(Con)federalism:
Cure or Curse?

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Kris Deschouwer & Johanne Poirier

According to its Constitution, since 1993, Belgium is a federal country. That is therefore its official status. The terms 'federalism' and 'federal state' were already frequently used during the decades preceding this self-declaration, but they were then part of the vocabulary of groups wanting the unitary Belgian state to be reformed. Federalism used to be a challenge. Federalism belonged to the language of the regionalists. Federalism referred to an alternative to the existing situation and was defended by groups opposing the institutional *status quo*.

Today, federalism has become the label of the *status quo*. Federalism is now used by those defending the existing Belgian state structure. Political parties and other groups defending a further transfer of powers to the substates can then obviously not refer to federalism as an alternative anymore: they have started using the term 'confederalism'. The term is not, however, used in a univocal manner. Hence, mainstream political parties such as the Flemish Christian Democrats (CD&V) or Flemish Liberals (Open VLD) have formally adopted confederalism as a political option, to explain and defend their vision of the future of Belgium in which Flanders would receive more powers. When the Nieuw-Vlaams Alliantie (N-VA) – a party that clearly aims for an independent Flanders in the long run – refers to confederalism, it refers to an intermediate step between federalism and full independence. For the N-VA, the confederal solution is needed to gradually move towards that end-goal. For other parties in Flanders, not wanting to go as far as the N-VA, the label confederalism has therefore become tainted. On the one hand, Vlaams Belang does not see why this intermediate step is needed. On the other, mainstream parties defending further devolution but without the breaking up of Belgium as ideal end point, have dropped confederalism from their vocabulary. Open VLD has done so formally, while CD&V is simply not using it any more.

Interestingly enough, while Flemish parties are in search of the right terminology for labelling their view on the future of Belgium and struggle with the meaning of confederalism, Francophone political leaders – fearing that Flemish independence might be a real option after all – basically accept the N-VA definition of confederalism as a step towards this independence. Confederalism is seen as – in the words of King Albert in 2006 – nothing else but 'velvet' separatism (*omfloerst / feutré*).

The battle of words is also visible in the decision to rename – at least for communication purposes – the French Community of Belgium. It is now labelled 'Fédération Wallonie-Bruxelles'. The term 'federalism' has positive connotation, as it suggests a strong association based on solidarity. But the expression FWB also sends out the message that were Flemish independence to actually occur, the two other regions would remain strongly united an indivisible. It is clear that federalism here also refers to a strong union and not to a loose association that can easily be broken up.

All this raises two interesting and related questions. The first relates of course to terminology. One wonders whether there is, or can, be a clear and unambiguous way to distinguish between different types of territorial (re)organization, in particular between federalism and confederalism. In a country that invests considerable energy in debates concerning its institutional future, it might indeed be useful to agree on some basic terminology. Secondly, in a country that is engaged in apparently never-ending discussions about what it actually is, and what it might become, it is also interesting to

ask whether fiddling with the territorial organization of the state is a fruitful avenue. Can federal-type solutions really bring about a stable and lasting equilibrium? Or is there something like an inevitable slippery slope from unitarism to federalism to confederalism and finally full separation?

The contributions to this e-book deal with these two questions. The first article – by John Loughlin – immediately questions our vocabulary. Loughlin argues indeed that the classification of unitary states, federal states and confederations of states does not fully capture the variety of institutional arrangements in the contemporary world. Within each of these subcategories, numerous different arrangements are possible. This leads to states that are of a rather hybrid nature and that combine characteristics of these different classical types, depending on specific social, political, economic and geographic conditions. To his conclusion that the unitary-federal-confederal typology is no longer adequate to describe the territorial structures of states he also adds a normative thought. The old and simple and one-dimensional models can no longer provide the conditions for democratic legitimacy and cultural recognition is states and societies marked by social and cultural heterogeneity.

Jan Velaers agrees that a large variety of hybrid structures exists, but he nevertheless defends a careful use of terms that refer to the constitutional nature of a state. In the Belgian political debate the label confederation is too often used to simply refer to a federal system with a very large degree of autonomy for the substates. That typically Belgian use of the word is misleading, and Velaers warns that constitutional theory is not a 'national discipline'. One can indeed clearly differentiate between a federation, where the power to distribute the competences (or the *Kompetenz-Kompetenz*) is at the level of the union, and a confederation where that power belongs to the constituent units. While this constitutional distinction is clear and unambiguous from a legal point of view, one can however also look at the way in which the decision-making game is actually being played. This political science approach certainly reveals that Belgium, which is a typical 'consociational' democracy with power-sharing devices and mutual vetoes, elicits some characteristics of a confederation.

Johanne Poirier in her contribution first reflects on the difference between federa*tion* and confedera*tion* on the one hand, and federal*ism* and confederal*ism*, on the other hand. The first terms describe an existing institutional arrangement, while the 'isms' are ideologies that point at preferred arrangements. That semantic distinction facilitates the recognition that there can be federalism without a federation and confederalism without a confederation. She also underlines that federations can have different origins. While the classic federations were (mostly) the result of associations, more recent federations are the result of devolution. In the same vein, it is arguable that confederations might be formed by devolution rather than – the classic and 'normal' way – by bringing together sovereign states. And just like Velaers, Poirier reminds us of the fact that some rules of the game of the Belgian federation today (the mutual vetoes and double majorities in particular) already contain elements of confederal arrangements. Existing state forms can indeed be quite hybrid and challenge the classic distinctions.

The latter is certainly true of the *Fédération Wallonie-Bruxelles*, the new name adopted – for communication purposes - by the French Community of Belgium in 2011. After analyzing what it is and what is does, Johanne Poirier concludes that the three words composing the *Fédération Wallonie-Bruxelles* are misleading. It is not a federation, and its constituent parts are not Wallonia (because the German Community is not part of it) and not Brussels (because the Flemish Community of Brussels does not belong to it). Just like political elites in Flanders use the term 'confederation' in a confusing way, the Francophone leaders have rebranded the French Community by using the expression

'federation' in a confusing and politically obfuscating way. Neither side seems to be very keen on conceptual clarity. Both might have good reasons for this conceptual murkiness, but that does not add to the quality of the debates on what Belgium is or should be.

That debate is however quite relevant. Belgium has reorganized its institutional setup in an attempt to accommodate the linguistic diversity and the demands for autonomy by communities and regions. Whether this type of response reduces tensions, or on the contrary exacerbates them, is a question that been widely discussed. It is referred to as the 'paradox of federalism', because there are very good arguments for defending both the positive and the negative consequences of federal-type solutions. In his contribution Kris Deschouwer presents this paradox, and investigates whether the expected 'problematic' consequences are present in Belgium. The results are mixed, with quite strikingly no strengthening of subnational identities, no specific dynamics of regional elections, but the enduring presence of regionalist parties in Flanders. Most of the favourable conditions for a so-called 'ethno-federation' to work properly are also present in Belgium, like a stable democracy and a prosperous economy. Only the lack of state-wide parties and thus of incentives for cross-border electoral mobilization makes the central decision-making sometimes difficult, long and painful. Yet when comparing Belgium to other ethno-federations – of which quite a number ended in bloodshed – the balance is not too negative. Belgium has developed a hybrid institutional answer to a complex society.

Commenting on this, Michael Keating posits that secession and non-secession – as possible end-points of institutional reform – are not radically opposed alternatives. Belgium is – like other countries – a good example of the rescaling of states and political communities and of the reconfiguration of the relation between identities, states, nations and political institutions. Organizing the world in ethnically homogenous units is an illusion. And in plurinational states one should not expect to find a definitive solution for the organization of political authority. A provisional agreement is enough. The Belgian case – so he concludes – shows how states can successfully muddle through.

Philippe Destatte concludes the discussion by stating that referring to ethnicity is probably not a fruitful way to rethink the future of Belgium. The country has changed and evolved, and Flanders, Wallonia, Brussels and the German-speaking community are increasingly moving form a model based on ethnicity to a model based on citizenship. That should allow the country to move forward. The intellectual fertility and the institutional creativity that is needed to build the federation (or the confederation for those who prefer that label) should promote balance between autonomy, cooperation, association, transparency, social cohesion and therefore also a more effective democracy. The battle of the labels is less important than the actual search for institutional tools that can improve the well-being of citizens.

In the end, the question of whether (con)federalism is a cure or a curse for complex societies in general, and for Belgium is particular, receives a predictably nuanced answer. Institutional designs, whether federal, confederal, or hybrid carry a number of advantages and hazards, which evolve with time and do not call for unanimous evaluations. A cure for some may be a curse for others. And, more importantly, a cure at some point in time may turn into a curse in the long run. Conversely, what may have appeared as a curse for some time may actually carry the seeds of (a temporary) cure. The six contributions that follow challenge the idea that there are simple univocal definitions, unquestionable normative solutions or "once and for all" institutional arrangements.

FEDERALISM, FEDERATIONS AND CONFEDERATIONS: TOWARDS HYBRIDITY

John Loughlin

Introduction

The distinction between confederations, federations and unitary states is the classical way in which political science has described the basic types of territorial organization, the latter two being central to the conception of the modern nation-state. The exemplars of those two types are, respectively, the United States and France. Both are nation-states but the way in which nation relates to state differs in each case. In confederal arrangements, the relation between nation(s) and state(s) is also often complex. The difference between federal and unitary states, on the one hand, and confederal arrangements, on the other, is that the confederation itself does not become a nation-state in its own right even if there is a sharing of certain functions at the confederal level.

This chapter will argue, however, that these distinctions are inadequate to describe the full range of territorial arrangements in contemporary political systems. The chapter begins with a brief historical survey of the origins of the nation-state and how this affected territorial arrangements (I). It further argues that both within federal and unitary systems there are a variety of arrangements so that we can discern different types of federation and a variety of forms of unitary state. As for classical confederations, they are composed of nation-states. Hence, a confederation is not itself a nation-state (III). The question that will be asked in this chapter is whether the disaggregation of nation and state which has led to pluralistic arrangements in federal and unitary states means that the lack of 'nation-stateness' of confederations really matters any longer. Furthermore, this variety is becoming even more complex as a result of the transformation of the nation-state under the impact of macro processes such as globalisation, Europeanisation (within the EU and those countries aspiring to become members), economic transformations and a new world division of labour, neo-liberalism, and societal and value change. This has not led to the abolition of the old system of nation-states or even of federal and unitary states, but rather to a more complex system of hybrid states which combine features of both (Loughlin, 2009). We shall argue that it is necessary to re-examine the conceptual framework that we use to describe and analyse contemporary political systems (III). Finally, we conclude that this analysis raises issues about democratic theory and practice that deserve further reflection.

1.   Historical aspects of the development of the nation-state: two tendencies

The sovereign state was already in the process of formation before the Reformation (Spruyt, 1996), the Thirty Years War, the Peace of Augsburg (1555) and the Treaty of Westphalia (1648) but it was the last two events that gave it its 'modern' shape. What this means is that, after Westphalia, with its confirmation of the principle *cuius regio, eius religio* sovereignty was interpreted as 'independence' from interference by any other states. The original Treaty created confessional states – Lutheran and

Catholic – within the Holy Roman Empire. And the principle of non-interference referred to interference by one confessional state into the affairs of another such state (Croxton, 1999). It would be anachronistic to speak of 'confederalism' during this early modern period as the latter really only developed with the full formation of the nation-state (see below).

This principle was later extended to Calvinist states such as the United Provinces and Scotland. During the 17th and 18th centuries, there grew up the notion among political philosophers such as Hobbes and Locke and the French *philosophes* that the state should be free of any entanglement with organised religion and this laid the intellectual groundwork for the arrival of the secular state and, finally, at the French Revolution, of the nation-state. By the first quarter of the 20th century, and despite the long 19th century history of imperialism, colonialism and warfare, the principle of non-interference in the internal affairs of another state had become a basic principle of international relations consecrated by the Wilsonian Principles of national self-determination at the League of Nations. It still remains to the present day as the organising principle of the United Nations, although it has been modified by developments such as the 'responsibility to protect' when confronted with situations of genocide and crimes against humanity (Orford, 2011).

What was less uniform, however, was how the Lutheran and Catholic Westphalian states of the Holy Roman Empire and, later, Calvinist and Anglican states, would be organised *internally*. It is sometimes forgotten that the 'Westphalian' state in 1648, and the immediate period after this, was not the 'Westphalian' state of contemporary International Relations theory. The early 'Westphalian' state, on the contrary, was, as remarked above, a *confessional* state in which (Catholic, Lutheran and Calvinist) theology shaped the form of the state itself. This was one of the factors that led to the emergence of different state traditions (e.g. Germanic, French, Scandinavian, Anglo), including forms of territorial organisation, that we have today, even if the properly theological origins have been all but forgotten (Dyson, 2010 [1980]). It is important, however to remember these origins.

Indeed, the early theorists of the state such as Hobbes, Bodin, Althusius, Locke and Rousseau, whose ideas helped shape modern state organisation, all wrote within a theological context, even if they were themselves non-religious or even anti-Christian. Two of these authors are especially important: Jean Bodin (1529/30-1596) and Althusius (1557–1638) as they represent respectively Catholic and Calvinist approaches (although others within these traditions proposed other approaches as neither Catholicism nor Calvinism are homogeneous systems). Both were writing in the context of the disorder and violence that had followed the Reformation (Cavanaugh, 2009). Both sought to find a political system that would accommodate internal religious diversity within the confessional states and, at the same time, preserve public order and avoid violence.

1.1 The absolutist conception of the state

Bodin was a theorist of the absolute state which he thought should be uniform, centralised and with a single principle of sovereignty residing in the monarch (Nemo, 2003: 79-108). Sovereignty is *indivisible* and cannot be shared with any other body such as the aristocracy, the church or, least of all, the 'people', thus ruling out what would later be called 'constitutional monarchy'. It is *perpetual* and this necessitates male hereditary monarchy. Sovereignty is *absolute* in the sense that the sovereign is *legibus solutus*, that is, above law itself and able to make or dissolve laws. Finally, sovereignty is *not*

based on a contract with the people since this would mean the sovereign sharing sovereignty with the social body and such sharing would go against the principle of indivisibility.

Nevertheless, despite its absolute nature, sovereignty, when seen from a human perspective, is limited by 'les lois de Dieu et de la nature', the laws of God and nature. The application of these principles leads to a particular kind of state: it is *hierarchical* and, for Bodin, also *corporatist*. This implies that the different parts of society – the 'corps intermédiaires' such as the nobility, the clergy and the 'Third Estate' – would be harmoniously incorporated into the state, under the authority of the monarch. Finally, Bodin stressed that a particular *territory* should have only one unique sovereign authority.

It is easy to see how this conception of the state underlies the French tradition of the 'one and indivisible' unitary state and nation (Tocqueville, 2011 [1865]), which in turn influenced other states such as Spain, Italy and, of course, the new Belgian state founded in 1830. In its secularised form, the state is also unconstrained by the 'lois de Dieu' even if it may be by the 'lois de la nature'. Of course, the French monarchy had been engaged in a process of centralisation since the early Middle Ages and, in some ways, this reached its apogee with the reign of Louis XIV and Cardinal Richelieu. However, the Reformation reinforced these trends. The French monarch often allied himself with the Protestant groups in opposition to both the Catholic Holy Roman Emperor and the Pope in Rome. Nevertheless, the internal organization of the state was much more influenced by Catholic conceptions than by those of Luther or Calvin. Throughout 17th and 18th centuries, and then after the French Revolution, the French state adopted what was basically its modern secular character.

1.2   The pluralist conception of the state

Absolutist and monist theories were not the only response to the crises and disorder of the 16th and 17th centuries. Some thinkers viewed pluralism as an intrinsically good thing and sought to devise systems that would accommodate diversity. The German Calvinist Johannes Althusius

> "conceived of a polity as a federally constructed edifice of multiple layers of 'consociations' such as family and kinship, guilds and estates, cities and provinces - in direct contrast to Jean Bodin's conception and defence of the unitary monarchical state as guarantor for order and stability. Taken as a whole, the different consociations form a system of 'societal federalism' in which representation is functional (e.g. professional guilds) as well as territorial (cities and provinces)".[1]

Hugo Grotius (1583-1645), a contemporary of Althusius and a fellow Calvinist, elaborated in his *De Jure Belli ac Pacis* (*On the Law of War and Peace*, 1625) what became, in effect, the modern theory of international relations, stressing the independence of states but also the necessity of their sharing a common set of values in order to avoid warfare. One important aspect of the Calvinist approach, drawing on the Old Testament, was its 'covenantal' dimension: just as the people of God had entered into a 'covenant' with God, so too Godly societies and rulers were built on 'covenants' with each other. The Dutch Republic, also known as the Republic of the United Netherlands (1581–1795), was organised along federal lines and reflected Althusian principles after it gained its independence from Spanish rule.

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1 Rittberger B. 2009; for a full exposition of Althusius's ideas see Hueglin, 1999.

According to Daniel Elazar, it was the Catholic (Bodinian) rather than the Protestant (Althusian) concept that became the dominant form of the modern state with most modern nation-states taking the centralised unitary form (Elazar, 1998: 2). Even the Netherlands adopted the unitary state model or, at least, it was imposed there by Napoleon even though some of the more consociational features of Althusianism did remain in the actual operation of the state. The Dutch case illustrates that, although a state may adopt a *de jure* unitary centralised form, the actual operation of its administration and the relationships between the central state and its territorial entities (the *gemeente*) may be *de facto* closer to a federal system (Hendriks, 2001).

The United States was the first modern federation and its foundation was strongly influenced by the covenantal principles of its Puritan founders (McCoy and Baker, 1991). Although they had common origins in 17th century England, and although for the most part they shared the Protestant faith and the English language, the original thirteen colonies had developed quite distinctive characteristics. First, they were marked by different versions of Protestantism: Puritan Massachusetts professed a different theology from Episcopalian (Anglican) Virginia, not to mention the Quakers of Pennsylvania. Furthermore, one colony, Maryland, had Catholic origins and Rhode Island was tolerant of all faiths including Jews. Second, there was the difference between the slave-owning states in the South and the non-slave-owners of the North. During the War of Independence they were united in their opposition to English taxation policies but there was little else to unite them. For these reasons, the early experience of union took the form of a confederation which allowed the individual colonies what was in effect the autonomy of independent states. It was only later when this proved unworkable that fully federation was considered and adopted. There was, however, some ambivalence on the part of the Founding Fathers as to whether the federation should be centralised or decentralised. James Madison stressed the former while Thomas Jefferson stressed the latter. The process of consolidation of the new state reflected this tension, which has never fully disappeared (Kincaid, 2013).

2.   Confederal, Federal and Unitary States: still viable distinctions?

It is this history and the dominance of the two great models – the US federation and French unitary state – which have led to the formulation of the classic division between federal and unitary states that is found in text-books of political science and constitutional law. This division, however, has become increasingly less clear-cut as federal systems began to develop characteristics of unitary states and unitary states have become less and less unitary, a phenomenon that Burgess describes as 'the penumbra of federalism' (Burgess, 2013: 59).

Part of the problem is the difficulty of definition. What counts as a federation or a confederation and when does a unitary state become a federation? Are there any fundamental characteristics besides that of self-definition that allows us to distinguish between the different categories? One of the problems of definition in federal scholarship has been that the US, because of its historical position as the world's first modern federation described above and, later, because of the strength of its tradition of political science, was often the template against which other political systems could be evaluated as to whether they are federal or not. It was seen as a kind of ideal-type model against which other systems could be measured. And, indeed, several subsequent federations such as those in Latin America

explicitly adopted this model, just as many modern unitary states such as Greece, Finland, Turkey and the countries of southern and eastern Europe adopted the French model.

The dominance of the US federal system understood as the primary model of federalism, however, has been challenged by recent scholarship (Karmis and Norman, 2005). First, there exist, as noted above, two traditions within US federalism: a Madisonian centralising one and a Jeffersonian decentralising one, the first emphasising the predominance of the federal and national level, the second the importance of states' rights. This tension has existed throughout the history of the US with oscillations between one approach or the other at different period although Kincaid argues that by the 20th century the centralising approach has become dominant (Kincaid, 2013). Furthermore, some would argue that it is a mistake to see US federalism as the ideal-type against which all other examples should be measured. Ronald Watts, for example, argues that, although it is true that the US was the first modern federation, it is but one example of a wider phenomenon which he calls *federal political systems*. The latter is the *genus* of which US federalism is a species, which can therefore itself be examined in a comparative perspective (Watts, 1996; 2013).

Both Watts and Elazar (1985) have been concerned to examine the different species of federal arrangements. Nevertheless, although Watts argues that '[t]here is no single pure model of federalism that is applicable everywhere' (1996: 1), he does say that there is a basic notion [of federalism] of involving the combination of shared-rule for some purposes and regional self-rule for others within a single political system so that neither is subordinate to the other' (1996: 6-7). Within the broad category of federal political systems there is a considerable variety of institutional arrangements. This leads, not to a single federal typology, but to a range of typologies depending on the angle from which the federation is analysed (Watts, 2013: 25-32).

