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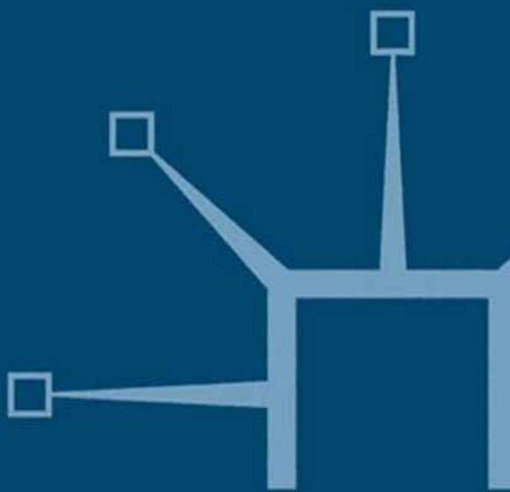
Multinational Federalism

Problems and Prospects

Michel Seymour
Alain-G. Gagnon



Multinational Federalism

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Multinational Federalism

Problems and Prospects

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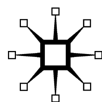

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Introduction: Multinational Federalism: Questions and Queries

Michel Seymour in collaboration with Alain-G. Gagnon

Contributions gathered in this volume were for the most part presented at the international workshop on multinational federalism, held at Université du Québec, Montréal, 25–27 September 2009. This introduction serves to prepare the reader for a long list of questions that could be raised concerning the topic of multinational federalism, all of which are discussed by the authors.

The following chapters are all concerned with federalism, multinationalism and with issues pertaining to the viability of multinational federalism as a model of political organisation. Specifically, the chapters deal with institutional and constitutional accommodation of stateless peoples. In other words, they examine the institutional design and the formulation of principles governing the political organisation of a given society when it is constituted by groups of different nationalities.

A state might be governed by normative principles concerning certain individual rights and individual practices that do not reflect the practices of individuals within minority groups (on issues like religion, marriage and sexual behaviour, for instance). There would then be a tension between the principles of the majority and those that the minority would like to endorse. But this is not an issue of concern in this book. Rather, we are preoccupied with the collective interests of the minorities and the collective measures that can be implemented to meet these interests. It is one thing to organise the institutions of a multinational federation in order to accommodate the self-determination of minorities, and it is quite another to live with a set of individual rights that are also endorsed by the minority. At the centre of our discussions one finds conflicts and accommodations of collective rights and not only of individual rights. These are conflicts involving majorities and minorities and not only individuals.

This collection is entirely devoted to the issue of multinational federalism. Furthermore, it offers a variety of theoretical perspectives from authors coming from very different contexts and looking at very different societies (Belgium, Canada, Europe, Great Britain, India and Spain). Even

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if this book is not the only one in the field, there should be a critical mass of such books in order to provide a complete picture of the different theoretical approaches, problems and case studies. There are dozens of books on federalism, nationalism and multinational states. But we have not reached a similar mass in the area of multinational federalism studies. The bibliography at the end of this introduction is very encompassing, and includes works that are not always explicitly concerned with multinational federations. It is just that we have decided to include some books dealing with federalism, nationalism and multinational states, when these were found to be useful for the study of multinational federalism. When consulting this bibliography, the reader will also note that contributors to this volume are among the most prominent figures in this field of research.

What's so special about multinational federalism? State nationalism can arise in all sorts of societies regardless of the particular regimes in which national minorities are included, and it can for that matter arise in a multinational federation. So what is the potential of federalism for accommodating national diversity? Is there a process of centralisation inherent to all kinds of federal states? Does the relative success of 'mononational' federal states like Germany, Australia and the United States present a guarantee of success for multinational federal states themselves? Should we rely instead on a model of confederalism in order to take national diversity into account? What are the advantages of federations when compared to confederations? And what are the advantages of federal states when compared to unitary ones?

It is perhaps not necessary for a stateless people to create a sovereign state of their own. But what are the comparative advantages of a federal setting? A unitary state model of political organisation is generally said to be best suited for the situation where one finds only one nation settled on the territory. It would become, however, less well adapted when the population is very diverse on a given territory. But is it not possible for the politics of recognition to be equally implemented in a unitary state? And must we not acknowledge the fact that federal states can also be intransigent and intolerant at times towards national diversity, and perhaps even more so than in certain unitary states? It appears that the crucial issue is not whether the state is federal or unitary but whether it is engaged in a nation-building policy insensitive to national diversity and is practicing state nationalism, as opposed to a dynamic of reciprocal recognition. So federalism is perhaps just one model of political organisation among many others and not a *panacea* for managing problems raised by multinationality within a state. Contributions gathered in this volume take the federal model as a starting point and advance research avenues that go beyond a comparative analysis of federal, unitary and confederal models.

Another point of convergence among the authors pertains to the kind of measures that should be adopted to accommodate national diversity. If there appear to be strong reasons for trying to accommodate such diversity

within a single state, what should be achieved exactly? Should we be implementing administrative measures or should we instead entrench provisions in a constitution? Or should we aim at both strategies? The authors in the present volume cast their thoughts in terms of explicit or implicit (as in the case of Great Britain) constitutional and institutional arrangements.

But what are the conditions that should be met in order to secure a viable multinational federation? Is the attachment to a common identity, embraced by all citizens, the missing ingredient we are looking for? Is such a bottom-up allegiance or loyalty required for a multinational federation to be viable, or can we settle for a more functional and instrumental role for the federal state? The problem is that even if the attachment, allegiance or loyalty to a particular federal state or to the European Union (EU) as a whole is understood as a prerequisite, they cannot be taken for granted when a federation is multinational. Attachment, allegiance or loyalty can to some extent already be present in the population, but they may not last very long if there is no simultaneous top-down expression of political recognition. It should not be claimed that a sense of loyalty, allegiance or emotional attachment to the central state is a precondition that would have to be met in order to achieve a true form of multinational federation. We should rather perhaps see loyalty, allegiance or emotional attachment as the possible outcomes of a new constitutional or institutional arrangement.

But let us return to our initial questions. Is there a need to implement a politics of recognition when the federation is multinational or can we simply adopt an ethics of hospitality? Should we follow Patchen Markell (2003) and James Tully (2000, 2001) and suggest that what is important for a people without a state is first and foremost to disclose their identity and be acknowledged by the encompassing state, whether or not the state also 'recognises' these people? Shall we rely instead on a continuous conversation between peoples, as argued by Charles Blattberg (2003), as the most important objective to be pursued? Must we try in addition to implement measures that reflect some form of deliberative democracy, as suggested by Simone Chambers (2000)? No matter how they see the role of constitutional negotiation, conversation and deliberation, all authors in this book agree that the crucial issue concerns the more substantial elements of a constitutional arrangement and not the procedural arrangements. More precisely, even when it is argued along the lines of Sujit Choudhry (2007) that there are enormous procedural obstacles that stand in the way leading to a discussion of the more substantial issues, these procedural obstacles often implicitly reveal a more fundamental substantial refusal of the majority to recognise its constitutive peoples.

Theoretical issues

The authors in this volume tackle some major theoretical issues. What is multinational federalism? Should we distinguish between the concept of

'federalism', which, by definition, would imply an ideal accommodation of diversity, and the concept of 'federation', understood as a particular political arrangement taking place in specific countries, that often may fail to stand up to this 'federal' ideal? In other words, is the word 'federalism' synonymous with a normative account that is precisely meant to be an accommodation of diversity in general and of national diversity in particular? This point of view is well illustrated in the chapter written by Michael Burgess. The federal ideal relates to principles like the separation of powers, subsidiarity, the equality between the federal and the federated states and thus the non-subordination of the federated states, as well as their autonomy. For a people to be autonomous, it is not sufficient to enjoy self-government. The federated state must also be fiscally and politically autonomous. Indeed, a people could enjoy self-government while the federal state would use and abuse of its 'federal spending power' in exclusive substate jurisdictions and create a fiscal imbalance between different orders of government.

Should we not instead distinguish between at least two different ways of implementing the federal ideal? One would be territorial federalism and the other would be multinational federalism. In this case, it would be granted that some federal states may perfectly well reflect the federal ideal without necessarily being concerned with national diversity per se. Territorial versions of federalism acknowledge regional diversity and may consider these regions as equal in status, if not in treatment, without distinguishing those that represent peoples and those that fail to do so. In other words, one can respect the principles of separation of powers, non-subordination, autonomy and subsidiarity, but fail to develop different sorts of policies for different peoples. But should we go beyond territorial federalism by exploring new forms of representation?

Supposing that we do have to go beyond territorial federalism, what would this imply? Moving away from the equal status of the federated states, multinational federalism would among other things allow different peoples, occupying different territories, to each have access to distinct administrative units in which they constitute a majority. In contrast with territorial federalism, multinational federalism would reflect the diversity of the peoples in the diversity of its federated states. But are there other normative principles that would meet the demands of peoples without sovereign states?

The problem is that we can also distinguish between instances of *de facto* multinational federalism and *de jure* versions that translate these facts into normative constraints. Some federations are as a matter of fact composed of different peoples, but this is not necessarily reflected in the institutions, mentalities and constitution of the country. Indeed, some federations happen to be multinational within their society and contain federated states in which minority peoples constitute a majority, but there is no specific constitutional provisions that would reflect these different nationalities. Even if federated states contain populations characterised by a different

ethnic background, the federal state may continue to treat all the federated states as equal in status. So, is there an obligation for the encompassing state to implement normative principles that are meant to capture, recognise, acknowledge and accommodate the specificities of national minorities? In other words, is there a need for a politics of difference? Some might want to argue that the ability of federal states to survive in spite of the wide variety of national groups present on a given territory is by itself an important achievement, whether or not the state puts in place a politics of recognition for these minorities. The fact that populations were able to live next to each other and tolerate each other in the very same state is already an outstanding accomplishment. And it is perhaps not a good idea to open up a constitutional reform for it could, at the same time, be like opening a Pandora's box. And yet, others will argue that toleration is not enough and that some measures must be implemented to reflect the wide variety of national groups within multinational states.

But a more immediate issue can be raised even before that: can the state intervene to promote and protect particular peoples? If the state is liberal, must it not remain neutral and does that imply that it should avoid implementing a politics of recognition for stateless peoples? These are fundamental philosophical questions that have a bearing on the very nature of the liberal state. The answer to this could lie in the distinction between two sorts of particularism: the structure of culture (language, institutions, institutional heritage) and the character of culture (religious beliefs, values, traditions, customs, ends, understandings about the common good and views about the good life). The liberal state can, in principle, be neutral towards the character of culture but it is not in general able to be neutral concerning the structure of culture. It always reflects a bias in favour of the structure of culture of the majority. This is why in the name of the equality of all cultural structures it must implement a politics of recognition for the structural cultures of the minorities.

But could the multinational federation also take the form of a communitarian society, itself composed of local communities that would also be united around common values, common beliefs with common objectives and common ends? The ties that bind a multinational federation cannot be ethnic. So must they be centred on a shared view of the common good or of the good life? Should we in this case abandon political liberalism? Must we not instead envisage the possibility of applying democracy and liberalism even in communitarian societies? In short, can we allow for a different application of federalism that would reflect the diversity of countries, peoples and experiences while maintaining a certain aspiration to universalism, and could this include liberalism? To put it differently, are liberal principles still universal principles? Or are they principles applying only in certain societies? The problem, of course, is that even if we choose to stick to political liberal principles, it is not clear what 'liberalism' means. There are

many different theories of liberalism. There are many individualist versions and there are also other versions that seek to accommodate peoples. If our favoured version is individualistic, it is not clear that it can remain universal in its application, but the same remark applies to communitarianism.

We should therefore consider formulating a version that would remain neutral between individualism and communitarianism, and one that would at the same time accommodate individual and collective moral claims. These difficult issues are discussed at length in Ferran Requejo's contribution to the volume. In his chapter, he argues for a shift from the Kantian to the Hegelian tradition. In accordance with this fundamental change, he considers different conceptions of liberalism (based on pragmatic agreements, on moral individualism or on moral agreements together with taking into account the ethnicity of empirical societies) and correlates them with different conceptions of federalism (respectively mononational, multinational but with a subordination of the federated states, and multinational with no such subordination). He looks at the third correlation as more promising for multinational federalism.

Even if we suppose that there is a version of liberalism that allows us to intervene and protect or promote collectivities as well as individuals, and even if we agree that there must be some kind of norms that reflect the existence of many different peoples, there is no clear agreement on what those norms should be. What are the requirements of multinational federalism? How far should we go to accommodate diversity? And even more urgently, what are the forces at play? Who are the actors and what role do they play? Of course, the actors are peoples, and it becomes indispensable to try to provide a definition for this concept. It is also important to note that the forces involved between these peoples are often those of majority and minority nationalisms. In his contribution, Philip Resnick describes the main protagonists, the different types of nationalist aspirations at play and the dangers of failing to learn the lessons prescribed by multinational states in general and multinational federalism in particular. He does so while exploring the particular cases of Canada, Spain, Belgium and Great Britain.

The European experiment

What exactly are the main requirements of multinational federalism? In order to examine this question, it is perhaps useful to look at existing multinational federations and to do so from a genealogical standpoint. More precisely, the idea would be to study a multinational federal experiment in an evolving context, and adopt a bottom-up perspective, looking at the forces that may lead to the adoption of such a political organisation. In this sense, it is useful to focus on what is actually occurring in Europe. The EU is engaged in the slow transition from a confederation of sovereign states into a plurinational federation. This is precisely what Hugues Dumont is arguing

in his chapter. For Dumont, the EU is now neither a confederation of sovereign states nor a federal state; it is rather a new prototype of a plurinational federation. In order to complete this process, members of EU must demonstrate some kind of federal loyalty. By doing so, they will also accomplish a cosmopolitan ideal.

We can also look at these processes by adopting a top-down perspective. In this case, we look at the already existing unitary states and examine how they are subjected from the inside to centrifugal forces that might transform them into plurinational federations. In his contribution, Michael Keating examines the case of Great Britain. This country is being dismantled as a unitary state because the Union on which it is based, along with the concept of Britishness construed in reaction to these centrifugal forces, is being abandoned. According to Keating, Great Britain is not only multinational, it is also plurinational in the sense that the English, the Scots, the Welsh and the Northern Irish interpret differently repercussions and meanings of the Union that keeps them together. But whatever the end-process, members are moving away from the old conception of the nation state as a unitary and centralised form. This seems to suggest that a multinational federation should not be striving for a concept of forced unity that would entail the notion of a common *national* identity. The federal loyalty prescribed by Dumont should therefore not be a loyalty to a common national identity. Or at least and perhaps even more importantly, the multinational federation should avoid engaging into a state-nation building that would have the effect of undermining minority nationalisms.

John McGarry tackles the same problem as he looks at the UK experience, but from a different angle, that of a *de facto* asymmetry. He wishes to test the suitability of the United Kingdom's asymmetric arrangements for its particular challenges. The United Kingdom has the advantage of being a prosperous, liberal and mature democracy, and this has contributed to the successful establishment of an asymmetric regime. In countries that are more vulnerable from the inside or in which the national majority is less secured or feels threatened by neighbouring hostility, it would be much more difficult to adopt asymmetric measures. Asymmetry leads to different distributions of powers for Wales, Scotland, Northern Ireland and England. Different sociopolitical situations call for different asymmetric arrangements and one must not be tempted to adopt a 'one size fits all' strategy for all the constitutive peoples. This is of course a lesson for liberal and democratic multinational federations, even if asymmetry cannot be applied everywhere in the world, and not in all multinational federations. But in the case of a liberal, prosperous, democratic and mature multinational federation surrounded by similar kinds of states, McGarry makes a convincing argument that it would be appropriate to recognise asymmetrical arrangements for the constitutive peoples within the constitution and institutions of the country.

When the state is a federal one, can we do more than simply allow for a fair representation of the elected members of the group in the central government? It seems that the answer is yes. Indeed, if the national minority is concentrated in a certain region and is allowed to exercise some kind of self-government in that region as a federated state, and able also to benefit from a *de facto* asymmetric arrangement, a federal system can play an important part in the recognition of this national group. In other words, the promise of self-government for minority groups is officialised in the very possibility of federalism understood as a model of political organisation, as long as the federated state is designed precisely to allow self-government for the minority group. That is, the region in which the minority finds itself must become a federated state in such a way that it becomes a majority within this administrative unit, and it must as a federated state also benefit from fiscal, political and cultural autonomy. This is precisely what Catalonia was seeking to obtain within the Spanish state, with the New 2006 Statute that was for a large part rejected by the Constitutional Tribunal in 2010. The adoption of this New Statute could have transformed Spain into an authentic multinational federal state. Federalism for Catalonia was also the promise of a *de facto* increased asymmetric political and fiscal autonomy. These issues are discussed at length in Montserrat Guibernau's chapter. In her contribution, Guibernau also looks at the objections that were raised along the way to stop the implementation of the New Statute. She asks whether there was a risk of sliding down a slippery slope for the national majority. Is ignoring the demands of minority nationalisms the only way to preserve a multinational society together? And if instead internal self-determination understood in the sense of an increased representation and self-government is granted to the minority, is the outcome inevitably going to be external self-determination sooner or later? In her chapter, she argues against this slippery slope argument.

The view according to which self-government and an adequate representation in the central government for each national minority, as well as *de facto* asymmetric arrangements, are sufficient measures to deal with a multinational society is usually portrayed as consociationalism. Let's suppose that we apply it in the context of a federation, this would also imply that different elites proportionally representing different national groups should occupy existing positions in the federal government. We should expect that at all levels of the state (courts, senate, legislative, executive, bureaucracy) there would be a fair representation of the different communities. There could also be a veto held by the component groups and some decentralisation for local governments. Among those governments, there should be one for each of the national minorities.

The consociational model has been applied in Cyprus and in Lebanon. It has also been tried in Belgium. But how can the consociational model avoid the 'majority/minority syndrome'? – to use the phrase introduced by Rajeev

Bhargava in discussing the relationship between the Indian majority and the Muslim minority in India. In his chapter on Belgium, Dave Sinardet looks at the immense obstacles along the way in trying to resolve the difficulties confronting Belgium. He notes the absence of a common public sphere between the two main communities, similar to the absence of a common public sphere in Europe. He argues that it is very difficult to implement multinational federalism in a society like Belgium if there is no support from a common public sphere between the communities.

Other case studies

The last part of the book provides additional case studies. Jan Erk and Raffaele Iacovino offer a comparative analysis of the Belgian and Canadian federations. A federated state and a fair representation in the House of Commons, along with certain *de facto* political arrangements, were offered to the province of Quebec in 1867. Contrary to the division of federated states in the United States, in which no minority has control over one of the states, one of the four initial provinces of the Canadian federation was dominated by a clear majority of French Canadians, who were then 33 per cent of the whole Canadian population. So it could be argued that when the federal experiment takes this orientation and provides self-government for its national minorities in the form of a federated state, in addition to securing the presence of these minorities in the central government, along with asymmetric measures, then it can deliver on the promises of recognition that is expected from federalism.

Is there something missing in this argument? In many multinational federations, we all know that problems may crop up even when the representation of the minority group is secured and when the group exercises self-government. Problems are bound to occur, especially if the national group is a small minority in the country and is only one among many other federated states in which the majority is present. The members of the minority nation are inevitably going to be in a minority situation in the institutions of the central state, and so the legislations of the central state may turn out to be to the advantage of the majority. Furthermore, most of the federated states may want to go along with the central government and this may isolate the federated state representing the national minority. For example, in Canada where Quebeckers have enjoyed a fair representation in the House of Commons and in the government, and exercise self-government in the province of Quebec, we have witnessed these kinds of difficulties. These were worsened by the fact that the population of Quebec has dropped and now represents approximately 23 per cent of the Canadian population, and that the federation is now composed of ten provinces and three territories. So Quebec tends to find itself isolated. The patriation of a reformed constitution from Westminster to Canada was

imposed in 1982 by nine provinces and the central government without the support of the Quebec population and against the expressed will of most of the members in the Quebec's National Assembly. The new constitutional order contained no recognition of the Quebec people, imposed restriction on Quebec language laws, limited the powers of Quebec in education and imposed a complex amending formula that turned its back to Quebec's historic veto power. Furthermore, a Social Union Framework Agreement has been imposed upon Quebeckers in 1999 with the explicit approval of all other provinces. Once again, Quebec found itself completely isolated. The arrangement meant among other things that all provinces would accept the constant intrusion of the central government into their exclusive jurisdictions. All provinces with the exception of Quebec accepted that the central government be recognised a federal spending power. This so-called federal spending power, not even mentioned in the 1867 constitution, allows the central government to create programmes and spend money in provincial jurisdictions, even if these are explicitly mentioned in the text of the 1867 constitution as exclusive powers of the provinces. So the Quebec people may enjoy self-government, but political autonomy is far from guaranteed. Closely related with this political violation of the federal principle, there is a fiscal imbalance between the central government and the federated states that has taken place over the last 60 years and that has been denounced by the successive Quebec governments of all political stripes. Because of this fiscal imbalance, the central government collects much more income tax than it needs to meet its constitutional responsibilities, whereas provincial governments do not have the fiscal resources that are required to meet their own constitutional obligations. So although Quebec enjoys certain fiscal resources, it does not exercise proportional fiscal autonomy. Let us not forget that although Canada is a highly decentralised federation 'on paper', 60 per cent of the income tax of Quebec citizens goes to Ottawa.[1]

Some have argued that the important thing for a multinational federation is to allow the people without a state to exercise some kind of internal self-determination. But what is meant by internal self-determination? It may, at a first level of analysis, simply imply a certain form of representation of the elected members of the minority group in the government of the encompassing state, but it may also mean, at a second level, self-government for the stateless people. These first two levels reflect the consociational model mentioned above. But when these two levels cannot respond adequately to the needs of the various communities, a multinational federalism must probably seek to reach a third level, in the form of a special constitutional status.[2]

There are clearly reasons for arguing that when a federal state comprises a national minority that is small in number, is represented by only a minority of MPs in the central government and is organised into a self-government that is only one among many others, there is no guarantee that the first

two levels of internal self-determination will be sufficient to meet its needs. With a minority representation in the various institutions of government, it may be isolated because at crucial points, the other members act like a majority. So the first level of internal self-determination may not even be secured. It may also fall prey to a state-nation building on the part of the central government that puts in jeopardy its fiscal and political autonomy. So the second level of internal self-determination is also not completely secured. In this case, a more robust version of internal self-determination should perhaps have to be implemented in order to protect and promote national minority's political rights.

A multination federation is no less vulnerable to the majority/minority syndrome than a unitary state. For, as was mentioned, a politics of recognition can equally take place within a unitary state, and federal states can also sometimes be intransigent and intolerant towards national diversity. It is clear that the crucial issue is not whether the state is federal or unitary but whether it is engaged in a nation-building project and is pursuing a strategy of state nationalism, or conversely is engaged in a dynamics of reciprocal recognition. Federalism is perhaps just one model of political organisation among many and not necessarily the best option for responding to challenges raised by multinationality within a given state. This is a conclusion that follows when the population of the stateless people finds itself represented by a small minority in the central government and by a single government among many other governments. Such a situation could in both cases (federal and unitary states) involve a power struggle between a majority and a minority. In short, the majority/minority syndrome raises equal challenges for both federal and unitary states.

For the proponents of multinational federalism, it is therefore important to look at alternative ways to accommodate minorities. It must open itself to the third level of internal self-determination: a special status within all the other federated states, a *de jure* system of asymmetric federalism and a *de jure* right to opt out of federal programmes in exclusive provincial jurisdictions with financial compensation would, among other things, serve to justify such a special status. In order to escape the majority/minority syndrome, the multinational federation should in these cases allow for a special constitutional status, as a strategy of accommodation for the national minority.

A multinational federal state is bound to fail if it operates in accordance with a model of territorial federalism in which all provinces are equal in status and in which there are many different substates, only one of which is controlled by a national minority. On the other hand, as we have also seen, the consociational model does not always work, especially when there are only two peoples involved, when the populations of these component peoples are not equal in size or in economic strength or if one of them has not secured its linguistic and cultural identities.

Of course, this does not mean that territorial and consociational models have no application. But we may sometimes have to go beyond consociational and territorial models. We also have to move to a third level of internal self-determination. So the constitution should establish the existence of its constitutive peoples, accept to grant them a special status, adopt an asymmetric version of the federalist principle and allow the federated states to opt out of federal initiatives with financial compensation, in addition to all the usual federalist principles (separation of powers, non-subordination, autonomy and subsidiarity). The first two levels of internal self-determination (political representation and self-government) still reflect measures of equality between peoples. But the recognition of specific peoples, special status and asymmetric federalism reflect a true *de jure* politics of difference and politics of empowerment.

This once again raises an issue concerning the preferential treatment gained by a particular group. Instead of considering their members as equal to other members of the federations, aren't we showing a bias in favour of some of the citizens? Aren't we establishing two kinds of citizens, not to mention two kinds of provinces? In answering this criticism, we could turn things the other way around. Very often, in a multinational federation, one group tends to identify itself to the country as a whole, while the other group tends to identify itself with one of the federated states. So, it is as though the first group has got its own sovereign state, that is, the central federal state, while the stateless people only have a federated state. This could be seen as a preferential treatment for the citizens belonging to the first group. In order to counterbalance the effect of such a preferential treatment, we have to offer a similar treatment to the second group, even if it is short of a sovereign state. Understood in this way, granting a special status is just a way of achieving a more equal treatment between all the citizens.[3]

It may be that Canada is not sufficiently multinational in its constitution and institutions, given that the model that it is trying to advance is territorial federalism. And it may be that Belgium is confronted with a similar problem, with a consociational model applied to what has become two societies, unequal in economic strength and demography, with one of them being also linguistically insecure. In Belgium and Canada, the two first levels of internal self-determination are at play. So it may be that both societies have to implement also the third level of internal self-determination discussed above.

The comparison between Belgium and Canada becomes crucial in this regard. It is well documented in the chapter written by Raffaele Iacovino and Jan Erk. The authors offer a comparative analysis of Belgium and Canada and investigate another aspect of the third level of self-determination. They reflect upon the possibility of resting the federal organisation of the state on a compact between multiple *demoi*, as opposed to the organic view that would postulate a single *demos* for federal institutions, and that would

recognise multiple *demoi* only in the case of confederations. At the third level of recognition of the self-determination of its constitutive peoples, a true *de jure* multination federation should perhaps be understood by all as founded on multiple *demoi*.

In 1994, the Belgian state was reformed to give the constituent nations of Belgium a constitutional right of self-rule, thereby creating multiple *demoi* within a state. But according to Iacovino and Erk, an ambiguity persists concerning the status of the *pouvoir constituant*. Is Belgium now committed to a compact theory? Canada is also, according to those authors, confronted with a similar fundamental ambiguity. While showing some pragmatism on substantial issues, these authors argue that 'Canada has not responded to pressures from Quebec to formally alter its conception of the country based on a pluralist conception of popular sovereignty'. Until the patriation of the constitution in 1982, there was a constitutional convention that granted Quebec a veto power. After that date, the principle of equality of all ten provinces was imposed. All in all, Iacovino and Erk argue that the main feature of the Canadian federation is revealed by 'Canada's inability to constitute itself through a clear and open discussion around the question of the appropriate justificatory scheme for locating the *pouvoir constituant*.

It seems that a multinational federal state will be viable only if it avoids falling prey to the majority/minority syndrome, and this may entail a commitment to a compact theory. It does not mean that multinational federalism cannot be applied in such countries. It is possible to constitutionalise and institutionalise a politics of recognition that is made to accommodate national groups and to see those groups as the founding members of a federal compact. Even if they are well represented in the institutions of the central state and have their own self-government, their federated states must in addition each have a special status within the country as *demos* on which to build foundational and constitutional principles.

When the people are in a minority and represent only one out of several federated states, the principle of equality among provinces is surely not a workable option. So some kind of special status must be provided for the people. As part of this process, such a people must be allowed to create their own constitution. Self-determination, after all, also allows a people to determine their own political status within the encompassing state. So, if some kind of special constitutional status appears unavoidable, the constitution of the encompassing state must be adapted to take into account claims made by minority nations and minority nations ought to be entitled to adopt their own internal constitution. The idea of creating an internal constitution for a federated state in a federation is well developed in John Dinan's chapter. Dinan provides a comprehensive account of the relevance of internal constitutions in different federal countries. He offers a balanced assessment of the merits and pitfalls one could encounter. But, all in all, he is generally open to the idea of internal constitutions for substates. His argument once again shows

that a top-down politics of recognition, understood as a politics of difference, is perhaps the best way to secure a bottom-up loyalty on the parts of those substates in the long run. This, the argument can be made, is even more true in the case of those substates that are the home of national minorities.

The book ends with a thoughtful analysis of the situation in India by one of the most informed intellectuals in that country. In the final chapter, Rajeev Bhargava seeks to explain why until now India has failed to meet the ideals of the multinational federation.[4] So what are the promises of multinational federalism? What are the issues associated with the presence of several peoples within a federal state? Is federalism an ideal for managing national diversity? What benefits can be derived from the accommodation of diversity? Which countries can serve as models and deserve a careful examination? Is Europe a good laboratory to assess if the federal model is adaptable to national diversity? These questions have been around for a very long time, and they are more pressing than ever. In a way, they all concern the viability of the multinational federal state. It is this challenge that the authors of this volume have decided to address.

Notes

1. For a discussion of the actual situation of Quebec in the Canadian federation, see Seymour, 2009, pp. 187–212.
2. For a discussion of the three levels of internal self-determination, see Seymour, 2011, and Seymour, 2007, pp. 395–423.
3. Formal asymmetry is discussed in favourable terms in recent contributions to the literature. See, for instance, the works of Agranoff, Funk and Iacovino mentioned in the bibliography, as well as McGarry's chapter in the present volume.
4. See also Seymour, forthcoming.

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Part I

Theoretical Matters

1
Multinational Federalism in Multinational Federation

Michael Burgess

Introduction: asking for trouble?

In a seminal paper titled 'Federalism and the Making of Nations' first published in an edited volume of essays in 1955, Kenneth Wheare reflected upon the limits and possibilities of using the federal idea as a device for 'bringing nations together, for preserving them and at the same time developing over and above their feelings of distinct nationality, a sense of common nationality' (Wheare, 1962, pp. 29–30). In the same year, Pierre Trudeau, a future prime minister of Canada, also observed in a famous essay titled the 'New Treason of the Intellectuals' that by separating 'once and for all the concepts of state and of nation' it was possible to 'make Canada a truly pluralistic and polyethnic society' (Trudeau, 1968, p. 177). It was perfectly possible, in his view, for French Canadians to 'lead the way toward making Canada a multi-national state' (Trudeau, 1968, pp. 164–65). Clearly, both men believed that the relationship between federalism and nationalism was one that could be imaginative, constructive and innovative in the realms of practical government and politics, even if the likelihood was that such a project would require exceptional political wisdom and elite leadership skills together with a realistic acceptance that at the very outset instability would be immanent in the state.

Interestingly, Wheare did not let the significance of the Canadian federal experiment escape him in this essay: 'We forget very often that the making and keeping of a Canadian nation is a continuous, delicate and intricate process going on unnoticed, not only by people outside Canada but inside it as well' (Wheare, 1962, p. 36), while Trudeau, in another essay titled 'Federalism, Nationalism and Reason', underlined the paradox that 'the principle of self-determination', which 'made federalism necessary in the first place', also made it 'rather unstable' (Trudeau, 1968, p. 192). Trudeau's observation remains a crucial one for those who seek to promote the idea of multinational federalism and its practice in the multinational federation. The paradox resides in the successful accommodation of difference and

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diversity that creates a novel state but that also creates the conditions for both a stable and an unstable state. It is surely a curious set of circumstances that leads to the formation of a federation deliberately founded upon strong cultural–ideological differences, such as distinct nations, which will always constitute one of the major fault lines in its subsequent evolution.

Together, these two eminent contributors to the early debate about multinational federalism had called attention to several important features and characteristics of complex federal state formation that would later take the form of stresses, strains and tensions built into the experiment from its inception. In short, they pointed to a variety of paradoxes, pitfalls and dangers that would threaten such a federation from the moment it was launched. It was asking for trouble. Why, then, would political elites champion such a hazardous enterprise? What peculiar circumstances would have to exist in order to create a set of conditions conducive to multinational federalism, that is, the desire and willingness of such distinct identities to live together in the same federal state?

Trudeau's answer to this conundrum was simple. In cases where 'a sense of national identity and singularity' that demanded a 'right to distinct statehood' coincided with the 'insuperable difficulties of living alone' and the 'practical necessity of sharing the state with neighbouring groups', national independence was either 'unattractive or unattainable'. Taking 'the first law of politics ... to start from the facts', Trudeau took difference and diversity for granted in the polity so that 'the federal compromise became imperative'. And if such a state would always be subject to internal threats of secession, the only way out of this dilemma was 'to render what is logically defensible actually undesirable': 'the advantages to the minority group of staying integrated in the whole must on balance be greater than the gain to be reaped from separating' (Trudeau, 1968, p. 192). Reason, in other words, would triumph over emotion. In such circumstances, federation was the rational state.

In this light, the federal imperative was not only essentially a compromise, but it was also construed as a last resort. In other words, it was couched in terms of stark alternatives: 'federate or separate'. Multinational federalism, then, conveyed a sense of 'separateness' within the state rather than separation from the state. It presumed the protection, preservation and promotion of distinct substate nations that would be able to determine themselves as nations within the larger federal state. This, in turn, meant that multinational federation would be *ipso facto* predicated upon the notion of a vibrant multinational federalism and that this would be its principal purpose as a state. These contributions of Wheare and Trudeau therefore confirm that a veritable labyrinth of conceptual, theoretical and empirical issues confront us when we consider the question of whether or not the idea of multinational federalism can be practically translated into the thing called multinational federation.

In this chapter I want to explore the practical implications of multinational federalism in multinational federation. The recent intellectual debate about normative empirical theories of liberal nationalism has far-reaching consequences for the practice of federal constitutional government and politics. But without wishing to revisit this debate for our practical purposes here, it is, nonetheless, necessary to clarify at the beginning some of the key concepts and definitions that will be used in the chapter. Mindful of this important need for conceptual clarity, then, I will begin with a short discussion of the terms being used followed by a brief survey of the distinction between territorial and non-territorial nations that will enable us to engage the main body of the essay, namely, how to translate multinational federalism into multinational federation. Let us start with the basic concepts and definitions.

Multinational federalism and multinational federation

In this section I want to underline the conceptual distinction between federalism and federation in order to locate substate nationalism and multinationalism in the former category while situating the national and multinational state in the latter one. This means that for the purposes of this chapter I will construe substate nationalism and multinationalism as the federalism – the cultural–ideological component – in federation. I take federalism to be the animating force of federation that can take many different forms: historical, intellectual, cultural–ideological, socio-economic, territorial and non-territorial, philosophical and legal. It is in essence a multidimensional concept. Federation, on the other hand, is a federal state, that is, a particular kind of liberal democratic state, which is characterised by the formal written constitutional entrenchment and legal recognition of difference and diversity that are enshrined in various forms and levels of autonomy. This basic conceptual distinction enables us to explore federalism as both substate nationalism and multinationalism and federation as the national and multinational state (Burgess, 2006).

Having just clarified the terms federalism and federation in this way, we must also cement the links between federalism, federation and substate nationalism by introducing the term 'political nationality'. This is a broad instrumental term used to describe what is essentially an overarching political rather than a specific cultural identity. Wheare put it thus: 'Nationality in a federal state means something more complicated than it does in a unitary state. And one of the factors which produce in states the capacity to work a federal union is the growth of this sense of a new common nationality over and above but not instead of their sense of separate nationality' (Wheare, 1963, p. 50).

Consequently, in the words of the Canadian historian W. L. Morton, we must refer to Canada as 'a community of political allegiance alone'

(Morton, 1972). We are also reminded of Donald Smiley's pithy essay titled 'The Canadian Political Nationality', first published in 1967, in which he made the following memorable declaration: 'If Canada cannot become a political community – one community not two – it is not worth preserving. The requirements of the Canadian political nationality are that Canadians find and commit themselves to a group of common objectives which they pursue in equal partnership together' (Smiley, 1967, pp. 128–29).

Federal states that comprise what are now frequently called 'internal nations' – and whose very *raison d'être* is the protection, preservation and promotion of these nations as nations – are therefore essentially political communities compelled to ensure that claims of citizenship in the state are fundamentally compatible with other substate national loyalties and allegiances, and this would also apply to religious, linguistic and territorial identities if they were the primary basis of the union. In the specific terms of Wheare's 'common nationality', then, we may simply regard this 'political nationality' as pertaining to the state itself.

If we take the meaning of the conceptual terms federalism, federation, substate nationalism and political nationality and translate them into the multinational federalism in multinational federation, we must tread very carefully in order to weave them into the very fabric of the state and society or, more accurately, state–society relations. In this way of thinking, multinational federation corresponds to the state and multinational federalism corresponds to society. But in this world of conceptual relationships how can we relocate the notion of each distinct internal nation or nationality in the specific context of multinationalism? We cannot take what is often just a descriptive label at face value. It is not a simple conceptual leap. This is because the translation of each internal nation and political nationality into multinationalism involves a qualitative as well as a quantitative change in the nature of the concept and this has important empirical implications. In other words, it will have a direct impact upon the thing we call multinational federation. We have to take into account a wide range of factors, some of which may be imponderables. These would include historical specificities, majority–minority relations that take account of demographic size and composition, the territorial distribution of each nation, language policy and complex socio-economic features that interact with national identities. These factors affect how internal nations relate to each other in a single state as well as the relationship of each of them to the government of the state. In short, moving from the conceptual to the empirical world is a complicated transition.

Having called attention to the familiar conceptual world of the internal nation and its relationship to the political nationality of the state, it is now time to turn and look much closer at this transition to multinational federalism and multinational federation. Here we must focus on the relatively

unfamiliar world of multiple nations that live together side by side in the multinational federal state or political system. Correspondingly, the centre of our attention shifts to investigate state–society relations mentioned above or, to put it another way, to define the meaning and to specify the nature of the relationship between multinational federation and multinational society.

Kenneth McRoberts has already traversed this road in his thought-provoking article published in 2001 and titled 'Canada and the Multinational State' (McRoberts, 2001). And it is interesting to note his preliminary observation about the word 'multinational', which he immediately questioned and acknowledged was 'not the most fortuitous of terms' because it had 'far too many other meanings' (McRoberts, 2001, p. 683). The term that he preferred was 'plurinational', which derived from the Catalan word *plurinacional* and was also formally adopted in the same year by Michael Keating, who suggested that it captured 'the complexity of nationality' better than multinationalism. Keating claimed that 'plurinationalism' was 'more than multinationalism' largely because it opened up 'the possibility of multiple nationalities' that could accommodate different meanings in different contexts (Keating, 2001, pp. 26–7). Nonetheless, the term remains both awkward and inelegant in the English language and this is doubtless the answer to McRoberts' evident perplexity in failing to understand precisely why the word 'multinationalism' has endured (McRoberts, 2001, p. 683). One important observation made by McRoberts in his article is pivotal to the continuing intellectual debate about multinationalism (or plurinationalism) and the viability of a new model of multinational federation: 'while many states are multinational in their composition very few of them actually function as multinational states' (McRoberts, 2001, p. 711). Presumably, to refer to a multinational state 'in its underlying composition', as McRoberts does, is actually to infer the sociological reality of a multinational society (McRoberts, 2001, p. 712). This suggests that it is one thing to speak about a multinational society but it is quite another to base 'the multinational state itself wholly or in part on the multiple nations it contains' (McRoberts, 2001, p. 686). The conceptual distinction is of course an important one. If there are 'sociological nations', that is, a multinational society within the state, should the state itself be correspondingly multinational? Should the political institutions of the federal state be organised to incorporate multinationality? If the distinction between federalism and federation utilised here is conceptually valid, it does point us in the direction of state–society relations and raises the question of whether or not so-called internal nations, if politically mobilised, should be represented both constitutionally and politically in their collective capacity as distinct nations in the state.

The gist of our conceptual survey in this section of the chapter, based upon federalism and federation, suggests that there are some problems with

how we reason from the socio-political reality of internal nations to multinational federalism. If internal nations are construed as unitary actors with specific policy preferences connected to substate national self-determination that are distinct from the larger national state agenda, how far do these discrete pressures add up to multinational federalism? Is there, in other words, a real collective desire for these identities to be organised constitutionally and politically in the fabric of the state? And if such nations constitute a multinational society, does this always lead logically to multinational federation? It may be that there is an appropriate structural response to this problem that falls short of full federation.

The answer to this question is not straightforward even if the constituent nations enjoy some form of recognition in the federal state or political system. One conclusion to be drawn from this section therefore is that multinational federalism is much more complex as a conceptual construction than it might at first glance appear to be. Indeed, it might even be worth questioning whether or not multinational federalism can exist as a viable conceptual category let alone an empirical reality. It is, however, helpful at this point to return to Wheare's essay introduced above because he referred to one particular type of multinational federalism that he considered might be conceptually more manageable when 'making a nation out of differing nationalities'. This was where such 'differing nationalities' were 'territorially segregated' so that 'each area contained its own single nationality exclusively' (Wheare, 1962, p. 32). Realistically he acknowledged that people did not organise themselves in practice so that a federation could be composed of states in which there were no minorities at all, but he did recognise, nonetheless, that 'there should be areas or an area in which each nationality' was 'at least in a majority' so that there could be 'a state or states in the federation' to which each nationality could look 'as to a motherland or national home'. And his interim conclusion led him to claim that if such a territorial homeland did not exist, it was difficult to see how federation 'in the ordinary sense of a union of territories, with territorial autonomy', could have 'much relevance to the problem of reconciling differing nationalities' (Wheare, 1962, p. 32).

Clearly, this was a perfectly understandable position for Wheare to adopt. Indeed, it was quite prescient for its time because he also did not hesitate to add that territorial autonomy by itself was insufficient to protect 'minority nationalities'. This alone, he argued, was no guarantee for the protection and preservation of minority national interests in the federal sphere. Several devices were necessary to do this and, at least in the specific contexts of Canada and Switzerland, they included constitutional recognition and protection of languages and religious rights, equal territorial representation in second chambers and minimum elected representation in lower chambers for minority nations. Taken together, he regarded these safeguards as 'practically essential adjuncts to a federal structure where differing nationalities

are associated together' and, indeed, they were 'just as important as the division of powers itself in a federation' (Wheare, 1962, p. 33).

There is no space to develop this line of reasoning here but suffice it to emphasise the remarkable prescience of Wheare's early observations which had in practice foreshadowed the later research conducted by scholars on both consociational democracy and asymmetrical federalism. We will turn now to explore some of the important empirical implications of multinational federalism in two contemporary case studies of multinational federations firmly rooted in territorial autonomy.

Two new federal models

In this section I want to present a short analytical survey of Ethiopia and Bosnia and Herzegovina (BiH) as two new multinational federations in order principally to highlight the conceptual and organisational principles mentioned above and to draw some conclusions about their viability. If they are multinational federations, how are they organised and what is the conceptual basis of each state? We will start by sketching out the broad constitutional contours of these two multinational federations that were both created in 1995 and then point to the normative assumptions upon which the conceptual and organisational principles are founded. I shall begin with Ethiopia and then look at BiH.

Ethiopia

The Preamble to the Constitution of the Federal Democratic Republic of Ethiopia (1995) loudly trumpets its mission statement in the name of 'the Nations, Nationalities and Peoples of Ethiopia' that continue to live with 'rich and proud cultural legacies', having 'built up common interests' and a 'common outlook' that has promoted 'shared interests' and their 'collective promotion' (Federal Constitution, 1995). In its reference to the Ethiopian flag, Article 3(2) reiterates the previous reference to 'the Nations, Nationalities and Peoples' but also introduces for the first time 'the religious communities of Ethiopia' with the aspiration that they should 'live together in equality and unity'. It also acknowledges in Article 3(3) that the various constituent units of the federation 'may have their respective flags and emblems' although no mention is made of their own substate constitutions (Federal Constitution, 1995). The sovereignty of the people of Ethiopia (Article 8) is confirmed as being in the name of 'the Nations, Nationalities and Peoples of Ethiopia' and its full expression is reflected in their elected representatives and in their own direct democratic participation in the political system.

Chapter 3, Articles 13–44, of the Federal Constitution refers specifically to what is effectively an entrenched Bill of Rights as 'Fundamental Rights and Freedoms' and Article 39 in this chapter brings into full view once again

the 'Rights of Nationalities and Peoples'. It is worth more than a moment's reflection here and I have included a full reference to it as follows:

1. Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.
2. Every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language, to express, to develop and to promote its culture; and to preserve its history.
3. Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government that includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in State and Federal governments.
4. The right to self-determination, including the secession of every Nation, Nationality and People shall come into effect:
5. When a demand for secession has been approved by a two-thirds majority of the Members of the Legislative Council of the Nation, Nationality or People concerned;
6. When the Federal Government has organized a referendum which must take place within three years from the time it received the concerned council's decision for secession;
7. When the demand for secession is supported by majority vote in the referendum;
8. When the Federal Government will have transferred its powers to the council of the Nation, Nationality or People who has voted to secede; and
9. When the division of assets is effected in a manner prescribed by law.
10. A 'Nation, Nationality or People' for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

These ten sections of Article 39 contain the conceptual and organisational principles of the multinational federation to which we have referred above. Taken at face value, they clearly suggest that culture, custom, language, identity, psychology or mindset, and territoriality are the key concepts that comprise multinational federalism in the multinational federation. Logically we might expect therefore that there would be an institutional architecture coincident and congruent with McRoberts' multinational society.

What sort of multinational federal model is this and how does it work in practice? If we turn to investigate Chapter 4, Articles 45–49, of the Federal Constitution that refers to the 'State Structure', we establish the following features: it is a parliamentary federation whose principal component elements are constituent states defined on the basis of 'settlement patterns, language,

identity and consent of the peoples concerned' (Federal Constitution, 1995). Article 47 establishes nine such constituent units with special arrangements made for the Capital City, Addis Ababa, in the state of Oromia:

1. The state of Tigray
2. The state of Afar
3. The state of Amhara
4. The state of Oromia
5. The state of Somalia
6. The state of Benshangul/Gumuz
7. The state of the Southern Nations, Nationalities and Peoples
8. The state of the Gambela Peoples
9. The state of the Harari People

According to this Article, it is possible for any of the 'Nations, Nationalities and Peoples' within the existing state structure to establish their own constituent state units provided that they follow the set procedure of achieving a two-thirds majority of the particular Council of the Nations, Nationality or Peoples concerned and a majority in a referendum in that specific Nation, Nationality or People. Any state border disputes must be settled by agreement between the states themselves but failure to reach agreement brings into play the House of the Federation, which alone can decide on such disputes, and to which we now turn our attention.

If the House of Peoples' Representatives as the lower chamber is a familiar feature of the typical bicameral federal legislature, the House of the Federation is unique in both its role and composition. Article 61 declares that the House of the Federation is composed of representatives of Nations, Nationalities and Peoples so that each constituent 'Nation, Nationality and People shall be represented' in the House 'by at least one member'. And each Nation or Nationality will be represented by 'one additional representative for each one million of its population'. But since it is the case with all second chambers, whether federal or non-federal, that their role, functions and composition are intimately intertwined, it matters precisely how their composition is decided. The key to the role of the House of the Federation lies in Article 61(3) which stipulates that its membership will be 'elected by the State Councils', but it also concedes that while the state councils can elect their own representatives, they may also 'hold elections to have the representatives elected by the people directly' (Federal Constitution, 1995).

The question of the composition of the House of the Federation in the Federal Democratic Republic of Ethiopia is vitally important when we consider its main powers and functions, which are outlined in Article 62:

1. The power to interpret the Constitution.
2. The power to organise the Council of Constitutional Inquiry.

3. The power to decide on issues relating to the rights of Nations, Nationalities and Peoples to self-determination, including the right of secession.
4. The power to promote the equality of the Peoples of Ethiopia and to consolidate their unity based on their mutual consent.
5. The power to find solutions to disputes or misunderstandings that may arise between states.
6. The power to determine the division of revenues derived from joint Federal and State tax sources and the subsidies that may be provided by the Federal Government.

For our purposes in this chapter it is important briefly to summarise the 'National Policy Principles and Objectives,' outlined in Chapter 10, Articles 85–92, of the Federal Constitution. Of special interest is Article 88(2) that confirms respect for the multinational character of the federation: 'Government shall respect the identity of Nations, Nationalities and Peoples' and shall 'have the duty to strengthen ties of equality, unity and fraternity among them' (Federal Constitution, 1995). Article 89(4) stipulates that 'Government shall provide special assistance to Nations, Nationalities and Peoples least advantaged in economic and social development', while Article 91(1) confirms that 'Government shall have the duty to support, on the basis of equality, the growth and enrichment of cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the Constitution' (Federal Constitution, 1995).

Clearly, the Constitution of the Federal Democratic Republic of Ethiopia includes and expresses all of the liberal democratic characteristics of what today we would expect to find in a new federal model of state organisation. It has also incorporated within it the conceptual and organisational principles typical of what we might anticipate in a new multinational federation. However, the structure of the federation, its institutional powers, functions and relationships, and the inclusion of such liberal democratic norms, processes and procedures do not automatically guarantee that constitutional practice follows in this way. Does the Ethiopian Federation operate in the way that its Constitution suggests and, if not, what are its deficiencies and malpractices?

We must remember that the federation has been in existence for only 175 years and that the specific context and circumstances of its emergence have played a key role in its performance and survival. One of the most interesting, if confusing, tendencies in the mainstream literature on Ethiopia is the insistence of scholars in using the terms 'ethnicity' and 'ethnic groups' generically as shorthand for the official terms 'Nations, Nationalities and Peoples' (Habtu, 2005, footnote 30, p. 318). Apart from the question of conceptual clarity, it affects the perception that we form of the nature of Ethiopia's diversity. Do we, for example, look through the lens of 'ethnic

diversity' and see 79 distinct ethnic groups as the guideline or do we construe the nine constituent units as encompassing separate nations and nationalities? And what is the basic distinction between 'Nations, Nationalities and Peoples'? The Constitution is formally silent about this. Let us probe the relationship between constitutional theory and practice a little further.

Theory and practice

Does the rhetoric of liberal democracy in a federal Ethiopia have any substance? Opinion seems still to be divided, although it is generally recognised that the political system is dominated by the minority Tigray People's Liberation Front (TPLF) that constitutes about 6 per cent of the total population of 53 million. Indeed, such is the strength of its military hegemony that many critics see it as a one-party state (Habtu, 2005, p. 314). However, in a thought-provoking essay, published in 2000, James Paul indicated that there was a recognised yardstick of measurement by which to judge the success or failure of Ethiopia as an emergent multiethnic federation. He identified the official report by the UN Secretary-General, Kofi Annan, to the Security Council in 1998 that discussed 'strategies to arrest the widespread conditions of repression, ethnic conflict, civil war, and other failures of states in Africa' (Paul, 2000, p. 192). The report, which has been repeatedly endorsed since then by the international community (IC), distilled the primary goals of state building to the following: 'human development and poverty alleviation; respect for all human rights; encouragement of civil society organisations; democratisation of governance at all levels; and a rule of law geared to these indivisible, interdependent ends and means of governance' (Paul, 2000, pp. 192–93).

Accordingly, adherence to these interrelated goals that reflect a strong body of norms for creating a new legal environment already exist in the republican constitution, in Articles 43, 44 and 89. But it is with the specific question of multinational federalism in multinational federation that we are principally concerned, although it is clearly related to the larger issue of rethinking 'the fundamental tasks of states in the African context' (Paul, 2000, p. 192). If we confine ourselves to the theory and practice of multinational federalism, what the new federal model displays are the following doubts, anxieties and shortcomings.

Formal institutional problems and failures

a) The House of the Federation is composed of 'Nations, Nationalities and Peoples' but in practice they are delegated to it by the regional councils. This means that the House members are actually representative of the constituent governments and the political parties rather than the Nations, Nationalities and Peoples, placing a large question mark over their independence in addressing their constitutional obligations.

b) The Constitution has provided only for formal conflict management procedures that occur between constituent state governments (inter-state) and not for those conflicts that are essentially within constituent states (intra-state). No provisions were made formally to accommodate the autonomy and self-administration of minority ethnic groups that were located in multiethnic constituent units.
c) The dominance of the executive power in the federation, principally via the ruling party coalition and the structure of the administrative agencies, has meant in practice that most of the processes and procedures used for ethnic conflict management have been monopolised by the hegemonic forces of the central government.
d) The promise of self-administrative structures and institutions for all ethnic groups and communities has effectively been sacrificed in favour of the competing constitutional economic and administrative imperatives so that another policy of the amalgamation of diverse groups has been practised in parallel to the official line.
e) The institutional capacity of the politico-administrative procedures of conflict management have been repeatedly called into question as largely reactive rather than preventive, with force sometimes taking the place of traditional procedures for conflict management.

Informal institutional problems and failures

a) The nature of party government: the TPLF is the dominant partner in the Ethiopian People's Democratic Revolutionary Front (EPDRF), a countrywide coalition of ethnic-based political parties controlled by the TPLF leadership that is widely perceived as tantamount to a one-party state.
b) The problem of minority domination of both the ruling party and the government creates difficulties regarding the nebulous boundaries between them and the rest of the governing parties in terms of public trust, responsibility, corruption and a lack of transparency in what is a heavily centralised federal state.
c) Since most ethnic communities have their own distinct languages and are by and large territorially concentrated (Tigray, Afar, Amhara, Oromia and Somalia constitute five states inhabited by dominant ethnic communities in whose name the state was designated), the management of ethnic conflict is much less complicated than in those constituent units like the State of the Southern Nations, Nationalities and Peoples and the State of the Gambella Peoples which are multiethnic (Kefale, 2009, pp. 260–81).

Summary

The creation of an ethnic-based federal state in Ethiopia in 1995 can be partly explained by what we might call the Marxist–Leninist–Stalinist ideological legacy and the peculiar nature of the circumstances in 1991

of an EPDRF victory in the civil war against the Derg Communist regime. Influenced by the ideas of Marxism–Leninism first introduced by the Ethiopian Student Movement (ESM) in the 1960s, the Communist regime, led by Colonel Mengistu's military junta, during the period 1974–91 gradually adopted the model of the Soviet nationalities policy that prompted Ethiopians to classify ethnic communities and groups as nations and peoples. Consequently, the constitutional silence identified above is now fully explained. These ideological antecedents filtered through into the circumstances of constitutional design during 1991–95 so that the organising concepts and principles remain somewhat misleading if taken literally at face value.

The constitutional theory and rhetoric does not stand up to close scrutiny largely because Ethiopia, with its strong authoritarian legacies of imperial centralisation and Marxist–Leninist practices of democratic centralism, together with the military prowess of its current TPLF minority-led coalition of ethnic parties, still lacks a liberal democratic political culture. This will take time to evolve and it will depend largely upon the promotion of an overarching countrywide citizenship and the political nationality of 'being Ethiopian' as a countervailing force to narrow ethnic identity. Ethiopia in many respects therefore still conforms to the typical model of other African states in the extent to which regime security, political stability and (multi) national state unity continue to take priority over civil society, political trust, power sharing, genuine participation in a multiparty democracy and the rule of law.

On the positive side, the Federal Democratic Republic of Ethiopia has endured for 15 years and it has managed to put in place a series of procedures and mechanisms of conflict management that, while flawed, have, nonetheless, sustained political stability without international intervention, and without the serious challenge of secession. Given its turbulent history in the twentieth century of imperial expansion, civil war, ethnic violence, foreign occupation and revolution, it is quite remarkable how far and how fast this new federal model has progressed.

Bosnia and Herzegovina[1] (BiH)

BiH is a dyadic, multinational federation: one state, two entities and three ethno-national communities. According to the Constitution of BiH, an integral part of the General Framework Agreement for Peace agreed in December 1995 in Dayton, Ohio, USA (known as the Dayton Accords), BiH is 'a democratic state' that operates under 'the rule of law and with free and democratic elections' and is composed of 'the two Entities, the Federation of Bosnia and Herzegovina (FBH) and the Republika Srpska' (the Serb Republic) (Annex I, Constitution of BiH, 1995). The three major ethno-national communities – identified as (Moslem) 'Bosniacs, Croats and Serbs' – are defined as 'constituent peoples'. The term 'federal' is restricted to only one of the

Entities, namely, the FBH but it, nonetheless, remains the case that in practice the foundations have been laid for a federal constitution and a federal state in BiH in all but the name.

In a nutshell, then, BiH is dyadic in the sense that it has just two constituent units, known as Entities, of which one is itself a federation (FBH) composed of 10 cantons and 80 municipalities and the other (Serb Republic) is a unitary centralised republic comprising 62 municipalities. The institutional design of BiH is also therefore highly asymmetrical. The political, fiscal and administrative structures are distinct in both Entities, which also have their own written constitutions. Since it would clearly be misleading to suggest that the country was created as a result of a voluntary agreement between the former warring parties, its construction and the gradual process of federalisation in BiH since 1995 is a direct consequence of the imposition of a new federal model by the IC involving in various ways the UN, the North Atlantic Treaty Organisation (NATO), the EU and the Organisation for Security and Cooperation in Europe (OSCE). To this extent, it fits the recent classification of a 'forced together' federation (Bermeo, 2002, p. 108).

One of the most striking features of BiH as a still emergent multinational federation is its weak central authority and the comparative strength of its two constituent units. In most cases of federal–state relations it is the reverse, with concerns usually expressed about the powers of an overweening central government and its encroachment upon the competences of the constituent state governments. In BiH the 'responsibilities of the institutions of BiH' appear to confirm substantial powers:

a) Foreign policy
b) Foreign trade policy
c) Customs policy
d) Monetary policy
e) Finances of the Institutions and for the international obligations of BiH
f) Immigration, refugee and asylum policy and regulation
g) International and inter-Entity criminal law enforcement
h) Establishment and operation of common and international communications
i) Regulation of inter-Entity transportation
j) Air traffic control (Constitution, 1995: Art. III, 1)

On the face of it only defence and some security competences are absent from this list of powers but in reality the state of BiH relies almost totally upon its Entities. While the Constitution acknowledges some relatively unusual competences for the two constituent Entities, including 'the right to establish special parallel relationships with neighbouring states' and the right to 'enter into agreements with states and international organisations',

it also charges them with the more conventional competence of providing 'a safe and secure environment for all persons in their respective jurisdictions' (Constitution, 1995, Art. III, 2). But it is Article III, 3(a) that, as in the tenth amendment to the US Constitution, allocates the residual powers to the constituent units, the two Entities in BiH. In these unique circumstances this has had the effect of formally reinforcing their strong role in the decentralised federation. This for example leaves them in effective control of their own police forces, cultural policy, education policy, social welfare policy and housing policy.

One result of this peculiar structure of government has been that the burden of responsibility for upholding and guaranteeing constitutional practices and for both strengthening the federal government and reining in the more ambitious claims and activities of the Entities has fallen upon the Office of the High Representative (OHR) of the UN and the Constitutional Court set up by the IC. The role of these two bodies should be construed as part of the unending process of construction and reconstruction in this new federal model as it gropes to find its own way towards the goal of a self-sustaining federal democracy.

One step towards this goal has been the character of the institutional architecture of the new state. Article IV established the Parliamentary Assembly (PA) with a bicameral legislature: the House of Representatives and the House of Peoples. The former is the lower house with 42 elected representatives, two-thirds from the 'territory' of the FBH and one-third from the 'territory' of the Serb Republic, while the House of Peoples comprises 15 delegates, two-thirds from the FBH (including five Croats and five Bosniacs) and one-third from the Serb Republic (five Serbs). It is important to note that the House of Representatives is assembled according to Entity proportionality while the House of Peoples incorporates an ethnic federalism based upon ethnic parity from the two Entity parliaments. The formal powers of the PA include enacting legislation, deciding upon the sources and amounts of revenues for the operations of the institutions of BiH, approving a budget for these institutions and deciding whether or not to consent to the ratification of treaties.

The Constitution also guarantees the representation of all three major ethno-national groups directly in the tripartite Presidency, with each of its three members directly elected from the FBH and the Serb Republic and indirectly in the Council of Ministers. In addition to the question of representation in both the PA and the Presidency, the quest to achieve political consensus is reflected in the consociational practice of striving to ensure that decisions are reached by a special majority, namely, that a majority includes at least one-third of the votes of delegates or members from the territory of each Entity. Built into these procedures is the attempt to safeguard what are deemed to be the vital interests of each Entity, preferably by a negotiated approval via a joint commission in the PA (provided

that the dissenting votes in the PA do not include two-thirds or more of the delegates or members elected from either Entity) or at least by two members of the Presidency, unless a decision is declared 'destructive of a vital interest' in one of the constituent assemblies (Constitution, 1995, Art. IV (3) and Art. V (2d)). The overall effect of these arrangements is that the collective Presidency, based upon a rotating chair and ethnic parity, has perpetuated the logic of the veto in terms of 'vital interests'. In practice, then, all decisions have to be taken unanimously.

