formal or constitutional asymmetry. For the sake of uniformity, we use the terms ‘political’ and ‘constitutional’ asymmetry throughout this book. Other distinctions have been made: asymmetrical relations involving full-fledged sub-national entities vs those involving peripheral political entities; permanent vs transitional asymmetric arrangements.²⁸ In this volume, we focus on ‘permanent’ arrangements, conceived as arrangements that are not intended to be transitional, although they might undergo changes in the dynamics of centralization or decentralization dynamics.²⁹ Also, as mentioned above, we exclude unitary states with one peripheral distinct entity.

Political asymmetry refers to territorial variations in the size of population, territory, economy, economic geography, identity, or political landscape. These are ‘objective empirical criteria’ to describe social reality.³⁰ Variations in economic geography are closely linked to variations in population, territory and economy. Variations in economy or wealth are often explained by variations in labor mobility, resources and transport networks, which in turn are partly determined by variations in population density and geographical location. Variations in identity refer to linguistic, religious, ideological, cultural or ethnic differences. Variations in political landscape relate to territorial differences in the electoral system, the party system or the electoral weight of specific political parties. This is reinforced where the organization of political parties is region-based. Conversely, to put it in Keating’s words, disparities in regional representation are tolerable if compensated by nation-wide political parties.³¹

Constitutional asymmetry occurs where territorial differences in autonomy are entrenched in constitutional documents and other legal sources,³² including negotiated agreements. It does not refer to variation in the *exercise* of powers, which is inherent to federalism as a system of shared rule and self-rule, but to differences in status, distribution of competences, and fiscal power.³³ Constitutional asymmetry is part of constitutional engineering: a deliberate public choice to create formal differentiation in status.³⁴ This may lead to a situation in which some sub-national entities enjoy privileges in terms of status, powers and/or fiscal competences, or, on the contrary, are disadvantaged compared to most sub-national entities. For example, in Spain, the Basque Country enjoys larger fiscal autonomy than other entities. By contrast, in Belgium, the German-speaking Community has inconsequential voice at the federal level compared to the other linguistic communities.

Moreover, a distinction can be made between what Alain Gagnon and Jean-Denis Garon further in this volume label ‘asymmetry in law’ and ‘asymmetry in outcome’. The Canadian country report shows how all sub-national entities have equal opportunities to form their own policy, but only some—and Québec in particular—actually take them. Similarly, as we can read in the relevant chapter, Member States in the EU sometimes deliberately choose to opt in or out of an integration project.

2.5 *Strong and Weak Asymmetry*

Practically every multi-tiered system reveals some constitutional asymmetry. A typical example is the representation of sub-national entities in upper houses. Some federal states such as the US, Brazil or South Africa, compose the upper house on the basis of equal representation; others keep representation in proportion to population. The latter is easily regarded as a constitutional asymmetry resulting from variety in population. However, the former, while maintaining formal equality between the sub-national entities, establishes over-representation of small sub-national entities and inequality of vote weighting depending on residence.³⁵ Hence, inequality, one way or the other, is inevitable.

Some asymmetries, however, are further-fetching than others. Measuring asymmetry across countries in a quantitative way is a difficult task, considering the wide variety of asymmetrical arrangements. It is easier to measure asymmetry within one system, where the status and powers of one entity can be compared to those of other entities.³⁶ This way, each country report can establish whether asymmetries are weak or

strong. Across countries, qualitative indicators may assist in comparing asymmetries. For example, with regard to *status*, asymmetry is weak if representation or involvement in decision-making varies but not to such an extent that under-empowered sub-national entities cannot weigh on central decision-making. It is strong if the privileged status results in a (quasi-) veto power. Asymmetry is strong if central oversight is absent with regard to privileged entities but preponderant towards others. It is weak if central oversight is in place with some detailed differentiation. With regard to the *distribution of powers*, asymmetry is weak if sub-national entities have different sets of powers, but only in details. It is strong if some sub-national entities have substantially more (or less) powers than others. With regard to *fiscal powers*, asymmetry is weak if all sub-national entities have more or less the same fiscal powers, even if variations are noticeable as to conditions or form. It is strong if some sub-national entities have substantial fiscal autonomy, whereas others have (almost) none.

3 MODEL: HYPOTHESES AND METHOD

In this volume, the correlation between constitutional asymmetry and multinationalism is examined through five hypotheses that are tested on the basis of a qualitative comparative study of country reports:

1. Constitutional asymmetry emerges from political asymmetry.
2. Multinationalism, in the form of variations in identity, is not the exclusive but a determining factor for constitutional asymmetry.
3. The correlation is stronger when the divide based on identity is reinforced with congruent political asymmetries of another nature.
4. Privileged status is attributed to identity markers rather than territory-based entities.
5. Factors that facilitate symmetrisation or further asymmetrisation processes are, among others, the presence of competing national groups, the presence of non-competing non-distinct groups, the dynamics of strongly divided fragmenting states, internal dynamics created by asymmetries.

The first hypothesis expects constitutional asymmetry to result from political asymmetry. For example, variations in population, territory, economy, identity, or political landscape between sub-national entities may not only result in decentralization and differences in policy,³⁷ but also in differences in autonomy. The hypothesis is not groundbreaking:

it has already been observed that political asymmetries frequently precondition constitutionally entrenched institutional asymmetries.³⁸ For example, one can expect sharp asymmetries in population to result in constitutional asymmetries in representation—for example in countries such as Belgium, where one sub-national entity constitutes over half of the population, whereas another sub-national entity contains less than one percent of the population. Sub-national entities with low population density and low per capita resources have less taxing capacity and less financial resources to pursue policies, leading to more dependency on federal transfers and fewer powers.³⁹ We merely emphasize that in multinational systems as well, identity may not be the only constitutive factor for constitutional asymmetry. Moreover, we look for indications as to which forms of political asymmetry induces which forms of constitutional asymmetry. To test this hypothesis, we have asked all authors of country reports in this volume to describe the political system in terms of territorial, national, economic and social developments and to explain the reasons for constitutional asymmetry against this background. On the basis of the country reports, we are able to map those factors that are most constitutive of variety in legal arrangements.

