BELGIUM

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I. OVERVIEW

1. *A Francophone Centralized State*

The territory of present-day Belgium has no history as a single unit before 1830. With the French Revolution, the territory was fully absorbed by France. After the fall of Napoleon in 1814, at the Vienna Congress, it became part of the newly created United Kingdom of the Netherlands, under King William I of the House of Orange. This was a Dutch speaking Protestant State, deeply resented in the Catholic South with its Francophone elite. Already in 1830, the South broke away and the Kingdom of Belgium was born. In 1831, the Belgian Federal Congress wrote a liberal constitution that created a unitary parliamentary state with a constitutional monarch. There was no shared sense of "Belgian" identity and no sense of a single people seeking nationhood. The line dividing Europe into a Germanic North and Latin South cuts across Belgium - dividing it in a Flemish North (Dutch speaking, 60%) and a Walloon South (French speaking, 40%).[2]

During the 19th century, a strong centralized government made French the single official language, imposed also on Flanders. From the outset, the Walloon industrialized region was economically dominant, with Flanders relying on subsistence agriculture. Within Belgium, there was rampant social and economic discrimination against those who spoke Dutch. Towards the end of the 19th Century a Flemish movement emerged, with a major focus on language rights. The 1898 "Law of Equality" nominally recognized the validity of both languages in official documents.

2. *Constitutional Revisions*

A critical change occurred in 1932 and 1935, when for purposes of governmental activities, two monolingual regions were created on the basis of a territorial line dividing the country into two parts. The use of language in administrative matters, primary and secondary education, as well as in judicial matters was to be based exclusively on location – not the mother tongue of the individual citizen. In Flanders, Dutch became the only official language, and in Wallonia, the official language was exclusively French. Brussels and certain border areas were said to be bi-lingual.

By the mid-1960s, the Flemish gross regional product per capita surpassed that of Wallonia.[3] Today, the Flemish Region of the country is substantially richer than the Walloon Region. Since 1970, contemporaneous with economic rise of the Flemish Region,[4] five sets of constitutional revisions have transformed Belgium's governmental structure from a strong unitary federal system into a federal structure of mind-boggling complexity, in which substantial power has devolved to sub-federal governmental units. Two major principles have dominated these reforms.[5] The first is the devolution of

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[2] Total population of ca 10.700.000.

[3] L. Hooghe, Belgium: Hollowing the Center, in *Federalism and Territorial Cleavages*, Eds. Ugo M. Amoretti and Nancy Bermeo, Johns Hopkins University Press: Baltimore. 2004, p. 56-57.

[4] The Flemish demand for reform in 1970 aimed at cultural and language rights (reflected in Communities) and the Walloons at economic autonomy (reflected in Regions), in order to improve the bad economic situation in the South.

[5] A. Alen & K. Muylle, *Compendium van het Belgisch Staatsrecht,* Kluwer, 2008, n. 246-249.

more powers and autonomy to the component states. The second one is minority protection: of the Francophone people (40 %) in the country at large, and of the Flemish people (20%) in Brussels (see infra II, D).

3. *A Federal State*

Article 1 of the Constitution declares Belgium to be a Federal State, constituted by Communities and Regions. Power and responsibility is allocated to governments for each of three Communities (French, Flemish, and the small German part) (article 2) and for three Regions (Wallonia, Flanders, and the bilingual Brussels Capital Region) (article 3). According to article 4 of the Constitution, Belgium comprises four language areas (Dutch, French, bi-lingual Brussels and German).[6] Every municipality in the country belongs to one of them. In these areas, all public affairs, between the government and citizens, in administrative, judicial and all other public matters, must absolutely be conducted in the language of the territory, i.e., Dutch, French or German in the monolingual areas, and Dutch and French in Brussels.[7] This is said to consecrate the territoriality principle, with several legal consequences, most importantly the territorial competence of Communities and Regions (see infra II, 4).

The Flemish Region comprises the Dutch language area, the Walloon Region the French and German language area, and the Brussels Capital Region the bilingual language area. The Flemish Region also comprises the Provinces of Antwerp, Limburg, East-Flanders, Flemish Brabant and West-Flanders. The Walloon Region consists of Hainaut, Liège, Luxemburg, Namur and Walloon Brabant.

The Flemish Community not only includes the Flemish language area but is also competent for the Flemish institutions in the Brussels Capital Region. The same goes for the French Community, including the French language area, and the French institutions in the Brussels Capital Region (articles 127 § 2 and 128 § 2 of the Constitution). The German-speaking Community consists of the German language area.

The Communities and Regions have separate, directly elected, parliamentary-style legislatures, a legislatively accountable executive body, and broad and exclusive policy responsibility and authority in specified areas. Although the Flemish Community and Region remain separate legal entities, their powers are executed in Flanders by one single Parliament and Government. Belgium therefore has six in lieu of seven parliaments and governments: one federal, and five on the component state level (Flanders, Brussels, Walloon Region, French Community, German Community). Belgian federalism is said to be of an asymmetrical nature: although the distinction between Community and Region is fundamental, their functioning is not identical in all parts of the country.[8] In Flanders, the powers of the Region are executed by Community institutions, while on the Francophone side, some Community powers are executed by Regional institutions. Also, the Brussels institutions have at several points a different status than in the other Regions.

[6] This is a small German-speaking area along the eastern border with a population of about 73.000.
[7] With a mitigation through 'language facilities' in 27 municipalities in a monolingual Region, where it is allowed to use the language of a protected minority in public matters. There are six border municipalities in Flanders with facilities for Francophone people, four border municipalities in Wallonia with facilities for Dutch speakers, six municipalities in Flanders on the border with Brussels, with facilities for Francophone people, nine municipalities in the German language area with facilities for Francophone people and two municipalities in Wallonia with facilities for German speaking people.
[8] A. Alen & K. Muylle, 2008, n. 257-258.

4. *Towards a Confederate State*[9]

The evolution is one of reverse federalism: not from separate entities towards a federation, but from a very centralized government to an unraveling of the federal power towards Communities and Regions. This evolution has not yet come to an end. The Flemish demand more devolution, towards a confederate model. This was the big issue for the June 10, 2007 federal elections. A Flemish cartel between the Christian-Democrats and a small nationalist party N-VA won the elections with an overwhelming victory for their leader Leterme. Since that date, for almost four years by now, the country has been in a deep institutional crisis. Flemish parties demand a substantial state reform, Francophone parties refuse.

Since mid 2007, the political scenario has been worse than a bad Hollywood B movie. More than six months of negotiations in the second half of 2007 led nowhere. In despair, on Christmas 2007, the King asked the Former Prime Minister Verhofstadt to form a provisional government until Easter. At the end of March 2008, with an agreement on a first round of minor issues for devolution[10] and the hope for a more substantial reform by mid July, Leterme took over as new Prime Minister with a government held hostage by the magical date of July 15. On July 14, 2008, no further progress was made in the negotiations for a state reform, and on that evening, the Prime Minister offered his resignation to the King. After a short cool-off period, the King refused this resignation and appointed three Mediators who had time until mid-September 2008 gathering the parties around an agenda for state reform. The financial crisis of the fall 2008 shifted the attention towards even more urgent matters. However, in the aftermath of the government intervention to save Fortis bank, Prime Minister Leterme had to resign around Christmas of 2008.

