

SURREAL FEDERALISM? THE BELGIAN ATTEMPT TO PRESERVE UNITY THROUGH CONTRADICTION[□]

di Susanna Mancini

«Ils se sont mis d'accord en se contre-disant»

(Louis Scutenaire., *Mes Inscriptions*, 1981)

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I. The Belgian Constitutional Odissey:

- I. 1) From the Hegemony of French to Linguistic Territoriality (1830-1963)

Belgium constitutes a paradigmatic example of "centrifugal" federalism. Born as a unitary state, it adopted the federal formula after a constitutional odyssey towards territorial decentralization, in the hope of solving the tensions between its two main linguistic communities: the Francophone and the Flemish. The process of separation between these two linguistic groups is "just as old as the very formation of the national state"¹. The Flemish speakers are approximately 5.9 million and constitute the numeric majority (57,6%) of the state population. They are mainly concentrated in the Northern region, usually referred to as Flanders. The Francophones are 3,3 million (32,4%) and live in the Southern region, or Walloon, while in the country's capital region, Brussels, (960.000 inhabitants, that is 9,3% of Belgium's population) about 85-90% speak French. Finally, after WWI, a small German speaking community of about 70.000 people was added to the country through annexation and constitutes the majority in a number of Eastern municipalities.

Belgium seceded from the United Kingdom of the Netherlands after the "August Revolution" of 1830, which was a product of the alliance between the Francophone bourgeoisie and the Catholic Church. The new state was shaped as a parliamentary monarchy with an electoral system based on a property assessment franchise, that favored the French-speaking élite. The latter put an end to the multilingual system that the

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¹ S. NOIRET, *Le revisioni costituzionali in Belgio: un cammino difficile verso il federalismo o l'agonia dello stato nazionale?*, in Z. CIUFFOLETTI E S. NOIRET (eds.), *I modelli di democrazia in Europa e il caso italiano*, Florence, Ponte alle Grazie, 1992, 175.

Flemish had experienced under King Willem I of the Netherlands, where both Dutch and French were *de jure* and *de facto* the official languages. It is true that Art. 23 of the 1830 Belgian Constitution protected linguistic freedom: this provision, however, played into the hands the Francophone élite, which controlled every aspect of public and cultural life, to speak "où et quand elle le désirait, la langue qui avait ses préférences"². A Government decree of 16 November 1831 declared French the sole official language with respect to legislation, administration, the courts, the church, schools, universities and the army. The fact that the majority of the population³ spoke a "barbarian and imperfect dialect of Dutch"⁴, was simply not taken into account.

The reasons for this are manifold. In part they have to do with the "politique hégémonique du français" in this part of Europe and with the choice of the Constitution framers to build up a francophone public space. It should not be forgotten, however, that at that time, Flemish was not yet a unitary or codified language. A number of *thiois* dialects were spoken by the rural population of Flanders, while the upper class commonly spoke French⁵.

Language and class were strictly entangled: therefore, it would be simplistic to say that, in spite of their numeric superiority, the "Flemish" as a whole were banished to the role of a dominated minority. Most (lower class) Flemish were certainly conscious of their linguistic distinctness and discriminated against on the ground of language, but the domination and discrimination were to be put down to other (bourgeois) members of their own linguistic group, that choose to speak French (the so -not too politely- called *Fransquillons*). This proves the relativity of the concept of "minority" and demonstrated that numerical consistency may not necessarily be the determinative attribute.

A first wave of reaction against this unjust linguistic status was sparked by a convergence between the social and economic changes provoked by industrialization, and some striking judicial proceedings such as the trials of the Flemish Coucke and Goethals, held before the Court of Assize of Hainaut where they were sentenced to death without having understood a single word throughout the entire criminal proceedings brought against them. After that the Parliament enacted a series of acts introducing bilingualism, albeit only within Flanders (the situation was therefore asymmetrical, as the Flemish region became in principle bilingual, while the rest of the country remained monolingual), making it possible to use Flemish in criminal proceedings (1873) and in the state administration (1878). Much of this legislation, nevertheless, remained dead letter.

The adoption of a block-vote system (1893) and, later, of male universal suffrage (191) strengthened the Flemish presence in the political sphere: as a consequence the Equalization Act of 1898 repealed the decree of 1831 and made Flemish an official language on an equal footing with French. In a further step, a law of 1921 introduced the principle according to which the administration must use the language of the region.

Such improvements provoked a strong reaction among the French speakers. Walloons and French speaking residents of Brussels started to fear that bilingualism in the whole country would make Flemish more competitive in the workplace and take jobs away from French-speakers in Wallonia.. In 1912 the Congress of Liege introduced the principle of "administrative separation", in order not to oblige French-speaking civil servants to learn

² M. RUYSS, *Les Flamands, un peuple, un mouvement, une nation en devenir*, Tielt, Editions Lannoo/ Vander, 1973.

³ In 1864 the Flemish were 2.4 millions and the francophones were 1.8 millions

⁴ J. DE MEYER, *Beschouwingen over het federalisme in België*, in *De Gids o Maatschappelijk Gebied*, 1962, 473, quoted by A. ALLEN, *Nationalism-Federalism-Democracy. The Example of Belgium*, in *Revue Européenne de Droit Public*, 5, 1, 1993, 45.

⁵ A. VON BUSEKIST, *La Belgique. Politique des langues et constitution de l'Etat de 1780 à nos jours*, Paris-Bruxelles, Duculot 1998, XII ("Introduction").