Our second hypothesis claims that even though other factors may explain constitutional asymmetries, multinationalism—operationalised as variety in identity—is still one of the most important determinants. This is based on the links that doctrine reveals between constitutional asymmetry and multinationalism. Hence, according to the hypothesis, out of all factual varieties that may give rise to constitutional asymmetry, the multinational factor leads to the most or the strongest constitutional asymmetries. The presumption that divided nationalist multi-tiered states necessarily turn to constitutional asymmetry, however, is not unanimously shared⁴⁰ and is therefore in need of evidence. To test this hypothesis, we have asked all authors to elaborate where constitutional asymmetries emerge and where they are most pronounced. A questionnaire was put at their disposal to detect and measure asymmetries in three distinct domains by describing, for each sub-national entity or group of sub-national entities, its status, the distribution of power and competences, and fiscal autonomy.

In the third hypothesis, the distinctive factors re-enter the stage, this time in combination with multinationalism. Here, the assumption is that where the divide in identity factors such as language or religion corresponds with economic or other divisions, this congruence reinforces

constitutional asymmetry. This builds on the observation that political asymmetry in one aspect—for example demographic differentiation—coincides with other political asymmetries—for example, economic but also ideological differentiation—which may lead to increased regional consciousness.⁴¹ In Wolff's terms: size, wealth, strategic location and cultural importance all add to the significance of a national group to determine how multinational conflicts are addressed by institutional arrangements.⁴² To test this hypothesis, we will compare the country studies to find whether constitutional asymmetries are stronger in countries where such congruence is pronounced compared to countries where it is weaker.

The fourth hypothesis focuses on status as one of the three aspects of constitutional symmetry, leaving aside asymmetry in the distribution of powers or fiscal powers. We expect that in multinational states privileged status, i.e. more intensive involvement in the central decision-making process, will more easily be granted to groups on the basis of identity markers—e.g. language, religion, culture or ethnicity—rather than their belonging to a specific territorial sub-national entity. The hypothesis suggests that even in multinational states with liberal consociational arrangements, based on territorial units, corporate consociationalist views, based on identity, seep through.⁴³ In Belgium, the reform of the Senate is a telling example of how territorial representation is not to interfere with linguistic power relations: when the Senate transformed into a chamber of the sub-states, this resulted in a complex composition in order to maintain the relations between the French- and the Dutch-speaking groups, and at the same time the Senate was deprived of most of its powers, leaving decision-making to the confederal compromising of both language groups in the federal government and the House of Representatives.⁴⁴ Bosnia and Herzegovina prove to be similar. Three ethnic-national communities, namely Bosniaks, Croats, and Serbs, outweigh the territorial design in their representation in the second chamber of the Parliamentary Assembly of Bosnia and Herzegovina.⁴⁵ In particular, the second chamber in Bosnia and Herzegovina does not represent entities, but three constituent peoples based on their territorial affiliation.⁴⁶ The country reports will reveal whether these are isolated and context-specific examples, or whether this is a frequently occurring situation in multinational multi-tiered systems. In the latter case, we hope to find indications of which circumstances enhance the establishment of privileged status on the basis of identity markers.

With the fifth hypothesis, we pay attention to constitutional developments. Where groups with identity claims acquire a privileged status, the question arises as to whether constitutional dynamics push them further ahead; whether other entities catch up, leading to more symmetry; or whether other dynamics lead to recentralisation. Crucial in this respect is the position of the other sub-national entities,⁴⁷ consisting of either non-distinct dominant groups, or underempowered national groups.

On the basis of the country reports, we will identify crucial factors to one of these dynamics. The hypothesis lists the following possible factors that we envisage, in a non-exhaustive way:

Competing national groups vs non-distinct entities—First, we expect that competing national groups will push for empowerment in line with the privileged group, or block further benefits for this group, whereas sub-national entities with no strong feelings of regional identity will sooner remain content with their situation. The sharper the contrast between national groups and other territorial entities, the more assertive we expect autonomy demands of distinct groups to be, and the more asymmetry appears as a probable solution.

Fragmenting divided states—We can expect that in strongly divided states, fragmenting dynamics are dominant, resulting in further asymmetry. This is based on the observation that symmetry is the logical outcome of traditional ‘coming together’ federations, whereas asymmetry is the result of differences in bargaining power of sub-national groups in fragmenting states.⁴⁸ Building on the third hypothesis, we expect that where congruence between the various dividing factors is strong, developments of symmetrisation are less likely to occur.

Internal dynamics—A dynamic approach that includes developments over time, however, must also take into account that constitutional asymmetries may reinforce an initially weak sense of sub-national identity when the under-empowered groups regard themselves as losers in the federal bargaining game⁴⁹ or raise the stakes for groups that initially held lesser demands.⁵⁰ In Wolff’s words: Asymmetry ‘inevitably raises the specter of comparison, in itself a potential conflict causing factor’.⁵¹ Hence, catching-up movements, leading to symmetrisation processes, may turn up with some delay.

To ensure comparability, the authors in this volume have used the same template to structure the country studies. Hence, all chapters, after (1) an introduction, successively elaborate on; (2) the historical context; (3) political asymmetries; (4) the reasons why constitutional asymmetries

have emerged in the constitutional framework; (5) where constitutional asymmetries appear and where they are most pronounced; and (6) whether and how constitutionalism is linked with multinationalism.

For the comparative exercises, all countries are selected that are both multinational and multi-tiered. Section 3 explains what we mean by ‘multinational’ and ‘multi-tiered’ systems. It can be argued that to test the claim that multinationalism is inextricably linked with constitutional asymmetry, non-multinational federations should be examined as a test group. We leave this, however, for follow-up research. In this explorative study, we focus on multinational systems for reasons of feasibility. We do not (yet) argue that multinational systems per definition display more or more intensive constitutional asymmetries compared to non-multinational systems, which would require an examination of both groups. We do hypothesize that *if* the system is multinational, this is a determining factor for constitutional asymmetry, more than other factors that may also constitute constitutional asymmetry.

On the basis of that, 15 countries can be identified that match our criteria. These are, in alphabetical order, Belgium, Bosnia and Herzegovina, Canada, China, Ethiopia, India, Indonesia, Iraq, Italy, Malaysia, Myanmar, Pakistan, Russia, Spain, and the United Kingdom. In what follows, the country reports are also presented in alphabetical order.