Herman Van Rompuy, the current President of the EU Council, became the new Prime Minister. Being called to Europe, he left the job in November 2009 and Leterme took over again. This Leterme II government was broken up at the end of April 2010 when the Flemish liberals resigned. New federal elections were unavoidable in June 2010. The result was a revolutionary landslide victory for Flemish nationalists N-VA in Flanders, led by the charismatic Bart De Wever who brought the party to the number one position as the largest political party in the country. In the South there was a clear victory for francophone socialists PS, led by Elio Di Rupo.

For more than a year, until the Summer of 2011, these two were trying to broker a deal for a new Belgian institutional design and attempt to form a government, without any success however. In the meantime Leterme II continued as a "resigning" government taking care of day to day current affairs. It was only after the largest Belgian party, NVA, left the negotiation table in July 2011, that DiRupo as "formateur" (and prime Minister to be) was finally able, after a record setting 541 days, and without any government on 6 December 2011, between the Socialists, Christian Democrats and Liberals.

II. THE FEDERAL DISTRIBUTION AND EXERCISE OF LAWMAKING POWER

Questions: *1. Which areas of law are subject to the (legislative) jurisdiction of the central authority?*; *2. Which areas of law remain within the (legislative) jurisdiction of the component states?*; *3. Does the constitution allocate residual powers to the central government, the component states, or (in case of specific residual powers) to both*?; *4. What is the constitutional principle according to which conflicts (if any) between central and component state law are resolved (e.g., supremacy of federal law)?*; *5. Do the*

[9] In the Belgian context, this concept does not necessarily refer to a cooperative model between independent states, but also to the extreme devolution of powers to the component states within the framework of one single independent State, in which, however, the powers of the Central Government have become extremely limited.

[10] Involving several transfers of power on minor issues, not discussed in this Report because not yet approved. See Proposal for a Special Act on Institutional Measures, *Belgian Senate* 2007-2008, n. 4-602/1, 5 March 2008.

municipalities – by virtue of the constitution or otherwise – have significant law making power and if so, in what areas?

From the concept of reverse federalism, it follows that there is a devolution of powers from the central, i.e., federal level to the Component States, Communities and Regions. The fundamental basis for this transfer of powers is the Special State Reform Act of 8 August 1980 (SSRA), as amended.

The Federal authority is being dismantled in a dual fashion: by transferring powers upwards to the European Union (and to the European Court of Human Rights) (see article 34 of the Constitution), and downwards to the Communities and Regions. The latter is the process of federalization. In the context of the present Report, we only deal with this phenomenon.

1. *The system of distribution of powers*

Enumerated Powers

Articles 127-130 of the Constitution enumerate powers for the Communities. Article 134 gives legislative powers to the Regions, through a special majority Act. Communities and Regions are competent to enact legislative norms, called Decrees (and Ordinances in Brussels),[11] in areas explicitly allocated to them by the Constitution or by Special Acts. They also have the implied power to make rules as far as necessary for the execution of an enumerated power (article 10 SSRA). Constant case law of the Constitutional Court teaches an exhaustive interpretation of these enumerated powers. Given the autonomy of the Communities and the Regions, and the exclusivity of their powers (see infra), enumerated powers are presumed to be total and exceptions must be interpreted restrictively.[12] This reduces the need for implied powers, and it explains the Constitutional Court's rather restrictive stance toward the use of implied powers.

Accessory or complementary powers are functional or instrumental competences enabling an efficient execution of the powers transferred. Examples are the power to establish decentralized services and institutions (article 9 SSRA) and the power to create an autonomous administration (article 87 SSRA).

Article 19, § 1, first section SSRA, provides that the Communities and the Regions execute their powers, without any prejudice to the powers that have been reserved after October 1, 1980,[13] by the Constitution to the Federal Acts of Parliament. Since there was no distribution of powers before the State Reform of 1980, the term "Act of Parliament" in the Constitution, dating from before October 1, 1980, refers to any legislative norm.[14] It can be a Federal Act, a Community or Regional Decree or a Brussels Ordinance. This depends on the area, i.e., on whether it is one in which the power has been allocated to Communities or Regions, or an accessory power thereof. In matters referred to by the Constitution, after October 1, 1980, as to be regulated by an Act of Parliament, it is clear that such Act of Parliament is a Federal Act, and thus constitutes a reserved power for the Federal authority, in the sense of article 19 § 1, first section SSRA. This prohibition for Communities and Regions to legislate in areas reserved for the Federation, does not follow from the Constitution itself, but from this Special State Reform Act. The Constitutional Court has therefore ruled that it is possible for a Community or Region to legislate in matters reserved for the Federal authority, if a special and explicit permission to do so is given by a Special State Reform Act, or if such legislation may be based on implied powers as provided in article 10 SSRA.

[11] With a slightly different legal status.
[12] There are, however, many exceptions, keeping several aspects of such powers with the central Federal authority (see infra).
[13] This is the date the SSRA entered into force.
[14] A. Alen & K. Muylle, 2008, n. 370.

Residual Powers

The central federal authority is involved in a constant process of devolving its powers. All areas not allocated to the Communities or Regions remain under the competence of the federal authority, i.e., the federal authority keeps all residual powers.

Yet, that principle is subject to change: article 35 of the Constitution, introduced by the 1993 State Reform, states that the federal authority has competence only in matters that have been explicitly allocated to it; according to this provision, therefore, residual powers rest with the Communities and Regions. This article, however, has not yet entered into force. It remains a dead letter until a new article in the Constitution enumerates the exclusive powers of the Federal authority and a special majority Act of Parliament has determined how the residual powers will be executed by the Communities and Regions.[15] In spite of the sixth state reform negotiated in Fall 2011, it does not seem very likely that this article 35 will soon become effective.

Exclusive Powers and the Principle of Verticality

The distribution of powers is based on the principle of exclusivity. The idea is that one legal issue should in principle be addressed exclusively by only one legislator. This relates to the autonomy of Communities and Regions, and the equal position of Federal Acts of Parliament and Decrees. This principle also serves to eliminate conflicts of competence. Yet, since there are many exceptions to the principle of exclusivity of powers, conflicts are not lacking in practice (see infra).

The principle of verticality implies that the government that is competent for the regulation of an area also is competent for the execution of its own norms. An exception to this principle are the limited concurrent powers, with the federal authority establishing the norms and the Communities or Regions executing them (see infra).

Shared, Parallel and Concurrent Powers[16]

First of all, there are situations of partial exclusivity. Some aspects of a certain matter are exclusively awarded to one authority, and other aspects to another. These are shared powers. This is a consequence of the numerous exceptions made to the power transfers to Communities or Regions, reserving some powers for the federal authority. There are numerous examples, illustrating the famous Belgian competence chaos: e.g., the power of youth protection is allocated to the Communities but several aspects are reserved for the federal authority (article 5, § 1, II, 6° SSRA); the power of policing dangerous and unsafe enterprises belongs to the subunits but labor protection remains a federal competence (article 6, § 1, II, 3° SSRA); the same is true for agriculture and offshore fishing (article 6, § 1, V SSRA). Many other examples could be added.

Second, in case of parallel competences, there is a cumulative and parallel execution of powers on several levels concerning the same area or topic. Several authorities are then competent, each for their own territory and with their own means and institutions. E.g., the power for the public industrial initiative was qualified by the Constitutional Court as a parallel power shared by the federal authority and the Regions. In the SSRA we can find other examples: e.g., scientific research, a parallel power for the Federal authority, the Regions and the Communities (article 6bis, § 1 and § 2 1°); establishing and governing public credit institutions, is a parallel power for the Federal authority and the Regions (article 6, § 1, VI, first section, 2° and fifth section, 2°). The same goes for fundamental rights such as equal rights for men

[15] A. Alen & K. Muylle, 2008, n. 58.
[16] A. Alen & K. Muylle, 2008, n. 358.

and women (article 11bis of the Constitution), the right to privacy and family life (article 22 of the Constitution), the right of a child to respect for its moral, physical, psychological and sexual integrity (article 22bis of the Constitution), the right to have a dignified human life (article 23 of the Constitution), and the right to consult and receive a copy of any official government document (article 32 of the Constitution).