Watts distinguishes ten such angles: (i) the maturity of the federation, (ii) the bases of its internal diversity, (iii) whether it was created by aggregation or devolution, (iv) its size and the number and relative size of constituent units, (v) whether it is symmetrical or asymmetrical, (vi) the way in which it distributes legislative and executive authority, (vii) the way in which regional revenues are collected and distributed, (viii) whether it is based on the separation of powers or parliamentary principles, (ix) whether it follows common law or civil law and (x) the degree of decentralisation and non-centralisation. A typology can thus be created under each of these headings. For example, under the first heading of maturity, they can be characterised as: (a) mature, (b) emergent, (c) post-conflict or (d) failed. Under heading (3) concerned with aggregation or devolution, there can be (a) aggregation of formerly independent separate states, (b) devolution from a previous unitary regime, (c) a combination of the two processes. And so forth.

Nevertheless, despite this complexity, Watts identifies a number of structural features and political processes that are common to all the different species of federalism:

- The existence of at least two orders of government.
- A formal constitutional distribution of legislative and executive authority and allocation of revenue resources.
- Designated representation of distinct regional views.
- A supreme written constitution.
- An umpire (in the form of courts, provisions for referendums, or an upper house with special powers for resolving intergovernmental conflicts).

- Processes and institutions to facilitate intergovernmental collaboration.

Watts wishes to avoid a normative understanding of federalism . He stresses that it is a pragmatic set of arrangements for dealing with concrete political, economic and societal problems: "Ultimately, federalism represents a pragmatic prudential technique, the effectiveness of which depends on the relation of the particular form in which it is adopted or adapted to its particular political and economic circumstances" (Watts, 2013: 25).

Watts is drawing here on the work of Elazar who had already constructed his own rather elaborate typology. Elazar's claims that there has been 'paradigm shift' from the old 'modern' nation-state to a new 'post-modern' set of political realities. He defines the elements of the new typology as follows:

> "*Confederation:* Several pre-existing polities joined together to form a common government for strictly limited purposes, usually foreign affairs and defence, and more recently economics, that remains dependent upon its constituent polities in critical ways and must work through them.
>
> *Federation:* A compound polity composed of strong constituent entities and a strong general government, each possessing powers delegated to it by the people and empowered to deal directly with the citizenry in the exercise of those powers.
>
> *Federacy:* Whereby a larger power and a smaller polity are linked asymmetrically in a federal relationship in which the latter has substantial autonomy and in return has a minimal role in the governance of the larger power. Resembling a federation, the relationship between them can be dissolved only by mutual agreement.
>
> *Associated state:* An asymmetrical arrangement similar to a federacy but like a confederation in that it can be dissolved by either of the parties under pre-arranged terms.
>
> *Consociation:* A non-territorial federation in which the polity is divided into "permanent" transgenerational religious, cultural, ethnic or ideological groupings known as "camps", "sectors", or "pillars" federated together and jointly governed by coalitions of the leaders of each.
>
> *Union:* A polity compounded in such a way that its constituent entities preserve their respective integrities primarily or exclusively through the common organs of the general government rather than through dual government structures.
>
> *League:* A linkage of politically independent polities for specific purposes that function through a common secretariat rather than a government and from which members may unilaterally withdraw at will, at least formally.
>
> *Joint functional authority:* An agency established by two or more polities for joint implementation of a particular task or tasks.
>
> *Condominium:* A polity ruled jointly by two external powers in such a way that the inhabitants of the polity have substantial internal self-rule." (Elazar, 1994)

Elazar adds: "Confederal, federacy, associated state, and common market arrangements as we now know them are post-modern applications of the federal principle and political scientists have

rediscovered the degree of federalism involved in consociational polities, unions and leagues. There is every reason to expect that the post-modern world will develop new applications of the federal principle in addition to the arrangements we already know, including functional authorities and condominiums. Thus, reality itself is coming to reflect the various faces of federalism" (ibid.).

Both Elazar and Watts have done a great deal to revamp studies of federalism from the 1970s onwards and have drawn attention both to the complexity of forms of governance and the inadequacy of the simple distinction between unitary and federal states. Both, however, seem to have a traditional understanding of 'confederalism' which, although Elazar claims that his analysis is 'post-modern', in fact is still rooted in a modernist understanding of the sovereign state.

While also acknowledging their contribution, Michael Burgess points to the probable origin of this confusion (Burgess, 2013: 45-60). He notably highlights their lack of appreciation of the state itself, which tends to be conceived differently in the North American context (at least in the US although Watts is Canadian) from how it is viewed in Europe. Although Burgess does not state this explicitly, the lack of an overarching concept of "state" such as the French "Etat" or the German "Staat", in which the state is a legal and moral entity (Loughlin and Peters, 1997), makes it easier to find a wide variety of governance arrangements to which one can pin the label "federal" or "quasi-federal" or "federacy", as Elazar does. In fact, as Murray Forsyth has commented if one is determined enough one can find federal-type arrangements almost everywhere. Thus it is probably necessary to introduce the variable 'state' to describe correctly and explain any particular set of arrangements and whether they qualify as "federal". Or rather the different kinds of federalism and federations may be related to whether a particular country is characterized by a society-centred state (as in the Anglo tradition found in the UK, the US, Canada, etc.) or by a state-centred society (as in most of continental Europe)[2].

For Murray Forsyth, it is also important in distinguishing "confederations" from "federations". Interestingly in his classic study distinguishing the two, he uses the German term "Staat": a confederation is a "Staatenbund" while a federation is a "Bundesstaat". The question of the state is particularly important given the significance of constitutions in federal arrangements. Forsyth distinguished between "interstate'" relations and "intrastate" relations and argued that a confederation "[occupied] the intermediary ground between the interstate and the state worlds … going beyond the one but … not unequivocally reaching the other" (Forsyth, 1981:6, quoted in Burgess, 2013: 49).

In other words, the confederation was not a "state" because it was not "a union of individuals in a body politic, but a union of states in a body politic" (*ibid*.). A confederation was based on a treaty similar to those that bound together states. However, it differed from this in so far as it could make laws for its members – that is for the member states – though not for the individual members (citizens) of those states. Burgess, however, points out that this analysis is rather misleading since, as James Madison had already pointed out in the *Federal Papers* in 1788, the then "confederacy" (i.e. confederation) could act upon individuals in certain matters such as piracy and postal services. Another problem, not picked up by Burgess, with Forsyth's definition of confederation is the assumption that a "state" is defined by a "body politic" of individuals, presumably meaning the nation. But this confuses "state" with "nation-state" and neglects the possibility that there might be other kinds of states than nation-states, such as pluri-national states. Burgess goes on to present his own typology from the perspective of *federal democracy*. He argues that it is periodically necessary to

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2 For further reflections on this notion of 'state traditions', see Dyson (1980) and Loughlin and Peters (1997).

rethink and reappraise our conceptual categories in light of new political, social and economic developments (Burgess, 2013: 56). Seen from the perspective of federal democracy and, given recent political developments, he identifies six new models of federation:

1. *Mature federal democracies.*
2. *Flawed federal democracies.*
3. *Incomplete federal democracies.*
4. *Emergent federal democracies.*
5. *Transitional federal democracies.*
6. *Aspiring federal democracies.*

What is interesting from these attempts at creating different typologies is that they indicate that territorial governance is a great deal more complex than the basic rigid division into confederal, federal and unitary states would suggest. They confirm the insight that our political systems are characterized by hybridity and they are continually evolving. On the other hand, 'hybridity' is present within certain constraints and does not imply a completely 'open' form of governance. Rather it means that there are overall dominant features, e.g. federal, that co-exist with other subordinate features, e.g. tendencies towards (re-)centralization.

Besides these new and evolving models of federalism, Burgess draws attention to what he calls the "penumbra" of federalism, a kind of twilight zone of shades of grey, rather than black and white, where conceptual boundaries are unclear. Recapturing the concept of "confederation", but using it in a rather different way from its usage by Forsyth, he adverts also to an evolving "confederalism" where states that have been solidly federal or unitary are becoming increasingly to resemble "confederal" unions. We might add that Belgium is one example of such a development having passed from a unitary state, to a regionalized state, to a federal state and, perhaps, is heading toward a confederal union.

The United Kingdom, although not a federation, is also moving in this direction as a result of the Scottish drive for independence. That is, since Scotland has voted NO to independence in the September 2014 referendum, it will almost certainly obtain enhanced fiscal and legislative powers. It is highly likely that this will be followed by similar demands from Wales. It may be that this process of federalization will evolve further into a more confederal system, at least with regard to Scotland's relations with the rest of the UK. There are already some confederal elements in the relations between Ireland and the United Kingdom as a result of the Good Friday Agreement. For example, the British-Irish Council, is a body joining together the different national and regional governments, including the Isle of Man and the Channel Islands, of the British Isles. This is modeled on the Nordic Council grouping together the Scandinavian countries and Finland, and deals with policy issues that affect all the members of the Council.

3. The Hybrid State

Both Watts and Burgess have alluded to the emergence of *hybrid* systems, with states combining in different ways both federal and unitary features. The European Union itself is a hybrid which has both federal and intergovernmentalist (or confederal) features. In order to grasp what is happening to

produce this "blurred" system, it is necessary to return to a consideration of recent developments in the nature of the nation-state itself.

The modern nation-state, the emergence of which was described in the early parts of this chapter, has been characterised by a number of features such as centralisation, uniformity, symmetry, and dominant hegemonic policy models (Loughlin, 2009). Since the 1980s, this has increasingly given way a much greater decentralisation, non-standardisation, asymmetry and a mixture of policy models none of which is hegemonic. This has resulted in complex systems that combine both these sets of features in different configurations depending on social, political, and economic conditions. This is as true of previously highly uniform unitary states such as France and Sweden as it is of federal states such as Germany and Canada. One way of illustrating this shift is to examine the ways in which approaches to territorial planning and governance have changed over a period of about thirty years from around 1980 until the present day (see Table 1).

These reconfigurations have been undoubtedly caused by a complex array of interlocking and mutually reinforcing factors such as globalisation, regionalisation, decentralisation, Europeanisation (in the EU and those countries aspiring to join it), new modes of economic production and the world division of labour, the rise of neo-liberalism, profound social change, and the rise of new technologies, etc. Certainly, since the 1980s, there has been steady shift towards greater political decentralisation, political regionalisation and a recalibration of the relationship between the constituent parts of nation-states. The United Kingdom, with its devolution process and the new institutions that have emerged from that is a good example. But so also is Belgium, Spain and even Italy and France which have all carried out significant territorial reforms in the same direction during this period.

Whether this signifies a growth of "confederalism" brings us back to the problem of definition. In the sense in which Forsyth uses the term, that is as a Staatenbund rather than a Bundesstaat, undoubtedly there are some elements of confederalism in the cases of Scotland, Catalonia and Flanders. However, it is probably preferable to speak of hybrid forms of territorial governance, which do not fit neatly into the older conceptual frameworks because the term 'confederal' is still based on an older understanding of the 'state' which we are arguing here is now being replaced by a more fluid and complex understanding.

A final comment may be made in relation to hybridity which is that states do not always evolve in straightforward linear fashion with one period (centralisation) being followed by another (decentralisation) and even back again (re-centralisation) with clear cut-offs between each period. Rather it could happen that each of these processes occurs simultaneously depending on the issue involved even if one of them is dominant. Contemporary governance, as found for example in the UK, Canada or the European Union, can, therefore, take on a rather "messy" appearance and is sometimes difficult to pin down, although I suppose it is the task of political science to try to do so.

Table 1: The changing paradigm in regional policy and territorial governance

	Classical model	*Contemporary model*
Lead organisation	Central government	Regional level
Central and regional government relationship	Hierarchy	Equality of levels of government
Policy development approach	Top down/centralised	Collective/negotiated/contractual
Type and nature of decentralisation	Administrative deconcentration	Political, functional and fiscal decentralisation, alongside administrative deconcentration
Style of urban and rural planning	Hierarchical and standardised	National level provides strategic direction, local level implements and is permitted variation
Type of regional development plans	Comprehensive and multi-sector plans covering the entire national territory.	Strategic with spatial focus on specific regional differences.
Territorial approach	Territorial symmetry	Territorial asymmetry
Special focus	Problem areas	Balanced and harmonious development of all regions although recognising regional diversity.
Key instruments	Bureaucratic regulation, public-sector provision which is usually standardised.	Reduced financial support, mixed public/private/voluntary provision which encourages local variations.
Government aids	Incentive schemes, business and hard infrastructure which tend to be standard across the entire territory.	Business environment, and soft infrastructure based on the heterogeneity of local conditions.

Source: Adapted from Roberts and Lloyd (1999); Bachtler and Yuill (2001); and Loughlin (2009).

Conclusions

The foregoing, leads to one major conclusion: the old unitary/federal/confederal division is no longer adequate to describe the territorial structures of contemporary states. Rather there are new configurations that are best described as 'hybrids' possessing federal, regionalised, and unitary, characteristics. We might think of these as existing along a spectrum with what Burgess calls "mature democracies", such as the US at one extreme, and (usually small) highly centralised states such as Ireland and Greece at the other extreme. States may be situated at different points on the spectrum depending on which dimension of Watts's typology is being examined. Furthermore, there can be political decentralisation, administrative deconcentration and fiscal (re-)centralisation all happening at the same time. What this means is that confederal systems, understood as Staatenbunden, will vary depending on the (hybrid) nature of the states which compose them.

All this merely describes what is happening in the real world. There is, however, also a normative dimension. We need to evaluate the developments from the perspective of our democratic systems. In which direction *ought* we to be moving? This is a crucial question given the fact that some of these developments may actually lead to a radical change in the nature of a particular state. If Scotland, for example, had voted in favour of independence in September 2014, there would have ensued a new and very different United Kingdom. This would have seriously affected the relationships between not just with Scotland and the UK but also with Ireland and the EU. There would have been knock-on effects in Spain with the Catalan question or indeed in Belgium with the Flanders question. A little further afield we are witnessing the crisis in the Ukraine which shows that questions of the state and territorial governance have important ramifications in the entire zone of eastern Europe and the borderlands of Russia.

From the perspective of the well-being of the populations of our European states, is it better for nations and states to stay together than to separate into independent states? We may assume that democracy, the rule of law, human rights, and material well-being are all desirable features of modern society. But other dimensions are also important, including the recognition of the distinctive linguistic, cultural, or religious features of populations who live within these states. Again, Scotland serves as a good example of the problems that can arise when this recognition is not present. Scottish alienation from London has many causes that cannot be examined fully here. However, many of the grievances stem from a perception by Scots that Westminster, particularly during the long period of Tory government (1979-1997) under Margaret Thatcher and John Major, failed to recognise their specific political and policy culture. Another good example is Catalonia where there has been a growing alienation from Madrid, thanks to the latter's reluctance to recognise its status as a nation.

What does seem clear is that the old classical model of the nation-state, whether this be federal or unitary, can no longer adequately provide the conditions of either democratic legitimacy or cultural recognition. It could do so under conditions of high levels of homogeneity and value consensus such as existed previously in countries like Ireland and Sweden. Today, though, many western countries, including Ireland and Sweden, are marked by social heterogeneity and a breakdown of the old consensus on values. The emerging models of territorial governance both reflect these developments but are also perhaps an *opportunity* for citizens, intellectuals and politicians to devise new systems of democratic governance and co-existence. Perhaps this is the significance of the Belgian 'Re-bel' conferences.

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THE BELGIAN FEDERALISM/CONFEDERALISM DEBATE IN LIGHT OF

CLASSIC CONSTITUTIONAL THEORY

Jan Velaers

Introduction

In his excellent presentation Professor Loughlin rightly points out that the distinction between a unitary and a federal system of government is not very adequate as these notions do not reflect the great variety of the different types of unitary and federal states. Most states have a hybrid system, combining in different ways both unitary and federal features. Does this also apply to the distinction between the notions federal state and a confederation of states?

For quite a while now, there have been vivid debates in Belgium about the form of its polity. According to Article 1 of the Constitution, Belgium "is a federal State composed of Communities and Regions". Yet many people question whether that is still the case and, even if so, whether it will remain one in the future. Several analyses have shown that the state system already has a number of so-called "confederal features" as well. Moreover, several political parties are calling – or have called - for Belgium to be transformed into a true confederation in the next round of state reforms. According to some, Belgium is already a confederation, while others claim that it should become one. The debate is symptomatic of the situation in which the country finds itself. After the 541-day crisis in 2010-2011 – the time it took parties to form a coalition government following federal elections - we are apparently dealing with a state that has doubts and uncertainties about its current and future form.

In this paper I would like to reflect on the federalism-confederalism debate, as it relates to the Belgian system. Is Belgian still a federal state or is it already, to a certain extent, a confederation? What do the parties hope to achieve through their appeal to confederalism? Do they use the term "confederalism" in the sense in which it is used in comparative public law? Or are they thinking of something else, a confederalism "Belgian style"? If the latter, what exactly does that consist of? This contribution seeks to bring some conceptual clarity to the debate. It does so, first by distinguishing the legal and the political Constitution (I). It then examines criteria for distinguishing federalism from confederalism in classical legal theory (II), before assessing the (con)federal character of the Belgian legal (III) as well as political (IV) Constitution.

1. The legal and the political Constitution

In order to understand the uncertainties related to the qualification of the Belgian State, it might be recalled that in German constitutional theory a distinction is made between the "rechtliche Verfassung" and the "wirkliche Verfassung", between "die Rechtsverfassung" and "die politische

Verfassung", that is, between the legal Constitution and the "real" or "political" Constitution.[1] In a sense it is the same distinction as the one made by Dicey between the "law of the constitution" and the "conventions of the constitution".[2] In essence this comes down to the difference between the rules of the game and the way in which the game is played. If you want to play chess, for example, you must of course be familiar with "the rules of the game". Otherwise you cannot play chess. But to really play chess well it is not enough just to know the rules of the game. You also have to have insight into the strategies, be able to draw up a plan, become skilled in the opening moves and the endgame, and so on. And there are libraries full of books written about that.

Something comparable can be said about the life of the state and the business of politics. The constitution sets out the rules of the game. It is the domain of the constitutional lawyer. In addition, however, there is a set of practices, usages and conventions that are not legally binding but are highly relevant politically. They are the sphere of the political scientist. The legal and the real constitution are mutually complementary. They do not contradict each other but in order to get the full picture, both must be taken into consideration. The position I wish to defend is that Belgium may be one of the few countries in the world where the distinction between the "legal" and the "real" constitution also applies to the form of polity. According to the "legal constitution" Belgium is a federal state, but in the real constitution, decision-making is an increasingly confederal process.

2. Federalism and confederalism in classical legal theory

Generally speaking, we have to recall that theoretical notions such as federalism and confederalism inevitably somewhat fail. They are necessarily somewhat reductionist. Constitutional constructions are always specific, as they are closely linked to the history, the political relations, the cultural, demographic, economic, geographical and other characteristics of the country. Therefore, there are no two states with the same institutions. This does not imply that theoretical concepts cannot be useful. It is possible to compare constitutional structures. One can try to detect common features and to draw up criteria to distinguish different types of states. The goal of the search for concepts is to provide keys to a better understanding of the diverse and never identical structures of states.

The practicability of the concepts depends to a large extent on the number of criteria that are used to distinguish them. If there is only one criterion to distinguish federalism from confederalism, then it is simple: a given state meets the criterion or not. If there are two criteria, four combinations become possible 1) de state meets both criteria 2) it meets none of the criteria; 3) it meets the first criterion, but not the second; 4) it meets the second criterion, but not the first. With three criteria nine combinations are possible, with four sixteen, with five twenty five.