In addition, we have a report on the European Union. Constitutional theory hardly addresses the EU in this context, despite the fact that asymmetry is the emerging point at issue in the EU.⁵² Evolution of the EU system over the years proves that it possesses dynamics immanent in multi-tiered systems under the umbrella of dynamic federalism. It is a system of multilevel governance, which adds a layer of complexity.⁵³ Constitutional asymmetries at the EU level concern distinctions in the relations of the different Member States with the European Union, but multi-tiered Member States establish additional distinctions in the relations of the sub-national entities with the European Union. The EU is nevertheless an important case study. It is a multi-tiered and multinational system and while symmetrisation defined as a process of European integration is one of its purposes, differentiation is now stated to be an essential and enduring feature of the European Union.⁵⁴ This is especially true in a light of differentiated integration, often seen as opposed to the foundation stones of the EU. What makes it even more interesting, is that while most multinational multi-tiered systems are fragmenting, the EU reflects a reverse pattern as it is by its nature an integrative

type of multi-tiered system. As an integrative system, the member states do not claim their political autonomy around differences ingrained in multinationalism. Rather, differences produce demands associated with maintaining the status of diversity. This is supported by the EU motto ‘united in diversity’. It is a presumption that customs and conventions in individual member states play a significant role in differentiation.⁵⁵

NOTES

1. Robert Agranoff, ‘Power Shifts, Diversity and Asymmetry’, in Robert Agranoff (ed.), *Accommodating Diversity: Asymmetry in Federal States* (Nomos, 1999), 11; Frank Delmartino, ‘New Dimensions of Asymmetry in (Quasi-) Federal States and in the European Union’, in Francesco Palermo, Carolin Zwillig, and Karl Kössler (eds.), *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems* (Europäische Akademie Bozen/Accademia Europea Bolzano, 2009), 37 and Charles D. Tarlton, ‘Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation’, *The Journal of Politics* 27 (1965), 861, 867.
2. Michael Burgess and Franz Gress, ‘Symmetry and Asymmetry Revisited’, in Robert Agranoff (ed.), *Accommodating Diversity: Asymmetry in Federal States* (Nomos, 1999), 43; Tarlton, ‘Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation’, 870.
3. Charles D. Tarlton, ‘Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation’, *The Journal of Politics* 27 (1965), 871.
4. Alain-G. Gagnon, ‘The Moral Foundations of Asymmetrical Federalism: A Normative Exploration of the Case of Quebec and Canada’, in Alain-G. Gagnon and James Tully (eds.), *Multinational Democracies* (Multinational Democracies, Cambridge University Press, 2001), 323; Alain-G. Gagnon and Guy Laforest, ‘The Moral Foundation of Asymmetrical Federalism: Normative Considerations’, in Ferran Requejo and Miguel Caminal Badia (eds.), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge, 2012), 89.
5. Rainer Bauböck, ‘United in Misunderstanding? Asymmetry in Multinational Federations’ (2001) ICE Working Paper Series, 15–22.
6. James Gardner and Antoni Abad I Ninet, ‘Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain’, *The American Journal of Comparative Law* (2011), 491, 493.
7. Michael Burgess, ‘The Paradox of Diversity—Asymmetrical Federalism in Comparative Perspective’, in Francesco Palermo, Carolin Zwillig,

- and Karl Kössler (eds.), *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems* (Europäische Akademie Bozen/Accademia Europea Bolzano, 2009); Alfred Stepan, 'Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism', in Edward L. Gibson (ed.), *Federalism and Democracy in Latin America* (Johns Hopkins University Press, 2004).
8. John McGarry, 'Asymmetry in Federations, Federacies and Unitary States', *Ethnopolitics* 6 (2007), 106–114; Stefan Wolff, 'Cases of Asymmetrical Territorial Autonomy', in Mark Weller and Katherine Nobbs (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (University of Pennsylvania Press, 2011), 18.
 9. Klaus-Jürgen Nagel and Ferran Requejo, 'Conclusions: Asymmetries and Decentralisation Processes—Comparative Comments', in Ferran Requejo and Klaus-Jürgen Nagel (eds.), *Federalism Beyond Federations* (Ashgate, 2010), 249–268.
 10. Christina I. Zuber, 'Understanding the Multinational Game: Toward a Theory of Asymmetrical Theory', *Comparative Political Studies* 44 (2011), 548.
 11. Burgess, 'The Paradox of Diversity—Asymmetrical Federalism in Comparative Perspective', 21; Angustias Hombrado, 'Learning to Catch the Wave? Regional Demands for Constitutional Change in Contexts of Asymmetrical Arrangements', *Regional & Federal Studies* 21 (2011), 479, 482–483.
 12. Christina I. Zuber, 'Understanding the Multinational Game: Toward a Theory of Asymmetrical Federalism', *Comparative Political Studies* 44 (2011), 546, 548.
 13. Burgess, 'The Paradox of Diversity—Asymmetrical Federalism in Comparative Perspective', 26.
 14. Stepan, 'Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism', 75. Also: R. J. Blindenbacher, R. Blindenbacher, and A. Koller, *Federalism in a Changing World: Learning from Each Other: Scientific Background, Proceedings and Plenary Speeches of the International Conference on Federalism 2002* (McGill-Queen's University Press, 2003).
 15. Francesco Palermo, 'Asymmetries in Constitutional Law—An Introduction', in Francesco Palermo, Carolin Zwilling, and Karl Kössler (eds.), *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems* (Europäische Akademie Bozen/Accademia Europea Bolzano, 2009), 13.

16. Hombrado, 'Learning to Catch the Wave? Regional Demands for Constitutional Change in Contexts of Asymmetrical Arrangements', 481; Wolff, 'Cases of Asymmetrical Territorial Autonomy', 24.
17. This follow-up research is part of the FWO funded project in which this study is situated and is carried out by Maja Sahadzic.
18. Stepan, 'Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism', 39.
19. Marc Helbling and Nenad Stojanovic, 'Switzerland: Challenging the Big Theories of Nationalism', *Nations and Nationalism* 17, 712, 712–714.
20. Stepan, 'Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism', 40.
21. For a critique of traditional federal theory and a claim for a dynamic approach, see Patricia Popelier, 'Subnational Multilevel Constitutionalism', *Perspectives on Federalism* 6 (2014), 1, E-3-5.
22. Agranoff, 'Power Shifts, Diversity and Asymmetry', 12–13; Ronald L. Watts, 'Contemporary Views on Federalism', in Bertus De Villiers (ed.), *Evaluating Federal Systems* (Juta & Company, 1994), 20.
23. See also: Francesco Palermo and Karl Kössler, *Comparative Federalism* (Hart Publishing, 2017), 14–16.
24. Mark Weller, 'Introduction', in Mark Weller and Katherine Nobbs (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (University of Pennsylvania Press, 2011), 4.
25. For example the semi-autonomous state of Zanzibar as part of Tanzania, Åland in Finland, Muslim Mindanao in Phillippines, Jejudo in South Korea, etc.
26. Ronald Watts, 'The Theoretical and Practical Implications of Asymmetrical Federalism', in Robert Agranoff (ed.), *Accommodating Diversity: Asymmetry in Federal States* (Nomos, 1999), 28. For example, Nagorno-Karabakh in Azerbaijan, Greenland in Denmark, Abkhazia and South Ossetia in Georgia, Svalbard and Jan Mayen Islands in Norway, etc.
27. Agranoff, 'Power Shifts, Diversity and Asymmetry', 16; Hombrado, 'Learning to Catch the Wave? Regional Demands for Constitutional Change in Contexts of Asymmetrical Arrangements', 481.
28. Watts, 'The Theoretical and Practical Implications of Asymmetrical Federalism', 27–29.
29. Ibid., 29 further adds the adjective 'relatively' permanent.
30. Agranoff, 'Power Shifts, Diversity and Asymmetry', 16; Burgess, 'The Paradox of Diversity—Asymmetrical Federalism in Comparative Perspective', 24.
31. Michael Keating, 'What's Wrong with Asymmetrical Government?' *Regional & Federal Studies* 8 (1998), 195.