Flemish. The Wallon socialist leader J. Destrée, published his “Letter to the King on the separation of Wallonia and Flanders”⁶, in which he proposed to transform Belgium into a Union of two free and independent peoples. Paradoxically, by fighting the introduction of a bilingual system at the beginning of the XX century, francophone Belgians set the basis for the adoption of the principle of territoriality based on linguistically uniform regions, that would prove later critical to the defense and promotion of the Flemish language. On the other hand, monolingualism was also convenient for the Flemish, who anticipated that its imposition “would accelerate the assimilation of the small, but strategic French-speaking bourgeois minority in the Flemish urban centers”⁷.

The second wave of language laws, adopted in the 1930s, moved towards territorial monolingualisms Flanders and Wallonia and bilingual institutions in Brussels as well as in areas with linguistic minorities. The core law of 1932 regulated the use of languages in the administration and in its dealings with the public. The laws were more comprehensive than their 19th century predecessors, and more evenly implemented, except in Brussels.

At this stage of the process, territoriality was not rigidly applied. The boundaries of the three linguistic territories were adjusted every ten years on the basis of the results of a population census. As a result of the first two censuses many more “Flemish” municipalities had become “francophone” or “bilingual” than the other way around. Flemish territory was lost around Brussels, partly to Wallonia and partly to Brussels. In this phase, therefore, the application of territoriality was widely mitigated by the acceptance of “natural” linguistic changes in social reality. But precisely for this reason, it failed as a means of protection for the Flemish language. Indeed, each census pushed Flemish further North, thus formalizing the natural francophonization of Flanders.⁸ The frustration which followed on the Flemish side had a crucial consequence, as it transformed prior linguistic concerns into territorial claims: the aim of the Flemish movement became the definitive demarcation of linguistic borders.

The census-based system came to an end in 1961, after the boycott by 300 Flemish burgomasters of the language questions in the census, which resulted in blocking the adjustment of the linguistic borders and practically forced the national government to drop questions on language usage from subsequent population censuses.

The political resources of the Flemish political class had by then considerably strengthened, mainly thanks to two factors. In the first place, there had emerged “a class of Flemish politicians who had been educated entirely in Dutch-speaking schools and/or universities and who were thus more vocal in demanding a strict observance of the language laws. Secondly, while Wallonia had been the industrial heart of Belgium, the decay of its post-war coal and steel industries shifted the bulk of socio-economic policy-making to Flanders. Unlike Wallonia, Flanders did not have to go through a painful restructuring of its heavy industries. It was more successful in attracting foreign direct investment and developing medium-sized enterprises and service industries”⁹.

⁶ J. DESTREE, *Lettre au Roi sur la séparation de la Wallonie et de la Flandre*, Paris-Gembloux, Éditions Duculot, 1968.

⁷ L. HOOGHE, *Belgium: Hollowing the Center*, in N. BERMEO, U. M. AMORETTI (eds.), *Federalism, Unitarism and Territorial. Cleavages*, Johns Hopkins University Press, 2003, chapter 3.

⁸ X. DELGRANGE, *Le fédéralisme belge: la protection des minorités linguistiques et idéologiques*, in *Revue de droit public et de la science politique en France et à l'étranger*, 1994, p 1164 s

⁹ W. SWENDEN, *Belgian Federalism, Basic Institutional Features and Potential as a Model for the European Union*, Paper presented at the RIIA Conference – Governing Together in the New Europe, Robinson College, Cambridge UK, 12-13 April 2003 and published by the London, Institute of International Affairs, 2003.

A series of reforms in the field of language rights took place between 1962 and 1966 and gave birth to three monolingual regions (Flemish, Francophone and German-speaking), and a bilingual one (the 19 Brussels municipalities). With the exception of latter, the degree of linguistic homogeneity within the new regional boundaries was very high. It wasn't, however, absolute, as in both the Flemish and the Francophone regions there were, respectively, Francophone and Flemish enclaves. Among the latter, the more problematic case was that of the Fourons, six French-speaking municipalities that used to be part of the district of Liege and were included in that of Limburg, within the Flemish region. The protest, organized by the *Rétour à Liège* party grew until it became a national issue when the bourgemester refused to use the Flemish language while in office. In the referendum, called by the district of Liege, 93% of the *fouronnais* voted against the inclusion of their municipalities in the Limburg district; however, the Flemish majority in the national Parliament refused to change the linguistic borders. This conflict was actually solved only in 1988, without modifying the regional boundaries, but by freezing the application of territoriality, that is by granting the francophone *fouronnais* the right to vote in the French speaking constituency of Verviers¹⁰.

As a consequence of these reforms, the Walloon "psychological" minority, officially became a linguistic minority¹¹, conscious of its disadvantaged position within what it began to call *un état belgo-flamand*. It tried to advocate for a non territorial protection of language rights, specifically in the field of education, in order to ensure them to all French speakers irrespective of their location, but first the European Court of Human Rights¹² and then, in a widely changed institutional context, the Belgian *Cour d'Arbitrage*¹³, frustrated such attempts, declaring the principle of territoriality compatible with, respectively, the Rome Convention and the Belgian Constitution.

- **1.2 The First Steps Towards Federalism: the State Reforms of 1970-1971.**

Despite the growing tension between them, the two linguistic communities agreed on the necessity to overcome the unitary formula through a process of decentralization. The francophones felt that the Walloon interests were hurt by a Flemish majority at the national level and that a more regionalized system was necessary to take the measures that

¹⁰ The Fourons case represents an exception in the Belgian system. Another exception is that of the municipality of Commines that was moved from Flanders to Walloon in 1962 and where there was a Flemish speaking minority. The Flemish claimed and obtained a regime of reciprocity with the Fourons municipalities. See E. WITTE, *Language and Territoriality: A Summary of Developments in Belgium*, in *International Journal of Group Rights*, 1993, 219.