2.1   Federalism/confederalism – Bundesstaat/Statenbund

There is reasonable consensus in classical constitutional theory on the essential elements of confederalism, which set it apart from federalism.[3] For a clear understanding of the matter, the

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1   See e.g. H. Heller, Staatslehre, in der Bearbeitung von G. Niemeyer, 6e Aufl. Tübingen, Mohr, 1983, 281-304
2   A.V. Dicey, An introduction to the study of the law of the Constitution, London, 1959.
3   E. Arcq, V. de Coorebyter, C. Istasse, Fédéralisme et confédéralisme, CRISP-dossier 79, 2012, p. 117. J.F. Aubert, "The historical development of confederations", in The modern concept of confederation, European Commission for democracy through law, Collection Science and technique of democracy n° 11, 17-37; T. Koopmans, "Confederalisme: van de "Articles of Confederation" naar het Verdrag van Maastricht", in F. Judo en G. Geudens, Confederalisme, Staatsrechtsconferentie, 2007, Vlaamse

German notions of *Bundesstaat* and *Statenbund* are still very enlightening. Most constitutional lawyers will agree to Forsyth's classic study using the German notion "Staat" as a distinguishing feature[4]: a confederation is a Statenbund (that is a union of states), while a federation is a Bundesstaat (a federal state). For his part, Malinverni defines a confederation as

> "a lasting union based on a public international law agreement, between two or more states which retain their sovereignty and their legal equality and which propose to achieve common internal and external goals by means of their union. The newly established entity does not therefor supersede the states in question, but has its own permanent organs distinct from those of the latter. For this reason, a confederation possesses international legal personality."[5]

In the same vein, Morrisson defines the confederation as "a governmental entity created by independent sovereign states that join together to perform some governmental functions under common authority"[6], while Härtel agrees, stating:

> "Der Staatenbund ist ein Zusammenschluss verschiedener Staaten zur Verfolgung gemeinsamer Interessen. Die Mitgliedsstaaten sind durch einen völkerrechtlichen Vertrag mehr oder weniger fest miteinander verbunden. Sie verfügen auch im Staatenbund nach wie vor einzeln über die massgebliche Staatsgewalt. Der Staatenbund besitzt keine völkerrechtliche Subjektivität."[7]

2.2   Essential criteria to distinguish a federal state from a confederation of states

According to classical constitutional theory, the difference between federalism and confederalism is not a matter of degree. It is not a question of more or less power, of a broader or narrower autonomy for the sub-states. Confederalism is not a more thorough-going form of federalism. The distinction between the two forms is an essential one.[8] There is a clear-cut distinction: a confederation of states is a form of cooperative entity between sovereign states that decide by treaty to exercise a number of powers jointly. A federal state, by contrast, *is* a sovereign state whose constitution divides powers between the federal level and the level of the federated entities or sub-states.

When we speak of "sovereign statehood" today, we do of course not use the term "sovereignty", in the sense of *"eine selbstgenügsame und* selbstherrliche *Vorstellung souveräner Staatlichkeit"*, as the

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Juristenvereniging, 2008, 1-18; S. Sottiaux, De verenigde Staten van België. Reflecties over de toekomst van het grondwettelijk recht in de gelaagde rechtsorde, Kluwer, 2012, 58-59.

4 M. Forsythe, Union of States: The Theory and Practice of Confederation, University Press Leicester, 1981; M. Forsyth, 'Towards a new concept of confederation", in The modern concept of confederation, European Commission for democracy through law, Collection Science and technique of democracy n° 11, 1995, p. 63: "A confederation is formed by a treaty or pact between partners who recognize one another as being equal in status, the status being that of "statehood", if there is no recognition of equal status, the basis for a confederation is missing.; See also Ch. Durand, Confédérations d'Etats et Etat fédéral, Paris, Librairie Marcel Rivière, 1955; F. Esterbauer, Kriterien föderativer und konföderativer Systeme. Unter besonderer Berücksichtigung Österreichs und der Europäischen Gemeinschaften. W. Braumuller, 1976.

5 G. Malinverni, "The classical notions of a confederation and of a federal state", in The modern concept of confederation, European Commission for democracy through law, Collection Science and technique of democracy, Council of Europe, 1995, n° 11, p. 40;

6 F.L. Morrison, "Confederation of States", in Max Planck Encyclopedia of Public International Law, Oxford University Press, nr. 1.

7 I. Härtel, "Der staatszentrierte Föderalismus zwischen Ewigkeitsgarantie und Divided Government." in I. Härtel, Handbuch Föderalismus, Band I, Springer, 2012, p. 396

8 E. Arcq, V. de Coorebyter, C. Istasse, Fédéralisme et confédéralisme, o.c., p. 25

German constitutional court rightly pointed out in its judgment on the Treaty of Lisbon.[9] Since every state is part of the international - and in some cases of the European - legal order, it is rather a question of "*die Souveränität*" as a "*völkerrechtlichgeordnete und gebundene Freiheit*"[10]. Since sovereignty is so relative in contemporary times, the "international immediacy" proposed by Malinverni, might be a more adequate concept.[11] The member states of a confederation are directly governed by rules of public international law. That is not the case with the entities of a federal state. Insofar as the sub-states of a federal state have any international powers, they do not derive these directly from international law but rather from the constitution of the federal state of which they are a federated entity.

The two decisive criteria for distinguishing a federal state from a confederation of states do not leave much room for a grey area: 1) either the "sovereign statehood" belongs to the (federal) state or to the constituent states that make up the confederation; or 2) the *Kompetenz-Kompetenz* (that is the power to distribute the competences) belongs to the state, whose constitution divides powers between the federal level and the level of the federated entities, or it belongs to the member states that decide by treaty to exercise a number of powers jointly in a confederation.[12]

2.3   Additional criteria to distinguish a federal state from a confederation of states

To distinguish federalism from confederalism, authors do not only use the above-mentioned two essential criteria but sometimes also apply an additional three criteria which relate to the institutions of the confederation; the absence of a relationship of the confederation with the population of the states; and the right to secession.

First, it is said that while the institutions of a federal state represent both the population of the state and of the sub-states (often through a Second chamber), the institutions of a confederation are only composed of representatives of the member states.[13]

Secondly, many posit that while the federal state has a direct link to the population, the confederation does not.[14] Citizens only hold the nationality of the member state, not of the confederation. They only elect the institutions of the member state, not those of the confederation. The confederal institutions cannot directly grant them rights or impose obligations unto them. They cannot impose laws, taxes or military service. To do these things they must always call upon the states that are members of the confederation. By contrast, a federal state does have a direct link with the population.

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9 BVerfG, 2BvE 2/08, 30 Juni 2009, nr. 223: "a self-sufficient and self-indulgent presentation of sovereign Statehood" (author's translation).

10 "Sovereignty as freedom which is submitted to and bound by International Law".

11 G. Malinverni, "The classical notions of a confederation and of a federal state", o.c., 44: "Nowadays the theory of sovereignty has been replaced by that of international immediacy Unlike the members of a confederation, the communities which form a federal state are not directly governed by the rules of international law. Only the federal state itself is so governed."

12 See e.g.   W. Pas, "Confederale elementen in de Belgische federatie", in F. Judo en G. Geudens, Confederalisme, Staatsrechtsconferentie, 2007, Vlaamse Juristenvereniging, 2008, 20; M. Storme, "Confederalisme voor dummies", 8 June 2010, p. 1 http://www.nieuwpierke.be/forum_voor_democratie/nl/node/788 (accessed, Nov 14, 2014); Sottiaux, De Verenigde Staten van België, o.c., 51.

13 F.L. Morrison, "Confederation of States", o.c., nr. 1; M. Forsythe, "Towards a new concept of confederation", o.c., p. 65-66; G. Malinverni, "The classical notions of a confederation and of a federal state", o.c., 44-45;

14 E. Arcq, V. de Coorebyter, C. Istasse, Fédéralisme et confédéralisme, o.c., p. 26. G. Malinverni, "The classical notions of a confederation and of a federal state", o.c., 50.; I. Härtel, "Der staatszentrierte Föderalismus zwischen Ewigkeitsgarantie und Divided Government." o.c. p. 396: "Die Entscheidungen des Bundes sind grundsätzlich nur an die Mietgliedstaaten gerichtet und nicht direkt an den Bürger." (The decisions of the Federal State are fundamentally directed to the member states and not directly to the citizens).

There is a federal nationality. The citizens of the state have the right to vote in elections for the federal parliament. The federal institutions can subject them to laws, taxes and military service.

Thirdly, some analysts argue that while the sub-states of a federal state do not enjoy a right to secede, this right is guaranteed to the member states of a confederation.[15] In the latter, the participating states retain their sovereignty. By signing a treaty, they have freely entered the confederation. By terminating the treaty, they can thus also freely withdraw from it.[16] The federal state is quite different. The federated entities do not in principle have an internationally protected "right" to secede, at least, not unilaterally. The so-called "right of peoples to self-determination" is recognised in international law only for nations who were subject to colonial rule, foreign occupation, domination or exploitation[17] or – as the Supreme Court of Canada stated with regard to the province of Quebec's claims to independence – who are denied meaningful access to political, social and cultural development.[18]

History shows – more specifically the example of the Deutsche Bund that existed between 1815 and 1866, and the Confoederatio Helvetica before 1848 -, that these additional criteria are not always present to the same extent in every confederation of states.[19] In my opinion these three additional criteria are not as essential as the first two. But anyway, if they are also used, the distinction between federalism and confederalism becomes much less clear-cut. The more criteria are used to distinguish federalism and confederalism, the greater the chances are that constitutional constructions are hybrid.[20]

3. The legal Constitution: Belgium and reform proposals in light of the criteria for distinguishing federalism from confederalism

In light of the five criteria discussed above, the current Belgian state can still unambiguously be considered a federal state. Only the Kingdom of Belgium is a state under international law, member

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15 See D. Thürer en P. Burri, "Secession", in Max Planck Encyclopedia of Public International Law, Oxford University Press, Oxford/New York, 2009, nr. 14.; C. Tomuschat, "Secession and Selfdetermination", in M. Kohen, Secession – International Law Perspectives, Cambridge University Press, Cambridge, 2006, p. 23.

16 It should however be noted in this regard that the treaty may explicitly rule out the possibility of termination – which was the case for example in the Deutscher Bund of 1815 to 1866 – and in that case the treaty cannot be terminated.

17 M. C van Walt van Praag and O. Seroo, in their report of the International Conference of Experts on the "Implementation of Right to Self-Determination as a contribution to conflict prevention" held in Barcelona, from 21-27 November 1998, assert that: "…separation or secession from the state of which a people forms a part should be regarded as a right of last resort. Thus, if the state and its successive government have repeatedly and for a long period oppressed a people, violated the human rights and fundamental freedoms of its members, excluded its representatives from decision especially in matters affecting the well-being and security of the people, suppressed their culture, religion, language and other attributes of the identity valued by the members, and if, other means of achieving a sufficient degree of government have been tried and have clearly failed, then the question of secession can arise as a means for the restoration of fundamental rights and freedoms and the promotion of the well-being of the people. This right could be regarded as analogous to the right of last resort of rebellion against tyranny and oppression referred to in the preamble to the Universal Declaration of Human Rights".

18 Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 paragraphs 109-146 (Supreme Court of Canada). In this advisory opinion the Court also stated that if a clear majority of the population of Quebec should express a desire to pursue secession, Canadian constitutional law imposes an obligation on the other partners of the federation to negotiate in good faith an amendment to the constitution to that effect. This does not imply however that the constitution requires the negotiations to be successful (paragraphs 32-108, esp. par. 102).

19 For instance the Deutsche Bund (1815) and the Confoederatio Helvetica (before 1848) had limited powers to directly impose obligations on the citizens. (W. Rudolf, "Federal States" in Max Plank Encyclopedia of Public International Law, Oxford University Press, 2011, nr. 2). Moreover the right to secession was excluded in the Deutsche Bund. (Article 1 of the Deutsche Bundesakte 1815 and Article 5 of the Wiener Schlussakte 1820).

20 P. Popelier, "Het geslacht der engelen. Een dynamisch perspectief voor de vergelijking van staatsvormen", Chroniques de Droit Public/Publiekrechtelijke Kronieken, 2008/2, 416-434.

of the United Nations. The federated entities - the communities and regions - are only sub-states of that state. The division of powers is not laid down in a treaty concluded between states that belong to a confederation, but in the constitution and special laws adopted by the federal parliament. The sub-states do not have to agree with the division of powers, though they are ever more – as is appropriate in a federal state – involved in its elaboration, via their representatives in the Senate, the second chamber of the federal parliament. The federal parliament consists of a directly elected Chamber of Representatives and a Senate which, after the Sixth Reform of the State, consists mainly of representatives of the sub-states. The federal government consists of ministers who enjoy the trust of the majority of the entire Chamber of Representatives. It is true that the Council of Ministers is constituted on the basis of linguistic parity (art. 99 al.2, of Constitution). However, this does not imply that the government needs to enjoy majority support in each linguistic group in the Chamber - the current federal government has only a majority in the Dutch-speaking linguistic group - let alone a majority in the regional parliaments. There is also a direct link between the federal state and the population. There is only one Belgian nationality, there is no sub-nationality. Federal institutions can impact citizens directly. The federal Chamber of Representatives is elected directly, while the Senate is composed of representatives of the sub-states (Communities and Regions). Finally, there is also no such thing as a "right" to unilateral secession from the Belgian state.

According to the above criteria, the current Belgian state can unambiguously be considered a federal state. Sometimes however an alternative view on confederalism is defended in Belgium. In that context, confederalism implies the allocation of the bulk of powers to the communities and the regions and the transfer of the "center of gravity" to these entities. For two reasons, in my view, such a redefinition of the institutional notion of confederalism does not make much sense.

In the first place, it is unwise to give a typical Belgian interpretation to a notion which has a standard meaning in comparative constitutional law. Why should we isolate ourselves? Moreover, the alternative approach is disputable, as it does not offer a precise criterion for distinguishing federalism and confederalism. When can we say that a federal state has evolved into a confederation? When has the center of gravity sufficiently moved from the state to the sub-states? Is this already the case in Belgium, after the sixth reform of the state? Has it already become a confederation? Or not yet? How many more powers have to be allocated to the Communities and the Regions? In the classical institutional approach the difference between federalism and confederalism is an essential difference: statehood and the "Kompetenz-Kompetenz". In this alternative approach, the difference becomes merely one of degree. It thus loses its usefulness.

Proposals by political parties that aim at introducing confederalism fall into two categories. On the one hand, some only wish to deepen federalism, to make it an "extra-large" federalism[21], to bring in a so-called *Copernican revolution*, to shift the so-called *center of gravity of powers*, by transferring the bulk of the powers to the sub-states or by conferring the residual powers on the sub-states, the communities and the regions.[22] As comparative constitutional law shows, these proposals are entirely

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21 S. Van Drooghenbroeck, "L'article 35 de la Constitution: fin du début ou début de la fin? Fécondité d'une entéléchie constitutionnelle", in A. De Becker en E. Vandenbossche (eds), Scharnier- of sleutelelementen in het grondwettelijk recht, Die Keure, Bruges, 2011, p. 115.

22 In terms of the Belgian Constitution, this relates to the implementation of Article 35 of the Constitution. See J. Velaers, "Artikel 35 van de Grondwet: het 'begin van het einde' of het 'einde van het begin." in Scharnier- of sleutelelementen in het grondwettelijk recht, Die Keure, o.c., pp. 155-209.

compatible with a federal system[23], as long as the division of powers is included in the Constitution of the state and not in a treaty concluded between two or more sovereign states.

On the other hand, one of the proposals does introduce an element of confederalism, as it provides that the article in the Constitution which enumerates the powers of the federal order would be based on an agreement between the governments of the communities and the regions. [24]   But mostly, at present, only the proposals of one political party – the Nieuw-Vlaamse Alliantie (N-VA)[25] - come very close to classical "confederalism", even though ambiguities remain. These proposals indeed imply – or seem to imply[26] – that the Belgian state and its Constitution cease to exist, and are to be replaced by a confederation of two member-states: Flanders and Wallonia. The latter are to enjoy all powers and conclude a treaty to determine which ones they will exercise together at the level of the confederation. This confederation would no longer have a constitution: there will only be a constitutional treaty ("grondverdrag" (sic), that is a "fundamental treaty"). The institutions of this confederation would only be composed of representatives of Flanders and Wallonia. Interestingly, the confederation would still be a member of the European Union and of the United Nations. This implies that, at least at the international level, the confederation still functions as a state (whch is, as we be recalled, one of the two essential criteria that would belie the status of "confederation").[27]

Some analysts posit that the introduction of true confederalism presupposes that the Belgian state must first be dissolved, that the constituent states would have to become independent and then begin to negotiate the powers of the confederation.[28] If no agreement can be reached on the matter, the confederation would not come into existence. In theory, that is indeed correct. And this is also why true confederalists are regularly being exposed as separatists. For this reason, the political association *Belgische Unie/Union belge* likes to refer to "*confédéralisme*" as a "*le fédéralisme des cons*".[29]

Creative jurists have responded to such charges that although the introduction of confederalism implies that the participating states are independent, this does not necessarily mean that Belgium must first be dismantled as a federal state in order subsequently to be reconstructed as a confederation. Those two steps could follow each other seamlessly, without a "real" but only a "logical" second of independence.[30] For M.E. Storme: "It is perfectly possible to agree to a confederation before the federation is dissolved, so that the dissolution of the federation is linked with the transformation into a confederation." This transformation could take place as follows. A new article of the Constitution would be introduced stating that the communities and/or the regions, as

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23 In several federal states, the residual powers are exercised by the federated entities. See e.g. Amendement X Constitution of the United States of America; art. 30 and 70, German Constitution; art. 15.1, Austrian Constitution; art. 3 Swiss Constitution.

24 See the proposals of the Flemish Christian Democratic Party CD&V Parl. Doc., Senate, 2002-2003, 2-1547/1, 3.

25 See the proposals of the Flemish nationalist party N-VA, in the document Verandering door vooruitgang, 2014.

26 It is not entirely clear whether the Belgian State would still exist. The term "State" or "Belgian State" does no longer occur in the N-VA proposals. Only the expression "confederation of states'" (confederatie van deelstaten) is used.

27 The practicality of this is, however, very questionable. For instance, in the European Council, the confederation would not be represented by the Belgian prime minister, a function that would have ceased to exist, but by the prime ministers of the governments of Flanders and Wallonia, in turn, each for a term of four years. It is unclear how will the prime minister of one of the member states of the Confederation would be able to present the whole Confederation.

28 See E. Arcq, V. de Coorebyter, C. Istasse, Fédéralisme et confédéralisme, o.c., 79- 80

29 Belgische Unie/Union belge (BUB), "Confederalistische nepoplossing – le fédéralisme des cons", 26 mai 2010, http://www.unionbelge.be/?p=786 (last access November 14, 2014).

30 M.E. Storme, "Confederalisme voor dummies", o.c. The author refers to G.Winkler, Zeit und Recht. Kritische Anmerkungen zur Zeitgebundenheit des Rechts und des Rechtsdenkens, Springer, Vienna, 1995, p. 318 ff. : "eine spezifisch rechtliche Denkform für die Zeit, durch die der zeitliche Anfang, der zeitliche Wechsel, und das zeitliche Ende der Zurechnung von dauerhaften Rechten und Pflichten und ebensolchen Rechtsverhältnissen zu verschiedenen Rechtssubjekten durch die Fiktion eines bloß gedachten, auf einen minimalen Zeitpunkt reduzierten Zeitraum voneinander unterschieden werden."

participating states of the confederation, define the powers of that confederation. A transitional measure would subsequently provide that the new article only enters into force after the communities and/or regions have entered into an agreement about those powers. Such an agreement could, moreover, specify that it cannot be dissolved unilaterally. This way, there could be a seamless transition from the federal state to a confederation, without Belgium ever ceasing to exist.

However, in such a scenario, it is important to consider the following implications. If the intention is really for Belgium to exist in the future only as a "confederation of states", then Belgium will cease to be a state. Only the member states would henceforth be states within the meaning of international law. There may perhaps be no more than a "logical second" where no Belgian union exists, but after that "logical second" those constituent states would not only be part of the Belgian confederation, but would themselves be independent states. However, in a paradox that seems hardly to be considered, *Belgium* would remain a EU member state.

4. The political Constitution: (quasi)-confederal decision-making processes

From a legal-institutional viewpoint there is no reason to doubt the proposition that currently Belgium is a federal state. From a political science perspective however, a different approach is possible. It must be acknowledged that the decision-making process in the Belgian federal institutions bears some resemblance to decision-making in a confederation.[31] This is largely due to the way the political forces operate within these federal institutions. For one thing, there are no federal political parties, which is unique in the world of federal states. All the parties have split up since the 1960s. Moreover, there are no ridings that cross the linguistic border. Brussels-Halle-Vilvoorde was the last one. The consequence of this situation is that the Flemish parties run candidates only in the Dutch-speaking areas and in the bilingual Brussels Capital Region, and the French-speaking parties address voters only in the French-speaking and German-speaking areas and in the bilingual Brussels Capital Region.

With such a political landscape, it is hardly surprising that behind the federal structures often lie political processes that could be considered "confederal" in nature. Decisions are indeed often preceded by negotiations in which the government members do not act as representatives of the whole nation, but as defenders of the interests of their respective political community. According to former EU commissioner and former federal minister Karel De Gucht, the Belgian council of ministers often looks more like a diplomatic conference than a meeting of the government of a state. From a political science point of view, the two main political communities – the Dutch-speaking and the French-speaking - negotiate with each other within the federal structures. They negotiate the formation of a government and they continue to negotiate within the federal executive and legislative branches.