32. Agranoff, 'Power Shifts, Diversity and Asymmetry', 16; Wilfried Swenden, *Federalism and Regionalism in Western Europe: A Comparative and Thematic Analysis* (Basingstoke: Palgrave Macmillan, 2006), 48, 63; Weller, 'Introduction', 8.
33. Palermo, 'Asymmetries in Constitutional Law—An Introduction', 11–12.
34. Burgess, 'The Paradox of Diversity—Asymmetrical Federalism in Comparative Perspective', 25.
35. John McGarry and Brendan Leary, 'Federation as a Method of Ethnic Conflict Regulation', in Sid Noel (ed.), *From Power Sharing to Democracy* (McGill-Queen's University Press, 2005), 282; Stepan, 'Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism', 54–55.
36. To this end, a questionnaire is provided to the authors of the country reports to assist them in their analysis. In follow-up research, the questionnaire will be used as a tool for more precise measurement and applied to a broader set of countries.
37. See, for example: Christian Leuprecht, 'Demographic Change—A Catalyst for Federal Asymmetry', in Francesco Palermo, Carolin Zwilling, and Karl Kössler (eds.), *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems* (Europäische Akademie Bozen/Accademia Europea Bolzano, 2009), 189, 189–220.
38. Amongst others: Agranoff, 'Power Shifts, Diversity and Asymmetry', 12; Burgess, 'The Paradox of Diversity—Asymmetrical Federalism in Comparative Perspective', 24; Swenden, *Federalism and Regionalism in Western Europe: A Comparative and Thematic Analysis*, 63; Watts, 'The Theoretical and Practical Implications of Asymmetrical Federalism', 25.
39. Watts, 'The Theoretical and Practical Implications of Asymmetrical Federalism', 33.
40. See, for example: Tillin Louise, 'United in Diversity? Asymmetry in Indian Federalism', *Publius* 37 (2007), 45, 45–67.
41. Leuprecht, 'Demographic Change—A Catalyst for Federal Asymmetry', 222.
42. Stefan Wolff, 'Complex Power-Sharing and the Centrality of Territorial Self-Governance in Contemporary Conflict Settlements', *Ethnopolitics* 8 (2009), 31.
43. For the concepts of liberal vs Corporate consociationalism, see, amongst others, Allison McCulloch, 'Consociational Settlements in Deeply Divided Societies: The Liberal-Corporate Distinction', *Democratization* 21 (2014), 501–518.
44. Patricia Popelier, 'Bicameralism in Belgium: The Dismantlement of the Senate for the Sake of Multinational Confederalism', *Perspectives on Federalism* (2018).

45. Maja Sahadžić, *Ustav Hercegovačko-Neretvanskog kantona o ljudskim pravima i slobodama i "Ostalim": o postuliranju krepke (ne)konstitutivne (ne)ravnoteže naustrib "Ostalih" i ustavnopravnom perverzitetu u Hercegovačko-Neretvanskom kantonu* (Centar za političke studije, 2013), 11–13; Maja Sahadžić, *Ustav Republike Srpske o ljudskim pravima i slobodama i Ostalim*⁶: O mogućnostima obvezujućeg i dozvoljenog narušavanja konstitutivne ravnoteže na normativnoj razini u korist nekonstitutivnih (Centar za političke studije, 2013), 11–15.
46. Article IV, *Constitution of Bosnia and Herzegovina* (1995).
47. Hombrado, 'Learning to Catch the Wave? Regional Demands for Constitutional Change in Contexts of Asymmetrical Arrangements', 480.
48. Palermo, 'Asymmetries in Constitutional Law—An Introduction', 11–12.
49. Hombrado, 'Learning to Catch the Wave? Regional Demands for Constitutional Change in Contexts of Asymmetrical Arrangements', 483.
50. Wolff, 'Cases of Asymmetrical Territorial Autonomy', 25.
51. Ibid.
52. Delmartino, 'New Dimensions of Asymmetry in (Quasi-) Federal States and in the European Union', 42.
53. See, for example: Martinico Giuseppe, 'Asymmetry and Complex Adaptive (Legal) Systems: The Case of the European Union', *Maastricht Journal of European and Comparative Law* 21 (2014), 281.
54. Frank Schimmelfennig, Dirk Leuffen, and Berthold Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation', *Journal of European Public Policy* 22 (2015), 764, 765. See also: Delmartino, 'New Dimensions of Asymmetry in (Quasi-) Federal States and in the European Union', 45. The EU has introduced several forms of asymmetry, such as the opting-out mechanism, the open method coordination, and enhanced cooperation to address individual demands for differentiated integration. Giuseppe Martinico, 'A Multi-Speed EU? An Institutional and Legal Assessment', *Istituto Affari Internazionali* 15 (2015) 1, 5–6.
55. For a comprehensive elaboration see: Janne Salminen, 'Depillarization and Shaping of AFSJ', *Maastricht Journal of European & Comparative Law* 18 (2011), 275.



Asymmetry and Complexity as a Device for Multinational Conflict Management. A Country Study of Constitutional Asymmetry in Belgium

Patricia Popelier

1 INTRODUCTION

Belgium is a divided multinational and fragmenting federation. Composed of two types of sub-national entities with different sets of competences, its basic structure is asymmetrical. Basic asymmetries evolved into territorial overlap, more asymmetries, and institutional complexity. The language divide, reinforced by socio-economic and ideological cleavages, is the most important determinant for this process. This is the main red thread throughout this Chapter. Another thread is that basic asymmetry results in more asymmetry. Importantly, Belgian federalism is a device for multinational conflict management. Differences between two major communities, divided by language, economic status and ideology, explain why Belgium transformed into a dual state,

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and why institutional arrangements are subordinate to the concern of maintaining stable power relations between the two major linguistic communities.