¹¹ X. DELGRANGE, 8, 1165: by this time the Francophones were 4 million and the Flemish were 5,9 million.

¹² The European Court of Human Rights, *Belgian Linguistic Case* of 23 July 1968, (Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 Ser. a, vol. 6). Certain measures of the Belgian Government that denied French-speaking students living in Dutch-speaking unilingual regions from state-subsidized education in French in those regions were challenged for violation of the right to education, the right to respect for private and family life, and the right against discrimination under the European Union's Convention for the Protection of Human Rights and Fundamental Freedoms. (paragraph 2 of the facts at 3 of the Court's judgment: "The Applicants, who are parents of families of Belgian nationality, applied to the Commission both on their own behalf and on behalf of their children under age, of whom there are more than 800. Pointing out that they are French-speaking or that they express themselves most frequently in French, they want their children to be educated in that language."). The Court did not find the Belgian Government's measures discriminatory or arbitrary. The pursuit of linguistic unity within the unilingual regions was based on the objective fact that a large majority of the population in the regions spoke only one of the two national languages. Furthermore the measures were based on a public interest, namely, to ensure that all schools dependent on the State and existing in a unilingual region conducted their teaching in the language which was essentially that of the region, hence promoting among pupils a knowledge in depth of the usual language of the region.

¹³ See A. ALEN, PEETERS, *The Competences of the Communities in the Belgian Federal State: The Principle of Exclusivity Revisited*, in *European Public Law*, 2 (1997), p 165 et seq.

Wallonia needed to face its economic crisis. The Flemish, on their side, were conscious of the importance of the decentralization process in guaranteeing their cultural and linguistic autonomy.

The creation in 1963 of the linguistic regions (which are not political structures with their own bodies, but rather simply a way to divide the federal territory) was a milestone in the history of Belgian federalization, as it set the basis of the future federal system. First of all, the existence of linguistic regions is the condition for rendering linguistic legislation operational (which, as we will see, is a critical feature of Belgian federalism); in the second place, the regions offered a territorial basis for the exercise of the future Community competences; finally, they anticipated the division of the state in four territorial areas: the Flemish Region, the Walloon Region, the Region of Brussels-Capital and the German Community.¹⁴

The first crucial step in the process of dismemberment of the unitary state took place in 1970-1971, with the creation of three cultural Communities¹⁵: the Flemish and the French ones were granted (limited) legislative competences in the fields of education, cultural matters and the use of languages, while the German community could enact only administrative (secondary) acts. The 1970-1971 reforms gave birth, albeit only in principle, also to three (political) Regions (Flemish, Walloon and Brussels-Capital); through the adoption of Art. 107^{quater} of the Constitution. The Regions have powers with regard to economic and employment policy, environmental and energy policy, local authorities, roads, transportation etc.. Obviously, the reform aimed at satisfying the claims and needs of both linguistic groups. The Flemish obtained a certain degree of cultural and linguistic autonomy, through the creation of the cultural Communities, while the Regions were supposed to respond to the need of a separate economic development for Wallonia. The Regions, however, did not become effective before 1980-1988, because the implementation of Art. 107^{quater} required an over-qualified (*cumulative*) parliamentary majority, which proved impossible to reach, mainly because of the divergences regarding the *status* of Brussels. The Francophones favored the creation of an autonomous Region, while the Flemish wanted the capital either to be jointly governed by the two cultural Communities, or transformed in a federal district¹⁶.

The Constitutional reform of 1970 was not confined to the territorial decentralization of state powers. It also deeply modified the criteria of representation of the linguistic groups in the central legislative and the executive organs, a particularly troubling issue for the French-speaking minority, that had already experienced (for example in the Fourons affair) the frustration of being outnumbered by the Flemish majority. The solution was a compromise which basically transformed Belgium in a bilateral and parity based state.

The federal government must have an equal number of Flemish and French speaking ministers, apart from the so called "asexual" Prime Minister. The governmental decision making process is governed by negotiations: all decisions must be adopted with a formula which is in between absolute majority and unanimity: dissenting Ministers, in fact, may only acquiesce or resign¹⁷.

¹⁴ M. UYTENDAELE, *Précis de droit constitutionnel belge. Regards sur un système institutionnel paradoxal*, Bruxelles, Bruylant, 2005, 823.

¹⁵ This took place through a constitutional amendment that led to the adoption of Articles 3bis, 3ter and 59bis and 59ter

¹⁶ In the difficulties of reaching an agreement see. M. UYTENDAELE, *Le fédéralisme inachevé*, Bruxelles, Bruylant, 1991, 287.

¹⁷ X. DELGRANGE, 8, 1174, n. 77.

The seats in the two Chambers are assigned according to a proportional system based on the number of voters, which in principle favors the Flemish majority. In order to maintain a balance between the two groups, however, the reform introduced a number of correctives. To understand how they work, one must take into account that according to Art. 43 of the Constitution, “the elected members of each Chamber are divided into a French linguistic group and a Dutch linguistic group”.