Third, there are situations in which the principle of exclusivity is not applied but rather replaced by concurrent powers. In the case of total concurrent powers, the Communities or Regions are allowed to regulate only as long as the Federal authority has not enacted, and any subunit regulation is abolished as soon as there is a federal regulation. There is only one example of this form of jurisdiction: the tax power of Communities and Regions based on article 170, § 2 of the Constitution (see infra IV, 2, A). This power is limited to areas where no federal tax exists, and a later federal tax abolishes the communal or regional tax, if this appears necessary. This criterion of necessity is subject to the control of the Constitutional Court.

More frequent are limited concurrent powers. Here, the federal authority determines the basic rules while the Communities or Regions usually complement and apply these rules (sometimes they must apply them unchanged). In doing so, the Communities or Regions may only make the rules stricter but cannot relax them. As indicated above, this is an exception to the principle of verticality. Examples are the mere application by the Regions of federal norms on employment of foreigners (article 6, § 1, IX, 3 SSRA), and the power for the Regions to complement and apply federal norms on government works and assignments (article 6, § 1, VI, fourth section, 1 SSRA). The Constitutional Court has given such power of complementing and applying to the Communities and Regions also in matters of fire security, the duty to motivate particular acts of government, and regarding restrictions on the right of privacy and family life. In all of these cases, the federal norms are a minimum that may be complemented by the Communities and Regions, without prejudice to the federal norms.

Solving Conflicts

A distinction is made between conflicts of powers and conflicts of interests.[17] While the former is a legal conflict, the latter is supposed to be of a political nature. The job to prevent conflicts of power is handled by the Legislation Department of the Council of State, whose opinions are not binding but command high moral authority (article 141 of the Constitution). The job to resolve conflicts of power is handled by the Constitutional Court (article 142 of the Constitution). Awaiting a Special Act for the prevention and resolution of conflicts of interests (article 143 of the Constitution), this remains in the hands of the existing Committee of Consultation (article 31 of the Ordinary State Reform Act (OSRA) 9 August 1980), with 12 members, and with a double parity, between Flemish and Francophone, and between members of the Federal Government and of the Regional and Community Governments. When exceeding a certain power forms the basis of a conflict, then the legal procedure applicable to power conflicts is followed.

Article 143 § 1 of the Constitution imposes on the Communities and the Regions the principle of Federal Loyalty (*Bundestreue*) in the execution of their powers, in order to prevent conflicts of interest in the Federal State. It is clear, however, that the principle of Federal Loyalty also plays a dominant role in the prevention and solution of conflicts of power. The principle of proportionality (see infra) applied by the Constitutional Court is in fact an application of this Federal Loyalty.

Conflicts of powers are decided according to the nature of the powers involved. In case of concurrent jurisdiction, the federal norm prevails over the Community or Regional norm. In the case of shared and

[17] A. Alen & K. Muylle, 2008, n. 412-413.

parallel jurisdiction, both norms are equal to each other. Even with both instances remaining within the limits of their powers, it is possible that there is an overlap or a conflict. Both the Legislation Department of the Council of State and the Constitutional Court resolve these conflicts according to the proportionality principle. No government may, even within the limits of its competences, take measures that would make it disproportionately difficult for another government authority to execute its powers in an efficient manner. The Constitutional Court applies the same principle to the exclusive powers, both of the Federation, and of the Communities or Regions, and both to their material powers and to their territorial powers. The proportionality principle is thus inherent in any execution of power.[18]

2. *Territorial Powers*

Obviously, federal powers can be applied in the whole country of Belgium. This is not the case for the Communities and Regions. The four language areas laid down in article 4 of the Constitution (see supra I) delimit their territorial jurisdiction. As indicated, this coincides with their territory for the three Regions and for the German Community. This is however not the case for the Flemish and the French Community who execute their powers, except in case of language matters, not only in their own area, but also in those institutions in the Brussels Capital Region that must be considered exclusively part of their Community (see supra I).

This has led to different interpretations of the concept of a Community. The French Community favors the personality principle: a Community is related to a group of individual citizens that are united by a same language and culture. This approach would allow the French Community to claim competence over all Francophone citizens, wherever they live, even in Flanders. The Flemish Community vehemently opposes such interpretation which ignores the constitutional territorial distribution of competences. The Constitutional Court firmly upholds the territoriality principle. The Constitution establishes an exclusive distribution of territorial powers. All legislation of a Community must be limited to the territory under the competence of such Community. Indeed, the exclusive powers doctrine requires that each concrete relation or situation is regulated by only one legislator (see supra). The Constitutional Court must ensure that Communities do not exceed their territorial or material jurisdiction.

The Court has, however, softened its stance in matters of culture.[19] Here, a limited deviation from the territoriality principle seems to be accepted. Given the specific nature of promotion of culture, it is possible that the execution of Community powers in this area may have some consequences outside the territory of the respective Community. Such extraterritorial consequences of measures for the promotion of culture are accepted if they respect the proportionality principle. In particular, they must not infringe the cultural policies of the other Community. Another restriction imposed by the Court is that a Community cannot protect its minority situated in another language area.

3. *Material Powers*

Communities

The powers of the Communities include cultural matters, education, personalized matters (see infra.) use of language, cooperation between the Communities and international cooperation in the areas mentioned (articles 127-130 of the Constitution). Within the limits of their powers, Communities (and also the Regions) may sanction non-compliance with their legislative norms, which means that the component states have important criminal law power.[20]

[18] Constitutional Court, n. 168/2004, 28 October 2004; n. 172/2006, 22 November 2006.
[19] Constitutional Court, n. 54/96, 3 October 1996; Comments of A. Alen & P. Peeters, in *European Public Law* 1997, 165-173.
[20] A. Alen & K. Muylle, 2008, n. 373-375.

Cultural matters are described exhaustively in article 4 SSRA. Among them are the libraries and museums, radio and television, written press, youth policy, sport, and tourism. Personalized matters are intrinsically linked to the life of a citizen in his Community. They are described in article 5 SSRA and include two categories: health policy and aid to individuals. The social security system, however, is excluded from communal power and reserved to the federal government. Health policy includes health care in and outside of hospitals (with important exceptions concerning the basic rules for hospital policy and sickness and invalidity insurance), health education and preventive health care. General health policy is a residual power of the Federation. Aid to individuals includes various measures of social welfare to families, immigrants, disabled persons, senior citizens, juveniles, detainees, etc. However, an important exception, again reserved for the Federation, is the regulation of the minimum standards of subsistence.[21]

Education is the most important Community power. Since the 1988 reform, this competence is quasi total. Limited exceptions are the determination of the beginning and end of the mandatory education age, the minimum conditions for awarding a diploma, and pension regulation.

Regions

The regional powers are, in execution of article 39 of the Constitution, specified in article 6 SSRA. Although some of them are very broad, there are always exceptions, reserving some aspects to the federal government. The Regions also have the authority to enter into international treaties with respect to matters within their Jurisdiction.