The rules regarding linguistic parity in the composition of the council of ministers[32], the division of the Chamber and the Senate into linguistic groups "for cases as determined by the Constitution",[33]

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31 See W. Pas, "Confederale elementen in de Belgische federatie", in F. Judo en G. Geudens, Confederalisme, Staatsrechtsconferentie, 2007, Vlaamse Juristenvereniging, 2008, 19-55; K. Rimanque, "Le confédéralisme", in La constitution fédérale du 5 mai 1983, sous la direction de F. Delpérée, Brussel, Bruylant, 1993, p. 31-35

32 Art. 99, par. 1, Constitution: "The Council of Ministers is composed of no more than fifteen members. With the possible exception of the prime minister, the Council of Ministers is composed of an equal number of Dutch-speaking members and French-speaking members".

the special majorities required for the institutional legislation[34] and the so-called "alarm bell"[35] lend a certain recognition to this fact. Yet, these rules do not point to confederalism in the institutional sense. They are mechanisms for protecting the linguistic minority within the federal institutions. They do not involve the federated entities as such – the Communities and the Regions - in the functioning of the federal institutions, with the exception of their representatives in the Senate, the second Chamber of the federal Parliament. They do not even require – as was revealed by the 2010 and 2014 formations of a federal government - that this government be supported by a majority in each linguistic group of the federal parliament, let alone that it has to be supported by a majority in the parliaments of the federated entities, the Communities and the Regions.

It is of course true that these mechanisms imply, in practice, that the decision-making process in the federal Parliament and in the federal government often resembles a negotiation between the representatives of two political communities and that at the federal level a compromise has to be found between Dutch and French speakers. These rules result in what is called "consociational" democracy[36] or "pacification democracy". However, it would be excessive to pretend that federal decision-making in Belgium is always conducted via the so-called "confederal" Dutch-French lines. For instance in social and economic matters, the left-right opposition – cutting across the linguistic border – often plays a more decisive role, whereas in linguistic or community-related matters, the Dutch-French opposition will surely prevail.

Negotiations about state reform take place, of course, between the Dutch and French-speaking political parties, sometimes even from "community to community" (i.e. between politicians active at the level of the federated entities). But that is not a reason to dub the constitutional system "confederal". There is nothing to be gained from so doing. On the contrary, it gives rise to confusion. In the end, state reforms will be settled by amending the constitution (with a two-thirds majority), or the special laws (with the same qualified majority plus a single majority in each of the linguistic groups) in both chambers of the federal Parliament, and not by consenting to a treaty in the parliaments of the sub-states. The argument that the same political forces are involved – given that there are only Dutch- and French-speaking parties – is only partly relevant: the same political parties may be involved, but the level at which the required majority must be attained is also important. As long as Belgium is a federal state, the *Kompetenz-Kompetenz* is situated, at the level of the federal state (federalism) and not on the level of the constituent states (confederalism).

From an institutional and a legal perspective (the rules of the game) Belgium clearly still is a federal state. From a political science perspective however, there are certain confederal features in its political decision-making (the way the game is played). The political science analysis is of course very

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33 Art. 43, Constitution.

34 Art. 4, last paragraph of the Constitution: "… a law passed by a majority of the votes cast in each linguistic group in each House, on condition that a majority of the members of each group is present and provided that the total number of votes in favour that are cast in the two linguistic groups is equal to at least two thirds of the votes cast."

35 Art. 54, Constitution: "Except for budgets and laws requiring a special majority, a reasoned motion signed by at least three-quarters of the members of one of the linguistic groups and tabled following the depositing of the report and prior to the final vote in a public sitting can declare that the provisions that it designates of a Government bill or private member's bill can gravely damage relations between the Communities. In this case, Parliamentary procedure is suspended and the motion is referred to the Council of Ministers, which within thirty days gives its reasoned opinion on the motion and invites the House involved to pronounce on this opinion or on the Government bill or private member's bill that, if need be, has been amended. This procedure can be applied only once by the members of a linguistic group with regard to the same Government bill or private member's bill".

36 A. Lijphart, "Constitutional design for divided societies", Journal of Democracy, 2004, p. 96–109; A. Lijphart, "The Belgian example of cultural coexistence in Comparative Perrspective", in A. Lijphart, (ed). Culture and co-existence in Belgium, Berkeley, Institute of International Studies, University of California, 1981, 1-13.

useful to clarify the decision-making process within the federal institutions. This clarification is however hardly unambiguous, as this decision-making is not always conducted via the so-called "confederal" Dutch-French lines. And, in any event, it is not sufficient to qualify the Belgian institutional system as confederal.

Conclusion

I would like to end these remarks with a quotation from a fellow constitutional lawyer who some time ago stated: "everyone knows that 'confederalism' in Belgium means something different from what it does in the classical theory. 'Confederalism' is a 'Belgicism'."[37]

When one analyses the concepts of federalism/confederalism, one does indeed often get the impression that the terms have a distinctive understanding in Belgium – and not only between certain politicians. "Confederalism" in that context seems to come down to a far-reaching form of federalism, an oversized federalism, a federalism where the bulk of powers lie with the federated entities. A federalism also with a political-decision making process in which the representatives of two political communities try to find compromises within federal institutions.

Some people might well wonder "What's in a name?" Why shouldn't Belgium give the term confederalism its own distinctive meaning? Switzerland still calls itself the "Confoederatio Helvetica"[38], after all, although we know that it is in fact a "federal state". Why shouldn't Belgium also give its own meaning to the term confederalism?

I think that such an attitude is misconceived and misleading: constitutional theory is not a 'national discipline'. In addition, the alternative Belgian understanding of the concept of confederalism can only lead to confusion, as it does not propose clear criteria for distinguishing federalism from confederalism. At what point do the bulk of the powers shift from the state to the sub-states? When are political decisions made on a more federal, and when are they made on a more confederal basis? With such criteria, the concepts of federalism and confederalism can hardly be distinguished, and thus lose their meaning.

I therefore believe that it still makes sense to apply the terms "confederalism/federalism", as they are understood in classical constitutional theory, to Belgian institutional relations. I also believe that it makes sense to supplement the classical "legal-institutional approach" with the "political science approach". These two approaches do not exclude each other: they are complementary. The legal-institutional analysis focuses on the conditions for validity of decision-making. The political science analysis, for its part, concentrates on the actual processes as these are played out. The distinction is between the rules of the game (which clearly remain federal) and the way in which the game is played (which may be more "hybrid" as John Loughlin suggests).

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37 H. Vuye, "Confederalisme in een Belgicisme", 9 February 2014, http://deredactie.be/cm/vrtnieuws/VK14-formatie/1.1868036 (last access 14 November 2014).
38 A. Kölz, Neuere schweizerische Verfassungsgeschichte. Ihre Grundlinien vom Ende der Alten Eidgenossenschaft bis 1848, Stampfli, Bern, 1992.

WHO IS AFRAID OF (CON)FEDERALISM?

Johanne Poirier[1]

« I swear, if you existed, I'd divorce you »[2]

Introduction

In "Who's Afraid of Virginia Wolf?" a middle-age couple viciously argues in front of a younger one. The entire play is built on the tension between reality and illusion. Key to the play are the references to a sixteen year old son who just got killed, but who, in fact, never actually existed. Things are just not what they seem to be. Or what they are called. Or insinuated.

Many Belgian French-speaking politicians and analysts criticise the appeal to "confederal solutions" by Flemish political parties. References to "confederalism" are considered to be, at best, ambiguous, ambivalent or obfuscating. And at worst, down-right intellectually dishonest. Some use the term to actually soften their intent to bring about Belgium's demise, others to "re-brand" what would essentially amount to a deeper federalisation.

Although it is tempting, I will not labour the parallel between the fear of confederalism in Belgium and the fear of the "Big Bad Woolf" in Albee's play.[3] At this stage, I simply want to focus on the tension between the "reality" and "illusion" of labels applied to state structures. Is there really a water-tight – ontological - distinction between federalism and confederalism? And do Flemish parties hold the monopoly on semantic confusion?

This article attempts to provide partial answers to these questions, by building on John Loughlin and Jan Velaers' rich contributions to this volume. Loughlin, a Northern-Irish political scientist working in England, convincingly defends the notion of hybridity, to capture the intricacies of constitutional constructions which defy orthodox distinctions between various forms of polities. For his part, Jan Velaers, a Flemish a constitutional lawyer, describes the confusion generated by the specifically Belgian use of the term "confederalism" to describe a heavily decentralised and bipolar federal regime, with vast numbers of mutual vetoes. Velaers pleads for conceptual and semantic clarity: the use of the term "confederal" should be restricted to describe unions of sovereign states (in the international law sense).[4] While Loughlin recognises that it might be clearer to limit the use of the term to non-state entities, he also notes that the conceptual rejection of any "confederal state" is "based on an older understanding of the 'state' which (…) is now being replaced by a more fluid and complex understanding".[5]

2 Martha to George, in Eward ALBEE's 1962 play, « Who is Afraid of Virginia Woolf ».
3 To add to the risks of misunderstanding, the allusion to Virginia Woolf in Albee's play actually refers to the Big Bad Woolf in Disney movies.
4 VELAERS, Jan, « The Belgian Federalism/Confederalism Debate in Light of Classic Constitutional Theory», in DESCHOUWER, Kris and POIRIER, Johanne, eds., (Con)Federalism, cure or curse ?, Re-Bel e-book, June 2015.
5 LOUGHLIN, John, « Federalism, Federations and Confederations: Towards Hybridity », in DESCHOUWER, Kris and POIRIER, Johanne, eds., (Con)Federalism, cure or curse ?, Re-Bel e-book, June 2015, p. 10.

This paper is divided in two sections. The first stresses the importance of reassessing our conceptual vocabulary to account for the "messiness" of current – and possibly future – Belgian institutions. I notably propose to distinguish (con)federal-ISM from (con)federat-IONs, before briefly reviewing the interwoven federal and confederal character of the Belgium's institutional design (I). The second section seeks to decipher the hybrid and confusing nature of the *Fédération Wallonie-Bruxelles*, the public – but not legal - avatar of the French Community. The "re-branding" of one of Belgium's constitutive units illustrates that Flemish parties who promote "confederal" solutions for Belgium do not hold a monopoly on strategic semantic confusion.

1.   (Con)federalism: the Search for Meaning(s)

Political rhetoric in contemporary Belgium is infused with appeals to "confederalism", as well as with – sometimes contemptuous – rejection of the term.[6] This section first reflects on the distinction between (con)federal-ISM as a political ideology and (con)federat-IONs as concrete institutional design (I.1). This leads to a simultaneous call for both conceptual precision and the recognition that empirical evidence reveals a wide phenomenon of "hybridity" (I.2). Then, noting that Belgium basically invented "federalism by dissociation" leads us to wonder whether it may not similarly be fashioning "confederalism by dissociation" (I.3). This query seems particularly justified given that both the federal and confederal traits of the current Belgian state architecture were born of a centrifugal movement.

1.1   What's in a suffix? :« ISM » *vs* « ION »

Federalism is a normative doctrine[7]: it promotes institutional design which favours unity and diversity, "self-rule" and "joint-rule", "autonomy" and "participation", within a single polity.[8] As most "ISMs", *federal-ISM* is a political idea, and for some, an actual political ideal.

For their part, *federat-IONs* are real-life incarnations of this political concept. Federations include the approximately 26 federal states, members of the United Nations, which include around 40% of the world population. This said, the term "federation" may also refer to other types of social constructions which combine self-rule and joint-rule: trade unions, employers' associations, NGOs, lobby groups and, of course, hard-to-define bodies such as the European Union.

The semantic distinction between federal-ISM and federat-ION facilitates the recognition that there can be federalism without full-fledged federations, as well as federations without actual federalism.

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6 The slogan : « Le confédéralisme, c'est le fédéralisme des cons » has almost become common parlance : « Fédéralisme des cons, le jeu de mots est-il bon ? », La Libre Belgique, online January 8, 2013 : http://www.lalibre.be/actu/politique-belge/federalisme-des-cons-le-jeu-de-mots-est-il-bon-51b8f6fee4b0de6db9c929d8 (last consulted, May 29, 2015).

7 "Normative" in the sense of "prescriptive", of "what should be". This is by contrast to the use of "normative" in the legal sense, which tends to refer to the presence of binding rules.

8   WATTS, Ron, Comparing Federal Systems, Institute of intergovernmental relations, Queen's University, Kingston, 3e ed., 2008; BURGESS, Michael, In Search of the Federal Spirit: New Territorial Perspectives in Comparative Federalism, Oxford U. Press, Oxford, 2012, pp. 183 ss. (discussing Daniel ELAZAR's "terminological toolkit" relative to federalism).

If we focus on state-like structures, federalism outside a formal federal design can, for instance, be observed in highly decentralised countries, including "regionalised" (Italy) or "devolved" (UK) ones, or those based on "cooperative government" (South Africa). These states might not meet the formal (often legal) criteria used to distinguish federal states from unitary ones.[9] Similarly, even those who resist seeing the European Union as a formal federation, will often admit that the integration process, as well as many institutional features, can be described through federal theoretical lenses.[10]

The "ism/ion" distinction also facilitates the recognition that an official federation – including a federal state – might actually be lacking in federalism. That would be the case if the formal institutional design is not imbued with the values of federalism, which require a commitment to both autonomy and interdependence, to self-rule and joint-rule, to respect for diversity in the context of a united whole. Hence, we could argue that federalism eludes autocratic federal states, that are, by definition, allergic to power-sharing of any sort.

By analogy, we can distinguish confederal-ISM as an ideology and a political process from confederat-IONs which are concrete incarnations of confederal principles. In other words, there can be official confederations, without actual confederalism.[11] But, more importantly in the context of a reflection on Belgium's institutional set-up, and constitutional future, there can be confederalism without actual – formal – confederation, even in the strict sense defended by classical constitutional theory.[12]

1.2   The need to reassess our conceptual vocabulary

The traditional dichotomous distinction between unitary and federal states could probably never account for the actual diversity and complexity of state-like arrangements. In any event, regardless of the (in)accuracy of historical labelling, it is undeniable that the diversity and complexity of today's multiple state structures eludes any binary approach. In response, political scientists have attempted to provide complex typologies and categories. A sliding scale with centralised unitary states at one end of the spectrum, and lose alliances at the other better seeks to capture this diversity.[13]

Nuancing further the relevance of this categorisation, in this volume, John Loughlin convincingly pleads for the recognition of *hybridity* to describe individual state structures, which may, in fact and/or in law, combine characteristics of different categories. All these approaches underline that

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9 For a discussion of these criteria, see below, section II.2.

10 TÖMMEL, Ingeborg, « The European Union – A Federation Sui Generis? » in LAURSEN, Finn, The EU and Federalism : Polities and Policies Compared, Ashgate, Farnham/UK ; Burlington, USA, 2011, pp.41-56; WOUTERS, Jan, CUYCKENS, Hanne, RAMOPOULOS, Thomas, « The European Union: A Federation in All but Name », in HALBERSTRAM, Daniel, REIMANN, Mathias, eds., Federalism and Legal Unification : a Comparative Empirical Investigation of Twenty Systems, Springer, Dordrecht, 2014, pp. 191-235. By contrast, see Olivier BEAUD thesis that federations are non-state polities : Théorie de la fédération, Presses universitaires de France, Paris, 2007, ch. 2 : « Rejeter la distinction entre État fédéral et confédération d'États, pour mieux penser juridiquement le fédéralisme », pp. 67-97.

11 In a very formal sense, we can think of the Swiss confederation, which is, despite the official name, undeniably federal. In the contemporary world, true « confederations » are rare or difficult to distinguish from international organisations (the Commonwealth of Independent States which brings together a number of ex-Soviet Republics: http://iacis.ru/eng/about/index.php (last consulted May 25, 2015); the Benelux (?): Benelux Parliament website: http://www.beneluxparl.eu/Pages/_FR/Wat%20is%20de%20Benelux.aspx (last consulted May 25, 2015).

12 For a discussion of the criteria which distinguish federal from confederal systems, see sections II.2 and II.3, infra.

13 WATTS, building on Elazar: WATTS, Ronald, Comparing Federal Systems, Institute of intergovernmental relations, Queen's University, Kingston, 3e ed., 2008, pp. 10-18.

while typologies are useful as pedagogical and heuristic tools, they must allow for a recognition that borders between categories are – increasingly - fluid.[14] As Loughlin points out, the fact that Anglo-American political science (and we could add "law") does not have a strong conception of the "state" (and of indivisible sovereignty), may facilitate the acceptance of the "fuzziness" that goes with hybridity than continental theorists.[15]

If the sliding scale helps capture the diversity of the institutional architecture of sovereign states, it also provides a better tool for describing the diversity of various forms of domestic arrangements *within* states in at least three different ways. First, the scale between centralisation and decentralisation may depend on policy areas and timeframe, even in relatively stable and symmetrical federal states. Again, the binary approach, which seeks to place a definitive label on a particular state, tends to obliterate these significant nuances. A state can function along federal principles in some areas, and be nearly unitary or even confederal, in others. Secondly, a largely unitary structure may incorporate a nearly federal asymmetrical arrangement with one of its components (think of the relationship between Groenland and Denmark).[16] In additional, constitutive units of federal states may themselves be unitary (as they often are) or themselves federal-type units.[17]

1.3   « Federalism by dissociation »: a Belgian invention

Basically any academic writing on federalism prior to the mid-1970s would assume that federations all arose from a process of association of previously autonomous regions/entities. The ancient models were the Greek cities (or the Roman Empire or some North American indigenous alliances), while the United States and Switzerland served as the "modern" versions of the federal phenomenon.

The tensions that divided Belgium in the post-war era led to a gradual transformation of its official institutional design. The term "federalism" was controversial and contested at the beginning. Opponents feared, amongst other things, that a federal solution it might lead to secession.[18] This said, the idea of federalism gradually made its entry into political discourse, reflecting and reinforcing institutional transformations that had strong federal undertones. By 1993, no one doubted that Belgium had become a federal state, as article 1 of the Constitution henceforth proclaimed. This peculiar federation came into being through a process entirely distinct from the one that had

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14 See also BURGESS, Michael, « The penumbra of federalism », in LOUGHLIN, John, KINCAID, John, SWENDEN, Wilfried, (eds.), The Routledge Handbook of Regionalism and Federalism, Routledge, London & New York, 2013, pp. 45-60.

15 For an exception: see constitutionalist Patricia POPELIER who posits that criteria for formally distinguishing between different types of states might better be understood as « indicators » of dominant character : POPELIER, Patricia, « Het geslacht der engelen. Een dynamisch perspectief voor de vergelijking van Staatsvormen », Chroniques de Droit Public – Publiekrechtelijke Kronieken, vol. 12, 2008, pp. 427-433 ; POPELIER, Patricia, « The need for sub-national constitutions in federal theory and practice: the Belgian case », (2012) Perspectives on federalism 36-58.

16 This is what WATTS and ELAZAR refer to as "federacies": WATTS, supra, note 7.

17 For instance, the Federation of Bosnia and Herzegovina which is one of the two constitutive units of the ((conf)federal republic of) Bosnia and Herzegovina…
    Bosnia and Herzegovina's Constitution of 1995 with Amendments through 2009, Constituteproject, 20 January 2015, https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009.pdf?lang=en, 4th of February 2015; KAVISH Donovan, Constitutional Reform in Bosnia and Herzegovina: State-Nation Theory and the Spirit of the Dayton Accords, Academia.edu, 2012, http://www.academia.edu/2350928/Constitutional_Reform_in_Bosnia_and_Herzegovina_State-Nation_Theory_and_the_Spirit_of_the_Dayton_Accords, 13th of February 2015.

18 See the discussion on the « Paradox of Federalism » in this e-book.

generated the "classic" federations.[19] It arose from the fragmentation of a unitary state.   The very concept of federalism – and federations – by "dissociation" was born.[20]

Since the fall of the Berlin wall, basically all federal experiments have arisen from a process of dissociation, with the exception of the "federalisation" of the European Union.[21] Today's federal experts systematically note that federations can arise by following two distinct trajectories: integration/association or dissociation/fragmentation. It is also admitted that – empirically – both processes can take place at the same time, or at least in the same polity.

Belgium also coined the neologism "de-federalisation" to refer to the transfer of competences from the centre (previously unitary) to regions and communities.[22] This was in response to what was traditionally understood by the term "federalisation" which indicated a process of "bringing together". Since "federal" comes from "feodus", a covenant or an alliance, the phenomenon of de-constructing a previous union, was seen as "de-federal". Again, this lexical adaptation – which was not universally endorsed – reflected the need to revise conceptual vocabulary in view of real-life developments.

Today, no one argues that federal states may *only* arise through an integrative process. Yet, many objectors to Flemish confederal project(s) posit that - "by definition" - confederations may only arise from the contractual union of sovereign states (at international law).[23] While the use of strict criteria to distinguish federal states from neighbouring types has been loosened to embrace the idea of hybridity, this seems to be more difficult in the case of confederations, which remain understood as contractual unions of states that are – and remain - sovereign at international law.

Empirical and historical evidence indeed suggest that confederations have arisen from a process of association. However, does it follow that this trajectory is ontologically inescapable? In other words, if Belgians invented "federalism by dissociation", a genus of federal systems that is now widely recognised, why could they not also invent "confederalism by dissociation"?   This does *not* imply that confederalism is inevitable, or that a Belgian confederation is desirable. It simply means that the objection that confederalism may only – by definition - emerge through association is unpersuasive. Objectors ought to find more robust arguments to reject the prospect of a confederal institutional design, rather than appeals to formal definitions and lists of formal criteria.