The first mechanism, which protects the French-speaking minority, is the so called alarm-bell procedure (“sonnette d’alarme”)¹⁸, according to which each linguistic group may block the legislative procedure in all “sensitive” matters. If at least three quarters of the members of one of the linguistic groups sign a motion, declaring “that the provisions of a draft bill or of a motion are of a nature to gravely damage relations between the communities. the parliamentary procedure is suspended... and the motion referred to the Council of Ministers which, within thirty days, gives its justified recommendations on the motion and invites the implicated Chamber to express its opinion on these recommendations” (art. 53 of the Constitution of 1993).

Another corrective measure aims at avoiding that fundamental (quasi-constitutional) legislation –i.e., laws regulating linguistic and institutional subject matters-, be adopted against the will of one linguistic group; it therefore protects both the Flemish and the Francophones. To adopt such laws, the Constitution requires a double, or “cumulative”, majority that is an overall two thirds majority in each Chamber and a majority in each linguistic group. This mechanism grants a *de facto* veto power to both linguistic groups, but it relies on a difficult requirement, the two-thirds majority, which can be reached only on the basis of an agreement among six parties, “with the risks in terms of incoherence and heterogeneity that this implies”¹⁹. Moreover, as it presupposes the division of MPs in linguistic groups it does not protect German speakers, as there is no German linguistic group in Parliament²⁰.

Finally each linguistic group can in practice veto constitutional reforms, given that a majority within the two communities – and the two linguistic groups which represent them in Parliament - is not only necessary from a political standpoint, but also a numerical necessity for the amending procedure, which culminates in a two-thirds majority of the total votes cast in both houses of the Federal Parliament (Art. 131 Const).

- **I. 3. The Reforms of the 1980’s: the compromise over the “Brussels Question”**

The constitutional amendments and the legislative reforms of the 1980’s strengthened the *status* of the Communities, which ceased to be qualified as “cultural” and were granted new competences. One notable responsibility that was (almost) completely transferred to the Communities is education²¹. The expansion of Community powers was carried on much to the detriment of regional competences, especially in Flanders, where it was decided in 1980 to merge the institutions of the Community and those of the Region.

The reforms also gave birth to a new judicial organ, the *Cour d’Arbitrage*, which initially had basically the role of solving responsibility conflicts between the central state and its sub-units (Communities and Regions), but was later transformed into a full-fledged constitutional court. The Court’s composition reflects the bipolar and parity-based nature of

¹⁸ If at least three quarters of the members of one group sign a motion the procedure is suspended and the motion is referred to the government which plays an arbitration role.

¹⁹ X. DELGRANGE, 8, 1177, n. 98.

²⁰ Ibid., 1175 s.

²¹ See on this point J. BOURTENBOURG, *L’enseignement et la communautarisation*, in *Administration Publique Trim.*, 1988, p 183 ss.

the Belgian state, as it must have an equal number of Flemish and Francophone members (a rule which also applies to the *Conseil d'Etat* and to the Court of Cassation).

In 1988 it was finally possible to reach a compromise on the thorny "Brussels question". The capital was organized as an autonomous and fully bilingual Region, although with a lesser degree of autonomy in as compared to the other Regions. Within the regional system, the Flemish minority enjoys a very high degree of protection. The alarm bell procedure, in fact, applies to the Regional Councils, and so does the principle of parity of the regional executive organ. Moreover, the latter's decision-making process are governed by the consensus procedure that also applies to the federal government.. In other words, the Flemish population in Brussels (less than 15%) is protected to the same extent and through the same mechanisms that apply at the federal level to the French speaking population (33%).

- **1.4 The 1993-2001 Reforms: The (Con)Federal Constitution**

By explicitly declaring at Art. 1 the federal nature of the Belgian state ("Belgium is a Federal State made up of communities and regions"), the 1993 Constitution ended the chaotic process which began in 1970 and was developed in the following two decades through an increasing erosion of the state powers .

The state reform, which took place in 1993, consolidated the previous ones and turned Belgium into a fully-fledged federal state. The responsibilities of the Communities and the Regions were expanded again, through the adoption of Art. 35 Const., according to which "The federal authority only has power in the matters that are formally attributed to it by the Constitution " and "The communities and the regions, each in its own field of concern, have power for the other matters" (Art. 35 Const..). Art. 35 is thus shaped as a typically federal clause; however, in the Belgian case its application is made difficult by the unclear line between the competences of the Communities and those of the Regions; and the vague terms in which the powers of the central state are expressed.

The revised Constitution of 1993 introduced several changes concerning the relationship between the legislative and the executive organs, including constructive non confidence-vote; moreover, it drastically changed the composition of the Senate and adjusted it to the new federal reality. However, the new Senate, unlike in other federal states, does not completely represent the federate entities. The former provincial senators have been replaced by a new group of senators, who are appointed by and from the community councils. The Flemish and French communities are equally represented in this group with 10 community senators each, while the German community appoints 1 community senator. More than half of all senators are directly elected at the federal level. Consequently, the protection of minorities is really only a matter for the linguistic groups that may rely on the "alarm procedure" and on the system of the special majority vote described above. Beside that, at least 1 Flemish speaking senator and at least 6 French speaking senators must, on the day of their election, reside in the bilingual region of Brussels-Capital.

Finally, a new state reform took place in 2001. More powers were transferred to the Communities and the Regions, with regard to agriculture, fisheries, foreign trade, development cooperation, auditing of electoral expenses and the supplementary financing of the political parties. The Regions became responsible for twelve regional taxes, and local and provincial government became a matter for the Regions, including supervision on

municipal elections. The functioning of the Brussels institutions was also amended during this last state reform, which resulted among other things in a guaranteed representation of the Flemish inhabitants of Brussels in the legislative Council of the Brussels-Capital Region..