Since 2002, the Regions have power over the subordinate authorities such as municipalities and provinces (see infra II, question 5). Exceptions are civil registry, police and fire departments, and pension regulation of personnel. Article 6, § 1, VI SSRA combines a very large allocation of powers on economic policy and development to the Regions (section 1) with important exceptions reserving powers to the federal authority, justified by the functioning of an economic and monetary union (section 3 to 5).[22] Tax law will be discussed infra IV.2.a; there have been important transfers to the Regions, although the Federation remains mainly in charge of taxation.

Other competences include environmental and urban planning, environmental policy, water policy, land and nature regulation and conservation, housing (except Federal powers regarding leases), agricultural policy (again, except important Federal powers), offshore fishing, energy, some aspects of labor policy, public works and transportation. In spite of the exhaustive interpretation of the latter powers by the Constitutional Court, large exceptions reserve important aspects to the federal government, such as railroads, air traffic, general police and regulation on traffic and transport, technical regulations, etc. Infrastructures exceeding the territorial limits of a Region require a cooperation agreement (see infra IV.3).

Federal Government

In the areas of public law, social law, economic law, criminal law, and tax law, numerous powers have been transferred from the federal to the state component level. Still, the federal authorities clearly have vast material powers (see, e.g., those enumerated in article 6, § 1, VI, in fine SSRA). As we have seen, many of the transferred powers are qualified by plenty and sometimes large exceptions, reserving substantial powers for the Federal government. Several areas of law completely remain with the Federation. Its competence includes e.g. private law, commercial law, corporate law, banking and finance,

[21] A. Alen & K. Muylle, 2008, n. 380.
[22] A. Alen & K. Muylle, 2008, n. 402-404.

competition law, industrial and intellectual property law, labor and social security law, the bulk of tax law and of the justice system. One should of course keep in mind that the Federation's impact in these areas is decreasing because of transfers upwards to the European Union.

4. *Minority Protection*[23]

At the federal level, there are a variety of mechanisms to ensure that neither the Flemish nor the Francophone parties, acting on their own, can impose decisions on the other language group. A governing majority in Parliament always requires a coalition and the Belgian constitution prescribes that the cabinet must have an equal number of ministers from each language group, apart from the Prime Minister. This means that the coalitions necessarily cut across language lines and typically include at least four of the six major parties.[24] Because of what is known as the "cordon sanitaire," all parties have agreed with each other never to include the Flemish Federalists (the Vlaams Belang) in the governing coalition. The reason for this is not so much this party's persistent calls for Flemish independence but what is regarded as its racist hostility to immigrants and its fascist antecedents.

Each Member of Parliament in the Federal House of Representatives is elected for a four year term in geographically defined districts from party lists on the basis of proportional representation and is assigned either to the French or the Dutch language group, depending on the language area.[25] Certain "special laws" require concurrent majorities from each language group as well as a two-thirds overall majority (article 4 final section of the Constitution). The "Alarm Bell Procedure" (article 54 of the Constitution), although rarely invoked, enables a three-quarter majority of either language group to suspend the enactment of any proposed legislation[26] that is thought to adversely affect that group. If invoked, the legislative process is suspended and the matter is referred to the Council of Ministers for further consideration and negotiation. Unless an acceptable compromise is reported out in 30 days, the government would most likely fall.

Analogous mechanisms and procedures are available in the Brussels Capital Region to protect the Flemish minority there.

Question 5. Do the municipalities – by virtue of the constitution or otherwise – have significant law making power and if so, in what areas?

As indicated, subordinate authorities like the Provinces and Municipalities are under the control of the Regions. Over the years the law making power of these subordinate authorities has been drastically limited and effectively reduced to an implementing or advisory role to the powers of the higher authorities.[27] Being lower authorities, they are under the judicial control of administrative action and under the administrative supervision of the higher authorities, in particular the Regions.

Especially the Provinces have become mere coordinators between these higher authorities and the Municipalities. An important power for the Municipalities is the civil registry (article 164 of the

[23] A. Alen & K. Muylle, 2008, n. 300-317.
[24] See also L. Hooghe, "A Leap in the Dark: Federalist Conflict and Federal Reform in Belgium." Occasional Paper #27, Western Societies Program. Cornell University: Ithaca. 1991. Since 60% of the population is Flemish, the unstated presumption has been that the prime minister will be Flemish. It has been three decades since a Walloon has had the top position.
[25] Except for the Brussels-Halle-Vilvoorde district that includes both the Brussels Capital Region and some surrounding suburbs, all of the electoral districts are monolingual.
[26] Except for budget matters and for special majority laws.
[27] Some autonomy remains, protected by the Constitutional Court against infringements of, e.g., the Regions and Communities (A. Alen & K. Muylle, 2008, n° 186 b).

Constitution) and the police (article 184 of the Constitution), which are both, however, subject to the ultimate control of the federal government.

III. THE MEANS AND METHODS OF LEGAL UNIFICATION

1. *To what extent is legal unification or harmonization accomplished by the exercise of central power (top down)?*

A. *Via directly applicable constitutional norms? (e.g., the equal protection clause in the US requires specific features of family law; due process limits in personam jurisdiction)*

The traditional individual civil and political rights and liberties in the Constitution, such as right to privacy and family life, have a direct effect. The same goes for the fundamental rights and liberties guaranteed in the ECHR as well as those in the UN Covenant on Civil and Political Rights. Obviously, the EU-Treaty has direct effect as well. The traditional rights and liberties enjoyed in Belgium also have a horizontal effect or *Drittwirkung*, i.e., on the relationship between individual citizens. Since only states can be brought before the European Court of Human Rights, this has introduced an indirect horizontal effect, imposing a positive duty on the Member States to take all measures needed to guarantee the effective protection of the rights and liberties also on the horizontal relationship between individual citizens.

Socio-economical rights and liberties such as the right to labor or housing have no direct effect. In some cases, however (e.g., access to free education, social assistance), there is a mitigated form of direct effect through a duty of standstill: it is then forbidden for the government to take measures that would lower the level of protection substantially below the one existing at the time of the entering into force of such a fundamental right. The Constitutional Court has accepted such standstill obligation also for the right of protection of a safe environment.[28]

Since the famous Franco-Suisse Le Ski judgment of the Cour de Cassation (Supreme Court, to be distinguished from the Constitutional Court) of 27 May 1971, it is accepted as a general principle of law that an international treaty with direct effect (self-executing), prevails over all legislation, both previous and future laws of all kinds. There is no discussion also that EU-law prevails even over the Belgian Constitution (see article 34 of the Constitution). However, as to the relationship between other international treaties and the Belgian Constitution, there is a difference of opinion between the Supreme Court and the Constitutional Court. The former has decided that the ECHR prevails over the Constitution, unless the latter provides greater protection.[29] This is not the opinion of the Constitutional Court which has ruled that the Treaty must respect the Constitution in the internal legal order: it is not allowed for the legislator to do indirectly by approving a Treaty what it cannot do directly, namely infringe upon the Constitution.[30]

B. *Via central legislation (or executive or administrative rules)?*

a. C*reating directly applicable norms*

This is the manner in which federal legislation operates in the whole country in the many areas that are still federal (see supra II. 3, in fine).