Two important developments must be mentioned in relation to the character of this multinational federation in the making. First, there is the question of the subnational constitutions of the two Entities. BiH is already characterised by a highly complex institutional system with a total of 13 governments and Constitutions, Parliaments and Constitutional Courts if we include the multilevels of State, Entity and Canton in a country with a population of only four million people. Regarding the subnational constitutions of the two Entities, the Constitutional Court ruled in 2000 that they both violated the Constitution of BiH because they did not formally recognise Bosniacs, Croats and Serbs as constituent peoples of the larger state. Their respective constitutions identified only Bosniacs and Croats in the FBH and only Serbs in the Republika Srpska. In direct response to this, an agreement was reached between the major political parties to introduce the necessary reforms to conform to the Court's judgement but when it failed to secure support in the parliaments of the Entities the decision was formally imposed in 2002 by the intervention of the High Representative so that quotas have been established to guarantee the representation of all three 'constituent peoples' in the parliaments and governments of the Entities. The subterranean world of the internal structure of the Entities has in this way been pulled along on the coat-tails of the larger state in a concerted effort to build up a new federal political culture that both recognises and respects difference and diversity.

The second development concerns the future of the city of Brcko that connects BiH's northern border with Croatia as well as with the western and eastern parts of the Republika Srpska. With regard to the contested status of Brcko, it is important to note that the arbitration process for determining its future culminated in 1999 in the decision to declare it as a special district, comprising the territories of both Entities, with a multinational government under international supervision. It now has a status similar to the District of Columbia (DC) in the United States but with the addition of an international administrator. Since then an aura of uncertainty has surrounded its future, one possible scenario being its elevation to the status of a third Entity in the evolving federal state. Its strategic territorial location had originally become something of a symbol for those Serbs in Republika Srpska who had separatist aspirations but today these existential goals seem to have faded.

Before we proceed to summarise multinational federalism in multinational federation in BiH, it is appropriate to address the socio-economic dimension in this brief case study. BiH was formerly described as a "Yugoslavia in Miniature" because of its demographic composition in the last official census taken in 1991: 44 per cent (Bosniac); 31 per cent (Serbs); and 17 per cent (Croats). When we consider that it has a total population of only 4.4 million people we can immediately understand why one of the main criticisms of the so-called 'Dayton Project' was that it was heavily over-governed and over-bureaucratised. Since both territoriality and ethno-national identity have been the dominant conceptual and organising principles in the state, it should come as no surprise to learn that post-1995 BiH has become much more territorially homogenous, notwithstanding the goal of the IC actively to encourage the return of some 1.2 million refugees and displaced persons which is a natural fallout of the civil war.

Armed with their own constitutions and a formidable array of powers and competences, the two Entities in BiH are politically, administratively and fiscally autonomous. Indeed, as we have seen, they have retained sovereignty even in policy fields that are typically assigned to the federal government in most federations, such as foreign relations, defence and social security. But it is in the realm of fiscal power that the key to their firm anchorage is based. It is their fiscal and financial autonomy that fuels their capacity for independent action. As one commentator has put it:

> The State is fiscally dependent on the Entities and neither possesses fiscal autonomy nor a proper revenue source of its own, except for some administrative fees. Therefore the share of subnational governments in total public expenditure is extremely high by international standards (98.7 per cent), which reflects idiosyncratic fiscal arrangements that attribute all public revenue sources (including customs duties) to subnational levels of government. (Spahn, 2002, p. 20)

Clearly, this is an example of 'bottom-up' federalism that cannot sustain a multinational federation. The capacity of the federal government is perpetually enfeebled if it has no fiscal resources. It has no possibility to grow and expand its countrywide functions as an 'energetic' government must do if it is to succeed in the mission it has been given in the Constitution, namely, a viable, self-sustaining democratic state based upon respect for human rights and the rule of law rooted in a market economy and a pluralist society. These circumstances changed in 2006 when for the first time the federal government acquired its own financial resources with the introduction of value added tax (VAT). Nonetheless, if the main purpose of political elites in BiH is a continuous state-building process to achieve a multinational federation, there must be a much stronger emphasis upon common institutions

that can reflect and represent the overarching unity and welfare of BiH as a whole – as a state in its own right.

Theory and practice

What does the theory and practice of multinational federalism in the new federal model of BiH reveal about its doubts, anxieties and shortcomings? We will apply the same formal and informal institutional problems and failures that we have just utilised for Ethiopia above.

Formal institutional problems and failures

a) The common institutions of the federation are inherently weak and do not have sufficient competences to fulfil the basic requirements of shared rule.
b) There is, as yet, very little basis to develop an independent fiscal federalism.
c) For a country with a small population of four million people there is clearly evidence of an over-institutionalisation and an over-bureaucratisation (some might call it 'over-government') of the state.
d) The institutional design and decision-making procedures of the state have allowed the ethnic groups to abuse their mutual veto rights so that the process of rule making is often brought to a standstill.
e) Elections by proportional representation in the institutions of the Presidency, the two Houses of the Parliamentary Assembly and the Constitutional Court are based in the Entities and are not countrywide, thus further entrenching the 'ethnic territoriality' of the federation.
f) The full implementation of human rights is still to be achieved and it remains the case that substantial minorities and those people who refuse to identify with a particular group of recognised 'constituent peoples' are effectively excluded.
g) The current dependence upon the OHR means that in practice the most important and powerful institution in the state is the only one that is not subject to any form of democratic accountability.

Informal institutional problems and failures

a) The focus on 'ethnicity' and 'territoriality' as the multinational federalism in the multinational federation promotes and reinforces both ethnic separateness and separatism with little incentive to build institutional bridges between the three dominant distinct identities.
b) There is little evidence of a desire or willingness by the political parties to work together to create a genuine multiethnic party system that could be a real integrating force in the polity. It is quite the reverse: recent trends in the party system suggest the radicalisation of what are in reality mono-national parties.

c) The slow rate of return of refugees and internally displaced persons (especially minorities) to their former homelands has been a disappointing process.
d) BiH lacks a federal political culture. The main focus of attention in the polity is not on human rights and citizenship but on ethnic identity.

Summary

BiH was brought into existence in 1995 in what were then unique circumstances by the force of external pressure, with the most powerful unitary actor being the United States. The basis for creating a new federal model occurred in the most unpromising conditions of post-conflict state building and the last 17 years have witnessed the 'managed evolution' of a federal state without a federal political culture. In the extent to which BiH has been first 'forced together' and is now being 'held together', by the so-called 'international community', IC (now including *inter alia* the United States, UN, EU and NATO), it is a new federal model but it is also representative of an important new classification of federations of which Iraq is the latest example in 2005 (Stepan, 1999).

Given its perilous origins and formation, it has remained up until today a very fragile federal experiment with its constituent units stubbornly resistant to the conversion of the 'democratic state' into a multinational federation. The centripetal forces for unity and integration are weaker than the centrifugal interests represented by the existing Entities that see very few incentives to support the state. Consequently, BiH is for the purposes of our survey a remarkable case study of a potential multinational federation without multinational federalism. In short, it exhibits federation without federalism.

Today there is some evidence that this federal model has much better prospects of survival than at any time in the last decade. This can be seen in the official handover in 2005 of responsibility for defence policy from the Entities to the federal government and similarly the albeit reluctant transfer since 2006 of further important competences to the federal government, such as customs issues, police matters, the secret security service, the judiciary, human rights protection and the prosecution of war crimes. It remains the case for the time being that such progress in state building and (multi)national integration can be achieved only through external sanctions, pressures and intervention by the OHR and the Constitutional Court (with three international judges), but this must be construed positively as part of the long-term process of creating a federal political culture where previously none existed.

In addition to the centralising trends noted above, it is important to acknowledge the powerful influence exerted by the prospect of future membership in the EU. Formal membership of the EU is not a panacea for all of the ills of BiH but in its insistence that the new federal model would

be able to join only as the state of BiH, it firmly closed the door on aspirations of secession from some parts of the state and it confirmed, via the Copenhagen criteria (1993), the normative principles of conditionality. The EU – with the OHR now merged with the EU Special Representative (EUSR) – is therefore yet another external centripetal force working for the unity and integration of BiH.

Conclusion: in search of the Holy Grail

The concept of multinational federalism is highly problematic. We know what some of its properties are but it remains unclear and uncertain just how far we can take this concept in order to translate it into practical reality. Logically we would need to fine-tune the concept much better than we have in order to be able to arrive at the point where federalism becomes federation but the intellectual journey is bedevilled by far too many imponderables to be sure of any concrete empirical destination.

This conceptual problematic is the result of trying to define some sociopolitical categories that are themselves inherently problematic. It would appear therefore that we are left with a frustrating proposition: some ideas and concepts can exist only as abstractions so that the very process of translating them into practice inevitably destroys them. Social scientists must beware of assuming that every problem, if examined in sufficient depth and with sufficient earnestness, will yield itself to a practical solution. One danger, then, is that we are looking for the Holy Grail. We are searching for something that simply does not exist. Conceptual analysis can reach high levels of sophistication but it has a utility only to the extent that it can actually be used in the real world of state building. Multinational federalism is just such a case.

This rather gloomy conclusion does not, however, imply that we should give up completely or abandon our attempts to find a relative or partial conceptual validity. There is, after all, no ideal type of multinational federation. Contexts and circumstances vary so widely that it would be foolish or impossible or both to claim that there exists one particular federal model of the multinational state that could serve as a benchmark for others to follow. There will be many conceptual and empirical variations on the basic theme of formally recognising and reconciling several nations in a single state. It is obvious, for example, that Ethiopia and BiH have resorted solely to a territorial federalism rather than to a non-territorial national cultural autonomy model of the sort we can find in both Belgium (Brussels Capital Territory) and the Russian Federation (Jacobs and Swyngedouw, 2003; Bowring, 2002). If utilised in Canada this variation might be more of a supplementary device for the francophone minorities outside Quebec and for the Aboriginal Peoples living in the urban parts of the country but it should not be forgotten that territoriality itself, while remaining the dominant mode of

constitutional and political organisation in the state, is not the only organising mode of state structures.

The implications for multinational federation, then, are not pessimistic. They merely indicate that both scholars and practitioners of the federal idea must lower their normative expectations, but not their energies, in seeking new federal models in the future. Normative claims for justice can be addressed but cannot always be satisfied simply because they are almost always contested by different communities. The question that confronts us therefore is not whether multinational federation is a viable model but rather whether multinational federalism is a viable concept.

Note

1. The following short survey has been put together by reference to a series of conference papers, discussions and references involving the following people: Jens Woelk, Joseph Marko, Florian Bieber, Soeren Keil and Tomislav Marsic.

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2
Three Theories of Liberalism for the Three Theories of Federalism: A Hegelian Turn

Ferran Requejo

Theories of political liberalism

The history of political liberalism has produced a number of competing normative theories. Each of them offers conceptual frameworks which induce one to select specific questions as being the most important and to answer them using specific concepts, values and language, while other questions, concepts and values put forward by rival theories are sidelined or simply ignored. More specifically, liberal political theories of a strictly individualistic nature tend to approach the issue of national and cultural minorities through a notion of homogeneous 'citizenship', while liberal theories which combine the individual perspective with others of a collective nature will be more inclined to introduce different principles of legitimisation and to pluralise the concept and the institutional regulation of citizenship through national and cultural pluralism.

It is advisable to keep in mind this internal pluralism of liberal political theories both when one is dealing with questions of a strictly normative nature and when one is analysing institutional and procedural questions. This theoretical pluralism is largely unavoidable and makes any overall synthesis unlikely. It is related to at least four aspects: (1) with emphasis on different features of individuality – life, freedom, development of abilities, rationality, subjective satisfaction and so on; (2) with contextual situations of a national and cultural nature; (3) with different interests according to characteristics of class, territory or social group; and (4) with the ambiguities and vagueness of the abstract language which give different meanings to the main legitimising values. Thus, these four aspects may highlight, respectively, for example, gender, nationality, social class or the contrast between values, their interpretation and their hierarchisation. 'Reflective equilibrium' is methodologically necessary, but its scope is wider and includes more perspectives than the simple Rawlsian version which contrasts moral

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intuitions and ethical principles. It strikes a balance between different theories depending on the normative or institutional question being dealt with.

Liberal theories can be classified according to different typologies. In relation to the normative ontology of political legitimacy one may take into account the type of agreement that the theories defend is achievable in the public sphere of a pluralist society (pragmatic agreements versus moral agreements). In the case of moral agreements, these may be distinguished according to the role that the theories establish for institutions in relation to the promotion or not of moral values and conceptions regarding the good life (neutralist theories versus perfectionist theories).[1] Broadly speaking, traditional liberal theories have maintained three strategies for legitimising the state: keeping the peace (Hobbes), establishing institutions and 'neutral' practices with regard to the different ways of life of its citizens (Rawls) or encouraging a set of virtues and political and social objectives, either through weaker normative versions (Galston) or through strong normative versions (Raz). These three strategies constitute two basic types of liberal political theories (the second subdivided in three groups), which differ from each other regarding what type of agreement a liberal society requires: theories based on *pragmatic* agreements and theories based on *moral* agreements (neutralist theories, theories of public purposes or weak perfectionist theories and strong perfectionist theories).

Pragmatic theories (Rorty, Gray)

These theories are usually sceptical with regard to the possibility of establishing moral agreements between individuals with different normative conceptions. No normative agreement is possible because there is no objective criterion to establish it 'rationally'. The basic objective of a liberal society is to prevent internal violence (Hobbes), regulate conflicts through institutions and procedures that respect individual freedom and prevent despotic power. Specific pragmatic agreements should be forged by the actors who are involved in each context. In the case of multinational polities, specific agreements will depend on the relative empirical power of these actors. The criticisms that they have received are based on the fact that (1) there is no guarantee that simply appealing to the prudence of the actors will propitiate cooperative positions between them, and (2) pragmatic conceptions propitiate a permanent instability in liberal institutions and practices because the latter depend on the specific power of the actors that reach real agreements in specific contexts.

Neutralist theories (Rawls, Larmore)

They aim to be a minimal moral and procedural form of liberalism which permits the maximum inclusion and compatibility between different ideals of the good life. Based on a strict separation between the spheres of justice

and morality, they oppose any 'perfectionist' attempt to identify 'superior' moral values or specific features of individuals' character that must be promoted by public institutions. Political liberalism is desirable precisely because it does not promote any specific way of life, permitting a plurality of individual conceptions and developments of life projects. The justification for this normative neutrality is based on (1) a sceptical position with regard to the existence of a rational decision between different ways of life, or (2) the acceptance of the fact that pluralism exists in contemporary societies, or (3) a normative priority (e.g. of lexicographical nature) of the value of liberty which prevents the state from imposing or promoting a specific way of life on its citizens. In general terms, there is a rejection of moral coercion by public institutions. This implies the adoption of a more sceptical attitude with regard to interventionist proposals by these institutions, for example, in the educational sphere. Neutralist theories sometimes claim to defend the neutrality of public institutions with regard to different conceptions of good and with regard to the different ways of life that occur in society. However, the latter appears to be truer than the former.[2]

Weak perfectionist theories (W. Galston)

These theories defend the position that all states, including liberal ones, possess a number of values and objectives that it is a priority to promote, as well as several anti-values and objectives to be avoided. In other words, these theories maintain that no institutional organisation is fully universal or normatively 'neutral'. They all, it is said, promote specific ways of life and discourage others. In fact, they state that a liberal state needs to establish the conditions for its own stability and permanence. The 'principles of justice' are not sufficient (whatever they may be). To this effect, these theories maintain that neutralist liberal authors also accept normative rules that go beyond the instrumental and formal criteria they defend. Political liberalism is characterised, on the one hand, by the defence of a series of (normatively non-neutral) public purposes and, on the other hand, by a refusal to defend a fixed set of specific styles and ways of life. Its attractiveness does not lie in the absence of coercion, but in its minimisation with respect to other political regimes. Insisting on 'neutrality' is only advantageous to the detriment of other liberal values. Regarding values, these theories, together with equality and liberty, also defend excellence and virtue as characteristics of political liberalism. Individual freedom, equality and rational dialogue are not sufficient for the stability of a liberal society. Liberalism is not at odds with a weak sense of virtue or public virtues, although it is at odds with a strong or 'perfectionist' version such as that of classical republicanism. In other words, for this type of theory, liberal practices and institutions require a certain kind of citizen endowed with some virtues and a specific character, which require the implementation of a weak form of perfectionism by liberal public institutions. Rather than putting limits on

diversity, it establishes what is considered unacceptable in social pluralism. Its aim, therefore, is to establish a weak form of substantive liberalism (e.g. in the sphere of civic education), but of a purposive nature rather than a formal and procedural form of liberalism.[3]

Strong perfectionist theories (J. Raz)

Linked to the very beginnings of the republican tradition (Aristotle), they defend an explicit connection with objectives and values regarding the good life (autonomy, knowledge, virtue, responsibility, etc.). Liberalism is seen as a partisan political conception which defends specific values and virtues and which establishes duties towards the community itself. It is a theory of being good, rather than well-being. The liberal polity is based on a shared moral vision which promotes certain ways of life that are considered good. It is unrealistic to try to combine an ethics of positive freedoms on an individual scale with a politics of strict negative freedoms. It involves the establishment of a normative and institutional framework in opposition to the centrifugal and corrosive forces of diversity. Here stricter limits are imposed on what degree of diversity is considered acceptable, to the extent that its critics accuse it of no longer being within the liberal paradigm due to the fact that it takes sides on controversial issues. These theories could be ambivalent regarding the separation of the state and churches and the treatment of minorities. Its differences with weak perfectionist theories are more a question of degree in relation to specific spheres (education, religious freedom, political pluralism, etc.).

The majority of moral liberal theories share certain conceptual and axiological foundations. The majority of them maintain a basic approach that is predominantly moral and rationalist with regard to political legitimacy. Most of these theories refer to an intellectual framework of an individualistic, universalist and statist nature mostly inspired by Kant. Moreover, these are theories that accept different types of pluralism whose protection and possibilities of development constitute one of the main legitimising pillars of a liberal society (although they differ in their limits and content). However, only recently has the national pluralism that exists in a number of liberal democracies (multinational democracies) been included in some liberal theories. This is a form of pluralism that includes values, identities and interests which are different from those usually considered in terms of legitimacy in earlier theories. National pluralism, when it is taken into account, tends to break with the usual interpretation of uniformising concepts of liberal polities, such as the 'equality of citizenship' or 'popular sovereignty' maintained by traditional political liberalism. It is a kind of pluralism, moreover, that leads one to approach political relations in ways that pay greater attention to specific contexts. Here 'pluralism becomes more plural and contextual'.[4]

In recent years, a number of analyses have shown the biased and impoverished nature of traditional liberal theories when they are applied to contexts

with strong components of national pluralism. In other words, when they are applied to multinational democracies such as Belgium, Canada, the United Kingdom or Spain. One might enquire into the theoretical roots of that partiality or bias. I believe that at least part of the intellectual difficulties of traditional liberal theories and classic constitutionalism in multinational contexts is related to their philosophical foundations, which in many cases refer to Kantian approaches. In the next section we ask whether a specific 'Hegelian turn' provides a number of philosophical foundations that are more suitable to approach and regulate, in liberal terms, the pluralism present in multinational contexts.[5]

A Hegelian turn (with Darwinian–Humean support): Recognition and moral collectivism

Somewhat paradoxically, it could be said that some central aspects of Kantian philosophy are 'too straight' for the 'crooked timber' which, to quote Kant himself, characterises humanity.[6] Kant maintains the perspective of moral individualism, which we summarise here by means of two assertions: (1) the autonomy of the self as a subject – conceived as 'prior to its ends' – is the liberal value par excellence, and (2) the individual is the last source of any legitimate moral claim. Despite the fertility of Kantian philosophy in the field of political legitimacy in traditional liberal theories, I believe that Kant fails in his attempt to link the notions of moral individualism, state nationalism and cosmopolitanism.[7] This is a particularly important failure in the case of multinational liberal democracies. Despite Isaiah Berlin's double warning,[8] let us see if some elements of Hegel's critique of Kant are better able to frame pluralism in multinational liberal democracies at the twenty-first century. To do so we will take as our starting point the continuity of Hegel's work with respect to the notion of unsocial sociability of Kant's historical writings.

In general terms, Hegel's more interactive and realistic vision opens the door to two important analytical and normative elements in multinational societies: the establishment of a policy for the recognition of national pluralism, such as Taylor and other authors have emphasised in recent years, and the introduction of the notion of moral collectivism (in contrast to moral individualism) that I will develop here. The Hegelian perspective makes it possible to approach individualism and universalism in different ways. However, from the very start the statism inherent in this perspective is a conceptual difficulty to be overcome, above all in the sphere of multinational democracies. Let us look into this.

Recognition and ethnicity

Through his philosophy, Hegel does not attempt to say how things should be, but how they are. He does not deny that the natural roots of conflict are

to be found in the passions and desires of individuals, just as Kant establishes when, following on from Hobbes, he deals with the 'unsocial' component of human beings. However, it is well known that Hegel establishes a series of critiques of Kantian philosophy, introducing a perspective based on 'social interaction' into his philosophy. Regarding unsocial sociability, Hegel transfers the antagonisms to civil society as a typically modern phenomenon.[9] Civil society constitutes the second sphere of Hegelian ethics (together with the family and the state). And it is in civil society where one finds the particularisms that generate contemporary conflicts and where the most socialising and the most disintegrative tendencies reside at the same time.[10]

Despite the fact that, as Berlin also remarks, 'for Hegel, the brute fact is an offence to reason' (Berlin, 2002, p. 81), Hegelian philosophy accentuates its well-known struggle against moralism, displaying a sceptical attitude with respect to Kant's ideas about the cosmopolitan society and perpetual peace. Moral imperatives are not strong enough to put an end to conflict. The horizon of Kantian cosmopolitanism and perpetual peace are, for Hegel, little more than a sermon on morality. He considers that the evolution of reality and its complexities generate interactive mechanisms which facilitate the solution of conflicts. From this one can deduce that the politician's main task is to establish a set of institutions whose job will be to help to prevent and to resolve conflicts.

Thus Hegel introduces a new analytical perspective to the study of modern societies. The basic underlying argument is that the strictly individual perspective of classic liberalism leaves too many normatively important issues out of focus. This is a perspective that Kantism has not been able to escape from completely. In addition to individual dignity and identity, considered in isolation, it is necessary to take into account the relations that are established between individuals in order to be able to adequately understand the notions of dignity and identity themselves.

On the one hand, deontology appears to be an incomplete approach to understand individual dignity. In fact, the consequences produced by actions based on the exercise of rights are never completely cognisable *a priori*. It is also essential to add a consequentialist approach, as individual dignity is a notion that always refers to particular social contexts, that is, to societies with specific historical, linguistic, cultural and national characteristics. To abstract these characteristics from normative analyses by means of deontological concepts based on an abstract form of individualism impoverishes these analyses. Along this path we pass from the sphere of Kantian morality to the sphere of Hegelian ethicity.

On the other hand, the recognition of other individuals is part of one's own identity.[11] Identities are partly shaped by our social relations, which make up our ethical landscape. According to this approach, individual freedom is not a solipsistic atomised notion which is comprehensible through mere self-introspection. From the Hegelian perspective, this freedom, in order for

it to be genuine, does not coincide with negative freedom –which focuses on individuals' choices while putting aside the arbitrary circumstances and the coercions exercised by other individuals as a framework for those choices. In contrast to the propositions of early liberalism, the individual, as the communitarians would say much later, is not prior to its ends. Rather, it is social interaction based on satisfying our desires which makes equitable freedom possible. And this involves recognition as the goal of this interaction. There is a human need for others to recognise our status as independent entities with our own characteristics. We seek a kind of recognition that satisfies our desire to be admitted in a certain way into the polity. This is a process that will not necessarily be a peaceful one as it is based on confrontation between different subjectivities.

In Hegelian terms of *Phenomenology* (1807), we are faced with a process that is a new stage in the progress of the consciousness of freedom, of the development of the mind.[12] Self-consciousness does not exist on its own, but transforms through the practical contrast with other self-consciousnesses. The mind is the collective subject, the knowledge that 'gradually appears' and its phenomena are intersubjectivity – an 'I' that is a 'we' – although consciousness does not realise this at times. Demand for recognition is thus always mutual and reciprocal. One's self-consciousness is threatened if it is not recognised by others on its own terms. The historical is intrinsic to *Phenomenology* because it uncovers the dialectic structure of the mind and allows one to understand history in conceptual terms. Therefore, the initial relation of mutual recognition is conflictive. Violent human relations are not anecdotal; rather, they characterise the immediacy of social relations through the demand for recognition. This is the Hobbesian element of Hegel's conception. The first movement produces the master–slave relationship through action. An action that is based on the desire for recognition by others which ends in unegalitarian situations (tragic idea of the fight to the death). Consciousnesses oppose each other in a fight to the death which ends when one of the adversaries prefers liberty to death and recognises the other without being recognised by him. The slave will later free himself through work, which only he carries out in contact with nature, not the master. In fact, the action is unique, indivisible and belongs to the two self-consciousnesses. However, for the process to be satisfactory for both parties, the action and the universal language that accompanies it must also be mutual.

Thus, negativity and confrontation belong both to the theoretical and to the practical spheres. For Hegel, this is the truly 'dialectic' moment, the moment when there is epistemological scepticism and a practical social split.[13] However, the process does not end here, in a state of negativity, split and war, but continues through struggle and must reach positiveness, reconciliation and peace. Reconciliation represents a new unity of the self-consciousnesses. These are the three moments of Hegelian 'dialectics':

simplicity or abstraction; split or negativity; and reconciliation or specific accommodation of differences. This is a fundamental element of the progress of consciousness and freedom in history.

Therefore, fundamental human actions occur not in one's relations with nature (work), but in the intersubjective co-acts of recognition through language. Hegel insists that individual autonomy shapes subjectivity, but it is the struggle for recognition which frames intersubjective relations, political relations. These are relations which will often involve domination, and have both an individual dimension and a collective dimension. Intersubjectivity or shared subjectivity is nourished by the recognition of others' freedom. The Mind (or Spirit) is, at the same time, an epistemological subject and a historical subject on the road to the conquest of freedom. At the end of the process, the 'we' must be the collectivity of free human beings. From this perspective, history is the analysis that the mind makes of its own stages. The perspective is now social, historical and internally conflictive.[14]

Therefore, it is possible to understand some of the central concepts of liberal-democratic legitimacy in different ways, depending on whether we adopt a Kantian or a Hegelian perspective. For example, the former establishes the notion of 'citizenship' as an abstraction, faced with which subjects are subsequently divided by their ethnic, linguistic or national differences. The Kantian perspective would tend to maintain this contrast, asserting the greater legitimacy of the notion of 'citizenship' over the private differences displayed by individual identities, because that notion preaches a notion of equality 'above' these differences. Along this path, when contrasted with reality, the notion of citizenship 'rebounds', in a manner of speaking, from the differences and returns to itself again. In an extreme case, a Jacobin model of rule of law and democracy will be defended. From a Hegelian perspective, in contrast, what will be asserted when faced with this contrast is a third moment, a revised notion of citizenship that is able to accommodate those differences so that the practical freedom achieved situates the 'we' at a higher level of liberal-democratic legitimacy. Reciprocal understanding is guaranteed only by instituted recognition. Hegel insists the freedom of individuals will be present in practical terms only through institutions implemented with the objective of assuring reciprocal recognition. The foundations of this stage are in the fact that notions of freedom and equality no longer 'ignore' the practical divisions that individuals display, but that freedom and equality are also understood in terms of these divisions, while at the same time attempting to re-accommodate them in the political organisation of the collectivity. There is no 'necessary' final design for this process, because the process itself will change the successive stages that result, but the logic of historical development is understood in terms of the progress of liberty, of a kind of individualism that is self-conceived in intersubjective political terms.

Thus, recognition is one key dimension of the value of political liberty which, following on from Hegel, will have a direct influence on the sphere

of legitimacy in multinational democracies. Recognition is fundamentally an epistemological, ethical and political act which has psychological effects, but it is not a psychological act. It represents the socio-economic and cultural–national dimensions of the concept of individual and collective dignity which refers to political and institutional patterns. We individuals are both independent from and dependent on the collectivities to which we belong, whether these collectivities are of a voluntary (family, profession) or involuntary (language, history) nature. We could say that if individual autonomy only occurs and develops in the interior of a specific collectivity (defined by its history, its language, etc.), the search for recognition will occur both between individuals and between collectivities. And we know that the legitimising 'universalist language' used by traditional liberal approaches has been used as an alibi for maintaining hegemonic national and cultural particularities in specific multinational and multicultural democracies.

It is true that there is not total congruence between individual and society, nor between individual and citizen. These are two strong points of political liberalism. However, when we link the first two concepts from the perspective of their interdependence and not as separate elements, collectivities come to be considered as subjects of recognition although this is only done in terms of their capacity as instrumental and historical structures for individual recognition.[15] But it is also possible to see this recognition of a collective nature in terms of the expression of different ethicities which deserve, in principle, to be respected and recognised in political terms by constitutional norms.[16] In the end, this process, according to Hegel, requires a mutual pardon between the two opposing subjectivities, but that is only possible when more egalitarian premises exist between them. Continuing Hegel's perspective, this is the logic that makes human history move down what we might call a 'long and winding road' towards greater stages of liberty.

This is an approach which is clearly of interest in liberal-democratic contexts where individuals with different national identities coexist. The political collectivity, the 'we', is therefore understood as a community of free and independent individuals that recognise each other reciprocally.[17] Liberty ceases to be an individual question and becomes also an interactive one which in many cases operates in unegalitarian relations of power and dependence. Most of our (professional, civil, political, etc.) identities depend on others. Individual autonomy operates in networks of struggles for recognition between individuals. A kind of recognition that allows us to move from individual morality to a form of collective ethicity that is always in progress.

From recognition to moral collectivism

No one has established with greater clarity than Hegel human beings' need for recognition. In multinational contexts, the politics of recognition

inherent in Hegelian ethicity includes the need to introduce the perspective of moral collectivism alongside the perspective of moral individualism. However, it is not necessary to adopt a 'communitarian' position in defence of this ethicity. It is possible to do so from liberal approaches that accept, in addition to strictly individual normative premises and the redistributive perspective of socio-economic justice, the collective premises of individuality and the perspective of recognition of national and cultural justice. In other words, the characteristics that frame relations between subjects which never exist as 'atoms', but as knots in national, social and cultural nets in specific contexts.

In parallel with the two characteristics of moral individualism mentioned above (the individual as sole source of legitimate moral claims and autonomy), from the perspective of moral collectivism (1) national collectivities are now regarded as legitimate sources of rights and moral claims (based on the normative link of their members with specific values, institutions and collective projects); and (2) the emphasis is on the fact that there is no need for the moral autonomy of individuals to be a liberal value *par excellence*; their place can be occupied by other values, such as collective liberty, tolerance, mutual respect and so on, always alongside individual autonomy, without there being a permanent hierarchy between them. These two requirements make it more likely to establish a successful political and constitutional accommodation of the state's national pluralism. I believe that this accommodation involves more liberal components to protect against the 'tyranny of the (national) majority' and to ensure the effective self-government of minority national collectives. In other words, it is more a question of 'collective negative freedom' which protects and allows minority nations to develop in an autonomous way than a question of 'democratic' participatory components, of 'collective positive freedom' in a common polity.

The key to a well-established recognition between national majorities and minorities is that recognition be reciprocal but based on equality. This makes it possible, from a perspective situated beyond moral individualism, to tackle the relations between different national groups within the state. And this is possible despite the statist emphasis inherent in Hegelian thought.[18] This is, in a manner of speaking, the establishment of an *a posteriori* social contract, whose legitimacy is no longer purely and simply 'moral', but includes a *modus vivendi* type component based on the mutual recognition of partially disjointed ethicities.

In a multinational democracy, the perspective of a moral collectivism of a national nature is by definition plural. This is the point that distances us from Hegel's monist perspective in relation to the state. Moral collectivism in multinational societies refers to a background of value pluralism which is often recognisable as agonistic. In this way, Berlin (value pluralism) and Taylor (recognition) meet, within a more complex ethicity than that

stipulated by Hegel. To continue to maintain the 'atomised' perspective of moral individualism and the national statist perspective that accompanies traditional liberalism – which neglects values, interests and national identities which do not coincide with those of the state, as well as the historical perspective regarding how the state was formed[19] – means legitimising the relations based on dominance which exist between national groups within empirical democracies. These relationships are usually based on historical or empirical origins characterised by the use of force. In other words, to stick exclusively to the perspective of moral individualism means legitimising the status quo regarding the existing relations that are based on national dominance in the institutions, rules and decision-making processes of traditional liberal democracies.

The conclusion is that the perspectives of moral individualism and moral collectivism are both needed in an ethically and politically advanced multinational liberal democracy. It is clear that (1) there are processes of nation-building led by state nationalism in all democracies; and (2) national minorities have experienced a lack of collective liberty and a set of constitutional inequalities in all liberal-democratic polities. Obviously, insisting on the ethical importance that national collectivities represent for individuals (both in majorities and in minorities) does not mean accepting that these collectivities are of a static, eternal nature lacking internal pluralism. Like almost everything human, these entities are internally dynamic, historical and plural. Over time their values, priorities and internal make-up will change. But they will probably be replaced by other collective forms of ethicity, which will continue to be a legitimate source of moral claims, political recognition and constitutional accommodation. The most important point here is to understand minority nations in a 'political' (not metaphysical) sense, that is, to understand them in institutional terms, with their specific history, language, culture, national symbols and so on, within which different plans of life and moral and political conceptions coexist.

It is true that the obscure language of Hegelian philosophy, in addition to what can be called its 'conservative optimism' regarding the fact that what happens in history represents the development of an 'objective mind', alienates it from modern readers and their scientific and philosophical knowledge. These readers know, for example, the conclusions of present-day Darwinian biological evolution and its contributions to human morality,[20] or of a number of theses associated with linguistics.[21] However, in the sphere of political theory, Hegel establishes a theoretical perspective that, despite its statism and obscure language,[22] represents a turn towards a more interactive and collective perspective that is institutionally important for the relationship between the national majorities and minorities within liberal democracies.

Multinational democracies are an example of pluralism that the majority of traditional liberal theories (and some theories of federalism) did not take

into account until a few years ago. The step from a Kantian paradigm to a Hegelian paradigm represents a change of intellectual perspective which relocates the individualistic, universalist and statist components of traditional liberal conceptions by situating us directly in the perspective of moral collectivism. Kant's individual approach is necessary, but it is convenient to put it within Hegel's theoretical turn in order to include an ethical dimension in the legitimacy of multinational democracies. Both the moral refinement of liberal-democratic theory with regard to the relationship between national groups and an institutional practice that attempts to achieve the recognition and political accommodation of national pluralism in democracies are two challenges for political theory and constitutionalism in the twenty-first century. And all this has repercussions for institutional models, such as federalism.

Multinational democracies and federalism: three types of political liberalism for three types of federal theories

This new approach to individual dignity through the introduction of a politics of recognition that incorporates moral collectivism makes it easier to overcome the epistemological and moral limits associated with the biased individualistic and statist versions of traditional political liberalism. As mentioned above, the latter has tended to marginalise or dilute the ethicity of multinational democracies, either into an individually based morality, reasserted through Kantian approaches, or into a monist ethicity of a statist nature, reasserted through the classic Hegelian approach.[23]

The Hegelian path of recognition and plural moral collectivism that I defend here makes it possible to put into practice a better approach for an institutional implementation of the pluralism of multinational democracies with regard to their two basic objectives: (1) the establishment of an effective political and constitutional recognition of the national pluralism of a state, and (2) the establishment of institutions and procedural rules which ensure an effective political and constitutional accommodation between national majorities and minorities within the same liberal-democratic polity.

It seems that questions regarding institutional issues in multinational contexts require liberal-democratic solutions that are 'open' to evolution over time. In the language of the liberal tradition, this makes it essential to establish (1) the collective rights of minority nations together with individual rights[24] in order to break with the monopoly of state nationalism, as well as with the uniformising concept of 'citizenship' present in the majority of approaches of traditional political liberalism[25]; (2) a division of powers that permits extensive self-government by minority nations in at least five spheres of action: symbolic–linguistic; decision-making powers; institutional; economic–fiscal; and international; and (3) a participation, if necessary according to the institutional solution adopted, within the framework

of a shared state (basically by means of techniques of a consociational, partnership, confederal or asymmetric federal nature) and based on the particular characteristics and the self-government of minority nations. In other words, in order to prevent minority nations from becoming weakened by being regarded as simply one of many territorial units of the state.[26]

In the institutional sphere, what have been the classic solutions revealed by comparative politics of democracies to achieve recognition and political accommodation in nationally diverse democracies? The answer includes (1) devolution processes and federalism, including partnership agreements, federacies, associated states and federations; (2) consociational institutions and rules; and (3) secession. From now on we will focus on federal solutions.[27]

Firstly, from an institutional perspective it is important to establish the motives and objectives on which a federalisation process is based, that is, why federate? Among the most classic responses to this question we find better protection for individual freedom, an increase in democracy associated with the proximity between representatives and those represented, a number of functional reasons related above all with defence or with economic efficiency or a combination of these reasons from the perspective that federal systems make it possible to bring together 'the best of what is large and the best of what is small'. However, the responses regarding these motives and objectives are unlikely to coincide in the case of uninational and multinational polities.

Secondly, it has been emphasised in the last decade that in theories of federalism, there is a clear contrast between those that situate the normative centre of gravity in the parties that obtain the federal agreement and those that situate it in the 'union' that emerges from it. Broadly speaking, this is the contrast between the approaches of J. Althusius and J. Madison, respectively. The first perspective is more closely linked with what we might call the spirit of confederations and consociational federalism. One of the aims of the 'federal agreement' would, in this case, be the preservation of the identities of the subjects of the agreement. On the other hand, American federalist tradition (*Federalist Papers*), associated with the second perspective and with the practical creation of the first contemporary federal state, has interpreted the agreement from a much more unitary–federal than from a confederal perspective. The centre of gravity is located in the governance of a 'nation state' (with new processes of state building and nation building), and in the subsequent supremacy of the central power over the federated units.[28] Here, the Union is more important than the units. It is obvious that different normative and institutional conclusions will be obtained depending on which of these two traditions of federalism is adopted (questions about liberty: individual and collective, positive and negative; about equality: equality of what?, who are the equals?, the equality of national entities? the equality of federated units?, the equality of citizens?, and so on, and how these responses interrelate).[29]

Thirdly, the empirical analyses. On the one hand, comparative political studies show that the two general objectives of multinational democracies – the recognition and political–constitutional accommodation of national pluralism – are attained in an extremely incomplete manner by means of traditional federal formulae (too much in debt to the conceptual and moral limits of traditional liberalism).[30] On the other hand, it is well known that the contrast between multinational and uninational societies has usually not been included in the traditional theories of federalism or in the more extensive typologies of comparative politics regarding federal systems. In fact, until the last two decades, most federal theories accepted the perspective of state nationalism. Moreover, federated units of a national nature often coexist in a multinational federation with others of a regional nature (of the majority nation). This represents a challenge for the institutional process of federalisation at both the potentially asymmetrical level of self-government (through partnership, confederal or federally asymmetrical rules) and the 'shared government' of the federation.[31]

From the philosophical discussion of the previous sections we can infer how the perspective of moral individualism as well as the concept of citizenship associated with individual autonomy based on Kant makes it easier to approach political relations either in 'monist' national terms – with regard to a single state *demos* – or in 'pluralist' terms, but with a hegemony of the *demos* of the federation over the *demoi* that make up the minority nations of the polity (who are sometimes denied recognition as *demoi* and are relegated to being 'regional' entities of a single state unit). Relations between national majorities and minorities are either removed from the normative and institutional political agenda or included in terms of the hierarchical subordination mentioned above.[32] We can therefore establish a simple typology of federal theories according to the national perspective they adopt: (1) federal theories that are monist in national terms, (2) federal theories that are pluralist in national terms with hegemony of the federation, and (3) federal theories that are pluralist in national terms without hegemony of the federation.

This typology can be combined with that of the liberal political theories established in the first two sections: (1) theories based on pragmatic agreements, (2) theories based on moral agreements from the perspective of moral individualism, ((2.1) neutralist theories, (2.2) weak perfectionist theories, (2.3) strong perfectionist theories), and (3) theories based on moral agreements and on the ethicity of empirical societies (moral individualism + recognition and moral collectivism).

The combination of these two groups of theories makes it possible to visualise what kind of federal theories are most suitable for the regulation of pluralism in multinational democracies. In order to do this, we will focus on the possibility of reaching agreements of the three types mentioned above (collective rights of minority nations, level of self-government and, where

appropriate, participation in the shared government of the federation in accordance with the specific characteristics of the minority nations and their self-government).

1) Federal liberal theories that are in favour of reaching pragmatic agreements in the public sphere of democracies. Although from the perspective of moral liberal theories, they are not regarded as sound in terms of their 'foundations', in some cases federal liberal theories based on pragmatic agreements appear to be more open to incorporating regulations, institutions and practices based on the recognition and accommodation of national pluralism than theories of a moral nature based on (Kantian) individualism. This may lead to agreements and innovations of an institutional and procedural nature that perspectives based on moral agreements reject for going against their notions about rights, citizenship or their criteria of political legitimacy in general. Obviously, this will not be the case if the main actors involved in the process adopt a monist national perspective with regard to the federation (1a). Pragmatic agreements once are guaranteed (i) individual rights, (ii) liberal techniques for controlling power (separation of powers, principle of legality, representative democracy, competitive elections, etc.) and (iii) a federal division of territorial powers, specific modulation of the rights of self-governments and so on; these agreements follow from the relative strength of the actors who must establish the federal agreement. When the political actors of minority nations start out from a weaker situation than their opponents, they are unlikely to achieve institutions, rules and processes that will favour them. This makes it difficult to achieve the recognition and a stable political and constitutional accommodation of the state's national pluralism. That will only be possible if all the most important actors adopt the perspective of a kind of federalism without the hegemony of the federation in national terms (1c). This perspective involves understanding the fact that in liberal-democratic polity there is not a single public sphere but as many spheres as there are national *demoi*. Finally, if the actors adopt a national pluralist perspective but with hegemony of the federation (1b), recognition and accommodation agreements will probably be possible, albeit partially. This situation makes it likely that there will be instability and a permanent unresolved conflict in the federation.
2) Federal liberal theories that are in favour of reaching moral agreements in the public sphere of democracies. In general terms, liberal theories of this type have not been inclined to conduct the analysis of federal agreements. This is not the strong point of the analyses, for example, of Rawls, Galston or Raz, whose 'analytical agenda' does not include issues regarding the territorial division of powers (and the case of multinational polities). The focus of these theories is basically the state. Although issues

related with nation-building processes are not addressed, the implicit perspective adopted is usually that of monist state nationalism. This makes it difficult for them to adequately regulate the pluralism of multinational democracies in federal terms, as the recognition of national pluralism is absent from this federal–liberal intersection (2a). However, if the perspective of a federalism without national hegemony of the federation and of a set of territorial public spheres to be regulated autonomously were adopted, things would be different. The neutralist perspective could permit different kinds of agreement in each of the spheres – taking into account, for example, a variety of conditions in the different 'original positions' depending on whether or not there was congruence between the latter and the national characteristics of the federation. The recognition and federal institutionalisation of the political accommodation of national pluralism would, in this case, be possible (2.1c). Something similar would occur with perfectionist theories, but only if the issue of minority national identities were included as one of the objectives of public institutions (2.2c, 2.3c). This approach would be closer to an explicit liberal-communitarian model (in fact, all states carry out policies of nation building of a communitarian nature in national terms). The intermediate situation – adopt the federal perspective with national hegemony of the federation – would probably result in a partial (regional) recognition of pluralism (2b). It is, however, worth noting that according to comparative studies, the highest levels of self-government of federal entities do not correlate with the uninational or multinational character of federations. There are as many uninational federations (the United States, Switzerland) as multinational ones (Belgium, Canada) with relatively high levels of self-government. In fact, the empirical correlation occurs more between multinationality and a greater degree of asymmetry and, surprisingly, between multinationality and a certain 'federal deficit' of an institutional nature (Requejo, 2010a).

3) Federal liberal theories that are in favour of reaching moral agreements that include pluralist ethicity in the public sphere of democracies. In this case, the intersection of liberal theories with the federal perspective which is monist in national terms does not exist by definition (3a). In this case, only the ethicity of the state would be included, as Hegel's conception does. If the more pluralist federal perspective were adopted, the ethicities of minorities would be established in terms of both their aspects of recognition and their aspects of institutional accommodation (3c). Here the adoption of partnership and confederal institutional formulae is congruent with the normative foundations adopted in terms of the legitimacy of liberal-democratic polity. In this case, the secession clauses will probably be less dramatic than in the case of federations. The adoption of a federal perspective with national hegemony of the federation may lead to the adoption of asymmetric federations (3b). In this case, both the

recognition and the institutional accommodation of the national pluralism of the state are likely to occur, but only partially. Only a regulation of the secession of minority nations through clear rules (majorities in referendums, time between consultations, possible economic compensations, etc.), a high level of self-government, including symbols and international politics, as well as similarly asymmetric participation in the 'shared government' of the polity (rights of veto; opting in, opting out policies; etc.) would be likely to ensure the stability of the polity in national terms.

Liberal democracies, by means of rights and techniques for limiting power, have offered humanity the best way to avoid the 'great evils' which have occurred throughout history (genocide, slavery, torture, deportations, etc.) and the best way for individuals to achieve their life plans. Liberal democracies can always be improved. Their Ithaca consist of the previously mentioned 'long and winding road' to higher levels of liberty. The commitment of liberal-democratic theory is to facilitate that improvement, by warning of the 'shadows' that are present in earlier theories, for example, in the adopted notions of individualism (which makes them blind to national collective identities that are different from those of state nationalism) and rationalism (the belief that it is possible to achieve a consensus based solely on rational criteria). These are two notions that situate Kantian-based liberalism before what could be called the 'mirage of linguistic consensus'. Perhaps most of the flaws of liberal theories that are based exclusively on moral individualism (which sometimes coincide with the so-called 'liberalism 1') are due to their conception of politics. Despite being a key aspect of his work, Rawls, for example, does not appear to take pluralism seriously in the political field. He considers private pluralism (interests and moralities) to be compatible with consensual principles of justice. Although in *Political Liberalism*, Rawls turns towards a more 'Hegelian' style (from a previous 'metaphysical' to a more 'political' approach) there is something missing in his approach.[33] The political arena always demands an adversary over whom to achieve hegemony. Politics, as Hegel (and Schmitt) well knew, cannot be reduced to morality or economics. Thus, I believe that the adoption of a liberal conception that includes the logic of ethicity and moral collectivism (improving liberalism 2) facilitates the analysis of societies in which different national identities confront each other and, perhaps, the possibility of reaching institutional agreements of recognition and political accommodation of minority nations that are more stable than those offered by present-day comparative politics.

Notes

1. Another typological criterion which is also related with the moral ontology of liberal theories is whether they advocate a monist perspective (those theories that

focus on a fundamental value), a pluralist perspective that focuses on a variety of values but which are based on a permanent ranking of these same values (e.g. the lexicographical priority of the principle of equal liberties in the work of J. Rawls) or a pluralist perspective without the possibility of establishing such a ranking (e.g. the agonistic pluralism of values of I. Berlin).

2. A. Wolf summarises it thus: 'In theory, liberal proceduralism, because it is inclusive of different political world views, ought to be less controversial than substantive liberalism, which defends a set of political goals against others. But in reality, liberal proceduralism finds itself under attack from left, right and centre, as if the one thing that people who disagree over substantive ends can all agree upon is that no set of rules can rise above the fray and look down disinterestedly upon those rules' (Wolf, 2009, p. 18).
3. Some of the 'republican' criticisms of political liberalism have focused on the vulnerability of the notion of 'liberty as non-interference' and the 'neutrality' of public institutions. However, regardless of the plausibility of such criticisms of these notions, they are more characteristic of some liberal versions than of liberalism itself. At times they take the form of criticisms that still reflect a 'monist' confidence with regard to rationality and morality: there is only one way to be rational and moral in any given situation, which can be discovered, for example, through 'deliberation'. I believe that this epistemological attitude and morality continue to reflect either an 'ancient' Greek or Roman mentality, from which modern liberalism breaks, or a Kantian moral perspective which normally only prescribes the existence of a correct form of conduct in a given situation. Neither attitude seems to be intellectually equipped to confront the different types of pluralism of present-day societies.
4. Elsewhere I have analysed the fact that it is impossible for any single political tradition (liberal, democratic, republican, nationalist, socialist, etc.) to provide the foundations for the legitimisation of present-day liberal democracies (Requejo, 2005, chap. 1). As a result, the theories are informative with regard to the questions, concepts, values, objectives and identities with which they deal. But at the same time, each one of them unfolds a 'veil of silence' (rather than a 'veil of ignorance') in relation to a significant part of the areas emphasised by other theories. We find ourselves, therefore, faced with partial theories that, on the one hand, highlight and promote specific aspects of political legitimacy, but which, on the other hand, devalue or even conceal other aspects of this legitimacy when these aspects are alien to the 'rules' (Wittgenstein) of their particular narrative. There is a kind of liberal 'two-stroke engine' in this sphere which goes from emphases which are aimed more at 'procedural justice' (neutralist theories) to others closer to liberal values and virtues (perfectionist theories).
5. Contemporary liberal philosophers have usually made few references to Hegelian philosophy. A search through the analytical indexes of the works of Rawls, Galston and Raz reveals that there is simply no reference whatsoever (Raz), or that Hegel is mentioned in very general terms, with no reference to any specific works (Galston) or that there are a number, very few, of references in relation to the Philosophy of Right (PhR) (Rawls). In the latter case, Hegel is only cited twice in the *A Theory of Justice* (TJ), a general citation and another referring to the PhR (private property, sections 182–87); in *Political Liberation* (PL) there are also references to PhR (religious pluralism, section 270) and four fragments related to the theory of contract in Locke/Kant; while in Law of Peoples there is a general reference to Hegel (liberalism of liberty), and others to the rejection of democracy in

the PhR and in Hegelian 'political writings'. Finally, in *Justice as Fairness* there is a reference to the notion of reconciliation, another to the historical role of Christian Reform as a phenomenon that precedes liberal rupture and a final reference to the civil society (sections 182–256), all referring to the PhR.

6. 'Alus so krummen Holze, als woraus des Mensch gemacht ist, kann nichts ganz Gerades gezimmert werden' ['Out of the crooked timber of humanity, no straight thing was ever made'] (*Idea for a Universal History from a Cosmopolitan Point of View*, 1784). Isaiah Berlin cites this classic quotation of Kant's in order to establish his critique of the Platonic and positivist background of Western thought and of the utopian positions sometimes associated with that thought. See Berlin (1998). I have developed this point in Requejo (2011).
7. However, the same Kantian work offers elements with which to rethink the articulation of these concepts when we move away from the individualistic approach of human *unsocial sociability*. See Requejo (2010c).
8. '[T]he Hegelian system had the greatest influence on contemporary thought. It is a vast mythology which, like many other mythologies, has great powers of obscuring whatever it touches. It has poured forth both light and darkness – more darkness perhaps than light, but about that there will be no agreement ... In Hegel we do see history through the eyes of the victors, certainly not through the eyes of the victims' (Berlin, 2002, pp. 74, 90).
9. The term *ungesellige Geselligkeit* is not used by Hegel (the term does not appear in the exhaustive index of Hegel's work published by Suhrkamp), but the concept remains in his philosophy. See the *Encyclopaedia of Philosophical Sciences*, section 95.
10. *Philosophy of Right*, sections 142, 182. See Requejo and Valls (2007).
11. L. Wittgenstein stresses knowledge of one's own experience through the public use of concepts acquired through learnt language or languages. This is a 'transcendental' argument similar to Kant's philosophy of knowledge, but supported now in a linguistic theory of meaning of a contextual nature. It shows how subjects depend on 'communities of subjects'.
12. I follow P. Singer's suggestion to use the word 'mind' rather than 'spirit' as a translation of the German term *Geist*. See Singer (2001). In fact, this is the concept which acts as the 'principle' of a kind of philosophy that would like to be 'scientific', in the sense of a rigorous and well-founded form of knowledge that is not mere 'opinion'. However, it is a principle that one deduces from the most immediate consciousness or the sensitive consciousness (chap. 1 of *Phenomenology*). When the deductive process ends, the work reaches the 'absolute knowledge' or epistemological knowledge (chap. 8) which goes beyond subjective opinions and allows the consciousness to be, at last, fused once again within the logic of the whole epistemological process – Heraclitus inside Parmenides. The end of the process means that we understand all the logic that has been present since the beginning. The soloist (consciousness) joins the choral finale (mind). See the last paragraph of Hegel's 'Introduction'.
13. Regarding the consciousness of servitude, Hegel maintains that '[this consciousness] has been fearful, not of this that particular thing or just at odd moments, but its whole being has been seized with dread ... In that experience it has been quite unmanned, has trembled in every fibre of its being, and everything solid and stable has been shaken to its foundations' (*Phenomenology*, chap. 4, A; Oxford University Press, 1979, translated by A. V. Miller). By means of the concept of *energeia*, Gadamer highlights the Aristotelian influence in Hegel's conception of the connection between movement and thought. See Gadamer (1980).

14. Deep down there is a religious idea of the final reconciliation of humanity here. However, it is not necessary to defend this final vision when we introduce the Hegelian philosophical perspective into political analyses. We can stop at the epistemological and political juxtaposition of this perspective as an open process, which is always unfinished in liberal democracies, putting aside the religious dimension of Hegel's philosophy, which is really unclear (atheist? pantheist? Christian? panentheist?).
15. This is a conclusion which is not accepted by the forms of liberalism whose starting point is an individualistic approach of a more 'atomised' nature. At the end, this is the case of, for example, J. Habermas. Despite the fact that his form of Kantism is perceived, in a manner of speaking, from Hegel's shadow, Habermas' conception is always reluctant to accept the collective dimension of political recognition. He accepts the Hegelian point of view about what the subject becomes, as well as the initial pages of the *Phenomenology* regarding 'unhappy consciousness' (knowledge can only be analysed through knowledge itself), but then reverts to a transcendental approach through the conditions of communication. As a result, Hegelian dialectics are presented as a radicalisation of Kant's 'transcendental' dialectics of the first *Critique*, and not as something different based on a double character: that of the concept (Logic) and that of a consciousness which moves forward until it reaches the pure concept, although its starting point is a kind of sensitivity that is not *a priori* but historically constructed over time. See Habermas (1985, 1997). I have developed the subject of Habermas' 'new return to Kant' through his 'heuristics' (epistemological interest and communicative reason) in Requejo (1991). See also Baynes (2002) and Taylor (1998). For recent bibliography on 'recognition', see 'Introduction' in Seymour (2009).
16. This route is the one that includes, for example, C. Taylor's liberal-communitarian approach, which on this point incorporates the Hegelian framework that is favourable to a recognition of national collectivities. In this way Hegel would help to better approach the notion of individualism. See Taylor (1997, 1998).
17. A. Kojève's classic interpretation of *Phenomenology* focuses on the individualistic approach to Hegelian dialectics. See Kojève (1947). This makes it easier to make Hegel a liberal and a theoretician of the source of political domination, but dilutes the Hegelian idea that self-consciousnesses that confront each other come from that which is universal and communal. This latter aspect, according to Hegel, is where individuals shape themselves.
18. In his 'technical' language, Hegel defines the state as 'the effective reality [*Wirklichkeit*] of the ethical idea'. See the *Philosophy of Right*, section 257. See also Weil (1950).
19. History is not usually regarded as a source of legitimacy in liberal theories based on individualism and contractualism. As a result, traditional liberalism adopts a conservative position of the status quo of existing states regardless of their historical formation (often associated with wars, annexations, deportations, etc., in other words, processes completely alien to liberal criteria of legitimacy). This is one of the most deficient components of traditional liberal statism. States are collectivities and all of them have been, and continue to be, nationalist agencies. We know that moral individualism has run parallel, in traditional liberalism, to the implementation of nation-building processes by national majorities. And we also know that history in many cases is the source of permanent claims by minority nations, such as Scotland, Catalonia, Quebec and so on. One might

observe that this is both a normative and an epistemological shortcoming: in these cases, history does not explain everything, but without history virtually nothing is comprehensible.

20. In contrast to strictly 'rationalist' approaches to morality, these analyses question the idea that human morality is 'socially constructed'. They defend the idea that morality is related to a shared basis resulting from the evolution of life on the planet. According to evolutionary biology, 'moral intuitions', many of which are rooted in emotions, are regarded as products of natural selection, with regard to both their more egotistic components (survival, sexuality) and their more cooperative and empathetic components (reciprocity, compassion, etc.). They could be described as emotional layers selected by evolution which continue to be present in human brains. We know today that we are neither as egotistic nor as rational as some economic theories of rationality suppose. Neither are we as 'rational' as some philosophical approaches of a Kantian nature presuppose. Rather than 'perturbing' objective thought, emotions are often more reliable than reason as a way of evaluating human actions. And basic emotions are clearly pre-human. See De Waal (2005) and Hauser (2006). The general perspective adduced from Darwinist biological evolution links up with Hume's classic – reason as the slave of passions, A. Smith's theory of sentiments, and with some of the intuitive conceptions of romanticism described by C. Taylor as 'the Expressivist turn', when they desubjectivise themselves (Shelley: 'Hidden in the light of thought'; Novalis: 'the heart is the key to the world and life'). See Taylor (1989, chap. 21).
21. In a similar way to what happens with 'universal grammar' adduced by Chomsky (all human languages have a similar level of complexity and all display structural similarities), the majority of evolutionary biologists accept that we come into the world armed with a moral hardware (e.g. a sense of fairness) in which different cultural software later operate (e.g. the modulation of certain spheres and criteria on fairness, although in all cases kin are favoured more than non-kin). Whatever form it may take, today hardly anybody denies the role that emotions play in human morality and the existence of a 'universal moral grammar' with contextual or parametric modulations. Rationality is a much later phenomenon in evolutionary terms. It also has an influence on morality, but its relationship with one's emotional background is not clear, as is its supposed leadership role. Underlying moral principles act, are operative, but normally remain hidden to the majority. This is an intellectual perspective that refers to a basic interindividual and intergroupal universalism, but which at the same time underlines the importance of specific groups in the modulation and interpretation of values and moral concepts, as well as individual identity. All this scores a direct hit on the so-called 'Standard Model' of the social sciences, which presupposes that everything human is always 'socially constructed' or is based on upbringing. See Stamos (2008, chap. 7), Hauser (2006, chaps 1, 5 and 6).
22. E. Weil has listed a number of 'horrors' included in Hegel's philosophy of right, among which he highlights the famous phrase from the Preface: 'Was vernünftig ist, das ist wirklich; und was wirklich ist, das ist vernünftig'. See Weil (1950, chap. 2). However, I believe that this is a sentence that is difficult to translate into other languages, which is the origin of many misunderstandings and unfortunate interpretations. One should 'read' the phrase by translating it within Hegel's systematic 'logic'. I do not develop this question further here. See Valls (1971).

23. In fact, the statist Hegelian approach, when it adopts a monist attitude in national terms, is more congruent with the perspective of state nationalism and the perspective of secession of minority nations than with the perspective of consociationalism, partnership, confederal or federal asymmetrical agreements.
24. Regarding the legitimacy of collective rights and how they differ from group rights from a normative point of view, see Seymour (2008), 'Introduction' and chaps 5 and 11–15, Kymlicka (2001), Kymlicka and Norman (2000), Parekh (2000), Tully (1995), Maiz and Requejo (2005).
25. In line with classic philosophical premises, Kant defended an 'enlightened universalism' based on the idea of a universal human nature. The source of authority is the reason that all humans share, the central political concept is that of citizenship as the aspiration of all humanity. However, Kant tells us that this is a regulative idea, since with regard to human questions one cannot marginalise the weight of history (nevertheless, it is Hegel who takes history seriously, not Kant, who believed it was possible to establish human nature from exclusively philosophical premises). Kant's political argument aspires to universality and cosmopolitanism, but stops at a 'national' universality of specific states and at a 'society of nations'. This is an argument that does not enter into the dimension of Hegelian ethicity. See Requejo (2010c).
26. This last point poses a problem for the politics of recognition in federal states which have a large number of federated entities. See Requejo (2010a). I have developed a federal model called *multinational federalism* which includes the three previously mentioned conditions, in Requejo (2005, chaps 3–4).
27. An approach to secession in multinational countries is Requejo and Sanjaume (2009).
28. See *Federalist Papers*, 10, 37, 51 (Madison); 9, 35 (Hamilton); Althusius, *Politica Methodice Digesta* (1614), VIII. See also 'Introduction' in Karmis and Norman (2005) and Hueglin (2003).
29. The classic juridical formula of Roman law known as *quod omnes tangit* (that which affects everyone should be decided by everyone) establishes, in federal terms, the introduction of a right of veto by the federated collectivities. This is a conception which represents a similar approach to the recently revalued republican theory of collective negative liberty, which Q. Skinner refers to as a 'neo-Roman' conception. See Skinner (1998).
30. Laforest (2005), Watts (2005), Baldi (2003), Watts (1999), Requejo (2010a). See also Watts (2005), Amoretti and Bermeo (2004), Gagnon and Tully (2001).
31. I have established a synthesis of these shortcomings, presented as 'Shadows of the Enlightenment', in Requejo (2010b).
32. It is worth recalling here the words of E. Burke in his famous speech to the voters of Bristol (1774) in which he describes Parliament as 'a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole' (Burke, 1854–56).
33. See Requejo and Gonzalo (2009, final section).