1.4   The confederal traits of the Belgian federation

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19 This is an oversimplification, as there were earlier examples of partial federalisation by dissociation. The Canadian (con)federation was born in 1867 as the province of United-Canada was simultaneously dissolved to create Ontario and Québec.

20 Despite some historical (partial) examples, the phenomenon was not really "theorised" until the 1980s.

21 CHOUDRY, Sujit, HUME, Nathan, "Federalism, Devolution and Secession: from Classical to Post-conflict Federalism", in GINSBURG, Tom, DIXON, Rosalind, eds., Comparative Constitutional Law, Edward Elgar, Cheltenham (UK)/Northampton (USA), 2011, pp. 356-384.

22 See, for instance, BERHENDT, Christian, « La défédéralisation des allocations familiales : l'amorce d'une scission progressive de la sécu ? », podcast, Centre de droit public, 19 novembre 2013, http://droit-public.ulb.ac.be/ecouter-christian-behrendt (last access, May 24, 2015) ; DUMONT, Hugues, VAN DROOGHENBROECK, Sébastien, « Le statut de Bruxelles dans l'hypothèse du confédéralisme », Brussels Studies, no. 10, 2007, p. 2.

23 This is the thesis defended by Jan VELAERS in this volume, but also by a vast number of authors. See, a.o., ALEN, André, MUYLLE, Koen, Handboek van het Belgisch staatsrecht, Kluwer, 2011, p.12 ; VANDE LANOTTE, Johan, GOEDERTIER, Geert, Overzicht publiekrecht, Die Keure, 2003, p.231 ; M. VAN DAMME, Overzicht van het grondwettelijk recht, Die Keure, 2008, p. 280 ; LEJEUNE, Yves, « L'idée contemporaine de confédération en Europe : quelques enseignements tirés de l'expérience de l'Union européenne », in COUNCIL OF EUROPE, Le concept contemporain de fédération, Ed. of the Council of Europe, Strasbourg, 1995 ; BEHRENDT, Christian, BOUHON, Frédéric, Introduction à la théorie générale de l'État, Larcier, Brussels, 2009, pp. 367 ff. ; UYTTENDAELE, Marc, Trente leçons de droit constitutionnel, Bruylant/Anthémis, Limal (Belgium), 2014, pp. *707-708*.

No one can pinpoint with certainty when Belgium actually became a federal state. Most analysts would set the date somewhere between 1980 and 1989, that is before its federal status was actually constitutionalised (in 1993). In other words, facts preceded law (as is so often the case) and labelling the Belgian state in the 1980s was no easy feat. One could argue that a similar gradual and blurry phenomenon characterises the (eventual?) transformation of the Belgian state following some confederal design.

In fact, Belgium constitutionalised a number of consociational techniques in 1970, to guarantee consensus-based decision-making in what were still then "unitary" central institutions.[24] These mechanisms were introduced as the national political parties were splitting along language lines and could no longer pretend (or hope) to represent the entire country. These mechanisms, which are still in place, include:

- Language parity in the Council of Ministers, which, by constitutional norm, must be composed of an equal number of French and Dutch speaking ministers[25];
- The creation of two language groups in each Chamber of Parliament, which implies that all elected – or indirectly designated – representatives defend the interests of the Dutch or French-speaking population[26];
- The introduction of "double majority legislation" which requires the approval not only of a 2/3 overall majority in each Chamber, but also a single majority of all members of each language group.[27] This provides a strong *definitive veto* to both groups, although in practice, it protects the French minority, since by their numerical majority, the Flemish members do not really require this blocking device;
- The introduction of a *suspensive veto* in favour of each language group, when a legislative initiative is deemed to threaten the interests of the collectivity they represent (the "alarm bell" system).[28] Again, while open to both language groups, in practice, this technique protects the French minority against decisions detrimental to their interests, by the numerical Dutch-speaking majority.

Consociational techniques are designed to promote dialogue and co-decision making between the two major cultural/linguistic groups in Belgium. French and Dutch-speakers – officially and constitutionally – enjoy the power of co-decision, over a wide range of issues crucial to their interests and well-being. These have been interpreted as bringing a confederal-type process to central institutions.[29] These confederal features preceded the advent of the federal system in Belgium. Yet,

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24 POIRIER, Johanne, « The Belgian Federation: Tools of Appeasement; Instruments of Confrontation», in SAXENA, Rekha, ed., SAXENA, Rekha, Varieties of Federal Governance – Major Contemporary Models, Cambridge University Press, 2011, pp. 344-377; POIRIER, Johanne, « Belgium: Less than the Sum of Its Parts », Inroads, vol. 23, 2008, pp. 83-91 (http://www.inroadsjournal.ca/pdfs/Inroads_23_Language.pdf (last access, May 22, 2015); DESCHOUWER, Kris, « Falling apart together. The changing nature of Belgian consociationalism, 1961-2000 », in STEINER, Jürg and ERTMAN, Thomas (eds), Consociationalism and Corporatism in Western Europe. Still the Politics of Accommodation?, Special issue of Acta Politica, vol. 37, 2007, p. 68-85l DESCHOUWER, Kris, « La dynamique fédérale en Belgique », in FOURNIER, Bernard, REUCHAMPS, Min (dir), Le fédéralisme en Belgique et au Canada : Un dialogue comparatif, de Boeck, Brussels, 2009, pp. 65-72.

25 Art. 99, Constitution.

26 Art. 43, Constitution.

27 Art. 4, Constitution.

28 Art. 54, Constitution. The "alarm bell" can be activated by ¾ of the members of a linguistic group. Note that other forms of suspensive vetos also exist, between federal and federated units, and between the later: the procedure in "conflicts of interests": art. 32, Ordinary Law on Institutional Reforms, 8/8/80. On these procedures, see POIRIER, 2001, supra, note 23, at pp. 364-66.

29 PAS, Wouter, «Confederale elementen in de Belgische federatie », in JUDO, Frank, KOOPMANS, Tim, GEUDENS, PAS, Wouter, Confederalisme, Staatsrechtsconferentie, 2007, Vlaamse Juristenvereniging, 2008, 19-55 ; ARCQ, Etienne, de COORBYTER, Vincent, ISTASSE Cédric, Fédéralisme et confédéralisme, dossier 79, 2012, Cahier hebdomadaire du CRISP, 2012 ; de COORBYTER, Vincent, « Le fantôme du confédéralisme », La Revue Nouvelle, jan. 2008, pp. 35-46 at pp. 38 ff.

they have remained in place while the unitary state which they first altered, gradually vanished in favour of a federal one.

This being said, as Jan Velaers rightly points out in his contribution, the devices are "mechanisms for protecting the linguistic minority within the federal institutions. They do not involve the federated entities as such – the Communities and the Regions - in the functioning of the federal institutions, with the exception of their representatives in the Senate".[30]

In short, while the overall Belgian state architecture has clearly become federal, the major central institutions (the ones that enshrine the "joint rule" dimension of federalism") have strong but idiosyncratic confederal features. These features provide mutual veto points to linguistic groups, not to constitutive units *per se*. Introduced from the 1970s, these minority-protection techniques did not arise through a process of association of sovereign entities, but rather through the transformation of a previously unitary state, which only spoke with one voice (and that voice, was French).

In other words, since the 1970s, Belgium has already witnessed some "confederalism by dissociation" which has been beneficial to Francophones. The latter should therefore be wary of rejecting confederalism wholesale, as a necessarily detrimental element of state architecture, and one which – by definition – can only arise on the ashes of Belgium.

The next subsection of this paper explores how a political construct, the so-called *"Fédération-Wallonie-Bruxelles"*, also challenges the categorical distinctions between federal and confederal design.

2. The *Fédération Wallonie-Bruxelles* as a case study of hybridity

In 2011, the Parliament of the French Community adopted a resolution which transformed the French Community into the "Fédération Wallonie-Bruxelles" (the Wallonia-Brussels Federation). This was, however, only for public communications purposes, in a way that clearly contradicts constitutional orthodoxy. The polysemic and fluid character of the FWB illustrates that Flemish political parties do not have a monopoly on the strategic use of ambiguous expressions. The FWB combines elements of a constitutive unit of the Belgian federation (2.1), with federal (2.2) and confederal traits (2.3). This amalgam raises the question of the "added-value" of this odd entity (2.4).

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30 Velaers, supra, note 3, at p. 12. See also DUMONT, Hughes and VAN DROOGHENBROECK, « Les conséquences sur le statut de Bruxelles en cas de confédéralisme », in Journée d'étude : Quel avenir en cas de confédéralisme ? organisée by the Centre d'études Jacques Georgin, Brussels, nov. 2008, pp. 21-27, at p. 20 : http://www.fdf.be/fdf/publications/Les-Cahiers-du-Centre-d-etudes/article/quel-avenir-en-cas-de#.VW1c6qaKHV0 (last access, June 1, 2015).

The Walloon Rooster, which is also the symbol of the French Community

The logo of the Fédération Wallonie-Bruxelles

2.1   The FWB as a constitutive unit

Over the years, a number of different labels had been suggested to capture the desired association of Walloons and of French-speaking *Bruxellois*. Between 1980 and 1999, the following terms were proposed by various political actors; "*communauté francophone*", "*communauté romane*"; "*communauté wallonne*"; "*communauté franco-wallonne*"; "*communauté Wallonie-Bruxelles*"; "*communauté française Wallonie-Bruxelles*". In 2008, francophone constitutionalists were talking both of the "Espace Wallonie-Bruxelles"[31] and of the Fédération-Wallonie-Bruxelles.[32] Finally, in 2011, Walloons and French-speaking Brussels leaders settled on that latter expression.

From a constitutional perspective, the "Fédération Wallonie-Bruxelles" (FWB) does not actually exist. The new expression was introduced through a resolution of the Parliament of the French Community (Communauté française - FC) in 2011.[33] It is meant to largely replace references to the French Community in public communications, but not in law. The legal endorsement of the new designation would have required modifications to a number of articles of the Constitution, as well as of the 1980 Special Law,[34] a burdensome process requiring the assent of Flemish parties. This was highly unlikely in the post 2007 election period (and even more so in the post 2010 paralysis).

The (presumed?) resistance of Flemish leadership to alteration of constitutional norms flows from the symbolic implications of this odd "federation", which replaces a "*community*" by the union of two (partial) *regions* (parts of Wallonia and Brussels). This union officiously reinforces the dominant *regional* conception of Belgian federalism amongst many Francophones, by contrast to the

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31 See the three pieces by Jean-Claude SCHOLSEM, Marc UYTTENDAELE, and Marc VERDUSSEN in Publiekrechtelijke Kronieken/Chronique de droit public, 2008, no. 1.

32 TOUSSAINT, Sandra, « Ne dites plus 'Communauté française' Quoique…. », Les analyses du CRISP en ligne, 7 oct 2013, pp. 1-9, at pp. 2 ff.

33 Proposition de résolution relative à l'utilisation de la dénomination « Fédération Wallonie-Bruxelles » dans les communications de la Communauté française, doc. Parliament of the French Community, no. 205 (2010-2011), no. 1, May 18, 2011; Compte-rendu intégral, Parliament of the French Community, CRI, no. 16 (2010-2011), May 25, 2011, pp. 38 ff., as cited by TOUSSAINT, ibid. Note that a parliamentary resolution is not subject – by contrast to a legislative norm – to constitutional review by the Constitutional Court.

34 Particularly, article 2, Constitution.

"community-based" conception promoted in the North of the country for decades. Moreover, replacing the *French* Community by a union of a bilingual region and a unilingual (French-speaking one), by a union that only functions in French, could be interpreted as a strategic challenge to the official bilingual character of Brussels.[35]

In short, the FWB is a public avatar of the FC. Its name and new logo stands *in lieu* of the rooster of the French Community, but does not officially eradicate it. As the FWB has no legal grounding, all legislative and executive norms are still formally adopted in the name of the French Community , which is also the only entity with the authority to conclude public contracts for instance.[36]

As a political and public relations substitute for the French Community, the FWB faces the same constitutional limitations. Hence, its actions are restricted to the policy domains over which the FC still has constitutional authority.[37] Its territorial competences are also restricted. As is well known, the French Community exercises "community competences" in Wallonia (with the exception of the territory of the German-speaking Community) and in Brussels, with regards to *institutions* that function exclusively in French. It is thus composed of the Walloon Region BUT without the German-speaking part; and of the Brussels-Capital Region, BUT only with regards to French-speaking institutions. The FWB faces the same territorial constraints.

In short, the FWB has no legal existence. The change of name – the re-branding – has not altered the fact that it designates one of the constitutive units of the Belgian federation. Moreover, in the expression "Fédération Wallonie-Bruxelles", neither "Wallonie", nor "Bruxelles" accurately describe the actual members of this so-called "federation".

2.2   The FWB as the « federal union » of 2 regions

As discussed in the first section of this paper, the idea that there are a limited number of essential criteria for the existence of a federal system has been challenged. The borders between unitary/regionalised/federal and "post-federal" or "confederal" states are not actually fixed but blurry and porous.

With this caveat in mind, there are still a number of "indicators" of federal status.[38] Hence, there is a certain consensus that federal-type political entities:

   i.   are composed of at least two orders of government

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35 A more accurate expression could have been the « Fédération Wallonie-COCOF » ! (COCOF standing for the Commission communautaire française, which is the entity responsible for French-speaking institutions in Brussels). The marketing effect would have been less then convincing… Moreover, the term « Wallonie » would still have been over-inclusive, since it continues to exclude the German-speaking communes.

36 There is revealing – if anecdotal – evidence of the difficulties encountered by organisations receiving public funding, which must negotiate with the FWB, but must sign formal agreements with the FC. The confusion about the use of logos would be amusing, if it were not so time-consuming…   As an illustration amongst many, the 2015-2016 Calendar of Events by the (federal!) Center of Fine Arts lists the French Community as one of its "partners" (sponsors) but reproduces the logo of the Fédération Wallonie-Bruxelles: BOZAR, 150 Years of Urban Vibes, Concert Calendar 2015-2016, p. 122.

37 Over time, the FC has made use of art. 138 of the Constitution to transfer the exercise of some of its competences to the Walloon Region and the Commission communautaire française (COCOF) in Brussels.

38 POPELIER, supra, note 14.

ii.   bring together members which enjoy a degree of autonomy that allows them to have the "final say" on certain policy areas (institutions and competences of "self-rule"/participation)

iii.   have common institutions with competences applicable to the overall polity ("joint rule")

iv.   see their arrangement enshrined in a "constitution-type" document which neither order can alter unilaterally

v.   have central institutions which adopt norms that are "directly applicable" to the population of the overall polity. In other words, there is no need for the members of a federal regime to « transpose » norms into their respective legal order

vi.   are structured so that each order has direct political connection with the population (which directly selects some of its representative in democratic institutions, for instance)

vii.   have a final arbitrator to resolve eventual disputes concerning the respective competences of the various federal partners (often a constitutional or supreme court)

How do these indicators apply in the case of the FWB?

i.   It is composed of two "regional" units, plus an equivalent to "central" institutions (the "federation")

ii.   Each unit (Wallonia and Brussels)[39] has a final say in its own sphere of *regional* competences through its *regional* institutions (self-rule)

iii.   The "federation" itself exercises community competences (over education for instance) over the entire territory of the FWB/FC

iv.   The respective competences of the FWB/FC and of its two components are enshrined in a Constitution which cannot be altered unilaterally. However, it is not "its own" constitution, but the *Belgian* one (as well as the 1980 Special Law adopted by the *Belgian* Parliament)

v.   Both the "central" institutions and the units adopt legislative norms which are directly applicable, without any need for "transposition".

vi.   However, while each unit has direct democratic connections with their population, this is not the case for the "central" legislative power. The members of the Parliament of the FWB/FC are indirectly designated (but they are directly elected as members of the regional units of the federation)[40]

vii.   The resolution of conflicts between norms adopted by the regional units (Wallonia, Brussels) and/or with the center (FC/FWB) is the prerogative of the *Belgian* constitutional court, not of a typically FWB organ

The FWB thus has a number of "indicators of federal status": two orders of government, institutions and competences that reflect both the autonomy (self-rule) and interdependence (joint-rule) principles, the absence of any need to "transpose" central norms by the units. However, both the constitutional structure and protection of the FWB lies with *Belgian* institutions, not those of the "federation". Finally, the lack of direct democratic connection with the population has confederal undertones.

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39 As explained in section I.1, it is only parts of Wallonia and of Brussels, which are actually members of the FWB…

40 Only the Parliament of the French Community has legal existence. And all legislative norms (« décrets ») adopted, are in the name of the Communauté française. While the website of the Fédération Wallonie-Bruxelles refers to the Parliament of the FWB, it is the Parliament of the French Community that actually legislates….

2.3   The confederal characteristics of the FWB

Classical political – and mostly constitutional theory – considers that a confederation has the following markers[41]:

i.   It unites "sovereign" polities
ii.   This union proceeds through a treaty, rather than a Constitution
iii.   Confederal institutions bring representatives of the units together and draw no direct democratic legitimacy from citizens (no direct elections)
iv.   The executive is generally composed of representatives of the units
v.   Confederal norms do not directly apply to citizens, but only to the units themselves. All "central" norms ought to be transposed before they can bind citizens
vi.   Confederations have very little autonomous financial resources
vii.   Units generally enjoy a veto right on all decisions, including the determination of the competences to be exercised by the "central institutions"
viii. Units have a unilateral right of secession. As they freely joined an "alliance" as sovereign polities, their contractual autonomy allows them to unilaterally withdraw from the arrangement (as sovereign states could withdraw from an international organisation).

How does the FWB qualify in this regard? Of course, the assumption that confederations are necessarily composed of polities that are "sovereign" at international law and that they are united through an international treaty would automatically disqualify the FWB.[42] But let us reflect, by analogy and in a less formalist fashion. With that in mind, the FWB:

i.   brings together two autonomous political units, each endowed with democratic institutions
ii.   is officially grounded in a constitution : the Belgian constitution, not a specific FWB\FC constitution. The FWB itself was politically created by a resolution of the Parliament of the constitutive unit it publicly stands for (the FC). Neither form comes close to a strong contractual arrangement (analogous to a treaty).
iii.   has a "central" legislative institution without direct democratic legitimacy: there are no direct elections. The members of the Parliament are members of the Parliament of the units[43]
iv.   has an executive that is sometimes composed of ministers of the Walloon or Brussels regional government, but not always[44]
v.   adopts norms (through the French Community!) that are directly applicable to citizens, without any need for transposition

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41 See, a.o., authors cited supra, note 23. On the distinction between those who defend a "classic" position which strictly distinguishes between federations and confederations, and the "critics of the classics", see BOURGAUX, Anne-Emmanuelle, "Le confédéralisme: le moulin à vents du droit public belge?" in in Journée d'étude: Quel avenir en cas de confédéralisme ? organisé par le Centre d'études Jacques Georgin, Brussels, nov. 2008, pp. 9-19, at pp. 9 ff : http://www.fdf.be/fdf/publications/Les-Cahiers-du-Centre-d-etudes/article/quel-avenir-en-cas-de#.VW1c6qaKHV0 (last access, June 1, 2015).

42 In his contribution, Jan VELAERS identifies two decisive criteria that polities must meet to qualify as « confederations » : « sovereign statehood » and the « competenz-competenz ». These correspond to points « i » and « vi » in the above list. His additional three, which are, in his view, less « essential », corresponds to « iii » and « vii ».

43 The FWB/FC Parliament is composed of 19 of the 72 French-speaking members of the Brussels' Parliament, as well as by the 75 members of the Walloon Parliament which are all automatically members of the Parliament of the FC/FWB (members from the German-speaking area are replaced by "suppléants") (TOUSSAINT, supra, note 31, fn 5).

44 Simultaneously occupying ministerial functions in the two (regional) units and in the FWB/CF executive is neither imposed nor prohibited by law. Over the last few years, parties have attempted to promote the "wearing of two hats" so as to reinforce the "regional" character of the FWB, but also to limit duplication. However, since the last federal election, the number of "purely" FBW ministers has again risen. One possible explanation lies in the fact that as the francophone socialist and humanist parties are no longer in the federal coalition, they had a greater number of people to place in public functions…

<ol type="i" start="6">
has very limited fiscal, and no natural, resources. However, by contrast to confederations, this limited funding is not provided by the "members" of the polity, but mostly through transfers from the Belgian federal order. This is, of course, consistent with the constitutive unit status, rather than with a confederal model
neither the Walloon members of the FWB parliament or government, nor the French-speaking members from Brussels enjoy formal veto rights over decision-making or legislation. This said, given the dominance of Walloon members (75 vs. 19), decisions in practice do require Wallonia's consent… The "pragmatic vetoes" are heavily asymmetrical in this context.
could only be abrogated through a new resolution by the Parliament of the French Community[45] which is its public relations alter ego. But the members of the FWB could not actually dissolve the very essence of the FWB, which is the French Community. This would actually require a formal constitutional amendment, which is the prerogative of the Belgian federal Parliament (and not of the FWB!)