[28] Constitutional Court, n. 135/2006, 14 September 2006; n. 137/2006, 14 September 2006; n. 87/2007, 20 June 2007.
[29] Cour de Cassation 16 November 2004, *Rechtskundig Weekblad* 2005-2006, 387.
[30] Constitutional Court, n. 26/91, 16 October 1991; n. 12/94, 3 February 1994.

b. M*andating that states pass conforming (implementing) legislation (e.g., Rahmengesetze, EC directives)*

In the framework of limited concurrent powers, it is possible, but not required, for Communities and Regions to complement federal legislation without infringing on the basic framework (see supra II, 1).

c. *Inducing states to regulate by conditioning the allocation of central money on compliance with central standards*

The Federal government cannot unilaterally impose obligations on the Communities and Regions. Moreover, authorities may only spend money on projects within their competence (*Die Ausgaben folgen den Aufgaben*), except when allowed by the Special Financing Act (see infra IV.2.E).[31] Therefore, to condition the use of central money on compliance with central standards, either a special majority Act or a cooperation agreement approved by Parliaments concerned would be needed.

d. *Indirectly forcing states to regulate by threatening to take over the field in case of state inaction or state action that does not conform to centrally specified standards*

This would not be possible, given the fundamental principle of autonomy of the Communities and the Regions. There is no principle or right of substitution, except a rather symbolic one in article 16 § 3 SSRA: if Belgium is condemned by an international or supranational court for non-compliance by a Community or a Region with an international or supranational obligation, then the Federal authority can, under some circumstances, substitute for the Community or Region concerned in order to execute such judgment.

C. *Through the judicial creation of uniform norms by central supreme court(s) or central courts of appeal?*

There is no doctrine of stare decisis. However the judgments of the Cour de Cassation (Supreme Court) have a strong unifying power (see infra IV.1.D).[32] The same goes for the Council of State in administrative matters and for the Constitutional Court.

These highest courts play an important role in the formulation of general principles. For example. the principle of the proportionality of sanctions,[33] or of compliance with the equality principle, are applied by all three tribunals, using the same criteria and applying the same tests - the Supreme Court to lower court judgments, the Council of State to administrative actions, and the Constitutional Court to legislative norms.

D. *Through other centrally controlled means, such as centrally managed coordination or information exchange among the component states (e.g., Europe's "Open Method of Coordination)?*

In light of the phenomenon of reverse federalism, and of the basic principle of the autonomy of the Communities and the Regions, the evolution of Belgian law is not towards more unification or harmonization, but towards devolution and regionalization.

2. *To what extent is legal unification accomplished through formal or informal voluntary coordination among the component states? (somewhat bottom up, coordinate model)*

[31] A. Alen & K. Muylle, 2008, n. 506.
[32] The unifying power of the judgments of the Courts of Appeal is limited to the jurisdiction area of such Court. It is not unusual to see a split of opinion between different Appellate Courts, not only but often following the linguistic lines (Antwerp, Ghent, Brussels Flemish Chambers vs. Liège, Mons and Brussels French Chambers).
[33] Constitutional Court, n. 81/2007, 7 June 2007.

There are several mechanisms and committees for consultation, cooperation and coordination between the different Communities, Regions and the Federation (see infra IV.3). Their goal, however, is not to strive for unification or harmonization but to try to coordinate the different component state regulations and federal regulations in a way that makes them operational.

There certainly is some influence between the component states, where one will follow the other to some extent. Again, this is not in a spirit of unification, but more of competition. For example, in the area of gift and estate tax, all Regions have followed the Flemish example to introduce special reductions and exemptions with numerous conditions. But these requirements, although similar to a large extent, may vary substantially in their specific and concrete technicalities, sometimes adding to the chaos rather than to harmonization

3. *To what extent is legal unification accomplished, or promoted, by non-state actors (e.g., in the US: American Law Institute, Federal Commissions on Uniform State Laws; in Europe: principles of European Contract Law (Lando Principles, etc.))?*

A. *Through restatements*; B. *Through uniform or model laws*

There are no such unification projects in Belgium.

C. *Through standards and practices of industry, trade organizations or other or private entities?*

Given the cleavage between Flemish and Francophone people, such initiatives remain regional, even when these matters are within the federal powers.

D. *To what extent do the activities listed in A-C, above, provide input for unification or harmonization by central action (top down) or by the states (coordinate)?*

Again, this does not apply to Belgium.

4. *What is the role of legal education and training in the unification of law?*

A. *Do law schools draw students from throughout the federal system?*

Given the linguistic cleavage, 99% of the Belgian students at Flemish law schools are Flemish and vice versa for Wallonia. In some Flemish law schools such as the University of Leuven, there are a large number of international students, from all over Europe in the framework of the EU Erasmus Program, but also from outside of Europe, in the framework of LLM Programs. Thus, ironically, there are more students from abroad than from the other parts of Belgium.

B. *Does legal education focus on (i) central or system-wide law or (ii) component state law?*

Since vast areas of law remain federal, legal education focuses on the federal law. Quite often the approach is different, from one's own particular Flemish or Francophone perspective, e.g., in constitutional law. Also in matters of e.g., private law or commercial law, case law of the Flemish tribunals and courts and Flemish scholarship tends to be ignored in Francophone legal education, because of the linguistic barrier.

In areas in which the law has been regionalized, the legal education will typically, only or primarily focus at the legislation of the respective Region or Community, e.g., law of education, environmental law, gift and estate tax.

C. *Is testing for bar admission system-wide or by component state?*

The same cleavage applies to the Bar admission. Flemish lawyers will have to pass Flemish Bar Admission tests, and Francophone lawyers the Francophone Bar. The legal knowledge tested there is the same as under B.

D. *Is the actual admission to the bar for the entire federal system or by component state?*

Admission is for the entire federal system.

E. *Do graduates tend to set up their practice or take jobs anywhere in the federation?*

Graduates tend to remain in their own Region, except for those taking jobs in Brussels, where there is a more profound mix between Flemish and Francophone professionals, both in law firms and in companies, mostly in a larger international context (see infra IV.5).

F. *Are there particular institutions of (primary, graduate or continuing) legal education and training that play a unifying role (e.g., internships by state court judges at central courts, federal academies or training programs)?*

There are virtually no such institutions except for a few private initiatives. I am, e.g., member of the Organizing Board and Visiting Professor in a Postgraduate Program on Estate Planning, offering half of the courses in Dutch and half in French, co-organized by the Flemish and the Francophone Free Universities of Brussels, VUB and ULB.

5. *To what extent do external factors, such as international law, influence legal unification?*

International law, and certainly EU law, has an influence in that it takes away power to legislate, mostly on the level of the federation. EU Directives have a unifying effect, in particular regarding individual rights and liberties. The Anti-discrimination Directives, e.g., force both federal and regional as well as communal legislation to comply with them.

IV. INSTITUTIONAL AND SOCIAL BACKGROUND

1. *The Judicial Branch*

A. *Is there a court at the central level with the power to police whether central legislation has exceeded the lawmaking powers allocated to the central government?*

The Constitutional Court controls the constitutional distribution of powers between the Federation, the Communities, and the Regions.

B. *If yes, do(es) the central court(s) regularly and effectively police the respective constitutional limitations? (Please explain and give examples.)*

There is a vast case law on these issues. Since there is no precise list of rules on the distribution of powers, but a rather complicated set of provisions embodied in the Constitution and in State Reform Acts,

the Court has a large margin of interpretation with regard to these rules and its own competence. The Court has considered itself competent to decide whether an issue must be regulated by Ordinary Act of Parliament of by Special Majority Act.[34] The Court also ruled that the complementary or accessory powers for Communities and Regions are rules of distribution of powers.[35] The same goes for rules in Acts of State Reform imposing a procedure of consultation between the Federal State, the Communities or the Regions.[36] Other examples are the case law on the principle of territoriality (see supra, II.2) and the principle of the exclusivity of the distribution of powers (see supra, II.1).