2 HISTORICAL CONTEXT: DEVELOPMENTS OF A TRIPLE FAULT LINE

Belgium was organized as a unitary state until 1970, when a devolutionary process was started that, after six state reforms, is still ongoing. The seeds that inspired this process were present from the beginning. When Belgium gained independence in 1831, efforts made at building national identity could not conceal that it already was a divided state, with three fault lines of language, economy and ideology.¹ These fault lines coincide but gradually changed in nature. Initially, the northern, Flemish part was Dutch-speaking, poor and catholic—apart from the elite—and the southern part was French-speaking, prosperous and secular. Presently, roughly speaking, the Flemish part is Dutch-speaking, prosperous and right-wing, whereas the southern part is French-speaking, less well-off and left-wing. This combination of fault lines resulted in a strongly divided dyadic state, with separate systems of education and channels of public opinion making as well as region-based political parties. Consequently, the Belgian federation was created on the basis of political asymmetries.

2.1 *Language*

From the beginning, the Walloons in the southern part spoke French. In the north, Flemings spoke Dutch—or rather a variety of Flemish dialects—but French was the language of the Flemish elite, used in the public sphere and required for key positions. Moreover, French was the official language of public affairs. According to the Constitution, the use of languages was optional, but the law could rule on this matter for acts of public authorities and judicial affairs.²

The efforts of the Belgian elite to construct a homogeneous French-speaking state were unsuccessful. Three influential groups helped to preserve the Dutch language against ‘Frenchification’: the catholic Church feared the influence of French revolutionary ideas; the monarchy feared annexation by an imperialistic France if Belgium were to become a homogeneous French nation; and some politicians, in the wake of the

Romantic era, were eager to protect national characteristics and dialects. This created an opportunity for the Flemish Movement to emerge.

Initially, this Movement's purpose was to create a Belgian national identity as a synthesis of Latin and Germanic cultures and languages.³ Gradually, it became more radical, fed by incidents that sharpened awareness of the Flemish case, indignation over the poor social-economic status of Flemings, and the democratic movement. With the introduction of the universal suffrage—plural in 1893, singular for men in 1918 and for women in 1948—the Flemish majority acquired political power. The plans to impose bilingualism in the entire country met with Walloon resistance and were countered with the introduction of the territoriality principle in 1921. Meanwhile, Belgium had acquired territory in the southern-east of the country with a small German-speaking population, ceded by Germany on the basis of the 1919 Versailles Peace as a reparation for the damage inflicted during the first World War.

According to the territoriality principle, the Belgian territory was divided into four linguistic territories: the homogeneous Dutch, French and (small) German linguistic territories and the bilingual Brussels territory along with the central administration. In administration, the language of the territory was to be the official language. In 1970, these territories were embedded in the Constitution. This became the starting shot for devolutionary dynamics in the Belgian state structure, with the Flemish Movement as a driving force.

The language divide also impacted the political party landscape. The first regionalist parties emerged in the wake of the Flemish Movement to protect Flemish interests, some aiming at Flemish independence. The *Frontpartij* was established after World War I, the *Volksunie* played an important role in turning Belgium into a federal state; the xenophobic and separatist *Vlaams Blok*, born out of the radical and fascist party *VNV* and renamed *Vlaams Belang*, managed to influence the program of more mainstream parties; the *N-VA* finally overthrew the christian-democrats as the dominant party in Flanders.⁴ At the francophone side the *FDF*, now *DéFI*, was established to protect the interests of francophones, with its power base in Brussels and the Flemish municipalities around Brussels where many francophones take residence. The Walloon *Mouvement populaire wallon* emerged in that same period of time to claim economic autonomy, resulting in various left-wing Walloon regionalist parties united as *Parti Wallon*, later *Rassemblement wallon*, but faded with the

rise of the Walloon socialist party.⁵ The electoral success of regionalist parties eventually led to the splitting of the traditional liberal, socialist and christian-democratic parties into separate Dutch and francophone parties. New parties, such as the Green Party, were also created as two different entities, with *Agalev*, now *Groen*, at the Flemish side and *Ecolo* on the French-speaking side. Hence, regional parties dominate the political landscape in Belgium, with (apart from marginal exceptions) no federal party remaining to protect federal interests.

Presently, the population—11.322.088 residents on 1 January 2017⁶—consists of four linguistic groups, identified on the basis of residence. The Dutch-speaking Flemings are the largest group, constituting a majority of 58%. About 32% of the population lives in the Walloon Region, covering both the French- and the German-speaking territories. The German-speaking community accounts for only 0.7% of the entire Belgian population. The remaining 10% lives in the bilingual Brussels territory. Brussels is bordered by Flemish territory. Initially a Flemish city, its status as Belgium's financial and administrative capital led to frenchification, with a decreasing Flemish population of less than 15%.⁷ Hence, the Flemings are a majority at the federal level, but a small minority at the Brussels level.

2.2 *Socio-Economic Context*

With its modern industry and Brussels' financial centre, the new Belgian state took a leading position in the nineteenth century.⁸ Wealth, however, was unevenly distributed. Coal mines and steel factories were mainly situated in the prosperous southern part, whereas the northern part was poorly developed and, apart from some centres of textile industry and an important Antwerp port, mainly agricultural.

This power balance turned after World War II. The economy in Flanders flourished as a result of the expansion of the Antwerp port and investments in the petrochemical industry and automobile manufacturing. Meanwhile, the Walloons were reluctant to abandon the declining coal and mining industries. Protests against the 1960 economic recovery plan by augmenting fiscal burdens and savings on government expenditures resulted in protests and strikes, bringing the Walloon but not the Flemish economy to a stand-still. When the contested law was voted after all, the socialist union leader blamed 'reactionary Flanders'. The Flemish growing political and economic power combined with different views

on socio-economic policy, put the Walloons in defense. When the federal government refused to save these industries through government subsidy, the Walloons claimed autonomy over economic policy. This was gained in the 1980s, but the Walloon Region was unsuccessful in bringing welfare to a level comparable to the Flemish situation.