II. The Characteristics of Belgian Federalism: A Logic of Compromise and Contradiction

The Belgian system does not resemble any other federal model.

In fact, its whole constitutional odyssey was carried on with no reference to other federal experiences, or to any previously identified theoretical models²². All comparative and definitional efforts at capturing it are therefore of little use.

In the first place, the Belgian system is to a much larger extent than that of any other deeply divided state, the result of political tensions and contradictory projects. The state reform was carried out in order to respond to ongoing crises and political deadlocks; as a result, it is characterized by a logic of compromise. In many cases, compromise meant the adoption of structurally contradictory constitutional norms, which reflect the often irreconcilable views of the two linguistic groups on how to shape the structure of the state . Moreover, Flemish and Francophone Belgians do not differ only on the ground of language. They are also separated by deeply different cultural, ideological and religious traditions that date back to the pre-unitary state time. Such differences are deeply reflected in the federal structure. It is, in fact, the state of two peoples, with different identities²³, that agreed on a constitutional compromise on the basis of parity. Said differently, Belgian federalism does not reflect a common Belgian identity.

• II. 1. An Asymmetrical Dual-Layered Structure: the Overlapping of Powers

Belgium is made up of two different types of state sub-units, the Communities and the Regions. The latter (The Walloon region, the Flemish region and the Brussels region) should not be confused with the linguistic regions to which the Constitution refers at Art. 4 (“Belgium has four linguistic regions: The French-speaking region, the Dutch-speaking region, the bilingual region of Brussels-Capital and the German-speaking region”), which are not politically autonomous sub-entities and simply constitute the territorial foundations for the three “political” Regions. Nevertheless, there is no total overlap: the Flemish Region overlaps with the Dutch linguistic region, and the Brussels Region overlaps with the Brussels-Capital linguistic region, but the Walloon Region overlaps with both the French and the German linguistic regions. The three “political” Regions have a directly elected council and an executive organ and can enact decrees with the same force of federal laws in various fields: economic and employment policy, environment, local authorities, transport etc.

The three Communities are: the Flemish Community, which comprises the Flemish-speakers in Wallonia and in Brussels; the French Community which comprises Francophones in Wallonia and in Brussels and the German Community, which comprises the Germans that constitute the majority of the population in the eastern municipalities of the country. In principle, just like each Region, also each of the three Communities has its own parliamentary Council and executive organ, and is entrusted with constitutionally assigned powers in the fields of education, culture, health and social policy.

²² M. UYTENDAELE, *Précis*, 14, 832.

²³ W. DEWACHTER, *De dualistische identiteit van de Belgische maatschappij*, Amsterdam, 1992, 28, quoted by A. ALLEN, 4, 71.

So, in theory, Regions and Communities are separated sub-entities, with their own political organs that exercise competences in different fields.

In practice, however, there is a significant overlap between both the organs and competences of a Region and a Community. Both the Flemish and the French Communities, in fact, ended up by being also territorially structured. Initially, at the time when they were created, they were thought in “corporative” terms, as a response to the hopes of the francophones to unify all French-speaking Belgians, though preserving the linguistic rights of those living in Flanders. The linguistic dimension was therefore a crucial issue in their creation: while there is a Region of Brussels-Capital, there is no Brussels Community, just as there is no homogeneous linguistic culture in Brussels. The initial project, however, was not successful. According to the Court of Arbitration, the competences of both Communities and Regions can be exercised only within their territory²⁴. So, today, the principle of ‘personality’ only applies as far as Brussels goes, since the French Community has no authority over francophones who live in the Flemish Region and the Flemish Community has no authority over the Flemish speakers who live in the Walloon Region.

The Flemish Community and Region even merged their institutions. Today, there are only one Flemish government and one Flemish parliamentary Council, catering for Regional competences (for citizens located in the Flemish region) and Community competences (addressing all inhabitants of the Flemish region and the Flemish-speakers in Brussels).

On the opposite, the French Community and Walloon Region have not been merged. Separate Regional and Community parliaments and governments continue to exist, although the French Community parliament is entirely composed of MPs who have been directly elected to the Brussels and Walloon regional parliaments respectively.

The reason for this difference is threefold. First of all, while there is a concurrence between the Flemish Community and the Flemish Region, the Walloon Region covers two linguistic regions: French and German. This means that certain regional powers in Wallonia are exercised by the German Community. In the second place, while Flemish inhabitants of Brussels represent a very small share of the total group of Flemish Belgians, *les Bruxellois Francophones* are a much larger share of Francophone Belgians with a strong tradition of “sociological and political independence with regards to Wallonia”²⁵. The creation of the Brussels Region, by conferring a high degree of autonomy to its population, has intensified such (reciprocal) independence. The Walloons, in particular, have developed a strong sense of regional cohesion, and a sense of hostility towards the French Community, which has to take into account the interests and claims of also the French-speakers located in Brussels. It is not by mere happenstance that while the Flemish have chosen Brussels as their capital, Wallonia choosed the city of Namur.

Moreover, to understand this deep asymmetry, one must bear in mind that the two types of subunits respond to different cultural (and, actually, philosophical) identities: that of the Walloons, which is inspired by the French theory of the nation-state, and that of the Flemish, which is more sensitive to the Germanic tradition of the *Volk*. These two different identities have shaped the actual functioning of the federal system, and produced a deep institutional asymmetry between North and South. In Flanders, the Community exercises both the competences of the Community and those of the Region, in Wallonia, after a first period of effective coexistence of the two sub-entities, the Region has clearly surpassed the Community, which has for all practical purposes been dismantled²⁶. Powers of the French Community are therefore exercised by the Region and also by the French

²⁴ *Ibid.*, 165.