Undoubtedly, the FWB is an odd polity. The result of political "re-branding" of the French Community, it has no constitutional grounding. It cannot adopt binding norms: it must still do so under the name of the French Community. Be that as it may, those norms are directly applicable: they need *not* be transposed by the institutions of the two components of the FWB. This is consistent with a "federal" arrangement. However, the composition of the FWB institutions are more akin to a confederal structure (with no direct elections) than federal ones.

In sum, the three words composing the "Fédération Wallonie-Bruxelles" are misleading. This is not a typical federation: it is still a constitutive unit of the Belgian federation, with some federal traits, but also confederal ones. And it does not "federate" Wallonia or Brussels in their entirety.

The following chart seeks to capture the hybrid character of the FWB.

CRITERIA	Constituent unit status	Federal	Confederal
At least two types of components (levels)	X	X	
Created by a constitution vs. a treaty	X (Belgian Const and resolution of the FC!)		
Legislative and administrative competences (self rule)	X	X	X
Composition of the central legislative institutions (joint rule)			X
Composition of the central executive		X	X
Central norms directly applicable to the population		X	
Source of revenues	X		
Veto rights over decisions/norms (no)	X	X	X (?)[46]
Resolution of conflicts regarding competences	X		
Right of secession (no)	X		

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45 Or possibly were the actual use of the expression fall into desuetude, since there is no legal obligation to use the term FWB.
46 In practice, given their numerical superiority, Walloon members of the Parliament of the FWB/FC do enjoy a veto.

So what is the point of this odd creation?

2. 4 The added value of the FWB?

As mentioned above, renaming the French Community as the Federation Wallonie-Bruxelles was a re-branding exercise. Strategically, a "federation" sounds positive: it signals some form of union, amidst a context of recurrent fragmentation. It highlights a show of unity in the face of Flemish calls for further decentralisation, "defederalisation" or "evaporation" of the Belgian state.   It underlines the importance of **solidarity** not only between Francophones but between **2 regions** (even if only parts thereof).   In so doing, it reinforces the regional dimension of Belgian federalism, partly to the detriment of the Community version (which has always been favoured by Flemish authorities and movement).

This "regional" emphasis may prove useful in the context of an eventual "Plan B".[47] Were Belgium to split up, some form of federation between the Walloon Region and Brussels (however it is conceived) would already be in place. If not formally in law, at least in the public eye, and in the collective imagination. This is just what "branding" is supposed to do.

Conclusions: On the use and misuse of labels

Since the beginning of the process of state reforms in Belgium, the use of "conceptual labels" has been controversial. It took a number of years (5, 10, 15?) for a system which many qualified as "regionalised", "quasi-federal" or even "federal-in-all-but name", to acquire the undeniable and constitutionally entrenched character of "federal". For a long time, many considered that federalism in Belgium would lead to its demise. The "F-word" was actually resisted, until it became banal. This is not unusual in comparative terms. The "F-word" has been avoided in polities such as Spain or South Africa, which nevertheless have undeniable federal characteristics, and that have, for a at least 20 years, been included in comparative federal studies.

Traditional theories in both political science and law have proposed lists of criteria to distinguish various forms of states. Gradually, most analysts have come to admit that the boundaries between the various models are blurry and fluid. Many regimes show signs of "hybridity" and labels may only apply for a certain period, or regarding specific policy areas. In other words, it is not enough to say that a polity is "unitary", "decentralised", "devolved", "regionalised", "federal" or even "confederal". Once a dominant label has been selected, there remains the need to examine – and regularly "re-examine" what type of "unitary/regionalised/federal…." regime we are looking at.

This said, many who would agree with John Loughlin that the frontiers between various types of state structures are blurry, nevertheless argue that the distinction between federations and confederations is not one of degree but of *nature*.[48] The first fall in the sovereign state category, the other in what we could call "supra-state" ones. This distinction, defended by our colleague Jan Velaers in this volume, has the advantage of conceptual clarity: you are "in" the confederal category, or you are "out". And if Flanders (and however the rest of Belgium is defined) crosses the conceptual border to join the

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47 SOHIER, Jérôme, « Le 'Plan B' » in SAUTOIS, Joëlle, UYTTENDAELE, Marc, dir., La sixième réforme de l'État (2012-2013): Tournant historique ou soubresaut ordinaire ?, Anthemis, Limal (Belgium), 2013, pp. 531-550.
48 De COORBYTER, 2008, supra, note 29, p. 37.

(minute) confederal family, they must first become independent international law subjects. Those who call for a "confederal" Belgium should be transparent about their vision and the road that would lead to its demise as an independent state at international law. This brings more intelligibility to the debate, which is, of course, welcome in terms of democratic accountability and legitimacy.

Yet, does this call for conceptual clarity necessarily imply that those who seek a more "confederal federation" - in which the "center of gravity" lies with the entities endowed with most resources, competences, veto powers etc. - should not be allowed to use the term "confederal" at all? I doubt it.

Strict legal definitions are not effective shields against political claims. For one thing, it seems a little futile to challenge calls for confederalism, by asserting: "you can't have confederalism, because you can't meet the legal/historical criteria for a confederation". For another, denying the use of the term may actually be counter-productive, if it is interpreted as an arrogant dismissal of an otherwise legitimate political project.[49]

Far more effective than an appeal to classical theoretical definitions (which, as we saw, are themselves subject to serious challenge), is the elaboration of arguments to demonstrate WHY confederalism is not a desirable outcome/option from a political perspective. History shows that confederal systems, particularly when they are so intensely bipolar, are highly unstable and fragile.[50] In other words, even if "confederalism by dissociation" were possible, and even if it is not inherently illegitimate, it is very likely to be unworkable.

In this paper, I have underlined that:

- Just as a state may have federal features without being wholly federal (whatever this means), it is possible to have confederal features without being a full-fledged confederation. To put it in other words, the call for confederal-ISM does not necessarily lead to a call for a "confederate-ION" in the classical sense of the term;
- Current Belgian institutions incorporate « confederal traits » but of a rather unusual kind. While this may not be as widely acknowledged, consociational mechanisms within central institutions are largely beneficial to Francophones. Moreover, these devices were introduced through a centrifugal process in the context of the former unitary state;
- Hybridity, which marks most state structures today (as convincingly argued by John Loughlin) also describe the nature of some constitutive units in federal systems;
- The "Fédération Wallonie-Bruxelles" (the political re-branding of the Communauté française known to the current Belgian Constitution) is such a hybrid entity. It is the public relations avatar of a constitutive unit of the Belgian federation. It combines both federal and confederal characteristics, without having any legal existence of its own;

In that context, it is arguable that the use of the expression FEDERATION by francophone political leaders is just as instrumental and potentially confusing as the use of the term CONFEDERALISM by Flemish political parties. In fact, francophone leaders may be ill-advised to denounce appeals to "confederalism" as conceptually confusing and politically obfuscating, when they have themselves

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49 In my view, it is similarly counter-productive to deny groups who consider themselves to be nations the "right" to actually call themselves as such, for fear that such recognition might threaten the overall polity … Catalonia is a telling case in point.

50 BURGESS, supra, note 7, at pp. 232-249; BAHCHELI, Tozun, NOEL, Sid, « The Quest for a Political Settlement in Cyprus: Is a Dyadic Federation Viable? », Publius, vol. 44, no 4 pp. 659-680; WATTS, supra, note 7, pp. 184-85.

rebranded a "*community*" constitutive unit as a "federation" of two (partial) *regions*, in a way that flies in the face of the constitutional text.

Neither side has a monopoly on conceptual clarity. And both have good strategic reasons for maintaining a degree of conceptual and constitutional murkiness. Citizens – and democratic transparency – on both sides, pay the price of these semantic and marketing choices.

THE PARADOX OF FEDERALISM – THE BELGIAN CASE

Kris Deschouwer

1. Presenting the paradox

The question raised by the so-called paradox of federalism is fairly simple and straightforward: can the federal organization of a state be a good solution when one or several parts of the territory claim to be different and demand a special and more autonomous status? Or is a federal organization of the state to the contrary a choice that cannot pacify the tensions and that will only lead to a further sharpening of the tensions? While the question sounds simple and straightforward, the answer is not. That is exactly why it is referred to as a paradox. Some claim that federalism is the answer, while others claim that federalism is a problem (Erk & Anderson, 2009).

This discussion about the appropriateness of federal-type state structures when the nature of the state is being challenged is actually part of a larger discussion about the way in which divided societies can be governed in a democratic and peaceful way (McGarry, O'Leary & Simeon, 2008). Democracy requires the governing of a society by responding to the demands of the members of that society. Yet when society is divided and when subgroups prefer radically different ways of organizing their life – because they define themselves as different in for instance religious, linguistic or historical terms – democratic governance becomes difficult. State and nation building can then opt between two (theoretical ideal types of) conflict management. The first is 'integration'. That means that one single public identity is being promoted. Integration aims at an equal meaning of citizenship for all, and thus for one single common public space. The second strategy is 'accommodation'. Here societal diversity is recognized and this strategy believes that the different groups can co-exist in a democracy. Accommodation thus accepts dual identities within one society. "*While integration responds to diversity through institutions that transcend, crosscut and minimize differences, accommodationist strategies seek to ensure that each group has the public space necessary for it to express its identity, to protect itself against tyranny by the majority, and to makes its own decisions in domains of critical importance*" (McGarry, O'Leary & Simeon, 2008: 42).

One specific form of accommodation is territorial pluralism, which is typical for a federal organization of the state. A federation is a state in which smaller territories have a certain degree of self-rule to organize policy matters in the way preferred in that part of the state territory. Matters that have to be equal for all citizens of the federation are dealt with at the center, where the principle of shared rule applies. When sub territories of the state are defined in identity terms, the federation is labelled 'ethno-federation' (using the term ethnicity in a very broad sense). Ethno-federations can then be seen as ways to organize and to govern a divided society. An ethno-federation opts for the formal recognition of the differences in a divided society.

The question is then indeed whether this can work. There are good arguments in favour, and good arguments against the choice for ethno-federations as instruments of conflict management. The first and most evident argument in favour states that doing the opposite – i.e. ignoring differences and imposing one single meaning of citizenship and one single identity in a society that manifestly does

not display it – will in the end fuel demands for territorial autonomy. For territorially divided societies unitary state solutions are thus not the best thing to do. There is no point in keeping the illusion of a single nation state when it is not there. Having sub states as part of a federal union gives the subgroups living on the different territories also the possibility to express their demands and preferences in a more subtle way. The sub state levels have their own electoral competition for power and can have their own specific party system and if they prefer also a different electoral system. Voters can vote differently at different levels, depending on the policies controlled by each of the levels.

Another advantage of federal solutions is that they are flexible. A federal state is not a fixed and final structure. There is always room and need for negotiation and recalibration of the distribution of powers, the financing of the levels and their policies and the procedures for shared decision making. Federal-type political institutions can also be flexible by not sticking to purely symmetrical arrangements in which each substate has exactly the same status and powers. Non-symmetrical solutions, granting more autonomy to some parts of the territory (those wanting more autonomy) and less to other parts, are not possible within the framework of a unitary state. Federalism allows creativity and solutions 'à la carte'. It allows for hybrid state forms.

There are however also strong arguments against the ethno-federal option. The first is an empirical one: ethno-federations have a poor track record. The most cited examples here are the former communist federations that were not able to survive when democracy was introduced. They all fell apart, and often after civil war and bloodshed. The strongest theoretical argument points at the consequences of formally recognizing differences in state and society. If groups in society claim that they are different and if that difference is accepted and formalized into state institutions, the feelings of identity will not be reduced. To the contrary: they will become legitimate. The subgroups with different identities will have their own substate, their own political system, their own administration, possibly their own flag, their own national holiday or other significant markers of identity. The differences between the citizens of the same state will then be essentialized. Belonging to a specific group becomes an essential part of the way in which one is a member of society and a citizen of the state. That increases the chances that many if not all political conflicts in the country will be framed in the terms of the ethnic differences (especially if the mass media are also organized per subgroup). And the end result will not be a pacification of the ethnic differences, but a strengthening of them.

One specific mechanism by which this can happen is the existence of a fully-fledged political and electoral system at the substate level. That is a very fertile ground for regionalist parties, limiting or focusing their activities on that level and putting pressure on the statewide parties to move in their direction – when they compete in that substate – and to also defend a larger degree of autonomy or to claim independence. The political system of the substate level is the home of ethnic outbidders (Brancati, 2006; 2007).

A federal solution for a divided society is therefore not a good option. It might be a short term solution and allow for a short term cooling down of tensions. But the federal institutions themselves contain the seeds of the next conflict. Ethnic federations embark on a slippery slope. Once the mechanism is started, the demands for autonomy will only increase. Federal solutions are thus only a temporary stop on the way to confederal options or to full separation of the state.

There are thus clearly two opposing views, and both put forward quite plausible arguments. There are however also more nuanced approaches that try to see under what conditions the 'negative' effects

might be softened (McGarry & O'Leary, 2005). One of these is the rules used for decision-making in the centre. These should have a consociational nature, which means that all the relevant subgroups should not only be formally recognized, but should also have a guaranteed presence when decisions are made. The central decision making should thus be based on the principle of power sharing and mutual vetoes and not on majoritarian practices. If the latter were used, a majority in the federation would be able to impose its will on the others (Lijphart, 1969; 1979; 2012). This actually means (see also Velaers in this e-book) that an ethno-federation has more chances of being successful if its central decision-making displays characteristics of a confederation.

A second favourable condition is the presence of statewide political parties that mobilize and thus also attempt to be responsive across the ethnic lines, or of an electoral system that offers incentives to parties or politicians who are willing to cross the lines. The problem is that when political elites have the possibility or even obligation to govern together in a consociational way, they are not necessarily quite eager to do so, especially if seeking compromises with other leaders entails the risk of being punished at the next elections (Horowitz, 1985; 2002).

A successful ethno-federation should also be based on a voluntary agreement between representative elites of the country itself. When the institutional setup is imposed from the outside, it will not be perceived as legitimate. This might indeed account for the failure of ethno-federations that were imposed by colonial powers. And a tradition of stable democracy and economic prosperity is another good condition. A tradition of democracy allows population and elites to evaluate the (limited) consequences of winning and losing, and economic prosperity and growth allows for compromises that never really hurt. Both the tradition of democracy and the economic prosperity were absent in the post-communist ethno-federations, that are so often cited to claim that ethno-federations are not able to live long.

This paradox of federalism and the discussions about it are very relevant for the Belgian political system. Before moving to the Belgian case, we should however add a few reflections to this debate. One must indeed be aware of the (often) implicit assumptions made. The discussion is generally rather conservative, in the sense that it takes existing states as the unit of analysis and their survival or at least their enduring territorial integrity as yardstick for the good functioning of the political institutions. Separatism or the breaking up of a state is then evidently a bad thing. Separatism is also generally evaluated as a bad and problematic outcome because it is associated with violence or civil war. There are indeed many examples of that to be given.

Yet while the examples of failure and bloodshed are arguments to warn against ethno-federal solutions, some countries are regularly cited as examples of functioning ethno-federations. These countries are Canada, Spain, the UK and … Belgium. That should invite us to reflect on the exact meaning of failure and success in this respect. Is failure the end of the state? Is failure the use of violence? Are endless debates over the nature of a state a failure? Is a very long process of coalition formation a failure? Is a peaceful and negotiated separation of one or more parts of the territory a failure?

2. The paradox in Belgium

The debate on the paradox of federalism is very relevant for Belgium. It raises the fundamental question about the future of the state and about the appropriateness of its institutions. Is federalism the best suited institutional design to govern a country divided along territorial ethno-linguistic lines, or is the federal solution only a temporary stop towards the breaking up of the Belgian territory? Has Belgium engaged on the slippery slope, or has it found an institutional equilibrium that can last?

We will present the Belgian case by looking at a few of the alleged consequences of ethno-federalism. We describe the evolution of substate identities, the evolution of regionalist parties and the degree in which regional elections have developed a dynamic of their own. We will conclude by looking at the presence or absence in Belgium of the favourable conditions for making an ethno-federation succeed.

2.1. The substate identities

As explained above, one of the arguments against the formal recognition of substate identities is that these identities will only become stronger as a result of that. The federal technique does then not reduce the tensions, but sets the stage for even stronger demands for autonomy. The question is whether such a thing happened in Belgium, whether people are identifying more with the substate entities as a consequence of the federal reforms. To check for that we can use the electoral surveys that have been conducted since 1991. In each of these the respondents – a random sample of the voting population – were asked to which groups they identified in the first place. Tables 1 and 2 present these figures for the population of Flanders and Wallonia separately.

In both regions the identification with Belgium is always the strongest. There is however a clear difference between Flanders and Wallonia. In the latter the identification with Belgium is much stronger. And therefore in Wallonia the identification with the Walloon region or with the French Community is much lower than the identification with Flanders in Flanders. If one looks at the level of that substate identification though, it is impossible to see a trend, and certainly not an upward trend. This is very much against the expectations. The creation of the Belgian federation has *not* produced a strengthening of the substate identities. In Wallonia they are hardly present and did not increase. In Flanders they are much stronger, although they remain lower than the identification with Belgium and did not increase.

Table 1: The evolution of identities in Flanders

	1991	1995	1999	2003	2007	2009	2010	2014
Belgium	42	52	56	54	52	47	45	48
Flanders	40	25	27	30	34	30	29	23
Province	3	3	2	4	3	6	9	7
Local	13	17	13	12	10	16	13	15
Other	2	3	0	0	1	1	4	7

Sources: ISPO/PIOP Voter surveys 1991, 1995, 1999, 2003, 2007, 2010; PartiRep Voter Surveys 2009, 2014. In the PartiRep surveys 'Europe' was added as an option. The figures presented here exclude Europe and recalculate the 100% on the remaining categories.

Table 2: The evolution of substate identities in Wallonia

	1991	1995	1999	2003	2007	2009	2010	2014
Belgium	68	65	72	68	75	68	70	61
Wallonia	11	10	11	10	8	11	5	12
French Community	11	8	5	6	6	6	7	5
Province	0	0	2	2	1	4	2	4
Local	7	10	10	10	8	11	14	11
Other	3	7	0	4	2	0	2	7

Sources: ISPO/PIOP Voter surveys 1991, 1995, 1999, 2003, 2007, 2010; PartiRep Voter Surveys 2009, 2014. In the PartiRep surveys 'Europe' was added as an option. The figures presented here exclude Europe and recalculate the 100% on the remaining categories.

2.2. *Substate elections and regional(ist) parties*

A second argument warning against the perverse effects of ethno-federal reforms is the creation of a substate electoral channel and of a fully-fledged political system at the substate level. That could become a very fertile ground for regionalist parties. These parties can concentrate their activities on the substate level and challenge the parties that govern at the center.

The first question to be answered is whether the federal system in Belgium gave rise to different electoral dynamics at the federal and at the regional level. So far there have been five regional elections: 1995, 1999, 2004, 2009 and 2014. Three of these coincided with federal elections. That allows us to check to what extent the results were different at the two levels. Table 3 presents for each of the three coinciding elections an index of dissimilarity for Flanders and Wallonia. That index ranges theoretically between zero per cent (when the results are identical) to 100 per cent (when no party winning votes at one level is present in the result at the other level). For both Flanders and Wallonia we find each time a very low figure. That means that the election results and thus the voting behaviour at the regional and at the federal level are almost identical. There is thus no such thing as a typical regional election in which different parties compete or in which different parties – regionalist parties in particular – score differently.