The Constitutional Court is also competent for judicial review of the constitutionality of a federal act of Parliament, a decree or ordinance regarding the fundamental rights and liberties, in particular the principle of equality and non-discrimination. It is safe to say that such review has become the primary task of the Constitutional Court.[37]

C. *Is there a court at the central level with power authoritatively to interpret component state law?*

Article 84 of the Constitution states that only an act of parliament can give an authentic interpretation of acts of parliament, i.e., an interpretation that is generally binding for everyone (subject to control of the Constitutional Court). Given the principle of mutual autonomy of the federal and component state authorities, article 133 of the Constitution teaches that only a decree can give an authentic interpretation of decrees. Strictly speaking, it follows from the Constitution that this only applies to decrees of the Communities, and that neither decrees of the Regions nor Brussels ordinances have such power of authentic interpretation. Quite logically, however, for the regional decrees, such power has been implicitly accepted by the Constitutional Court.[38]

D. *Are there both central and state courts, and if so, are there trial and appellate courts on both levels?*

The entire judiciary system is Federal (articles 147, 150-151, 156-157 of the Constitution),[39] with civil tribunals and courts, criminal tribunals and courts, labor tribunals and courts, commercial tribunals and courts, and in wartime military courts. There is a level of first instance, and an appellate level (mostly the Courts of Appeal), and for legal (but not factual issues) ensuring the unity of law, a third level with the Supreme Court (Cour de Cassation). For administrative law, there are administrative tribunals, and the Council of State. At the apex, there is of course the Constitutional Court.

E. *Are there other mechanisms for resolving differences in legal interpretation among central and/or component state courts? If yes, please describe their nature and the extent of their use*

There are no such mechanisms in Belgium.

2. *Relations between the Central and Component State Governments*

A. *Does the central government have the power to force component states to legislate?*

The central government has no such power. The Communities and Regions are autonomous. See supra II and III.1. A.a. and d.

[34] Constitutional Court, n. 18/90, 23 May 1990.
[35] Constitutional Court, n. 24/86, 26 June 1986.
[36] Constitutional Court, n. 2/92, 15 January 1992; n. 68/96, 28 November 1996; n. 74/96, 11 December 1996; n. 49/99, 29 April 1999.
[37] A. Alen & K. Muylle, 2008, n. 711-713.
[38] Constitutional Court, n. 193/2004, 24 November 2004; n. 25/2005, 2 February 2005.
[39] A. Alen & K. Muylle, 2008, n. 522-583.

B. *Who executes central government law? (the central government itself or the component states?) If it depends upon the areas involved, please explain*

The principle of verticality implies that the authority responsible for a regulation also carries this out. An exception are the limited concurrent powers (see supra II.1).

C. *Are component states or their governments, or other Communities, represented at the central level, and if so, what is their role in the central legislative process?*

D. How and by whom are component state representatives at the central level elected or appointed?

Political life in Belgium is conducted along linguistic lines. There is no longer any major political party that operates on both sides of the linguistic frontier. By reason of internal conflicts relating to language and cultural autonomy, all three of the major parties – the Christian Democrats, the Liberals, and the Socialists – have , for four decades by now, split into separate French-speaking and Flemish parties.[40] In the Federal elections, citizens must vote in geographically defined areas – choosing exclusively from party lists of their own language group. Thus, a person who lives in Flanders must vote for a Dutch-speaking party. Similarly, a person voting in the Walloon Region must choose a French-speaking party. With the limited exception of the Brussels-Halle-Vilvoorde area, these six parties do not compete in the Federal Parliamentary elections.[41] Nor do political parties compete across the language line in the Community and Regional elections, with the exception of the Brussels Capital Region.[42]

This means that any politician at the central level is, though not formally, in some informal way a representative of his or her Community or Region. This situation has been identified as a major democratic problem since federal politicians are essentially unaccountable to half of the population.

Formally, there are no component state representatives in the House of Representatives (150 members), which is the most important legislative body. In the Senate, 40 of the 71[43] members are directly elected, 25 by Flemish and 15 by Francophone voters, reflecting the demographic proportions in the country. Then there are 21 Community Senators, ten of them appointed by and from the Flemish Parliament, ten by and from the Parliament of the French Community and one by and from the Parliament of the German Community. They are clearly the representatives of the respective Communities in the Federal Senate. They have no other role or powers than those of an ordinary Senator. Finally there are ten additional Senators appointed by cooptation by the 61 Senators mentioned, 6 of them on the Flemish side and 4 on the Francophone side.

E. *Who has the power to tax (what)? The central government, the component states or both*?

[40] By the 1930s, the Catholic party became divided into two linguistic "wings" – one Flemish and one French-speaking -- over the issue of Flemish cultural autonomy, and later in 1968, the Christian Democrats formally split into two separate Parties, as part of the conflict surrounding the Catholic University of Leuven/Louvain. Similarly, in the 1960s and 70s, as Walloon economic conditions declined, Walloon Federalist Parties sprouted up, with federalist-socialist agendas, which threatened the larger Socialist Party and led to its division in 1978. The Federal Liberal Party also broke up along Flemish and Francophone lines in 1971.

[41] Deschouwer, Kris. "The Changing Nature of Belgian Consociationalism: 1961-2001," Section 4.

[42] Deschouwer, Kris. "Kingdom of Belgium," p.60

[43] One must add the Senators by virtue of Law, being the sons and daughters of the King, from the age of 18, with voting rights from the age of 21.

F. *Are there general principles governing or prohibiting multiple taxation*?. *Are there constitutional or legislative rules on revenue sharing among the component states or between the federation and the component states*?

In execution of articles 175 and 177 of the Constitution, the Special Financing Act (SFA) of 16 January 1989, as amended 13 July 2001, introduces the principle of financial federalism: financial means can only be spent by an entity on projects within its powers (see supra III.1.B.c).[44] The Communities and Regions have large financial means to execute their powers in an autonomous way. Their fiscal autonomy to levy taxes is, however, rather limited for the Regions and virtually non-existent for the Communities. The sources of financing of the Communities and Regions are mainly four: (1) a direct constitutional taxing power (article 170, § 2); (2) a constitutional power to charge fees for specific services rendered (article 173); (3) loans (article 49 SFA); and most importantly (4), their allocated shares in the federal tax revenues.

The first source appears strong in theory, but it is weak in practice. It is the general power to levy taxes, awarded directly by the Constitution to the Communities and the Regions (article 170 § 2). This is an autonomous power aimed at acquiring financial means and not constrained by the material powers of the Communities or Regions. However, the proportionality test will limit such power if the non-fiscal side effect of a tax appears to be its primary goal and would be a disproportionate infringement on the distribution of material powers. An important restriction is that the fiscal Decrees or Ordinances must respect the limits of their territorial powers. This makes Community taxation virtually impossible for the Flemish and the French Communities, since it is not possible, in the Brussels area, to determine how and to whom such taxation would be applied.

As has been noted (supra II.1), this general taxation power is the only total concurrent power between the Federation and the state components, with a hierarchy of norms and superiority of the fiscal Federal Act of Parliament over a fiscal decree or ordinance. A federal act of parliament may determine the exceptions to this state component power, as they seem necessary (article 170 § 2, section 2 of the Constitution). It is therefore in the power of the Federation to determine a priori what taxation remains within and outside of the jurisdiction of the Communities and Regions, as well as to limit or abolish existing Community or Regional taxes ex post, under the condition that the necessity for such a measure can be shown. Based on these limitations, large areas of tax law remain federal, such as personal income tax, VAT, and company tax.