²⁵ A. ALÉN, PEETERS, , 165 et seq.

²⁶ X. DELGRANGE, , 1167.

Community Commission in Brussels. The German Community exercises all community powers as well as some regional competences and the Brussels Region disposes of all regional competences. Finally, in the Brussels regional territory, both the French and the Flemish Communities exercise competences in fields such as education and culture.

- **II. 2. The Problem of Minority Rights**

As it clearly emerges from the description of its actual functioning, Belgian federalism is not based on the equality among its territorial sub-units, but rather on that of its two main linguistic groups. Language rights are therefore a key element in the Belgian federal structure, but also a particularly problematic one. Linguistic territoriality has been applied in Flanders in very strict terms. Flemish has been imposed at all levels: in legislation, the administration, the schools and universities, the courts, private enterprises, with no possible exception, apart from the "*régime de facilité*" which is applied in six municipalities in the periphery of Brussels and consists in a quasi-bilingual system in the fields of education and public administration. It would not be accurate to define the "*régime de facilité*" as a means of minority protection. In the Flemish view, the system is just a temporary solution that serves as a prelude to the linguistic assimilation of the French-speaking population.²⁷

The truth is that the Belgian system structurally excludes the possibility of protecting linguistic minorities. In the first place, minorities are not legally defined as such. Linguistic groups enjoy an equal status and are therefore protected through the territorial and institutional state organization itself, as well as through ordinary legislation, applicable to all groups, and not through special constitutional clauses and/or special autonomy.

In practice, however, the system shows a certain degree of similarity to the French "neutral" state model, in the sense that it results in a sum of strictly homogeneous sub-units, in which the elevation of collective linguistic goals over individual linguistic rights results in the weakening of the latter.

The region of Brussels-Capital represents an exception, because there both the French and the Flemish Communities exercise competences in fields such as education and culture. It has been pointed out that this overlapping of regional and community levels constitutes a good solution, because "the region gives protection to the French-speaking Brussels population with a built-in protection for the Dutch-speaking population", while the "presence of the Communities...guarantees the cultural and social rights of each group" and that the positive aspect of the system is that it offers "choice to the population"²⁸.

This choice, however, is denied to the rest of the population by the strictly monolingual systems applied within the other two regions. In the latter, the situation is in fact similar to that of a typically monolingual state: there is only one official language and linguistic freedom of those who do not belong to the majority group is highly limited. This results in a high degree of protection of the linguistic rights of the individuals belonging to each majority group within the two main regions, but also in the discrimination of "regional" minorities, which are not recognized as such, that are subject to a duty of linguistic assimilation. The definition of linguistic minorities in Belgium is a particularly thorny issue. The difficulties do not concern the federal level, where only German speakers can be

²⁷ In this logic, the Province of Brabant, which is located on the border of the two regions and includes Brussels, has been divided in Flemish Brabant and Walloon Brabant, so to reduce the number of municipalities that require the application of the "*régime de facilité*", (as well as, according to X. DELGRANGE's malicious interpretation - , 1181- in order to weaken the ties between Walloons and Francophones bruxellois).

²⁸ W. PAS, *A Dynamic Federalism Built on Static Principles: The Case of Belgium*, in G. A. TARR, R. F. WILLIAMS, J. MARKO (eds.), *Federalism, Subnational Constitutions, and Minority Rights*, (2004), 164

viewed as a linguistic minority, but rather the status of trapped minorities within the two monolingual regions. According to Resolution 1301 (2002) of the Parliamentary Assembly of the Council of Europe on “The Protection of Minorities in Belgium”, such groups (Francophones in Flanders and in the German-language Region, as well as Flemish and German speakers in the French-language Region) could actually be regarded as linguistic minorities²⁹. Such recognition, however, is likely to challenge the principle of territoriality, which “remains the fragile and therefore static basis on which the actual Belgian state rests”³⁰. It is not by chance that Belgium signed the Framework Convention for the Protection of Ethical Minorities in 2001³¹ but made the reservation that “the notion of national minority will be defined by the Belgian inter-ministerial conference on foreign policy”.

Linguistic minorities are not the only groups to suffer from the bipolarization of the Belgian federal system. In Belgium (which is a highly politicized country), there is an almost perfect coincidence between ideological and linguistic boundaries. Traditionally, Flanders belonged to a Catholic culture, while Wallonia has a French-style secular tradition. The Flemish political system has been dominated by the Christian Democrats, the Walloon one by the Socialists and the *Bruxellois* system by the Liberals. Whenever a conflict arises on “sensitive” issues such as abortion, Wallonia and Brussels stand united in a secular coalition against Flanders³².

At national level, the traditional Belgian tendency towards political compromise has always succeeded in preserving a satisfying balance between such social and political forces. But at local level, the institutionalization of the linguistic conflict and the federal reform, have worsened the situation of ideological minorities (*i.e.* Catholics in Wallonia and secularists in the Flanders)³³. The Constitution “guarantees notably the rights and freedoms of ideological and philosophical minorities” (Art. 11) both at the federal and a Community levels (Art. 131, “The law determines measures designed to prevent all forms of discrimination for ideological or philosophical reasons”). Moreover, ideological minorities are protected through a mechanism that might be defined an “ideological alarm bell”, according to which one fourth of the members of the three Community Councils may suspend the decision making procedure when according to them a decree contains a “discrimination on ideological or philosophical grounds”³⁴. However, nothing of the sort applies at the regional level, something which cannot be justified on the basis of the nature of regional powers, which is less likely to produce ideological conflicts. In a society such as

²⁹ This Resolution represents an important step forward with respect to the traditional view, expressed in the Human Rights Committee decision in the *Ballantyne* case according to which “the minorities referred to in article 27 (of the 1966 Covenant) are minorities within ... a State, and not minorities within any province” (11.2) See Human Rights Committee, 47th session, Communications Nos. 359/1989 and 385/1989, *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v Canada*, views adopted on 31 March 1993.