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3
What Theorists of Nationalism Have to Learn from Multinational States

Philip Resnick

> There has never been a perfect government, because men are creatures of passion.
>
> Voltaire, *Idées Républicaines*[1]

Theories of nationalism comes in various shapes and sizes – ethnic and civic; primordialist and modernising; functionally inspired; Marxist-inspired; rational choice-inspired; psychologically based, state-based, culturally-based and so on. Indeed, so vast is the array on offer, it is tempting to throw up one's hands in trying to map them.

Theories of nationalism, by and large, have taken as their model the modern nation state, one which tends to promote a fairly close fit between the concept of nation and the concept of state. This is certainly what the historical paradigm underlying French nationalism has been about – the Declaration of the Rights of Man and the Citizen, Jules Michelet's invocation of 'le peuple',[2] Fustel de Coulanges' 'a community of ideas, interests, affections, memories and hopes'[3]; German nationalism in its way has sought the same amalgam of nation and state, as have English, American, or Russian (Greenfeld, 1992) – and in the non-European sphere, Japanese, Chinese, Mexican, Brazilian or Australian.

The fit between state and nation is not always an easy one. Multinational empires come to mind – the most telling example of the late nineteenth/early twentieth century being the Hapsburg Empire. The Dual Monarchy as it came to be called after 1867 was made up of a multitude of nationalities within a complex state structure presided over by a hereditary monarch. Attempts to theorise from this case proved quite interesting, leading socialist theoreticians like Otto Bauer and Karl Renner to distinguish between state structure and cultural autonomy, and to advance the notion of a community of fate that is shared, but not identically experienced, by different members (Bauer, 1987, p. 62). All this remained rather hypothetical in character, given the extreme fragility of the Austro-Hungarian Empire,

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and its ultimate dissolution after 1918 in the era of ascendant successor nationalisms.

> An old man with one foot in the grave whose life is endangered by any cold in the head keeps his ancient throne by the sheer miracle of still being alive to sit on it. How much longer? This age has no use for us. This age wants to form independent national states. People no longer believe in God. Their new religion is nationalism. Nations don't go to church, they go to independence meetings instead. (Roth, 1974, pp. 155–6)

Reality has its own perverse logic, remaining obtuse to simple formulae. A plethora of cases do not seem to correspond to simple nation state reality. This can be true of older, established states, for example, former imperial powers like Britain and Spain; it is also true of more recently established states like Belgium or Canada. And it is true in a host of non-Western states from Sri Lanka to Indonesia to China to much of post-colonial Africa where the complexities of ethnicity, language, religion, and tribal loyalty undercut any simple, uniform version of national identity.

My primary focus in this article is on Canada, Belgium, Spain and the United Kingdom. There has recently emerged a significant literature dealing with the national identity of peripheral or 'stateless' nations (Keating, 2001; Dieckhoff, 2000; Guibernau, 1999; Taylor, 1993). For the most part, this literature has focused on the situation facing minority or peripheral nationalities within multinational states. I would like to draw certain lessons from the experience both of majority and of minority nationalities for our understanding of the nature of nationalism in such states.

Multiple identities characterise multinational and multilingual states. There is a tug between Scottish–Welsh–English identity and British; among English Canadian–Québécois–aboriginal and Canadian; Wallon–Flemish–Bruxellois and Belgian; Catalan–Basque–Galego and Spanish. There is a tendency on the part of members of minority nationalities to define themselves more as Québécois, Catalans or Scots than as Canadians, Spanish or British.[4] But it is also the case that there are sharp divisions among the members of minority nationalities, for example, hard nationalists and soft ones, supporters of sovereignty and its opponents.[5] Members of majority nationalities, by contrast, define themselves primarily or exclusively in terms of the larger national identity. Members of majority nationalities have thicker allegiances to their larger nation state that they generally dominate, while members of minority nationalities have thinner allegiances to those same nation states. Much of the conflict within multinational states is between these thicker and thinner versions of identity, with strong nationalists at opposite ends of the divide seeing the choice as a zero-sum game between the nation state and substate nationalities, and with softer nationalists and others in between more comfortable with the notion of multiple allegiances.

Multinational states spawn diverse, nay contradictory, readings of history. In the words of the Spanish historian Murillo Ferrel, 'Nationalism is a historical concept, but history, in turn, is a national concept.'[6]

For example, in a 2001 survey of history teachers in secondary schools in English Canada and Quebec, there was a striking difference in what each cohort held to be important. Anglophone teachers stressed events like Confederation, the two world wars, or the Charter; Quebec francophone teachers gave lesser weight to such events, and greater weight than their anglophone counterparts to the discovery of Canada, the Conquest, or the post-1960 development of Quebec nationalism (Dominion, 2001). As Guy Rocher notes: 'If there is a Canadian culture common to Anglophones and Francophones, one must recognize that it includes memories of conflicts, struggles and misunderstandings…While history can unite, it can also divide. A society has to learn to live with its memory, to absorb it and to fashion its present and future accordingly' (Meisel, Rocher and Silver, 1999, pp. 367–8.).

Similar observations can be found in the case of Belgium: 'Flemish and Walloon national consciousness are so developed and Belgian consciousness so weak that neither group is prepared to make concessions…A half century after World War II, it seems that the German occupier has left a ticking time-bomb, not only in Yugoslavia and Czechoslovakia, but also in Belgium (Wils, 1996, pp. 305, 332).'

A student of Scottish history notes:

> History rather than natural law or political theology derived from Scripture was the very backbone of political argument in early modern Scotland. Scottish history as ideology was multifacted and highly developed. Scotland's past provided material for the national origin myth; for national independence; for the religious nation's 'chosen people' status; for pride in a caste of aristocratic warriors who preserved freedom intact against foreign invaders and domestic tyrants. (Kidd, 1993, p. 27)

In the case of Spain, regionally centred histories are taught in the various autonomous regions/nationalities, leading the Royal Academy to complain about the absence of a Spanish-centred history.[7] But can there be a common history? Catalonia has memories of autonomous institutions existing prior to 1714 and suppressed for over two centuries thereafter. The Basques hark back to autonomous institutions in the past, and harder Basque nationalists to summoning up an independence that may never have been (see Jon Juaristi, El Bucle Melancolico: 'Of all lost things, the hardest to encounter is a country that never existed'). The rest of Spain has its memories of an imperial Spanish past, of the final loss of empire in 1898, of the Republican moment and Civil War in the 1930s, the legacy of the Franco period, and the democratic restoration and entry into the EU that followed his death.

One of the more telling characteristics of multinational states is that its members cannot agree on a single, shared vision of history. There is no single people, in Jules Michelet's sense of the word. This is why I cannot accept an argument like that of Michael Ignatieff directed at the Québécois, 'We do possess a common history, and like it or not, we better begin sharing a common truth (Ignatieff, 2000, p. 134).' At most, there may be historical events common to the inhabitants of multinational states; what is far less common are the interpretations and lived memories surrounding those events.

Complexities of language and culture are salient features of multinational and multilingual states. For the German Romantic poet Friedrich Hölderlin, 'Language is the most dangerous possession, which is given to man so that creating, destroying, and perishing, he might bear witness to what he has inherited (Hölderlin, 2001, p. 149).' For Martin Heidegger, 'Language is the house of Being. In its home man dwells (Heidegger, 1977, p. 193).' For the French historian, Marc Bloch, 'Our science, unlike mathematics or chemistry, does not dispose of symbols that can be divorced from a national language. Historians speak with words, hence with those of their own country. What happens if one finds himself dealing with realities expressed in a foreign language? One is forced to translate (Bloch, 1974, p. 134). For the Scottish poet, Hugh MacDiarmid, speaking of Gaelic,'– for here's a language rings *Wi' datchie* [secret] sesames, and names for nameless things' (MacDiarmid, 1992, p. 21).

A significant part of the national identity of non-sovereign nationalities like Quebec, Catalonia, Flanders is caught up with a concern for the survival of a language that is seen as threatened by a more powerful one. A passage from an appeal by the Catalonian Cultural Committee in the 1920s brings this home: 'Our language, the expression of our people, which can never be given up ... is the spiritual foundation of our existence' (Catalonian Cultural Committee, 1996, p. 160).

Yet multinational states also teach us that a state can have more than one recognised or official language within its borders and survive. How to best bring this about has exercised some of the best minds and mobilised a great deal of political energy in such states (The Royal Commission on Bilingualism and Biculturalism in Canada; Bill 101 on the Statute of the French Language in Quebec; various language measures in Belgium). Switzerland may have been the most successful country to date in reconciling linguistic and cultural divisions within the same federation; former federations like Yugoslavia or Czechoslovakia, by contrast, proved abject failures, once the forced bonds of political ideology had been sundered. Now that religion has lost its formative power in shaping national identities in much of the Western world, language has often filled the void. This has certainly proven to be the case for minority-type or peripheral nationalities like the Québécois, the Flemish, the Catalans, or the Basques, as well as for aboriginal peoples in Canada.

Hubris and melancholy are also characteristic features of multinational states. Excessive pride is generally characteristic of majority nationalities, for example, in Spain or the United Kingdom in the heyday of their empires. It could also be found, albeit in a more diffuse way, among English-speaking Canadians, basking in the reflected glory of the British Empire. Melancholy is more characteristic of minority nationalities within multinational states, like the Québécois, the Scots, the Welsh, the Basques or the Catalans, who have experienced defeat in the past at the hands of majority nationalities and feel sorrow for the hammer blows of fate that have left them in a subordinate position today.

Ressentiment can be a characteristic of both majority and minority nationalities. One of the best descriptions of nationalist ressentiment is provided by Isaiah Berlin, writing about the voyage of the eighteenth-century German intellectual and proto-nationalist Johann Herder to Nantes and Paris: 'He suffered that mixture of envy, humiliation, admiration, resentment and defiant pride which backward peoples feel towards advanced ones, members of one social class towards those who belong to a higher rank in the hierarchy. Wounded national feeling – this scarcely needs saying – breeds nationalism' (Berlin, 1997, p. 397).

Conflicts over recognition are vital features making multinational states what they are. But ressentiment, defined as 'a chronic feeling of affront of an ongoing or long-term character',[8] is also one of their characteristics. Nor is it restricted to minority nationalities alone – majority nationalities within multinational states are thoroughly capable of experiencing ressentiment towards minority nationalities. How does one keep these antagonistic feelings from spilling over into political conflict that tears the polity apart?

There is a constant tension between federal and confederal/decentralising constraints within multinational states. Both Catalan Socialists and the formerly governing Convergència i Unió (CiU) in Catalonia have pressed for recognition of the plurinational, pluricultural, plurilingual character of Spain, participation by the *Generalitat* in the EU in areas of its responsibility and direct Catalan representation in the European Parliament and UNESCO (El Pais, 2003, p. 30). Competitive emulation exists among minority nationalities, for example, if Belgian regions enjoy a degree of international representation, why not Catalonia or Quebec? (See the controversy at the time of the Summit of the Americas in Quebec City in 2001 over desires by the Parti Québécois government of the province for some form of recognition at a conference limited to nation states and hosted by the Government of Canada.)

On the other side of the divide, members of majority nationalities are unwilling to accept too great a weakening of the powers of the central government. As *Staatsvölker*,[9] they tend to see the central government as their national government, and to identify much more fulsomely with the

nation state of Canada, Great Britain or Spain than is generally true for members of substate nationalities.

Further complexities are posed by immigration, multiculturalism and debates over integration versus assimilation. Such developments tend to dilute the historical lines of cleavage between minority and majority nationalities by introducing new players into the game. Allophones in Quebec, that is, Quebecers of neither French nor English origin, are now twice as numerous as anglophones; non-Spaniards constitute a significant part of the population of Barcelona; non-Belgians have significantly altered the ethnic mix in Brussels and other Belgian cities. The symbolic imagery of the substate nationality becomes more diluted than before, as it is forced to open itself more to outside influences. This can lead to negative reactions – see the Vlaams Belang in Flanders with its strongly anti-immigrant, anti-Moslem refrain; but more typically, it leads to the rejection of ethnic nationalism in favour of a more civic formulation (Resnick, 2000, pp. 282–97).

Challenges are posed by globalisation and transnational integration. At one level, the EU, the North American Free Trade Association, or the World Trade Organization serve to undercut the previous importance of nation state sovereignty. At another, they reinforce the importance of central governments as internationally-recognised actors. Regions too can become more important actors, with some international recognition, e.g. Committee of the Regions in the EU. And minority nationalities can seek forms of domestic and international recognition. This leads to different kinds of accommodation.

In Canada, accommodation has been elevated into a high art. To illustrate the point, we could refer to the Royal Commission on Bilingualism and Biculturalism and the Official Languages Act that followed, to the entrenched principles of multiculturalism, and to the Royal Commission on Aboriginal Peoples. Symbolic accommodation has been coupled with self-limiting forms of nationalism, on the English Canadian, French Canadian/Québécois and aboriginal part. Multiculturalism and *la pluriculturalité* in Quebec further dilute the old lines of cleavage.

Belgium is a study in compromise, always threatening to fall apart. The extreme complexity of Belgium's political institutions translates into three territorial regions, three language communities and intricate federal structures. Immigration poses additional challenges, with the monarchy, along with the EU headquartered in Brussels, functioning as a stabilising element.

Spain's Statute of Autonomy represents a search for equilibrium between the Spanish national dimension and that of peripheral nationalisms. It is very much a work in progress, with both Catalonia and the Basque Country pressing for a change in status that would acknowledge their distinctive national characters and grant them enhanced autonomy as compared to other regions of Spain. Here again membership in the EU and immigration, both from Latin America and more especially from North Africa, pose further challenges to national identity.

In the United Kingdom, devolution of power to Scotland and Wales has brought about a fundamental change in the formerly unitary character of the British state. It has also fostered an ongoing debate about British versus English, Scottish, Welsh identities.[10] To this has been added the ongoing challenge of race relations, multiculturalism and its discontents, for example, the 11 July 2005 subway bombings in London, and Great Britain's love–hate relationship with the EU.

What lessons can one draw from all this for theories of nationalism?

1) There can be no simple overlap between state and nation, whatever the mainstream literature on the nation state may suggest. 'The Spanish reality, from the start of the twentieth century and today as well, allows us to discover that for a majority of its citizens Spain is, at the same time, a nation and a state, but for important minorities it is the second and as a result not the first' (Tusell, 1999, p. 157). 'Today Spain is a state for all Spaniards, a nation-state for a large part of its population, but a state, rather than a nation, for important minorities.'[11] 'Canada is my country (*pays*) and Quebec is my homeland (*patrie*).'[12] 'Multiple identities', 'concentric identities', 'nested identities' are terms that have been coined to address this complex reality – one that traditional theories of nationalism have difficulty accommodating. But accommodate it we must, if we are to avoid Procrustean attempts to impose one all-encompassing version of nationalism on quite dissimilar situations.
2) Federalism or a concomitant devolution of power is a key means of dealing with national diversity within multinational and multilingual states. John A. MacDonald, Canada's first Prime Minister, acknowledged that 'the people of lower Canada [i.e. Quebec] are a minority with a different language, nationality, and religion from the majority (MacDonald, 1968, p. 365)' in justifying a federal, rather than unitary, form of government for the new Dominion. Pi y Margall, a Spanish political figure of the late nineteenth century, spoke about 'unity in variety'[13] as the goal for his country. Stanislaw Ehrich has noted: 'It is necessary to distinguish two basic models of federalism ... the highly developed form of decentralisation on the one hand and federalism as an instrument for resolving conflicts within a multi-nation state, on the other' (Ehrich, 1971, pp. 495–6). Theorists of nationalism need to take seriously the multinational dimensions of federalism in states that are themselves multinational in character. This often involves symbolic recognition – flags, special powers and so on – for minority or substate nationalities.
3) Recognition of linguistic realities in multinational and multilingual states entails protection for minority or substate languages. This takes different forms in different places. In Canada this has led to two quite different language regimes – one at the federal level with official bilingualism, the other within Quebec with official unilingualism. In Belgium, it

has entrenched a rigid territorial principle, with a language boundary running down the middle of the country, and a separate bilingual status for Brussels. In Spain – Spanish is the official language at the nation state level, but Basque, Catalan, and Galego enjoy official status as well at the regional levels.

If one bears in mind what was stated above regarding the centrality of language to people's identities, this too has important implications for the way in which theorists of nationalism go about their business. Linguistically plural societies are, almost by definition, going to generate a more complex version of national identity than linguistically uniform ones.

4) Shared citizenship may well be a substitute for shared nationality. David Miller writes: 'Nationality and citizenship complete each other. Without a common national identity, there is nothing to unite the citizens, no reason to attribute citizenship only to these people…Nothing gives them the common identity that allows them to conceive the common construction of their world' (Miller, 1989, p. 245).

I disagree with Miller, whose argument works well for nation states where nation and state tend to overlap, but not for multinational states where this may not be so. In contrast, I would point to the more subtle distinction that the Dictionary of the Spanish Language makes: 'Depending on its context, citizenship can be used as a synonym for nationality or as one for statehood.'[14] Or to Jean Leca's observation: 'Citizenship refers to the rights that a state confers on individuals living in a territory over which it exercizes control…Nationality refers to belonging to a cultural community with diverse, natural, ethnic, or historical foundations (Leca, 1991, p. 482).' This sounds to me much more like the situation that prevails in multinational states like Belgium, Canada, Spain and the United Kingdom with their multiple national identities.

Accepting such a distinction opens the door to a version of constitutional patriotism that may be especially compelling in such states. One is a Spanish (or Canadian) citizen, but that does not imply the same thing for members of majority and minority nationalities when it comes to their sense of national identity. Canadians, Québécois and aboriginals may have a quite different relationship to the larger whole – what Charles Taylor would call deep diversity (Taylor, 1993, chap. 8). Yet they do partake of a common state structure, carry the same passport and have most of the same rights and obligations as other citizens.

5) This carries lessons for transnational entities like the EU faced with the need to accommodate cultural diversity and deeply rooted nation state realities within a larger multinational framework. Multinational states

remind us of the persistence of pre-existing national sentiments even in long-established nation states, of the unlikelihood that these will be easily effaced. This was worth remembering at a time when the EU was trying to come up with a constitutional document outlining what Europe was all about, culminating in the NO votes in France and the Netherlands on the European Constitution in May–June 2005. As a *Le Monde* article of 1995 had presciently observed, 'The elites have their heads in the global world ... The population keeps theirs in the national territory.'[15] Cosmopolitanism and transnational forms of loyalty can only carry us so far in the world of the twenty-first century (Resnick, 2005, pp. 242–55). This is something multinational states learned long ago, though this does not prevent an overlapping of cultures within such states, as Hugh Kearney has forcefully argued with respect to the British Isles.'[16]

6) Ambiguity is perhaps the most important characteristic of multinational and multilingual states, the one on which I wish to conclude this chapter. Ramsay Cook talks about the Canadian situation as one of living together and living apart at the same time (Cook, 2005, p. 177). Peter Russell writes: 'Canadians can be a sovereign people if they avoid all insistence upon agreement upon fundamentals' (Russell, 1992, p. 193). Jocelyn Létourneau highlights the constitutive and unsurpassable tensions between major linguistic–cultural communities and regions in Canada (Létourneau, 2000, p. 82). Hugues Dumont notes with respect to Belgium: 'No one has any illusion that the introduction of federalism between 1970 and today is not steeped in ambiguity. While for some it is a real project that has a value in itself, for others it is simply a pragmatic and provisional means of pacifying insurmountable intercommunal conflict' (Dumont, 1999, p. 71).

The ethos of multinational and multilingual states rests on the need to live together despite at times seemingly insurmountable differences among their constituent peoples. This is quite a different rationale from the one that drives nationalist sentiment in traditional nation states with a monistic concept of nationality. The multinational rationale rests on overcoming the friend–enemy distinction, the reduction of the political to a single all-encompassing good, on learning the art of living together with civility, if not with excessive intimacy, despite linguistic and cultural differences. It does so without denying the pathos, the struggle, the frustrations, even the occasional violence that can mar living together within a compound state. The act of searching for a common basis for coexistence while acknowledging important differences is the major characteristic of multinational states. Learning how to live with such ambiguity may well be the chief lesson that multinational and multilingual states have to impart to students of nationalism. For the latter too need less certainty and more self-doubt as

they try to chart one of the more elusive political concepts of the modern world.

Notes

1. Voltaire (1961), p. 516.
2. 'La grande France agricole et guerrière de 25 millions d'hommes ... cette vaste et profonde légion de paysans-propriétaires soldats qui constitue le peuple.' (Michelet, 1986, pp. 45–80, 64).
3. Cited by Nicolet (2000) from an exchange between Fustel de Coulanges and the German historian Theodor. Mommsen that took place in 1870 regarding the German annexation of Alsace-Lorraine in the aftermath of the Franco-Prussian War.
4. Cf. Linz, Keating, McRoberts. For example, a 1995 British survey shows that 64 per cent of Scots saw themselves as more Scottish than British, 41 per cent of Welsh as more Welsh than British, but only 25 per cent of English respondents as more English than British. Richard Wright (2003).
5. 'The national consciousness of the Flemish is more polarised; both Flemish and Belgian identities are more contrasted. This is not the case in Wallonia' (de Witte and Verbeeck, 2000, p. 132).
6. Cited in Beramudi, Maiz and Nunez (1994), p. 98.
7. See Real Academia (2000). For a Catalan rebuttal, see Segura (2001).
8. My definition is inspired by a thoughtful article by Meltzer and Musolf (2002), p. 251.
9. Brendan O'Leary refers to a *Staatsvolk* as 'a national or ethnic people who are demographically and electorally dominant' within a multinational state, and sees them as playing a crucial role in keeping such states, particularly when they are federations, together (O'Leary, 2002).
10. Bernard Crick: 'I am a citizen of a country with no agreed colloquial name. Its official name is the most rarely used ... The sense of identity of the English is almost as difficult to specify as the name of the state (Crick, 1991, pp. 90–1).'
11. Juan Linz, cited in Blas Guerrero (1997), p. 171.
12. Jean Chrétien, Prime Minister of Canada, citing the former Liberal Premier of Quebec Jean Lesage, in a televised address on 25 October 1995, five days before the Quebec referendum on sovereignty partnership.
13. Cited in Hennessy (1989) p. 20.
14. *Diccionario de la Lengua Española*, 1992, cited 'Ciudania', in Blas Guerrero (1997), p. 81.
15. *Le Monde*, Dec. 7, 1995, cited by Benoit (1997), p. 104.
16. 'The history of "England" has overlapped repeatedly with that of the other cultures within the British Isles ... During the past millennium, "England", "Ireland", "Scotland", and "Wales" have not lived in mutual isolation. Since the Viking invasions, the cultures of the British Isles have reacted with each other' (Kearney, 1995, pp. 284–5).

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Part II

The European Experiment

4
The European Union, a Plurinational Federation *in Sensu Cosmopolitico*

Hugues Dumont

Classical legal theory has always found it extremely difficult to determine the legal nature of the EU. It is clearly inadequate to call EU a confederation of states, and yet there are even more decisive objections against calling it a federal state. However, in so far as it is a prisoner of this binary classification – the EU is either a confederation of states or a federal state, *tertium non datur* (Leben, 1991; Constantinesco, 2002) – classical theory prefers to call it a confederation, which is in effect the least bad description, but not without adding, as if to excuse the abyss that separates the EU from the former American, Swiss and German confederations, that it is 'very integrated' (Lejeune, 1995, p. 147).

We object to this rather unenlightening approach. We defend here the thesis that the EU is of the species 'plurinational federation' of the genus 'federal phenomena' which includes two other species – federal states and confederations of states, in other words, *tertium datur* – on the condition that we redefine the notion of confederation in a way different from that employed in classical doctrine, and that we construct a generic concept of federation able to encompass the three distinct species that we have just named.

After this exercise in legal conceptualism, which tries to explain the very special fate that the EU reserves for the sovereignty of member states (Part I), we show that this plurinational federation is based on a 'constitutional pact' that requires a special form of 'federal loyalty'. In order to explain the legal, political and ethical requirements that this principle seems to postulate, we will employ what Belgian legal theorist François Ost, among others, calls the 'translation ethic' (Part II) (Ost, 2009).

Finally, we will see that inspirations for the institutional and material law of the EU include, at least to a large degree, a philosophical idea: cosmopolitanism. This partly covers the characteristic features that we group together under the label 'plurinational federation' founded on a 'constitutional pact', but it complements them with other features that are just as essential to understanding the legal nature of our object (Part III). We will then be able

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to describe the EU in the most accurate, rigorous manner: as a plurinational federation *in sensu cosmopolitico*.

Because of space constraints, we will not be able to describe the entire path that has led us to this construction. However, we have to note that our concept of plurinational federation results from a reworking of the concept of 'federation' as the French public law theorist Olivier Beaud framed it (Beaud, 1996, 1999, 2007, 2010), while the legal features that we present under the label of the cosmopolitan idea come from a dialogue that we have been engaging in for many years with the French philosopher Jean-Marc Ferry (Dumont, 2003; Ferry, 2000, 2003, 2005, 2010, pp. 144–57). While we owe a great deal to both of these authors, we take complete responsibility for the double conceptual construction that we are building here, partly with them and partly against them.[1]

The EU is a plurinational federation

The EU benefits from being presented as a new species that is, nonetheless, part of a genus that we are calling here 'federations' or 'federal phenomenon'. Under this generic concept, which we will define precisely, we will identify three species: confederations of states, to which it would be mistaken to reduce the EU; federal states, a category into which the Union also does not fall; and plurinational federations, of which the EU is the prototype.

Confederations of states and federal states: two species of federation

The federal phenomenon, in other words, the most generic concept of federation, which includes these three species, can be defined as follows: it is a sustainable union[2] formed by distinct political communities each of which has legal personhood, and the union itself has legal personhood and an institutional apparatus that can take decisions sometimes with the unanimous approval of and sometimes with the majority of votes of its component communities. All the component communities have at least legislative and executive autonomy. Competences are thus shared and a balance is sought between union and diversity. Citizens of the union have dual legal membership in the union and in their own community.

Within the federal phenomenon defined in this way, confederations of states are special mainly because of their foundation and their answer to the question of who holds formal sovereignty. By sovereignty in the formal sense, we mean the power to have the last word, that is, the ultimate power to decide which competences one will have, in opposition with the concept of material sovereignty, which concerns the content of concrete prerogatives – so-called regalian powers – which are specific to state power. In order to fully understand the justification that will follow our proposal, it should be noted that we are distancing ourselves from the classical definition of confederation that is still found in most manuals of international and constitutional

law. A confederation is usually defined as an association resulting from an international treaty concluded by sovereign independent states with a view to managing certain issues jointly: ordinarily, foreign policy, defence, international trade, maintenance of order, domestic markets and currency. Recognised as such on the international scene, confederated states (in other words, the member states of the confederation) retain, according to this classical presentation, the benefit of their sovereignty within the confederation owing to their right to veto the confederation's decisions and their right to unilateral secession. However, there is reason to reject this definition because the positive law of the former American (1777), Swiss (1815) and German (1815) confederations contradicted it.

Indeed, as Olivier Beaud has shown clearly (Beaud, 2007), contrary to what is traditionally taught, these confederations were much more integrated than international organisations, though they were still not states. For example, the principle of unanimity was far from systematically applied when decisions were adopted by the confederal diet,[3] and such decisions were sometimes immediately applicable (in other words, dispensed of any formality of incorporation into the member states' statutes) and sometimes also directly applicable in the confederated states (in other words, they could be invoked in court by individuals without waiting for transposition procedures). Moreover, the confederated states could not generally secede even though this was not always clearly established. Finally, there were forms of confederal nationality in addition to confederated nationalities.

It thus seems that confederation revised and corrected by Olivier Beaud under the name 'federation'[4] can be defined[5] as a voluntary, sustainable union of states founded on a federating pact unanimously agreed to and amendable, and designed in such a way that neither the union nor its components have formal sovereignty. In effect, the principle of unanimity of confederated states with respect to amending the federating pact prevents the emergence of a constitutive sovereign power, while the confederated states' obligation to apply majority decisions by the confederal assembly,[6] combined with the absence of a right to secede or at least uncertainty affecting the existence of such a right, means that the component states do not have sovereignty either.[7]

In confederations of states, the sensitive question *par excellence* is thus not dealt with and this is indeed what is special about the system: ultimate coercive power is not clearly situated. On this point, Olivier Beaud's analyses are extremely useful for understanding, in contrast, the special features of the EU. He has shown clearly that the typical manner the first great confederations kept the issue of sovereignty in suspense continued into the first decades following the foundation of the federal states that succeeded them. It was only later, for example, in the United States, it was not until the 1803 *Marbury v Madison* decision, that the Supreme Court declared itself competent to judge the constitutionality of federal laws, and not until after the

Civil War that the distinction between federal state and confederation of states became enshrined in doctrine and substantive law.

The two criteria, namely, the foundation of the union and sovereignty, have thus become crucial. As we know, the foundation of the federal state is not contractual as it is in confederations: it is based on a unilateral legal act,[8] in other words, a constitution that can be amended by a supermajority of federated 'states'. Formal sovereignty belongs to the author of the constitution, to the constituent power (*pouvoir constituant originaire*) of the federal state and to the power that can amend the constitution (*pouvoir constituant dérivé*). Federated states (in other words 'the federal units') are unquestionably deprived of sovereignty because they can, except for rare exceptions,[9] suffer amendments to the federal constitution against their will. The ultimate coercive power thus clearly lies in the federal government's hands.

We can, of course, add other more secondary differences. First, the confederation's decision-making body is a diet composed of representatives of states that all have the same number of votes, while federal states are generally based on the American model, which assigns legislative power to a house representing the nation and a senate representing the federated 'states'. The states are on equal footing (or at least benefit from over-representation) only in the second house. Second, confederation's decisions are generally directly applicable, provided they are published in the confederated states, and sometimes have direct effect. In contrast, federal laws are all directly applicable and virtually endowed with direct effect.[10] Third, individuals have dual nationality in confederations: with respect to the confederation and with respect to their 'state'. In contrast, federal law on nationality tends to absorb the federated nationalities: federal states tend to be mononational, which certainly creates problems in sociologically plurinational states such as Canada and Belgium.

Plurinational federations: the third species of federation

We are thus able to get a good conceptual grasp on the originality of the EU. It is useful to describe it as a third species within the federative genus, and thus clearly distinguished from confederations of states and federal states. We are calling this third species 'plurinational federations'. One may wonder what interest there is in conceptualising the determining features of the EU if it is the only one so far that we can justify calling a 'plurinational federation'. In fact, there are two reasons to do this. On the one hand, it is in itself enlightening to specify how the EU is different from both the confederal model and the federal state model, while avoiding, thanks to the construction of a species within a genus, its placement in the fuzzy category of 'between the two'. On the other hand, we know that the species that we call a 'plurinational federation' already provides a model used partly by other regional integration processes around the world, and we can even hope that it will provide more inspiration in the future. Defining the notion

has at least the advantage of promoting comparative work justified by this virtual expansion.

Plurinational federations are different from confederations of states and federal states, first, because of our two cardinal criteria: the foundation of the union and the seat of formal sovereignty. The foundation of a plurinational federation is a treaty that has the scope of a constitutional pact. We will explain this choice of term below. Like the federating pacts of confederations of states, but unlike federal constitutions, the constitutional pact of a plurinational federation cannot be amended without the unanimous assent of the member states. In its negative version, the seat of formal sovereignty is located in the member states because they have not only a right to veto amendments to the constitutional pact (TEU, Article 48), but also a right to secede (TEU, Article 50). In this respect, plurinational federations are different from both confederations, which refuse to situate negative sovereignty on one side or the other, and federal states, which attribute sovereignty to the constituent power of the federal state. In contrast, in matters that they have transferred to the union, the states' positive sovereignty is replaced by co-sovereignty, in other words, pooling of sovereignties. The same goes for confederations of states. However, the extent of the transfers to the Union in matters concerning the material sovereignty of the states and the frequency with which recourse is taken to the majority principle in the representative council of the member states, combined with maintenance of formal sovereignty in the states' hands, means that there is a separation of the formal and material facets of the sovereignty characteristic of and specific to plurinational federations.

The three other criteria used above to distinguish confederations of states from federal states are also relevant to complete the description of plurinational states. First, the decision-making bodies are mainly a representative council of states (we are thinking of the EU's Council of Ministers) and a parliament representing the Union's citizens (obviously, we are thinking of the European Parliament). In this respect, plurinational federations resemble the two-chamber system typical of federal states, with the major difference that in federal states, the unanimity of the federated states is never required in the federal assembly designed to represent them, whereas the representative council of the states in a plurinational federation is sometimes subject to the unanimity principle. Moreover, the principle of separation of powers, which is generally respected in federal states, is not a feature of plurinational federations. The council that represents the states sometimes exercises both legislative and executive functions, a little like the diet of a confederation of states. Second, the decisions of a plurinational federation are all directly applicable and most of them also have direct effect. Here also, plurinational federations resemble federal states except that the direct effect of the laws of federal states has no categorical exception analogous to the distinction between the EU's regulations and directives. Third, unlike federal states,

plurinational federations, as the adjective indicates, leave nationality rights up to the discretion of state members while instituting shared citizenship in parallel with that of the federal states.

In sum, we thus define plurinational federations, as incarnated by the EU, as voluntary, sustainable unions with legal personhood that bring together under a constitutional pact states that maintain jurisdiction over nationality and their negative sovereignty, but have consented to have their positive sovereignty concerning substantial issues transferred to the union through an institutional mechanism designed for shared exercise of such sovereignty in service to the citizens of the union. We call such federations plurinational in order to emphasise that unlike federal states, which are generally mononational (Gjidara, 1991), they are 'communities of nations ... that do not absorb the member nations into a new, larger nation' (Beaud, 1996, p. 49 [our translation]).

Plurinational federations are thus not formally sovereign. Their components do not fit into the 'typical state configuration' of subjection that is found in federal states when their constituent power unilaterally imposes its will on the federated bodies through majority decisions (Beaud, 1996, p. 50). Plurinational federations are based on 'constitutional pacts' negotiated among national entities that jointly hold constitutive power. The pact can be reduced to neither an inter-state treaty nor an ordinary constitution. This thus confirms that plurinational states should not be confused with federal states since they are not properly sovereign, unlike federal states, owing to the plurality of their constituent powers. There can be no state if constitutive sovereignty is divided among different powers. The notion of constitutional pact, which is normally a perfect *contradictio in terminis*, provides a good indication of the non-state nature of plurinational federations. Indeed, such a pact cannot be reconciled with state unity. It therefore cannot be intra-state.

However, we have to immediately add that plurinational federations put up stubborn opposition to the classical categories of public law because they should also not be confused with confederations of states. Unlike such confederations, which leave the crucial question of formal sovereignty unanswered, plurinational federations clearly place the negative components of such sovereignty in the states' hands while pooling positive sovereignties with respect to the competencies that have been transferred to them.

The EU is founded on a constitutional pact that postulates 'translation ethics'

In order to refer to the foundation of the legal order of the EU understood as a plurinational federation, we have just used the concept of 'constitutional pact'. This denomination requires two comments.

A constitutional pact should not be confused with a constitution

First, we should note the inappropriateness of the concept of a European 'constitution'. It is well known that the Court of Justice of the European Communities has borrowed from the terminology of domestic constitutional law in ways that can be described as at least ambiguous,[11] for example, the European Community Treaty would be the 'Community's domestic constitution', its 'basic constitutional charter', the 'constitutional charter of a legally constituted Community'. Above all, we know that the defunct so-called 'Second Treaty of Rome' claimed in a more frankly predatory manner to establish a 'Constitution for Europe', and not a constitutional treaty, a term too often heard when the vehicle – the treaty – is confused with the object conveyed, the so-called Constitution.

We can only repeat what so many others have said about how inappropriate the appellation 'European Constitution' is (Dumont, 2003). Of course, European treaties form a constitution in the broadest material sense,[12] but as former Prime Minister Tony Blair's adviser said, a golf club also has a constitution understood in the material sense. A constitution in the formal sense – the sense that there is good reason to prefer, as we will see below – is usually defined as the legal embodiment of the will of a sovereign people. Since formal sovereignty remains in the hands of states, notably through the decisive principle of unanimity when treaties are amended, it was deeply misleading to speak of a 'Constitution for Europe', and even, further back, of a 'Convention', since the latter was only an advisory committee. It is true that 'the insignificant French term "enceinte" ... bordered on the ridiculous in the English version (body) ... ' and that there was a reasonable desire to remotivate citizens around the political meaning of the European undertaking, but this was not a reason to manipulate the legal vocabulary and run the risk of inciting both sovereigntists and federalists to rebel against the 'nominalist sleight of hand' and 'legal fraud' (Burgorgue-Larsen, 2006, pp. 45, 47, 81 [our translation]).

Yet, this does not mean that there is nothing constitutional in the EU's legal system. That position, which is defended by some constitutional experts, is not tenable either. Such experts reason that there is a clash between specialists of European law and constitutional experts, and protest on behalf of the latter because the onus of explaining how the principal concepts of the field should be understood would rest with the former. It is a little like how among the Greeks there was no logos except in the Greek language (Ost, 2009, p. 113); according to this school, there is nothing constitutional outside of states and constitutions in the formal sense. It is as if EU law were nothing more than an avatar of international law, when in fact we can explain its originality only by showing that it plays a new role between international law and domestic law. We thus have to construct a concept by 'abduction' to refer to the legal foundation of this unprecedented union.

Abduction is a method that is useful when we have to 'go from the known to the unknown'. It focuses on 'functional equivalents'. It 'builds bridges across differences and establishes equivalencies without ever claiming identity' (Ost, 2009, p. 257 [our translation]).

Typically, the notion of 'constitutional pact' can justify using the abductive method. It seems optimal for designating what is in question with a maximum of conceptual rigour: what a constitution is to a state, the constitutional pact is to the EU. It is first and foremost a pact, thus a treaty between states, but this substantive 'pact' can be qualified by the adjective 'constitutional' because it takes on a constitutional quality or manner of being through its material object and through the co-sovereignty that it institutes.

The substantive 'pact' has to be maintained because the primary property of the European treaties is that they are indeed signed between sovereign states. Of course, the sovereignty of the states is intact only from the formal angle, through the power of the last word or 'the competency of the competencies' (*Kompetenz-Kompetenz*) that they keep *de jure*, even though they have lost fractions of their material sovereignty as notable as control over currency, borders, immigration policy and police and court cooperation in criminal matters. Naturally, this formal sovereignty is purely negative. It is reduced to a right to veto flowing from the principle of unanimity when treaties are amended, and the right to unilateral withdrawal, which is no longer challenged since the treaty signed in Rome in 2004 that claimed, paradoxically, to establish a 'Constitution' for Europe.[13] However, it is indeed formal sovereignty that has to be given precedence in law because its exercise by a state wishing to withdraw from the Union would lead it to reinstitute full, formal, material sovereignty. There is not, and never has been, a European constitution because there has never been a formally sovereign constituent power. Formal sovereignty is, by definition, one and indivisible, and has never ceased to belong to each of the member states.

Nonetheless, the adjective 'constitutional' is quite appropriate for the second quality of the pact formed by the *Treaty on European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU), given the purpose and what they found. The purpose of the pact is materially constitutional since, on the one hand, it governs the organisation, functioning and competences of European institutions, and, on the other hand, it institutes citizenship in the Union for all those with the nationality of one of the member states and proclaims the basic rights that beneficiaries of that citizenship can demand to be respected by European institutions and states when they enforce Union law. Indeed, we know that under the terms of Article 6 of the TEU 'the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU' are fully recognised by the Union and have 'the same legal value as the Treaties'.

The pact also deserves to be called 'constitutional' because it replaces the positive sovereignties of the states by co-sovereignty. Indeed, in the many

jurisdictions that they have transferred to the Union, in particular those most sensitive with respect to material sovereignty, they have lost, owing to a very wide range of features, the power to make or impose decisions alone, but they have gained in exchange the co-sovereignty that the pact institutes.

It is true that many authors deduce from these constitutional features that we should be allowed to speak more simply of a European Constitution. For example, Jean-Marc Ferry considers that 'the idea of constitution is more appropriate than those of treaty or constitutional pact' because it better conveys the symbolism of a 'European Social Contract' and because the notions of treaty and pact seem to 'consider states to be their only logical subjects, whereas it is rather peoples as united peoples that are addressed by the Contract. Rather than resorting to neologisms to speak of new realities, philosophy should prefer to use classical terms, such as "state" and "constitution," even though this may mean accepting that they take on new meaning.' The eminent philosopher thus pleads for the denomination 'post-state constitution', which would be 'pertinent from the processual perspective of differentiating between state and constitution' (Ferry, 2010, pp. 156–157 [our translation]).

We cannot agree with this suggestion. In our opinion, this would lead to greater misunderstandings that have proven so fatal to the European treaty that wrongly seized upon the substantive 'constitution', and would overlook what is original about European law. Of course, this 'europeanises' the notions of state constitutionalism, but by doing so it creates an original legal system that merits an original name.[14] The adjective 'post-state' says nothing substantial. The term 'pact' has the advantage of rendering faithfully the procedure by which today's treaties are developed: they are indeed, whether we like it or not, treaties signed between sovereign states. The citizens of Europe as such have not been involved in the negotiations. There was probably some representation of the European Parliament and national parliaments in the 'Convention', but the latter had and will have in the future only the power to make recommendations to the conference of representatives of the governments of the Member States. It is this conference that determines 'by common accord the amendments to be made to the treaties'. The entry into force of the treaties is in no way subject to a proper European referendum: the only decisive point is ratification of the amending treaty by all of the Member States, each in accordance with its own constitutional requirements (TEU, Article 48, §3–4). Thus, the Member States remain the only contracting parties to the founding treaties, and there is no indication of any change in the long or medium term to this predominantly diplomatic procedure. We are thus very far from the philosophical idea of a social contract.

Of course, the subjects of the plurinational federation thus created include not only states but also citizens: under certain conditions, the latter

can claim the rights instituted by the treaties directly, without depending on intervention from their national legislative or executive authorities. It is precisely for this reason that the adjective 'constitutional' is pertinent: the pact formed by the treaties creates an institutional framework that seeks to ensure the representation of these citizens through the European Parliament, and that is legally equipped to address its regulations directly to them, over the shoulders of the states. However, these attributes of European citizens derive only from their national membership in one of the Member States. There is thus no one European people. Indeed, Article 1 of the TEU speaks quite explicitly of the 'peoples of Europe' in the plural. It is true that the provision also describes the treaties as part of a 'process of creating an ever closer union' among those peoples. The peoples are thus not simply superimposed. They are united in a federation that could lead to what we could call, like Jean-Marc Ferry, a 'plurinational people' (Ferry, 2010, p. 150). However, it is precisely because people remain divided into nations and are resolutely attached to their constitutive sovereignty that it is appropriate to speak of a constitutional pact, and not of a constitution, even if it is christened 'post-state'. It is possible that one day these nations will renounce their respective formal sovereignties, and place them in the hands of the Union, which would then have 'the competency of the competencies', in other words, the power to attribute powers to itself despite the opposition of a minority of member states. It would be then, and only then, that it would be appropriate to speak of a European 'constitution' and a European federal 'state'.

In the meantime, the denomination 'constitutional pact' precisely because it seems affected by an internal contradiction – which opposes the contractual dimensions of the pact and the unilateral nature of a constitution – has the advantage of revealing in the most reliable manner possible the dialectic between the source of European authority and its exercise: its source remains international, while its exercise belongs to a constitutional system within the limits of what the source postulates.

Thus, in line with its international source, 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein' (Post-Lisbon TEU, Art. 5, §2). One of the preoccupations of the Treaty of Lisbon is to insist especially heavily on the cardinal importance of the so-called conferred competencies principle. This principle, which governs the 'limits of Union competences'(Post-Lisbon TEU, Art. 5, §1), is formulated in this case in negative terms ('the Union shall act only within the limits of the competences conferred upon it by the Member States' (Post-Lisbon TEU, Art. 5, §2), and this is repeated in many places (TEU, Art. 1; 3, §6; 4, §1; 5, §2; and 7).

All these reminders of the international source of the European authority are in addition to the rules that we have already pointed out concerning the amendment of treaties and the states' right to unilateral withdrawal.

However they take nothing away from the established norms that we can call constitutional and that have governed exercise of the authority since the first major decisions of the Court of Justice and the progress made in the direction of the ideals of rule of law, democracy and human rights. Let us think in particular of the obligation placed upon national judges to set aside application of domestic rules of law that are in contradiction with Union law; the direct applicability of derived law; the direct effect of clear, precise and unconditional norms; European citizenship; the Charter of Fundamental Rights; the ever-expanding jurisdictions subject to majority vote in the Council; and the constantly increasing powers of the European Parliament.

The constitutional pact of a plurinational federation postulates translation ethics

The constitutional pact of a plurinational federation postulates federal loyalty that is slightly different from that traditionally required of communities belonging to a federal state. In the law of the EU, Article 4, §3.1, of the TEU prescribes a 'principle of sincere cooperation' which provides 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. In this formulation, which dates from the Treaty of Lisbon, we can see the source of rules that do not apply only to Member States. Of course, on the basis of this principle, Member States must 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' (TEU, Art. 4, §3.2). The Member States must also 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives' (TEU, Art. 4, §3.3). However, this principle also establishes that the Union must respect the Member States. This means that the Union must act 'within the limits of the competences conferred upon it by the Member States' (TEU, Art. 5, §2; 4, §1). More broadly, the treaty requires that the Union respect the 'national identity' of Member States, an 'identity' described as 'inherent in their fundamental structures, political and constitutional' (TEU, Art. 4, §2).

We are inclined to think that this principle of sincere cooperation would gain much from taking inspiration from what we call 'translation ethics'. Here, we are taking a position in line with the principle of constitutional tolerance dear to Joseph Weiler, but we intend our stance to be more demanding and explicit than his. Weiler employs the notion of 'constitutional tolerance' to describe the spirit that should inhabit the entire European construct (Weiler, 2002). The point is to both establish a shared political space and ensure the survival of cultural, political and legal traditions specific to each state. Constitutional tolerance has to lead to the recognition of the shared identity as well as the special aspects of the parties to

the European undertaking. It invites all players in the legal orders in question, both those of the Union and those of Member States, to stop claiming to look down from the summit of a new pyramid of norms. In other words, the principle of constitutional tolerance asks the various participants in Union law to recognise the relativity of their points of view.

This is also what translation ethics postulate, though in a more demanding manner and with greater rigour, when applied to the delicate issue *par excellence* of determining who has the last word when there is a conflict between the Union's founding treaties and national constitutions. As we know, the relationships between the legal system of the EU and national legal systems have long been generating fiery controversies about the primacy that Union law claims over not only domestic law but also the norms established in national constitutions. The failure of the treaty 'Establishing a Constitution for Europe' and its replacement by the Treaty of Lisbon are proof of this. The defunct Second Treaty of Rome had the honesty to assert explicitly, in Article I-6, the primacy of its provisions and acts adopted by the Union's institutions over the law, thus all the laws, of Member States. This provision, which in fact simply reflected the well-known case law of the Court of Justice of the EU, in particular in the famous *Costa v ENEL*, *Simmenthal* and *Internationale Handelsgesellschaft* decisions, aroused strong emotions in the states most attached to their sovereignty and to the primacy of their national constitutions. Aside from the United Kingdom and the Netherlands, the states that were most upset were those that had just become members of the Union on 1 May 2004, which is easy to understand if we keep in mind that they had rediscovered effective legal sovereignty only ten years earlier, with the fall of the Berlin Wall.

Thus, after the failure of the 'European Constitution', the Treaty of Lisbon renounced the admirable attempt to be transparent to European citizens by eliminating Article I-6. However, the Intergovernmental Conference adopted 'Declaration No. 17 concerning primacy', which reproduced an opinion from the Council's legal service in which we find the magnificent sentence: 'The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice'. Hypocrisy? In any case, it is a compromise between the states attached to this essential component of 'community advantages' (the *acquis communautaire*) and states concerned with avoiding any indication that could lead to the belief that a 'super federal state' has been established.

As Jacques Ziller writes, 'The depressing case of primacy ... appears ... as the strongest symptom of the disappearance of mutual trust in the EU' (Ziller, 2008, p. 104). More deeply, in this case we have to denounce, and this is our focus here, a translation deficit. In order to fully understand this, we have to recognise that the primacy claimed by Union law over national constitutional norms will not be admissible to Member States without translation.

The translation may be slavish or constructive, but it is always necessary. It is, let us note, legally necessary, at least if we adhere to the pluralist theory of law. For this theory, if the primacy of international law over national law is required from the point of view of the former, it is not binding in national law except when recognising of such primacy. Since such recognition is the prerogative of the sovereignty of the national law itself, its conditions can vary from one state to the next. It is precisely in the act of recognition that there is necessarily a translation, in other words, an operation consisting in transferring into a 'target' language, namely, national law, the message emitted in the 'source' language, namely, the claim that European law has primacy.

The thesis that we are defending (Dumont, 2010) consists in saying, first, that this claim is not admissible or embeddable in national constitutional systems without a constructive translation that adjusts its scope in accordance with the properties of the domestic system and, second, that such national translations of the primacy of EU law benefit from being retranslated in turn by European law in an equally constructive manner so as to adjust their scope in accordance with its own special properties. These two movements achieve what we can call a double constructive or relevant translation–incorporation flowing from mutual adjustment, or a translation based on mutual measured hospitality.[15] In other words, we need, on the one hand, a translation into national constitutional statutes of the primacy that Union law postulates for itself so as to make the incorporation of this requirement acceptable to national legal systems, and, on the other hand, a translation of the supremacy that national constitutions claim for themselves, rightly, into the basic law of the Union so as to make maintenance of that supremacy acceptable to the Union.

We can make two positive remarks in this respect. On the one hand, some national constitutional case law, but not all, has managed, after a long struggle, to perform this translation–incorporation. It has adjusted the principle of the primacy of European law by keeping, under certain conditions, the power to confront the claimed primacy of European law with predetermined limits (*réserves de constitutionnalité*) taken from certain constitutional principles that are essential to the national legal system.[16] On the other hand, the Second Treaty of Rome 'Establishing a Constitution for Europe' and the later Treaty of Lisbon have had the merit of engaging in symmetrical translation–incorporation by adjusting the principle of supremacy claimed by national constitutions. Indeed, the Treaty cannot or does not want to renounce its unconditional primacy, a form of primacy that, it should be noted, has original conditions of application that are specific to Union law (Jacqué, 2010, pp. 541–61; Chalmers et al., 2006, 182ff). It does not dare to open a breach into which less sincere states could dive and immediately amend their constitutions or interpret them in a manner so as to escape their European obligations. Thus it does not translate the stores

of constitutionality of national jurisdictions literally or slavishly. Instead, it provides a translation that is acceptable to European law and its primacy by announcing that it will not harm the 'fundamental structures, political and constitutional' of the Member States (TEU, Article 4, §2).

The 'masters of the treaties' are probably thinking about the choices that each state has to be able to make in a fully sovereign manner between monarchy and republic, among parliamentary, semi-parliamentary, directorial and presidential regimes, and among unitary, regional and federal structures. Nonetheless, the French *Conseil constitutionnel* (the Constitutional Court) interprets or translates this provision as if it authorised the Court to control the compliance of European directives with the norms inherent to the constitutional identity of France, such as secularity. In its 20 December 2007 decision on the Treaty of Lisbon, the *Conseil constitutionnel* confirmed, unsurprisingly, that the French Constitution retains its supremacy at the top of the domestic legal order.

Clearly, when there are two legal orders that have to be jointed together but there is no final referee between their respective supreme jurisdictions and their contradictory claims, the unavoidable dialogue postulates translations, which may not necessarily be faithful, but which are adjusted to what each order can incorporate. This translation dialogue does not eliminate tensions or power relations; it only regulates them. Each legal order only partially satisfies the claims of the other so that it retains the means to put pressure on the other. Jean-Paul Jacqué sums it up perfectly. If a national jurisdiction challenges primacy, even in the name of predetermined limits of constitutionality, the state in question suffers, in addition to strong political pressure, proceedings to establish breach of EU law with the accompanying financial implications, while on the national side, an attack on constitutional supremacy by an initiative of the EU or the Court of Justice of the EU could lead to 'a challenge to the primacy' of European law and 'through the same action, to the unity of the internal market' Each is thus encouraged to take the other into account and to 'control any desire to infringe' (Jacqué, 2007, p. 20 [our translation]).

It should, however, be noted that in recent doctrine concerns have been expressed about the perverse effects that these power relations could create to the detriment of European integration (Baquero Cruz, 2008). There is a temptation to condemn the theory of legal pluralism, or at least a radical normative version of the theory, which would encourage constitutional jurisdictions to possibly engage in acts of sovereigntist resistance against the primacy of European law. We, however, think that the pluralist theory of law describes the legal reality appropriately, but that it calls specifically for demanding translation ethics.

The debate over primacy in relations between the law of the Union and the laws of the member states of the Union lends itself wonderfully well to what François Ost and others call 'translation ethics'. What is in question is positive recognition of the otherness of legal systems: each has to agree to

stop seeing itself as the centre of the world, to leave behind the lofty perspective that its autonomy tends to give it, to engage with the Other in accordance with an interlocutory movement so that the respective positions shift, each consenting to changes that it could not predict initially. Translation recognition thus leads to 'the writing of a second text ... carrying ... emergent properties and new meanings that can enrich both the language of origin and the language of translation' (Ost, 2009, pp. 289–99 [our translation]).

If we approach the ideal of reciprocal hospitable translation, each national constitutional legal system accepts EU law by recognising its claim to primacy within the limits that it can tolerate with respect to its in-principle supremacy and, at the same time, the national constitutional laws are accepted by European law, which in turn recognises their supremacy, but within the limits that it can tolerate, given its in-principle primacy. The relations between European law and the national constitutions are thus indeed reciprocal hospitable relations, in which each is the guest of the other, in which each both receives and is received. The virtue of the reciprocal hospitable translation that we are recommending under the aegis of federal loyalty is that it makes European law the 'external same' of domestic law and the latter the 'internal other' of European law.[17]

We might be tempted to protest against these language games with a view to the legal security of those subject to the laws in question. It is true that such security is not absolutely guaranteed because the hypothesis of a disagreement over primacy cannot be entirely eliminated, but we know that absolute legal security is out of reach in the era of complexity, and that it is not desirable either. At least, the ethics of reciprocal hospitable translation should shrink risk to a minimum and reduce it to cases of disagreement as fruitful as the 29 May 1974 *Solange I* decision rendered by the German Constitutional Court (*Solange I*). Note that the Court found that, despite the principle of the primacy of European law, it could control community legislation with respect to the provisions of the fundamental law concerning fundamental rights 'so long as' there was no community catalogue of fundamental rights with scope identical to that of the fundamental law and adopted by an assembly elected through universal direct suffrage. Comments by proponents of a slavish translation of the principle of the primacy of community law were limited to denouncing the violation of that principle and the case law of the Court of Justice (Louis and Ronse, 2005, p. 363).Yet, there is no better example of our thesis of the fruitfulness of a double constructive translation incorporation by mutual adjustment or of a translation based on measured reciprocal hospitality. Indeed, this predetermined limit of constitutionality was accepted by the Court of Justice of the European Communities precisely as a powerful incentive for it to in turn translate the concern for human rights into the community's legal system by integrating them into the category of general principles of law.[18] Moreover, we know that this reorientation of Luxembourgian case law is itself at the origin of Article 6 of the TEU, which

was extended in the Charter of Fundamental Rights of the EU, which the Treaty of Lisbon finally made binding (Jacqué, 2010, pp. 54–80).

Another example of a fruitful translation-based dialogue between the requirement of unity of European law and respect for the diversity of national constitutional traditions can be seen in the *Omega* case, in which Germany was granted great discretion by the Court of Justice of the European Communities to protect a founding value of its constitutional order – human dignity – to the detriment of the principle of freedom to provide services (*Omega*).

We can thus conclude from the above that federal loyalty understood in light of the principle of constitutional tolerance and, more deeply, translation ethics, is indeed the 'cement' of the European constitutional pact. The doubling of the label 'constitutional', which remains 'substantially' associated with the states but which also deserves to be attributed 'adjectivally' to the EU, justifies the fact that the former claim the supremacy of their respective constitutions, as well as the fact that the Union claims the primacy of its prescriptions over the states. Only a 'translation dialogue' can control such tension between such contradictory claims, and it is the only one that infuses hope that this tension can be made fruitful.[19]

The EU is a plurinational federation inspired by the idea of cosmopolitan law

The concepts of plurinational federation and constitutional pact as we have just constructed them are insufficient to grasp the legal–political essence of the EU. The Union has an additional, in fact, more fundamental, source of inspiration in what is called 'cosmopolitan law'. This philosophical concept was, of course, introduced by Kant in his *Project for Perpetual Peace* at the very end of the eighteenth century, when he was reflecting on what he thought would become in the very distant future, but nonetheless in his eyes certainly, a 'universal republic' (*Weltrepublik*). He thought that 'the moral "goal" of the history of the world is the advent of a cosmopolitan order' (Ferry, 2005, p. 123 [our translation]) requiring the structure of a federation of peoples (*Völkerbund*) with a view to this universal republic in the future. This is not to be confused with a world state (*Weltstaat*) in that it is intended to make room for a plurality of national identities and state sovereignties. It is not a question of creating a superior sovereignty, but it is also not a question of a simple peace treaty designed to put an end to a war. The ambition is to 'end all wars forever'. For this, Kant imagined a federation of a specific type (Kant, 1795, p. 128), a world federation resulting from 'a permanent free association…of the different states' (Kant, 1795, p. 189) and on which the *ius gentium* would be founded again. The cosmopolitan law of the federation 'shall be limited to the conditions of universal hospitality' (Kant, 1795, p. 137).

As promising as it may be, the Kantian concept of cosmopolitan law was not, however, more fully defined by its author. It is thus contemporary theorists motivated by the perspective of this sort of world law who attempt to pursue its institutional development. The philosopher Jean-Marc Ferry argues that the idea of a cosmopolitan union as sketched by Kant prefigures the original features of today's EU since the latter is itself only the cutting edge of a cosmopolitan union that will be deployed on a more long-term basis at the global level.

We think that the concept of cosmopolitan law as developed by Jean-Marc Ferry benefits from being accepted by legal experts as an 'idea of trans-positive law'. By this, we mean a representation of the legal order considered desirable on the basis of a specific political philosophy. Like any idea in transpositive law, that of cosmopolitan law constitutes both a range of meaning and possible deployment of an ongoing process, and a source that is already inspiring, deliberately or unconsciously, certain rules in the EU's positive law.

As Ferry says, the idea of a cosmopolitan union consists in

> recognizing individuals *both* with respect to their universal aspects (their freedom as persons, their equality as citizens) and with respect to the specific aspects of the identity that they have thanks to their membership in a nation, as representatives of a specific people with traditions, a history and a culture. The differences related to the plurality of national identities must not be erased in the name of republican integration. In accordance with the structure [of a cosmopolitan union], individuals meet and recognize one another as members of peoples that are distinct from one another. (Ferry, 2005, p. 128 [our translation])

Confronted with the givens of the EU's positive law, the idea of cosmopolitan law framed in this way makes it possible to see the consistency and sense of a few especially significant rules. Without the light it shines, a jurist might miss this consistency and meaning. What we have just said already makes it clear that our concepts of plurinational federation and constitutional pact are integral parts of the idea of cosmopolitan law. These concepts combine recognition of national identities and formal sovereignty of member states with Union co-sovereignty, institution of mechanisms that respect democracy and jurisdictional protection of human rights in transferred competencies.[20] However, this postulates other legal translations that are foreign or less directly related to the notion of plurinational federation. A number of provisions in the treaties in effect can be identified from this perspective. We are thinking in particular about the following norms:

1. The formulation of EU values in Article 2 of the TEU: essentially, what is in question is human dignity, human rights, rule of law and democracy.

2. The conditions for membership in the EU set out in Article 49 of the same treaty, in so far as they refer to precisely these values and neither to a predetermined territory nor to religious or cultural criteria.
3. The partial dissociation of the notions of nationality and citizenship when a foreigner who does not have the nationality of the European state where he or she resides nonetheless has European citizenship if he or she has the nationality of one of the Union's Member States (TFEU, Art. 20).
4. The attributes of European citizenship, in particular, political rights, diplomatic protection and the right to move and reside freely within the territory of Member States – a right that announces the universal hospitality dear to Kant (TFEU, Art. 21ff).
5. Procedural actions available to individuals against Member States, including their own, and against European institutions.
6. Protection of national minorities living in Member States of which they do not have the nationality, and thus dissociation of nation and land.
7. The principle of solidarity, which underlies the so-called European policy of 'economic, social and territorial cohesion' with a view to 'reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions' (TFEU, Art. 174) – Jean-Marc Ferry sees in this a transposition of individuals' recognised social rights to the level of 'the rights of peoples' (Ferry, 2000, p. 131 [our translation]).
8. The EU's competency to provide support with respect to education and culture (TFEU, Art. 165–7), which promote 'reciprocal opening of political cultures and historical memories' (Ferry, 2010, p. 149 [our translation]).