2.3 *Ideology*

Traditionally, Flemish peasants were mainly catholic, whereas the labourers in the south were more often socialist and secular. In this context, federalization was considered an attractive construction for combining two societal models, a social one in Wallonia and a catholic one in Flanders.⁹

The catholic/secular divide remained a sensitive political issue especially in the domain of education. The catholic Church held a tight grip on the schools, whereas the liberals advocated a public school system. This led to a delicate compromise, laid down in political School Pacts, establishing the co-existence of a public school net and a private school net dominated by the catholic pillar. Considering the ideological divide, the public net was—and still is—dominant in Wallonia, whereas the private net dominates the Flemish educational landscape. Gradually, however, with secularization trends, the religious divide between north and south watered down.¹⁰

Nowadays, religion is mostly an issue that is situated in the cultural and value divide based on globalization and the influx of islamic immigrants, that also divides people within the linguistic regions. Political ideology, however, is still strongly linked with the linguistic divide. The Walloon population is left-wing oriented, whereas the Flemings vote mainly for centre and right-wing parties. As the Constitution imposes language parity in the federal government, the coalition is mostly heterogeneously composed. Only in recent years did the christian-democratic party collapse in favour of the right-wing nationalist *N-VA*, leading in 2014 to a coalition that banned the dominant francophone socialist party and ruled with the French-speaking liberal party, which, however, did not rely on a majority in the French linguistic group.

Clearly, the coincidence of language and ideological preferences brings the federal government in a delicate position. During government formation, parties have to choose between legitimacy or homogeneity. If composed of parties that have a majority in each language group, the

government will have to compromise between strongly diverging views in the political spectre. If the emphasis is on homogeneity to enable more uniform policymaking, the government risks lacking majority support in one of the main linguistic communities and difficulties to impose its policy in that part.

3 POLITICAL ASYMMETRIES IN BELGIUM

The triple divide lays the foundation for a complex, multinational society marked by the following political asymmetries.

Variations in size of population. The country is divided between two major communities of almost equal size, a majority of Dutch-speaking Flemings and a large minority of French-speaking Walloons. Flemings and francophones live together in the bilingual Brussels Region, where the Flemings constitute a small minority. The German-speaking Community amounts to less than 1% of the population.

*Variations in territory.*¹¹ The country covers an area of 30.528 km². The Flemish majority population occupies 44% of the country, whereas the Walloon Region covers 55% and the German-speaking Community only 3%. The Brussels population lives in the smallest part: the Brussels Region covers not more than 0.5% of the entire surface area.

Variations in economy. Since World War II, economic growth has been faster in Flanders than elsewhere in Belgium. Belgium is a relatively prosperous country, with an above-average gross domestic product (GDP) within the European Union.¹² The Brussels Region generates the highest GDP, but with the commuting component factored in, the Flemish Region is the winner.¹³ Economic policy and geography explain these differences. Walloons rely on interventionist economic policies, whereas Flemings prefer private initiative. Flanders benefits from its coastline, population density, means of transport, and the Antwerp harbour that provides a gateway to the world economy. Brussels is the administrative and financial capital of Belgium and hosts EU and NATO headquarters, but the more prosperous population tends to reside in the residential areas around Brussels, on Flemish soil.

Variations in identity. The suppression of the Dutch language and the underprivileged situation of Flemings gave rise to the Flemish Movement. As soon as the Flemish Movement demanded cultural autonomy, it very consciously started to create a Flemish identity,¹⁴ a task that the Flemish government took over once it gained autonomy.¹⁵ This included the construction of a Flemish collective memory

through heroic persons, symbols, flags, hymns and events¹⁶ but also the training of a Flemish elite by introducing Dutch as the official language for higher education in Flanders. In turn, the Walloon identity was less explicit and controlled, and more linked with the socio-economic emancipation of the region.¹⁷ At the same time, identification with an overall Belgian identity is weak, as the process of nation-building was hindered by the Flemish fight for recognition and protection of its language and culture.¹⁸

Variations in the political landscape. The division of parties along linguistic lines, and the demarcation of electoral districts according to linguistic borders, reinforce devolutionary dynamics. The traditional parties have gradually grown apart from their sister party; autonomist and separatist parties, but also new parties are created within one community without a linguistic counterpart. As a result of the ideological divide, sister parties do not have the same electoral weight: the christian-democrats were traditionally strong in Flanders but small in Wallonia; the socialist party is more dominant in Wallonia.¹⁹

For a long time, small parties joined the governing coalition for the sake of symmetry. This was abandoned in recent years. The last government also, for the first time, included an autonomist and even separatist party, *N-VA*, that has no sister party.

4 LOGIC BEHIND CONSTITUTIONAL ASYMMETRIES AND THEIR EVOLUTION

Devolutionary dynamics developed to deal with the triple divide between the two major communities. From the start, asymmetry was part of the construction. Further developments have partly strengthened and partly reduced the asymmetries.

4.1 *Asymmetries in the Set-Up of the Federal State*

Since 1993, the Belgian Constitution declares in its first Article that 'Belgium is a federal State composed of Communities and Regions'. The different concerns behind autonomy claims resulting from the linguistic and the socio-economic divide explain the creation of two different types of sub-national entities. Communities, with powers in the field of language, culture, person-related matters and education, resulted from Flemish demands for cultural autonomy; Regions were created to meet Walloon claims for socio-economic autonomy. While the three

Communities (the French, the Dutch and the German-speaking) and the three Regions (the Walloon, the Flemish and the Brussels) were each granted an identical set of powers, asymmetry was built in from the start with the co-existence of these two types of entities.

Moreover, the German-speaking Community and the Brussels Region were discriminated against in certain respects. For example, it lasted until the sixth state reform in 2012–2013 before they were granted the same (minimal) sub-national constituent autonomy. Their powers are also restricted in other ways. For example, the German-speaking Community has the power to regulate the use of languages but only for educational matters, not, as the other two Communities, in administrative matters and social relations.²⁰ Moreover, it has no significant say in the adoption of institutional laws, unlike the other linguistic communities. The institutions and competences of the German-speaking Community are not even entrenched in special majority laws.

Insignificant demographic and thus political power explains this situation for the German-speaking Community.²¹ This is different for the Brussels Region. The Flemish parties for a long time opposed its autonomy on a par with the other Regions for fear of being outnumbered by francophone sub-national entities, taking into account the considerable majority of francophones in Brussels.²² For this reason, the Brussels Region came to life only in 1988, eight years after the other Regions, and was restricted in several ways. For example, its laws (called ‘Ordinances’ instead of ‘Decrees’) are subjected to more extensive decentralized judicial review.