Taxes on water and garbage are in the exclusive power of the Regions. In addition, article 3 SFA transfers the revenues and the regulation of twelve specific taxes exclusively to the Regions, e.g., gift and estate tax, real estate transfer tax, real estate ownership tax, traffic tax, radio and TV tax, tax on games and gambling.

The fourth source mentioned is the most important one. The federal authority determines, claims and receives personal income tax and VAT, but transfers parts of the revenue to the Communities and the Regions. Personal income tax is transferred based on its localization, with an 80% Francophone and a 20% Flemish share for taxes levied in Brussels. The VAT revenues allocated to the financing of education is determined on the basis of the number of students (article 39, § 2 SFA). There are two techniques. The first is a system of shared taxes. Parts of personal income tax and VAT are received by the federal authority in a uniform way throughout the whole country and then allocated to the Communities, without any possibility for these Communities to apply tax cuts or tax surplus (article 6, § 1 SFA). Part of the personal income tax revenue is allocated to the Regions in a system of joint taxes. Here, the Regions are allowed, within some limits, to levy a tax surplus or allow tax cuts.

[44] A. Alen & K. Muylle, 2008, n. 501-506.

3. *Other Formal or Informal Institutions for Resolving Intergovernmental Conflicts. Are there other institutions (political, administrative, judicial, hybrid or sui generis) to help resolve conflicts between component states or between the central government and component states?*

Belgium is evolving from a dual form to a more cooperative version of federalism.[45] The principles of equality of federal acts and decrees, and of exclusivity of the distribution of powers, as conditions for the autonomy of the Communities and the Regions, were not able to realize an effective dualist system. The sharing of responsibilities at different levels, federal, regional, and communal, and the many links and sometimes overlaps between their powers, gave rise in the 1980s to all kinds of informal cooperation (in addition to the formal procedures and the Committee of Consultation, supra, II.1) and political agreements not based on written law, such as policy protocols for health care. However, the strict principle of autonomy of the different authorities often proved to be an obstacle for more far-reaching cooperation.

Therefore, the State Reforms of 1988 and 1993 have attempted to remove obstacles and have expanded the possibilities for cooperation between the federal and the communal and regional levels. Cooperation agreements may deal with the joint establishment and management of services and institutions, joint execution of autonomous powers, common development of initiatives (article 92bis, § 1 SSRA). Besides this possibility to conclude cooperation agreements, there are situations where such an agreement is imposed (article 92bis, § 2-4quater SSRA). In most cases the agreement must be approved by federal act, decree or ordinance. Article 77, first section, 10 of the Constitution makes the Chamber and the Senate equally competent for legislation approving cooperation agreements between the Federal State, the Communities and the Regions.

Article 6, § 2-7 SSRA imposes several consultation procedures, in particular between the Federal Government and the Governments of the Regions. It also provides that the Committee of Consultation can create Inter-ministerial Conferences (article 31bis, first section OSRA), and must create one for Foreign Policy (article 31bis, second section OSRA).

4. *The Bureaucracy*

A. *Is the civil service of the central government separate from the civil services of the component states?*

The Federal State, the Communities and the Regions have each established their own administration (see supra II).

B. *If there are separate civil service systems, to what extent is there lateral mobility (or career advancement) between them?*

The administrations are separate and autonomous, and there is no formal system of lateral mobility or career advancement.

5. *Social Factors*

A. *Are there important racial, ethnic, religious, linguistic or other social cleavages in the federation? If yes, please briefly describe these cleavages.*

[45] A. Alen & K. Muylle, 2008, n. 495.

It is quite obvious that Belgium today is a country with two peoples living in a divided society.[46] Early in the 20th century, King Albert I was told by a Walloon political leader: "Sire, You reign over two peoples. In Belgium there are Walloons and Flemish; there are no Belgians".[47] This is an overstatement if it is meant to suggest that a Belgian identity counts for *nothing.*[48] There seem to be some common attitudes on both sides of the language divide, including a pragmatic willingness to compromise and skepticism of government. Belgians take pride in the restaurant culture in their country (which is said to have more Michelin stars per capita than France) and share a love for outstanding food and drink. Nevertheless, survey evidence suggests that for most citizens, their Belgian identity is thin, at least in comparison to their local or Regional identity.[49] No one knows the words of the national anthem, and Belgium is one of the least nationalistic countries in the world. Belgians are quick to suggest that there are real cultural differences between the Walloons and the Flemish. The conventional wisdom is that the Flemish are more disciplined and harder working, like the Northern European, Germanic cultures, while the Walloons take after the more fun-loving Latins in Southern Europe.[50] Politically and ideologically, there are some conspicuous differences: the socialist tradition is much stronger in the Walloon Region, and the Flemish are much more committed to a market economy.[51] While nearly everyone throughout the country is nominally Catholic, the Walloon Region is more secular, and in Flanders the proportion of observant Catholics is higher.

It seems uncontestable today that within Belgium, the language cleavage has been embedded in a governmental structure that reinforces the sense that there are "two peoples" who are likely to drift further apart and not closer together in the foreseeable future.[52] Ordinary citizens may participate in the political process only among their own language group, except for a small political elite who must interact and negotiate in the federal government. There are no mass media – i.e., federal newspapers, television stations, or radio stations – that are aimed at both the French- and Dutch-speaking Communities.[53] The daily newspapers are exclusively Dutch, French, or German.[54] Television and radio stations have been separate in Flanders and Wallonia since 1960,[55] and each Community has its own public broadcasting organization regulated by its language Community rather than by the federal government.[56]

The degree of residential and workplace segregation in the Flemish and Walloon Regions is stunning. Belgians sometimes describe themselves as "living separately together." Within Wallonia, very few Dutch-speaking people reside or work, and very few Flemish live in or commute to Wallonia. Flemish

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[46] The following text under 5a is a quotation, taken literally from Robert Mnookin & Alain Verbeke, Persistent Nonviolent Conflict with No Reconciliation: The Flemish and Walloons in Belgium, 72 *Law and Contemporary Problems* 2009, Spring, (151) 164-166.

[47] This quote comes from a published letter to the Belgian King written by J. Destree, a Walloon Socialist leader. See André Alen, "Federalism - Federalism - Democracy: The Example of Belgium," 47.

[48] Some even suggest that the younger Flemish are more willing to identify with Belgium, possibly because they lack first-hand experience with linguistic discrimination (W. Swenden & M.T. Jans, WEP 2006, p. 889).

[49] Liesbet Hooghe, p. 65.

[50] Against "clichés", see Rudy Aernoudt, *Vlaanderen Wallonië. Je t'aime moi non plus*, Roularta Books, 2006, p. 17-35.

[51] Research indicates that the partisan control over the administration in Wallonia impacts on the French-speaking governments' resistance against organizational and HR management reforms, while Flanders has been a modernizer in administrative reform (M. Brans, C. De Visscher & D. Vancoppenolle, Administrativer Reform in Belgium: Maintenance or Modernisation?, WEP 2006, p. 979-998).

[52] See also Martin Euwema & Alain Verbeke, Negative and Positive Roles of Media in the Belgian Conflict : A Model for De-escalation, 93 *Marquette Law Review* 2009, Fall, (139), 140-150.

[53] Martin Euwema & Alain Verbeke, 93 *Marquette Law Review* 2009, Fall, 150-158.

[54] Els De Bens, "European Media Landscape: Belgium," European Journalism Centre. 2000. http://www.ejc.nl/jr/emland/belgium.html.