The unity of 'post-national' or, more specifically, 'cosmopolitan' thought that provides the cement binding this series of rules is obvious. The rules contribute just as much as the notion of plurinational federation to making the EU both an original political union and a possible model for other regional integration processes in the world.

Finally, we still have to note that the idea of cosmopolitan law exceeds the temporary translations found in the positive law of the EU today. In this, it is indeed an idea belonging to 'transpositive' law. Thus, under the cosmopolitan interpretation, Union citizenship should prefigure future world citizenship since it is true that, by definition, cosmopolitan law is virtually the 'law that belongs to citizens of the world' (Ferry, 2010, p. 124 [our translation]). The idea of cosmopolitan law thus postulates a 'gradual extension to other states of the acquired rights and freedoms' of European citizens (Cheneval quoted by Ferry, 2010, p. 148 [our translation]). It also postulates a moral requirement that goes at least partly beyond what positive law can offer, namely, a so-called 'reconstructive' ethics that invites every nation to cast a self-critical eye on its own past and recognise its guilt in the violence that it has inflicted on others (Ferry, 2000, p. 145ff).

Conclusion

In conclusion, we would still like to raise two major issues that are closely linked. First, can a plurinational federation founded on a constitutional pact *in sensu cosmopolitico* face up to the challenges of contemporary governance – in particular the challenges related to creating 'a certain capacity for political action' at both the international and domestic levels 'given the functional imperatives of the market' (Habermas, 2006, p. 9 [our translation]) – using only the resources of 'constitutional patriotism'? Second, must such a federation exclude from its possible future a federal revolution that would turn it into a federal state under the banner 'the United States of Europe'? We think that major adjustments need to be made to the normative answers that the idea of cosmopolitan law provides to these two questions.

To the first question, legal cosmopolitanism answers that constitutional patriotism must suffice. We know that, for Habermas and his disciples, this concept designates an essentially rational attachment to the universalist principles of rule of law and democracy as – the qualification is important – they are rooted in the political culture of the political entity in question (Habermas, 1992, pp. 28ff; 2006, p. 36ff). Except in the eyes of the most intransigent liberals (Lacroix, 2006, p. 33ff), this conception does not exclude an emotional dimension, as the term 'patriotism' suggests. Ferry points out that the expression 'clearly denotes something like an affective link urging citizens to transcend their immediate selfish interests in favour of values that belong to principles of constitutional rank ... Constitutional patriotism is related to the feeling of forming a political community with others when those others adhere for the same morally significant reasons to the community's constituting principles' (Ferry, 2005, p. 207 [our translation]).

Nonetheless, this political philosophy of the EU is the exact opposite to the one that considers it indispensable to lead the EU towards a form of 'supernation'. This opposite current finds in the diatribe of the former French Minister of Foreign Affairs Hubert Védrine a particularly clear expression: 'If there are no geographical, historical, cultural or religious limits to Europe, if Europe is only an association of friends of democracy, a sort of subsection of the UN, a spreading vaporous entity, no one will be able to feel towards it a sentiment of citizenship or belonging' (cited in Ferry, 2010, p. 80 [our translation]). It is clear that if we were seeking to create a feeling of belonging to the EU by focusing on such pre-political motivations, we would be contradicting the very aspiration of cosmopolitan post-nationalism. Ferry adds for the benefit of those, like us, who wonder whether constitutional patriotism would be sufficiently effective, that

> the EU has nothing else up its sleeve to inspire unity in a [plurinational] European people ...: despite incantations addressed to the shared spiritual heritage and since there is no substantial political project with

> unchallengeable priority, the plurality of national cultures, historical heritages and collective memories leaves available, in the end, only an appeal to shared fundamental values to cement the Union and provide a framework for its action in procedures consistent with principles: principles of recognition, reciprocity, non-discrimination, cooperation, tolerance, transparency, participation. (Ferry, 2005, p. 206 [our translation])

We willingly endorse this response, but on the condition that European constitutional patriotism allows itself to be infused with what we have called 'translation ethics'. The principles noted by Ferry, in particular that of tolerance dear to J. Weiler, will not be sufficient to make the EU an active political subject. I can tolerate convictions that are different from mine without understanding them.[21] As we said above concerning the legal controversy created by the conflicts that can occur between national constitutions and European treaties, translation ethics has the merit of being more exacting while at the same time fully accepting the plurality of linguistic and national cultures. The point is to recognise the otherness of these cultures in a positive manner. According to an exacting understanding of what translation ethics postulate, every language, culture and national system has to agree to be engaged by the other through an interlocutory action so that respective initial positions shift, each consenting to transformations that it could not have predicted at the beginning (Bailleux, Cartuyvels, Dumont and Ost, 2009). We hold that it is in this spirit that more proactive European cultural and audiovisual policies should contribute to the development of an authentic European public space (Dumont, 1992).

The second question still remains: should a revolutionary transformation of the EU into a 'United States of Europe' in the form of a veritable federal state be absolutely rejected? In other words, could constitutional patriotism gradually metamorphose into a feeling of membership in a supernation? As we have seen, the idea of cosmopolitan law seems to exclude such a mutation owing to its attachment to respect for national sovereignty. Yet, this has not prevented Jurgen Habermas from finally pleading for the creation of a European federal state at risk of contradicting himself because it is not clear how such a state could be formed without the support of a feeling of collective belonging much more emotional than his concept of constitutional patriotism seems to authorise (Lacroix, 2006, p. 30ff). From our point of view, and acknowledging how far this perspective is from medium-term possibilities, we consider that the idea of cosmopolitan law should not exclude it in so far as the hypothetical United States of Europe would have an immediate vocation to enter into a wider plurinational federation. European cosmopolitanism would be called upon only to expand.[22] This is an additional reason to not speak of a 'European constitution' at the present stage. If through extraordinary circumstances the nations that are part of the EU were one day able to renounce their formal sovereignty and join

together into a European federal state, for example, through an authentic European referendum held in all of the Union's states, they would need the term 'constitution' to designate the legal and political foundation of their shared state. In the meantime, they are living today, and for many years to come, in a plurinational federation founded on a constitutional pact *in sensu cosmopolitico*.

Notes

1. We will explain below how we diverge from Jean-Marc Ferry's theses. Concerning Olivier Beaud, let us say here that his work, which is utterly remarkable, seems to us to suffer from an internal contradiction between two positions that he defends at the same time. On the one hand, he constructs his concept of 'federation' in opposition to the state understood as a federal state, as if these two forms of political structure were incompatible (Beaud, 2007, p. 65). On the other hand, he intends to 'develop a general concept of federation' that covers 'all federal forms', but he leaves it up to others to identify the species within the 'federation genus' (Beaud, 2007, p. 92 [our translation]). His problem stems from the fact that failing to distinguish clearly between federal states and unitary states (Lejeune, 2009), he tends to remove the federal state from the category of federal forms on the pretext that it is precisely a 'state', but he cannot take this conceptual paradox to its logical conclusion. Among other things, he avoids saying anything about the legal nature of the EU (however, see some elements in Beaud (2010)) while hoping that his concept of 'federation' will help others meet this challenge. We have decided to try to do so by constructing the generic concept of federation differently and placing federal states within it as a species like confederations of states (which we identify with the concept of federation as Olivier Beaud constructed it based on analysis of the American, Swiss and German confederations) and the plurinational European federation, the concept of which we are building at our own cost. We have also set aside the terminology used by Olivier Beaud, who identifies the notion of federating pact with that of constitutional pact (Beaud, 1999): we reserve the former to refer to the foundation of a confederation and the latter to designate the foundation of a plurinational federation.
2. We are not saying 'voluntary' in order to avoid excluding federal states born of the break-up of an initially unitary state (concerning this, see Watts (2006)). The adjective 'sustainable' does not necessarily mean 'irreversible': its minimal sense is that a member's secession is slowed down by a negotiation procedure.
3. 'Diet' is the name traditionally given to a confederation's deliberative assembly. It is composed of representatives of the confederated states.
4. Note that this is our reading of this author's theory of federation, and that he does not agree with it. In Beaud (2010), pp. 88–9, he recognises, however, that our objection reported in Note 1 is not irrelevant and that if we were to subscribe to it, 'we could claim that [his] theory of federation is simply a modernized theory of the confederation of states (*Staatenbund*)' [our translation]. This is precisely what we are doing here.
5. Here, we are taking the risk of summarising his theory, which is full of nuance.
6. It is composed of representatives of the states, each of which has the same number of votes (Beaud, 2007, p. 354). The most important decisions require qualified majorities, more rarely unanimity.

7. This does not prevent confederated states from portraying themselves as sovereign, but in such cases they are using the term politically (Beaud, 2007, pp. 318–24).
8. Given that an originally contractual pact can metamorphose into a statutory norm.
9. Obviously, we are thinking of certain constitutional norms in Canada that cannot be amended without unanimous assent from the provinces.
10. On the distinction between directly applicable and direct effects, see Foster (2010, pp. 182–4).
11. Note that the appellation 'European Communities' has been replaced by 'European Union' since the Treaty of Lisbon entered into force on 1 December 2009.
12. Any statute of any institution, private or public, can be called a constitution in the broad material sense.
13. See Art. I-60 of this treaty, which has become Art. 50 of the TEU signed in Lisbon, and see Louis (2007, pp. 1293–316).
14. As N. Walker has pointed out, a 'good' translation has to be based on a method and produce a result that can be recognised as appropriate by both experts on national political systems and those involved in the post-national political system of the EU (Walker, 2003, pp. 37–8).
15. With respect to this notion of relevant translation flowing from the work of J. Derrida (Ost, 2009, pp. 263–4), a 'relevant' translation is one that does not limit itself to being suitable or appropriate, but which 'raises' the translated work, in other words, improves it in the manner of the Hegelian *Aufhebung*: it separates itself from it to go beyond it while maintaining it. On the notion of hospitable translation, see Ost (2009, pp. 293–5).
16. On these predetermined limits, see Chalmers et al. (2006, p. 201ff), Dumont (2010).
17. On the dialectic between the 'internal other' and 'external same' in translation ethics, see Ost (2009, p. 277ff).
18. Even though it is true that the Court of Justice had taken a few steps in this direction before *Solange I*.
19. See in the same direction Lenaerts (2009, pp. 623–46).
20. Compare this with Ferry's more Kantian presentation (Ferry, 2010, pp. 123–5, 146).
21. It is true that the 'reconstructive' ethics that Ferry recommends to give rise to a historical memory shared by the nations of Europe goes far beyond the principle of tolerance, but it is centred on the past.
22. We would like to thank philosopher Francis Cheneval for having suggested this reasoning to us at a colloquium to honour Jean-Marc Ferry held by the *Société belge de philosophie* on 29 February 2011.

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5
Reforging the Nation: Britain, Scotland and the Crisis of Unionism

Michael Keating

Union and unionism

Something curious happened in the United Kingdom in the late twentieth century. The people of what was widely regarded as one of the oldest and most consolidated nation states stopped thinking of themselves as a nation. There is a now a small literary industry on the end of Britain and the crisis of union (Nairn, 2000, 2007; Bryant, 2006; Colley, 2003; McLean and McMillan, 2005; Weight; 2002; Colls, 2002). Opinion polls show remarkable indifference to the prospect of the break-up of the state. Perhaps the strongest indication, however, is to be found in the frantic efforts of the UK elite to reinvent the concept of Britishness. There are multiple dimensions to this, across the territories of the United Kingdom and in relation to immigration, multiculturalism and Europe but this chapter focuses on the Anglo-Scottish Union. I do not enter here into the economic, social and political reasons for the decline of Britishness (covered in Keating, 2009a). My concern rather is with the philosophy and ideology of the union, its death and the failure of efforts to reinvent it.

The United Kingdom is notorious as the only state (since the demise of the USSR) without an adjective; the appellations 'Uke' or 'Ukanian' have been coined only in satire or jest. It was formed as a union of nations, themselves at different stages of formation and consciousness and never forged a single, homogeneous identity on the continental or 'Jacobin' model. Some observers, looking at the current crisis of Britishness, have claimed that there never was a common identity, merely an instrumental co-existence. Others claim that what common identity existed was monopolised by Empire, so that when it came to an end there was nothing to hold the metropolitan nations together (Marquand, 1995); Colley (2003) in an influential contribution has claimed that Britain (that is, excluding Ireland) was forged in Protestantism and war with France and that when these ceased to be important Britishness faded. Yet Britishness was more than Empire and its high point was probably in the years following the Second World War,

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when the Empire was already disappearing. In any case, other nations were forged by religion and war with their neighbours but did not disintegrate when these ceased to operate. There was indeed a Britishness but its secret was to be articulated differently in the various parts of the United Kingdom, meaning one thing for the southern English, another for Lowland Scots and a very different thing for Irish Protestants. Rather than something with a strong core meaning and local variations, as is found in other European states, it is more like a Wittgensteinian family resemblance concept, with overlapping meanings and affinities but no central content. This is not just a multinational state but what I have elsewhere (Keating, 2001) called a plurinational one, in which the very meaning of nation varies from one part of the territory to another; Spain and Canada are other examples of the same phenomenon. Strictly speaking, Great Britain consists of England, Scotland and Wales. The United Kingdom includes Northern Ireland as well (and the whole of Ireland before 1922). Unionists in Northern Ireland, however, insist that they are British. The term 'unionism', even in Scotland, has normally referred to the union with (Northern) Ireland and only occasionally to the Anglo-Scottish Union but since 2007 has been embraced by the non-nationalist parties in Scotland to contrast themselves with the Scottish National Party (SNP). It is this latter Scottish/British unionism with which we are chiefly concerned here.

The ideology of union

The efficient secret of this unionism is to present a different conception of the nation adapted to the political traditions of England and Scotland, respectively; in England the tradition is of a unitary nation state, while in Scotland the dominant idea is of a multinational union. English Whig historiography presents constitutional development as a continuous progress from its origins in the English Parliament. One result of this was that constitutional historians saw the United Kingdom as the product only of English constitutional practice, arguing that parliamentary sovereignty was absolute since this had been established in the sixteenth- and seventeenth- century England (Dicey and Rait, 1920; Dicey, 1912). English people, when they thought about the matter at all, could imagine that they were living in a unitary state whose name was either England or Britain, which were essentially synonyms.

After the Union, many Scottish Whigs colluded in this narrative, adopting English constitutional history as their own while stripping it of its more chauvinistic and exceptionalist elements (Kidd, 1993, 2008; Finlay, 1998). Yet unionism was never assimilationist and there was room for a distinct Scottish civil society and a recognition of Scottish nationhood. Sir Walter Scott's novels, appreciated more by intellectuals than they were a generation ago, celebrate pre-Union Scotland, allowing credit to all sides in the

religious wars and Union debates, but carrying an underlying message of progress under the settlement of 1707. The Union, in Scott, is an honourable bargain, preserving Scottish identity while bringing the blessings of a greater Britain and healing the divisions of the past. His subsequently much-mocked extravaganza of 1822, when King George IV was dressed up in Highland gear for a progress through Edinburgh, symbolically united both parts of Scotland and the whole of Great Britain. Other ideologues went even further, appropriating William Wallace and Robert Bruce, the heroes of the mediaeval independence struggle to the unionist cause, the argument being that only their defence of Scottish rights had allowed the nation to enter the Union as an equal partner in 1707 (Morton, 1999).

Unionism as an ideology and a political practice is committed to the unity of Britain and traditionally against any measure of self-government. It emphasises the absolute sovereignty of the Westminster Parliament as the supreme constitutional principle. Yet unlike state-nationalists in other European countries, unionists fully accept national cultural diversity, administrative decentralisation and Scotland's distinct civil institutions. Its subtleties are well captured in Kidd's (2008) and in Ward's (2005) portraits of prominent unionists. This stance has been described by Morton (1999) as 'unionist nationalism', a striking and deliberately paradoxical phase to capture the insistence on Scottish distinctiveness within the Union. It would be more accurate, however, to label it more simply as 'unionism', since British unionism has never been assimilating and is distinct precisely in recognising national diversity.

The whole edifice is crowned by a British patriotism, presented as more enlightened and less aggressive than the nationalisms facing it from within or without. Conservative unionism tends to be traditionalist, based on Burkean notions of respect for the past and the wisdom of ages (although its Irish version presents an altogether harsher aspect). On the Labour side, unionism is linked to a denigration of nationalism as divisive, the need for broader forms of solidarity, an emphasis on class (at least in the past) and a strong centralised state to redistribute resources. From another angle, however, we might see unionism itself as a form of nationalism, asserting the primacy of a British nation, a feature that becomes more obvious when it is faced with challenges from within (from Scottish nationalism) and without (from European integration).

The central doctrine of the Union, the absolute sovereignty of Parliament, allows for considerable variation in practice across the constituent nations, on the argument that none of this can affect the basic principles of authority. It also, by avoiding the concept of popular sovereignty, makes it unnecessary to define the 'people'. Yet the doctrine itself has never been uncontested in Scotland. Dicey and Rait (1920) insisted that the Westminster Parliament inherited all the prerogatives of the English Parliament and can therefore legislate on anything, including the constitution itself. Others have

countered that the Union is a fundamental law and cannot be changed by a parliament that was its creation. Both English and Scottish parliaments were abolished in 1707 and since the Scottish one had never asserted the principle of absolute sovereignty the new one could not have inherited it (McLean and McMillan, 2005; MacCormick, 1999, 2000). Many scholars have emphasised the distinct tradition of popular sovereignty and balanced government in Scotland (Kidd, 1993) and the specific reservations in the Union Treaty itself. It is always difficult in such cases to appeal to the original intent of the constitution makers; in this case it is likely that they were concerned among other things to protect the Church of Scotland from the sort of state regulation to which the Church of England is subject (Kidd, 2008). It is more important to see how doctrines have evolved in practice and are understood over time, as well as the way in which a distinctive constitutional doctrine was kept alive in Scotland even during the era of unionist hegemony.

The idea of limited sovereignty survived long enough for Lord Cooper in the Court of Session to find in 1953 that Parliament was not unlimited, although this celebrated case for long remained no more than a legal curiosity.[1] MacCormick[2] (1999) details the two rival views of the constitution and, while inclining to the view that the Union represented the foundation of the constitution and was thus superior law, admits that this has not been the prevailing doctrine; McLean (2010), although a staunch unionist, largely agrees. Dicey (1961) can certainly be accused of overreach in his doctrine of parliamentary sovereignty, since he even suggested that the 1931 Statute of Westminster, declaring that Parliament would no longer legislate for the Dominions (thus in effect giving them independence) could be superseded by subsequent Westminster legislation, a position that nobody would share today. He also had a tendency to write of England and the English constitution, which might have been the usual insensitivity to the nature of the state, if it were not for the fact that he was well aware of the constitutional issue in Ireland and Scotland. Rather, it seemed to reflect an assumption that only English constitutional practice was relevant to the Union. Political scientists and some lawyers have also argued that the concept of the Union as a partnership of nations should be regarded as one of the conventions on which so much British political practice is based (Tierney, 2004). At its weakest, the argument is that political prudence should inculcate in British politicians a sensitivity to Scottish differences. Even Dicey, in the same sentence in which he likened the Act of Union (Scots would have said Acts or Treaty of Union) to the Dentists Act, conceded that it would be 'political madness to temper gratuitously' with it. Nor was Dicey himself consistent, as he supported Irish unionists in their defiance of Parliament's concession of home rule before the First World War. Challenges to the Union from the 1960s have led to a renewed interest in Scottish constitutional traditions and arguments that they should be included in any account of the British

unwritten constitution (Keating, 2001; MacCormick, 1999, 2000; Tierney, 2004). In the late 1980s the Campaign for a Scottish Assembly (1988) produced a Claim of Right, deliberately based on the Scottish covenant tradition, insisting that sovereignty belonged to the Scottish people. That it gained the assent of the entire Scottish Parliamentary Labour Party, with the single exception of Tam Dalyell, might be read as an endorsement of the claim or, more likely, as an indication that they did not take it seriously.

This ambiguity was the efficient secret of the Union, but also its weak point. As Colls (2002) puts it, unionists never allowed the wires of nationality and statehood to be crossed. Scotland could have as much of its historic and cultural identity as it wanted, together with its own civil society and even administration, but never an elected parliament, since this, resting on the principle of nationality, would inevitably assume sovereignty for itself and challenge the one fundamental principle of Union. This was a staple of Dicey's (1912) argument against Irish Home Rule and was later taken up by Wilson (1970) and Dalyell (1977) in the context of the devolution debates of the 1970s. There may be something to their argument; but it rests upon the hope that these two dimensions of Scottishness (or Irishness before it) can be kept apart indefinitely. This was not to be.

The new ideology of Britishness

This ideology and understanding of the Union has withered in recent years, for a variety of reasons (discussed in Keating, 2009a). The state, like others in Europe, is challenged from above and below by globalisation, European integration and substate nationalisms but, unlike others, UK state elites lack the ideological resources to defend if effectively. The state, as noted, has not been linked to a single nationalist ideology, and successive Conservative and New Labour governments have sought to undermine the legitimacy of the state itself through anti-statist rhetoric and an insistence on the moral superiority of the private sector. Euroscepticism has meant that British elites have not incorporated Europe into a new understanding of the state and nation, as has happened elsewhere, but nor has Euroscepticism itself furnished a national ideology, given that neither of the major parties actually wants to pull out of the EU. Opinion polls show the public in England remarkably relaxed about the prospects of Scottish independence; indeed, opinion on the various constitutional options for Scotland is almost identical within Scotland and England (Keating, 2009a). Perhaps even more tellingly, a recent survey of Conservative parliamentary candidates showed them almost equally divided between those who would defend the Union at all costs (54 per cent) and those who would not be uncomfortable with Scottish independence (Conservative Home, 2009).

In the last few years, however, the British government, supported by various intellectuals, has launched a comprehensive and ambitious plan

to reassert Britishness and the value of the Union. This is aimed at two perceived threats to the nation, the multicultural and the multinational. Multiculturalism is the recognition of cultural diversity among native peoples and ethnic minorities of recent immigration. Multinationalism is the recognition of the diverse nations within the United Kingdom and is of longer standing. The government's response has been to assert an ideology of Britishness that can subsume both while reducing their impact and reintegrating the British nation state.

The ideology is to be a civic one, based on common human values and open to all. Critics have challenged the idea of national ideology based on values such as democracy and fair play that are universal, or on an open, not a closed identity. Yet this is not the main problem. Most modern states have national ideologies that combine adherence to universal values with a recognition of the nation as the place they are realized, as in the American and French revolutions at the end of the eighteenth century or Habermas's (1998) constitutional patriotism, in which adherence to the institutions of the state replaces blood and belonging; Colley (1999) advocates a similar construction for Britain. National narratives tend, however, to be rather thicker and more particularist. So nationalism is reconciled with universalism by the claim that this nation has a special mission, or that it discovered liberty first or that it evinces it better than others. Its history is presented as a march of progress towards enlightenment and its symbols are given a democratic and liberal meaning, providing a normative superiority over rival national projects.

British New Labour governments have done all of these things. There has been an insistence on Britishness as a strong, albeit non-ethnic, identity, apart from and above that of the component parts. In Gordon Brown's first speech as leader to the Labour Party Conference, he mentioned Britain 51 times and British 29 times, including British people (16 times) and the notorious 'British jobs for British workers'. Addressing the Fabian Society, he urged the flying of flags and, in a curious mixture of nation building and managerialism, the need for a British mission statement (Brown, 2006). This British identity is, according to a Labour minister, 'different from our English identity or Scottish identity or our Bengali or Cornish identities because it is quintessentially plural' (Wills, 2008). The implication is that it is superior and broad, while the other identities are narrow and exclusive. As the green paper on the Governance of Britain (Secretary of State for Justice and Lord Chancellor, 2007, p. 57) put it, 'There is room to celebrate multiple and different identities, but none of these identities should take precedence over the core democratic values that defines what it means to be British.' UK governments are not alone in seeking to renew a strong national identity in the face of multiculturalism and the fear of social disintegration, as similar projects are at work across Europe and North America. Yet there are two problems. The first is to subsume the different issues of multiculturalism

and multinationalism under the same heading. The second is to postulate this British identity as a uniform Britishness across the whole United Kingdom, with local national identities nested below it.

Sunder Katwala (2005), General Secretary of the Fabian Society, for example, has urged that the issues of Europe, multiculturalism and devolution should come together. Yet, while all these are about pluralism, the multicultural challenge, about the co-existence of different cultures, values and ways of life, is not the same as the challenge of plurinationalism, which is about the boundaries of political community and the scope of the polity in which universal values will be developed. Measures to tackle what the government sees as an excess of multiculturalism do not fit well with the reality of a multinational state in which the nationality bargain is being negotiated differently in different places. The constituent nations of the United Kingdom are themselves the sites of nation-building projects, based on civic and universal values and facing the challenges of multiculturalism. This is very similar to the problem that has arisen in Quebec, where Quebeckers/Québécois of both nationalist and federalist persuasions have resisted efforts to combine the two challenges in a single logic of unity in diversity. Multiculturalism itself will therefore have to take different forms in the different parts of the United Kingdom, just as it does in Quebec and English-speaking Canada.

Lord Goldsmith's (2008) report on citizenship, commissioned by the Prime Minister, devotes a long section to citizenship education, linking this to the inculcation of Britishness but refers exclusively to the English education system. There is no indication whatever of how this might work in Scotland, Wales or Northern Ireland, or what citizenship actually means there. There is a breezy assurance that none of his recommendations will affect recognition of national plurality within the United Kingdom, but nowhere is this plurality addressed. It is seen rather as a subordinate element within the overwhelming narrative of Britishness rather than a core component of that Britishness itself. This is a long way from traditional unionism, in which the meaning of Britishness itself differs from one part of the United Kingdom to another, rather than lying on top of diversity. Goldsmith recommends an Oath of Allegiance to the monarch and a Pledge of Allegiance to the United Kingdom by young people coming of age, with only a passing acknowledgement of how this might go down in Scotland or Northern Ireland. The new citizenship tests incorporate a knowledge of the United Kingdom but only by demanding of potential citizens a type of knowledge that most of the native-born do not possess, rather than accepting diversified citizenship in the component nations. There is also the paradox that, as has been pointed out by many commentators, this kind of nation building is essentially un-British, as is the constant evocation of citizen duties (as in Kelly and Byrne, 2007).

New Labour's Britishness is relentlessly modernist. It is linked with democracy, fair play and the National Health Service and carefully detached

from Empire. As Nairn (2006) has noted, it is almost completely devoid of reference to the monarchy, an important symbol of unity in the past. This gives a clue to the second problem: that UK politicians are trying to build a unitary national tradition and identity in the wrong era. Plurinational states, including Spain and Canada – having missed out building a single national identity in the nineteenth century, when it could be linked to republicanism and modernity – cannot try to build it in the different circumstances of the late twentieth century or twenty-first century. This explains the failure of Pierre Trudeau's vision of converting Canada into a mononational (albeit multicultural state), against the already-advanced project of nation building in Quebec. New Labour similarly seeks to build a new Britain based on shared civic values, when nationalists and home rulers engaged in the same process have already stolen a lead of some 20 years in Scotland.

So the effort to promote national identities based on universal values confronts not a Scottish identity based on exclusion and ethnicity, but a revived Scottish national identity based on exactly the same values and with a distinct European and global dimension. Evocation of the National Health Service (NHS) as the embodiment of British solidarity may provide ammunition against the political right, but has no impact against Scottish (or Welsh and Irish) nationalists who are equally committed to universal provision free at the point of use. Indeed, it stumbles against the fact that the NHS is being reconstructed in different ways in the constituent parts of the United Kingdom, drawing on distinct ideas about social citizenship. While reform in England recasts the user as consumer, in Scotland and Wales the underlying image is that of citizen. Labour leaders have so far failed in weaving a narrative that links social citizenship back into a coherent nation-rebuilding project (Jeffery, 2005).

While multiculturalism might better be detached from the debate on multinationalism, the same cannot easily be said about Europe, since it represents a new scale of territorial government and political community. Brown's speeches are notorious for the absence of European themes that are a staple of political discourse elsewhere in the EU. This makes it difficult for the promotion of Britishness to look other than exclusive, despite the gestures to globalisation and friendly relations with Europe and the United States (which are usually given equal billing). Other European states have refashioned their national narratives to embrace the European dimension, crediting Europe for sustaining the values of the winning democracies of the Second World War. Britain's different experience, with neither defeat nor occupation, meant that it did not need such external validation for democratic and liberal values, and the arguments in favour of the EU have been largely instrumental. The predominant image is of the EU as an arena for struggle in which ministers fight to defend the national interest against our enemies, forever drawing red lines and negotiating opt-outs. This means that Europe cannot itself provide new ways of thinking about the British

Union, nor can the United Kingdom help Europe to imagine a plurinational union on a wider scale.

History remains a battleground for rival national projects, and both New Labour and its associated intellectuals have called for a revived British history. Since the 1970s, historians have largely abandoned teleological or English-centric visions of the past in favour of the 'islands history' perspective. Some have moved further and sought to link developments here back into the broader sweep of European history. New Labour, however, tends to fall back on the old Whiggish teleology, in which British history is merely a continuation of English history and represents a steady march of progress (Lee, 2006). So, after referring to 2,000 years of British history, Gordon Brown (2006) cites Runnymede (*Magna Carta*) but makes no reference whatever to non-English constitutional history. He asserts that in 1689, 'Britain (sic) became the first country to successfully assert the power of Parliament over the King' – this 18 years before Britain came into existence. The only non-English citation is to Henry Grattan (the late eighteenth-century Irish patriot), declaring that 'we can get a Parliament from anywhere…we can only get liberty from England (sic)'. When Jack Straw, Lord Chancellor (of England) and minister for constitutional reform, lectured in the United States on modernising the *Magna Carta*, he gave a view of British constitutional history that included a list of English milestones as well as developments in the nineteenth and twentieth centuries but failed to mention the acts of union with Wales, Scotland and Ireland; he also incorrectly told his audience that the House of Lords was currently the 'final court of appeal for the UK court system' (Straw, 2008).

Much attention has been given to the teaching of British history and the need to include the good and bad of Empire, multiculturalism and the story of the nations and regions of these islands (Colley, 2003; Marsden, 2005). Yet English politicians and intellectuals raising this issue address it exclusively through consideration of the 'national curriculum', which only applies in England. The same applies to citizenship education, although this is a distinctly English notion with no counterpart in the devolved nations (Andrews and Mycock, 2008). It is as though the English curriculum could itself become British by being a little more pluralistic and accommodating, so allowing the same story to be told throughout the United Kingdom. Again, this misses the point that the experience and meaning of Britishness themselves vary from one nation to the other and that a common history curriculum would mean a greater centralisation than was ever attempted in the high days of Union. It also evades the question of whether the Union should be taught as a fundamental value, when Scottish nationalism and independence now feature in public debate as legitimate political options. Were the Scottish Government to introduce such a programme of nation building or a celebration of independence into the school curriculum, it would be virulently condemned as political indoctrination.

The British political elite seem to have lost their old sense of the Union and are engaged in a new form of nation building for a new age, but one that curiously resembles the classic nation building of the nineteenth century. They are not alone here, since many European countries have taken up renewed national narratives in the face of immigration and cultural differentiation. In Britain, however, it cuts across the narratives of multinationalism. Ascherson (2006) claims that it is mainly the non-English elites who are making the fuss about Britishness, seeking to redeem the old unionist polity; and indeed it is they who have the most to lose from the end of Union. There is in fact a debate in England, but it is a different one, in which multinationalism is brought under the rubric of multiculturalism and both are addressed within essentially English parameters.

Scottish nationalism in the twenty-first century

While unionism is declining, political community is being rebuilt in the constituent nations of the United Kingdom, notably in Scotland since the 1970s. Nationality was mobilised to resist Thatcherite assaults on the welfare state in the 1980s and 1990s, when class or British national solidarity would no longer do the trick. There has been a cultural revival and new connections between culture and politics. This is not because political values are diverging between Scotland and England. On the contrary, there is a large degree of convergence and, if there is a territorial cleavage, it pits Scotland and the north of England on one side and the south of England on the other (Rosie and Bond, 2007). Civic community is being built in Scotland as a site for the realisation of universal values oriented to social democracy. In England, on the other hand, the swing voters and marginal constituencies are in the south, a region that is indeed deviant from the British norm but which defines political competition and pushes the agenda towards neoliberal norms.

The last 30 years have seen a shift in national identities in Scotland, away from more British ones and towards more Scottish ones. The clearest evidence is provided in the Linz/Moreno question asked at various times since the 1980s, and in the Scottish Social Attitudes Survey since 1992, in which respondents are asked about the degree to which they feel British or Scottish. Given a straight choice between Scottish and British, the proportion choosing Scottish rose from 65 per cent in 1974 to peak at 80 per cent in 2000 and has since fluctuated between 72 and 80 per cent. The decline in Britishness in Scotland is not therefore linked to devolution, although devolution does seem to have affected attitudes south of the border, with increasing numbers making a distinction between Britain and England, and English identifiers overtaking British identifiers there in 2006 (Heath and Roberts, 2008).

Further probing reveals that these figures encompass a shifting relationship between Scottishness and other identities. The salience of Scottish

identity is shown by the fact that it ranks alongside being a parent (and above gender, class or marital status) as the most important (Bond, 2006), which is not the case in England or Wales (Bond and Rosie, 2006). There is a link with class in that Scots, particularly those identifying as Scottish, have been more likely to describe themselves as working class, irrespective of their objective occupational class (Brown et al., 1999; Surridge, 2003) – although most people are now reluctant to place themselves in a social class at all. Not surprisingly, SNP voters overwhelmingly prioritise their Scottish identity (that is, feeling only Scottish or more Scottish than British), but so do two-thirds of Labour voters, a majority of Liberal Democrats and nearly half of Conservatives (Scottish Social Attitudes Survey, 2005). Voters are now more likely to identify with a fellow Scot of a different social class rather than an English person of the same social class, a reversal of findings in the 1970s; Tilley and Heath (2007) show a marked decline in pride in Britain among Scots over succeeding generations, particularly so in relation to political matters such as democracy and history, as opposed to science, sports, arts and literature. The shift is also marked in social security and in economic achievement, suggesting that newer generations do not construct their visions of economic development or social solidarity around the British nation. On the other hand, Scottishness has not displaced Britishness completely and often seems complementary rather than competitive to it, as nearly half of even SNP supporters retain some element of British identity and often take pride in the British past (Bechhofer and McCrone, 2007). Only at the extremes is there a real polarisation, with more than half those strongly repudiating Britain's past supporting independence against a fifth of those who were very proud, but these numbers are small and the great majority of the population take moderate positions on both questions (SSAS, 2005).

The SNP have certainly been beneficiaries of these shifts in identity, although the shift affects supporters of all parties. Yet, if the unionists are losing the political argument, it does not follow that the nationalists are winning it. Support for Scottish independence has stagnated since devolution and even fell after the election of the first SNP government in 2007. A 'national conversation' was launched to discuss constitutional options and the modalities of independence but it languished. Compared with other nationalist movements, the SNP devotes little effort to nation building, the assumption being that the Scottish nation is an undisputed fact merely requiring constitutional change for its realisation. There is no powerful narrative and no effort to forge a distinct social and economic project. They have not, however, harnessed them or linked them into a clear narrative of nation. SNP policy remains a mixture of global neo-liberalism based on low taxes and a Scottish social democracy building on the Labourist past and conceptions of national solidarity. Little thought has been given to the contours of a distinct Scottish social democracy.

Nor have the nationalists come to terms with European integration. Since the late 1980s the SNP has been pro-European and remains more so than the Labour Party, but its vision of the link between the nation and Europe is vague. It has not embraced the post-sovereignty ideas that prevail in Catalonia, Flanders or, to a lesser degree, the Basque Country, but sticks to an intergovernmental vision that bears a strong resemblance to that of the United Kingdom. Rather than inserting Scotland into the heart of Europe to maximise influence, it wants to pursue a Danish strategy of opting in or out of common policies at its convenience.

Neo-unionism and neo-nationalism

Traditionally, Scottish opinion has been divided among nationalists, favouring a separate state; unionists, opposed to political autonomy; and home rulers, supporting a Scottish Parliament within the United Kingdom. The boundaries have always been fluid, so that Great Britain has avoided the stark clashes of nationality that have marked other European countries. Nationalists have often been ambivalent about statehood, the SNP has been divided between fundamentalists and gradualists and home rulers have come in a variety of shapes. Unionists, while opposed to political autonomy, have recognised the national diversity of the polity. After 1999, matters briefly appeared to clarify. Now that home rule was the status quo, nationalists could unify around the slogan that 'we are all fundamentalists now', bound together on the next stage of the journey. Unionists generally abandoned their opposition to devolution and joined the ranks of the home rulers. The political offer then seemed to be twofold and simple, reinforced by the polarisation of the party system, with the SNP facing Labour as the principal contenders. Yet neither side has won the argument and there is a broad swathe of public opinion, usually constituting a plurality if not an absolute majority and encompassing supporters of the Labour, Liberal Democrat and Scottish National parties, favouring more self-government but falling short of independence in its classic sense. Even among party activists there is a willingness to work gradually towards independence, making devolution work in the meantime (Mitchell, 2008). Among the leadership, there is recognition of the limits of classic statehood and almost everybody has begun to talk the language of union, be this the British union, the EU or Alex Salmond's 'social union'.

Does this mean that the old divide between nationalists and unionists is now irrelevant? I would argue that it is still there but as a general orientation and set of preferences, which start from different premises rather than a clear difference in end points. The first perspective, the neo-nationalist, sees the United Kingdom as a framework for managing common issues in union of self-governing nations. Scotland is presented as a historic nation, with a will to self-determination expressed recurrently since the late nineteenth

century, a sociological reality and a political community. It may have passed on the option of independent statehood in the eighteenth and nineteenth centuries but it retains the right of self-determination, either as a state or as an autonomous entity within the Union. The neo-nationalist perspective would present the Scotland–UK relationship as bilateral, based on the exchange of powers and mutual interest. It can accept radical asymmetries, while insisting that the question of how England should be governed is a matter for the English themselves. There is relatively little concern about the concept of a UK centre and no attachment to the Union in its own right. Scotland rather than the United Kingdom would be the primary framework for citizenship, although this does not preclude some redistribution across the United Kingdom and common arrangements for insuring against risk. The United Kingdom could develop along similar lines to the EU, as an unidentified political object in continual evolution, although in this case the dynamic would be centrifugal rather than centripetal. Indeed, if and as the EU develops and deepens, it could gradually replace the United Kingdom as the predominant union and external support system for Scottish self-government. Neo-nationalists would be relaxed about the general concept of Scottish independence, even if they accept that independence in the classic sense is no longer an option.

The second perspective is the neo-unionist, to be distinguished from traditional unionism, which opposed elected assemblies in the peripheral nations while recognising other forms of differentiation. Neo-unionists accept devolution but start from a different premise from neo-nationalism, taking the United Kingdom as the primary unit and asking how power might be reordered within it. They base their analysis on the continuing existence of a British nation, rooted in common values and the need to preserve these. Neo-unionists are not old-style centralists and usually favour rebuilding the centre, while strengthening the territorial element within it and balancing the constitution more generally in a form of cooperative federalism. They emphasise the need for integrative and centripetal elements to balance the centrifugal dynamics of devolution and, while not necessarily calling for constitutional uniformity throughout the United Kingdom, they would tend to oppose radical asymmetries; so they might favour English regional government as a counterweight to Scottish and Welsh devolution.

Perhaps the critical difference between neo-nationalist and neo-unionist perspectives concerns the meaning and reach of citizenship and the rights that flow from this. Marshall (1992), writing at the birth of the welfare state, recognised three sets of rights. Civil rights came first and secured citizens' liberties against the state. Political rights consisted of the ability to participate in public life, including voting and standing for office. Social rights were the last to arrive, and represented the right to basic welfare provision stemming from membership of the same political community. Such citizenship rights did help to underpin the British union and explain its evolution

over time, even while identities remained diverse. They largely remained British-wide until devolution, despite the differentiation in civil society and some instances of policy divergence.

The neo-nationalist is less concerned with British citizenship in its three dimensions, as long as the requisite rights are underpinned elsewhere. So there is no need for a British Charter of Rights as long as the European Charter applies. Social solidarity is not necessarily cast at a British level. Scotland itself, or Europe or the world, may be seen as equally appropriate levels at which to conceive of sharing and redistribution (Keating, 2009a, b). UK citizenship might then be seen rather as European citizenship is, as a bundle of specific rights and duties, but not rooted in deep identification with the state as the primary political community.

For the neo-unionist, there is a strong common citizenship, covering civil, political and social rights, inherently equal and symmetrical and cast at the British level, implying strict limits to divergence in social entitlements. Power many be decentralised to the periphery, but within a common policy framework, with clear boundaries to the devolved sphere and a new normative underpinning for Britishness (Jeffery and Wincott, 2004; Jeffery, 2005). Citizen demands, it is argued, are much the same throughout the United Kingdom (Jeffery, 2006). Hazell and O'Leary (1999, p. 43) write that 'it may be that we will also need to develop a baseline statement of social and economic rights, to give expression to our deeply felt expressions of equity; and that statement may help to define one set of boundaries beyond which devolution cannot go'. The Westminster Government's evidence to the Calman Commission on Scottish Devolution clearly reflects this thinking, emphasising common social citizenship and assumptions about public services, 'All parts of the UK regard the provision of healthcare as a fundamental part of what it means to be a citizen – devolution has responded to local needs, but it has not altered this fundamental feature of our citizenship' (Scotland Office, 2008). Hazell and O'Leary (1999, p. 43) write of the 'need to express the common values we hold in being British and the values which make the UK a state which is worth belonging to'. Andrews and Mycroft (2008, p. 148) write of a 'worst case scenario (of) differentiated citizenship rights underpinned by varying educational entitlements'. The Commission on Scottish Devolution (2008, 4.60) comments that 'Devolution, as it currently exists, would in principle allow for a fundamentally different welfare state in Scotland or in England, at least in relation to health or education. But there may be a case for a broadly common social citizenship across the UK. If so, does a common understanding of what that involves need to be more clearly articulated?'

These two perspectives are ideal types, and it is not always possible to fit individual proposals within them. Politicians have tried to straddle the two, as did the Labour Party in signing up to the 1988 Declaration of Right with its ringing claims of the sovereignty of the Scottish people and then putting

through the Scotland Act of 1998 that bluntly reaffirmed Westminster sovereignty. The two perspectives do, nevertheless, reflect different conceptions of the logic and the boundaries of devolution since 1999.

A written constitution?

The devolution settlement of 1999 avoids these issues and, indeed, most issues of principle, in favour of a typically British compromise. The Scotland Act explicitly stakes a claim to undiminished Westminster sovereignty and the right to legislate untrammelled in devolved areas. Few people in Scotland take this claim at face value and indeed Westminster has never sought unilaterally to legislate in devolved fields, suggesting that respect for devolution has become one of the more binding conventions of the constitution. Many critics of the devolution settlement have, however, expressed unease at all this ambiguity and called for clarity and stability in a written constitution. This dovetails with a campaign running since the 1980s through Charter 88 (later renamed Unlock Democracy), the Institute for Public Policy Research (1991) and others. Such a constitution would be based on the sovereignty of the people, not Parliament, and would limit the scope of government, democratise the system, protect civil liberties and democratise the state. Gordon Brown dropped approving hints, as did the Green Paper, The Governance of Britain (Secretary of State for Justice and Lord Chancellor, 2007), but shied away from a commitment. Reformers, nonetheless, still look to a comprehensive package of changes that would incorporate the devolution settlement in a formalised order.

The idea is in many ways appealing and could help to entrench the settlement on generally federal principles. The traditional objections that Westminster cannot bind itself by higher law are rather beside the point. A constitution could be adopted and affirmed by referendum and special procedures provided for its amendment. The deeper problem is how a single constitution would sit on a plurinational and asymmetrical state. The principle of popular sovereignty requires that the people, or *demos*, be defined for the first time. If it were the people of the United Kingdom, that would undermine Scottish understandings about sovereignty and represent a unionist move. If sovereignty were vested in the constituent nations, we would have in effect a confederal order. It would also imply recognising England as a sovereign nation, something that reformers have been very reluctant to do. The Institute for Public Policy Research (1991) draft constitution seeks to resolve the problem through English regional government but only at the cost of reducing the Scottish Parliament's powers to those of an English region. English regional government, however desirable, is not the answer to the UK question; it is the answer to a question about the internal organisation of England (Keating, 2006). The problem is magnified when we move from Great Britain to Northern Ireland since the constitution

would need to incorporate the Good Friday Agreement, with its provisions for people to express multiple loyalties and for the province to secede and join the Republic of Ireland. If there were a secession clause for Northern Ireland, then it would seem inconsistent not to include one for Scotland, given that successive British governments have not denied the Scottish right to independence. There would also be demands, as there have been in Quebec, that constitutional amendments require not just a special state-wide majority but consent from each of the constituent nations.

One demand that has attracted some support across the political spectrum is for a British Bill of Rights. It is favoured by the liberal left as part of the Charter 88 agenda on civil liberties, and by the Conservative Party as a way of undermining the European Charter for the Protection of Human Rights and Fundamental Freedoms (ECHR). Labour Ministers see it as a way of restraining rights by balancing them with duties and as a contribution to their Britishness agenda, with a preamble stating British values. Herein lies the problem. Both the Conservatives and Labour appear to see a British charter as a nation-building device, much as Pierre Trudeau used the Charter entrenched in the 1982 Canadian Constitution to build a pan-Canadian identity and citizenship against the claims of Quebec. Nationalists and many federalists in Quebec rejected the Charter precisely on these grounds and not because of its substantive provisions, which indeed closely resembled those in Quebec's own charter. A UK Charter (that is not just British) that linked rights to Britishness could not work in Northern Ireland, where the whole basis of the settlement is about separating human rights from national identities. Nor would it get an easy reception in Scotland. The problem is recognised but not resolved by the House of Lords and House of Commons Joint Committee (2008). They prefer the title 'UK Bill' rather than 'British Bill' on the grounds that some people do not consider themselves British, but English, Scottish, Irish or Welsh. This merely begs the question of what 'UK' used an adjective covers, if it is to be more than a geographical expression. Indeed, they go on to say that 'there is an inevitable and entirely appropriate link with national identity. A national bill of rights is an expression of national identity and the process of drawing one up deliberately invites reflection on what it is that "binds us together as a nation", what we regard as of fundamental importance, and which values we consider to guide us. It is potentially a moment of national definition' (Joint Committee on Human Rights, 2008, p. 96). JUSTICE (2007) explicitly excludes Northern Ireland from its proposed bill, which is defined as British, but it says nothing whatever about the implications in Scotland and addresses only the English legal system. The ECHR, on the other hand, is delinked from nationality and nationalism, represents a more universal conception of rights and is more easily adaptable to slightly different traditions and requirements in various parts of Europe. Since ECHR is already binding on the Scottish Parliament, it is difficult to see what a UK Charter

could add, except to restrict Scottish policymaking in favour of state-wide uniformity.

At present the ECHR is entrenched in UK law in a way that purportedly preserves parliamentary sovereignty. The courts cannot strike down laws, merely refer them back to Parliament, which is invited to amend the offending clauses by fast procedure. It is, however, directly applicable in the devolved institutions. In Canada the 'notwithstanding' clause allows both federal and provincial governments to opt out of some provisions of the Charter; the Parti Québécois when in power used it as a blanket exception, while taking care to abide by Quebec's own Charter. If a UK or British Charter were to follow the ECHR procedure by allowing Westminster but not Holyrood to opt out, its unitary purpose might be undermined as the same rights could be more strongly entrenched in Scotland than in England and Wales.

The written constitution and charter of rights might thus be part of a neo-unionist strategy to reform the union, restrain the executive and enhance the territorial dimension of the polity. It is more difficult to reconcile with the neo-nationalist strategy or a confederal conception, not because of any difference over the substance of democracy or rights, but because of the differing assumptions about nationality, sovereignty and the locus of authority. It might therefore be better for human rights advocates to press for an extension and deepening of the European instrument rather than get involved in the project to recreate a British nation.

More generally, this all shows the difficulty in making explicit matters that can be managed in practice without raising questions of high principle and consistency all the time. There are also practical problems in the 'big bang' approach of taking the whole constitutional agenda together. This creates so many interlinked problems and veto points that agreement can become impossible except at founding moments such as independence, defeat in war or emergence from authoritarian rule. Canada has been trying to agree on its constitution on and off since the middle of the nineteenth century. The 1982 repatriation of the constitution was pushed through without the consent of Quebec, which has remained a grievance ever since. Efforts to address it in the Meech Lake Accord during the 1980s were rebuffed in English Canada and among the aboriginal people for offering unilateral concessions to Quebec and ignoring their grievances. When the agenda was widened in the subsequent Charlottetown Accord, it created even more conflict points, with the result that the deal was voted down both in Quebec and in the rest of Canada. The British approach to constitutional reform, by contrast, has been piecemeal, often impelled by political opportunism and low politics, as with successive extensions of the franchise, reform of the House of Lords or devolution. Constitutional conventions emerge, they are challenged, and they change, often without worrying too much about the doctrinal implications. Efforts to pull it all together quickly run into their

own contradictions, as with Dicey's (1912, 1961) to reconcile his concept of the rule of law with that of parliamentary sovereignty, or to insist that Parliament was sovereign but that it could not legislate Irish Home Rule.

Reconciling the nations

At one level, the national question in Great Britain appears relatively easy to manage. There is no sharp division in values between England and Scotland and no clear 'ethnic' differentiation. Both nationalisms are self-consciously civic, based on territory and citizenship rather than birth or other ascriptive characteristics. This transformation of the national question away from ethnic differentiation might, in some respects, seem to help accommodation between states and stateless nations, since it lowers the stakes and diffuses the issue across a variety of systems, making the old issue of independence less relevant. On the other hand, the very fact that stateless nations are constructing themselves as political communities based on universal values, rather than ethnic fragments based on particularism, may make accommodation more difficult. Stateless nation builders are now claiming the same normative ground as the state itself and, as states are weakened by the process of global and European transformation, they seek to guard their prerogatives more closely. This is what Dion (1991), in the case of Quebec, has called 'de Tocqueville's paradox', the rise of nationalism along with cultural convergence.

In the current debate on constitutional reform, unionists have striven, and largely failed, to provide an ideological underpinning for Union. The final report of the Commission on Scottish Devolution (2009) (Calman Commission) established by the three unionist parties seeks to ground it in shared social obligations and commitments to social citizenship. There is an underlying suggestion that devolved governments cannot be relied on to sustain the welfare state. The assumption seems to be that if we believe in social citizenship, then we must believe in British citizenship. This is a patent *non sequitur* when social citizenship is being rebuilt in different ways in the constituent parts of the United Kingdom, a process likely to be accentuated in the event of a UK Conservative government committed to extending private provision and charges in public services. Calman (recommendation 2.1) recommends that the Scottish Parliament and UK Parliament should confirm that each agrees to the elements of the common social rights that make up the social Union and also the responsibilities that go with them. The implication is that not only the devolved bodies but the sovereign Westminster Parliament should somehow subject themselves to a form of social constitution, limiting their ability to reshape the welfare settlement. This is not something that Westminster will ever do, especially when the UK parties have rejected the European Charter of Rights (largely concerned with the European 'social union') as

an unwarranted interference both in the market and in the sovereignty of Parliament.

The United Kingdom is thus faced not with a process of ethnic differentiation or value conflict between England and Scotland but with rival projects for the construction of the civic nation and political community. This makes accommodation in some ways more difficult than in the case of cultural differences, which might be accommodated by policy concessions, as in the case of the Welsh language.

Yet, while differing in their premises, neither neo-nationalists nor neo-unionists are bound to the old conception of the nation state as unitary and centralised. This opens up new possibilities for institutional compromise and constitutional creativity. The Union can be recast in new forms and actors can agree on practical forms of change even where they start from different assumptions and have different end points. This, rather than the Diceyan certainties about parliamentary sovereignty, has been the genius of British constitutional practice.

Notes

1. The case was *MacCormick v Lord Advocate*. MacCormick had challenged the right of the Queen to use the title Elizabeth II in Scotland. The Court dismissed the case on the grounds that the matter came under the royal prerogative. Lord President Cooper commented:

   > The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his Law of the Constitution. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions.

   He added, however, that neither the English nor the Scottish courts were competent to enforce this provision.
2. The late Professor Neil MacCormick, son of the MacCormick of the celebrated case.

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6
The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned

John McGarry

Asymmetric autonomy normally refers to an institutional arrangement in which different parts of a state enjoy different levels of autonomy. It can arise in federations, when certain federal regions have more (or less) powers than others, or in unitary states, when some regions enjoy autonomy, including different levels of autonomy, while other regions are governed from the centre. In most cases asymmetric autonomy is a response to pressure for autonomy, or more autonomy, from minority national communities, or results when an independent entity is granted special self-governing privileges in return for joining a state. Examples of asymmetric autonomy include Aceh, the Aland Islands, Southern Sudan, South Tyrol and Zanzibar. Asymmetric autonomy is also mooted as a possible solution to several current conflicts and stand-offs, including in Georgia (Abkhazia and South Ossetia), Moldova (Transnistria) and Sudan (Darfur).

The United Kingdom has one of the most complex examples of asymmetric autonomy in existence today. Since 1998, it has granted different degrees of autonomy to its so-called 'Celtic periphery' of Scotland, Wales and Northern Ireland, but continues to govern England, representing 85 per cent of its population, from the centre at Westminster. This chapter discusses the appropriateness of the United Kingdom's asymmetric arrangements for its particular situation. To this end, it first discusses the background to the adoption of asymmetric autonomy and describes the new institutions. It argues that an asymmetry of institutional design across the United Kingdom's regions was a reasonable response to the asymmetric aspirations that exist across the state's territory. The United Kingdom's experience, it is argued, reveals the flexibility of asymmetric institutional design, which can cope not just with differential desires for autonomy, but also with different levels of division within regions. The chapter then discusses criticisms of the United Kingdom's asymmetric design. It concludes by drawing some lessons from the United Kingdom's experience with asymmetric autonomy

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that might be useful for other states that are contemplating asymmetry, or facing demands for it.

Asymmetry in the United Kingdom

Prior to the 1990s, the United Kingdom was generally referred to in political science textbooks and elsewhere as a unitary state much like France or Japan. This was inaccurate. The British were not Jacobins, intent on destroying all particularisms and constructing a monistic national identity. The United Kingdom, as suggested by its name, was what Rokkan and Urwin call a 'union' state (Rokkan and Urwin, 1982). It recognised the distinctiveness of the historic nationalities and their boundaries in a range of different, that is, asymmetric, ways. Scotland, after the Acts of Union, retained its own established church, a separate legal system and separate systems of education and local government. While Scotland's government, at least from the nineteenth century, came under the control of central institutions, a series of steps were taken to accommodate the Scots within these. From 1885, Scotland was given its own Secretary of State, a position that was given full cabinet rank from 1926. Around this there evolved the Scottish Office, a branch of the British civil service, but largely housed in Edinburgh, which was given the task of lobbying for Scotland at the centre, and adapting UK policies to Scottish conditions. Much Scottish legislation was passed separately at Westminster, and the committee stage of Scottish bills was heard before the Scottish Grand Committee, in which Scottish MPs usually predominated. These were territorial provisions but they took place within a context of political centralisation, which is why the United Kingdom was often seen as 'unitary': the Secretary of State, though by convention a Scot, was a representative of the UK government and Scottish legislation depended, in the final instance, on majority support among all the United Kingdom's MPs.

The treatment of Wales was much less distinctive – and less accommodating – reflecting its longer integration with England and the terms on which it was integrated. Its established church, until the early twentieth century, was the Church of England, which was not supported by most people in Wales. There was administrative decentralisation, though less than in Scotland, beginning with the Welsh Department of the Board of Education in 1907, and gradually expanding until it embraced 17 departments by the 1950s. These were then taken under the umbrella of the Secretary of State for Wales and the Welsh Office, created in 1964. As with Scotland, the Welsh Secretary of State was a member of the British cabinet. By contrast with Scotland, Wales was treated as part of England for legislative purposes, although the Welsh Office was able to make regulations flowing from this legislation.

Ireland was treated at least as distinctively as Scotland, but much less benignly. Ireland retained its own legal system and statute book, but, like

Scotland, was legislated for, often separately, by Westminster. Its established Church, until 1870, was the Anglican 'Church of Ireland', which was rejected by most of its population, which was overwhelmingly Catholic. It was governed by distinctive officials, primarily the Chief Secretary for Ireland, a UK cabinet minister, who, throughout the period from 1801 to 1921, never came from Ireland or represented an Irish constituency. Many of the boards and agencies that the Chief Secretary presided over were not accountable to the UK parliament let alone Irish MPs. Ireland was governed through much of the nineteenth century by emergency legislation, the only part of the United Kingdom to have this dubious distinction. Its regime was arguably closer to Britain's non-white colonies than to Scotland's, although its elected representatives, which before 1829 could not be Catholic, sat in the Westminster parliament.

Prior to 1998, then, the United Kingdom combined political centralisation with an asymmetric system of administrative decentralisation. The exception to this pattern was Northern Ireland, which, between 1921 and 1972, had its own regional legislature, and a government responsible to it. This was part of a strategy that envisaged analogous institutional arrangements for Southern Ireland, but these were never established, and Southern Ireland seceded from the United Kingdom in 1921. Northern Ireland's parliament operated on the basis of the Westminster model of government, that is, it was majoritarian and executive-centred. As unionists were in a majority and the region was polarised between them and nationalists, this meant government by unionists over nationalists, or what O'Leary and I describe elsewhere as a regime of hegemonic control (O'Leary and McGarry, 1996). Control broke down in the late 1960s, and the parliament was abolished in 1972, after three years of violent unrest. Between then and 1998, with the exception of a failed attempt at devolution on a power-sharing basis for five months in 1974, Northern Ireland was ruled directly from Westminster, in much the same way that all of Ireland had been ruled prior to 1921 – by British ministers who did not represent Northern Irish constituencies, by a 'Northern Ireland Office' that was separate from British departments, and by a legislative regime that relied on emergency laws and 'Orders in Council' rather than, as in the case of England, Wales and Scotland, ordinary legislation debated in the normal way at Westminster.

The asymmetric autonomy changes of the late 1990s do not mark a break from a symmetric past. The break is, rather, with the exception of Northern Ireland between 1921 and 1972 and briefly in 1974, from a centralised past, in which ultimate decisions were made at Westminster, by the UK parliament and/or a UK government responsible to it. In Northern Ireland's case, the Agreement reached in 1998 renewed its autonomy but this time, unlike 1921–72, on terms that were acceptable to both nationalists and unionists. The asymmetric nature of the changes adopted in 1998 are related to the pre-existing asymmetries that have just been described – with the more

integrated region of Wales receiving much less autonomy than Scotland or Northern Ireland (Jeffery and Wincott, 2006). Arguably, the United Kingdom's union-state legacy, and the different manifestations it took in the peripheral regions, also helped to maintain and shape the identity of the nationalities and their aspirations.

The autonomy arrangements adopted in 1998 are asymmetric in two main senses. First, not all regions of the state enjoy autonomy. England, which possesses around 85 per cent of the United Kingdom's population, has neither a parliament nor an assembly. The English regions do not enjoy self-government, although many of them are at least as populous as Scotland, Wales or Northern Ireland. The practice outside London is what has been called 'functional regionalism' to distinguish it from political autonomy (Keating, 2006). This has resulted in what Jeffery and Wincott describe as 'little more than an improved capacity for centralized policy-making' (Jeffery and Wincott, 2006, p. 8). The greater London area has had, since 2000, a Greater London Authority, which replaced the Greater London Council abolished by the Thatcher government in 1986. It comprises a directly elected Assembly and a directly elected mayor, but its powers are modest and much closer to those of an upper tier local authority than an autonomous assembly.

The lack of autonomy for England and the English regions reflects satisfaction among the English with the centralised *status quo*. Survey data shows that only a small minority of the English want their own parliament, no more than 19 per cent between 1999 and 2003, and that the English are much more likely than the Scottish or Welsh to trust the UK government to look after their interests (Curtice, 2006, pp. 121, 133). The reason for this is straightforward: the UK parliament has 529 English MPs out of a total of 646 (83 per cent) and, as the Scots are well aware, already operates as a reasonable facsimile of an English parliament. This also explains why the English are much more likely than any of the nationalities to identify with the whole state. Indeed, the dominant English view is that the United Kingdom is an English state, with the peripheral bits seen as optional add-ons. No serious political party supports an English parliament, and although the leader of the Conservative Party, William Hague, briefly flirted with the idea in 1999, he quickly abandoned it.