³⁰ W. PAS, 28, 173.

³¹ In the framework of the Council of Europe, the European Charter for Regional or Minority Languages (1992) and the Framework Convention for the protection of ethnical minorities (1994), form an important site for the gradual development of a minimum standard with regard to the legal position of regional and minority languages. The Framework Convention is self-executing, but only regarding the loose commitments that the states have undertaken towards the minorities. Beyond this point, the execution of this convention requires special regulations in order to be effective at domestic level. Both the Framework Convention and the Charter on Languages have entered into force in 1998. Neither of the two is as yet so universally accepted as the European Convention of Human Rights, but the number of states parties is rising. The Framework Convention is much closer to become a genuine pan-European standard. It has now been ratified by 37 states and the only ones missing, apart from some mini-states, are Turkey and four EU states: Belgium, France, Greece and Luxembourg.

³² X. DELGRANGE, 8, 1171.

³³ X. DELGRANGE, 8, p 1171 s.

³⁴ Laws of. 3 July 1971, Articles. 4-6, and, for the German Community, Law of 31 December 1983, Articles. 73-75.

the Belgian one, which is so deeply polarized, it is difficult to imagine a subject that is not ideologically sensitive”³⁵.

• II. 3. A Bipolar and Parity-Based Structure: an Implicit Withdrawal Clause

At the end of its constitutional odyssey, the core of the Belgian state and the basis of its functioning at all levels are the two largest linguistic communities. As described above, the federal government must always decide by consensus. In the federal Parliament, the agreement between the two linguistic groups is also always necessary, as each of them may block the legislative procedure in all “sensitive” matters, and veto constitutional reforms.

Also “at the European Union level, regional and community governments can shape the position of the Belgian state or even speak on its behalf when it comes to their constitutionally-specified jurisdiction. Basically, when a Council of Ministers discusses policy-making in an area where either the Community or the Region is competent in Belgium, then it is up to the relevant units to flesh out a position. This involves a fair degree of compromise between Regions or Communities since they need to agree for a Belgian position to take shape”³⁶

At all levels and for all purposes, the federal system is based on a necessary consensus between Flemish and Francophone Belgians. Here, however, lies the paradoxical character of the system: federalization was made necessary because of the presence of two deeply divided groups with a high degree of reciprocal mistrust, but the condition for the federation to function is the agreement between the two.

The bipolar character of Belgium is not confined to its state organization, but it extends to virtually every aspect of public life. For a long time there has not been a “Belgian” cultural life, a “Belgian” university, a “Belgian” public opinion, “Belgian” media or a “Belgian” party system. “The three major political parties—each electorally threatened by a nationalist movement—were torn apart” between the 1960’s and 1970’s. “In 1967, the Christian Democrats split into a Flemish and Francophone party in the wake of an acrimonious linguistic confrontation around the catholic university of Louvain”³⁷, a century-old (mainly) francophone university located in the Flemish Brabant, which was split in two (Leuven and Louvain-la-Neuve), because it challenged the Flemish claim of a linguistically homogeneous region³⁸. Finally, “The unitary Socialist Party held out until 1978, though the two wings gained de facto autonomy in the early 1970s”³⁹. So, unlike in other multiethnic federations (India, Switzerland and to a certain extent Canada), the party system on Belgium is not an element of cohesion among the different state components⁴⁰, but, quite to the contrary, a propeller of centrifugal tendencies.

The structural risks of this system are legislative paralysis and political deadlock. On December 19 2007, the former prime minister Guy Verhofstadt, a Flemish liberal,

³⁵ X. DELGRANGE, 8, 1191.

³⁶ J.VAN GINDERACHTEN, *The Belgian Federal Model*, at <http://www.ecsanet.org/conferences/ecsaeworld2/Ginderachter.htm>

³⁷ W. SWENDEN, 9.

³⁸ *L'Université de Louvain et la question linguistique*, in *Courrier Hebdomadaire*, Centre de Recherches et d'Information politiques, 1968, 394 *et seq.*.

³⁹ W. SWENDEN, 9. For a comprehensive overview of historical development of the Belgian party system see S. NOIRET, *Political Parties and the Political System in Belgium before Federalism, 1830-1980*, in *European History Quarterly* (SAGE, London Oaks and New Dehli), vol. 24 (1994), 85-122.

⁴⁰ R. PADDISON, *Il federalismo: diversità regionale nell'unione nazionale*, in G. BROSIO (ed.), *Governo decentralizzato e federalismo*, Bologna, Il Mulino, 1995, 39 *et seq.*, provides an illuminating discussion on the role of national political parties in multiethnic federations..

assembled a stopgap coalition after 192 days of embarrassing political deadlock⁴¹. Even forming a temporary government proved difficult because of the deep and bitter division between north and south.