Table 3: The degree of dissimilarity between regional and federal election results
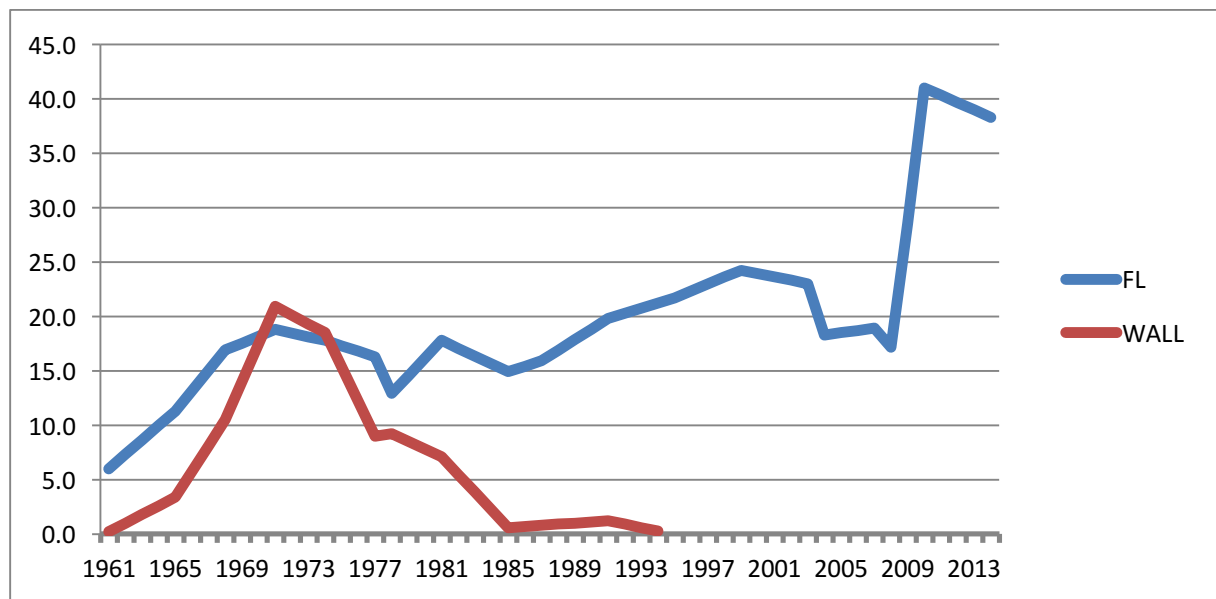
	1995	1999	2014
Flanders	2,8%	2,7%	2,1%
Wallonia	2,3%	1,1%	3,0%

One could also wonder whether the transformation of Belgium from a unitary to a federal state based on the linguistic identities has created a fertile ground for regionalist parties to flourish. In Figure 1 we show the electoral evolution of regionalist parties in Wallonia and in Flanders since 1961. That reveals a very simple story for Wallonia: the regionalist party Rassemblement Wallon reaches its high point in the early seventies, and starts to decline as soon as the Belgian state starts being reformed towards a federal system. For Wallonia one can thus not at all say that the state reform provided for a fertile ground on which regionalism could grow.

In Flanders the story is different, but also more complex. The line for Flanders in Figure 1 refers to three parties. First there was the Volksunie (VU) that broke through in the 1960s together with the Rassemblement Wallon. It scored quite well in the 1970s, but started losing voters when it accepted to participate in the national government. That participation in government in 1977 lead to the creation of a new party Vlaams Blok (VB) that defended the hard line of Flemish independence. The Vlaams Blok did however not gather many votes with that position and only started to grow (from 1991 on) when it shifted its focus towards migration and security issues. The VB reached its high point in 2004, when it polled 24 per cent of the Flemish votes. Research has shown however that the electoral success of the VB was hardly based on its claim for Flemish independence and could indeed be explained by its radical right and populist position (e.g. Swyngedouw, 1992).

Meanwhile the VU had fallen apart, after constantly losing votes. Its successor party – the New Flemish Alliance N-VA – participated in the federal elections of 2003 and polled only 4,8 per cent of the Flemish votes. Again this is proof of the fact that a regionalist (or separatist) position does not automaticallyoffer good chances for electoral growth in Flanders. The N-VA needed an electoral alliance with the Flemish Christian democrats to secure its survival, and it was only in 2009 that it was able to – quite suddenly – reach 13 per cent of the Flemish votes. The results in 2010 and 2014 were then quite spectacular (28,5 per cent and 32 per cent). While N-VA became the largest party of Flanders and of the country, VB was on its way down. And when N-VA reached its highest point so far in 2014, it did so after a campaign in which it focused on its center-right economic program rather than on its preference for more autonomy for Flanders and eventually an independent Flanders. There is thus one clear upsurge of regionalist voting behavior after the introduction of federalism: the rapid rise and success of the N-VA. It did however only appear on the scene some fifteen years after the first direct elections of the regional parliaments.

Figure 1: The electoral score of regionalist parties in Flanders and Wallonia since 1961

In a split party system like the Belgian one though, the mobilization of regionalism is not limited to the regionalist parties only. All parties participate in elections in one language community only and thus represent only the voters of that language community. That is – in Flanders – reflected in the names of several of the parties. '*Vlaams* Belang', 'Christen-Democratisch & *Vlaams*', 'Open *Vlaamse* Liberalen en Democraten' and 'Nieuw-*Vlaamse* Alliantie' all explicitly refer to their language community. The leftist parties in Flanders SPa, Groen and PvdA do not. And among the Francophone parties only the FDF (Fédéralistes Démocrates Francophones) refers to its language group.
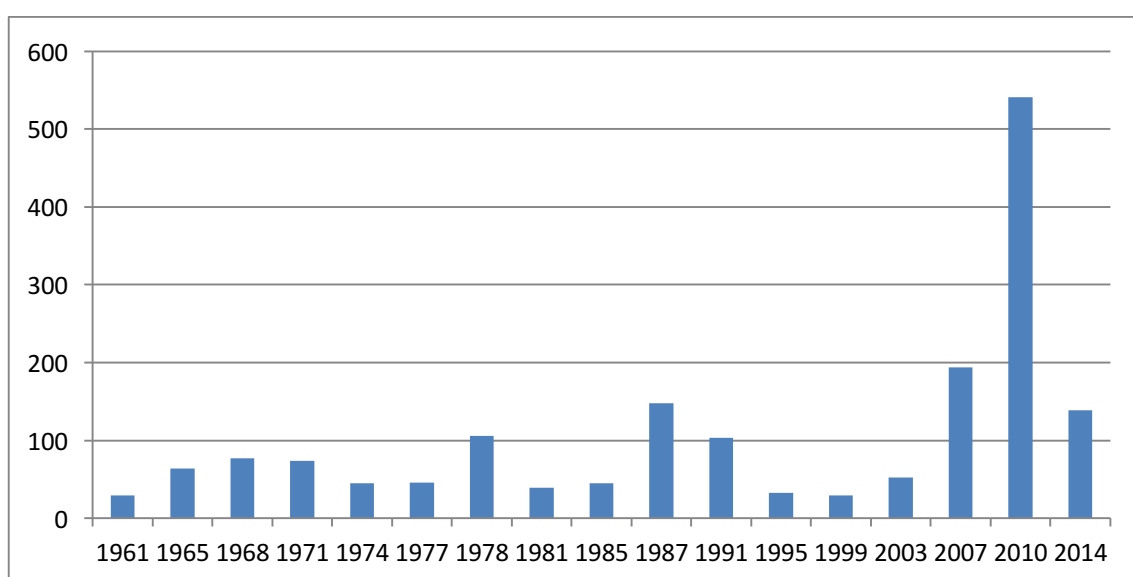
An interesting illustration of the role that 'mainstream' parties can play in the regionalist mobilization is what happened in the Flemish Parliament at the end of its first term in 1999. A set of resolutions was accepted that called for further reforms of the state, more in particular for further devolution of powers, an increased fiscal and financial autonomy and a revision of the status of Brussels as a fully-fledged region in the federation. Although not all resolutions were backed by all parties (Greens and socialists did not support them all), it does show to what extent the role of regionalist parties can be played by the others. And in this case it also shows how the subnational level can be a forum where demands for further autonomy can easily be voiced. At that subnational level all parties of one language group are 'among themselves' and do not need to search for a compromise with parties of the other language group.

2.3. *Favourable conditions*

Five favourable conditions for making an ethno-federation more successful were suggested above: a stable democracy, a prosperous economy, an agreement built from within, statewide parties or incentives for cross-community mobilization and a power-sharing logic for the joint decision making at the federal level. For three of these there is absolutely no doubt that they are present in Belgium. Belgium is indeed a stable and old democracy that does not run the risk of being deeply destabilized when political tensions between its language groups occur. Belgium also belongs to the group of countries with a prosperous economy. And the structure of the state has not been imposed by external powers but is the result of a series of agreements that were crafted by the Belgian elites and that were furthermore adopted by large and double majorities in parliament.

The two remaining favourable conditions do require some reflection though. First there are the rules for decision-making. An ethno-federation that functions in a consociational way is supposed to be less vulnerable than one that uses pure majoritarian techniques. The consociational techniques of power-sharing give each subgroup a guaranteed presence in the central decision making and gives each group a veto, which means that the only rule for decision-making is consensus. No group is then able to dominate and to impose its will. And that is exactly how Belgium functions. The parity composition of the central government, the language groups in parliaments, the alarm bell procedure and the required double majorities for changing the architecture of the state have introduced since 1970 a strong consociational logic into the Belgian state. Since 1970 it is impossible for one of the language groups to govern alone against the other, and for each institutional reform a double majority is required and thus a negotiated agreement between the two communities. This consociational nature of the federation builds in the obligation to govern together, which has both wanted and perverse effects. The wanted effects are the guaranteed presence of representatives of each language group in the decision-making process and the obligation to find compromises between different views on policies and on the very structure of the state. The different constitutional reforms that were agreed on since 1970 do indeed display an incredible creativity for finding the middle way between quite different definitions of Belgium and of its basic building blocks. The flipside of the coin however is that when no such agreement can be found, no government can be formed. Figure 2 displays the evolution of the time needed to form a new Belgian government after elections. That is never an easy affair and always takes at least a few weeks. There were peaks with formation processes of more than 100 days in the 1970s, the 1980s and the 1999s, and then the formation of almost 200 days in 2007 and of 541 days in 2010-11.

Figure 2: *Number of days to form a Belgian government after general elections*

The consociational nature of the Belgian federation cannot be analyzed in isolation from the absence of the other institutional favourable condition: statewide parties or electoral incentives to mobilize across the language border. The consociational obligation to govern together and thus to find a middle ground does not come with an in-build *willingness* to govern together. Elected politicians want to be responsive to their voters, and in the Belgian split party system that responsiveness is to one language community only. The compromise accepted at the statewide level is then more likely to be followed by an electoral defeat next time round. The absence of statewide parties and of cross-border mobilization makes the federal shared ruling cumbersome and risky (Deschouwer, 2012; Deschouwer & Van Parijs, 2013.

Out of five favourable conditions for the good functioning of an ethno-federation, four are present in Belgium. The fifth is absent, and renders the consociational central decision making difficult, but not impossible. At the end of the unbelievably long coalition formation of 2010-2011 a compromise was reached in the middle between the Flemish demand for far-reaching further devolution and the Francophone demand for keeping the status quo.

There is indeed an interesting and striking asymmetry in the Belgian federation. After a first wave of devolution in the 1970s, the demands for moving further have come mainly from Flanders. We have seen above that the Flemish identity is stronger than the Walloon identity and that regionalist parties – of different types and ideological background – have remained present only in Flanders. Flanders is also the largest substate, with a majoritarian status than can however not be fully translated into political power since the requirement for governing the center is the sharing of power. Flanders has had now for several decades also the strongest economy and is therefore a net payer in interregional and interpersonal (social security) financial transfers. And finally the institutional setup of the Belgian federation has made Flanders a strong political actor. On the Flemish side there is indeed only one government, one parliament and one administration for both the Flemish region and the Flemish Community. There is no counterpart to that on the Francophone side. The 'Federation Wallonia Brussels' as the French Community has now labelled itself is indeed an association of the Walloon

region and the Francophones of the Brussels region (see Poirier in this e-book). That is a complex and hybrid construction that is not built on the same strong identity as the one in Flanders and in its institutions.

Conclusions

This note tried to answer the question whether the Belgian federal solution has been a wise way to deal with tensions between the language communities, or to the contrary has been at the origin of further tensions and possibly disintegration of the state. The question was inspired by an ongoing discussion about the paradox of federalism, in which indeed a number of arguments have been given to explain why the acceptance and institutionalizing of different identities in a society contributes to their strengthening, their essentialization and thus to an exacerbation rather than to a pacification of the tensions. Several ethno-federations have indeed not survived and have ended in bloodshed. The latter is certainly not the case in Belgium and chances that the tensions escalate into violent conflict are close to zero.

We have first checked whether expected consequences of the creation of an ethno-federation, like increased substate identities and the rise and success of regionalist parties have occurred. The strengthening of substate identities could not be found, and the story of regionalist parties is one of rise, decline and then rise again, but in Flanders only. We have checked the favourable conditions found in the literature on ethno-federations and found most of them present in Belgium. Only the split party system and the lack of cross-border electoral mobilization seems to weaken the capacity of joined decision-making that is required in the consociational rules that characterize the Belgian federal system.

Belgium oscillates between periods of relative calm and periods of high tension and difficult decision-making. The crucial question is whether the ever-returning tensions can be considered to be a consequence of the federal setup that has replaced the Belgian unitary state since the 1970s. Debates between north and south about the internal boundaries, about the status of Brussels, about the distribution of competences or the financial flows between the substates reflect a view on the country that is different in north and south. These debates and different opinions were there before federalism and are still there. Federalism itself cannot be blamed for that.

Against the background of the international literature on federalism as a possible solution for ethnic tensions, Belgium is often cited as a success (at least before the 2010-11 crisis). It is a success because the conflict is non-violent and – compared to for instance Spain and the UK – because there is no strong movement defending the breaking up of the country. One should thus for democratic ethno-federations probably reformulate the questions and criteria for failure and success. Are ongoing discussions about the nature and the future of the state a failure of the federal system? Is institutional gridlock like in 2010 a failure of the federal system? And if it is: which institutional alternative could produce more stability, more welfare and more legitimacy than a hybrid federal-type state? The Belgian case does not give a straightforward solution for the paradox of federalism. If a more nuanced answer is possible, one that does not make a crude and quite normative distinction between failure (breaking up the state) and success (keeping the integrity of the state), Belgium does show that ad-hoc constructions that can be amended and rethought, offer a decent way to govern a divided society. The crucial question then is whether the price to pay – in terms of recurrent crises and fierce debates

about the very meaning of the country – is too high, and whether clear and unambiguous solutions would come at a lower price. The jury is still out on this question.

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THE RESCALING OF STATES AND POLITICAL COMMUNITIES

Michael Keating

My first question is whether federalism helps to keep plurinational states together or pull them apart. It is an old one and has never found a definitive answer. So much depends on the context that large-n quantitative studies do not get us far, while individual cases seem to offer different lessons. When a question in the social sciences cannot be answered, it is often a sign that we are asking the wrong question. The question about whether federalism fosters secession is perhaps such a question, as it reifies the nation-state and assumes that secession and non-secession are radically opposed alternatives. What if it is the case that the transformation of statehood in the modern world is such that neither the existing states nor the putative secession states can actually claim sovereign independence in the traditional sense? We are then in a world of 'post-sovereignty' in which authority and power are constantly contested and negotiated (MacCormick, 1999; Keating, 2001).

Let us apply this perspective to nationality movements in Europe. At one time, the nationalism of the stateless was assumed to aim at gaining their own state. From the 1980s onwards, however, many of them moved towards post-sovereigntist ideas, often embedding their project within a future Europe of the Peoples (or Nations, or Regions), superseding the old nation-state model. In fact, there was nothing new about this since many of the nationalisms of the late nineteenth century had aimed at self-government within overarching systems of order, including reformed and democratized empires. During the 2000s, however, this idea faded along with the Europe of the Regions. Welsh nationalists moved back to independence; Flemish nationalists talked of independence, if only in the long-term; Catalan moderate nationalists moved towards independence; and in Scotland the separatist option gained ground. When pressed to say what their independence project means, however, these movements rapidly retreat into post-sovereigntist formulations. Scottish nationalists during the independence referendum noted that Scotland was joined with the rest of the United Kingdom in six unions (political, monarchical, European, defence, monetary and social), of which they proposed to dissolve only the first. Catalan nationalists have played with the term 'state', which may or may not be independent. Flemish nationalists play on the vocabulary of confederation and staged moves to self-determination. Opinion polls in Spain, Canada and the UK have regularly shown that post-sovereigntist options gain more support than either of the state-bound ones. The rescaling of states and political communities has loosened the connection between them and reconfigured the relationship among identity, functional capacity and institutions (Keating, 2013).

My second point concerns the nature of the political communities that are the subject of these demands. I have never been happy with the term 'ethno-nationalism'. The term ethnicity is notoriously difficult to define, most sociologists see is as socially constructed and, however it is defined, it does not map automatically onto political communities. It is used prejudicially to refer to the minorities but rarely to the majorities. The minorities in turn are often seen as characterized by distinct values that may even be seen as somehow deviant. One of the most interesting features about many contemporary nationalist movements, however, is that they flourish in conditions, not of value divergence, but of convergence; this is what Stéphane Dion (1991) called de Tocqueville's paradox.

The political community is a contested space, not one of cultural homogeneity, and dividing it into ever smaller places does not alter this fact until we get down to a community of a single individual. The idea promoted by Alesina and Spoloare (2003), that we can break the world up into ethnically homogeneous communities where everyone shares the same preferences, is an illusion. In some ways, this makes the management of nationality questions easier, since it is not a matter of defending essential ways of life. On the other hand, it raises the stakes, since these demands are no longer just about culture and language but about the locus of political authority in a wider sense.

My third point concerns constitutional accommodation. In a plurinational state, the locus of sovereignty is permanently contested. There is, and can be, no definitive resolution of the issue, whether by appeal to positive law, to consensus or to history. Yet it is not necessary to drill down the foundations and find agreement there in order to get agreement on a constitution that works. In conditions of peace and liberal democracy (the conditions that Kris Deschouwer mentions), provisional agreement is enough. This has been the lesson of the United Kingdom, where there are two distinct doctrines of sovereignty in relation to Scotland. Even over such a vital issue as whether the Scottish Parliament could hold an independence referendum, agreement was reached on the substance without either side conceding the principle – the UK Parliament authorized the Scottish Parliament to do what the latter claimed it had the right to do in any case. Spain, by contrast, is wracked by sharp disputes about the principle of sovereignty.

Plurinational federations do contain centrifugal tendencies but there are also centripetal forces and cross-cutting cleavages. They have fallen apart at a time or regime change and crisis, and often collapsed at the centre rather than the periphery. The Belgian case does indeed show how states can muddle through.

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(CON)FEDERALISM IN BELGIUM IS NOT A PROBLEM, IT'S A SOLUTION

Philippe Destatte

In order to respond to the questions on the development of federalism in Belgium and its relevance in dealing with tensions between the population groups that make up Belgium, I believe, that the question of ambiguity must be addressed. This point is clearly crucial, because it affects how we understand words, concepts and ideas, which, by a natural or historical process, have a life of their own and therefore evolve and undergo transformation. Ambiguity refers to the capacity of words to take on multiple interpretations and hence multiple possible meanings. It creates uncertainty, and where it affects critical variables, it will tend to destabilise our understanding of the system and impede dialogue, or even make it impossible while it persists.

It is with this in mind that I would like to single out two ideas which make their appearance in Kris Deschouwer's discourse right from the start, but which also contaminate overall relations between the actors in the Belgian political system. The first of these is the use of the ethno-linguistic concept as a basis for a territorial, political or institutional analysis in the twenty-first century. The second is federalism itself, and its modern-day extension or corollary, confederalism.

1. The functional viability of the concept of ethnicity in 21st century federalism

There is no denying that the concept of ethnicity took over from that of race in the ideological system of those who devised the State reforms up to the 1970s and early 1980s. Moreover, it probably remained active for longer in Flanders and Brussels. The same is true of the use of language as the driver of federalism – something which occurred from the time of the first meetings of the Walloon Assembly in 1912, where there was a clash between a Walloon territorial vision and a linguistic vision involving the defence of the *fransquillons* – the French-speakers in Brussels and then in Flanders. This process was intensified firstly by the rift in the early 1920s between these defenders of the *fransquillons* and those who described themselves as regionalists and federalists, and secondly, by the emergence of the cultural communities. The latter appeared earlier than is generally remembered: the first experiments in this direction date back to the late 1930s. For, although the development of the regions represents part of an attitude and a broad trend found at European level if not more widely, the same is not true of the cultural communities, which are definitely an innovation in the development of federalism.