Support for English regional assemblies is similarly low, around 15 to 24 per cent (Curtice, 2006, p. 122; Bogdanor, 1999, p. 271). Even in the North-East of England, where support for regional devolution is relatively strong, it is still weak in absolute terms. When the government held a referendum in the North-East on a regional assembly in November 2004, its proposals were defeated by 78 per cent to 22 per cent on a 48 per cent turnout. What desire for autonomy exists there is based on functional needs only, and there are functional arguments for and against decentralisation.

The absence of support for an English parliament or English regional assemblies means that a symmetric federation is not an appropriate option for the United Kingdom. This makes its situation analogous to the many states, such as Moldova or Sri Lanka, in which nationalities seek autonomy but the dominant people do not. The fact that the English do not seek symmetric devolution or a symmetric federation, with England as a single region is, on balance, a good thing. A region based on England would be ten times larger than the next largest region, Scotland, and five times larger than all three peripheral regions (Scotland, Wales and Northern Ireland) combined. This would make the English parliament a serious rival of the UK parliament and well-placed to win in any competition for resources between it and its Scottish, Welsh and Northern Irish counterparts, particularly as nearly 90 per cent of the central or federal parliament's MPs would be English. In a recent comparative study of the pathology of pluralist federations, Henry Hale argues that a leading cause of failure is the existence of a 'core ethnic region' defined as a region that possesses at least 50 per cent of the federation's population, or 20 per cent more than the next largest region (Hale, 2004). A core ethnic region, according to Hale, produces a 'dual power-structure', where the core region is strong enough to rival the federal authorities and provoke the resentment of smaller regions. Hale shows how the existence of core ethnic regions destabilised the Soviet Union and the first Nigerian Republic, and currently destabilises Pakistan. England would represent a 'core ethnic region' that is much more dominant than those in any of Hale's examples. A four-region United Kingdom, dominated by England, would not provide for the multiple balance of power and shifting coalitions that are generally seen as conducive to federal stability, as England would not need to make alliances. A likely result would be that England would be constantly ranged against the periphery, making the United Kingdom analogous to a two-unit federation, which is generally regarded as unstable (Watts, 1999). As its supporters argue, symmetric institutions based on the English regions would not have these difficulties (Hazell, 2006, p. 224). This would create a federation similar to Canada's, in which the English-speaking majority is divided among several regions, giving rise to a multiple balance of power in which coalitions cross-cut linguistic and national boundaries. However, any autonomy arrangements that put the English regions on a par with Scotland, or even with Wales, would have to be imposed from the top, and would involve giving either the English regions more autonomy than any of them want or the nationalities less autonomy than they want.

Second, the three parts of the United Kingdom that have been given autonomy – Scotland, Wales and Northern Ireland – enjoy different forms of it. Scotland has been given a parliament with wide-ranging primary legislative powers in most fields of domestic policy, including health, local government, housing, education and training, transport, sport, fishing, forestry, the arts and law and order. It is the only region in the United Kingdom that

has been given fiscal discretion, in its case the ability to vary UK taxation upwards or downwards by 3 per cent, although it has not yet used this power. This relatively extensive autonomy is related to pre-devolution arrangements, and broadly involved the transfer of responsibility for governing and legislating for Scotland from the UK government's Scottish Office and Westminster to institutions that are accountable to the Scottish people. The level of autonomy is also in line with popular opinion, as measured by survey data, and by support for political parties that back autonomy. In the 1997 UK election which preceded devolution, parties backing a Scottish parliament, meaning legislative devolution, won all of Scotland's 71 seats in the UK parliament. In the 1997 pre-legislative referendum in Scotland, which had a 60.4 per cent turnout, 74.3 per cent of Scots voted in favour of a Scottish parliament, while 63 per cent supported giving it 'tax-varying' powers.

Wales was given an Assembly, with essentially the functions that had belonged to the Secretary of State for Wales and the Welsh Office. Before 2011, the Assembly only had control only over secondary legislation, or regulations, and the administration of the region. The Assembly's power to make secondary legislation, moreover, was not general or uniform in nature. Rather, it applied only to certain (over 400) Westminster statutes, as specifically outlined in each of them (Jeffery and Wincott, 2006, p. 6). All primary legislation remained a prerogative of Westminster, although the Government of Wales Act (1998) required the Secretary of State for Wales to consult with the Assembly about the UK's government's legislative programme. If, as some plausibly maintain, the ability to pass primary legislation is considered an essential criterion of autonomy, then Wales, after 1998, was not an autonomous region. In the Government of Wales Act 2006, however, the UK parliament legislated to extend and generalise the Assembly's powers of secondary legislation. The Act also provided for the Assembly to have powers of primary legislation in specified fields, but only after this had been supported by a referendum in Wales. This referendum was held, eventually, in 2011, when the Welsh voted by 65 per cent to 35 per cent to give their Assembly the capacity to pass primary legislation.

Wales's initial, relatively modest degree of self-government is linked to the fact that support for self-government there was markedly lower than in Scotland, with many among Wales's large English-speaking majority sceptical. The Welsh rejected devolution in 1979 by 79.3 per cent to 23.7 per cent, a degree of opposition similar to that expressed in the North-East of England's 2003 referendum. Twenty years of Thatcherite government helped to reduce enthusiasm for the merits of centralisation, and the Welsh approved devolution in 1998, but only by the narrowest of margins, 50.3 per cent to 49.7 per cent, on a low turnout of 50.1 per cent. The government's margin of victory was linked, arguably, to the fact that it deliberately placed Scotland's referendum a week earlier, rather than at the same time, as in 1979, on the assumption that the expected affirmative vote in Scotland would facilitate a yes vote in Wales.

While Northern Ireland has an 'Assembly' like Wales, this was from the start a parliament with primary legislative powers, similar to Scotland's, and, indeed, to Northern Ireland's parliament between 1921 and 1972. Northern Ireland's new autonomy arrangements are different from those in Scotland and Wales, and from those that operated during the Stormont period, in a number of important ways. First, under the Agreement, Northern Ireland does not just enjoy autonomy, but is linked to the Irish Republic through a number of all-Ireland political institutions. The most important of these is the North–South Ministerial Council (NSMC), a body nominated by the Republic's government and the Northern Ireland co-premiers. The Agreement also allows the Irish Republic's government access, through the British–Irish intergovernmental conference (B-IGC), to policy formulation on all matters not or not yet devolved to the Northern Ireland Assembly or the NSMC. This continues the arrangements first agreed to in the Anglo-Irish Agreement of 1985.

Second, the Northern Ireland Act, the UK statutory form of the Agreement, provides for the Assembly to seek jurisdiction over any reserved matter, where there is cross-community consent (O'Leary, 1999, p. 1647). The Scotland Act or Government of Wales Act contains no similar provision. There is thus an explicit path for Northern Ireland, unlike Scotland and Wales, to extend its autonomy. Third, under the Agreement, Westminster has formally conceded that Northern Ireland can secede from the United Kingdom to join a united Ireland, if its people, and the people of the Irish Republic, voting separately, agree to this. Scotland or Wales have no analogous formal right of secession.

Fourth, while the basis of Northern Ireland's autonomy in Westminster legislation makes it appear superficially similar to Scotland's, its autonomy, unlike Scotland's, is also entrenched in an international treaty between the United Kingdom and the Republic of Ireland. Moreover, the UK government, through the Agreement, has explicitly recognised the right of the people of Ireland to self-determination, and the Agreement was ratified not just by a referendum in Northern Ireland, but also by a simultaneous referendum in the Irish Republic. There has been no similar explicit recognition of the Scottish people's right to self-determination. The proper understanding of Northern Ireland's Agreement is that the UK government and parliament cannot exercise power in Northern Ireland in a way that is inconsistent with the Agreement, without breaking its treaty obligations and without denying Irish national self-determination. This means that the relationship between the United Kingdom and Northern Ireland established by the Agreement, is, properly speaking, that of a 'federacy', a system of autonomy that cannot be unilaterally altered by the centre alone, and not just, as in Scotland and Wales's case, devolution in a unitary state (O'Leary, 1999, pp. 1646–7). This change has been obscured by the actions of the UK government between 2000 and 2002, when it unilaterally suspended Northern Ireland's political

institutions on four occasions. This, however, was a breach of the Agreement which the Irish government choose not to challenge because of the need to maintain good working relations with Britain and to avoid dangerously polarising matters within Northern Ireland. Irish nationalists subsequently insisted, and the British government agreed, that the suspension power be repealed.

These distinctive dimensions of Northern Ireland's autonomy arrangements are there at the behest of Irish nationalists, about 40 per cent of Northern Ireland's population. They, unlike their Welsh and Scottish counterparts, see themselves as part of a national community that stretches beyond the United Kingdom's frontiers, hence the insistence on cross-border institutions and on a role for the Irish Republic's government in Northern Ireland. Between 1972 and 1998, even moderate Irish nationalists, represented by the Social Democratic and Labour Party (SDLP), consistently rejected autonomy arrangements that were internal to the United Kingdom. More radical nationalists, represented by Sinn Féin and the IRA (Irish Republican Army), rejected any link with the United Kingdom and insisted on a British withdrawal and a united Ireland. They eventually compromised, accepting that a united Ireland could not be achieved without the consent of the people of the North and South, voting separately, thus making an agreement with unionists possible. As a *quid pro quo*, republicans demanded the Agreement's provisions on Irish self-determination and the maximum degree of freedom from British rule. The British government's decision in 2000 to unilaterally suspend the institutions aroused strong opposition from republicans and, while it did not produce a resumption of armed conflict, helped to prevent the IRA from decommissioning its weapons and Sinn Féin from recognising Northern Ireland's new police service. It was only when London agreed in 2003 to remove its suspension power that progress became possible.

The academic literature on the United Kingdom's asymmetric autonomy arrangements has generally acknowledged the centrality of the cross-border dimensions of Northern Ireland's Agreement, but not so much the distinction between the status of Northern Ireland's autonomy and that of Scotland (or Wales) (for an exception, see McLean and McMillan, 2005, p. 9, 241). Both features, however, are important. The first suggests that minorities that have national kin on the other side of state frontiers may need to be treated differently from minorities that are wholly internal to the state. The second suggests that states may have some success extending 'devolution' to minorities that are not seriously or violently alienated from the state. However, if they want to end militant secessionism, or reintegrate territories which have *de facto* seceded, and are unable to prevail militarily, they may, as in Northern Ireland, have to concede a 'federacy'.

The United Kingdom's new autonomy arrangements have given rise to an additional type of asymmetry, although technically one that could exist even if the powers and status granted to its different regions were perfectly

uniform. This is an asymmetry in the design of political institutions across the state. Elections to the Scottish Parliament and Welsh Assembly are conducted on the basis of the 'additional member system' of proportional representation (PR-AMS), similar to that used in Germany, rather than the single-member plurality system that is used for elections to the UK parliament.

The executive formation process in Scotland and Wales is also different from Westminster's, in both minor and important ways. British government formation is governed by convention with the leader of the largest, usually the majority, party becoming prime minister with responsibility for naming the cabinet. In Scotland and Wales, executive formation has been codified, with the Scottish Parliament and Welsh Assembly electing their respective First Ministers, who then appoint the rest of their executives (Ward, 2000, pp. 121–2). More importantly, while the single-member plurality system used in Westminster elections usually produces single-party government, the proportional systems used in Scotland and Wales make coalitions more likely, although both have had single-party minority and majority governments since 1999. The Westminster electoral system invariably converts electoral minorities into governing 'majorities', but majority governments in Scotland and Wales are likely to be based on electoral majorities.

Northern Ireland's Assembly is elected by the single transferable vote version of proportional representation, which is different to the proportional representation electoral systems used in Scotland and Wales. More significantly, its government is based on formalised power sharing. The government is led by First and Deputy First Ministers who, in spite of their titles, are co-premiers. Between 1998 and 2007, the rule for selecting the co-premiers was a majority of the Assembly plus a concurrent majority of nationalist and unionist MLAs, which effectively meant unionist and nationalist co-premiers. Since 2007, the First Minister is the nominee of the largest party from the largest designation ('nationalist', 'unionist' or 'other') while the Deputy First Minister is the nominee of the largest party in the second largest designation. The rest of the cabinet is appointed according to the d'Hondt rule, and not by the First and Deputy First Ministers. This ensures that all parties that meet the quota established by the conjunction of the d'Hondt system and the limited number of ministries are entitled to seats in the executive. The effect, after the resumption of power sharing in March 2007, was that four parties, with 98 of the Assembly's 108 seats, received seats in government. D'Hondt also helps small parties entitled to executive positions by preventing large parties from monopolising all of the most important portfolios (O'Leary et al., 2005).

The composition rules for Northern Ireland's executive are, therefore, more inclusive than Scotland's or Wales's, while all three more inclusive than the conventions used at Westminster. Northern Ireland's rules are

there because of its intense internal divisions, and are appropriate given those divisions. If the Scottish, Welsh or Westminster rules for executive composition were applied to Northern Ireland, the danger would arise of a minimum winning coalition comprised exclusively of unionists, or a coalition of nationalists and small centrist parties ('others') or a cross-community coalition restricted to moderate political parties. The first two possibilities would be potentially disastrous. Even the third would endanger peace and stability by excluding republicans and hard-line unionists (McGarry and O'Leary, 2009). When an executive of this last type was effectively mandated in the Sunningdale Agreement of 1973, it did nothing to resolve the violent conflict and collapsed after only five months (Wolff, 2001). The Northern Ireland executive is different from Scotland's and Wales's in another way, which relates to the relatively deep alienation of Irish nationalists from the crown: its First Ministers and other executive members are nominated by the parties and elected by the Assembly whereas the Scottish and Welsh First Ministers are appointed by 'Her Majesty' upon nomination by the Scottish parliament and Welsh assembly. The rest of the executive branches in Scotland and Wales are appointed by the respective First Ministers and serve 'at her Majesty's pleasure'.

Northern Ireland's internal divisions required a number of other institutional arrangements that are missing from Scotland and Wales's institutions. The d'Hondt rule is also used for electing the chairmen and deputy chairmen of the Assembly's statutory committees, and for selecting the political representatives of the Policing Board, charged with holding the Police Service of Northern Ireland to account. While measures are passed in the Scottish parliament and Welsh Assembly by simple majority, key legislation in the Northern Ireland Assembly requires either a majority in the Assembly, plus a concurrent majority of nationalists and unionists, or a weighted majority of 60 per cent in the Assembly, including at least 40 per cent of both nationalists and unionists. In addition the Agreement made provision for a Northern Ireland Human Rights Commission, an Equality Commission, and a Civic Forum, the last to provide civic associations input into the region's governance. There are no analogous institutions in Scotland or Wales.

This asymmetry of intra-regional institutional design shows the flexibility of autonomy arrangements: regional institutions can be tailored to cope not just with differential aspirations for autonomy, including aspirations for cross-border links, but also with different degrees of intra-regional heterogeneity/division. This latter point provides an effective response to a key criticism of autonomy for nationalities, that it is unfair and results invariably in narrowly based and ethnocentric institutions which abuse regional minorities (Nordlinger, 1972; Wimmer, 2003; Dalyell, 1977, p. 293). The United Kingdom's only previous example of regional political autonomy, Northern Ireland between 1921 and 1972, is often held up as

the paradigmatic case of such abuse (Dalyell, 1977, p. 293; Rose, 1976). Its experience was used by both British and Irish integrationists to argue that the region was a 'failed entity' which should not be given autonomy, but which should be integrated into a centralised British or Irish state. However, the new arrangements in Northern Ireland show that the potential for minority abuse is not inextricably linked to autonomy, but is related to the design of the autonomous region's institutions. The same can be said, of course, for any territorial entity, including states themselves, which are just as likely (or unlikely) to give rise to the abuse of minorities as autonomous regions. In the United Kingdom's case, the institutions of all the autonomous regions, and not just Northern Ireland's, are more inclusive than the centre's institutions, although Northern Ireland's are the most inclusive. The United Kingdom's asymmetric institutional design has another advantage: the diversity of institutional approaches allows experiments from which other parts of the state can draw lessons, such as on the merits/demerits of proportional representation and coalition government.

Assessing the UK's experiment in asymmetric devolution

Debate over asymmetric devolution in the UK is usually divided into separate debates about Great Britain and Northern Ireland. In Great Britain, there are criticisms that focus on the general issue of devolution and criticisms that focus on asymmetry. Between 1979 and 1997, the governing Conservatives ruled out devolution at least partly on the grounds that it would threaten the Union. This was also the gist of several publications on the subject written between 1977 and 2000 (Dalyell, 1977; Hitchens, 1999; Redwood, 1999; Marr, 2000; Nairn, 2000; Fukuyama 2000). Some English critics on the left support devolution but point to the 'unfairness' of asymmetry. They argue that this has denied a 'voice' to the English regions, which, allegedly, are as politically and economically marginalised as the Celtic nations of the periphery (Hazell, 2006). By contrast, some critics on the right argue that asymmetry discriminates against England, the only one of the United Kingdom's four nations that does not have its own parliament, and call for such a parliament to be established. These critics point to what is called the 'West Lothian Question' as evidence of the unfairness of asymmetry. This refers to the fact that under the devolution arrangements, Scottish (and Northern Irish) MPs in the Westminster Parliament can, in principle, decide legislation that affects only England (and Wales) while English MPs have no reciprocal say over such matters in Scotland (and Northern Ireland).

In Northern Ireland, unionist 'integrationist' critics of the 1998 Agreement argue that treating Northern Ireland differently from other parts of the United Kingdom offends norms of 'equal citizenship', and encourages Irish republicans, including republican militants, to believe a united Ireland is

possible. The Agreement is seen from this perspective as a prize won by the IRA, and conceded by a UK government eager to avoid expensive attacks on Great Britain, known to the critics as the 'British mainland' (Kennedy, 1999). Unionist integrationists also criticise the Agreement's power-sharing institutions, which involve nationalists and unionists in government, as bound to be unstable, or even 'unworkable' (Roche, 2000; McCartney, 2000). They are also critical of the cross-border political institutions which bring together the governments of Northern Ireland and the Republic of Ireland. The critics have talked of a flawed or even a 'failed' peace process (Peatling, 2004). Rather than the Agreement's institutions, unionist integrationist critics of the Agreement would prefer devolution on the Scottish or Welsh models, because neither of these models include formal power-sharing or cross-border institutions.

These criticisms have obvious weaknesses. In Great Britain, as we have seen, asymmetric autonomy is squarely in line with popular aspirations throughout the state. It is difficult to see how catering to these aspirations is either unfair or more injurious to the state's unity than the alternatives. Refusing to give the Scots devolution in the late 1990s would have involved denying them what they expressly desired, while foisting some sort of symmetrical autonomy package on England or the English regions would have involved giving their people something they did not want. Symmetric devolution involving the English regions would also have implied equating communities that do not see themselves as nations with those that do. The comparative evidence from elsewhere, including Canada and Spain, suggests that the 'nationalities' would baulk at such equivalence.

This does not mean that Great Britain's experiment in asymmetric devolution is bound to be stable and unifying. Critics of the new arrangements are correct to argue that devolution gives resources to nationalists that they previously lacked. Scotland already had its own boundaries, flag, traditions and sports teams, but it now also has its own government and parliament. This is likely to promote a greater focus on Scottish issues, and a 'federalisation' of British parties, civic associations and interest groups. The use of proportional representation in regional elections in Scotland has helped the Scottish National Party (SNP), which had low and dispersed levels of support, to win seats and make its voice heard. Regional elections have also helped the SNP to increase its support, as its programme seems more relevant in Scottish than UK-wide elections. The party has done better in every election to the Scottish parliament than in the preceding Westminster election. In 2007, the SNP became the largest party in Scotland, forming a minority government, and in 2011, it won a majority of seats in the Scottish parliament, a remarkable feat under an electoral system based on proportional representation. It is also possible that the constitutional stability that existed

during the first decade of devolution was a result not of devolution, or not just of devolution, but of the fact that the British Labour party dominated the UK government and the executive branches in Scotland and Wales. This meant that intergovernmental relations during this period was a relatively benign intra-party affair. The UK government generally had little difficulty cooperating with its peripheral counterparts in these circumstances, such as when dealing with the EU or public finances. Intergovernmental relations, however, are very unlikely to be as amicable in devolution's second decade. Not only has Labour's hegemony in the Scottish periphery ended, but so has its domination of the centre, with the election of a Conservative-Liberal Democrat Coalition at Westminster in 2010. With the Scottish SNP government's recent decision to call a referendum on independence in 2014, centre-periphery relations look likely to become much more conflictual in the coming period.

On the other hand, asymmetric devolution hardly points inexorably towards break-up. The autonomous institutions also constrain the SNP. The resources of government give the SNP the opportunity to promote secession, but there are also pressures on a governing party to make current arrangements work if it wishes to secure re-election, and this can undercut support for radical change. While increased intergovernmental conflict is to be expected, this is something that occurs elsewhere without producing break-up. The evidence from other comparable Western democracies, including Canada (Quebec), Spain (Basque Country, Catalonia), Finland (Aland Islands) and Italy (South Tyrol), indicates that they have weathered intergovernmental conflict and even, in Canada's case, two referendums on secession, without falling apart, although the most recent Canadian referendum in 1995 was a close run thing. One reason for the success of autonomy in these cases is that the states involved are reasonably prosperous democracies, in which their minorities have nested identities, that is, they identify with their regions and the state, and this in turn may be linked to the state's preparedness to concede genuine autonomy before relations have polarised. They are not analogous to the failed federations that have broken up in the communist and post-colonial world, the experience of which appears to overly influence the analysis of critics of autonomy (See McGarry and O'Leary, 2005).

One way to reduce the risk of future instability in Great British politics would be to address the West Lothian Question. While survey data shows that the English are supportive of autonomy for Scotland and Wales, and are not concerned about the subsidisation of those regions, there is some latent concern about the prospect of Scottish MPs deciding laws that affect only England (Curtice, 2006, pp. 129–30). Relatedly, there is evidence, as the criticism of Tony Blair's appointment of the Scottish MP

John Reid as UK Health minister in 2003 makes clear, that the English are not keen on Scottish ministers running essentially English departments (BBC, 2003).

Two possible answers to the WLQ can be dismissed at the outset, on the grounds that they are unwanted and unfair, respectively. The unwanted answer is symmetry, whether centralised or decentralised. The unfair answer is to underrepresent Scotland (or Northern Ireland) in the United Kingdom's parliament on the grounds that this parliament is less relevant to them. The difficulty with underrepresenting Scotland is that the Scots (and Northern Irish) are entitled to be fully represented when the UK parliament is discussing common matters. Reducing Scotland's representation on such matters would make it less likely that the central parliament would take Scotland's interests into account, and less likely that the Scots would continue to identify with the United Kingdom.

The most sensible answer to the West Lothian Question is what has been called the 'in and out' principle. Here, the asymmetrically autonomous regions would continue to be equitably represented in the common legislature, but their representatives would vote only on common matters, abstaining on issues that are in the competence of their regional government, as Scottish nationalist MPs currently do (Keating, 2001, p. 132). Asking Scottish MPs to abstain on English business would remove an English grievance without creating a Scottish one, as Scottish opinion is strongly supportive of such a step. Indeed, the Scots in some polls are more likely to support barring Scottish MPs from a say over English matters than the English themselves (Hazell, 2006, pp. 14, 21, n11). Suggestions of this sort are usually objected to on the basis that it is difficult to separate bills in this way, or that bills involving expenditure outside the autonomous regions necessarily have implications for expenditures within them (See Hazell, 2006, p. 88; Bogdanor, 2007). However, these are largely technical drafting and budgetary matters rather than insuperable obstacles. An apparently more profound criticism is that the 'in and out' practice is difficult to reconcile with core parliamentary conventions of responsible and accountable government, whereby the executive must command a majority in the legislature, and preside over a coherent legislative programme. The concern here is that a government, comprised in the normal Westminster way from a minimum winning majority, could lose its majority when dealing with non-common matters (matters that apply only to the part of the state outside the autonomous regions). This need only pose a danger of government resignation, however, if the government insists on making these matters of confidence. The problem would not arise at all if the government simply refrained from imposing unpopular measures on the non-autonomous region, that is, if it adopted a convention of winning majority support in the non-autonomous region on matters that were exclusive to it.

This leaves delicate questions relating to the composition of the UK government. The extension of the 'in and out' principle to the UK's executive branch

suggests that members of the common legislature from the asymmetrically autonomous region should, ordinarily, be given ministerial responsibility only for common matters. It is provocative and hardly necessary to appoint a Scottish MP as a minister of health or education in the UK government, when these portfolios are not concerned with Scotland. As the prime minister, and several other ministers, preside over both common and English- (and Wales)-only matters, a Scot can hardly be fairly ruled out of those positions. To do so would almost certainly guarantee the state's break-up.

Another way to stabilise the United Kingdom's new asymmetric arrangements would be to introduce a proportional electoral system for UK-wide elections that would reduce the convergence of nationality and party representation (also see Hazell, 2006). Under the current electoral system of single-member plurality, there is a reasonable prospect of the election of a Conservative majority government at the centre that has little or no representation in Scotland. Such a government is even more likely to be seen as, and perhaps to behave like, an 'English' government than the current Conservative-Liberal Democrat coalition, which has 12 MPs from Scotland, but only one of them a Conservative. However, the Conservative Party's weakness in Scotland, like its strength in England, is exaggerated by single-member plurality. Proportional representation at the UK level would both reduce the Conservative Party's hold on English seats, while enhancing its representation in Scotland. Both effects would reduce its image as an 'English' party. Proportional representation would additionally make it more difficult for the SNP to dominate Scotland's representation at Westminster than under current electoral arrangements. The SNP would be unable to emulate the Bloc Quebecois which has recently dominated Quebec's representation in Canada's federal parliament with only a plurality of the vote. Proportional representation would also almost certainly eliminate the prospect of one-party government at Westminster, and give rise to coalitions, based on a much broader level of support than one-party governments usually have. A more consensual government of this type would be more like those within the United Kingdom's autonomous regions and more appropriate for the governance of a plurinational state.

In Northern Ireland, there is no evidence that the Irish nationalist community, about 40 per cent of the population, would ever support (any conceivable) symmetric institutional arrangements. Even moderate, or 'constitutional', nationalists in the SDLP have consistently rejected symmetric decentralisation on the Scottish or Welsh models, and argued instead for maximum devolution combined with all-Ireland institutions. The SDLP has also always insisted on formal executive power sharing, and during negotiations on the Agreement, pressed for an inclusive form of executive power sharing that would give places to Sinn Féin. This followed from the party's belief, based on the Sunningdale fiasco of 1974 and Sinn Féin emergence as an electoral force, that an agreement without republicans would be unstable, and not in the interests of nationalists,

as it would likely reduce their presence on the executive. As a result, the only agreement possible in 1998, from the perspective of nationalists, was one that contained the Agreement's core institutional features.

Contrary to the claims of the Agreement's critics, it has ushered in a palpably successful peace process. Lethal political violence dropped from 509 killed in the nine years before the Agreement (1989–97) to 134 in the nine years after (1998–2006), a decline of three-quarters (PSNI, 2007). While 105 members of the security forces were killed in the earlier period, only five have been killed since, two of them in 1998. The war between the IRA and the British state is now over. In 2005, the IRA destroyed its entire arsenal and 'disbanded its operational structures'. Defections to dissident republican paramilitary organisations have been minimal. Both major loyalist paramilitary organisations have recently indicated their preparedness to place their weapons 'beyond reach'. The Agreement has resulted in demilitarisation by the British Army, its return to barracks and a normal peacetime garrison and the construction of a new police service that is more widely accepted than before (McKittrick, 2007). These facts hardly describe the flawed or failed peace process described by the Agreement's critics.

Political stability was less in evidence, at least during the Agreement's first decade. The Agreement's institutions took 19 months to establish, and were suspended on four occasions between 2000 and 2007. Post-Agreement elections also resulted in a movement in electoral support from the moderate parties in each bloc, the Ulster Unionnists and the SDLP, towards more radical parties, Sinn Féin and the Democratic Unionist Party (DUP), a trend described by the Agreement's critics as a 'victory of the extremes' (Patterson, 2005). As McGarry and O'Leary have shown, however, much of the political instability that marred progress after 2000 was caused by security-related controversies over demilitarisation, decommissioning of paramilitary weapons and policing reform, rather than by flaws in the design of the Agreement's political institutions (McGarry and O'Leary, 2009). The movement of support to Sinn Féin and the DUP was also not as damaging as the critics alleged, as it took place alongside a clear moderation both party's positions and an increased willingness on their part to compromise. These facts explain why Sinn Féin and the DUP were able, with reasonable enthusiasm, to reach an agreement on power sharing in early 2007, and why, in the Northern Ireland Assembly elections of March 2007, parties committed to power sharing won all 108 seats in the Assembly, and 93 per cent of the vote. By contrast, the only party that unequivocally opposed the Agreement, the UK Unionist party (UKUP), which is closely associated with the criticisms on the Agreement outlined in this chapter, received a paltry 1.5 per cent. The DUP-Sinn Féin pact has remained strong through the Assembly elections of 2011, when pro-Agreement parties won 107 of 108 seats.

Like devolution to Scotland, Northern Ireland's power-sharing pact may not last indefinitely, although the current experiment has advantages that

its predecessors lacked (see McGarry and O'Leary, 2009). Even if it does not survive, the Agreement has a default option. The failure of power sharing will result in increased cooperation between the London and Dublin governments through the B-IGC, possibly combined with increased responsibilities for larger, more efficient local governments, particularly those prepared to accept power sharing. Even if future stability is not guaranteed, one of the Agreement's critics has pointed out that Northern Ireland is currently 'at its most stable…in a generation' (Shirlow, 2007).

In sum, it can be argued that asymmetry has delivered institutions that have accommodated the aspirations of the Scots and Welsh for autonomy, while bringing peace and consensus government to Northern Ireland. The new institutions are also broadly in line with what the English want, and adjustments can be made to accommodate concerns relating to the West Lothian Question. While the new asymmetric institutions do not guarantee unity or stability, the onus is on supporters of symmetry to show that their alternatives would do better.

Conclusion

The comparative utility of the United Kingdom's experience with asymmetric autonomy may be doubted. The United Kingdom is, after all, a prosperous, liberal and mature democracy, quite different from many states faced with demands from national communities for autonomy, such as Georgia, Moldova or Sri Lanka. However, its experience is broadly relevant in a number of respects. First, the United Kingdom is similar to several of these other states in that it has an 'asymmetric political sociology'. Its dominant national community, the English, do not seek autonomy and is largely content to be governed from the centre, but it has nationalities that seek different degrees of autonomy. In none of these states are symmetric prescriptions likely to be fruitful, whether based on centralisation or decentralisation. As in the United Kingdom, centralisation is unlikely to satisfy the nationalities, while far-reaching symmetric decentralisation is unlikely to be preferred by the dominant community. The United Kingdom's experience suggests that asymmetry is the only way to give each of the state's communities what they want.

Second, the United Kingdom confronted a militant secessionist movement in Northern Ireland, which, in the view of British army commanders, could not be defeated militarily. The conflict has been ended, with no immediate prospect of resumption, by an Agreement precisely tailored to the needs of the region, rather than by 'one size fits all' arrangements applied throughout the United Kingdom. The Agreement won the support of Irish nationalists, including militant Irish republicans because it involved substantive, guaranteed autonomy, as well as cross-border links with the Irish republic, internal power sharing, demilitarisation and security sector reforms. A similarly tailored approach, involving substantive and guaranteed autonomy, is likely

to be fruitful in other secessionist struggles, such as the *de facto* secessionist regions of Abkhazia, South Ossetia, Tamil Eelam, TransNistria and Nagorno-Karabakh.

Third, the challenges facing the United Kingdom include those of a region, Northern Ireland, that has its own serious internal divisions, comparable to several other regions that are candidates for autonomy, including Tamil Eelam, Darfur and Mindanao. Here, the United Kingdom's experience offers lessons on both inappropriate and appropriate prescriptions. From 1921–72, the United Kingdom allowed Northern Ireland to be governed under the same majoritarian institutions that were used at Westminster to govern the rest of the state. This insistence on institutional (executive) symmetry across the United Kingdom had ultimately disastrous consequences, including, by the late 1960s, the complete alienation of the region's minority, the abolition of the regional government and a low-level insurgency that lasted for a quarter century. This experience is often used, unfairly, to support the argument that autonomy arrangements in heterogeneous regions are inevitably unstable and unfair to local minorities, and that the proper alternative is centralisation. Centralisation, however, was not a realistic option for Northern Ireland, and has not worked in the other regions either. In the Belfast Agreement, the UK government agreed, by contrast, to a form of autonomy, based on consociational power sharing, that protected the interests of the Irish nationalist minority. These institutions have played an important role in bringing peace. In the case of internally divided regions, the United Kingdom's experience suggests that autonomy is not equivalent to the oppression of regional minorities, as long as it is remembered that the design of the region's internal political institutions are as vital as autonomy itself.

On the other hand, the willingness of the United Kingdom to support asymmetry does not mean that other states will be similarly forthcoming. There are a number of factors that distinguish the United Kingdom. Its preparedness to accept asymmetric autonomy has been partly shaped by its history as a union state, which has involved a long tradition of asymmetric arrangements within a centralised political order. Its situation may be more analogous, therefore, to other union states, such as Spain, than to states with a Jacobin unitary tradition, including Turkey and Moldova. The latter are more likely to resist asymmetric autonomy, or any kind of autonomy for nationalities.

The United Kingdom's willingness to embrace asymmetric autonomy can partly be explained by the dominance of England and by its independent history and identity. England's strong sense of identity means that the English do not fear the break-up of the state in the way that Castilians do, or English Canadians in what has been called the 'Rest of Canada', i.e. Canada outside Quebec. A lack of concern about secession helps to explain the state's preparedness to facilitate both asymmetry and autonomy.

The United Kingdom's willingness to accommodate its minorities may also have been facilitated by the fact that it exists in a benign neighbourhood,

one which is tightly integrated into prestigious supranational organisations, like the EU and the North Atlantic Treaty Organization (NATO). As an independent Scotland would be likely to join the EU and NATO, England would not be shut out of its current economic markets, or faced by a military threat on its frontier. This makes secession, and hence autonomy, less threatening than it would otherwise be. Autonomy for the Celtic parts of the United Kingdom is also unthreatening because none of these regions is the satellite of, or aspires to join, a threatening neighbour.

These various factors make the United Kingdom's situation unlike several of the cases where asymmetric autonomy is currently being mooted. Either Moldova, Georgia, Cyprus and Sri Lanka do not have union–state traditions or their dominant peoples do not have separate institutional histories and identities. They also exist in threatening neighbourhoods, where autonomy for their nationalities is seen as strengthening the position of neighbouring enemy states. This helps to account for the protracted stalemate in each of these states. Even if asymmetric autonomy makes sense for each of them, it does not follow that sense will prevail.

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7
From Devolution to Secession: The Case of Catalonia

Montserrat Guibernau

Introduction

Do all nationalisms seek their own state? Are all nationalisms separatist? To date the main Catalan nationalist parties have not been secessionist, as also the Galician, Welsh and Corsican. Even in Scotland popular support for independence is recent, linked to the Scottish National Party (SNP) governing Scotland since 2007. Should these non-secessionist 'nationalisms' be redefined as 'regionalisms'? Surely not, since all these parties seek the protection, enhancement and development of the 'nations' they claim to represent.

Not all nationalisms pursue secessionist aims; not all nations have a state of their own. Some scholars consider that nationalism without states is synonymous with 'regionalism' or 'federalism' and could never be referred to as 'nationalism'. I challenge this approach, which fails to make clear-cut distinctions between the concepts of nation, state and nationalism.

The state is a political institution. According to Max Weber the state is 'a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory' (Weber, 1958, p. 78). By 'nation', I refer to a human group conscious of forming a community, sharing a common culture, attached to a clearly demarcated territory, having a common past and a common project for the future and claiming the right to decide upon its political destiny. This definition attributes five dimensions to the nation: psychological, cultural, territorial, political and historical (Guibernau, 1999, p. 14). Not all nations have a state of their own and not all states are coextensive with a nation.

Nationalism is both a sentiment and a political ideology. It refers to the sentiment of belonging to a community – the nation – whose members identify with a culture, history and territory, and have the will to decide upon their common political destiny. It also refers to the political ideology whose objective is to guarantee the nation's 'right to decide' upon its political destiny. While some nations are happy to maintain a status as a region,

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a province, a member of a federation or an autonomous community, others demand the right to independence. Within a single nation, we find different views concerning the nation's future including its political status.

Nationalism, the state and the nation

Most so-called nation states are not constituted by a single nation, which is coextensive with the state; internal diversity is the rule (Guibernau, 1996, p. 47). The nations or parts of nations included within a single state do not share similar levels of national awareness. Nations are not unique and fixed, and throughout history it is possible to record the disintegration of some nations which have played a prominent role during a particular period and the creation of new ones.

The state tends to absorb functions and to resist delegating any it considers integral to its sovereignty. The argument for state centralisation is closely connected to the idea of state sovereignty understood as full control over all matters concerning the social, political and economic life of its citizens. The increasing number of international organisations, multinational companies, supranational social movements and the technical sophistication of modern warfare are currently challenging this classic concept of state sovereignty.

In addition to these external pressures the state is also under pressure to modify its centralised form and acknowledge the existence of territorially circumscribed cultural communities within its territory, which show varying degrees of national self-consciousness while advancing different socio-political demands. The origin of most of these national communities pre-dates the formation of the nation state.

The nationalism of nations without states emerges as a socio-political movement that defends the right of peoples to decide upon their own political destiny. Some forms of nationalism endorse democratic means in this quest; others employ violence, just as some states are democratic and others violent and authoritarian. However, all these movements share the will to develop their specific culture and language, whenever it exists, and to be represented in the institutions that decide upon their future. The number of people involved in the movement indicates the strength of such nationalism; a massive following is more difficult to ignore if the state wants to maintain democratic credibility.

Romanticism and the nation: the preservation of language and culture

The primary conviction of Romantic nationalism is that culture, a particular way of life and important social institutions are essentially formed and shaped by the nation. They are expressions of a unitary force, which is usually referred to as the soul, mind or spirit of a people. Alongside an interest in language, there emerges a specific interest in history – the glorious past, myths of origin, customs and ways of life and ideas of a particular people.

Contemporary forms of nationalism in nations without states also invoke the pre-eminence of the nation and the value of its culture and language. However, while Romantic nationalism provided justifications for cultural claims on behalf of small nations, this contemporary form extends beyond the defence of minority languages and cultures to make claims for political autonomy which may or may not involve independence.

According to Nipperdey, Romantic nationalism was a reaction to intellectual hegemony based on the Enlightenment, as well as to the imperial uniformity threatened by the expansion of Napoleonic France (Nipperdey, 1983). In an analogous way, the nationalism of nations without states is a response to the perceived threat of cultural homogenisation associated with contemporary globalisation. Americanisation of culture and the rise of English as a dominant language have prompted reactions in various nation states as well as in nations without states. They are all concerned about their cultures being replaced by an increasingly pervasive global culture, which permeates public life and even intrudes into the private sphere.

Romantic nationalism contributed to the creation of new nation states, such as Germany and Italy. It also achieved prominence among the peoples of Western Europe who lived in nation states, as was the case with the French; and had a profound effect in nations without states such as Catalonia where it favoured the revitalisation of their vernacular cultures and languages. The nationalism of nations without states could contribute to the generation of new political institutions and structures formed by representatives of smaller nations, which prove to be economically viable and possess a strong sense of national identity. For Catalan, Scottish, Welsh and Basque people, among many other European national minorities, the prospect of a Europe of the Regions stands as a pioneering political structure within which they could enjoy a substantial degree of autonomy. A Europe of the Regions would encourage regional development and allow for sub-state cultures to be preserved.

Romanticism sought to protect relatively untouched traditions at a time when cultural isolation was still possible. In the global age, interdependence and awareness of difference have resulted in the creation of complex societies engaged in a constant dialogue, competition and confrontation with other cultures. They welcome some new influences, they reject others, they clash and constantly adapt to a changing socio-political environment. Only cultures with sufficient power and resources are equipped to survive in the global age.

The quest for political recognition

There are many studies of political violence, which highlight the pernicious character of nationalism (Hobsbawm, 1990; Kedourie, 1960). However, a significant number of democratic nationalisms have emerged in nations lacking a state of their own such as Catalonia, Quebec and Scotland, and this type of nationalism merits specific and separate analysis.[1]

This democratic nationalism currently employs two major sets of arguments to legitimise its claims. First, there are political arguments stemming from the French and American Revolutions. They concern the endorsement of democracy and popular sovereignty as providers of legitimacy to the modern state. Second, there is a cultural argument based on the arguments of Romantic nationalism.

Recognition by the state in the first instance and then by the international community are the foremost goals of nations without states, since most of them are included within the boundaries of states, which are reluctant or bluntly opposed to acknowledge their status as nations. The main objective of nearly all state elites in the last 200 years has been to generate a single nation within the state's territory in order to legitimise their power over an originally culturally and linguistically heterogeneous population.

The democratic nationalism of nations without states is often confronted with the ignorance, neglect or hostility of the state, which tends to resist pressure to grant self-determination to national minorities living within its borders. In most cases, nations without states possess memories of a past in which they enjoyed autonomous institutions. The processes which brought that time to an end are not free from conflict and experiences of oppression. Berlin defines nationalism as 'the result of wounds inflicted by someone or something, on the natural feelings of a society, or of artificial barriers to its normal development' (Berlin, 1996, p. 248). In the nationalist discourses of nations without states, which are currently seeking recognition, it is common to find a detailed description of grievances against the state. In Berlin's words: 'Nationalism springs, as often as not, from a wounded or outraged sense of human dignity, the desire for recognition' (Berlin, 1996, p. 252).

The democratic nationalism of nations without states seeks to halt a relationship with the state which is often marked by (1) political dependence (sometimes involving also economic dependence); (2) limited or frequently inexistent access to power and resources; (3) restricted or even absent financial powers; (4) a constant effort aimed at the cultural and linguistic homogenisation of the nation; and (5) in many cases, a restrained capacity to develop and promote one's own culture and language. Nations without states claim the right to be recognised as political actors and to have a voice in international *fora* such as the EU and the UN.

The citizens of nations without states often feel dissatisfied concerning their present situation. They tend to regard the state within which they are included as 'alien', as an 'obstruction' to the development of their nation or as a 'burden' which takes a great deal of their resources while providing insufficient benefits. The articulation of such feelings generates the emergence of nationalist movements with differing political aims ranging from devolution and autonomy to secession and independence. Such movements are based upon the denunciation of an unsatisfactory situation related to

economic, social, political or security matters stemming from the relationship between the state and its national minority/ies. The particular nature of the state, which differs in each case, determines the status of the national minority, while the strength of the minority's nationalist movement heavily influences a possible reshaping of its relationship with the state. In what follows I focus on the case of Catalonia.

Nationalism without states: different political scenarios

Cultural recognition, political autonomy and federation are three possible political responses to the nationalism of nations without states. All presuppose the acceptance of democracy and the readiness of the state to accept internal differences. I will consider regionalisation, devolution and decentralisation as either variations within cultural recognition or political autonomy depending upon each case.

Cultural recognition

The acknowledgement of certain cultural traits as specific characteristics of a territorially based national minority which the state may refer to as 'region', 'province', or *département* stands as a 'soft' option in the state's process of recognising its internal diversity. Cultural recognition presupposes the existence of a unitary state, which recognises only one nation, and promotes a common language and culture through more or less efficient national education and media systems. Internal differences is not perceived as a threat to the state's integrity; rather, they are incorporated into the state's culture.

Cultural recognition seems to work wherever national minorities have a weak sense of identity, or are unwilling to or prevented from articulating social and political movements in defence of their specificity. There are three main reasons for such a weak sense of identity: (1) a successful assimilation programme implemented by the state resulting in a considerable degree of integration of the national minority (e.g., the homogenisation of French Catalans, Bretons and Occitans and of the Welsh) (Sahlins, 1989; Weber, 1979); (2) repression, whether or not using physical force, of a national minority over a substantial period[2]; and; (3) historical accident such as needing to find a new monarch outside the nation[3] or a high level of either immigration or emigration (as in the case of South Wales which received a large contingent of English-speaking immigrants resulting in the weakening of Welsh identity and a much more limited use of the Welsh language than in the North); or upward mobility and assimilation of the kind which arguably made Lowland Scots into political Britons.

Cultural recognition involves little, if any, decentralisation. The state may appoint a special representative to distribute state subsidies and administer the region.

There are no regional elections, sovereignty is exercised at a single level and is not devolved. The integrity of the state is well preserved since the possibility of internal challenges is ruled out by a firm unitary state structure. Cultural recognition usually involves the protection and promotion of the regional language, if there is one, and culture. For instance, the two major achievements of Welsh nationalism prior to devolution were the 1967 Welsh Language Act promoting the use and teaching of Welsh and the establishment of the Welsh language TV station, S4C –Sianel Pedwar Cymru – or Channel Four Wales which had to confront, among other things, the opposition of the then Prime Minister Margaret Thatcher (Davies, 1995; Rawlings, 2003).

Political autonomy

Political autonomy refers to a situation in which a unitary state implements some decentralisation by devolving certain powers and functions to all or some of its constituent regions, provinces or nations – the terminology varies. Key concepts connected with political autonomy include subsidiarity, decentralisation and devolution. They all refer to the transformation of a unitary state into a political institution able to delegate some functions while still retaining key powers and functions.

Political autonomy requires constitutional amendments and clear principles concerning the allocation of resources to the devolved authorities. Sovereignty is not shared, as in a federation. Instead, the state transfers functions to newly created regional institutions with or without a historical past, which remain accountable to the state. Matters relating to culture and welfare seem to be easier to transfer than those concerning taxation, security and international relations. There is no fixed rule of how much power might be devolved when autonomy is conferred upon regions.

For instance, Catalonia shares Scotland's history of having been independent until the early eighteenth century and subsequently integrated within a larger state. A separate sense of identity based on a particular culture, which in the case of Catalonia includes a distinct language, and the desire for political recognition have been at the heart of Catalan and Scottish nationalist demands. Both nationalisms experienced significant cultural developments in the eighteenth and the nineteenth centuries. A shift towards claims for greater political recognition became significant during the twentieth century. Currently, the major difference between the two concerns the status of Catalonia as a net contributor to the Spanish Coffers which contrasts with Scotland's' economic dependence on the British state.

Federation

Federation is constitutionally established and guaranteed. It offers the greatest degree of autonomy that a nation without a state can enjoy without

becoming independent. However, there are major differences between different federal structures. Graham Smith argues that federalism is both a political ideology and an institutional arrangement (Smith, 1995, p. 4). Federation exemplifies a particular articulation of political power within a clearly demarcated territory, which is informed by the desire to acknowledge, protect and encourage diversity within, while at the same time maintaining the territorial integrity of the state. The constituent units of a federation are not mere local authorities subordinate to a dominant central power (Burgess and Gagnon, 1993, p. 5). As Elazar puts it, 'the very essence of federation as a particular form of union is self-rule plus shared rule' (Elazar, 1987, p. 12).

As Quebec shows, there is often a tension between some members of the federation's desire to expand the scope of self-determination and the state's wish to increase central control. The intensity of such tension depends a great deal on the reasons which prompted the creation of the federation. Ideally, federations should be the outcome of an agreement between independent states which freely decide to start a federal project which allows them to shoulder common interests jointly while dealing separately with their domestic affairs.

In Switzerland, most cantons are linguistically fairly homogeneous. Ethnonationalism within language communities is discouraged by primary powers being vested in the cantons. Political parties do not correspond to language regions and the voting behaviour of cantons on constitutional issues is primarily associated with socio-political patterns rather than language. A further cross-cutting cleavage in Switzerland derives from the division between Protestants and Catholics (Koller, 2003).

Quite often, however, federations arise from the pressure exerted by territorially circumscribed ethnic groups that are dissatisfied with the treatment they receive by the unitary state containing them, and have enough power to force its transformation. This being the case in Belgium where a strong Flemish nationalist movement, which initially displayed a cultural character, progressively developed a political agenda. Pressure for change resulted in the transformation of Belgium – once a unitary state – into a federation to accommodate Flemish nationalist demands. The country evolved into a federal structure through five state reforms (1970–2001). Currently it is not clear whether the Belgian federation will withstand mounting nationalist pressure or finally break-up. In other cases, federations are not the result of pressure from below, but are created from above, as with the Soviet Union and India.

An exception is the regionalisation of the German political system and the role of the *Länder*. Here federalism today does not reflect a society divided by significant ethnic, social, cultural or religious tension; rather, it is designed to reduce the power of the central government and guarantee a stable democracy (Gunlicks, 1989). This explains the greater emphasis which the German Basic Law places on the sharing of powers, responsibilities and

resources compared to the Constitution of the United States, which stipulates a separation of powers between the federation and the states. In Germany, federal and *Länder* governments are forced to collaborate by a system of joint policymaking or 'interlocking politics'. The cultural or historical basis of the *Länder* is weak due to the vicissitudes of German history throughout which the territorial patchwork was in constant flux. Benz emphasises the role of the two World Wars in overturning the territorial boundaries of the state and its parts. He writes, 'After the Second World War, the regional structures of the German state were re-established in a territorial setting primarily defined by the artificially created occupation zones. The *Länder* that formed the Federal Republic after 1949, as well as those which existed in the German Democratic Republic (GDR) until 1952 and which were re-established in 1990, were for the most part pragmatic creations of the Allies and lacked traditions' (Benz, 1998, pp. 111–129, 113). Cultural regions exist but they are more fiction than reality from a political point of view since the *Länder* do not coincide with them, except in a very few cases like Bavaria. Thus federation is employed not only to protect and promote a diversity of nations or ethnic groups but also to promote the interest of territories turned into 'regions' by the state or external powers.

The success of federal systems is not to be measured in terms of the elimination of social conflicts but, instead, in their capacity to regulate and manage such conflicts (Burgess and Gagnon, 1993, p. 18). Federations seek to resolve conflict through democratic means, by encouraging tolerance and respect for ethnic, national and cultural diversity. This is why successful federations cannot be the result of force or an imposition from above.

To prevent disintegration, federations need to combine a strong but minimal federal government with a genuine policy of decentralisation and respect for its members. Decisions need to be taken collectively and the relations between the federal state and its constituents clearly established in a constitution sanctioned by all. A state may adopt some federal elements, but it cannot be referred to as a federation unless the federal principle is stated in its constitution. Once a federation is established, in principle, all its members hold symmetric rights and duties.

The Case of Catalonia

The historical roots of contemporary nationalism

Until the mid-eighteen century Catalonia enjoyed a good deal of autonomy. The union with Aragon in 1137 recognised separate political identities including their territorial integrity, laws, institutions and rulers. This was enshrined in the Catalan *Usatges* of 1150 whose very title (the uses and established customs and practices) demonstrates that the laws the document proclaimed had already been in existence for a long time. During the thirteenth and fourteenth centuries Catalonia built up a powerful

Mediterranean empire of a primarily commercial character. When Martin the Humane (Martí l'Humà) died without a successor in 1410, Fernando de Antequera (Fernando I) from the Castilian family of the Trastámara was elected to the throne (Compromise of Casp, 1412).

The joint rule of Isabel, Queen of Castile, and Fernando, King of the Crown of Aragon, referred to as Reyes Católicos, over their territories from 1479, placed two very different nations under the same monarchs (Elliott, 1963, p. 7). Thus, apart from sharing common sovereigns, neither Castile nor the Crown of Aragon underwent any radical institutional alteration. However, Castile soon came to overshadow the other territories. A radical change in the Castilian policy towards Catalonia took place when Philip IV appointed the Count Duke of Olivares as chief minister in March 1621. His objective was to create a powerful absolutist state. In 1640, the increasing tension between Castile and Catalonia reached its climax in the Revolt of the Reapers, treated by scholars of Catalan history as one of the first nationalist revolutions in Europe (Elliott, 1963, p. 45; Vilar, 1989, pp. 217ff).

In the Spanish War of Succession, Catalonia supported the Austrians against the Bourbon claimant Philip V. The Treaty of Utrecht (1713) confirmed Philip V as King of Spain. After a massive Franco-Spanish attack that followed a *siège* of 14 months, Barcelona surrendered on 11 September 1714. Philip V ordered the dissolution of Catalan political institutions and a regime of occupation. Catalan was forbidden and Castilian (Spanish) was proclaimed as the official language, although the majority of the population could not understand it.

The industrialisation of Catalonia and the Basque country generated a scenario in which the most economically developed parts of the state were politically subject to an anachronistic and backwards Castile.[4] By the end of the nineteenth century and influenced by German Romanticism, the *Renaixença* – a movement for national and cultural renaissance – prompted demands for Catalan autonomy, first in the form of regionalism and later in demands for a federal state. Catalan nationalism did not emerge as a unified phenomenon. Rather, diverse political ideologies and cultural influences gave rise to different types of nationalism, from the conservative nationalism of Balmes, to the federalism of Pi y Margall, the Catholic nationalism of Torres i Bages, or the Catalan Marxism of Andreu Nin, among many others (Balcells, 1996). Only in the early twentieth century did a pro-independence Catalan nationalist party manage to obtain significant electoral support (Esquerra Republicana de Catalunya, i.e., Catalan Republican Left).

Catalonia enjoyed some autonomy under the administrative government of the Mancomunitat (1913–1923). This was halted in 1923 by the *coup d'état* of Miguel Primo de Rivera. Autonomy was granted again during the II Spanish Republic – *Generalitat* (1931–1938) – and abolished by General Francisco Franco's decree of 5 April 1938 after the *coup d'état* of 1936 which initiated the Spanish Civil War (1936–1939). After almost 40 years of Franco's

dictatorship, Catalonia recovered its autonomous government, Generalitat, in 1977 and sanctioned a new Statute of Autonomy in 1979. The president of the Catalan Government in exile, Josep Tarradellas, returned from France (1977). Jordi Pujol, leader of the Convergence and Union coalition (*Convergència i Unió* or Convergence and Union; CiU), became the first president of the Generalitat after the first democratic Catalan election (1980).

The rise of modern Catalan nationalism

Franco's *coup d'état* against the legitimate government of the II Spanish Republic (18 July 1936) and his subsequent victory after the Civil War (1936–1939) led to the suppression of Catalan political institutions, the banning of the Catalan language and the proscription of all the symbolic elements of Catalan identity, from the flag (the *senyera*) to the national anthem (*Els Segadors*) (Benet, 1973; Guibernau, 2004).

After the Civil War, the most important representatives of the democratic political parties banned by the regime went into exile, were imprisoned or executed. The authoritarian state designed by Franco did not accept dissent, and used brute power in relation to the historical nations included within its territory. The regime's aim was to annihilate them as nations.

In February 1939, the institutions of the *Generalitat* went into exile.[5] In 1940 the Gestapo arrested the President of the Generalitat, Lluís Companys, and handed him over to the Spanish authorities. In Madrid, he was interrogated and tortured, and subsequently sent to Barcelona, where he was court-martialled and executed in Montjuïc castle on 15 October 1940.

The allied countries did not take any action to overthrow the Francoist dictatorship, with the exception of two UN resolutions (Díaz Esculíes, 1991, pp. 129–135). The first (12 December 1946) recommended withdrawing ambassadors from Spain, and the second (17 November 1947) denounced the Franco regime because it had been created with the collaboration of the Axis powers. The disappointment of the Catalan resistance emphasised the political discrepancies between the firm defenders of the re-establishment of the Republic – ERC (Esquerra Republicana de Catalunya or Catalonia's Republican Left) and the PSUC (Partit Socialista Unificat de Catalunya or Unified Socialist Party of Catalonia) – and those who proposed beginning a provisional period of reflection to discuss the future organisation of the state and the status of Catalonia (de Riquer and Culla, 1989, p. 153). The threat of a foreign intervention to restore democracy in Spain evaporated and it was not long before Franco received economic support from the United States (1951) and signed the Concordat with the Vatican (1953).

From 1959, with the awareness that the future of Francoism was guaranteed, a widening gap between most of Catalan society and the regime emerged. Only those members of the bourgeoisie who had renounced their national identity to protect their status and defend their class interests were still satisfied (Riera, 1998; Aracil et al., 1999; Cabana, 2000). In this new

stage, the homogenising policies imposed by the dictatorship encountered the opposition of those who wanted to recover democracy and protect Catalan identity. As a threatened national minority, the Catalans devised several kinds of counter-strategies aimed at rejecting the uniformity dictated by the regime.

Armed struggle did not take root among the anti-Franco opposition in Catalonia, which preferred using non-violent tactics. The only exception was the maquis, approximately 12,000 armed men who operated mainly in the Pyrenees and were active primarily in the 1950s (Sánchez Agustí, 1999).

Cultural resistance, that is, the use of all kinds of symbols of Catalan identity in both the public and the private spheres, evolved from the performance of isolated risky actions to the achievement of numerous activities enlisting mass support (Fabré, Huertas and Ribas, 1978; Colomines, 1999; Carbonell, 1999; Raguer, 1999). Resistance actions culminated on 11 September 1977, when 1 million demonstrators demanded a Statute of Autonomy for Catalonia. Franco had died in 1975 and shortly afterwards an overwhelming majority voted 'yes' in a referendum about whether to initiate or not a political reform in Spain. The referendum was led by the then Prime Minister Adolfo Suarez and it turned out to be the first step towards the Spanish transition to democracy. The Catalans, through this display of strength, manifested their outright rejection of a simple administrative decentralisation of the state and demanded political autonomy.

On 7 November 1971 about 300 people representing different political, social and professional sectors of Catalonia founded the Assembly of Catalonia, a clandestine organisation that soon became the broadest and most important unitary Catalan movement since the Civil War. No similar unitary movement, in view of its scope and its relevance, was created in any other part of Spain. The Assembly, initially founded by the socialists and, in particular, the communists, received the economic support of the group led by Jordi Pujol (president of the Catalan Government 1980–2003), which subsequently joined it (Balcells, 1996). The MSC (Catalonia's Socialist Movement) and the PSUC won the support of significant sectors of the working class and of a high number of Castilian-speaking immigrants. They all voiced the need to bring together democracy, left-wing policies and autonomy for Catalonia.

The mobilising action of the Assembly continued until the first democratic parliamentary election held on 15 June 1977. The unity of the democratic front was now replaced by competing 'images' of Catalonia; including its status within Spain. Jordi Pujol was elected as president of Catalonia in 1980; he was re-elected and governed the country until 2003, when he decided not to stand for office. Pujol led the CiU, a social-democratic nationalist party, and played a key role in building Catalan institutions, language and culture after 40 years of repression.

Radical political change was initiated after the 16 November 2003 Catalan election when the new Socialist Party of Catalonia (PSC), involving the old PSC, along with the Spanish Socialist Workers Party (PSOE), the Catalan Republican Left (ERC) and the Initiative for Catalonia-Greens (ICV) formed the government, under the leadership of Pasqual Maragall and ended 23 years of CiU's government at the Generalitat.[6] Once in power, the most distinctive initiative of Maragall was to propound the drafting of a new Statute of Autonomy for Catalonia; an updated and much more ambitious statute than that of 1979. However, this turned out to be a much more complicated business than initially expected. Conflict and differences emerged among Catalan political forces, which finally managed to agree on a draft to be submitted to the Spanish Parliament where Rodriguez Zapatero, the socialist Primer Minister of Spain, had the majority. A socialist prime minister in Spain and a socialist president of Catalonia might have been expected to smoothe out the sanctioning of the new Statute. But this was not the case; on the contrary, profound discrepancies emerged between Maragall and some sectors of the PSOE, also strong within his own party, when the PSC federated with the PSOE. The process culminating in the referendum that voted 'yes' to the 2006 Statute was far too long and acrimonious and Catalan society, its political forces and Maragall himself were to pay for it.

Instability generated by differences among members of the three-party government coalition ruling Catalonia since December 2003 forced early elections. Maragall was prevented from standing as leader by the pro-PSOE sector in his own party and his successor, José Montilla, became president of the Generalitat after repeating the coalition with ERC and ICV. Again, the election had been won by the CiU – 12 more seats in the Catalan Parliament than the second party (the PSC), but they were outnumbered by the three-party coalition formed by the PSC, the ERC and the ICV.

Does devolution foster separatism?

Most Western nation states have embraced federal political structures or some type of devolution. Nevertheless, the rationale for devolution varies according to each particular case and the aims and mechanisms to implement it are also specific to each country. Geographical, economic, administrative, cultural and historical reasons are invoked by states when they decide on the boundaries of their regions (Keating, 1999, pp. 71–86; Seymour, 2004).

If we were to consider Britain, Canada and Spain as states containing significant national minorities which have been recognised and enjoy varying degrees of devolution and federation in the case of Canada, we could infer that devolution models are specific to each particular case and that these tend to evolve throughout time. This confirms the idea that democracy as a dialogic process has a dynamic nature.

Such an assertion leads us to consider whether devolution may foster secessionism or, on the contrary, it could be understood as a stable and satisfactory solution to the political aspirations of national minorities endowed with their own sense of common ethnicity and ethnohistory.