Conclusion—Constitutional asymmetries thus resulted from political asymmetries. Variations in identity or the linguistic divide, on the one hand, and variations in economy or the socio-economic divide, on the other, explain the co-existence of two types of sub-national entities with different powers. Variations in the size of the population explain why the German-speaking Community is put in second place. Variations in identity—in particular the minority status of Flemings in Brussels combined with their majority status overall—explain constitutional asymmetries with regard to the Brussels Region.

4.2 *Further Developments*

After six state reforms, some of the asymmetries have been straightened out. For example, in 2012–2013, the German-speaking Community and

the Brussels Region acquired constituent powers (roughly) on a par with the other regions and communities. This can be considered the result of the German-speaking Community's friendly but persistent request for equal powers.²³ A few asymmetries remain as a result of diversity in identity: the Brussels constituent powers are more restricted to maintain the balance between the two linguistic groups and protect the Flemish minority. Overall, however, asymmetries have deepened. Some communities exercise regional powers, the French Community has divested itself of certain powers, some regions exercise community powers, and two mini-communities were established.

First, the regions are the preferred recipient for new transfers of powers. This is because the Constitution restricts community powers to four specific categories, whereas it leaves the catalogue of regional powers to a special majority law.²⁴ This way, the fifth state reform could take place without constitutional revision, thereby avoiding an interim election.

More importantly, the different views on both sides of the language border, with the francophone's preference for a region-based federation and the Flemings' preference for communities, resulted in more structural asymmetries.

Article 137 Constitution allows the Parliaments of the Flemish and the French Communities to exercise the competences of the Flemish respectively the Walloon Regions. The Francophones have not made use of this provision, whereas the Flemings took the opportunity to merge the institutions into one Flemish Parliament and Executive. Hence, the Flemish Community, unlike the French Community, also exercises (all) regional powers. Article 139 of the Constitution allows the Parliament of the German-speaking Community to exercise, by common accord, competences of the Walloon Region. On this basis, the German-speaking Community regulates, within its territory, matters such as monuments, employment and decentralized administrations. Consequently, the German-speaking Community also exercises regional powers, but only for a few matters.

Instead, the French Community Parliament used Article 138 of the Constitution, which enables the transfer of its powers to the Walloon Region and, as the Region has no competences in Brussels, to the French linguistic group of the Brussels Parliament. Hence, the Walloon Region can now exercise community powers. Since the sixth state reform, the Brussels Region can also exercise certain community matters that are qualified as 'bicultural matters with regional importance'.²⁵

Some other community matters are also regulated by Brussels institutions, but not by the Brussels Region as such. The language groups that make up the Brussels Parliament have a separate status as the Joint Community Commission with competences over person-related community matters regarding persons and bilingual institutions.²⁶

Moreover, this brought to life a new asymmetry between the French and the Dutch language group in the Brussels Parliament. These language groups already have a separate status as the Joint Community Commission with competences over person-related community matters regarding persons and bilingual institutions. As separate language groups, the French and the Dutch language group of the Brussels Parliament operate as decentralized community bodies, called the French Community Commission and the Flemish Community Commission, which implement the laws (called Decrees) of their, respectively, French and Flemish Community in line with the specific Brussels situation, and establish unilingual institutions such as schools and libraries. For matters that are transferred from the French Community to the Walloon Region and the French Community Commission, the latter, unlike its Flemish counterpart, has an autonomous status and can adopt Decrees equal to Acts of Parliaments.

With all this, two new communities were created, with autonomous lawmaking powers: the Joint Community Commission and the French Community Commission. As to status and scope of powers, however, these mini-sub-national entities are not on an equal footing with the other Communities.

Finally, since the sixth state reform, the Regions are permitted to organize advisory referendums on exclusive regional matters.²⁷ At the federal level, referendums are prohibited²⁸ because of their potentially polarizing effects.²⁹ This problem is absent at the level of the homogeneous Walloon and Flemish Region, but present in the linguistic heterogeneous Brussels Region. There, an additional majority requirement protects the Flemish minority: the organic referendum ordinance has to be adopted with a 2/3 majority, similar to the other Regions, but also with a majority in each language group.³⁰ Additional protective measures are left to the Brussels Parliament. Until now, however, none of the Regions has made use of the power to regulate a framework for the organization of advisory referendums. The Communities cannot organize referendums, because of the problems for the Flemish and the French Community to organize this in Brussels, in the absence of

sub-nationality.³¹ The German-speaking community, although homogeneous, is penalized by the identical treatment of the communities.

Conclusion—It was established above that the Flemish preference for communities resulted from variations in identity and the Walloon preference for regions from variations in economy. The continuation of these different preferences resulted in complexity and asymmetry, with the Flemings accentuating the Community by having the Flemish Parliament assume the powers of the Region, and the French Community Parliament rejecting some of its powers in favour of the Walloon Region and the French Community Council.

The situation in Brussels, where different identities meet in inverse proportions, has complicated the state structure even further. As the Brussels population is partly French- and partly Dutch-speaking, the French and the Flemish Community both have jurisdiction over Brussels. In the absence of sub-nationality, both communities only have power over unilingual institutions in Brussels. Other community competences are distributed over the Joint Community Council, the federal authorities and the Brussels Region. The position of the Flemish minority in Brussels is the strongest in the Joint Community Council, where they have a (watered down) veto right.

Finally, complexity—with asymmetric tails—results from territorial overlap. The Flemish Region overlaps with the Flemish Community, minus the Brussels territory. The Walloon and the French Community share the same territory, but the French Community extends to Brussels, whereas the Walloon Region also has jurisdiction over the German-speaking territory. As a consequence, all residents in Belgium are subjected to the authority of two or more sub-national entity authorities.

5 DETECTING CONSTITUTIONAL ASYMMETRY WITHIN THE SYSTEM

5.1 *The Distinct Status of Sub-national Entities*

5.1.1 *Recognition and Entrenchment of the Communities and Regions*

Article 1 of the Constitution states that ‘Belgium is a federal state composed of Communities and Regions’. The next two articles name the Flemish, the French and the German-speaking Community, and the Flemish, the Walloon and the Brussels Region. The Joint Community

Commission and the French Community Commission are not listed as distinct communities, although they do function as such in fact.

The Constitution lists the categories of powers that can be transferred to the communities: education, culture, person-related matters and languages. Except for educational matters, the actual competences within these categories are designated by a special majority law, but they have to fall under these categories, and, conversely, such matters cannot be transferred to the regions. The powers of the regions are not specified in the Constitution. Any power other than community matters can be transferred to the regions with a special majority. A constitutional revision requires an interim election and a 2/3 majority in House and Senate. A special majority law requires a majority in each language group and an overall 2/3 majority. Hence, in both cases, the competences are entrenched. This is, however, not the case for the German-speaking Community. The Constitution lists the same categories of powers, but, apart from education, an ordinary law designates which matters fall under these categories. Moreover, an ordinary law regulates the composition and procedures of the sub-national entity institutions. For the other sub-states, this is entrenched in a special majority law.