[55] Kris Deschouwer, "Kingdom of Belgium," in *Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid, et al., *A Global Dialogue on Federalism* (Montreal: Published for Forum of Federations and InterFederal Association of Centers for Federal Studies by McGill-Queen's University Press, 2005), p.50.

[56] Belgian newspapers, however, are self-regulated by a single association, the Federation of Editors. "CountryProfile:Belgium,"BBCNews.14May2006.<http://news.bbc.co.uk/2/hi/europe/country_profiles/999709.stm>

businessmen in prosperous southwest Flanders complain that because even unemployed Walloons are unwilling to commute to Flanders, they often hire workers from neighboring France. Within Brussels (where about 80% of the population speaks French at home) there is a modest degree of residential integration. The Brussels workplace tends to be more integrated because many Flemish people who live in Flanders commute to Brussels for work. The Flemish who work or live in Brussels are typically reasonably fluent in French.

While Belgium is a small country, there is surprisingly little social interaction between Flemish and Walloons. Millions of Belgians are literally unable to communicate because they cannot speak each other's language. The degree of linguistic segregation in the schools – from the elementary level through the universities – is striking. At all levels the curriculum of any particular school is typically taught exclusively either in French or Dutch. While some families intentionally cross-enroll their children so that they might better learn the other language, this is the exception. Nor is there a shared Federal commitment to make Belgians bi-lingual. While on both sides of the language divide, elementary schools beginning in the fourth grade do offer a few hours a week of language instruction in the other language, few Walloons ever learn to speak Dutch with any degree of fluency. In the year 2000, researchers found that in Wallonia 17% know Dutch in addition to French. The proportion of bilingual Flemish people is much higher: 57% know French and Dutch, and 40% know English as well. In Wallonia, only 7% are trilingual.[57]

B. *Are distinct groups evenly or randomly dispersed throughout the federation or are they concentrated in certain Regions, territories, states or other political subdivisions? If they are concentrated in certain Regions, etc., please explain how this concentration relates to the structure of the federal system*

The linguistic cleavage between Flemish, Francophone and German speaking people coincides largely with territorial separation. Most Flemish live in Flanders, most Francophone citizens in Wallonia, and most German speaking in the East Cantons. This affects the structure of the federal system in a substantial way, since the concept of language areas, which is the basis for the principle of territoriality, is based on it (see supra, I). There is of course the notable exception of Brussels where a large majority of the people speak French, living mixed with a Dutch speaking minority. Note that Brussels is becoming more and more an international melting pot with languages such as English, Spanish, and even Arabic spoken. The specific Brussels situation certainly has a strong impact on the structure of the federal system, with the creation of the Brussels Capital Region and all its complicated and delicate consequences (e.g. how the Communities relate to that Region; supra, II.2).

An extremely sensitive issue are the "border" municipalities, i.e., suburbs of Brussels that are situated on Flemish regional territory, but in which the vast majority of the inhabitants are Francophone. This phenomenon is known as the 'Frenchification' of Brussels and its surroundings. This has affected the federal system (e.g. language facilities, supra I) and has had a huge impact on the political situation and the relationship between the two groups. These substantially Francophone municipalities on Flemish soil have become a symbolic catalyst for the conflict that has put the country in an institutional crisis, with passionate reactions, such as the refusal by the Flemish Government to appoint Francophone Mayors who refuse to conduct all official meetings solely in Dutch, and with the enormous discussion on the electoral district of Brussels-Halle-Vilvoorde and its alleged unconstitutionality.

C. *Is there significant asymmetry in natural resources, development, wealth, education or other regards between the component states? If yes, please explain how this relates to the structure of the federal system.*

[57] Victor Ginsburgh and Shlomo Weber, "La Dynamique Des Langues En Belgique," in *Regards Economiques, Institut de Recherches Economique et Sociales de l'Universite Catholique de Louvain* (2006).

Wallonia used to have vast natural resources, especially in the form of coal mines. This made it the rich part of the country; one of the first regions in Europe to become industrialized as early as the 19th Century (see supra, I). Development, wealth, education were all at higher levels in the Francophone parts, and situated in Brussels and Wallonia. As mentioned before, this has drastically changed over the 20th Century, especially after World War II. The traditional industries declined and foreign investment shifted dramatically to Flanders. Since the end of the 1960s, Flanders has been the more prosperous Region, and it has constantly been moving upwards while Wallonia has declined, creating an ever- widening gap. Today, Flanders is one of the richest Regions in Europe, Wallonia among the poorest. Flemish education is among the top in the world, Wallonia is far below.

This relates to the structure of the federal system in that solidarity mechanisms ensure vast transfers of money from Flanders to Wallonia, especially in the social security system. Another example is the 2000 reform transferring revenues from VAT to the Communities, using a formula that enabled the Francophone Community to pay for its education deficit.

These disparities also matter for the future structure of the federal system in that the Walloons fear any form of devolution and see it as a signal that Flanders wants to let them down and break solidarity. Despite the Walloon Marshall plan and some signs of economic recovery in the South, the gap remains huge. Flanders argues that Wallonia must take responsibility for itself and that money transfers must be conditioned on economic performance. This argument finds support in the fact that some Regions in Wallonia which have received enormous subsidies from the European Union, such as Hainaut, have shown not to be able to use them for the better.

V. CONCLUSION

There was enormous Flemish pressure to change the status quo. Since the last two federal elections, in June of 2007 and June of 2010, the Flemish negotiators have not stopped to press further for substantial state reform. The Francophone "No" that stood firmly for many years, at some point seemed to come to a more realistic position of readiness to cooperate with a state reform of sorts. After NVA left the negotiations, DiRupo managed to broker a state reform deal and a six-party coalition government in the Fall of 2011. This sixth state reform (1) settles the historical problem of Brussels-Halle-Vilvoorde (BHV) by splitting this electoral and judicial district, (2) comprises a limited reorganization of the Brussels government; (3) adapts the Financing Law; and (4) organizes further devolution to the communities and regions. Critics claim it to be too little too late. Some powers to regulate labor markets are devolved to the regions, but the federal government retains control of the collective bargaining process. To a limited degree the regions will now have the power to raise or lower income taxes. But corporate taxes remain a national prerogative. Moreover, to protect Wallonia, there is a "solidarity mechanism" that will insure that a regions' share of income taxes will be no less than its share of the total Belgian population. The social security system remains entirely at the national level.[58]

Hence, this state reform confirms both the inevitable tendency of further devolution towards a more confederate model and the typical Belgian pattern of complicated technical compromises lacking all coherence. Its implementation is now on the table of the new government. It will, however, not correct the fundamental defects of a dysfunctional political system.[59] The challenge for Belgians is not to make their peace with national integration, but to re-invent a genuine relationship between Flemish and

[58] Robert Mnookin & Alain Verbeke, 72 *Law and Contemporary Problems* 2009, Spring, 186.
[59] Ibid.

Francophones, and to organize their living separately together in a collaborative way. This calls for more open communication, trust, respect, and empathy.

All of these virtues seem to have been lost during the intense game of chicken of the last half decade. All actors, even the media, are caught in a war of positional bargaining full of Emotions, Ego and Escalation. In spite of the temporary peace the sixth state reform has brought, Belgium remains in desperate need for moral and political leadership that can break this vicious cycle of the three "E"s.[60]

[60] Martin Euwema & Alain Verbeke, Negative and Positive Roles of Media in the Belgian Conflict: A Model for De-escalation, 93 *Marquette Law Review* 2009, Fall, 163-171.