Up to the present time, neither Britain, Canada or Spain has witnessed the rise of a separatist movement sufficiently robust to force the independence of the region it claims to represent, although secessionism has grown substantially in Scotland, currently ruled by a pro-independence political party (the SNP) who has promised to hold a referendum on Scottish independence in 2014. While in Catalonia, support for the 'right to decide' movement, a cross-party social movement in favour of self-determination, is gaining addicts, support for independence remains constant at around 20 per cent.

So far and in spite of substantial support for Quebec, Catalan and Scottish nationalism, all these movements seem to have been somehow accommodated through the device of particular devolution structures, which, so far, have prevented secession and weakened pro-independence claims. Hence, the main nationalist political parties within these countries do not stand for outright independence; rather, they advocate greater devolution or some form of 'qualified independence' such as the 'sovereignty and partnership' model defended by some Quebeckers. As Keating argues, 'Autonomy is no longer a question of establishing a state, or using it to pursue a strategy of economic autarky. Rather it involves the creation of a national project, mobilization around it and an ability to engage in policy making in a complex and interdependent world' (Keating, 2001, p. 64). Therefore an independent Quebec would be reliant on the rest of North America. It would have to negotiate its place within the North American Free Trade Agreement (NAFTA) and 'in face of the USA and Canada it would be more of a rule-taker than a rule maker, having to accept rules made elsewhere' (Keating, 2001, p. 134).

Should we then conclude that devolution acts as an antidote against secession? And if so, why? Secession entails national self-determination and sovereignty. This is, it empowers the people to decide upon their political destiny by drawing up their own laws and constructing their political institutions and national identity. At the same time, a newly created state, to function as such, requires the international recognition of its status as an equal partner by the international community of nation states. There is a strong reluctance on the part of Western nation states to contemplate the possibility of new states emerging out of the break-up of their own territories.

Western nation states feel threatened by the ghost of secession and are strongly opposed to altering their territorial boundaries. They are also aware that a single successful secessionist movement leading to the constitution of a new nation state, as was the case in the former USSR after 1989, could trigger a domino effect and foster the intensification of nationalist movements seeking independence elsewhere. Should we then infer that

hostility towards secession has prompted nation states to regard devolution as a remedial strategy to placate the nationalist demands of some of their national minorities? A cautious response is needed since each case study is subject to specific nuances. For while Catalans and Scots sustain long-standing demands for self-determination, Quebeckers are in favour of greater devolution and sovereignty and partnership. In Wales devolution was rejected in the 1979 Referendum and supported by a narrow majority in 1997.

Pro-independence nationalist movements in Catalonia are in favour of maintaining some kind of partnership with Spain and membership of the EU. In Quebec the pro-independence movement supports 'sovereignty and partnership' with Canada. In Scotland and Wales secessionist political parties are also in favour of EU membership. A radically different scenario corresponds to Northern Ireland where the two successive suspensions of the Stormont Assembly since its re-establishment in 1997 reveal the profound difficulties of power-sharing within a divided society marked by many years of hatred, discrimination and violence.

Up to the present time and after considering the cases of Britain, Canada and Spain, I believe that I am justified in arguing that devolution does not fully satisfy self-determination claims but it tends to weaken them. It locks regional movements and political parties into a dynamic which involves an almost permanent tension with the central state; uneasiness is generally grounded on ongoing demands for greater autonomy and recognition. Yet, devolution also enables national minorities to enjoy substantial powers. I list some of the outcomes of devolution which help explain its deterrent power against secession.

1) The creation of devolved institutions contributes to the dynamism of civil society for two main reasons. First, it requires the reallocation of resources to facilitate discrete policies and regional budget planning. These processes, in turn, revitalise civil society, encouraging local and regional initiatives including cultural, economic and social projects. Second, among other endeavours, devolved institutions tend to promote regional businesses, restore and preserve the regional heritage and create regional cultural networks such as universities, museums and libraries. None of this is necessarily inconsistent with sustaining an overall national identity.
2) The constitution of devolved institutions invariably tends to foster a sense of common regional identity where it did not previously exist – as is the case in the non-historical Spanish autonomous communities. In those cases where a pre-existing sense of identity is already in place, devolved institutions display a tendency to strengthen it by promoting the culture, language, art and selected meaningful landscapes of the area in question. But while some of these elements originate in the local cultures, others

are the products of recent invention. Whether indigenous or invented, old or new, cultural distinctiveness both generates and restores regional collective identities.

3) In Spain, devolution has resulted in the emergence of dual identities, regional and national. The promotion of regional identity seems to be compatible with holding an overall national identity, as is the case in Catalonia.
4) Devolution bolsters the sentiment of forming a community at the regional level. Citizens are enabled to participate in decisions concerning their common political destiny and usually feel better represented by their own regional leaders. Furthermore, projects to promote the culture, economy and well-being of the region's citizens tend to increase individual self-esteem. This is not to ignore the disappointment that some may sense when faced with insufficiently funded devolution settlements, self-interested politicians, occasional corruption and a growing bureaucracy.
5) Devolution fosters the construction and consolidation of a regional political elite enjoying various degrees of power and prestige (Guibernau, 2000, pp. 1003–1004). A substantial degree of devolution when accompanied by sufficient – or even moderately generous – resources automatically raises the profile of regional political elites. Members of the regional government, key figures among the indigenous bourgeoisie – if there is one – and some distinguished intellectuals dominate the elite. Moreover, selected political leaders representing various tendencies are almost invariably incorporated within the regional elite. For the most part, devolution tames secessionist leaders by enticing them with doses of political power and prestige. There is a certain 'comfort' arising from devolution, which tends to turn secessionist aims into never-ending demands for greater power and recognition.
6) Devolution favours the strengthening of democracy as it brings decision-making closer to the people. Problems are identified, analysed and resolved where they emerge. Regional politicians usually have greater awareness of the needs and aspirations of their electorates.

Why is secessionism currently growing in Catalonia?

According to a recent Spanish Council of Sociological Research (CIS) opinion poll, 35 per cent of Catalans are in favour of 'the Spanish state granting greater autonomy to its autonomous communities', and 22.5 per cent look favourably a the 'state acknowledging the right of the autonomous communities to become independent states' (CIS, 2008, question 8). The secessionist option is supported by around 35 per cent of the population, while roughly 45 per cent oppose it and around 20 per cent remain undecided (Belzunces, 2008). These data reflect a significant shift among the Catalan electorate,

which traditionally has been granting a much lower support to independence. In May 2010, an opinion poll by the Noxa Institute (published in *La Vanguardia*) found that 37 per cent were in favour of independence, while 41 per cent stood against it. According to the *El Periódico* newspaper, in June 2010, 48 per cent supported independence while 35 per cent stood against it (El Periodico, 2010). According to a published Noxa Institute opinion poll carried out in July 2010 – after the sentence of the Spanish High Court of Justice on the 2006 Catalan Statute of Autonomy – those in favour of independence scored 47 per cent and those against 36 per cent (La Vanguardia, 2010).

What are the reasons behind such a decisive boost in support of independence? By and large, the Catalan nationalist movement has never been overwhelmingly secessionist. Since its inception in the late nineteenth century, secession from Spain has not been the objective of its leaders; instead, different alternative options – ranging from federation to political autonomy – have embodied the main Catalan nationalist projects. Secession only attained substantial support after the Catalan Republican Left Party succeeded in placing itself as the third political force in the Catalan Parliament after the 2003 election. Having said so, I would like to move on and examine the reasons why secessionism is currently growing in Catalonia.

In my view, the roots of a growing support for secession and the 'right to decide' originated in the second Prime Minister Aznar's mandate (2000–2004). Since March 2000, the landslide victory of the Popular Party (*Partido Popular* or PP) meant that they no longer required the support of CiU or of any other political party to attain the majority in the Spanish Parliament. While CiU's support was needed in Madrid, the PP had adopted a sympathetic attitude versus Catalan claims. Soon after the 2000 election, sympathy and understanding were somehow replaced by a neo-centralist political discourse charged with conservative overtones. During its mandate, the PP was dismissive of claims for greater autonomy for the historical nationalities and adopted an arrogant attitude towards former political allies. It is during this period that the ERC achieved greater electoral support and became the third force in the Catalan Parliament.

In Catalonia, growing discontent with the Aznar government guaranteed strong support to Rodriguez Zapatero (leader of the PSOE) in the 2004 election (just two days after the Madrid terrorist attack which left over 200 people dead). In Catalonia, many received the PSOE's victory with joy; most people regarded Rodriguez Zapatero as sympathetic to Catalan political aspirations within Spain.

However, Pasqual Maragall's project of a new Statute of Autonomy for Catalonia became more and more uncomfortable to Rodriguez Zapatero and the PSOE. Was Catalonia becoming too ambitious? As a result the draft Statute of Autonomy sanctioned by 90 per cent of the Catalan Parliament

(30 September 2005) was significantly downgraded in order to obtain a positive vote in the Spanish Parliament. This created strong tensions and discontent in Catalonia which were to be further accentuated by three main events which, in my view, have contributed to an unprecedented rise in support for an independent Catalonia.

A growing gap between Catalan contributions to Spanish Coffers and state funding received by Catalonia has been increasing on a yearly basis

According to a report published by the Catalan Government (Generalitat) and presented by the Catalan Minister for the Economy, Antoni Castells, the Catalan deficit has become more acute since José L. Rodriguez Zapatero became Prime Minister (*Avui*, 10 July 2008). In 2005, it amounted to 16.735 million euros or 9.8 of Catalan GDP. Catalonia has accumulated a 15 per cent deficit which stands in the way of its development and seriously hampers its economic leadership. Currently, after contributing to the Spanish solidarity fund, Catalonia is worst off than those autonomous communities receiving funding from the Spanish solidarity fund and finds itself below average in per capita spending (*El Pais*, 11 May 2008) (Ministerio de economia y hacienda, 2008, p. 19). A growing imbalance between contributions to the Spanish Treasury and state investment in Catalonia has become a hindrance for the advancement of Catalonia. Such an anomalous imbalance also affects Baleares, Madrid and Valencia.

After a long and acrimonious process, a novel financial arrangement for Catalonia was agreed in August 2009 – more than a year later than the date initially stipulated in the 2006 Statute of Autonomy. The Catalan government formed by the Socialists (PSC (PSC–PSOE)), the ERC and the Greens (ICV) supported the agreement while the opposition led by the CiU showed a much more critical and nuanced view, arguing that the new agreement does not fulfil the provisions included in the 2006 Statute of Autonomy.

Massive increase in immigration

There has been a massive increase in immigration primarily from Latin America, North Africa and Easter Europe. As a result, the population of Catalonia has been augmented to over 1 million people in about eight years. In 2000, Catalonia had 181, 590 registered immigrants, which made up 2.9 per cent of the country's population. In 2010 the number had risen to 1,091,433, representing a little less than 15 per cent of the total population (Source *Idescat*, 30.12.2010). It is true that immigration has contributed to dynamise the economy, thus contributing to a rise in GDP; however, it is also true that integrating such a large immigrant contingent opens up some new challenges regarding social cohesion, including cultural and linguistics issues. Catalonia's limited devolved powers and resources concerning

immigration adds up to the social and political challenges faced by the country.

The Spanish High Court of Justice diminishies and modifies the 2006 Statute of Autonomy of Catalonia

Initially, the Catalan Parliament ratified the Statute of Autonomy – 90 per cent of MPs voted in favour. The Statute was subsequently revised and modified by the Spanish Parliament in Madrid to fully comply with the Constitution and it was finally sanctioned in a referendum (18 June 2006) by the Catalan people.

In spite of a long and difficult process leading to its endorsement, the 2006 Statute of Autonomy was challenged in the Spanish High Court of Justice – arguing that some of its content did not comply with the Spanish Constitution. Legal proceedings challenging 51.5 per cent of the Statute's text were taken by the PP. In addition, the Spanish Ombudsman decided to challenge 48 per cent of the text, and the government of the autonomous communities of Murcia, La Rioja, Aragon, Valencia and the Balearic Islands (two of them ruled by the PSOE and three by the PP) also initiated legal proceedings against the Statute (Homs, 2008, p. 205). After four years, the Spanish High Court finally issued its verdict on 28 June 2010.

The main points to be removed from the 2006 Statute of Autonomy and declared non-constitutional according to the Spanish High Court of Justice are:

1) The Spanish Constitution acknowledges the existence of a single Spanish nation within Spain. The sentence accepts the use of the term 'nation' applied to Catalonia as legitimate only if this is interpreted as void of juridical value. The term ought to be strictly employed in an ideological, historical or cultural context. The sentence emphasises quite a few times the 'indissoluble unity of Spain' as stated in the Constitution.
2) The expression 'national symbols' employed in the 2006 Statute of Autonomy are to be interpreted as 'symbols of a nationality', so that there is no contradiction with the symbols of the Spanish nation, the only ones to be properly considered as 'national'.
3) It is deemed unconstitutional to confer a preferential status to the Catalan language within the Catalan Public Administration. Catalan is confirmed in its status as a preferential language in the Catalan education system. Students have the duty and the right to speak and write in Catalan as well as Castilian (Spanish) after completing their compulsory education.
4) The duty to know Catalan in Catalonia is not considered as having the same meaning/importance/legal status as the duty to know Castilian (Spanish) included in the Spanish Constitution.

5) The verdict rejects the attempt of the 2006 Statute of Autonomy to protect matters already devolved to the Catalan autonomous government from the constant legislation of the Spanish State concerning these areas. The State appeals to the need to guarantee uniformity within the State to justify its measures.
6) The 2006 Statute sought to eliminate the Catalan economic deficit generated out of a constant imbalance between Catalan contributions to Spanish coffers and state funding received by Catalonia. To avoid that, the Statute established that Catalonia's contribution to the so-called 'solidarity fund' should be made conditional to a similar fiscal effort being made by other Autonomous Communities (CCAA). With this measure, Catalonia was trying to avoid that a CCAA in need of a high percentage of funds from the 'solidarity fund' could afford to lower down its taxes as an electoral strategy, while the other CCAAs had to pay for its needs. This has been deemed non-constitutional.
7) The 2006 Statute established that the Catalan Government could set up its own taxes at the local level. This has been deemed non-constitutional.
8) The 2006 Catalan Statute of Autonomy established that the level of state investment in Catalonia should be on a level with the Catalan Gross Domestic Product (GDP) contribution to the overall Spanish GDP. The Spanish High Court accepts this, if and only if this does not entail an 'economic privilege' for Catalonia. However, the Spanish High Court view does not have 'binding effect for the State' (El Pais, 2010a).
9) Articles of the 2006 Statute setting up a Catalan Council of Justice; establishing the exclusivity of the Catalan Ombudsman concerning the Catalan Administration; and the status and role of the president of the Catalan High Court of Justice, as the representative of the judicial power in Catalonia nominated by the King, have all been deemed unconstitutional (El Pais, 2010b).

The reaction to the Spanish High Court of Justice was immediate. On 10 July 2010, over 1 million people demonstrated in Barcelona. Their motto was 'We are a nation. We decide'. The demonstration was led by José Montilla, president of the Catalan Generalitat.

Conclusion

In Catalonia, the enthusiasm for democracy associated with the initial phase of the Spanish transition to democracy has given rise to a new sociopolitical environment defined by disenchantment. Lack of trust in politicians and institutional politics has alienated a rising number of citizens. Currently, the word 'democracy' seems to have lost the golden aura associated with it during the Francoist years when the opposition to the regime was strong.

It is true that Spain is a democratic state – democratic procedures are in place and Catalonia has witnessed the re-establishment of its old autonomous government (Generalitat) and institutions. Catalan is taught in primary and secondary schools and it has a substantial presence in public life and the media. However, Catalans long for greater self-government.

The difficult and frustrating process leading to the challenging of the 2006 Statute at the Spanish High Court of Justice and the subsequent sentence issued in last June have substantially contributed to the idea that the autonomous system is not prepared to accommodate Catalan political demands. In 2009, Catalonia had already witnessed civil society organising a series of non-binding symbolic referendums on whether the country should become independent. This was unprecedented, in particular since Catalan nationalism had never been a primarily secessionist movement. On 13 December 2009, with the support of 15,000 volunteers, 166 Catalan cities held referendums on Catalonia's independence. The referendums were not legally binding, but they contained an important symbolic meaning. Participation amounted to 27 per cent, and 94.71 per cent voted in favour of Catalonia's independence.

The Spanish High Court of Justice sentence has cut back 14 articles and modified about 30 more articles of the 2006 Statute of Autonomy. The Catalan people have reacted by organising a 1 million people demonstration in Barcelona (10 July 2010). At the demonstration with the banner 'We are a nation. We decide', it was possible to see and hear many pro-independence slogans. This demonstration confirmed, once more, the Catalans' use of democratic peaceful means to promote their demands. It also managed to send a clear message of protest against cutting down an Statute of Autonomy supported by the Catalan Parliament, sanctioned by the Spanish Parliament and the Senate, accepted by the King and voted by Catalans on 18 June 2006. In this context, those voices arguing that the sentence represents the break-up of the constitutional agreement reached in 1978 to end the dictatorship and initiate the unequivocal path towards democracy are growing in number and strength.

At present it is uncertain how secessionist feelings will evolve in Catalonia, but the outcome of the Spanish High Court of Justice's sentence is bound to exercise a strong influence in the way in which Catalans perceive their political future and their relation with Spain. Frustration with devolution could surely turn into a reason for devolution to foster separatism.

Notes

1. Henceforth I will use the term democratic nationalism to refer to these nationalisms of nations without states.
2. For an account of the Kurdish case. see, Ignatieff, 1993; O'Ballance, 1996. For an account of the linguistic homogenisation of France and the consolidation of the nation state, see Citron, 1992.

3. Martin, the humane king of Aragon and count of Barcelona, died without a successor in 1410; Fernando de Antequera from the Castilian family of the Trastámara was elected to the throne (1412). This event signalled the end of the Catalan–Aragonese dynasty and resulted in the progressive weakening of the Crown of Aragon traditionally led by the Counts of Barcelona.
4. For an analysis of the process of industrialisation of Catalonia, see Vilar, 1977.
5. For a detailed version of the activities of the *Generalitat* in exile illustrated with key documents from that period, see Ferré, 1977.
6. At the election, the PSC involving the PSC–PSOE coalition along with the Citizens for Change (CpC) obtained 42 seats, corresponding to 31.17 per cent of the vote. Against all predictions, the CiU, with its new leader Artur Mas, managed to obtain 30.93 per cent of the vote, which corresponded to 46 seats. As well as the PSC, it had also lost 10 seats when compared to 1999. The key to political change in Catalonia was then in the hands of the ERC, which obtained a record 23 seats corresponding to 16.47 per cent of the vote. In the 1999 election, it had obtained 8.7 per cent of the vote corresponding to 12 seats. The ICV achieved a significant recovery, obtaining 9 seats (it had 5 previously), and the PP obtained 15 seats, 3 more than in 1999.

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8

Is There a Belgian Public Sphere? What the Case of a Federal Multilingual Country Can Contribute to the Debate on Transnational Public Spheres, and Vice Versa

Dave Sinardet

Introduction

The debate on democratic legitimacy of transnational forms of governance has resulted in growing academic interest regarding the possible emergence of transnational public spheres. In line with the basic premises of public sphere theory, many authors argue that the existence of such transnational public spheres is a necessary condition for the development of democratic participation on the increasing number of political decisions taken at a transnational level, which in turn is a necessary condition for the democratic legitimacy of these transnational political arenas. As potential carriers of such public spheres, mass media are considered as a crucial factor in this process.

More specifically, in the past few decades, a lot of attention was devoted to the question of the development of a European public sphere, as an important element to improve the EU's democratic legitimacy. Generally, this is conceptualised either as a pan-European public sphere, carried by pan-European media, or as the 'Europeanisation' of national public spheres, in the sense that national media feature the same EU actors and EU topics and report on them from a similar angle. Many consider the existence of merely national media, largely focused on a national context, as hindering the development of a European public sphere and thus also the democratisation of the EU. National media would not be adapted to the European political context in which they also operate.

This debate generally takes as premise the existence of national public spheres and national media systems. However, in federal countries – and more specifically their multilingual variants – this is not necessarily (entirely) the

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case and they can therefore be interesting points of comparison. Specifically, the Belgian situation can be very relevant for the ongoing debate on transnational public spheres. Indeed, Belgian federalism is characterised as bipolar and centrifugal, which is also reflected in its media system which is split up on a language basis. Dutch-speaking and French-speaking television broadcasters, for instance, have no structural ties and are legally embedded solely within their own language community. Consequently, an inadequacy and potential tension, similar to that between national media systems and the European context, exists between, on the one hand, 'community media', directed to and contributing to construct respectively a Dutch-speaking and a French-speaking public sphere, and, on the other hand, the Belgian context in which they also operate. One can expect this tension to be specifically palpable where the federal political level is concerned, comparable to the tension between the national public spheres of the different EU member states and the EU level.

It is on this relation between community media and federal politics and on what this means for the existence and functioning of a public sphere in Belgium that this chapter will focus. Departing from the conceptualisations of a European public sphere, we want to assess the situation for Belgium. Do community media in Belgium focus on the same federal political actors and topics? Do they discuss federal political issues within a similar framework or from a similar angle? Can we, in other words, speak of the existence of a Belgian public sphere? And, if not, what are the reasons for this? How can we relate the Belgian case to the larger European and transnational debate?

Indeed, looking at how media deal with this tension in a federal multilingual country such as Belgium can be relevant for the debate on the democratic legitimacy of transnational, multinational polities whose institutional designs and public spheres do not (entirely) overlap. Therefore, given the academic interest in this debate, it is surprising that research on the role of public spheres and media systems in such federal systems has remained largely inexistent. Similarly, it is also surprising that the often voiced concern on the lack of a European public sphere has never prompted interrogations on whether the situation in a country like Belgium would not be similarly problematic.

We first sketch the debate on the role of the public sphere in the democratic legitimacy of political systems, and more specifically in that of transnational polities such as the EU. We then depart from the premises in the literature and research on the European public sphere, for our research on the Belgian case. We end by discussing how we can interpret our results in light of the larger debate on European and transnational public spheres.

National public spheres and transnational decision-making

Many authors consider the existence of public spheres, a concept which was developed by Habermas (1962) within the framework of the modern

Westphalian (nation) state, as an integral part of democratisation of these states. As Fraser (2007, p 7) argues, the concept of the public sphere is to be situated in a normative political theory of democracy, in which it is conceived of as 'a space for the communicative generation of public opinion', assuring legitimacy of views by an inclusive and fair process. More precisely, according to this theory 'democracy requires the generation, through territorially bounded processes, of public communication conducted in the national language and relayed through the national media, of a body of national public opinion', which should 'reflect the general interest of the national citizenry concerning the organisation of their territorially bounded common life' (Fraser, 2007: 11). Making the link with political theory most explicit is the fact that the thus constituted public sphere must also make it possible to influence political decision-makers and to hold them accountable, to turn public opinion to political power (Eriksen, 2005: 342; Fraser, 2007, p. 11).

Media play a crucial role in this, as they are carriers of such public spheres. Indeed, the communicative public spaces they create are a necessary condition for the existence of a public sphere. Media are the instruments par excellence that can generate a common public debate, where the same issues can be discussed at the same time and under the same premises (Eriksen, 2005, p. 343). While the public sphere was tied to the emergence of modern mass media such as books and newspapers, according to Gripsrud (2007, pp. 480–3), broadcast television is of particular relevance, as in the past half a century it has been 'one of if not *the* most important institution in the national public spheres' through its provision of essential information, social coherence and a central common forum for the entire nation state.

However, recent years have witnessed the emergence and continuous gain of importance of new forms of governance which transcend the traditional realm of national democracy and are therefore often referred to as 'transnational governance', taking form in the emergence of transnational polities and institutions. While we are thus increasingly evolving towards an era of 'post-national democracy', public spheres have, however, largely remained national and have thus increasingly become inadequate to enable democratic debate and participation on the policies and politics that are relevant in today's world. Basically, the argument goes as follows: an always increasing number of social processes and political decisions take place at a transnational level, but meanwhile public information, debate and participation are still organised nationally, confined as they are to national public spheres. This can be defined as a democratic deficit and can be situated within the larger debate on the lack of democratic legitimacy of transnational institutions and the legitimacy crisis they are confronted with (Peters et al., 2005). This is why it is argued that in order for these transnational political systems to become more democratically legitimate, it is necessary for transnational public spheres to develop.

A European public sphere?

The debate on democratic legitimacy of transnational polities has certainly been most extensive concerning the EU. This is not surprising as through the continuous process of European integration of the past decades, the EU has gained an enormous influence on the lives of citizens of its member states. Many authors (e.g. Beetham & Lord, 1998, Scharpf, 1999, Bartolini & Hix, 2006, Hix, 2008, Magnette and Papadopoulos, 2008) consider that the EU suffers from a democratic deficit. Next to more institutional elements, such as a lack of parliamentary control (the European Parliament (EP) not having full legislative and control powers) and the lack of a real electoral contest on the EU level (in turn due to the absence of EU-wide parties and an electoral system based on national constituencies), an aspect addressed widely not only in academic literature but also by political commentators and not in the least by the EU itself is the lack of public participation. The 'White paper on European Communications Policy' issued by the European Commission (2006, p. 4) expresses concern on the fact that 'people feel remote from [...] the decision-making process and EU institutions' and that 'there is a sense of alienation from 'Brussels' and states that one of the reasons for this is 'the inadequate development of a "European public sphere" where the European debate can unfold'.

Therefore, the absence of a European public sphere can be considered as an important element of democratic deficit in itself. The question of whether a European public sphere is emerging in some form, whether its absence is problematic and what can be done about this has been discussed extensively in academic literature (e.g. Closa, 2001; Schmitter, 2001; Mercier, 2003, Eriksen, 2005; Koopmans, 2007; Fossum and Schlessinger, 2007), generally separately from the more institutional elements of democratic deficit mentioned above. As Fossum and Schlessinger (2007, p. 2) argue: 'Inasmuch as the Union actually might serve as an exemplar for the development of post-national democracy at the supranational level, surely such a process has to be rooted in the reshaping of the EU as an overarching communicative space (or spaces) that might function as a public sphere.' According to Habermas (2001), the existence of a European public sphere is the only way the democratic deficit can be eliminated.

The question is of course how we should imagine such a European public sphere. Generally, the literature conceptualises it either as a pan-European public sphere or as the result of the Europeanisation of national public spheres. If we look at how media could carry such a public sphere based on this conceptualisation, this could be either through pan-European media, available across the entire territory of the EU, or through Europeanisation of national media reporting. This Europeanisation can be operationalised in different ways, which generally include treatment of the same relevant EU topics and EU protagonists in national media of the EU countries

(cf. Machill, 2006), often also from the same angle or within the same framework (cf. Grundmann, 1996). Studies have also often focused on specific events or debates, such as European elections, the introduction of the euro or specific political debates (Machill, 2006, p. 69; Van de Steeg, 2006, Downey & Koenig, 2006).

Concerning the first conceptualisation, European-wide radio and television broadcasters and newspapers do exist, but either are organised by the European institutions themselves (Europe by Satellite) or can be considered as elitist (the French–German cultural television station *Arte, Euronews, European Voice, EUobserver,* etc.). They reach only a very small part of the European public and therefore do not contribute significantly to the formation of a public sphere involving the broad public. Political actors who participate in EU-level decision-making don't see these EU-wide mass media as the primary instruments through which to communicate with the European public. An important aspect in the lack of such pan-European media is the absence of a common language in the EU, as English cannot (yet) be considered the *lingua franca* of all social classes and all geographical areas in the EU.

However, it is also difficult to speak of a European public sphere originating through its second conceptualisation: the Europeanisation of national public spheres and consequently of national media reporting. From their study of national newspapers in five European countries, Peters et al. (2005) conclude that 'national public spheres are…quite resilient' to Europeanisation. Machill et al. (2006) conducted a meta-analysis of different smaller content analysis of reporting on the EU in the national media of a range of EU member states. The analysis shows that, while there are differences between countries, generally only a very small proportion of news reporting in national media concerns EU topics and EU protagonists, which leads to the conclusion that 'the much-discussed deficit in terms of democracy and public in the EU runs in parallel to a deficit in European media reporting' (Machill et al., 2006, p. 79). Moreover, the EU news that does reach national audiences is often nationalised, as journalists covering the EU often select topics or angles that relate to domestic political debates (Grundmann, 1999, pp. 136–7). While a number of other authors do find traces of Europeanisation of national media, often when studying specific cases such as the 'Haider case' (Van de Steeg, 2006) or the 'Berlusconi–Schultz case' (Downey & Koenig, 2006), most research rather seems to point in the opposite direction, even if much also depends on the criteria used to evaluate this Europeanisation.

However, the responsibility for this lack of Europeanisation of national media should not only be attributed to journalists, as EU political elites also seem to encourage this. National politicians who represent their member state in the different levels of the Council structure communicate their decisions primarily to national media. An example of this is how

press conferences are organised during meetings of the European Council (composed of heads of state and government leaders). All 'chiefs' address their national journalists during simultaneous press conferences in separate rooms. This allows all 27 of them to spin the joint decisions as 27 separate negotiation victories. Their aim, of course, is that their national mass media report this national victory 'at home'. Even the Commission – being the most 'European' institution of all – has opted for a differentiated (read nationalised) communication strategy in order to reach all the way down to the national publics. Spokespersons of the Commission 'adapt' information to the country they are briefing (Baisnée, 2007, pp. 494–5). This type of strategic behaviour does not stimulate but rather hampers the construction of a European public sphere, a project, nonetheless, officially very dear to the Commission.

A Belgian federal public sphere?

As argued, the concept of public sphere was developed within the framework of the Westphalian nation state. The argument that transnational polities like the EU cannot be considered democratically legitimate if transnational public spheres do not develop also starts from the premise that national public spheres are present in an unproblematic way in any given national context and consequently also that national media systems carrying these public spheres are in place in all those contexts. However, in the case of multilingual federal polities, this is not necessarily that simple. Because they are composed of different language regions or communities, they might not so much resemble classic unitary nation states, but rather deal with similar concerns regarding the formation of public opinion and the possibility for public participation as the EU or other transnational systems and therefore provide an interesting point of comparison to feed the debate on transnational public spheres. It is even peculiar how in the very extensive debate on this European public sphere, the situation of a federal multilingual polity like Belgium has almost never been taken into account. In turn, looking at Belgium from this perspective can also be relevant for the debate on democratic legitimacy of federal multilingual countries such as Belgium. Indeed, if we transpose the arguments used in this debate, which follow the basic tenets of public sphere theory, to the case of Belgium, a federal public sphere would be a necessary element to consider the Belgian federal state as democratically legitimate.

To assess the existence and functioning of a Belgian public sphere, we can draw inspiration from the conceptualisations of the European public sphere. We can establish straightaway that in contrast to the situation in most other classic West European states, we cannot speak of a Belgian federal public sphere in the first conceptualisation discussed above. Indeed, no pan-Belgian media of importance exist, certainly not with regard to television broadcasting, as broadcasters of both large language communities are

organised entirely autonomously. As for whether and how we can speak of the second conceptualisation of a public sphere in Belgium, which is comparable to the 'Europeanisation of national public spheres' and which we could redefine as the 'federalisation of the community public spheres', we have to analyse whether and how this inadequacy between community media and federal political institutions is transcended. This is precisely the aim of this chapter, where we will more specifically – and in line with the importance given to it by Gripsrud (2007) – look at television broadcasting.

It is not our intention to measure whether media in Belgium fulfill all the criteria that can be used to operationalise the concept of the public sphere as was conceived specifically by Habermas (1962). Rather, as argued, we draw inspiration from the conceptualisation used in most research on the 'Europeanisation' of national media reporting by looking at the degree of 'federalisation' of community media reporting in Belgium. Do Dutch-speaking and French-speaking media feature the same federal political actors and the same federal political topics? And are federal topics reported on from a similar perspective or rather from a community perspective? In other words, do television broadcasters in Belgium meet requirements deemed crucial for democracy in public sphere theory such as offering a communicative space for the generation of a federal public opinion and for holding accountable the federal political elite? Do they generate some form of public federal debate where the same issues can be discussed at the same time under the same premises? Before we answer these questions, it is necessary to detail some of the relevant characteristics of the federal system and the media system in Belgium.

Federalism and media in Belgium

The federal system

Since the 1960s the unitary Belgian state has been subject to a process of devolution that eventually led it to officially become a federal state in 1993. The resulting institutional landscape is very complex. Two overlapping types of federated entities were created: three territorially based regions (the Flemish, Walloon and Brussels region) and three language-based communities (the Flemish, French-speaking and German-speaking community). In the Brussels region, both the Flemish and French-speaking community also have legal authority. The borders of regions and communities have been based on those of the four language areas, through which language use is officially regulated: only the official language(s) can be used in administration, education and justice. Since 1963 the borders of these language areas have been fixed, through a linguistic border line. The system is thus based on territorial unilingualism (except in the Brussels region). However, some exceptions exist: 16 communes (of which 6 border the Brussels region) with significant linguistic minorities enjoy 'language facilities' which grant

inhabitants the right to communicate with the authorities or have primary school organised in a language other than the official language.

Notwithstanding the existence of three regions, three communities and four language areas, the federal dynamic in Belgium is largely bipolar, based on the two large communities of Dutch speakers (approximately 6 million) and French speakers (approximately 4 million). At the level of federal parliament and government, a number of consociational devices, obliging power sharing, were introduced in 1970: all MPs have to belong to either the Dutch or French language group, a number of 'special majority laws' can only be passed by a majority in both language groups (and an overall majority of two-thirds), an 'alarm bell procedure' protects one language group from being overruled by the other and linguistic parity is guaranteed by the council of ministers (i.e. the federal government with the exception of secretaries of state), whose decision is consensual (Lijphart, 1981; Deschouwer, 2009; Sinardet, 2010). At the level of the party system, Belgium is also a unique federation, as no national parties of importance exist; between 1968 and 1978 the three traditional parties split on a linguistic basis and new parties (greens, extreme right, etc.) also limited their action radius to one language community (Deschouwer, 2009).[1] At the level of the electoral system, for the Senate and the EP two electoral colleges were created and for the Chamber most electoral districts do not cross the borders of the regions. This all leads to a situation where federal elections can in fact be considered as 'community elections': 'community' parties compete amongst each other for 'community' voters by conducting 'community' campaigns. After election day, however, two 'community' election results are the basis to form one federal government (Sinardet, 2008).

Thus, the institutions of federal Belgium are both a product and a pacemaker of (political) identity construction: 'they created permanent boundaries that gave additional subjective meaning to cultural markers and/or territory in addition to favouring identity politics' (Lecours, 2001, p. 63). Although the Belgian system and practice of consociationalism and federalism was supposed to lead, amongst other objectives, to political pacification between the communities (Deschouwer 2009), the bipolar institutional characteristics are more incentives that instigate political conflict. Due to the way the party and electoral system is organised, parties only compete for votes within their own language community and therefore do not have any incentive to take into account or be accountable to voters of the other language group. This results in polarised positions on community issues and also leads to other political issues being framed in terms of a community division (cf. De Winter, 1993; Sinardet 2012). Institutional explanations can therefore largely account for the fact that community conflicts are much more salient among political elites than among the Belgian population (Hooghe, 2004). Indeed, public opinion research shows that

community issues generally score among the lowest as vote-determining issues for Dutch-speaking as well as French-speaking voters (Deschouwer and Sinardet, 2010). Also, the number of separatists remains limited to 9.4 per cent in the Flemish region and 3.84 per cent in the Walloon region (Swyngedouw and Rink, 2008; Frognier et al., 2008). Research on ethno-territorial identity feelings shows a majority of citizens still identify with Belgium and do not consider Flemish or Walloon/Francophone identity and Belgian identity to be mutually exclusive (Deschouwer and Sinardet, 2010).

The media system

The bipolarity of Belgium's political system is also reflected in its media system. Actually, evolutions in broadcasting precede and prefigure the more general federalisation process that followed (Antoine, 2000, p. 10; Erk, 2003, p. 213; Sinardet, 2007).

The 1960 broadcasting law split the unitary public broadcasting organisation NIR-INR (*Belgisch Nationaal Instituut voor Radio-Omroep / Institut National Belge de le Radiodiffusion*), which had existed since 1930 and had started television broadcasting since 1953, into two quasi-autonomous companies: BRT (*Belgische Radio en Televisie, Nederlandse uitzendingen*) and RTB (*Radiodiffusion-Télévision Belge, émissions françaises*). Having been granted a monopoly for their language community, their programmes were aimed specifically at, respectively, a Dutch-speaking and a French-speaking public. A third Institute of Common Services, established for technical matters, international broadcasts and so on, was gradually dismantled and it ceased into being in 1977. The split-up of public broadcasting was the first policy act which can be considered an implicit announcement of the existence of two large language communities in Belgium, something which would only be inscribed in the constitution ten years later.

However, already in 1953, the creation of a Dutch-language television channel within the still unitary NIR-INR had been considered by the Flemish catholic elite who ran it as an opportunity for Flemish nation building. Not only was this Flemish broadcaster aimed specifically at the Dutch-speaking part of the population, thus contributing to the construction of a Flemish 'imagined community' (Anderson, 1991), it also conducted an explicit policy aimed at the development and promotion of a Flemish identity and culture (Van den Bulck, 2001). This use of television in a nation-building project was, however, largely absent in the case of the francophone broadcaster (Sinardet, 2007).

When in 1970 the language communities were established and granted their own councils, they were largely given the control over radio and television as part of their cultural competencies (Antoine 2000, p. 12). Meanwhile, RTB became RTBF (*Radio–Télévision Belge de la Communauté Française*) and BRT transformed into VRT (*Vlaamse Radio en Televisie*).

The Dutch-speaking and French-speaking commercial broadcasters, VTM *(Vlaamse Televisie Maatschappij)* and RTL–TVI *(Radio Télévision Luxembourgeoise, Télévision Indépendante)*, that were introduced in the 1980s are also specifically aimed at one language community and do not have any structural ties.

As well as being unique for the absence of national political parties, Belgium is also quite unique as far as the absence of national media is concerned. While in Belgium there are no structural ties between the two public broadcasting companies, with the exception of the common central office building in Brussels, in other federal – also multilingual – countries, such as Switzerland, Canada and even Cyprus, public broadcasters of the different communities or other federated entities are part of the same national broadcasting company (Shaughnessy and Fuente Cobo, 1990, p. 42). For instance, the Swiss public broadcaster is divided into three regional subcompanies, transmitting programmes for the three major language regions.

Linked to this, and also internationally quite unique, is that in Belgium the agreement between the regional governments and the broadcasters, enumerating the obligations of the latter, only contains explicit references to stimulating the cultural identity of the concerned language community and none to the federal context. In most other federal countries, broadcasters are instructed to also disseminate national culture and stimulate national cohesion. For instance, the Swiss public broadcasters are expected to serve the interests of the country, reinforce national unity and comprehension and contribute to mutual understanding between the communities (Shaughnessy and Fuente Cobo, 1990, p. 40). The Canadian law on radio and television stipulates that media are an essential instrument 'pour le maintien et la valorisation de l'identité nationale et de la souveraineté culturelle' (Monière, 1999, p. 10). Public radio and television in Canada are also the exclusive competence of the federal state.

However, while Dutch-speaking and French-speaking media are entirely autonomous, legally embedded solely within their own language community, with no structural ties and catering only to the public of that language community, they, nevertheless, still function within a federal system, in which these communities are themselves embedded. A potential tension therefore exists between the French-speaking and Dutch-speaking public spheres that these media are carriers of and to which they are directed and the Belgian context in which they also operate. The political arena is one of the domains in which we can expect this tension to be specifically palpable, given the bipolar and polarised political system.

As argued above, it is that tension that we want to look into, by analysing the degree of 'federalisation' of community media. Surprisingly, the role of media in the Belgian federal system has not been the subject of many large-scale studies yet.

Data and methods

In line with research on the degree of 'Europeanisation' of national media reporting, which focuses on the presence and treatment of EU actors and issues in national media, we want to know whether and how community media in Belgium deal with federal political actors and federal political issues. More specifically, we analyse appearances of ministers of the federal government and candidates at federal elections, as well as coverage on the issue of Brussels–Halle–Vilvoorde (BHV).

For this purpose, we used a combination of quantitative (selection of actors, themes, etc.) and qualitative (metaphors, use of deixis, etc.) content analysis of TV news and current affairs programming from public and commercial Dutch- and French-speaking television stations. More precisely, we analysed news programmes, political debate programmes and electoral debates, broadcast on the four main television channels in Belgium: the two public broadcasters of each language community, the Dutch-speaking VRT and the French-speaking RTBF; and the two commercial broadcasters, the Dutch-speaking VTM and the French-speaking RTL–TVI.

For the analysis of federal actors, we selected the main and most watched news programmes of the day: broadcast at 19:00 on VRT, VTM and RTL–TVI and at 19:30 on RTBF. In total, we analysed 140 news broadcasts, 35 per channel, on the basis of five constructed weeks over the year 2003–04. We also analysed a sample of each of the channels' main weekly political debate programmes: *De Zevende Dag* (VRT), *Mise au Point* (RTBF), *Polspoel en Desmet* (VTM) and *Controverse* (RTL–TVI). Each last programme of the month from the same TV season was selected, which resulted in 40 (4 × 10) programmes. Finally, we also analysed the electoral debate programmes broadcast on the four main channels in the run-up to the federal elections of 2007, which came to a total of 42 electoral debates.

To analyse the issue of the electoral district of BHV, we used another sample of debate programmes. We limited this to *De zevende dag* and *Mise au point*, but included all broadcasts of the period of more than one year in 2004 and 2005 in which the issue was a subject of political debate. More precisely, all broadcasts from the moment when the first communes announced the boycotting of the European elections if BHV was not split until the moment when the federal government – after announcing that it did not reach an agreement on BHV – received the confidence of the parliament again were taken into account. We researched in which particular broadcasts of these programmes the issue of BHV was mentioned, through an examination of the written documents of the archive services of VRT and RTBF which contain a summary of these broadcasts. In total, the analysis contains 44 broadcasts of *De zevende dag* and 46 of *Mise au point*. The items on these programmes concerning BHV were studied using partially quantitative, partially qualitative content analysis, analysing in depth the arguments

used and positions taken, looking at the content as well as at the lexical level and examining both manifest and latent meanings in language use in the latter. Special attention was also given to rhetorical techniques.

Additionally, we also conducted qualitative interviews with programme makers and heads of information of the four concerned broadcasting networks to help us understand the dynamics behind what we found in the media content.

Community media and federal political actors

The members of the Belgian federal government are federal political actors par excellence. They are just as relevant for the public of both language communities as they decide on policies that affect the entire country. However, they also belong to a language group and to a political party which limits its action radius to one language community. The question is therefore whether media treat them as federal representatives or as representatives from a specific community, which obviously has consequences for whether viewers can be informed correctly about federal politics as can be expected in a genuine federal public sphere.

The federal government

Table 8.1 gives the speaking time for all members of the federal government in the news broadcasts and debate programmes. The federal prime minister, Guy Verhofstadt, is excluded from this analysis as he is officially language-neutral (or 'linguistically asexual', in vernacular speech) and attracts much media attention in his specific role as the official representative of the country at home and abroad. Moreover, in the period under analysis he was not taken into account to achieve linguistic parity in the council of ministers.[2]

As the news programmes were broadcast on the same days, one would expect the numbers of Dutch-speaking and French-speaking ministers featured to be roughly the same on the four channels. , As the federal government maintains linguistic parity and as linguistic equilibrium is generally also achieved in the importance of the portfolios, it would also seem logical that numbers for both would approximate 50%.[3] Obviously, not all of these competences are as newsworthy on a daily basis, but a representative sample over a long period should even out this variation.

Table 8.1, however, shows a quite different picture. The percentage of time allowed to French-speaking federal government members on Dutch-speaking news programmes amounts to less than one-fifth of the total speaking time of federal ministers. Similarly, the share of Dutch-speaking federal ministers on RTL also does not reach 20 per cent. The figures for RTBF are only slightly deviant, with almost 30 per cent speaking time for Dutch-speaking federal ministers. The debate programmes show a similar

Table 8.1 Federal government members according to language group, prime minister Verhofstadt excluded (per cent of speaking time)

	News				Debate			
	VRT	**VTM**	**RTBF**	**RTL**	**VRT**	**VTM**	**RTBF**	**RTL**
Dutch-speaking	80.1	81.9	29.3	18.8	88.9	100	24.6	62.7
French-speaking	19.9	18.1	70.7	81.2	11.1	0	75.4	37.3
N (# sec)	*633*	*597*	*832*	*830*	*4528*	*2258*	*3046*	*1944*

pattern, with the exception of RTL, but far-reaching conclusions are not possible here, the total number of federal government members in these broadcasts being too limited.[4]

One would think that language knowledge of the ministers plays a part in whether they are selected by the news broadcasters of the 'other' community. However, most (important) ministers in the government are more or less fluently bilingual, with a few exceptions in both language groups. Also, while language knowledge is a relevant factor for live programmes, such as political debates, this is not so for news programmes, where interviews are generally pre-recorded and can therefore easily be subtitled or dubbed.

To summarise, while federal ministers make policy and take governmental responsibility for the entire country, in the eyes of both Dutch-speaking and French-speaking television news the newsworthiness of federal ministers seems to depend on the language group they belong to. Additionally, this even applies to the prime minister (although we can obviously only research this in one direction). Indeed, while Verhofstadt is the most featured Dutch-speaking federal government member on the French-speaking news (on RTL–TVI, his speaking time amounting to the total of all other Dutch-speaking federal ministers), he still speaks substantially less than on the Dutch-speaking channels.

The minister of the budget and the minister of finance

This intriguing finding raises the question of how exactly national relevance of a federal minister can be matched with a newsworthiness that depends on his or her language group. When is a minister of the 'other' language group considered as relevant and when as irrelevant by TV news editors and journalists? Are issues where no minister of the own community is involved covered without the minister appearing or are these simply considered as irrelevant and not covered at all?

To find out, we focus more in detail on two federal ministers that are granted strikingly much speaking time on TV news in their 'own' community and strikingly little on that in the 'other': the Dutch-speaking minister of the budget Johan Vande Lanotte (14.1 and 26.2 per cent on VRT and VTM,

but only 4.6 and 6.1 per cent on RTBF and RTL) and the French-speaking federal minister of Finance Didier Reynders (12.5 and 17.4 per cent on RTBF and RTL, but only 0.9 and 0 per cent on VRT and VTM). They are also both vice prime ministers as well as bilingual; so factors such as political weight and language knowledge should not play a part.

Whenever one of the two ministers is granted speaking time on one of the four news broadcasts, the other news broadcasts of that day are screened to find out if and how the issue the minister is involved in is covered there.

Table 8.2 indicates that in many cases, items concerning the competence of one of the two ministers contain a reaction of that minister in the news broadcasts of his own language community and not in the others.

Particularly interesting in this respect are the four items relating to the budget (in bold), for which both ministers are responsible (the minister of finance being responsible for the receipts). In two cases, the government holds an official press conference on the budget, where both Vande Lanotte and Reynders are present (in one case, Verhofstadt is also present). On the Dutch-speaking news, only Vande Lanotte and Verhofstadt are interviewed (in one case also on a typical fiscal issue, which is Reynders' competence). On the French-speaking news, both are given speaking time. When no press conference is organised, journalists tend even more to ask their 'own' minister for a reaction (with the nuance that this is twice the case on Dutch-speaking news and never on RTL, which always interviews both ministers).

This pattern does not seem to follow from mere unconscious journalistic routines. French-speaking journalists tend to interview the minister of finance on the budget as he can 'integrate this in a more global and more political analysis linked to his francophone belonging' (Rosenblatt, 2007). The distribution of competences within the government often makes it possible to interview a minister of the 'own' community on other issues too. For instance, the connected departments of the interior and of justice are often divided among Dutch speakers and French speakers (Van Den Driessche, 2007). Even when there are no (partially) overlapping competence domains the tendency to address politicians of the 'own' community remains. When the minister of foreign affairs Louis Michel took up a post as European commissioner and was replaced by a Dutch-speaking colleague, French-speaking journalists still tended to interview Michel – whom they had better contacts with – when an important foreign affairs issue had to be commented on (Rosenblatt, 2007).

Table 8.2 also shows that a minister's language group not only influences whether he is selected to appear in the news, but also influences whether the news story that is connected to him appears. At different times, items concerning Reynders are only broadcast on the French-speaking news, although they do clearly have national relevance. An example is a story on the national employer's organisation severely condemning government plans to drastically increase taxation on company cars. At a press

Table 8.2 Speaking time for federal ministers Vande Lanotte and Reynders

		News			
		VRT	**VTM**	**RTBF**	**RTL**
08/09	*Pollution of the North Sea*	*0*	V	/	/
08/10	**Surplus on the budget '04**	**V**	/	**R**	**R + V**
08/10	Takeover of the National Post	V	V	V	/
27/11	Reaction of Reynders on article in 'Trends/Tendances'	/	/	R	R
27/11	New allocation for castle of Argenteuil	/	/	/	R
06/01	**Surplus on the budget '03**	**V**	/	**0**	**R + V**
16/01	'Super-council of ministers'	R	0	0	R
25/02	Pre-agreement with trade unions on reorganisation of National Railway	V	V	/	/
26/03	New location EU top-meetings starting from 2010	/	0	/	R
05/04	**Surplus on budget control**	**V**	**V**	**R + V**	**R + V**
05/05	More competences for security personnel of National Railway	V	V	0	0
15/05	Suicide as accusation of tax service	/	0	/	(R)
25/05	Election campaign: Vande Lanotte shaves his beard off	/	V	/	/
04/06	**Economic predictions of the National Bank**	**V**	**V**	**0**	**0**
04/06	Criticism of Durant on agreement on Biac	/	/	/	V

V = Vande Lanotte; R= Reynders.
0 = Item appears, without Vande Lanotte and Reynders.
/ = Item does not appear.

conference, Reynders denied any such plans and accused his administration of deliberately leaking this wrong information. The story was covered on both francophone news broadcasts, but not a word on it was there on the Dutch-speaking news.

Programme makers and information directors largely attribute the absence of federal ministers of the other language group to the reluctance of politicians themselves. It seems difficult to convince even perfectly bilingual prime ministers to address media of both communities. For some time, former prime minister Jean-Luc Dehaene (1992–99) refused interviews for French-speaking stations, while accepting those of their Dutch-speaking counterparts, while in his initial years, a reluctant Verhofstadt (1999–2007) also had to be pushed by his French-speaking spokesman to address French-speaking journalists. Also, by organising press conferences

with Dutch-speaking as well as French-speaking ministers, the federal government anticipates that journalists will want the quote of a politician of the own community, which reinforces the dynamic. Obviously, politicians also want to appear in the media of their own community, as they can then reach their electorate (Gerlache, 2006; Hellemans, 2006; Rosenblatt, 2007; Van Den Driessche, 2007).Still, the situation is certainly not the sole responsibility of politicians. While programme makers depend on politicians responding to their invitations to feature them in live debate programmes, this is not so much the case for news shows (certainly when the minister is present at a press conference). However, as we saw, the share of politicians of the other language group on news shows is also low. Also, when Dutch-speaking journalists are interested in French-speaking politicians, this often seems to be limited to a limited number of top-politicians (cf. Van Den Driessche, 2007). Obviously, this leads to a vicious circle where unknown politicians are not given much chance to get themselves known.

Federal elections

Finally, we also look at how community media deal with candidates at federal elections, by analysing appearances Dutch-speaking and French-speaking candidates featured in the electoral programming of the four broadcasters in the run up to the 2007 federal elections.

We can be very short about this: nearly all politicians featured on the programmes belong to the ‘own’ community. The only exception was one special broadcast – outside of the regular electoral programming – which staged a debate between the president of the Flemish regional government Yves Leterme and his Walloon counterpart Elio Di Rupo, broadcast simultaneously on VTM and RTL. However, rather than as a federal debate, this was framed as a confrontation between ‘Flanders’ and ‘Wallonia’. All the actual election debates that notably concern policies that *have* been conducted on the federal level during the preceding term and policies that *should* be conducted during the next term are thus held between politicians of the ‘own’ community.

This leads to a situation whereby policies of federal ministers that belong to the ‘other’ language group are discussed, and often attacked (by the opposition) but generally not defended as the ministers or representatives of their party are not present. For instance, the sometimes heated debates on federal policies such as justice and finance in the Dutch-speaking media are held without the participation of the incumbent ministers of justice and finance, or of other representatives of the parties that these ministers belong to. Also, the Flemish candidates for the post of prime minister in the 2007 election almost never debated or presented their political programme for the entire country in French-speaking media. In other words, federal elections are held without hardly any federal media debate.

Community media and federal political issues

Above, we already showed how federal political issues are sometimes not covered by TV news when they are linked to politicians of the 'other' language group. This is of course not the case with issues that are at the heart of political conflict at the federal level. However, the tension between community media and federal politics is also likely to be palpable here, and even more so concerning so-called 'community' issues. On the one hand, these are federal issues, on which Dutch-speaking and French-speaking politicians generally have diverging opinions. And while media are expected to provide objective information on political issues, their belonging to a single community in which a political consensus exists on the matter may influence their reporting. This would obviously make it impossible for viewers to be informed about all sides of the issue and for them to participate in a genuine federal public debate on this matter, as would be expected in a federal public sphere, where the same issues can be discussed at the same time under the same premises. This is why we want to look into the way the two public broadcasters deal with such a federal 'community' issue. Is it presented from a federal or rather from a Dutch-speaking/francophone viewpoint? To what extent do public broadcasters frame this issue within the political consensus of the own community, rather than take a more 'neutral' position which contrasts the different points of view? How is the issue described? Who is allowed to talk about it? Which politicians are invited to debate about it? With which arguments do journalists confront these politicians? Which rhetorical devices (such as metaphors, deictic references, etc.) are used? How is the viewpoint of the 'other' community represented?

Brussel–Halle–Vilvoorde versus Bruxelles–Hal–Vilvorde

To analyse this, we chose the issue of the split of the bilingual electoral district of BHV, a highly symbolic and controversial issue that has been at the heart of Belgian political community disputes for many years and has been at the heart of numerous political crises.

BHV was an electoral district, encompassing the officially bilingual region of Brussels as well as 35 communes of the officially unilingual Dutch region of Flanders. In the latter, an important minority – in a few cases a majority – of French speakers (most of them having left Brussels for its periphery) could vote for popular Brussels candidates of the French-speaking parties. This went against the linguistic territoriality principle defended by most Flemish political parties. Historically driven by the fight against 'frenchification' of Flanders, they wanted to split BHV. Most French-speaking parties, however, defended the personality principle and considered the francophones in Flanders as a minority that should be protected and therefore wanted the electoral link between francophones in Brussels and the periphery

to remain. Needless to say, on both sides electoral interests also play an important part.

While discussions on BHV dated from 1963, the problem came to the forefront due to a ruling of the Constitutional Court on the electoral reform voted by Verhofstadt I in 2002: the complex compromise found for BHV was considered as unconstitutional; CD&V–N-VA, the cartel of Flemish Christian democrats and nationalists, used the issue in the 2004 campaign for the regional elections, based on an erroneous interpretation of the ruling, which they claimed stipulated that BHV should be split (while other solutions were also possible). Party president Leterme declared that '5 minutes of political courage' were enough to split BHV. Indeed, electoral legislation could be voted with a simple majority of only Flemish MPs in the federal parliament. However, he omitted that francophone parties have constitutional protection mechanisms to react against such a unilateral Flemish vote, such as the 'alarm bell procedure' which would bring the issue back on the government which would undoubtedly fall if no solution would be found. In any case, a consensual decision would have to be found through negotiation. Francophone parties however stated that demands of Flemish parties did not oblige them to negotiate on the issue. Although the matter is of federal competence, the fact that BHV had to be split 'without delay' was inscribed in the regional coalition agreement, mostly under pressure from N-VA. This way, the Flemish coalition put pressure on the federal coalition to come up with a solution. During the first few months of 2005, in a quasi-crisis atmosphere the federal government tried to find a solution to BHV. In the end an agreement was almost reached but was rejected by the small Flemish-nationalist cartel partner of the Dutch-speaking socialists. Finally, the federal government agreed to disagree and put BHV 'in the freezer', thereby relegating the problem to the next federal coalition negotiations in 2007.

As explained above, to analyse the role of the media in this issue, we analyse political debate programmes on both public broadcasters: *De zevende dag* on VRT and *Mise au point* on RTBF.

Who debates on BHV?

The parameters within which the debate takes place are partially determined by which politicians are invited. We have already discussed how debates on federal issues often take place among politicians of only one community. More surprisingly, this is also true for debates on an issue such as BHV, which is all about a conflict between politicians of the two communities. There is a difference between the two programmes though: while on *Mise au point* the number of Dutch-speaking guests is substantially higher than average when BHV is debated on, amounting to 1 on 4; the share of French speakers on *De zevende dag* stays about the same, amounting to 1 on 14.

However, more unexpected is that the limited number of politicians participating in a programme on the other side of the language frontier are

Table 8.3 French-speaking politicians featured on *De zevende dag* and Dutch-speaking politicians featured on *Mise au point* (appearances on both programmes)

Politician		Date of appearance	
Language group	**Name and party affiliation**	**De zevende dag (VRT)**	**Mise au point (RTBF)**
French-speaking	Christian Van Eyken (MR-FDF)	25/04	0
		16/01	0
	Didier Reynders (MR)	23/01	10/10
		0	30/01
		0	15/05
	Elio Di Rupo (PS)	27/02	30/05
			19/09
	François-Xavier De Donnéa (MR)	08/05	0
Dutch-speaking	Jos Chabert (CD&V–N-VA)	0	16/05
	Guy Vanhengel (VLD)	0	16/05
	Pascal Smet (sp.a/spirit)	0	16/05
	Yves Leterme (CD&V–N-VA)	25/04	03/10
		16/05	0
		23/05	0
		05/09	0
		23/01	0
		06/03	0
	Guy Verhofstadt (VLD)	09/01	24/10
	Leo Tindemans (CD&V–N-VA)	08/05	20/02
	Willy Claes (sp.a/spirit)	0	20/02
	Roel Deseyn (CD&V–N-VA)	0	20/02
	Stijn Bex (sp.a/spirit)	0	20/02
	Pieter De Crem (CD&V–N-VA)	19/12	15/05
		16/01	0
		15/05	0
	Geert Lambert (sp.a-spirit)	15/05	15/05
	Sven Gatz (VLD)	0	15/05

often not those featured on their own side. Table 8.3 shows that only 2 out of 5 French-speaking politicians on *De zevende dag* are also featured on *Mise au point*, while of the 12 Dutch speakers appearing on *Mise au point*, only 5 could also be seen on *De zevende dag*. Dutch-speaking politicians featured on *Mise au point* are often backbenchers or from the Brussels region (in one RTBF debate, the three traditional Dutch-speaking parties were all represented by their ministers in the Brussels government), who rarely feature on Dutch-speaking television, where coverage on the Brussels region is generally very limited. The fact that they are the only Dutch-speaking politicians with an electoral interest to also reach the 'other' community certainly contributes to explaining their prominence in the French-speaking debate programmes. However, their more moderate stance is often greeted with suspicion from the presenter who tends to question their representativeness, delegitimising their discourse, often rather ironically, sometimes bordering on the condescending, such as in this address to Brussels ministers Vanhengel (VLD) and Chabert (CD&V):'Well, when we listen to you both, you are both from Brussels, we still have the impression that there's something of a double language, that your language is not exactly that of your party presidents. Are you not playing the enchanted flute for us, to make us fall asleep?' The remark on the party presidents is pertinent, because at the same time (and in the same broadcasting building), the then party president of CD&V, Yves Leterme indeed delivered a sensibly different message on BHV on *De zevende dag*. It is probably not a coincidence that CD&V chose two different politicians to represent its viewpoint on the two channels. Brussels minister Jos Chabert symbolises the tendency of (Dutch-speaking) political parties to adapt the choice of their representative to the Dutch-speaking or French-speaking character of the programme. Chabert seemed to be the 'permanent interlocutor for the French-speaking debates', as he was always the only one at CD&V who was free to come, even if programme makers often asked for other representatives (Rosenblatt, 2007). At one time, this is also made clear to the viewer in quite a blunt way: 'I want to make clear that we have obviously invited mister Leterme, but finally CD&V has sent us mister Chabert.'

What is said about BHV?

Next, we look more closely at the questions asked and the arguments invoked and discussed on both programmes. For this purpose, all questions asked by the journalists to politicians and all arguments used in the debates were transcribed and analysed.

The first striking finding is that the heart of the matter – should BHV be split or not? – is never the subject of a question when only politicians of the 'own' community are invited and only very rarely when politicians of both communities are in the studio. Rather, the debates start from a given premise, which is radically different on both programmes: the necessity

to split BHV is never questioned on *De zevende dag*, while the necessity to oppose a split is never questioned on *Mise au point*. In other words, on both programmes, the debate takes place within the parameters defined by the political consensus of the 'own' community. Interviewers always confront (the rare) invited politicians of the other community with the 'own' viewpoint, but never the other way round. On whether a split should be achieved or blocked, a reciprocity of perspectives (cf. Collins, 1998) exists between interviewers and politicians of the same community.