The historians Jean-Pierre Nandrin and Pierre Sauvage argue that the concept emerged in the 1930s. The notion of the people's community or *Volksgemeenschap*, which found favour with the Flemish movement, was, it is suggested, borrowed from the German *Volksgemeinschaft* and Herder's

paradigm of romanticism.[1] We could also follow the sociologist Claude Javeau in tracing the origins of this notion to Ferdinand Tönnies and his work *Gemeinschaft und Gesellschaft*, published in 1887, which took an equally perilous approach in defining the notion of community with reference to individual links based on blood.[2] In 1936, the Research Centre for State Reform recognised the existence of two 'main cultural communities'.[3] The Centre defined the concept of community as follows: 'the term is a modern one involving some very old ideas, which, however, have taken on a new psychological value. It describes the state of attachment to a cultural group by all the fibres of one's being; it places less emphasis on political and material elements than on cultural and linguistic factors. It in fact reflects a very noble and very respectable reality. The community is an entity that has genuine rights. The elite cannot develop properly and fulfil its educational mission unless it remains in close contact with the community'.[4]

The notion of ethnicity, which was dear to Guy Héraud [5] and Charles-François Becquet,[6] and indeed to Maurice Bologne [7] and Maurits Van Haegendoren, [8] was to be the last incarnation of a way of thinking which in Wallonia was broadly challenged by the *Manifesto for Walloon Culture* of 1983, which, contrary to what its name might suggest, laid the foundations of a regionalism in Wallonia built on truly territorial and civic bases. Here, it is the geographical limits of the territorial space that underpin the citizenship of the federated entity, regardless of nationality. According to this way of thinking, which has received legal corroboration in the Maastricht Treaty, an inhabitant of Wallonia is a Walloon, regardless of his or her origins. This text expressed the strong idea that "*All those who live and work in the Wallonia region are undeniably part of Wallonia. All respectable human ideas and beliefs are also part of Wallonia. (...) Being a straightforward community of human beings, Wallonia wishes to emerge as an appropriate entity which opens itself to the entire world.*"

So, personally, even if I know that ethnicity, ethno-nationalism, and all their declension are still operational in political science and sociology, I would like to disqualify that concept for a discussion about the future of Belgium. We cannot build the future with the word of the past. In 1998, Bart Maddens, Roeland Beerten and Jaak Billiet considered that the dominant Flemish nationalistic discourse could be labelled as ethnic in the sense that the national identity is described as a static

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[1] Jean-Pierre NANDRIN, De l'Etat unitaire à l'Etat fédéral, Bref aperçu de l'évolution institutionnelle de la Belgique, dans Serge JAUMAIN éd., La réforme de l'Etat… et après, L'impact des débats institutionnels en Belgique et au Canada, p. 14, Bruxelles, Editions de l'Université de Bruxelles, 1997. – Pierre SAUVAGE, Jacques Leclercq, Les catholiques et la question wallonne, p. 10, Charleroi, Institut Destrée, 1988. – Il n'est pas impossible de trouver des acceptions plus anciennes mais moins courantes. Par exemple : Les solutions équitables se dégageront d'elles-mêmes si nous réussissons à opposer à la ténacité flamande une égale ténacité wallonne. Pour cela, il faut tout d'abord que la Wallonie prenne conscience d'elle-même, de sa communauté linguistique et morale, de sa force passée et présente. Jules DESTREE, Les Arts anciens du Hainaut, Résumé et conclusions, p. 24, Bruxelles, Imprimerie Veuve Mommon, 1911. – Voir aussi l'intervention de Hervé Hasquin au Conseil de la Communauté française, le 25 juin 1993. CONSEIL DE LA COMMUNAUTE FRANCAISE, Session 1992-1993, Compte rendu intégral, Séance du vendredi 25 juin 1993, p. 18-19, CRI, N°15 (1992-1993).

[2] Claude JAVAUX, De la Belgitude à l'éclatement du pays, dans Hugues DUMONT, Christian FRANCK, François OST et Jean-Louis De BROUWER, Belgitude et crise de l'Etat belge, p. 152, Bruxelles, Facultés universitaires Saint-Louis, 1989. – Ferdinand TöNNIES, Communauté et société, Paris, Puf, 1977.

3 Lid Studiecentrum tot Hervorming van den Staat.

4 Robert SENELLE, La Constitution belge commentée, p. 153, Bruxelles, Ministère des Affaires étrangères, 1974.

5 Guy HERAUD, L'Europe des ethnies, Préface d'Alexandre MARC, Nice, CIFE, 1963. - G. HERAUD, Qu'est-ce que l'ethnisme? dans L'Europe en formation, n°76-77, Juillet-Août 1966.

6 Charles-François BECQUET, L'Ethnie française d'Europe, Paris, Nouvelles Editions latines, 1963.

7 Guy HERAUD & Hendrik BRUGMANS, Philosophie de l'ethnisme et du fédéralisme, coll. Etudes et documents, Nalinnes, Institut Destrée, 1969.

8 Maurits VAN HAEGENDOREN, Un fédéralisme honteux, dans Belgique 1830-1980 : la réforme de l'Etat, Numéro spécial de L'Europe en formation, p. 89-93. - M. VAN HAEGENDOREN, Nationalisme en Federalisme, Politieke Bedenkingen, Antwerpen, De Nederlandsche Boekhandel, 1971.

cultural heritage that has to be preserved for future generations while in Wallonia, supporters of regionalism generally adopt a more republican approach to national identity. They stressed on the fact that in the Walloon view, *regional autonomy is necessary to defend the common social economic interests of the Walloons in the Belgian State, not to preserve a Walloon cultural heritage*[9]. With some exceptions like the surprising declaration of the Minister-President Rudy Demotte during Summer 2013, even defenders of the concept of nation like José Fontaine and the *Toudi* review have in mind an opened conception referring to a postnational model like the one defended by the German philosopher Jürgen Habermas[10] or expressed by the French sociologist Dominique Schnapper in her essay about "The Community of the Citizens, About a modern idea of Nation[11]. These conceptions are indeed very far of what the French historian Raoul Girardet called the *nationalism of the nationalists* [12] *and* are opening the dream of building a nation without nationalism.

2. The ambiguities of the concepts of federalism and confederalism

It was not an historian but one of our greatest constitutionalists – a former Minister of Community Relations – who said that federalism, one of the most complex terms in political science, "is not a legal concept: it is in reality a product of history". And Fernand Dehousse went on to say, during a speech at The Destree Institute on 26 February 1976: "*It is a system that a number of peoples, a very large number in fact, have adopted at different times and which, accordingly, has presented and still presents today multiple variants across time and space*"[13].

What Fernand Dehousse was fond of pointing out is that, around the world, the federalist approach has been intended to link together two major and conflicting principles: the need for autonomy and the need for association. Sometimes federalism has a centripetal character, as is the case with the United States or with the European project, whereas at other times it takes a centrifugal form, which has been the approach in Belgium and Switzerland. The main author of the first federalist proposals ever brought before the Belgian Chamber raised the question of the difference between a confederation of States and a federal State. He took the view that this classification was very relative and extremely difficult to pin down – so much so, in fact, that some authors claimed that such differences were non-existent, or that it was the 'right of secession', as enshrined in Soviet law, that constituted the sole distinguishing mark of a confederation.[14] Moreover, Dehousse confirmed what he had already written in 1938 with Georges Truffaut in *L'Etat fédéral en Belgique*, namely that a confederation of States is often very similar to a federal State[15].

However, when he compared his draft legislation, which was tabled in the Chamber in 1938 by Georges Truffaut and certain other socialist parliamentarians, with the proposals composed secretly by a number of Liège socialists (including the future member of parliament, Simon Paque, the future

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9 Bart MADDENS, Roeland BEERTEN & Jaak BILLIET, The National Consciousness of the Flemings and the Walloons, An Empirical Investigation, in Kas DEPREZ and Louis VOS, Nationalism in Belgium, Shifting Identities, 1780-1995, p. 204, London, MacMillan, 1998.

10 Jürgen HABERMAS, Après l'Etat-nation, Une nouvelle constellation politique, Paris, Fayard, 1998.

11 Dominique SCHNAPPER, La Communauté des citoyens, Sur l'idée moderne de nation, Paris, Gallimard, 1994.

12 Raoul GIRARDET, Le nationalisme français, 1870-1974, p. 16, Paris, Seuil, 1983.

13 Fernand DEHOUSSE, Les projets fédéralistes de 1938 à nos jours, dans Jacques LANOTTE éd., L'histoire du mouvement wallon, Journée d'étude de Charleroi, 26 février 1976, p. 27, Charleroi, Institut Destrée, 1978.

14 Ibidem, p. 28.

15 Fernand DEHOUSSE et Georges TRUFFAUT, L'Etat fédéral en Belgique, p. 15, Liège, Editions de l'Action wallonne, 1938.

minister, Léon-Eli Troclet and the future mayor of Liège, Paul Gruselin), Fernand Dehousse noted that although the latter project retained elements of a federal State, it was closer to a confederation 'given the extent of the powers it gives to the federated States, which are much greater than in the orthodox federal system'. For this is the heart of the matter, claimed Dehousse: *"the most essential element of federalism is a rearrangement of the powers and of the functioning of the State apparatus. (...) 'The rest is literature'"*[16].

I would therefore defend the idea that what is important when we are building institutions is not to engage in endless discussions about how those institutions should be labelled - federalism or confederalism? - but to use them concretely as a tool in order to improve citizens' well-being and to reinforce the harmony of the system as a whole.

3. Is the phenomenon called federalism or confederalism a relevant tool?

In Belgium, federalism has gradually developed since the early 1970s. It is common to describe it as *sui generis* and centrifugal. The first description refers to the originality of the Belgian State reform, but also to its dynamic character ever since the formulation in the mid-1990s of the ambition to complete the process of federalism. Its description as "centrifugal", meanwhile, refers to the long-term direction of this process. For the Belgian institutional system is subject to "pull" from four different phenomena: firstly, there is a true Flemish nationalism, i.e. an irrational but genuine desire for Flanders to be a country; secondly, there is the intellectual and cultural proximity of France and Wallonia; thirdly, there is the more recent aspiration of greater Brussels for greater regional autonomy; and finally, it should be noted that the German-speaking Community, which in reality is already a fourth region, aspires to detachment from Wallonia to form a fourth federated State in the Belgian system. This quadruple centrifugal movement is so powerful that it has been argued by some people that in 1993, when the Belgian Parliament finally enshrined in Article 1 of the Constitution the principle that Belgium is a federal State composed of Communities and Regions, its institutions were already largely tinged with confederalism.

It is true that, if such a thing exists, classical federalism would be hard to square with the three principles of Belgian federalism: 1. the "equipollence of norms", i.e. the equality of juridical power between the federal law and the law of the federated entities; 2. the exclusivity of the powers located either at federal level or at the level of the federated entities in their respective territories; 3. the exclusive right of deployment, again by the federated entities, of the international aspect of the powers transferred to them, including the right to sign international treaties. It should be added that two of the federated entities of the Belgian federal State have real sovereignty in the exercise of their powers, thanks to a system whereby their members are elected directly and separately, as well as a constitutive autonomy, which represents the germ of constitutional power: the Parliament of Flanders and the Parliament of Wallonia.

I strongly agree with the idea that for the past forty years - I am referring to July 1974 and the Perin-Vandekerckhove Law, the first concrete step in regionalisation - federalism has improved relations between the Flemish and the Walloons and gradually made possible the emergence of a "political collectivity" in Brussels and in the German-speaking community. This formulation of political

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16 F. DEHOUSSE, Les projets fédéralistes..., p. 31 et 37.

collectivity, with reference to Wallonia, comes from Francis Delperée[17], in a more inspired moment than when he talked about confederalism as the "*fédéralisme des cons*". We should remember that, at that time, in the Seventies, while all the ministers of State Reform were stressing that their proposals were anything but federalism (Freddy Terwagne, Leo Tindemans, François Perin, Jacques Hoyaux, etc.), Francis Delperée proclaimed that Belgium was becoming a federal state, 20 years in advance of the Constitution of 1993.

One of the benefits of the emergence of federalism in Belgium is also the fact that, in our regions, with our competences, we are responsible for our future. And those who were minorities in their state, such as the Walloons, are not really minorities anymore. In Namur, the Walloons are not a minority. They decide by themselves, under their own responsibility. Their policies may succeed or fail, but at least the success or failure is their own. And they can no longer claim that developments that occur are the fault of Flanders or Brussels.

However, I sometimes feel that, as researchers, we confuse virtual models with reality. And, after Paul De Grauwe's comment about sovereignty in the federal system and transfers of sovereignty, it occurred to me that the Belgian system has survived not because of the relevance of the institutions but because – and this is the reality! – we have transferred sovereignty to our political parties. This is not a positive or negative opinion: it is an observation.

Anyway, I can agree with Jan Velaers that, in a confederation, you could have a right of secession, but not in a federation. Fernand Dehousse also took this into account. But, having said that, how, as Walloons, could we really think that Woodrow Wilson's right of self-determination, as enshrined in the first article of the United Nations Charter, could apply to all people and all nations worldwide except Flanders?

Regarding the fragility of the federal system, I think it lies in its bipolarity, in the face-to-face confrontation between the Flemish and the French-speakers. This confrontation is reinforced by the idea of the Wallonia-Brussels Federation, coming directly from the FDF strategy devised by Serge Moureaux and Antoinette Spaak in 2006 and 2008 and picked up by Rudy Demotte and Charles Picqué, as a war machine against Flanders (see Poirier's article in this e-book).[18] Because they seem to think - as Olivier Maingain does - that Brussels is French-speaking. But you know it isn't.

For me, the alternative is clearly a polycentric view involving four regions or community-regions receiving all the residual competences that are not reserved to the federal level. These regions are based on the four linguistic regions as enshrined in the Constitution (Article 4): the French-speaking region, the Dutch-speaking region, the bilingual Brussels-Capital region, and the German-speaking region. This system means a new balance and a real re-foundation of federalism.

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17 Francis DELPEREE, Histoire des mouvements wallons et avenir de la Wallonie, dans J. LANOTTE éd., L'histoire du Mouvement wallon..., p. 85-100.

18 Jean-Marie KLINKENBERG & Philippe DESTATTE, De Zoektocht naar culturele autonomie in Wallonië en Franstalig Brussel: van cultuurgemeenschap tot regionale bekoring, in p. Mark VAN DEN WIJNGAERT red., Van een unitair naar een federal België, 40 jaar beleidsvorming in gemeenschappen en gewesten (1971-2011), Studie naar aanleiding van 40 jaar Vlaams Parlement, p. 79-80, Brussel, Vlaams Parlement - ASP, 2011. - See also Ph. DESTATTE, L'idée fédéraliste dans les Etats-nations, Regards croisés entre la Wallonie et le monde, Bruxelles-Charleroi, Presses interuniversitaires européennes - Institut Destrée, 1999. - La Wallonie, une région en Europe, Nice - Charleroi, CIFE - Institut Destrée, 1997.

The so-called Brassinne-Destatte project of *Reasonable and efficacious federalism in a balanced state*,[19] built on these four regions and published in 2007, is making headway and has been promoted by Karlheinz Lambertz, Johan Vande Lanotte and Didier Reynders. However, the main difficulty of that model is the fact that it implies a disengagement of the "ethnic" communities - Dutch-speaking and French-speaking - from Brussels in order to create the space for a real regional and political collectivity of Brussels in the 19 municipalities, with its own aims and a real cohesion based on a bilingual approach.

Conclusion

Flanders, Wallonia, Brussels and the German-speaking region are progressively moving from a model built on ethnicity to a model built on citizenship. This shift is occurring, not only because of the superiority of the so-called Republican model but because of the cultural diversity of the 21st century populations and models. The political and institutional system is thus adapting to this evolution.

To conclude, let me highlight the ambiguity of the word "curse" in English. It is a key word in the Re-Bel reflection: *(con)federalism: cure or curse?* If "curse" means evil, misfortune, bad, "maléfique" in French, in English its meaning is also "woman's period". This is characteristic of primitive European society, which rejected women. For my part, I therefore want to return to this meaning because of its associations with fertility - the intellectual fertility and institutional creativity that we need in order to continue building a relevant federalism, or confederalism, if you prefer, which recognises others for a real and positive dialogue in order to balance the needs of autonomy, cooperation, association, transparency, empowerment, social cohesion and, furthermore, democracy.

And never forget that we are included in the European Union framework, which provides some strong guidelines on the future of our institutions and the future of our federal state, even in a potential separation process between the federal entities.

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[19] Jacques BRASSINNE DE LA BUISSIERE & Philippe DESTATTE, Een billijk en efficiënt federalisme voor een evenwichtige Staat, Namur, 24 Februari 2007.
http://www.institut-destree.eu/Documents/Publications/2007-02-24_J-Brassinne_Ph-Destatte_Quatrieme-Voie_NL.pdf

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Editors: Bart Cockx & Bruno Van der Linden. Lead piece: Jean-Claude Marcourt & Frank Vandenbroucke. Comments: Bea Cantillon, Benoît Cerexhe, Bart Cockx, Mathias Dewatripont, Robert Plasman, Michael Rusinek, François Rycx, Ilan Tojerow, Bruno Van der Linden, Paul Van Rompuy

Re-Bel e-book 3 | Published June 2009
Is Democracy viable without a unified public opinion? The Swiss Experience and the Belgian case
Editors: Dave Sinardet & Marc Hooghe. Lead piece: Nenad Stojanovic. Comments: Marnix Beyen, Marc Hooghe, Marc Lits, Marc Reynebeau, Dave Sinardet, Jean-Pierre Stroobants, Jeroen van der Kris

Re-Bel e-book 4 | Published June 2009 (also available in Dutch and French)
Electoral engineering for a stalled federation
Lead piece and reply: Kris Deschouwer & Philippe Van Parijs. Comments: Laurent de Briey, Donald Horowitz, Bart Maddens, Brendan O'Leary

Re-Bel e-book 5 | Published August 2010
Towards a more efficient and fair funding of Belgium's regions?
Editors: Paul De Grauwe and Mathias Dewatripont. Lead pieces : Robert Deschamps, Christophe Ernaelsteen, Michel Mignolet, Marie-Eve Mulquin & Alexandre de Streel, Dirk Heremans, Theo Peeters & Annelore Van Hecke. Comment by André Decoster & Philippe Van Parijs

Re-Bel e-book 6 | Published October 2010
What does history teach us about the future of Belgium's institutions?
Editor: Bruno De Wever. Contributions by Herman Van Goethem, Vincent Dujardin, Jean Pirotte & Luc Courtois, Bruno De Wever, Marc Hooghe & Luc Huyse

Re-Bel e-book 7 | Published November 2010
What does geography teach us about the future of Belgium's institutions?
Contributions: Jacques-François Thisse and Isabelle Thomas, Patrick Deboosere, Paul Cheshire, Bea Cantillon, Seppe De Blust & Aaron Van den Heede

Re-Bel e-book 8 | Published February 2011
Educational Divergence. Why do pupils do better in Flanders than in the French Community?
Lead Piece: Vincent Vandenberghe. Comments: Sergio Perelman, Pierre Pestieau & Daniel Santin, Jean Hindriks & Marijn Verschelde, Frank Vandenbroucke, Dirk Jacobs

Re-Bel e-book 9 | Published February 2011
Social Federalism: how is a multi-level welfare state best organized?
Lead Piece and reply: Patricia Popelier, Bea Cantillon & Ninke Mussche. Comments: Benoît Crutzen, Johanne Poirier, Frank Vandenbroucke

Re-Bel e-book 10 | Published September 2011
Belgium's health care system: Should the communities/regions take it over? Or the sickness funds?
Lead Piece and reply: Erik Schokkaert & Carine Van de Voorde. Comments: David Crainich, Jan

De Maeseneer, Myriam De Spiegelaere, Brigitte Dormont, Johan C. Kips, Fred Schroyen, Erik Schut

Re-Bel e-book 11 | Published October 2011
The linguistic territoriality principle: right violation or parity of esteem ?
Lead Piece and reply: Philippe Van Parijs. Comments: Helder De Schutter, François Grin, Alain Maskens, Henry Tulkens, Harry Van Velthoven, Jan Velaers

Re-Bel e-book 12 | Published December 2011
Right-wing Flanders, left-wing Wallonia? Is this so? If so, why? And is it a problem?
Editor: Bruno De Wever. Contributions: Henk de Smaele, Jaak Billiet, Jérôme Jamin

Re-Bel e-book 13 | Published September 2013 (also available in Dutch and French)
Must Brussels' Communes Be Merged? The Experiences of Antwerp, Berlin and Vienna
Lead Piece: Wouter Van Dooren & Dave Sinardet. Comments: Stefan Sottiaux, Maik Martin, Harald Bürger

Re-Bel e-book 14 | Published April 2014
The Malaise of Electoral Democracy and What to Do About It
Prologue and epilogue: David Van Reybrouck. Lead Pieces: Didier Caluwaerts & Min Reuchamps, Kristof Jacobs. Comment: Philippe Van Parijs

Re-Bel e-book 15 | Published January 2015
Belgium's Diverging Memories. If so, why? And is it a problem?
Editor: Bruno De Wever. Contributions by Maarten Van Ginderachter, Ann Roekens, Axel Tixhon, Nico Wouters, Laurence van Ypersele

Re-Bel e-book 16 | Published March 2015
Economic Regulation in Today's Belgium
Editor: Estelle Cantillon. Lead pieces by Jan Bouckaert and Axel Gautier, Paul De Grauwe and Yumei Ji. Commentary by Patrick Van Cayseele

Re-Bel e-book 17 | Published June 2015
Corruption in Today's Belgium
Editor: Estelle Cantillon. Lead piece by Antonio Estache. Comments by Jeroen Maesschalck and François Vincke

Re-Bel e-book 18 | Published July 2015
(Con)federalism: Cure or Curse?
Editors: Kris Deschouwer & Johanne Poirier. Contributions by Kris Deschouwer, Philippe Destatte, Michael Keating, John Loughlin, Johanne Poirier, Jan Velaers.