The crisis had started after the June 10 elections. In Belgium, the National governments are formed after complex negotiations among the parties, divided as these are by ideology and by language. In this case, the process required the appointment by the King of an “informateur” and also of a “démineur” (mine sweeper), as the formation of a new government was expected to be exceptionally complicated. Both came to the conclusion that the only coalition possible was the so-called “Orange-Blue” formula consisting of the CD&V-NVA (Flemish Christian Democrats), MR (French speaking Liberals), Open VLD (Flemish Liberals) and the CDH (French speaking Christian Democrats). However, Yves Leterme (Flemish Christian Democrat - CD&V) the “formateur”, appointed by the King as, failed for the impossibility of reaching an agreement on the State Reform and the division of the electoral district BHV (see below). In order to unblock the situation, the King appointed an “explorateur” (explorer), who recommended to re-appoint Leterme as “formateur” to resume the negotiation process. Despite his decision not to open discussions on the State Reform or the electoral district BHV, Leterme failed again.

Due to this time-consuming working method, for the first time in Belgian history the Federal Parliament started its activities while government negotiations were still going on. On November 7, the parliamentary Commission on Interior affairs voted in favor of the division of the electoral district “Brussels-Halle-Vilvoorde” (“BHV”). The issue of the electoral district BHV is a symbolic and tense issue. BHV is the electoral district that brings together Brussels and a number of Flemish communities (Halle-Vilvoorde). This means that the District covers the territory of Brussels, which is bilingual, but also part of the monolingual Flemish Region. The fact that “Brussels-Halle-Vilvoorde” is one electoral district, means that the 150,000 French speaking Belgians who live in the Flemish municipalities of this district, have the opportunity to vote for French speaking candidates of Brussels for the European and Federal elections. The division of this district is a long-standing demand of Flemish politicians, and has been revived following a recent judgment of the *Cour d'Arbitrage* that ruled the unconstitutionality of the district structure.

For the first time in Belgian history, the Flemish MPs took advantage of their numerical superiority and voted without the agreement, and actually radically against the French speaking MPs for the separation of BHV. Their vote had mainly a symbolic meaning: apart from the activation by the Francophone MP's of the “conflict of interest” resolution and of the “alarm bell” procedure, the law was not voted in a plenary session and this means that it will not be possible within the upcoming year to formally enact it.

This episode, together with the 192 days of political deadlock, provide unequivocal signs that the Belgian tradition of compromise may no longer ensure the functioning of the federal system.

Moreover, the 2007 crisis demonstrated very clearly the confederal nature of the Belgian structure. The country survives and its political institutions work, only as long as its two founding peoples want, and are able to, make it survive and function.

The Belgian Constitution did not enshrine a secession clause; this right, however, is implicitly embedded in the very logic of the Belgian system. Liberal federations are reluctant to enshrine a secession clause in the Constitution precisely because it suggests the coexistence of more than one people within a state, that possesses a form of

⁴¹ Twenty years ago, in 1987-1988, Belgium was confronted with one of its longest political crises. It took 148 days to agree on a new government. Twenty years ago, the winning parties of the elections were, just like today, facing issues concerning the division of communes. In this case, the situation regarding the municipality of Fourons, to which I have referred in Section I, had not been solved by the previous government.

“quiescent” sovereignty, while, as the American Supreme Court put it, in most federal contexts the Constitution “in all its provisions, looks to an indestructible union”⁴².

Moreover, in a federal context, the constitutional right to secede may be used strategically by the state sub-units, taking advantage of the right to secede in order to seek gains having little to do with secession. The democracy and transparency of decision-making processes may be threatened when the right of secession is exploited by the most populous or richest subunits, taking advantage of their greater bargaining power to put forward non-negotiable demands in search of immediate gains instead of compromise solutions, to the detriment of the national interest. In such cases cooperation between the State’s components is replaced by forms of autonomous development, reducing the level of interdependence among the subunits.

The Belgian people seem actually to be aware of the *de facto* existence of a withdrawal clause. In December 2006, the (public) Wallonian national broadcast outlet, RTBF, broadcast a grotesque joke throughout the country. In the middle of a popular TV-program, a special news edition was broadcast. “Good evening, tonight in a special reunion of the Flemish parliament, Flanders has declared itself unilaterally independent. The King has fled the country, citizens cannot cross the borders anymore.” There followed a number of interviews with “real” Ministers and MPs, that took a part in the performance. The reactions were of many kinds; the (Southern part of the) country did panic and practically no one thought that secession would be impossible.

Moreover, the risk that the Belgian system embodies, which is clearly manifest in view of the absence of a supremacy clause for federal sources of law in the constitution, results in a de-legitimization of the latter, which becomes more of a “compact” between states “rather than a “Constitution over them” (Calhoun). In other words, the federal formula in its Belgian application does not attain its main objective, which is to conciliate unity with diversity. Instead, this federal formula has a disintegrating role that is likely to bring about a deeper separation between the linguistic communities.

The country, however, has a long democratic tradition and no inclination to violence. Even the most bitter confrontations between Flemish and Francophones have never degenerated into violence. So far, the Belgians have proved, through their paradoxical system, that it is possible to conciliate what seems irreconcilable. Whatever future decision they will take, whether to differently structure their problematic coexistence, or to put an end to it, it will be a democratic and negotiated decision, one that respects the different needs and wills of both of the country’s peoples and identities.

As novelist Hugo Claus, put it, when he was asked why he did not give his book entitled “Chagrin des Belges”, the title “La Tragédie des Belges”, “Belgium is too small to be the scene of a tragedy”.

⁴² U.S. Supreme Court, *Texas v White* (1868).