It is not that politicians of the 'own' community are never critically interrogated on the issue, but the critical questions always concern their strategy to achieve the split (on *De zevende dag*) or to block the split (on *Mise au point*). During a first period, one of the main questions is whether there can and will be negotiations on BHV. Here the initial consensus on both programmes is that this should not be the case, although for opposite reasons: because it should simply be split by a Flemish majority (on *De zevende dag*) or because there can simply be no split at all (on *Mise au point*). Politicians that indicate they might have to negotiate after all are confronted with their earlier statements on the matter that this cannot be the case. In a later period, when negotiations are started, attention switches to which concessions both sides will have to make, what 'price' will have to be paid. In *Mise au point* even Olivier Maingain of the radical francophone FDF was accused of retracting an earlier statement that there could not be any form of split of BHV. When he responds that the Flemish would have to pay a very high price – not the most moderate statement – the journalist asks him: 'So you are willing to abandon the 120,000 francophones of the periphery ?'Still, there are some exceptions to the rule that politicians are never confronted with the viewpoint of their colleagues on the other side of the language frontier. These occur when politicians of both communities are invited, which apparently widens the parameters of the debate and brings to the surface a concern for balance, causing a short breach in the consensus. However, when one analyses these instances more closely on the lexical level, it becomes clear they rather have the opposite effect and reinforce the consensus. In a debate on *Mise au point*, the presenter first asks a question to the Dutch-speaking politicians arguing from the francophone viewpoint: 'A very simple question, actually rather naive: why does it bother you so much that 120,000 francophones could vote in … in … in their language, namely in French? What is so unbearable about this for the Flemings?' When he turns to the French-speaking politicians, the presenter uses a similar technique: 'A naive question also, the way I have done for .. er … for the … for the Flemish: er … (a few seconds of silence) … : isn't it normal somehow, .. the demand of the Flemish who say: well, these francophones, after all, they are settled in Flanders, some since thirty years, they had the time to … integrate themselves, it is time at a certain moment that they understand that they are in Flanders.' Although the purport of both questions is comparable (confronting a politician of one

language group with the viewpoint of politicians from the other language group), the way they are asked differs on the lexical level, by which they ultimately carry a different meaning. When turning to the French speakers, the presenter seems to feel the need to justify his critical question by underlining that he did the same for 'the Flemish'. It is also asked in a more hesitating, almost insecure way, as the different moments of silence and 'ers' indicate. Words such as 'somehow' and 'after all', examples of 'hatching', add personal nuance to the statement. Remarkable is also the use of a 'shift in footing' (Goffman, 1981, p.128; Levinson 1998), a technique used regularly by television journalists to maintain a neutral position in (political) interviews (Clayman 1992, pp. 163–4). They will ascribe an opposite (and controversial) viewpoint to a third person to avoid the impression that it is their own. Here, the presenter ascribes the viewpoint that he puts before the French-speaking representative to 'the Flemish', while his question to the Dutch-speaking politicians is just asked without ascribing it to the francophones. This suggests that the presenter feels more need to distance himself when he voices a Dutch-speaking viewpoint. Finally, after his initial critical question to the French-speaking politicians, in all his next interventions, the presenter departs from the French-speaking perspective, while the further questions to the Flemish representatives remain on the same critical line, also departing from the French-speaking position, as the initial question. All of this suggests that the 'Flemish' question to the francophone politicians is mostly asked for form's sake, starting from a concern for journalistic objectivity and balance. On the (hidden) lexical level, however, the question is undermined.

A similar example can be found in a debate on *De zevende dag* with three Flemish politicians and one francophone. The opening question to one of the Flemish politicians also momentarily puts the 'Flemish' premise into question: 'Why is this so important? Why in the end does a Fleming care that his Francophone neighbor can vote for a Francophone list?' However, the importance of a split is not denied; rather, it is suggested that it is unclear and an informative question is asked. The question to the francophone representative is of a different nature: 'Mister Van Eyken, it is actually a reasonable demand, it seems to me, that indeed this state reform that was started up then, would now be finished. But you are against this.' The presenter uses the first person singular and thus seems to take a position. This can be considered as the opposite of a 'shift in footing' and goes a step further than in the case of *Mise au point*. By stating that in his opinion the demand is 'reasonable', the earlier critical question to the Flemish is undermined, and by adding 'but you are against this', Van Eyken's viewpoint is presented as unreasonable straightaway, which again, is not the case with the question to the Flemish representative.

Moreover, not only are viewpoints on BHV represented differently, but in some cases even factual elements differ.

On *De zevende dag*, politicians refer numerous times to the 'important ruling' of the Constitutional Court, generally adding that this demands a split of BHV. The then president of CD&V, Yves Leterme, even refers to it in each of his five statements on BHV and in one of those, he invokes it no less than four times. This much-discussed ruling, however, seems inexistent in the studios on the other side of the broadcasting building. On *Mise au point* it is only mentioned by Dutch-speaking politicians. However, this then directly leads to a reaction of the presenter, who states that there are other ways to execute the ruling than splitting BHV, even if the politician did not assert this. This rectification of Dutch-speaking politicians' statements is, however, never heard on *De zevende dag,* besides on the rare occasions that French-speaking politicians are invited.

A case in point is an interview on *De zevende dag* with French-speaking politician Christian Van Eyken, who is confronted with the ruling two times, to which he twice reacts by denying that it demands a split. During the debate among Flemish party presidents which directly follows that interview, the 'Flemish' interpretation of the ruling is mentioned numerous times, without any critical question on that interpretation. The 'French-speaking' argument is not heard again, until nine months later when a French-speaking politician is invited again. It is again Van Eyken; he again gives his interpretation of the ruling and it is again neglected.

To summarize, on *De zevende dag*, the incorrect statement that the ruling demands a split is repeated numerously and never denied. On *Mise au point*, the ruling – which is an important element in the issue, as it does prescribe that something has to be done about BHV – is never mentioned. The only exceptions to this occur when politicians of the other community are invited on the programmes. However, even then their arguments seem to bump into an invisible wall, preventing them from seeping through to the debate.

How is BHV talked about?

We also looked for discursive elements through which journalists position themselves in the debate, such as deictic references: words like 'we', 'us', 'them', 'our', 'theirs' and so on. As this type of language use entails the creation or reinforcement of the imagined community of national (in this case community) viewers and formulates a distinction between 'us' and 'them', Billig (1995: 106–9) sees it as a form of 'banal nationalism', as part of the media's role in national identity construction and the creation of boundaries. However, when used in the context of a political conflict such as BHV, the use of deictic references also implies (a reinforcement of) a positioning in the conflict. In this case it can be considered as making more explicit the consensus which, as we saw above, is implicitly prevalent in the debate programmes.

Deictic references are not used systematically, but can be found both on *Mise au point* and on *De zevende dag*, although more frequently on the latter,

where the frequency partly depends on the interviewer. The subject of the 'price to pay' particularly seems to inspire the use of deictic references. In one case, it even occurs in the official proposition at the start of a debate, to which politicians have to react: 'We will not pay a price for the split of BHV.' When the Flemish politicians avoid the question, the presenter repeats the question different times, still continuing the use of deictic references, for example, 'Yes ... ok right. And so we do not pay a price hè, Mr Somers?' In another broadcast, the interviewer formulates the question even more bluntly: 'And we of Flanders, we will not put anything against this which the francophones get. Or am I mistaken now?' A striking example in *Mise au point* is when the presenter, desperately attempting to make reluctant French-speaking politicians say which concessions of the Flemish parties they consider as a reasonable price for the split of BHV, tries to create a more informal atmosphere: 'This means that ... there is a price that we could hope for? What would that price be? Come on, we are by ourselves here. No woolly language.' Here not only a personal pronoun ('we'), but a demonstrative pronoun ('here') is also being used, which reinforces the deictic reference. But mostly the expression 'we are by ourselves here' while clearly ironic because of the public character of the debate, can also be interpreted as 'the Flemish' are not listening and 'we are among francophones'.

Demonstrative pronouns also occur on *De zevende dag*, such as in a quite remarkable opening question put to the French-speaking liberal François-Xavier De Donnéa: 'You have made propositions yourself in the Chamber to solve the problem, from a French-speaking ... er ... from a French-speaking viewpoint of course and you say we have to enlarge the region of Brussels if the Flemish absolutely want that split. How can you defend that here, yes, let's say in the hole of the lion, a proposition like that?' Probably unintentionally, the presenter represents the television studio as 'the hole of the lion', an expression which holds a double meaning in this context. First, it is a general expression in the Dutch language, which here implies that the broadcaster is not a neutral arbitrator in this political struggle, but rather a bastion where the 'other' party can only risk itself with fear for its own life. This is further reinforced by the reference in the expression to 'the lion', the 'national' symbol for Flanders.

Finally, deictic references are not only used to refer to the 'own' community (creating a 'we'), but also to the 'other' community (creating a 'them'), such as in this example: 'They will never get that hè. What they maybe will get though, what do you think of that, the right ... francophones then in those facility communes, ... to go and vote for francophones in Brussels.'

The use of deictic references which makes journalists take sides (and incites viewers to do the same) in the conflict takes an even stronger meaning when one looks at the types of language use with which the conflict itself is represented. One of these is the use of war metaphors. Besides the regular use of the word 'front' to refer to one of the two positions ('the Flemish front' and

'the francophone front'), among the expressions used are 'defending the francophones', 'the weakest link in the francophone camp', 'Flanders could bend', 'the Flemish do not retreat', 'the counterattack against the Flemish demands', 'annexation of Flemish territory', 'spearhead of the battle of the francophones in the periphery' and so on.

We can therefore conclude that media inscribe themselves in the political consensus of the 'own' community as well on the level of content as on the lexical level, the latter sometimes in quite a remarkable fashion. Indeed, while it would be unimaginable that in a debate between socialists and liberals, the journalist would suddenly refer to the socialists using words such as 'us' or 'we' and to the liberals with words such as 'them' or vice versa, this seems to go unnoticed when the debate is between Dutch speakers and French speakers.

Discussion and conclusion

Our analysis of the media's role in the Belgian federal system, embedded in the debate on media and the European public sphere, permits us to conclude that there is a lack not only of federal pan-Belgian media (comparable to the absence of pan-European media), but also of 'federalisation' of community media (comparable to the limited Europeanisation of national media).

The latter is reflected in how Dutch-speaking and French-speaking media cover federal actors, elections and issues. While the federal government in Belgium is based on linguistic parity and decisions of all of its ministers are relevant to the entire Belgian population, this is not reflected in media reporting: on Dutch-speaking TV news, 80 per cent of the federal ministers interviewed are Dutch-speaking, on French-speaking TV news, 70 to 80 per cent are French-speaking. The newsworthiness of a federal minister thus seems to depend on his or her belonging to a language group. Moreover, this is also true for issues that fall under the ministers' competences, as they are also less covered when the minister belongs to the 'other' language group. The Dutch-speaking and French-speaking public can therefore not be fully informed of the actions and policies of the federal government. When issues dividing politicians of the two large communities are concerned, Dutch-speaking and French-speaking viewers are even less informed in a way that allows them to form an opinion on the heart of the matter. On the controversial issue of the split of the electoral district of BHV, viewers can hardly witness the fundamental arguments of Dutch-speaking and French-speaking politicians being confronted with each other. Indeed, on most television debates, discussions take as premise the political consensus in their own community, which is sometimes reinforced by the use of deictic references. Politicians are almost never confronted with the position of 'the other side' but most often with strategic questions on whether and how they will defend the own position. Even factual elements are emphasised or omitted

depending on whether they fit or do not fit in the political consensus of that community. The lack of genuine federal debate on federal issues becomes even more striking during election time, as debates on federal elections are held exclusively between political representatives of the 'own' language community and thus without an important number of relevant political actors and parties, of which some will take office after the elections.

To summarize, a federal public debate, where the same actors can discuss the same issues at the same time and under the same premises is clearly not present. Therefore, as has been concluded for the EU before, we can also speak of the existence of a 'media reporting' or 'information' deficit for the Belgian case. Or in other words, if we cannot speak of a European public sphere, we can also not speak of a Belgian federal public sphere.

Of course, the comparison with the EU has to be made cautiously: while previous research has shown that in most national media attention for the EU as a whole is low, this is not really the case in Belgian community media with federal politics, of which at least the 'own' side is strongly covered. Additionally, while federal actors of the 'other' language community in Belgium are not featured very much, they are not as invisible as most European actors are in national media. This being said, our results show that other dynamics are largely similar, information on the federal level in Belgium clearly leaving much to be desired from the perspective of a well-functioning genuine public sphere. The question is which conclusions we can draw from these results, as well for the debate on transnational public spheres as for the case of Belgium.In fact, two quite opposite conclusions are possible. On the one hand, it can be argued that if the prerequisites for a genuine public sphere are not even met in a bilingual country such as Belgium, it is unreasonable to put similar demands on the EU for it the earn the quality label of democratic legitimacy. Because public theory is stuck in the model of the monolingual Westphalian nation-state, it would foster unrealistic expectations. The Belgian case would then incite us to profoundly rethink this theory for an increasingly multilingual and post-national world. Belgium could then be considered as a kind of precursor of the type of multilingual democracy that will increasingly become the norm and for which other democratic theories and demands might have to be developed.

On the other hand, if we do consider the assumptions of public sphere theory as valid for all types of political systems, including multilingual ones, and if we thus follow the assumptions of numerous authors in democratic theory arguing for the development of a European public sphere as a prerequisite to eliminate the democratic deficit of the EU, we can only conclude that Belgium faces a similar democratic deficit. Indeed, to paraphrase the diagnosis for the transnational level: in Belgium many social processes and political decisions still take place at a federal level, but public information, debate and participation are largely organised at a community level,

confined as they are to community public spheres. Belgium could then again be regarded as a potential laboratory for the EU, but in the search for ways out of the current situation. The question then becomes where these can be found. As main carriers of public spheres, media are seen as the instrument through which to stimulate their development. In the past, the EU has argued for and invested in the development of pan-European media and European media programs. Consequently, options that could be suggested for the Belgian case include the establishment of pan-Belgian media, the attribution of a competence on media to the federal level – additional to that of the communities – through which it could, for instance, support specific media initiatives that aim to create exchanges and/or collaborations between the community media. However, both for the EU and Belgium, these types of initiatives do not seem realistic today. Even less ambitious propositions for Belgium, such as organising federal political debates simultaneously on Dutch-speaking and French-speaking broadcasters or subtitling news programmes in the 'other' national language seem difficult to put in place, even though in the slipstream of the recent Belgian political crisis some have argued for this and broadcasting a subtitled version of the VRT news was actually done by the RTBF, be it only during a few weeks in the federal election campaign of 2010, not in a structural way. The fact that such 'remedies' do not stand much chance of realisation in the current political and institutional context suggests it is precisely this context we might have to look at. More importantly, other elements also make us focus on the institutional context.

Indeed, we also noted an influence of political behaviour on media reporting in Belgium, with Dutch-speaking and French-speaking federal ministers tending to communicate their decisions primarily to their 'own' media and often refusing to address media of the other community. Here again, we can see parallels with the EU. Quite comparable to how press conferences after European Council meetings are organised, press conferences of the federal government are often held by the prime minister, flanked by a Dutch-speaking as well as by a French-speaking minister, both of whom later cater for their own media. In other words, responsibility for the lack of European and Belgian public sphere cannot be exclusively attributed to journalists, but is clearly also encouraged by the behaviour of political elites.

This parallel behaviour can in turn be explained by institutional similarities between the EU and Belgium. EU politicians' communication strategies are national because their electorate also is. The EU does not have full-blown European parties, nor is there electoral competition organised at the EU level, as the election system is organised on a national basis. This turns European elections into the sum of 27 simultaneous national elections. Or rather 28, given that in Belgium, European elections, but also federal elections can be seen as simultaneous community elections for largely the same

reasons: Belgium has no federal parties and most electoral districts do not cross the language border. Because politicians only address voters of their own community, they are also less inclined to show interest for media of the 'other' community. It is not just the lack of information and public debate that poses a problem on the level of accountability, it is the organisation of the party system and electoral system that causes federal ministers to only be accountable to the public of one of the two communities. The heart of the democratic deficit lies there. It influences politicians and journalists in their mutual relations: media need politicians that are relevant to their audience, politicians need media that are relevant to their electorate. This contributes to the lack of a genuine federal public sphere which further reinforces the democratic deficit. Looking for 'remedies' solely in media reform, amounts to focusing too much on the symptoms and not enough on the structural causes behind the public sphere diagnose in Belgium and the EU. If there is a key to a further development of European and Belgian public spheres, it is more likely to lie in institutional reform. It is beyond the scope of this chapter to discuss which institutional changes could contribute to allow the emergence of such public spheres. However, here again, we can see that parallels can be drawn between the EU and Belgium, for which similar reforms have been suggested that would incite politicians to address voters in the entire polity, such as a polity-wide constituency. In 2011 a large majority of the Constitutional Affairs Committee of the European parliament proposed that 25 MEP's would be elected through a European constituency, which would see the introduction of transnational lists, containing candidates from at least one-third of the members states. In Belgium, Dutch-speaking and French-speaking intellectuals have argued for the introduction of a federal electoral district to elect part of the federal representatives. In both cases, the idea is that politicians up for election in such a constituency would become relevant for voters and consequently media over the entire polity and will also be incited to address them, thus contributing to the development of a European- and Belgian-wide political and public debate. Of course, certainly in Europe, linguistic differences will continue to form an obstacle for the emergence of a public sphere such as conceived in the Case of monolingual nation-states. But while electoral reform may not be a sufficient condition for the development of genuine public spheres, it is most probably a necessary condition take down the important barriers separating public spheres within Belgium and Europe today.

Notes

1. The green parties, however, have tried to transcend the language frontier, by always maintaining close relations and forming one parliamentary group in the federal Chamber.

2. The Constitution states that the prime minister can but does not have to be considered to achieve linguistic parity.
3. During the period under analysis, Dutch-speaking as well as French-speaking ministers led important departments, attracting much attention: the interior, the budget, work, public companies and so on are in the hands of Dutch-speaking ministers while foreign policy, justice, finance and so on are in those of their French-speaking counterparts.
4. In the selected broadcasts of *Controverse* there are only four federal government members featured, of which two are Dutch-speaking. This explains why 62.7 per cent of the speaking time goes to Dutch-speaking politicians.

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Part III

Other Case Studies

9

The Constitutional Foundations of Multination Federalism: Canada and Belgium

Raffaele Iacovino and Jan Erk

> Tout les pouvoirs publics sans distinction sont une émanation de la volonté générale; tous viennent du peuple, c'est-à-dire, de la Nation ces deux termes doivent être synonimes [sic.].
>
> Abbé Sieyès (1789, p. 32)

Introduction

The word 'democracy' literally means rule by the people. It is a compound noun derived from the Greek words *demos* (the people) and *kratein* (to rule). The starting point for any discussion about democracy is therefore to circumscribe 'the people'. Rule by the people – including all citizens – started with the French 'Declaration of the Rights of Man and the Citizen' in 1789, which brought democracy exclusively to French citizens. The notion of democracy is inseparable from territorial demarcations defining who constitutes the people, that is, the *demos*, which represents the *pouvoir constituant* of the constitution, and indeed the democratic system, since all laws are seen as the embodiment of the general will of the French people. Of course, in Jean Jacques Rousseau's original formulation what made law supreme was the fact that the people directly voted for it. In such a clear expression of the general will of the people, popular rule was deemed infallible, and thus the source of all legitimate authority. The French 'Declaration of the Rights of Man and the Citizen' expanded the notion of general will of the people to the institutions of representative democracy, thereby turning the Parliament into the embodiment of the general will of the people. Abbé Sieyès' formulation above captures the revolutionary spirit of those times.

The constitutive basis of representative democracy was thus the notion of the 'people'. The people was not only the abstract source of the *pouvoir constituant* for the new regime, but it was also the basis of a new form of political legitimacy. Instead of relying on older royal and religious conceptions

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of legitimacy, democracy was based on a people who had become the people around the nation form. The German constitutional philosopher Georg Jellinek called this the two roles of the *Staatsvolk* (literally 'the state nation') (Jellinek, 1905). Not surprisingly, European languages other than German also use the same word for 'people' and 'nation'. Throughout the nineteenth century, this view provided the template for a series of national integration strategies in Europe, even if it meant that the boundaries of a people had to be delineated through explicit acts of statecraft, or formative projects, resulting in an era of nation building and unification – the forging of a people. In consolidating what was meant to be a single-status community, popular sovereignty derived from an implied consent of the people, which in turn reveals that the people itself preceded, or at least transcended, its relationship to political authority. Popular sovereignty in this view was indivisible, because the existence of the state and its boundaries was assumed to have been the product of consent, and this is reflected in constitutional architectures that explicitly vested authority in a unified nation.

The idea of a unified single-status community applied to federal states as well – there existed an assumed 'people' and its representative government around which constitutional legitimacy was grounded. Despite the presence of multiple orders of government, one people stood out as the *pouvoir constituant*. In other cases, several states came together in the form of a confederal union. The legitimacy of the confederation rested on the treaty between these sovereign entities. The existence of confederations therefore did not challenge this fundamental link between the existence of a people and the legitimate exercise of indivisible popular sovereignty. The *pouvoir constituant* in these cases was not contested, because confederations were compacts between formerly separate units. These constituent units had their own versions of internal legitimating principles (popular, religious, royal), which subsequently came together with the understanding that the state was the result of a union, not the embodiment of a single people.

Indeed, this understanding of a federation grounded in a pact was expressed first by the anti-federalists and then the confederacy in the United States (Dry, 1985; Main, 1961), French-Canadian jurists (Gagnon and Turgeon, 2003) and conservative Alpine cantons of Switzerland (Erk, 2003; Linder, 1994). Aside from the American case, where a defence of the compact was grounded in the relative democratic merits of smaller republics, in most cases it took the form of reaction against the principles of popular legitimacy and modernity, for fear of increased centralisation and homogenisation. In fact, the origins of compact theory were more in Christian social philosophy than in democratic ideals. Protecting the particular against the homogenising influence of Enlightenment thinking brought together an eclectic group of supporters of the *ancien régime*. Those who favoured the continuation of the conservative political order established with the 1815 Congress of Vienna were more likely to oppose popular legitimacy as

reckless idealism and a recipe for anarchy. Conservatives were more likely to support the continuation of the estates system, political decentralisation, regional autonomy, the continuation of aristocratic entitlements and Church prerogatives.

The search of an intellectual forefather for compact theory has led some students of federalism to discover the 1614 work of Johannes Althusius. Althusius had in fact written about a 'pactum', as he called it, to describe a contractual union where parties retain their pre-existing corporate identities. According to Friedrich Carney, Althusius' views envisaged a political community of various levels united by a pact in pursuit of common interests and utility (Carney, 1964). There seems to be an intellectual link between the biblical covenants Althusius wrote about and nineteenth-century defenders of the *ancien régime*. The fear of popular legitimacy – and the processes of centralisation and homogenisation it was deemed to bring – made the compact theory of federalism an ideal around which opponents of modernisation rallied. In his study on the European tradition of federalism, Michael Burgess identifies the role Christian social philosophy played in fostering support for federalism (Burgess, 1993). In its most explicit form, this was embodied in the 1891 papal encyclical *Rerum Novarum*. The principle of subsidiarity formulated in the encyclical called for decisions to be taken at the lowest level possible, thereby aiming to limit the powers of the new modern state.

While our current discussion seeks to explore the workings of representative democracy in federations with multiple *demoi*, it is imperative to reiterate that the compact theory of federalism was more of a reaction of Christian conservative circles and minority nations to modernist state building and centralisation, and not an alternative formulation of democratic legitimacy. Again, the anti-federalists were the only group within the camp of compact theorists that made references to 'rule by the people' instead of recourse to pre-existing corporate identities. The anti-federalists argued that the reason they were against the consolidation of power in the central government was because popular democracy could only exist in a small territory (Main, 1961).

In terms of the notion of divisible sovereignty in contemporary multination federations, these two historical ideal models – federation and confederation – had very little to say. As early as the nineteenth century, German constitutional philosophers in particular grappled with the puzzle of a singular German nation crisscrossing the various German empires, states, kingdoms, bishoprics, principalities and city states of the time. The transformation of the loose German confederation of early nineteenth century into the Prussian-led German federation highlighted the pull of these two ideal models. In this context, the idea of a federation with multiple *demoi* failed to emerge as a viable path to political existence between a federal state and a confederal union of states.

It was after the end of the Second World War, however, that minority nations started to use self-determination as the justification for self-rule – and not the protection of pre-existing corporate identities. Democratic legitimacy thus became the main point of contention between those who see the federal union as an organic whole legitimated by one *demos* and those who see multiple *demoi* entering into a constitutionally defined federal compact. The main issue of contention thus centred on defining the *demos*. With the emergence of multination federalism, divisibility of sovereignty (and by extension the general will of the people) comes to be the primary issue of political contestation. The multination federation thus occupies an uneasy place with regard to our understanding of the relationship between the legitimating principles of representative democracy, through the prism of indivisible popular sovereignty, and federalism, precisely because the issue of constitutional origins, intentions and reforms has come to take on an almost existential dynamic that is now embedded in the language of identity. The idea of a single-status community remains ensconced as a legitimating principle and its legacy endures as an ideational tool for those that seek to continue the formative project of integrating the associative community and ensure that the constitutional architecture that ought to settle these questions and define a union remains outside of the political arena.

The Belgian constitution of 1831 displays the basic democratic philosophy described above. Once again, defining the people precedes any discussion of democracy. The supreme general will of the Belgian nation is the *pouvoir constituant* of the Belgian constitution, which, in turn, determines how this power is exercised. At the time of its introduction in 1831, the Belgian constitution was one of the rare examples of a modern democratic constitution. Elements from the French constitutions of 1791, 1814 and 1830 and the Dutch constitution of 1814 were combined with influences from the British constitution in establishing a parliamentary monarchy for a newly independent Belgium. The constitution outlined a separation between legislative, executive and judiciary powers. While the King was seen as the part of the executive, legitimacy of the new political order rested on the general will of the nation. And it was the Parliament that represented this supreme will of the Belgian *demos*.

After three decades of state reforms, the new Belgian constitution of 1994 was revised to acknowledge the new constituent units of the Belgian state, that is, Communities and Regions. The old Article 25 – now renamed Article 33 – is identical to its 1831 predecessor; 'all powers emanate from the Nation and they are exercised in a manner established by the constitution'. The people, or the *demos* of the democratic system, thus formally remain the Belgian nation. Despite the long process of federalisation granting the Regions and Communities the right of self-rule, the constitution still holds a nationwide understanding of the boundaries of democracy, which then

endows this supreme law of the country with popular legitimacy. In itself this is not unusual.

In comparative terms, democratic principles enshrined in federal constitutions can have an integrated view of the union in which all levels of government are seen as part of an organic whole. This is a view closely associated with the Austrian constitutional philosopher Hans Kelsen (1923, 1925). While the rights of self-rule of the constituent units of the federal union are constitutionally enshrined, the democratic legitimacy of such self-rule is derived from a nationwide understanding of the *demos*. In this organic view of democratic legitimacy in federal systems, the *pouvoir constituant* is still the larger 'nation'. The opposite view tends to see constitutions as a federal compact between the constituent units of the union (Loranger, 1884). The democratic legitimacy of the constitution is thus predicated on the existence of multiple *demoi*, and the role of the constitution is to outline the terms of association between peoples, not between citizens of a single-status community. This 'constitutive contestation' thus represents a relatively novel and direct challenge to settled notions of popular sovereignty as a normative basis of contemporary states, igniting a new wave of questions around legitimacy.

Demos, democracy and legitimacy

Georg Jellinek's portrayal of the two roles of the people – as we had discussed a little earlier – as the object and subject captures the dual role 'the people' plays in a democracy: the people (plural) are the voters but at the same time the people (singular) demarcates the political community. In his work *Inventing the People*, the student of American Revolution Edmund S. Morgan dubs this 'the people's two bodies' (Morgan, 1988, p. 78). According to Bernard Yack, the idea of democratic legitimacy inevitably came with this dual role: 'Alongside an image of the people actually participating in political institutions, [the doctrine of popular sovereignty] constructs another image of the people as a pre-political community that establishes these institutions and has the final say on their legitimacy. It is the latter community, not the majority of citizens, that is sovereign in this new doctrine' (Yack, 2001, p. 519). This implies that the *demos* is ontologically prior to democracy. Claus Offe provides the following reasoning:

> [T]he democratic form of government cannot be brought into being by democratic means. This is almost a matter of logic. The *pouvoir constituant* is prior to and unconstrained by the democratic principles which govern in a democratic regime once it is established. The agents governing that *pouvoir constituant* may well be, and by rule are, inspired by democratic beliefs and intentions. But the 'initial framework in which democratically legitimated power is to be created is not enacted democratically'. (Offe, 1998, pp. 115–16)

Ideas about democracy and popular legitimacy became influential at a time when territorial states were already in existence. The principle of 'let the people decide' of course needed a people and popular legitimacy then turned the 'people' into the 'nation'. The result was the nation state as the basis for popular sovereignty.

The problem of introducing the principle of democratic legitimacy without a pre-existing *demos* was acutely felt during the post-war decolonisation process in Africa. In a comment on the debates at the UN in 1956, Sir Ivor Jennings made the following observation: 'On the surface it seemed reasonable: let the People decide. It was in fact ridiculous because the people cannot decide until someone decides who are the people' (quoted in Mayall, 1990, p. 41). Offe's point is therefore beyond doubt relevant for the very emergence of democracy. Either a historical accident of having been carved up into a particular territory, royal inheritance, decolonisation, wars or popular uprising can all be part in demarcating the ontologically prior *demos*. Offe continues: '[D]emocracies are by necessity heirs of non-democracies: they owe their existence to an antecedent non-democratic state and…to a non-democratic process of overthrowing the regime form of this non-democratic state (Offe, 1998, p. 116).

But Offe's argument fails to acknowledge cases where a democracy legitimated by a single *demos* changes to grant multiple *demoi* the right of self-rule. A new multination democracy, thus, can very well be the heir of an old mono-nation democracy, contradicting what Offe dubbed 'a matter of logic'. A new federal democratic union can very well owe its origins to a democratic unitary state. If this is just a constitutional change in the way that a *demos* has decided to govern itself by dividing political power between levels of government (along Kelsen's ideas of an organic federal union), Offe's point remains unchallenged. But what if the newly recognised *demoi* end up becoming the individual *pouvoirs constituants* in a compact creating a new democratic federal union (along Loranger's formulation), where is the basis of democratic legitimacy? In other words, what happens when a democracy legitimated on the basis of a nationwide *demos* decides either to divide itself into smaller democracies legitimated by multiple *demoi*, as illustrated by the Belgian case, or to consistently confront a challenge to the overarching conception of the *demos* by one or more of its constituent member states, as in the case of established federations such as Canada?

The Belgian federation formally established in 1993 thus poses an interesting question for constitutional philosophy: if the Belgian constitution represents the supreme will of the Belgian *demos*; and if the Belgian state has been reformed to give the constituent nations of the Belgian federation the constitutional right of self-rule thereby creating multiple *demoi* within a state; what is the *pouvoir constituant* of the new federal Belgium? In other words, where does democratic legitimacy come from: the 'Nation' that Article 33 of the amended constitution mentions or the compact between the *demoi* that brought about the changes in the Belgian state?

In Canada, the issue of organic versus compact theory sustaining the federation lies at the heart of its constitutive contestation since confederation, and more poignantly, since Henri Bourassa introduced the notion of a 'double compact'[1] at the turn of the century. Canadian scholars have generally referred to this distinction in terms of territorial versus multinational federalism (Kymlicka, 2001), yet the compact theory itself is not the sole premise of a multination conception, since it has much deeper roots and has at times been used to justify a doctrine of provincial equality rather than asymmetrical accommodation for internal nations. In short, in Canada, federalism itself has always been a contested norm (Schertzer, 2008), and the constitution has served as a battleground for competing visions of how its constituent *demoi* (or its *demos*) ought to be defined. Lying at the heart of divergent federal visions is the problem of identifying the *pouvoir constituant*, since this is the very issue at play in constitutional conflicts over recognition.

Federal constitutions in the contemporary age are thus forced to grapple with a dual mandate – they must at once assign powers to different orders of government while delineating the contours of popular sovereignty – or to employ the terminology above, they must define the constituent *demoi* that serve as the source of political legitimacy. The latter requirement seems logically to flow from the former, as a condition of the terms of association and one of the justifications for particular distributions of powers. However, as the discussion below will illustrate, in both Canada and Belgium the basis of democratic legitimacy continues to be elusive, either through conscious avoidance due to a perceived threat to institutional stability or through calculated indifference allowing for a deepening of federalisation. This in turn has resulted in a constitutive void in both countries that has created a fragile balance between the emergence of opportunities for flexible political accommodation and the existence of ongoing struggles over the boundaries of democratic self-rule.

Democratic legitimacy in Belgium

The Parliament of unitary Belgium established in 1831 was divided into two chambers with equal powers: the House of Representatives and the Senate. Both chambers were elected on the basis of limited franchise. Based on property and education requirements tighter than that of the lower house, the Senate was dominated by the aristocracy while the House of Representatives represented the middle classes. This was a time when Belgium had single-member electoral districts – albeit only around one-tenth of Belgian males had the right to vote; thus the most salient political division was between the two opposing caucuses of liberals and Catholics. The overwhelming majority of Belgians were Catholic – at least in nominal terms – including the liberals, but the elites were divided into these two political groups.

The creation of formal political parties along these lines would come much later, as cabinets at the time would normally include members from both chambers of the Parliament, and sometimes even from different caucuses sitting in Parliament. Ministers of the cabinet were accountable to Parliament. Under the constitution, the King and the cabinet together represented the executive power, while the court system functioned as the third leg of the Belgian *trias politica*.

The constitutional architecture was thus based on a separation between the executive, judiciary and the legislature, with the Parliament representing the supreme will of the nation. According to Bernard Tilleman and André Alen:

> One of the cornerstones of Belgian democracy is the provision that all powers stem from the Nation…, as it refers to the 'metaphysical' foundation of the Belgian constitutional system: the concept of national sovereignty. Sovereignty refers to the supreme authority within the State that has the power to determine its form of government, its constitutional system. In Belgium, this authority is exercised by the 'Nation', an abstract, indivisible collectivity compromising the citizens of the past, the present and the future. The powers may only act as 'representatives' of the Nation, in the name and on behalf of the Nation. (Tilleman and Alen, 1992, p. 11)

The constituent 'people' is therefore more than those citizens who happen to inhabit Belgium and participate in democratic politics at any given time. The people can also be conceived of as the intangible and lofty reason for Belgium's existence. The constitutional architecture of Belgium thus acquired legitimacy as the purveyor of popular sovereignty precisely because of the recognition of the primacy of the nation, in a development characteristic of nineteenth-century national integration efforts in Europe. However, the role of the Belgian people as the *pouvoir constituant* has recently come under question.

Two challenges

The constitutional order established in 1831 has been challenged on two important fronts. Since all legislation derived its legitimacy as the presumed general will of the nation, and the Parliament represented the nation, no other political authority could thus question the supremacy of Parliament. According to Rusen Ergec: 'In this understanding of political legitimacy, it was difficult to envisage how the Parliament – representing the national will – could come to violate the supreme law of the land that emanated from this will' (Ergec, 1995, p. 148). However, the constitution had come into being at a time when Belgium had single-member electoral districts and no formal political parties and when cabinets were part of the executive

carrying out the legislation passed by the Parliament. This was a time before proportional representation and coalition governments, and when the legislative leg of Belgian *trias politica* was at the centre of political power.

The following decades witnessed a number of changes that weakened the role of Parliament as the embodiment of the 'Nation'. The first was the establishment of political parties as vehicles of democratic representation, and the second was the proportional changes in the electoral system that paved the way for these parties to form coalition governments. In these changing circumstances, legislation increasingly reflected the "behind closed doors" compromises between political parties in coalition governments that were then rubber-stamped by party members in the Parliament. In a system of proportional representation, 'elite cartels' were formed by means of coalition governments delivering the majority of votes in the Parliament. Add to this consolidated political parties with strong internal discipline, the result is that legislation had become the outcome of compromises between political parties and not necessarily the expression of the general will of the nation, as has been idealised. As Ergec states it:

> Due to a docile parliamentary majority, increasingly dominated by the executive, and behind it, by the coalition parties, the classical dualism between the executive and legislative bodies has been progressively superseded by the duality of the government and the opposition. In this context, laws are developed in governmental spheres, often in response to interest groups, and subjected to a speedy vote by the parliamentary majority, fearful of provoking a governmental crisis by blocking bills emanating from a coalition government. (Ergec, 1995, p. 151)

Yet the Belgian constitution does not acknowledge the existence of political parties (Peeters, Alen and Tilleman, 1992, p. 53). The growing power of political parties, and the executive formed by a coalition among these parties, in many ways violates the political order formulated by the 1831 constitution. It is thus not clear if legislation can still be seen as the unadulterated expression of the general will of the nation, since the original notion of parliamentary supremacy has been compromised. In the original formulation, the legislative power was deemed infallible because this was the voice of the nation – the *pouvoir constituant*. And the ultimate expression of the general will of the nation was the supreme law of the land, that is, the constitution. There was thus no need for a judiciary to ensure the constitutionality of legislation. The first challenge was thus the unforeseen domination of the executive and the legislative legs of the *trias politica* by political parties evolved to undermine the democratic intent behind the country's founding.

The second challenge to the democratic architecture of 1831 has been the process of federalisation. Constitutional changes carried out in the last

45 years have created a complex federal system that eventually led to the establishment of nine different legislatures (the bicameral Belgian Parliament, the Walloon Regional Parliament, the Flemish Region Parliament, the Flemish Community Parliament, the French Community Parliament, the Brussels-Capital Region Parliament, the German Community Parliament, the Brussels Joint Community Commission, the Brussels French Community Parliament). In the areas under their jurisdiction, these legislatures have become the voices of the people. But without clarity with regard to the underlying *demos*, it is difficult to conceive of the constitution as a legitimate and reliable guide in delineating the division of prerogatives between these nine legislatures? In other words, the constitution itself is ill-equipped to address these emerging and persistent political claims that are slowly expanding the boundaries of self-rule away from the Belgian nation.

Judicial review

The two challenges outlined above have become particularly acute because some of the most important changes to Belgian democracy have been brought about by ordinary legislation and not constitutional amendments. More precisely, these constitutional changes have been ushered in by special laws requiring double majorities (Vandamme, 2008, p. 131), but the process of reconfiguring the basic constitutive principles of Belgian democracy has been left aside. Indeed, the entire process of federalisation has been spearheaded by political parties without recourse to examining the constitutionality of legislation that has fundamentally altered the democratic nature of the Belgian state. According to Wilfried Swenden, the dominance of political parties has reduced the judiciary to somewhat of a secondary role: ‘Broad, inclusive and congruent coalitions at the federal and regional levels of government facilitate the creation of compromises and have minimized the need for competence adjudication by judicial means’ (Swenden, 2005, p. 198). Moreover, the political architecture established by the 1831 constitution envisaged no such role for the judiciary. Thomas Vandamme states that ‘in the old Belgian unitary state, a leading principle of Belgian constitutional law has always been that the legislator was infallible ... [N]o court was allowed to question Parliament’s view on the constitutionality of statutes’ (Vandamme, 2008, p. 131).

The 1831 constitution established the ‘Court of Cassation’ in order to ensure uniform interpretation of laws in their application (Janssens, 1977). Its primary role was to annul lower court decisions that failed to follow the letter of the statutes – hence the Court’s name that derives from the French verb *casser* (to break/to annul). There was, however, no high court responsible for the judicial review of legislation. At a time when the legislature was at the centre of Belgian politics, there was of course philosophical justification for reviewing the legitimate expression of the national will. But as the executive became the main vehicle for passing national legislation through

political party coalitions, the question of judicial review emerged as a constitutional issue. Yet the spark for a constitutional high court was not going to come from the emergence of an executive-dominated legislative process that the 1831 constitution failed to foresee; rather, it was the growing need to rule on the jurisdictional conflicts between the new substate entities that came into being as a result of the process of federalisation.

The 1980 state reform brought in a constitutional amendment establishing a Court of Arbitration (*Cour d'Arbitrage/Arbitragehof*) to rule on jurisdictional issues between the Regions, the Communities and the central government, and its position in the new constitutional order was consolidated with the 1988 state reform (Suetens, 1995). But the court's role in reviewing the constitutionality of legislation remained unacknowledged. As Patricia Popelier puts it: 'according to official doctrine, primary legislation was still immune from judicial control' (Popelier, 2005, p. 22). The state reform deliberately avoided naming the court a constitutional court and instead highlighted the arbitration role it was expected to play between various constituent units of the reformed Belgian state.

The formation of the court clearly revealed the role political parties had assumed in the Belgian state. Half of the 12 judges sitting on the court were to be selected among former politicians representing political parties. The current chair of the Court of Cassation, Ivan Verougstraete, calls this composition a 'compromise': 'there would be a limited review by a court whose members were *pro parte* former members of the parliament and *pro parte* members of the legal profession acceptable to the political parties' (Verougstraete, 1992, p. 100). Inevitably, a federal system – especially one that has been in the process of constant change – needs an arbiter over constitutional questions of jurisdiction. The result has been the renaming of the court as the Constitutional Court (*Grondwettelijke hof/Cour constitutionnelle*) in 2007. While the Court has finally received its appropriate designation that the federalisation process made imperative, revisiting the definition of the *demos* of Belgian democracy has not been high on the political agenda. In short, the Court simply represents another manifestation of compromise between political party elites at the executive level; thus the question of the Court's role in interpreting the constitution based on certain parameters of democratic legitimacy is carefully avoided, or altogether disregarded. The constitutive *demoi* of the Belgian polity are in flux, subject to ongoing and *ad hoc* change, and the Court is faced with very little in the way of normative constitutional grounding on which it may draw and to which it may contribute in its role as an arbiter of conflicts between member states.

While the constitution in Belgium still invokes the 'Nation', there are signs that the underlying logic of the constitution has been changing to acknowledge the new *demoi*. The 1831 constitution had placed residual powers at the legislature – that is, any power that was not explicitly granted to the executive, the judiciary or the provinces was, by default, vested in

the Parliament. This was clearly driven by an understanding that all powers emanated from the nation and the Parliament was where the supreme will of the nation was embedded. But with the 1993 state reform, residual powers were transferred to the Regions and Communities, thereby turning the political logic of 1831 upside down. The centre was to exercise the powers only explicitly listed in the constitution; everything else, by default, was now assigned to the constituent subunits of the Belgian federation. This change in constitutional philosophy indicates that the *pouvoirs constituants* of the Belgian federation have become the constituent *demoi*. This new political logic, however, coexists with a constitutional shell that still refers to a single nation. In fact, such ambiguity between the real constitution and the formal constitution is fairly common in multination federations (Erk, 2007).

In an earlier comparative study, Jan Erk and Alain-G. Gagnon found that in multination federations, ambiguity had been an important factor in managing the differences between the federal partners (Erk and Gagnon, 2000). In federal partnerships where organic and compact theories of federalism coexisted, constitutional ambiguity had become the sign of a broad consensus to eschew polarisation. When an agreement on the exact terms of the union seemed beyond reach, questions about the nature of the political community were deliberately left unclear. Ambiguity thus represented an agreement to avoid having to agree – however, it is imperative to note that this was enabled by the *sine qua non* of trust. The benefits of constitutional ambiguity can only be reaped if it is underscored by a mutual willingness to work to sustain the federation. In the absence of this trust, constitutional ambiguity could stir latent tensions in multination federations by blurring the rules of the game and thereby escalating the issues of contention. What that study had not explored was whether it mattered if the federations had reached some degree of institutional stability, or whether the process of federalisation was still ongoing. With the intractable issue of Brussels and its periphery on the agenda, Belgium seems to be perpetually locked in federal redesign. Ambiguity as a way forward is a little different than ambiguity in interpreting what already exists. In this sense, it might be necessary to revisit the Erk and Gagnon (2000) study, and as a variable, add whether federalisation continues or an institutional stasis has been reached.

Indeed, in contrast to Belgium, Canada is a federation sitting on an institutional design dating back to 1867. Intentionally leaving certain parts of the constitutional definition of a federal arrangement ambiguous may have helped promote the durability of the Canadian federation as each side interpreted its membership in the association differently, and this has allowed for some degree of adjustment and accommodation through elite-level compromise. This is particularly evident in the ambiguity over whether the 1867 British North American Act was a union between two nations or four provinces (Gagnon and Erk, 2001, pp. 325–6), and even in the face of ongoing contestation over the legitimacy of the terms of association since

1982, political actors have still managed to address many long-standing jurisdictional issues. Ambiguity here becomes the oil that greases the wheels of the Canadian federation, but it might be of little help in designing new wheels for Belgium. The Belgian practice has been to approach the intractable issues dogging Belgian federalism in a piecemeal manner without an attempt to define the nature of the political union (and hence, the source of democratic legitimacy).

Democratic legitimacy and Canadian federalism

Unlike the case of Belgium, the evolution of political contestation around the question of constitutive *demoi* has been a persistent feature of Canada, culminating in the 1982 patriation of the Canadian constitution without the formal consent of Quebec's National Assembly and subsequent reform attempts during the mega-constitutional rounds of the late 1980s and early 1990s, and finally through two failed attempts by Quebec to receive a popular mandate to secede in 1980 and 1995. In essence, the question that continues to nourish the sense that Canada is defined by a constitutional impasse is 'who represents the people of Quebec'? Quebec has always maintained that the National Assembly is the representational vehicle of a 'people', yet the Canadian constitution contains no provision that recognises Quebec as an internal nation, or distinct society – with some corresponding claim to popular sovereignty. The basic principles of the Canadian constitutional architecture as they pertain to the status of member states are formal symmetry and provincial equality and pan-Canadian citizenship through a Charter of Rights and Freedoms. Although this picture admittedly simplifies the complexities of federalism, it remains that the constitutional settlement in place has not responded to Quebec's traditional claims that it constitutes a founding nation in the Canadian federal compact. Sovereign authority in Canada is formally indivisible.

The aim of this chapter is not to rehash the sources of conflict between Quebec and the rest of Canada (Gagnon and Iacovino, 2007), but a brief overview of some of the constitutive areas of contention will provide some context. On strictly procedural grounds, the fact that Quebec was stripped of its assumed constitutional veto is the primary source of contention. Indeed, throughout the constitutional wrangling from the late 1960s on, Quebec believed that it was vested with a constitutional veto by convention. In terms of the constitutional package itself, Quebec rejected the inclusion of a Charter of Rights and Freedoms on the basis that it was deemed to undermine the sovereignty of the National Assembly. It was seen as homogenising and centralising, with the ultimate purpose of configuring Canada along the lines of equal individual citizens rather than as an association of peoples. Finally, Quebec rejected the adopted amending formula, which stripped Quebec of its traditional veto in some sections while maintaining

the unanimity rule in areas that Quebec believed should be subject to less rigidity, including minority language education rights. In the end, Quebec rejected what it deemed to be a constitution that did not reflect its view of the associative community – and saw it as the imposition of a more robust conception of Canadian citizenship at the expense of its self-understanding as a contracting nation.

In order to explore the ongoing politics of contestation around the question of locating the *demos* in Canada, we can make use of a distinction between substantive and procedural constitutional matters (Choudhry, 2007). It is our contention that the ambiguity around the question of democratic representation in Canada has been managed by political compromise in issues pertaining to the former category, while it is on the level of 'constitutive constitutional matters' that the nature of the nation form in the Canadian polity becomes an intractable exercise. It is this constitutional distinction that has allowed observers to at once proclaim the Canadian experiment to be among the most successful federations in the accommodation of minority nationalism (Kymlicka, 1995) while leaving much interpretive room to argue that it has been an abject failure at recognising national pluralism and reflects the imposition of an illegitimate nation-building project that will inevitably remain in a constant state of crisis (Seymour, 2009).

For Sujit Choudhry, the constitutional debate in Canada is often presented as a substantive matter – about how to divide powers, assign responsibilities, manage the terms of interdependence, determine the extent of autonomy of member states relative to the central government and so on. Yet he argues that we can better grasp the debate by conceptualising it as a procedural *malentendu* – about determining the body of rules within which such substantive constitutional disputes can be addressed. Briefly, the constitutional malaise in Canada is not characterised by a crisis in normal politics – this is what majoritarian liberal-democratic institutions are meant to address, nor is the country unique among federations in its propensity to generate substantive jurisdictional disagreements. Rather, the impasse stems from the fact that federal participants cannot agree on a 'procedural framework for constitutional politics'. In other words, political settlement on its own is not the sole issue of concern; rather, the country has yet to have found a compromise on the rules through which the constitution itself ought to recognise the *demoi* that constitute the country and endow legislative outcomes with democratic legitimacy. We will demonstrate how this relates to the ambiguity surrounding the *pouvoir constituant* below, but for now we believe that this distinction helps to explain which constitutional issues are subject to political compromise and accommodation and which are simply neglected, as though there is no possible resolution to these intractable points of contention.

In unitary states, constitutional disagreements do not involve existential questions relating to political identity and its basis as the source of legitimate

political sovereignty. As such, constitutional decision rules may be contested in terms of their capacity to produce a neutral procedural framework for political settlement, or may concern the delicate balance between democratic procedures and codified rights, for example, but there is no added element of tension with regard to the manner in which the constitution actually assigns sovereign authority. In multination contexts, however, and particularly for minority nations, Choudhry adds that substantive questions eventually become matters of procedural concern because it forces actors that are bound by the constitution to engage in 'constitutive constitutional politics, which concern existential questions that go to the very identity, even existence, of the political community as a multinational political entity' (Choudhry, 2007, p. 635). He thus concludes that:

> the problem is that it can be very difficult, if not impossible, to suspend substantive political judgment regarding the procedures for constitutional amendment at moments of constitutive constitutional politics because these procedures might reflect one of the competing constitutional positions at play. And there is no higher level to which the dispute can be shifted. Even if one designed a constitution that created a special set of rules to regulate amendments for the rules to constitutional amendment, the same problem might arise with respect to those rules ... In the absence of agreed-upon rules for constitutional decision making, institutional settlement cannot yield political settlement. (Choudhry, 2007, p. 635)

In other words, Canada's constitution, in place for almost 30 years, has not settled the question of democratic legitimacy as the basis for delineating sovereign authority. Unlike Belgium, however, Canada has experienced very unsettling events, acrimonious constitutional negotiations and two referendums on Quebec's independence that leave a legacy of prudence when it comes to tackling these conflicts through formal constitutional channels. In Belgium, the constitution has stood above the many legislative initiatives to inject national diversity into the polity.

While Choudhry's argument rests on the notion that this distinction between substantive and procedural constitutional conflicts gets blurred in multination states, he is specifically referring to moments of constitutional introspection. We submit, in contrast, that the distinction can be employed to describe some of the conflicts between the parties during moments of relative constitutional peace. To state it simply, substantive matters are more easily subject to political compromise and accommodation, particularly in constitutional competencies that are ambiguous, while procedural matters, understood as constitutive in the sense that they assign a particular status to certain member states, remain in the shadows. We will discuss these in turn.

Substantive political accommodation

When Canadian federalism is characterised as flexible and able to meet the demands of Quebec through political compromise, it is usually supported by developments in the area of political or *de facto* asymmetry as opposed to formal constitutional asymmetry (Iacovino, 2010). This has generally occurred through executive federalism, which emphasises elite-level intergovernmental negotiations, particularly in the area of social policy, where shared-cost programmes have been most common (Banting, 2008). While the use of the federal spending power has been challenged by Quebec, intergovernmental agreements have, nevertheless, resulted in a form of political asymmetry where Quebec is allowed to opt out of shared-cost programmes with full compensation. Quebec is thus endowed with the autonomy it seeks while the other member states and the central government run a programme jointly. While these initiatives generally take place within provincial jurisdictions to begin with, this approach is often taken as an example of Canada's capacity to meet the needs of Quebec without resorting to the messy and unpredictable game of constitutional amendment. It portrays the federal system's propensity to simultaneously accommodate its functional, governance-related concerns while respecting Quebec's claims for autonomy. As a result, asymmetry in Canada is often approached indirectly, presented as a consequence of differential policy choices or administrative dealings between governments, as the outcome of intergovernmental practices and functional requirements in order to accommodate disparate needs of constituent units, and so on, rather than as a defining principle that reflects, fundamentally, the meaning and purpose of Canadian federalism.

A recent watershed that highlighted this approach was the First Ministers Accord on Health Care, signed in September 2004, an agreement widely hailed as a resurrection of asymmetrical federalism through its explicit mention of the term in a separate appendix addressing Quebec.[2] The preamble to the specific provisions relating to Quebec reads as follows:

> Recognising the Government of Quebec's desire to exercise its own responsibilities with respect to planning, organising and managing health services within its territory, and noting that its commitment with regard to the underlying principles of its public health system – universality, portability, comprehensiveness, accessibility and public administration – coincides with that of all governments in Canada, and resting on asymmetrical federalism, that is, flexible federalism that notably allows for the existence of specific agreements and arrangements adapted to Quebec's specificity, the Prime Minister of Canada and the Premier of Quebec have agreed that Quebec's support for the joint communiqué following the federal–provincial–territorial first ministers' meeting is to be interpreted and implemented as follows...

Despite the political rhetoric, very little distinguished the conditions imposed on Quebec relative to the other provinces. The main areas of distinction for Quebec were twofold: the province would establish its own wait-reduction plan, with the inclusion of a regular progress report available to its citizens; and health transfers from Ottawa were to be used by Quebec at its own discretion, maintaining Quebec's autonomy in this jurisdiction, In short, Quebec accepts the general tenor of the accord, receives funding on a per capita basis like the other provinces, yet is afforded the autonomy to set standards and monitor developments without interference. Benoît Pelletier, Quebec's Intergovernmental Affairs Minister at the time, endorsed this form of asymmetrical adaptation as the 'only efficient way to endorse and promote the true values of federalism' (Pelletier, 2007). Notwithstanding the explicit reference to asymmetrical federalism, the agreement is not particularly novel, however, and follows Canadian precedent. Quebec opts out of a shared programme, while other provinces do not. This formula is taken as an acceptable compromise – allowing provinces to not be locked into policy choices that shut out the Federal government because of Quebec's predilection towards autonomy. The multination emerges as a natural outgrowth of provincial diversity in specific policy fields rather than through the wholesale recognition of an internal nation.

Apart from social policy, the immigration portfolio is often touted as a successful example of political accommodation to meet the specific needs of Quebec. Indeed, greater control over immigration has been a traditional demand by successive Quebec governments, and was one of its five minimal demands for consenting to a new constitution during the failed Meech Lake[3] constitutional round in the late 1980s. Unlike social policy, in which federal government involvement is extra-constitutional and premised on funding agreements, immigration is a shared constitutional jurisdiction with Federal Government paramountcy. Quebec governments since the Quiet Revolution have sought and received increased powers over recruitment, selection and integration of immigrants through bilateral arrangements in what can be termed a 'natural asymmetry' in the configuration of powers in the Canadian federal system.

While such bilateral agreements proceeded through piecemeal accords, in 1991 the two parties signed the Canada–Quebec Accord Relating to Immigration and Temporary Admission of Aliens (Gagnon-Tremblay/McDougall accord), the most recent and exhaustive agreement still in force today. While Canada sets the broad guidelines of immigration policy, Quebec has much room to manoeuvre according to how it chooses to meet its own needs. For example, while selection criteria are established by the federal government, Quebec is allowed to alter the relative weight of priorities (Carens, 1995).

In the field of immigration, both sides can claim to have benefited from openness and flexibility. For Quebec, immigration is more than an instrumental dossier, since it is inherently related to maintaining control over its

political identity in the face of sociological challenges – the sort of formative projects related to citizenship that concern all states. In a sense, the immigration competency reflects constitutive questions since it assumes the existence of a host society where the expectations of democratic participation are spelled out, debated and addressed. From the perspective of the Federal Government, while acting as a willing partner to meet Quebec's needs in an instrumental sense, there is no initiative to recognise this role for Quebec on the basis of principle. Canadian multiculturalism, for example, does not recognise that Quebec has a distinct role in integrating immigrants; policy statements on Canadian citizenship go no further than to indicate that the actual bureaucratic process of obtaining certain documents relative to immigration status may be different in Quebec, but there is no mention that Quebec is a distinct host society that may require a different bundle of obligations, rights and responsibilities as a condition of citizenship. Again, a flexible response to a potentially messy situation is simply dealt with through agreements that stop short of actually exploring and acting upon their significance for both the minority nation and the terms of the larger association.

Finally, another area where substantive 'gains' have been made by Quebec is in the area of paradiplomacy, or treaty-making powers. Indeed, many substate nations have actively used the international arena to compensate for a lack of clarity with regard to the international projection of their internal sovereign authority (Tierney, 2005). In Canada, this has resulted in a situation where Quebec has simply proceeded to establish an international network of foreign offices abroad. Quebec has signed treaties with other sovereign states while invoking the Gérin-Lajoie doctrine, which was developed in the late 1960s and is still evoked today. While the subject of ongoing jurisprudence, the doctrine essentially states that treaty-making powers ought to flow from the division of powers allocated in the constitution, and that there is nothing in Canada's constitutional framework that assigns foreign relations as the exclusive domain of the federal government. Finally, Quebec has also actively engaged in diplomacy in certain periods, particularly prior to the two referendums, in order to lay the groundwork for potential appeals for international recognition in the event of unilateral secession (Lecours, 2002).

These initiatives, however, unlike the instances of political accommodation described above, have proceeded without the support of the federal government and in a sense this domain straddles the substantive and procedural distinction outlined above, because it is at once a substantive division of powers concern and a the projection of sovereign authority. It has been advancing in spite of agreement, and is very much the result of Canada's incomplete self-understanding, or more concretely, the absence of clear jurisdiction in terms of treaty-making powers in the constitution. Hugo Cyr, for example, demonstrates that even a long history of jurisprudence on this matter does not settle the issue of where sovereign authority lies in the Canadian constitution. The idea that Canada ought to be represented

abroad by the Federal Government rests on the notion that the central state assumed the powers of the British Crown upon Canada's independence, yet Cyr retrieves much jurisprudence that contradicts this claim, showing that the notion of sovereign authority cannot simply be assumed to have been transferred to Ottawa, and that in terms of treaty-making powers, it follows the powers assigned to legislatures and executive branches on the basis of divided sovereignty – concurrent with the constitutional division of powers (Cyr, 2009).

While it is difficult to claim that Quebec has successfully challenged Canada's sovereignty in this area, it has nevertheless managed to challenge a basic indicator of unified and monistic sovereign authority without generating more than strong disapproval from the central state, including recourse to the courts, and in most instances, benign indifference. Indeed, most recently this area may have entered the universe of subjects for political conciliation when the Conservative government of Prime Minister Stephen Harper included formal Quebec representation in the United Nations Educational, Scientific and Cultural Organization (UNESCO) as an election promise, in an attempt to outline a doctrine of 'open federalism' (Noël, 2006) that would demarcate the party from the traditional approach of the Liberal Party of Canada, which insists that provinces ought to respect Canada's unified representation on the world stage and remain inputs in the foreign policy process, rather than full-fledged partners. While it is still too early to make the claim that the dossier of treaty powers will make its way into the realm of political negotiations and potential accommodations between Quebec and the central state, it remains significant to demonstrate the capacity of a minority nation to behave as though it enjoyed the status of a sovereign actor without severe limitations on its actions by either Ottawa or the international community. It is a small opening, yet it has been exploited by Quebec and it signifies once again that the absence of a clear recognition of Canada's constituent *demoi* has not prevented the country from circumventing such rigidities and evolving to accommodate the challenges posed by national diversity despite its self-understanding.

Procedural rigidity and the courts

It is in the area of procedural constitutional politics – that involve actually defining relevant majorities in particular areas of constitutional contestation – where the Canadian polity has proven to be extremely rigid. Unlike the flexibility shown in normal jurisdictional conflicts, through active cooperation, bilateral arrangements, or benign indifference, the rest of Canada has not responded to pressures from Quebec to formally alter its conception of the country based on a pluralist conception of popular sovereignty. While an exhaustive historical overview of Canada's constitutional battles reveals this fundamental divide, it can also be clearly understood by

assessing the distinction between federalism jurisprudence and the recent Secession reference set forth by the Supreme Court of Canada (Erk, 2011).

Indeed, Robert Schertzer has observed a particular puzzle that continues to leave legal scholars without a satisfactory answer. He shows that when confronted with a hypothetical situation through the reference device, the Court frees itself to elucidate on the grand principles of the Canadian constitutional order, as opposed to the rigidity of federalism jurisprudence, where it has shown some tendency to side with centralising forces in the areas of economic regulation and the use of the criminal law for social ends. In terms of the Secession reference specifically, however, the Court was asked to consider three questions on the legality of Quebec's unilateral secession. While the Court ruled that under both domestic constitutional law and international law Quebec could not legally secede, it went on to deliver a groundbreaking judgement – Quebec could launch the proceedings for constitutional change in order to achieve secession if a clear majority of Quebeckers, through a clear question, voted in favour of secession. The Supreme Court argued that this process, to which Quebec has adhered since *étapisme*[4] was adopted as the preferred process prior to the first referendum, would place an obligation on Quebec's federal partners to negotiate a new relationship.