All Communities and Regions have lawmaking and executive powers. Sub-national acts of Parliament are called 'Decrees' but they have the same status as federal Acts of Parliament. The parliamentary acts of the Brussels Region and the Joint Community Commission are called 'Ordinances'. While they also have the force of law, they are treated in a somewhat inferior way. Constitutional review of parliamentary acts is centralized with the Constitutional Court and decentralized courts can only review these acts against international law. However, decentralized courts can also review Ordinances against provisions in the Constitution and the organic special majority law on the Brussels institutions, in so far as they do not fall under the jurisdiction of the Constitutional Court.³² The importance of this exception decreases with the gradual enlargement of the Constitutional Court's powers.

Hence, the smaller entities—the German-speaking Communities, the Joint Community Commission and the French Community Commission—are treated in a different way. The latter two are not formally recognized by the Constitution, whereas the German-speaking Community's powers are not secured by a special majority, and the Brussels Ordinances are put under stronger judicial review.

5.1.2 *Constituent Powers*

The design of the sub-national entities is largely regulated by the constitution and federal laws. The Constitution establishes the principles, such as the parliamentary system, direct and periodic elections and criminal proceedings against members of the sub-national entity executives. The federal laws stipulate further details, including the composition of the parliament and government and the lawmaking procedure.

An embryo of constituent power is granted to the sub-national entities, the Joint Community Council and the French Community Council not included. The constitution allows the federal lawmaker to designate those matters relating to the election, composition and functioning of the parliament and to the composition and functioning of the governments, which can be regulated by the sub-national entity parliaments by a 2/3 majority. The federal law stipulates which precise aspects can be regulated by the sub-national entity Parliament. The institutional autonomy granted to the sub-national entity is, however, limited in quantity and scope.³³

As mentioned, these powers were initially denied to the Brussels Region and the German-speaking Community. Since 2012–2013, they are put on an equal foot with the other entities.

However, the scope of the constituent powers is narrower in the Brussels case in order to maintain linguistic power balances.³⁴ For example, unlike the other Parliaments,³⁵ the Brussels Parliament is not allowed to change the number of MPs. This is because the number of 89 MPs results from a fixed number of seats for each language group, with an overrepresentation of Flemings to allow the small Dutch language group effective representation.³⁶ It does have the power to change the maximum number of Government officials, but, unlike the other sub-national entities, it has to respect the proportion between French- and Dutch-speaking members. Also, the power to regulate the functioning of the Government is more restricted in the Brussels case. For example, unlike the other Parliaments, the Brussels Parliament is not allowed to regulate the votes of confidence or no-confidence.

Difficulties arise in the exercise of constituent powers as a result of the complex and entangled institutional design. For example, the Constitution allows the federal law to entitle the sub-national Parliaments to determine the term for which they are elected and the date of their election. The implementing law—requiring a special

majority except for the German-speaking Community—has not yet been adopted. But even if it were, the Flemish Parliament would have to coordinate with the Brussels Parliament to change the date of election: to identify the Flemish voters that elect the six Brussels members in the Flemish Parliament, voters only have access to the ballot if they have first voted for a Flemish party list in the simultaneous Brussels election.

5.1.3 Representation and Participation in Federal Decision-Making

a. In constitutional and legislative decision-making

In 2012–2013, the Senate was transformed into a more genuine chamber of the sub-national entities.³⁷ Its composition, however, is complex, so as not to interfere with the proportions of the Dutch and French language group. Moreover, not all sub-entities are represented. Most of all, with the transformation of the Senate, the assembly has been devoid of most of its powers.

The composition is as follows:

- 29 Senators are designated from the Flemish Parliament or the Dutch language group of the Brussels Region. One of them must have residence in Brussels.
- 10 are designated by the Parliament of the French Community, at least nine of which are member of this Parliament. Three must be member of the French language group of the Brussels Parliament.
- Nine are designated by and from the Walloon Parliament. Two are designated by and from the French language group of the Brussels Parliament.
- One is designated by and from the Parliament of the German-speaking Community and does not belong to a language group in the Senate.
- 10 senators are co-opted based on federal elections, six in the Dutch language group, four in the French.

Hence, the Flemish Community (including the Region), the French Community, the Walloon Region and the German-speaking Community are represented in proportion to their population. The consequence of spreading the Brussels representatives in two language groups is that the Brussels Region and the Joint Community Council are not represented,

in contrast to the Brussels language groups which have a separate stature as the French and the Flemish Community Council—the first as a sub-national entity, the latter merely a decentralized body subordinate to the Flemish Community.

Simultaneously, the Senate's powers, once at a par with the House of Representatives, have been drastically reduced. The standard procedure is that laws are adopted by the House without the Senate's involvement.³⁸ For the categories listed in Article 78 Constitution, the Senate has the right to discuss and amend laws adopted by the House, but this is not binding: the House has the last say. For the categories listed in Article 77 Constitution, the Senate has the same powers as the House. Both lists, however, are brief, comprising mostly institutional matters that affect the federal state structure as well as constitutional revisions. Even in shared matters—the rare concurrent power for tax laws, some framework matters such as consumer protection—the Senate is excluded from the lawmaking process. The Senate's main role, therefore, lies in its involvement in institutional matters, especially on the occasion of state reforms.

Multinational conflict management explains the Senate's increasing insignificance: territorial representation is not to interfere with the power relations between the language groups. Also, devolving dynamics have resulted in a preference for individual sub-national entity veto powers over collective involvement.³⁹

Evidence of the first is the fact that the Senate is not only representative of the sub-national entities, but also composed of two language groups, combining territorial and identity representation. However, the Senate is redundant for identity representation. The House of representatives as well is made up of a Dutch and a French language group. Each language group can veto the adoption of (institutional) laws that require a special majority; for most other laws, it can use the so-called alarm-bell procedure to suspend the procedure if it is of the opinion that the measure will harm its interests. In the House, the language groups do not necessarily coincide with the sub-national entity majorities. However, language interests are located mainly in the French Community, the Walloon Region and the Flemish Community (including the Region), leaving the Brussels Region split up, and the German-speaking Community unrepresented.

Each sub-national entity, however, can get directly involved in the lawmaking procedure: by expressing its concern that the proposal is