While there is nothing in the text of the constitution that allows for a member state to launch a process of secession, the Court arrived at this conclusion by widening the constitutional landscape in Canada to identify its core principles, allowing it to go beyond a reading of the amending formula as the only avenue for constitutional change. Without getting into the details, the Court noted that federalism was one such unassailable value, while conceding that federalism was both the response to demands by the maritime colonies and a means to address the social and demographic reality of Quebec, while also legitimating the right of Canada to conceive of itself as a unified democratic community through the Federal Government (Schertzer, 2008, pp. 114–15).

In the end, the Court viewed federalism as a forum for the negotiation of several conceptions of the associative community rather than a closed structure defined by the text of the constitution. Indeed, the Court explicitly stated that the constitution ought not to be interpreted as a straightjacket, and allows that each member state is endowed with the right to initiate constitutional change. This approach is in stark contrast to the centralising-nationalising tendencies of some of the earlier federalism jurisprudence. While we are not making a normative argument concerning the role of the Court in shaping Canadian federalism, it is important to note for our purposes that given the opportunity to consider historical-contextual variables, the Supreme Court of Canada has clearly exposed the ambiguity at the heart of the Canadian constitutional landscape. While Choudhry and Howse have explained this as the result of a dualist interpretive role of the

Court – where jurisprudence mandates positivist readings while reference cases reduce the text of the constitution to a secondary status (Choudhry and Howse, 2000), we submit that this description of the Supreme Court's dual mandate reflects Canada's inability to constitute itself through a clear and open discussion around the question of the appropriate justificatory scheme for locating the *pouvoir constituant*. The basic question confronting the Court can be posed differently – in procedural matters relating to the terms of association – which democratic majorities matter?

The Secession reference has also been invoked in support of the argument that the judicial branch has not superseded legislatures in the making of policy in Canada. For James Kelly and Michael Murphy, the Secession reference validates the Supreme Court's role as a 'meta-political' actor, a referee of sorts that is careful not to infringe on the legislative prerogatives of elected officials rather than assuming an activist role in the policy process: '[The Supreme Court] studiously avoids imposing comprehensive solutions and instead articulates the constitutional bounds within which political actors can agree on such solutions through consultation or negotiation' (Kelly and Murphy, 2005, p. 222). For these authors, the Court explicitly avoided the temptation to determine what constitutes a clear question and a clear majority, thus placing the onus on political actors with regard to the content of negotiations, hardly the actions of a Court with a particular agenda, or one that is willing to wade into inherently political conflicts (Erk, 2011).

Kelly and Murphy's interpretation of the Secession reference and what it reveals with regard to the role of the Supreme Court in adjudicating the various federal visions is not contested here. What is relevant, however, and too often ignored, is the actual response of the political actors in question. Indeed, what followed was a direct reflection of the difficulty in reconciling questions of self-understanding through political channels. The federal government responded to the opening provided by the Supreme Court of Canada by passing Bill C-20, or the Clarity Act, in which future attempts at initiating secession on the part of Quebec would have to meet the requirements of clarity as determined by the Federal Parliament, without any input from the Quebec National Assembly. Quebec's reaction was to enact Bill 99, which asserted the inviolable right of the National Assembly to determine the actualisation of Quebec's right to self-determination, including the process of achieving secession. Although the Secession reference was hailed as an enlightened judgement that allowed political actors to address essentially political questions, with the Supreme Court of Canada acting as a facilitator of dialogue, the actual result is that the camps retreated into their default positions, initiated no discussion and have arguably deepened the impasse since there is now the matter of the legitimacy of competing bodies of legislation to overcome. This is where we now stand, and apart from a recent motion passed in the House of Commons recognising that the

'Québécois form a nation in a united Canada', there is very little to indicate that the question of deliberating democratic legitimacy through political channels is on the horizon in the near future.

In the lead-up to the referendum on sovereignty association initiated by the Parti Québécois in 1980, Prime Minister Pierre Trudeau, following a sweeping electoral showing in Quebec where his Liberal Party won 74 of 75 seats, proclaimed that 'we have therefore just received from the people of Quebec a mandate to exercise sovereignty for the entire country'. While easily dismissed as political rhetoric in a particularly tense historical moment, its motivating logic is clear: democratic legitimacy in Canada flows through the Federal Parliament. The claim is that this is the only body that can speak for all Canadians. Yet if this is accepted as a legitimate reflection of the locus of popular sovereignty in Canada, a different story emerges today, since the Bloc Québécois has dominated federal politics in Quebec by winning a majority of seats in that province in every election since 1993 until 2011. Again, democratic institutions on their own cannot provide for their own legitimacy, particularly in a multination federation; thus the cycle continues, and the words of Peter Russell bear repeating: the *patria* in Canada has yet to be defined (Russell, 1993).

Conclusion: ambiguity and multination federalism

The recent developments highlighted above illustrate that the notion of a multination federation remains a work in progress, constantly challenging and shifting conceptions of legitimate popular sovereignty through debates concerning relevant *demoi*. Yet these cases reveal that such transformations continue to proceed in a vacuum of the kind of legitimating principles deliberated in the age of national integration, and in a sense continue to draw from and refer to these debates in a distinctly political arena. Otherwise stated, the multination federation cannot break free from the enduring legacy in which democratic legitimacy is assumed to flow from constitutions that have claimed to settle the question of the relevant boundaries of popular sovereignty. In the cases outlined above, the unity imperative continues to occupy the constitutional terrain, so actors have found other ways to deal with pressures to unlock the hold of the monist *demos*, and political contestation around this question may in the end be what defines the multination federation. As it now stands, groups challenge the hold of the single-status community and the federation evolves through political accommodation to somehow shift sovereignty in subtle and *ad hoc* directions without undoing the foundations of the state.

It is difficult to explain the source of this reluctance to espouse the sort of national pluralism that would formally recognise the complex nature of the *pouvoir constituant* in multination states, particularly since both Canada and Belgium have employed political and non-constitutional channels to

achieve similar objectives. Yet it is clear that the unity inherent in a doctrine of state sovereignty is where the problem begins. As Tierney has shown, these measures for meaningful constitutive self-government for minority nations in many ways seriously alter our conceptions of the role of a constitution to maintain territorial integrity and link it to popular sovereignty. Indeed, Tierney contends that these claims for internal sovereignty are more challenging than outright secession: 'although internal accommodation constitutes a seemingly less radical challenge to the State than does "separatism", in fact the new debates emerging around the nature of the State and its plurinational nature perhaps raise more difficult questions for established conceptions of constitutional sovereignty than does secession' (Tierney, 2005, p. 181).

It thus remains unclear whether or not this political contestation around the politically salient majorities that constitute Belgium and Canada can really be addressed through conventional constitutional channels. Indeed, many Canadian commentators have viewed this apparent impasse in a positive light and there seems to be a consensus emerging around the idea that these unanswerable claims serve as defining attributes of a multination polity (Papillon, 2008). Political contestation around constitutive matters within states can never be codified as readily as we enumerate substantive powers. In Belgium, legislative compromises and bargains have not been impeded by this lack of clarity with regard to the locus of popular sovereignty, while Canada has been able to adapt in many areas without recourse to existential certainty.

Notes

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1. The double compact refers to an attempt by Bourassa to reconcile the somewhat competing claims that the federation was the result of either a compact between provinces or a compact between peoples.
2. For the full text of the First Ministers' Accord on Health Care, see www.hc-sc.gc.ca/hcs-sss/delivery-prestation/fptcollab/2004-fmm-rpm/bg-fi_Quebec_e.html (accessed 1 September 2008).
3. The Meech Lake Accord would have entrenched formal asymmetry in the Canadian constitution. Quebec's five constitutional demands were the recognition of Quebec as a distinct society, included as an interpretive clause in the Charter of Rights and Freedoms; a permanent constitutional veto; a limitation on the Federal Government's spending power; a role for Quebec in the appointment of Supreme Court judges; and increased powers in the field of immigration.
4. This refers to the Parti Québécois' decision to launch the process towards independence through various stages, including the initial step of holding a referendum to achieve a mandate to negotiate a new relationship with the rest of Canada, in contrast to the more hardline approach which would launch negotiations following an electoral victory by the party.

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10
The Consequences of Drafting Constitutions for Constituent States in Federal Countries

John Dinan

Scholars have long been interested in investigating the impact of various institutions on federalism, with an eye towards determining which arrangements contribute to the effective functioning of federal systems and under what circumstances. Among other things, scholars have analysed the consequences of various mechanisms for assigning competences to federal and state governments and for representing constituent states in federal decision-making processes. My purpose is to continue in this tradition by investigating the consequences of drafting constitutions for constituent states in federations and quasi-federations. What have been the consequences in countries where constituent governments have already drafted constitutions? And what are the likely consequences of drafting such constitutions in federations and quasi-federations where constituent states do not currently have such documents? These questions hold particular importance for the multinational federations that are the focus of this volume.

There is no necessary relationship between the drafting of constitutions in constituent states and the maintenance of a functioning federal system. It is true that in the majority of federal and quasi-federal systems some or all constituent states boast constitutions; but in a good number of these countries none of the constituent units have drafted constitutions (at least in the form of entrenched documents). In the former group are Argentina, Australia, Austria, Bosnia and Herzegovina, Brazil, Ethiopia, Germany, Malaysia, Mexico, Russia, South Africa, Spain, Sudan, Switzerland, the United States and Venezuela. And the latter group includes – to name the most prominent federations in which constituent states lack entrenched constitutions – Belgium, India, Nigeria and Canada. Nor are there automatic consequences that would inevitably follow from the drafting of such constitutions in countries that do not currently have them. Some federal countries with constituent state constitutions are highly centralised in their

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distribution of political authority (for instance, Venezuela), whereas several federations without constituent state constitutions are relatively decentralised (for instance, Canada).

To say that there is no necessary relationship between constituent state constitutions and a functioning federal system and no automatic consequences that follow from drafting such constitutions is not to conclude that they have no consequences for federalism. In fact, they have the potential to make important contributions, over and above the effects of other institutional arrangements, to reconciling the perennial tension faced by all federal systems of maintaining unity on essential questions and respecting diversity on contested questions. In particular, they have the potential to boost citizens' attachment to the federal system by providing formal recognition for their distinctive foundational commitments within the federation. They can also play a part in strengthening the design of governing institutions in constituent states and the federal government. They can also permit heightened protection for rights in constituent states where particular circumstances warrant such protection.

The degree to which constitutions of constituent states will actually have such beneficial consequences, or rather will have problematic effects or even little effect, depends on several factors. It depends on the circumstances surrounding their drafting and the character of the resulting documents. It also depends on the constitutional space that is allotted to member states by the federal system and whether member state amendment processes facilitate opportunities for making use of this space. Finally, it depends on whether the structure of the court system favours the issuance of decisions providing heightened levels of rights protection.

In setting out the potential benefits of drafting constitutions in constituent states and specifying the influence of these various factors, I draw on the growing literature examining these constitutions from a comparative perspective. Several scholars have undertaken broad analyses of these constitutions (Saunders, 1999; Watts, 2000; Williams and Tarr, 2004; Tarr, 2007; Dinan, 2008; Gardner, 2008). Scholars have also examined their role in particular federations (on Argentina: Hernandez, 2005; on Australia: Saunders, 2000; Twomey, 2004; on Germany: Gunlicks, 2000; Niedobitek, 2007; on Russia: Salikov, 2005; on South Africa: Williams, 1999; Brand, 2000; Brand and Malherbe, 2003; Marshfield, 2008; on Spain: Colino, 2009; on Sudan: Murray and Maywald, 2006; on the United States: Tarr, 1998; Dinan, 2006).

My intent is not only to contribute to this emerging comparative literature but also to identify practical considerations that might inform individuals who are contemplating drafting such constitutions. In part, I call attention to the varied potential consequences of entrenched constitutions. I also highlight the particular features and consequences of constituent state constitutions, which differ in important respects from federal constitutions.

The citizenry

One way that constitutions in constituent states can contribute to the maintenance of a federal system is by affording citizens an opportunity to express their foundational commitments not only at the federal level but also at the state or provincial level, thereby offering added recognition for citizens' distinctive commitments and helping to connect them more closely to the federal union as a result. Because constitutions have a higher standing than statutes in the public consciousness (even aside from their different legal standing), when citizens of constituent units see their distinctive commitments expressed in constitutional provisions, this is seen as giving them added legitimacy. Put another way, in federations with a federal constitution but without constituent state constitutions, citizens may feel with some justification that their distinctive commitments are accorded insufficient weight. In such a context, the drafting of member state constitutions might remedy this deficiency and contribute to reducing these grievances and thereby attach citizens more closely to the federal union.

This is one potential effect of drafting member state constitutions; however, they can also have the more problematic effect of fostering division among citizens. By forcing clarity on issues that have effectively been held in abeyance, in part because of their controversial nature and the difficulty of crafting precise and satisfactory language to address them, the act of constitution writing can have divisive effects (Foley, 1989). In part, this is because some citizens in constituent states are bound to be dissatisfied with the compromises forged in the constitution-making process; these individuals are likely to be more frustrated than if the underlying issues had continued to be held in abeyance. The process of drafting member state constitutions and clarifying matters previously held in abeyance also risks creating consternation among citizens in other regions. Clarifying certain issues, especially regarding the sovereignty of constituent states vis-à-vis the federation, can be viewed by individuals in the rest of the federation as an act of provocation and a greater source of concern than if these issues remained in abeyance.

In assessing the likelihood that constituent state constitutions will generate any of these potential effects, two considerations are paramount. Does the drafting of constituent state constitutions take place after the act of federation? And do the constituent states form a multinational federation?

In one group of federations some or all state constitutions precede the federal constitution. The United States, Argentina and Australia are leading examples. In the United States, the 13 original states, along with other states such as Vermont, drafted state constitutions (or in the case of Connecticut and Rhode Island, retained their original charters) prior to 1787, at which time the federal constitutional convention drafted a federal constitution (Williams and Tarr, 2004, p. 8). The situation in Argentina is similar, in that

the original 14 provinces all drafted constitutions prior to the drafting of the 1853 national constitution, although in this case, unlike in the United States, these provinces promptly revised their constitutions to conform to the requirements of the federal constitution (Le Roy and Saunders, 2006, p. 22). The pressing question for these federations was not whether to draft state constitutions, but rather whether to form a federal union and adopt a federal constitution.

In a second group of federations, all of the constituent state constitutions are drafted after the federal constitution, and these are the instances when constituent state constitutions are most capable of having a contemporary effect on citizen attachments, precisely because there is the possibility of remedying an imbalance between the presence of a federal constitution and the absence of constituent state constitutions. Among the recent federal and quasi-federal systems in this group are Spain, Ethiopia, South Africa and Sudan. Thus, Catalonia, Galicia and the Basque Country adopted Autonomy Statutes in the immediate aftermath of the adoption of Spain's 1978 constitution that provided for a quasi-federal system; by 1983 the 17 Autonomous Communities had all drafted Autonomy Statutes (Agranoff and Gallarin, 1997, p. 3). In Ethiopia, the nine states comprising the newly created federal system drafted state constitutions in the immediate aftermath of the adoption of the 1995 federal constitution (Regassa 2004: 6). In South Africa, the federal constitution of 1996 authorised provinces to draft constitutions, and the Western Cape Province drafted a constitution that was approved by the constitutional court and took effect two years later (although an effort by the KwaZulu-Natal Province was rebuffed by the constitutional court) (Brand, 2000; Marshfield, 2008). In Sudan, the 2005 Comprehensive Peace Agreement called for the creation of a decentralised political system and the drafting of a national constitution, a constitution for Southern Sudan, and constitutions for the 25 states (Murray and Maywald, 2006). Moreover, and these cases also fall in this second category, proposals have been considered to draft entrenched constitutions in constituent states in several federations – namely, Canada and to some extent Belgium – that have a federal constitution but no constituent state constitutions (Sharman, 1984; Wiseman, 1996; McHugh, 1999/2000; Morton, 2004).

If constituent state constitutions in this latter group are capable of having particularly important contemporary effects on the citizenry, they are also more likely to have an effect in multinational federations, whether in the sense of fostering citizen commitment to the federation or in the very different sense of promoting divisiveness among the citizenry. These greater potential effects are due in part to the fact that groups in multinational federations are more likely to hold grievances capable of being somewhat ameliorated by the drafting of state or provincial constitutions. It is precisely because a concern with recognition and legitimacy is likely to be felt more deeply, and some citizens more likely to be estranged from the

federal system, in multinational federations, that constituent state constitutions in these federations have the most potential to legitimate these citizens' distinctive commitments and thereby reduce citizen estrangement from the union (Gardner, 2008, pp. 330–1, 334).

Member state constitutions also have the potential, however, to have more damaging effects in multinational federations than other federations, on account of another trait common to many multinational federations: their tendency to hold controversial issues in abeyance as a way of reducing divisiveness among the citizenry. As Michael Foley has argued:

> Abeyances refer to those constitutional gaps which remain vacuous for positive and constructive purposes. They are not, in any sense, truces between two or more defined positions, but rather a set of implicit agreements to collude in keeping fundamental questions of political authority in a state of irresolution. Abeyances are, in effect, compulsive hedges against the possibility of that which is unresolved being exploited and given meanings almost guaranteed to generate profound division and disillusionment. (Foley, 1989, p. xi)

All polities rely to some degree on abeyances; but multinational federations are especially likely to do so, because issues of national coexistence and sovereignty tend to be more prominent in these cases. And drafting member state constitutions, no less than the drafting of federal constitutions in such countries (Thomas, 1997), runs the risk of bringing these controversial issues to the forefront and requires them to be addressed with precision in the text of constitutional provisions. This has the potential to in turn lead to disillusionment on the part of citizens of member states who are dissatisfied that the proposed constitution does not do enough to express and legitimate their distinctive foundational commitments. Even the resulting compromise language is likely to be viewed as a provocation by citizens in other regions, especially in asymmetric federations, thereby fostering division.

The question of whether a particular constituent state constitution will generate one or the other of these consequences (increasing citizen commitment to the union or fostering disillusionment and division) does not admit of a precise answer, but depends heavily on the nature of the campaign waged in its favour and the character of the resulting document – in particular, to what extent is a member state constitution supported and drafted in an effort to legitimate the distinctive commitments of a member state political community within the federal union? On the other hand, to what extent can the campaign and document be viewed as emphasising separation of the member state political community from the federal union?

Admittedly, this is less a rigid rule than a general guide for categorising and assessing the consequences of drafting member state constitutions in multinational federations. One recent case that goes some way towards illustrating

both the potential benefits and pitfalls is the ongoing effort in Spain to reform Catalonia's 1979 Autonomy Statute. On the one hand, the case illustrates the potential pitfalls of forcing clarity on matters long held in abeyance as well as the disillusionment and consternation caused as a result of the process. The initial proposal of the Catalan parliament in 2005 was viewed by some as having 'overstepped the constitutional limits of the model of federalism that had evolved in Spain so far, showing some traits that many considered confederal' (Colino, 2009, p. 270). As a result, when the Spanish parliament undertook a substantial revision of the original proposal in the actual document that it approved in 2006, 'the original aspirations of the parties that voted for the Subnational Constitution in the Catalan Parliament were considerably reduced' (Serra and Onate, 2007, p. 15). This produced 'political tension, frustration of citizens' expectations, and sense of relative deprivation', and 'encouraged in turn some regional politicians victimism and grievance' (Colino, 2009, p. 279). Moreover, because this process 'stretched the limits of what was considered acceptable' in other Autonomous Communities, it led to consternation in these other regions (Serra and Onate, 2007, p. 15).

At the same time, the Catalan case, and particularly the eventually enacted reform, which was challenged and reviewed in the Spanish Constitutional Court, also demonstrates the potential benefits of state constitution making in according constitutional recognition and legitimacy to the Catalan citizens' distinctive foundational commitments and thereby redressing grievances based on the absence of such formal recognition. The enacted reform in Catalonia 'reasserted the elements of regional identity, particular history, and self-definition, especially in the Preamble', and made 'repeated allusions to history and cultural peculiarities, references to the national character of the Community, and to the will of the Catalan people in the Preamble and several articles' (Colino, 2009, p. 275), even if it did not accept the various initial proposals to use 'the term nation in numerous articles of their statute proposal' (Colino, 2009, p. 274).

It is important not to overstate the capacity of constituent state constitutions to remedy grievances found in multinational federations. Many grievances have far deeper origins than the absence of constitutions capable of giving expression to distinctive foundational commitments. Nevertheless, to the extent that some of these grievances stem from the imbalance between the legitimacy accorded to federal commitments in a federal constitution and the lack of any counterpart constitutional documents for member states, the drafting of constitutions in these states might have beneficial effects, depending on their circumstances and character.

Governing institutions

Constituent state constitutions might also contribute to the functioning of a federal system by enabling a greater degree of experimentation with

institutional arrangements and generating lessons that can benefit other constituent states and the federal government. A classic benefit of a federal system is to permit more experimentation and allow more lessons to be gleaned from these experiments than is possible in a unitary system. Often associated with US Supreme Court Justice Louis Brandeis's argument that the states in the United States serve as valuable laboratories for experimentation for various social and economic policies, this argument can also be applied to the design of governing institutions. Brandeis believed that state-level experimentation could illuminate the effects of social and economic policies and thereby contribute to the design of more effective policies in other states and potentially on the national level; the same conclusion might be advanced regarding institutional arrangements regarding separation of powers and representation. The greater the opportunities for experimentation and learning at the level of the constituent units, the greater the likelihood that a majority of these constituent states and the federal government will adopt institutions that have been proved to be effective and reject reforms that are untested or shown to be problematic in practice.

The degree to which member state constitutions will have the effect of increasing institutional experimentation and learning, or rather will have little effect or even render these benefits less likely, depends on several factors. It depends in part on how much constitutional space the federal constitution allocates to the constituent units. When member states have little discretion regarding the design of institutional arrangements, the drafting of constituent state constitutions is unlikely to have much effect on the level of institutional innovation. It also depends on the processes for amending and revising the constitutions of the member states. Where changes to member state constitutions require direct popular participation (as is generally the case in these constitutions), this provides added legitimacy to institutional innovations adopted by the constituent states and contributes to more experimentation. Such experimentation is also likely to be more prevalent where changes to member state constitutions can be achieved without having to secure large supermajority legislative votes or meet other rigid requirements.

First, federal systems vary widely in how much discretion their constituent states have to engage in institutional experimentation. Alan Tarr and Robert Williams have pioneered the concept of 'subnational constitutional space' and have shown that federations differ especially in whether they require member state constitution makers to obtain prior approval from federal officials for constitutional changes and whether they prescribe detailed requirements for member state institutional arrangements (Williams and Tarr, 2004; Tarr, 2007).

A key consideration is whether federal officials can block passage of state constitutional innovations. In many federations, federal officials play a role in approving the initial constitutions of constituent units. Such is the case,

for instance, in the United States, where Congress (and in some cases the President) had to approve the constitutions of the 37 states that entered the union after 1789. And it has been the case, more recently, in South Africa, where the Constitutional Court is required to approve all provincial constitutions before they take effect.

However, federations vary widely in whether and how they provide for ongoing federal supervision of member state constitutional changes, and this has important implications for the amount of constitutional innovating that takes place at that level. At one end of the spectrum, some federations require federal officials to approve any proposed changes in the constitutions of the component states. South Africa assigns this supervisory role to the Constitutional Court. Sudan gives this power to the Ministry of Justice. And in Spain the national parliament performs this function.

At the other end of the spectrum, some federations do not require any prior approval by federal officials before constitutional changes in constituent units take effect. Such is the case in the United States. It is not that state constitutional provisions are insulated from federal oversight in these federations. In the United States, for instance, state constitutional provisions can be challenged in the course of state or federal litigation on the ground that they are inconsistent with the US Constitution or federal law, and on occasion they can be struck down. But there is no opportunity for federal officials to block state constitutional reforms before they take effect, thereby giving state constitution makers more of an opportunity to innovate than in federations where federal officials must sign off on constitutional reforms.

Another key consideration concerns how stringently the federal constitution restricts the range of institutional arrangements that state and provincial constitution makers can adopt. In some federations, the federal constitution prescribes virtually all of the institutional arrangements for state or provincial governments and leaves little room for innovation. In several South American federations, for instance, the federal constitution specifies the length and number of terms for state or provincial legislators and executives. And the federal constitutions of Austria, Brazil and Malaysia stipulate that member state legislatures must be unicameral (Dinan, 2008).

On the other hand, some federations allow constituent states to engage in a great deal of institutional innovation. The US Constitution is again among the most flexible in this regard, providing only that state governments be 'republican' in form. Moreover, this republican guarantee clause has been interpreted in a manner quite open to state institutional innovations in that it has been held not to be violated by state adoption of direct democracy. Several other federations, such as Argentina, take a similar approach, which requires provincial constitutions to comport with 'the representative republican system' and be 'in accordance with the principles, declarations and guarantees contained in the federal constitution' (Hernandez, 2005,

p. 22). Other federal constitutions stipulate that member state constitutions must comport with 'homogeneity' or similar requirements, although in some cases these are interpreted more stringently than in the United States, as in Austria where the Constitutional Court recently held invalid a direct democracy provision in the Vorarlberg constitution as contrary to the 'homogeneity' clause.

Federations without rigorous prior approval requirements or detailed institutional prescriptions have reaped clear benefits from the institutional experimentation that has taken place. A leading example concerns experimentation with unicameralism. In the United States, four states have experimented with unicameralism, including one state, Nebraska, that continues to do so; but no other states have followed Nebraska's early twentieth century lead. Similarly, in Australia, one state, Queensland, adopted unicameralism in the early twentieth century, but no other states have opted to follow. In Germany, however, experiments with unicameralism at the *Land* level were viewed favourably by other *Land* constitution makers, and by the late 1990s, all of the German *Land* constitutions had opted for unicameralism (Dinan, 2008, pp. 858–9). Similar benefits from institutional innovation can be seen with regard to direct democratic institutions, in that various federations have benefited from the opportunity to permit one or several constituent units to experiment with variations of direct democracy, thereby allowing other constituent states to learn from these experiments and then reject direct democracy altogether or adopt it in the same or different form. In the United States, nearly half of the states adopted the statutory initiative and referendum in the early twentieth century. But a majority of states decided, partly based on these experiments, not to adopt them. And efforts in the United States to adopt direct democracy at the national level have been rejected. The German *Land* constitutions have provided a similar testing ground and learning opportunity for direct democracy, with the main difference being that by the end of the twentieth century all of the German *Land* constitutions had followed the reconstituted East German *Länder* in adopting direct democracy, even as efforts to amend the federal constitution to this end have been resisted (Dinan, 2008, pp. 849–50).

The amount of institutional space available to the constituent states clearly affects how much institutional experimentation and learning can take place; the design of constituent state constitutional amendment processes also plays a key role in influencing how much of that space will be occupied. When constituent states permit some sort of direct popular participation in the process of making constitutional changes, this increases the likelihood that they will engage in institutional innovations. Direct popular participation, which is much more common in state constitutions than in federal constitutions, can provide more legitimacy to institutional reforms, especially when these reforms deviate from the federal model, and certainly more legitimacy than if they were adopted through statutory changes that

do not involve the people directly. Occasionally, citizens are given a formal opportunity to propose changes to the constitutions of constituent states. Even more important, in Argentina, Australia, Austria, Germany, Russia, Spain, Sudan and the United States, some or all subnational constitutions require at least some constitutional changes to be approved in a popular referendum (Dinan, 2009, pp. 13–15).

Institutional experimentation and learning is also more prevalent when changes to constituent state constitutions can be approved without the large supermajority legislative votes and other rigid requirements common to federal amendment processes. In general, and with the notable exception of Switzerland, federal constitutions are difficult to change. The constitutions of constituent states are comparatively easier to amend, so that institutional experimentation is occasionally more brisk at the state level, most notably in the United States (Dinan, 2006).

Of course, constitutions are still more difficult to change than ordinary statutes, and in that sense one effect – and a potential downside – of drafting entrenched constitutions in constituent states is to actually make it more difficult to engage in the institutional experimentation and learning that can be beneficial to a federal system. After all, some constituent states in some federal systems have been able to undertake institutional innovations in the absence of entrenched constitutions (and perhaps with more flexibility than would have been possible had there been entrenched constitutions), as with various twentieth-century experiments with direct democracy in the Canadian provinces. Therefore in some respects drafting entrenched constitutions for constituent states can have a stifling effect on institutional innovation. However, to the extent that amendment processes for constituent state constitutions are more flexible than rigid, as they generally are, such constitutions can facilitate the sorts of experimentation and learning that contribute to the functioning of a federal system.

Individual rights

An additional way that member state constitutions can contribute to the maintenance of functioning federations is by permitting judges to interpret their provisions in a way that provides more protection for individual rights than is guaranteed at the federal level. There is no denying that certain fundamental rights require uniform protection. And there is little to be gained from permitting judges to provide lower levels of protection for such fundamental rights than are guaranteed at the federal level. But it can be advantageous on certain contested questions for federations to allow judges to provide higher levels of protection for certain rights in particular states when this is warranted. Such heightened protection might be warranted, among other reasons, by a long-standing solicitude for a particular right in

a given political community or a greater degree of support for a particular means of securing a right in that community.

Because written constitutions empower judges, drafting constitutions for constituent states can facilitate these rights-protective judicial decisions. Written constitutions are, admittedly, not essential to generating judicial rulings of this kind, given that judges can issue such rulings on grounds other than constitutional provisions and have done so in the absence of constituent state constitutions. But entrenching distinctive conceptions of rights in constitutions goes a long way towards providing a legal ground and justification for these decisions.

The extent to which member state constitutions will generate these sort of rulings or else will have little effect depends, however, on the structure of the court system and the means of selecting judges (Morton, 2004, p. 3; Tarr, 2009, pp. 9–14). The ability and willingness of judges to undertake independent interpretation of member state constitutional provisions and provide heightened protection for rights is likely to be influenced in part by whether a federation establishes separate courts at the state or provincial level. It also depends on whether the judges who sit on these courts are selected by state or provincial officials or by federal officials.

Thus, one would not expect to find judges engaging in as much independent interpretation of member state constitutions when there are no state or provincial courts or when state or provincial judges are selected and/or paid by the federal government. As examples of the former, South Africa does not have provincial courts; Austria does not provide for separate *Land* courts; and it is not clear that constituent units in Russia have their own court systems (Saunders and Le Roy, 2006, pp. 84, 238–9, 273). Meanwhile, several federations provide for subnational courts but the appointment process renders these judges more accountable to federal officials than state officials, as in India, where judges of the highest state courts are appointed by the president, after consultation with the governor and participation from the national supreme court (Saunders and Le Roy, 2006, p. 187), and Canada, where judges on provincial superior courts are in essence appointed and paid by the federal government (Saunders and Le Roy, 2006, p. 116).

On the other hand, in some federations state or provincial judges are appointed by state or provincial officials and empowered to invalidate state or provincial measures that run afoul of the constitutional provisions of constituent states. Such is the case with judges on cantonal courts in Switzerland, *Land* courts in Germany, provincial courts in Argentina and state courts in Australia (Saunders and Le Roy, 2006, pp. 26, 57–8, 154, 306). And in some of these cases, especially in the United States, these courts are the final interpreters of state or provincial constitutions, as long as these do not run afoul of federal constitutional provisions.

Judges in this latter group of federations can be expected, on balance, to be more prone to engage in independent interpretation of member state

constitutions for the purpose of providing greater rights protection in particular constituent units. The United States is an outstanding example. At times, state judges in the United States have concluded that their states have a distinctive tradition of protecting certain rights or that distinctive language in their state constitutions warrants heightened protection for certain rights, such as when the California Supreme Court in the 1970s invalidated the death penalty, in part because the California Constitution prohibits 'cruel or unusual punishment' whereas the US Constitution banned 'cruel and unusual punishment'. At other times, state judges have provided heightened protection for rights out of an apparent conclusion that such rulings best reflect the state's distinctive political culture. This is one way of characterising the rulings that recognised a right to same-sex marriage in Massachusetts, California, Connecticut and Iowa between 2003 and 2009.

Conclusion

It is difficult to pinpoint with any sort of precision the actual consequences of drafting any particular constituent state constitution in a given country. It is possible, though, based on the general tendencies of entrenched constitutions as well as their observed effects in federal and quasi-federal countries, to identify the potential consequences and the main factors that affect which of these consequences will be realised.

Regarding the effect on the citizenry, constituent state constitutions can legitimate the distinctive foundational commitments of aggrieved groups and in a beneficial manner; but the process of constitution writing can also force clarity on issues previously held in abeyance and with disillusioning and divisive consequences. These potential benefits and pitfalls are both at a premium when drafting member state constitutions in multinational federations. Much depends on the precise way that a constituent state constitution is drafted and its language couched.

Regarding the effect on governing institutions, drafting constitutions for constituent states can increase institutional experimentation and learning and with beneficial consequences. This is especially the case when a federation allocates constitutional space for such experimentation, by not requiring federal prior approval of state constitutional changes and not mandating a template for state institutional arrangements. Such experimentation is also more likely when state amendment processes require direct popular participation (as they generally do), thereby boosting the legitimacy of state innovations adopted through these processes. It is also more likely when state constitutional processes do not contain overly rigid requirements for enacting constitutional changes; and in fact state amendment processes are generally more flexible than federal amendment processes, even if they are more rigid than if institutional arrangements were established by statute rather than entrenched in a constitution.

Regarding the effect on rights protection, written constitutions tend to empower judges, and drafting constitutions for constituent states can facilitate judicial decisions that provide heightened protection for certain rights in particular states when warranted. These benefits are mostly likely to be realised when a federation provides for separate state or provincial courts and provides for the selection of the judges on these courts at the state or provincial level.

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11
Should Indian Federalism Be Called Multinational?

Rajeev Bhargava

The governing elite in India, perhaps even the larger political elite, has had a continuing conceptual block about recognising multiple nationalities in India. I am not suggesting that from the very beginning of its inception, India should have been named and understood as a multinational state. My point, I believe, is more subtle: given the complexity and size of India, we should have recognised and worked with what might be called a deeply asymmetrical federalism which recognised some societies within it as nations and some not. Over time, the governing elite in India did imagine an inclusive enough state in India, one that granted recognition to different cultural communities but it just fell short of grasping the precise form of recognition for which some societies increasingly yearned. This was a political as much as a conceptual failure. Moreover, the hold of some conceptions was so strong that these elites could not imagine an even more inclusive variety of federalism. Instead of responding even more democratically to multi-layered difference, the Indian state, which had recognised difference pretty early, responded to it with force. Furthermore, it could not imagine that the organisational principle of different states could itself be very different. The crisis of border states in India must *also* be accounted in terms of this deeper conceptual failure.

The chapter is divided into three sections. In the first section, I briefly outline four different conceptions of nation states prevalent in India since the late nineteenth century. In the second section, I provide a brief history of how institutional arrangements in India came to embody one of these four conceptions, what I call coalescent nationalism, that helped establish India into a linguistically federal nation state. In the third section, I argue that neither this conception of nation state nor the linguistically federal state that flows from it satisfactorily captures or fits the ever-deepening multi-layered diversity of India. So, this move from the second to the third conception of nation states does not take India far enough. Since the governing elites of India were not willing to take this important further step, they contributed to the crisis of Indian federalism and nationalism.

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I demonstrate this by taking the example of how the Indian state dealt with the aspirations of the Nagas. My general proposal is that Indian federalism should not be *called* multinational but it should allow some of its segments to be and call India multinational.

Four nationalisms

In roughly a century before India achieved independence from British colonial rule, four conceptions of nationalism developed in the subcontinent. The first, succinctly articulated much later by Gellner, manifested the idea that a community bounded by a single culture must have its own state.

This view bifurcated into two. The first defined culture in ethno-religious terms and was articulated by the Hindu Mahasabha and the Muslim League. On this view, both Hindus and Muslims, defined respectively by their common religious allegiances, were separate nations. For the Hindu Mahasabha, Indian nationalism simply had to be Hindu nationalism. The entire territory of the subcontinent was the home of Hindus and other communities whose religion had its origins outside the subcontinent could live in India only at the sufferance of Hindus, at best as second-class citizens. This primacy of Hindu identity had consequences not only for Muslims and Christians but also for those Hindus who saw other identity-constituting features as equally if not more important. For Hindu nationalists, to be a Hindu was of overriding importance, much greater in weight than say being a Tamil, Telugu or Punjabi. Hindu nationalists define their culture as possessing a thick unity of purpose and as a friction-free whole.

The second manifestation of this conception of nationalism was articulated by vulgar Nehruvians, including occasionally by Nehru himself. This view accepted the premise that a nation is defined by a common culture and that a people whose identity is constituted by this common culture must have a state of their own, but their idea of common culture was not ethno-religious. This common Indian culture was defined by shared historical experience and a joint struggle against British colonial rule. It was also constituted by cultural elements generated out of the inter-penetration of beliefs, values and practices that, when they first encountered one another, were separate. For want of a better term, let us call this composite-culture nationalism. The substance of this composite-culture nationalism is very different from Hindu or Muslim nationalism. Here, because cultural identity is not defined in ethno-religious terms, the ensuing nationalism is far more inclusive. However, its basic form is not very different from Hindu nationalism and as a result it has equally negative consequences for those who take particular identities seriously. Because it defines this common culture as a thick unity of purpose, it has a tendency to become exclusionary. Other regional or subnational identities are thrown to the margins, reduced to near insignificance.

A second conception of nationalism does not require that a culture be defined in terms of a thick unity of purpose. It insists on a common culture but not that particular cultures of different regions or communities be seen by their adherents to be of less overall significance. It seeks only contextual priority of common culture and generally attempts to create mechanisms and policies by which possible conflicts and hard choices in favour of one or the other are prevented. This may be called a *coalescent* nationalism which is consistent with a fairly strong linguistic federalism.

This conception also comes in two versions. The first is willing to recognise that each of the separate cultures within India is more or less self-sufficient, approximating what Kymlicka calls 'societal culture', one that is territorially concentrated and has the potential to organise from within its own resources a large number of important educational, legal, economic, political and media-related public and private institutions. In short, each federal unit is more or less a distinct society. And yet, these distinct societies see themselves as part of a larger, equally significant common culture which forms the basis of a coalescent *nationalism*. If the commitment of every subunit within this larger polity to this common culture is strong, then a state linked to this common culture cannot be called a multinational state. It is a loosely coalescent nation state of multiple but distinct societies, each with some form of limited but largely acceptable self-government rights. One might even say that this is a multinational state without labels, one that does not call itself so. Call it self-effacing multinationalism. The second of these two versions is not shy of calling itself so. In short, it accepts that a single state can be run by dual or multiple conceptions of nationalism. Here each people define their culture and identity as they see fit and organise their state in terms of an organisational principle endorsed by them. This results in a robust, deeply federal state parts of which are distinctly multinational. Call it assertive multinationalism.

Which of these conceptions have been realised in India? In the 1930s, each of the first three conceptions was at play among political elites in India. By 1940s however, the third, coalescent nationalism (self-effacing multinationalism), was submerged by the other two which appeared as the only two serious contenders in the game. The impending success of Muslim League nationalism plunged composite-culture nationalism into crisis. Yet, when the Constitution was adopted in 1950, India rejected ethno-religious Hindu nationalism. Instead, it adopted composite-culture nationalism, installing it as the official ideology of the Indian state. It was not long, however, before this official conception faced yet another serious crisis. The third conception which had been put on the backburner came right back into the game as India shifted its allegiance slowly to the third conception. This coalescent nationalism has served several but not all groups in India well. It has been severely inadequate for the border states of India. An important reason for this is that having come so close to having more

inclusive ways of including **marginalized groups** within the Indian polity, the political elite in India has failed to take the important next step of a timely recognition of their distinct national identity. To amplify this point further, India's complexity is such that it can only be run by a *deeply asymmetrical* federalism. By deeply asymmetrical I mean a form of asymmetry which is not just about different legal provisions but about the organising principle of the federation itself. A form of federalism which is asymmetrical does not question that there is just one basis, say language, on which the constituent units of the federation are formed. The boundaries of states are determined roughly in accordance with the location of speakers of the dominant language in different parts of the country. Thus, all states are symmetrical in the sense that they are grounded in a single, uniform principle, while asymmetry results from the varying needs of different linguistic units. But another possible form of asymmetry could arise from variation in the grounding principle itself. Here, the bases on which the subunits of the federation were formed would be different. Some boundaries could be drawn, for example, on the basis of language, while others could be drawn on the basis of religion and still others by a distinct culture formed by layers of deep differences in language, religion and a way of life. This is what I call deeply asymmetrical federalism, one that accepts plural foundations for state organisation because in these societies multiple pluralities go very deep, and yet people may be able to live together if political recognition is given to different grounding principles of the constituent units of a federation. This means, as I mentioned, that some subunits may call themselves linguistic regions within the Indian nation state and some may call themselves distinct nations within a multinational state. Thus, deeply asymmetrical federalism allows for different peoples of India to see it either as a coalescent national or as a more assertive multinational state. It gives each people the cultural autonomy of collective self-definition and the choice of owning up or not to a label that is commonly regarded as significant. For some, it is significant and therefore owned up. For others too, it is significant but for that very reason given up.

A failure to recognise this deeply asymmetrical federalism has led to rigidities within the political system and among policymakers. It has resulted in unwarranted violence from the state and led to a vicious and pathological syndrome. In what follows (Section 3), I shall try to explain this point in some detail. But before doing so, it is important to give a historical narrative of how we came to be where we are.

Evolution of linguistic federalism and coalescent nationalism in India

At the time of the Mughal emperor Aurangzeb, who ruled between 1665 and 1707, pre-British India was divided into 21 administrative units or *subas*,

some of which coincided with a single, distinct sociocultural region, while others incorporated several. This is not surprising, because every large political entity must divide itself into its constituent units. Even ancient Indian empires were divided into *janapadas*, or territorially bounded communities, based on an admixture of culture, dialect, geographical location, social mores and political status. Ancient Indian literature refers to six 'natural' regions, with 165 *janapadas*.

But although it is true that the federal idea has some resonance in non-modern traditions, the current federal arrangement has its origins in colonial modernity. Under British colonialism, provinces were the result of an *ad hoc* and completely arbitrary process of annexation, accomplished by outright conquest, by treaties that lapsed due to a mixture of manoeuvre and neglect or that were framed under conditions of unequal bargaining strength. All these large provinces were multilingual and multiethnic. They were not the result of a policy of divide and rule, a key instrument of colonial power but, once formed, they were certainly sustained by such a policy. In many cases, people speaking the same language were broken up to form parts of different provinces. This happened, for example, to the Oriyas, the Kannadigan and the Marathas. The vastness of the empire – the sheer size of its territory – compelled the British to devolve power to these provinces. Yet no matter how substantive the devolution of authority to the provinces under the 1919 Government of India (GOI) Act, nor how apparently federal the provisions of the 1935 Act,[1] power was centralised and always in British hands. This was to shape the political structure of independent India in the initial period of its formation.

Early resistance to colonialism did little to unsettle the multilinguistic and multiethnic character of provinces. Later, the necessity of broadening the base of resistance, turning it into a mass anti-colonial struggle, made it very tempting for political movements to mobilise on the basis of linguistic or even religious identities. The Indian National Congress,[2] the main protagonist of the freedom struggle, recognised the potential of relatively stable ethno-linguistic territorial identities. To channelise this potential and ensure that it was tapped exclusively for an anti-colonial struggle aimed at building an inclusive civic nationalism, it evolved an organisational framework for their integration into a newly imagined political community. The *pradesh*, a democratic, ethnically sensitive alternative to the colonial province, was projected as the basic territorial unit of a new federation. Language was to be the organisational basis of each *pradesh*. Thus, subnational linguistic identities were recognised and given their legitimate due, but in a manner that contributed to the larger civic national identity. By 1920, the Congress decided to reorganise all its units along linguistic lines. From then on, national politics began systematically to draw deeper sustenance from various aspects of these language-based regional cultures. The Congress recognised not only that the struggle for Indian nationalism had

to be pursued along federal lines, but also that a responsible, representative government of the future needed a linguistically organised federal state. In the policy adopted at the Karachi Session of the Congress (1929), the approach was to give substantial powers to the provinces. Gandhi, in particular, realised the significance of ethnic identities and sought to forge a unity without glossing over the country's diversities. The Cabinet Mission Plan,[3] in 1946, envisaged a very weak centre in a confederation-like arrangement. The jurisdiction of the union was to be limited to foreign affairs, defence, communications and the power to raise finances for the discharge of these functions. All other subjects were to be within the jurisdiction of provinces. They were also to be vested with residuary powers. Thus, till as late as the 1940s, there was little disagreement about the need for a federal constitution.

Along with the idea of language-based federal units, however, came the notion of religion-based segments and constituencies. Just as the partition of Bengal in 1905 propelled movements of linguistic solidarity everywhere, just so its annulment[4] consolidated a trend towards the potential organisation of political units based on religion. The idea of separate electorates for Muslims had always found favour with Muslim elites. Had Muslims been dispersed more evenly in the territory of the subcontinent, and had they not been in a majority in some provinces, both religion and language could have been given political recognition without practical contradiction. Self-governing units could have been drawn along linguistic lines and special representation rights could have been given to religious minorities. But a large concentration of Muslims in the Northwest and in East Bengal ensured that potentially either religion or language could become the basis of self-governing political units and they therefore began to compete for the same political space. This conflict between two competing forms of ethnicity suited the designs of imperial power. To contain the growing popularity of the national movement, it exploited divisions along religious lines and proposed a power-sharing arrangement that included representation along ethno-religious lines. A parallel mobilisation process was then set in motion on the basis of religious differences. From then on, the Muslim elite felt that provinces grounded purely on language reflected a Hindu bias. Now, one ethnic principle of self-government was to be in continuous conflict with another ethnic principle of self-government.

As is well-known, the independence of India was accompanied by its partition along religious lines. This had a traumatic impact on the psyche of members of the Congress Party. Most of them began to be obsessively concerned with the dangers of further fragmentation and disintegration and began to view with suspicion the political expression even of linguistic identities. No one was more uneasy with these identities than Nehru himself. During the course of his work in the Committee which

enquired into the demand for the linguistic organisation of states, Nehru wrote:

> [This inquiry] has been in some ways an eye-opener for us. The work of 60 years of the Indian National Congress was standing before us, face to face with centuries-old India of narrow loyalties, petty jealousies and ignorant prejudices engaged in mortal conflict and we were simply horrified to see how thin was the ice upon which we were skating. Some of the ablest men in the country came before us and confidently and emphatically stated that language in this country stood for and represented culture, race, history, individuality, and finally a sub-nation. (quoted in Banerjee, 1992, p. 56)

The unitary mindset shaped by the experience of a centralised colonial state was now resurrected and, for a while, it appeared that the idea of a multicultural Indian federation was lost forever (quoted in Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, 1966, reprinted, 1999, Delhi, p. 242). Though committed to the maintenance of pluralism and to granting powers to provinces, the Congress reversed its stand after independence, giving the security and unity of India as its primary reasons. It is true that Nehru believed that 'some kind of re-organisation' was 'inevitable', but he was convinced that language must be supplemented by cultural, geographic and economic factors. The question of linguistic provinces was examined by a special committee appointed by the Constituent Assembly. After an exhaustive enquiry, this committee, known as the Dar Commission concluded that 'the formation of provinces on exclusively or even mainly linguistic considerations is not in the larger interests of the Indian nation and should not be taken in hand.' Another three-member committee that included Nehru was appointed by the Congress to examine the report of the Dar Commission and to make final recommendations. This committee also felt that 'the present is not an opportune moment for the formation of new provinces'. Yet, they conceded that 'if public sentiment is insistent and overwhelming, we, as democrats, have to submit to it, but subject to certain limitations in regard to the good of India as a whole'. They all agreed that the assembly must not attempt to solve the problem 'when passions are roused', but 'at a suitable moment when the time is ripe for it' (Austin, 1966, p. 242).

Given the vast size and diversity of the country, however, federalism in India was less a matter of choice than of necessity. India has 8 major religious systems, at least 15 major language groups and about 60 sociocultural subregions with distinct subnational identities. Besides, India also has one of the largest tribal populations in the world. This, along with its huge population, made it impossible for India to be anything but 'a continental federal polity constituted into a single territory' (Khan, 1992, p. 2) (see Tables 11.1, 11.2 and 11.3 on the multicultural base of India).

Table 11.1 Population by religion

	1961		1971		1981		1991	
Religious group	**Number (million)**	**% to total**	**Number (million)**	**% to total**	**Number (million)**	**% to total**	**Number (million)**	**% to total**
Hindus	366.5	83.5	453.3	82.7	549.7	82.6	672.6	82.41
Muslims	46.9	10.7	61.4	11.2	75.6	11.4	95.2	11.67
Christians	10.7	2.4	14.2	2.6	16.2	2.4	18.9	2.32
Sikhs	7.8	1.8	10.4	1.9	13.1	2.0	16.3	1.99
Buddhists	3.2	0.7	3.8	0.7	4.7	0.7	6.3	0.77
Jains	2.0	0.5	2.6	0.5	3.2	0.5	3.4	0.41
Others[1]	1.6	0.4	2.2	0.4	2.8	0.4	3.5	0.43
Total	439.2	2097.0	548.2	2107.0	665.3	2108.0	816.2[2]	2487.0

Including unclassified persons.
Excludes Assam and Jammu and Kashmir

Note: 981 data do not include Assam.

Source: Census of India, 1981, Series I, Paper 1 of 1995 (Religion), Paper 1 of 1991 (Religion).

Table 11.2 Population by major language group

	Number (in million)		Percentage	
Languages	**1971**	**1981**	**1971**	**1981**
Hindi	208.5	264.5	38.0	42.9
Bengali	44.8	51.3	8.2	8.3
Telugu	44.8	50.6	8.2	8.2
Marathi	41.8	49.5	7.6	8.0
Tamil	37.7	3.8	6.9	0.6
Urdu	28.6	34.9	5.2	5.7
Gujarati	25.9	33.1	4.7	5.4
Malayalam	21.9	25.7	4.0	4.2
Kannada	21.7	25.7	4.0	4.2
Oriya	19.9	23.0	3.6	3.7
Punjabi	14.1	19.16	2.6	3.2
Assamese	9.0	0.1	1.6	0.01
Sindhi	1.7	2.0	0.3	0.3
Kashmiri	2.5	3.2	0.5	0.5

Notes: his statement excludes Assam as no census was taken there due to disturbed conditions prevailing at the time of 1981 census.
This statement excludes language figures of Tamil Nadu as the entire record of Tamil Nadu state under 'P' sample was lost due to flood at the time of the 1981 Census.

Source: Census of India, Part IVB (ii) Series I, India 1981.

Table 11.3 States and union territories by population size

Rank in 1991	State/union territory	Population	Percentage of total population of India		Rank in 1981
		1991	1991	1981	
1	Uttar Pradesh	139,112,287	16.44	16.18	1
2	Bihar	86,374,465	10.21	10.20	2
3	Maharashtra	78,937,187	9.33	9.16	3
4	West Bengal	68,077,965	8.04	7.97	4
5	Andhra Pradesh	66,508,008	7.86	7.82	5
6	Madhya Pradesh	66,181,170	7.82	7.52	6
7	Tamil Nadu	55,858,946	6.60	7.06	7
8	Karnataka	44,977,201	5.31	5.42	8
9	Rajasthan	44,005,990	5.20	5.00	9
10	Gujarat	41,309,582	4.88	4.97	10
11	Orissa	31,659,736	3.74	3.85	11
12	Kerala	29,098,518	3.44	3.71	12
13	Assam	22,414,322	2.65	2.90	13
14	Punjab	20,281,969	2.40	2.45	14
15	Haryana	16,463,648	1.95	1.89	15
16	Delhi	9,420,644	1.11	0.91	16
17	Jammu and Kashmir	7,718,700	0.91	0.87	17
18	Himachal Pradesh	5,170,877	0.61	0.62	18
19	Tripura	2,757,205	0.33	0.30	19
20	Manipur	1,837,149	0.22	0.21	20
21	Meghalaya	1,774,778	0.21	0.19	21
22	Nagaland	1,209,546	0.14	0.11	22
23	Goa	1,169,793	0.14	0.15	23
24	Arunachal Pradesh	864,558	0.10	0.09	24
25	Pondicherry	807,785	0.10	0.09	25
26	Mizoram	689,756	0.08	0.07	26
27	Chandigarh	642,015	0.08	0.07	27
28	Sikkim	406,457	0.05	0.05	28
29	Andaman and Nicobar	280,661	0.03	0.03	29
30	Dadra and Nagar Haveli	138,477	0.02	0.02	30
31	Daman and Diu	101,586	0.01	0.01	31
32	Lakshadweep	51,707	0.01	0.01	32

Note: The 1991 Census was not held in Jammu and Kashmir. The population projections of Jammu and Kashmir as on 1 March 1991 made by the Standing Committee of Experts on Population Projections (October 1989) is given.

Source: Census of India 1991 final population totals (1) PCA Part IIB (i), 1991 (2) PCA Part IIB (i), 1981 (PPXX).

But although its federal character had an air of inevitability about it, the form it assumed, and the justifications for it, did not. India was formed as a federation, but the second tier of government was justified primarily in functional terms. Thus, despite a strong social base for federalism, its institutional expression, at least in the initial period, was weak. Arguably, this was due to the anxieties of a newly empowered political elite, which showed a lack of faith in the power of the democratic process to appropriately articulate and channelise ethno-regional aspirations in such a way that they led neither to violent conflicts nor towards separation. Nehru's reasons for being reluctant to endorse a linguistic organisation of states, however, had some plausibility. First, he believed that a federation structured along ethno-linguistic lines would give some politicians an opportunity to mobilise permanently on the basis of language and give rise to regional chauvinism. This, he feared, might divert attention from issues of welfare and material well-being. Second, such a federation would 'freeze' ethno-linguistic identities, or certain forms thereof. The fluidity, flexibility and multiplicity of identities would then give way to a valorisation of one single identity. It would also prevent the formation of other more inclusive collective identities. But most of all, he feared that these frozen collective identities would increase the likelihood of intra-ethnic violence, encourage separatism and eventually lead to the balkanisation of the country.

Third, this reason was decisive and gave Indian federalism a strong centralising and unitary bias. Article 1 of the Constitution speaks of a dual polity.[5] But, due to the provision of single citizenship, single integrated judiciary, uniform criminal law for all the states and a unified all-India Civil Service (see Articles 5, 11, 14–15, 44, 131–41, 312 of the Constitution), India remains a unified polity. The Constitution gives general supremacy to the Union Parliament and Executive in all matters vis-à-vis the states (Article 365), especially in the making of laws on items included in the state list, in the appointment and dismissal of governors, in the dismissal of state ministry officials, and in the appointment of judges to the states' high courts. It not only gives the residual powers to the Union (Articles 245–46, 249–54, 356) – a clear index of centralisation – but also envisages easy and flexible procedures of constitutional amendment (Article 368) and assigns a larger share of the revenue and a greater fiscal authority to the Centre (Part XII). But more than this, it has provided a legitimate means, in the form of emergency powers (Articles 352–60), to enable the Centre to transform the federal system into a virtually unitary system under three conditions: external aggression or internal disturbance; breakdown of the machinery of law and order and threat of financial breakdown. There is no right of secession for the states, on the principle that, in Ambedkar's words, 'the union is indestructible'. The Union also has the authority to create new states, adjust boundaries between states and generally restructure the Indian Union (Articles 2–3). President's rule in the states, which was declared 95 times

between 1951 and 1995 (i.e., on average, more than twice a year during the last 40 years), and the dramatic imposition of a state of national emergency between June 1975 and March 1977 underlined the capacity of the Centre to dominate the federal polity.[6]

Linguistic federalism and its problems

When the Constitution was inaugurated in 1950, the country was divided into four kinds of states. First, there were the Part A states – former provinces of British India such as Assam, Bihar, Bombay, Madras, Orissa, Punjab, Uttar Pradesh (UP) and West Bengal. Second, there were Part B states which were products of the integration of the princely states. These included Hyderabad, Jammu and Kashmir, Mysore, Rajasthan, Saurashtra, Madhya Bharat and Travancore Cochin. Third, there were Part C states which were either the former Chief Commissioner's provinces or smaller units formed by the integration of princely states. These included Ajmer, Bhopal, Delhi, Himachal Pradesh, Kutch, Manipur and Tripura. Finally, there was a Part D state – the Andaman and Nicobar Islands. As is evident, this structure was the result of a historical accident rather than the realisation of a coherent principle for the organisation of territories.

This system of states, based on the absorption of ethnic identities into a larger civic identity and therefore on the rejection of every trace of ethnonationalism, proved inadequate. As Rajni Kothari (1988, p. 225), pointed out, it began to fall apart when, thanks to its democratic nature, it was forced to encounter mass politics. Demands were immediately made by regional and ethnic leaders for autonomy and for the sharing of political power. The issue of linguistic states became the focus of popular agitation. After a massive agitation in 1953, the state of Andhra Pradesh, where a large number of Telugu-speaking people live, was created. This once again foregrounded the question of whether the entire structure of states in India should be reorganised on a linguistic basis. In 1954, a States Reorganisation Committee was set up. In the Committee, the advocates of linguistic reorganisation gave the following reasons in its favour. First, the creation of such states would remove the frustration and anxieties of minorities within the existing heterogeneous regions. Second, by alleviating tensions and fostering internal harmony within regions, national unity would be assisted. Third, a unilingual region would involve less administrative complexity, thereby enhancing administrative efficiency. Fourth, political units with a greater degree of homogeneity would encourage the internal cohesiveness in regions and facilitate a more democratic government (Narang, 2003, pp. 74–5).

Following the Committee's recommendations, states were reorganised in 1956. Instead of the four-tier structure, there were now only states and union territories. Even so, the linguistic principle was given only partial recognition. It took another mass agitation to divide the province of Bombay into

Maharashtra and Gujarat. In 1966, Punjab was reorganised into three units: the core Punjabi *suba*, the new state of Haryana and Himachal Pradesh. Several new states have since been carved out in response to popular agitation. These include not only the states of the Northeast but more recently the states of Jharkhand, Chattisgarh and Uttaranchal. Although the Constitution did not originally envisage this, India is now a multilingual federation. Each major linguistic group is politically recognised and all are treated as equals.

It is of course true that this political recognition does not cover every large linguistic community. Only languages that had already received official recognition under British rule, undergone some grammatical standardisation and literary development and had become entrenched in the government schools of a particular region could claim to be dominant. Such a claim itself required immense political mobilisation. Only linguistic groups who were capable of this mobilisation could be granted equal political recognition. The current form of linguistic federalism in India depends, as Paul Brass demonstrates (1990, pp. 172–4), on four formal and informal rules.

The first rule is that no secessionist demand shall be recognised. The Indian Constitution does not give any state the right to secede. Therefore, it can suppress such demands by force. The Indian Army has ruthlessly suppressed the secessionist demands of tribal groups in the Northeast and of groups in Assam and Punjab and continues to be militarily engaged in Kashmir. Whenever a linguistic group has dropped its secessionist demands, however, as the Dravid Munnetra Kazhagam (DMK) did in Tamil Nadu in 1960s, the GOI has made concessions and even granted statehood to placate leaders of groups previously dubbed secessionist. The second rule is that the state shall not accommodate the religious principle of state organisation. It took long for the Indian state to reorganise Punjab along linguistic lines because the creation of a Punjabi-speaking state was widely believed to be merely a cover for a Sikh-majority state. A separate Punjabi-speaking state was acceptable only when the sincerity and loyalty of the leader of the Punjabi *suba* movement was believed to be entirely unquestionable. The third rule was that the mere existence of a distinct language group shall not be sufficient for the formation of a separate political subunit of the federation. It had to find political articulation. Even political articulation was not sufficient, however, if it was limited to the cultural or literary elite. It had to have the backing of popular will. Without democratic legitimacy, no language could be the basis of a new state. Finally, the reorganisation of a province was unacceptable if such a demand was made by only one of the important language groups in the relevant area. Thus, Madras was reorganised because it had the backing of both Tamil-speaking and Telugu-speaking peoples, but Bombay had to wait a long time before it could be reorganised because it had the support only of the Marathi-speaking people and was not backed by the Gujaratis.

The reorganisation of states on the basis of language gave equal recognition and dignity to all the dominant language groups. But how have these states fared in the treatment of their own internal linguistic minorities? There is in effect a hierarchy of official statuses in the languages and mother tongues of India.[7] Hindi and English are the official languages of the union. The various regional languages are the official languages in the linguistically reorganised states. These are also listed in the Eighth Schedule of the Constitution.[8] Finally, there is a third level, consisting of those languages listed in the Eighth Schedule without official status in any state. The Indian Constitution gives every linguistic minority the right to maintain its own script and language (Article 30). It also gives it the right to establish and administer educational institutions of its choices (Article 26). Finally, it obliges every state to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups (Article 350A). Thus, any language that is mentioned in the Eighth Schedule is recognised as a minority language in states where other languages are dominant. This gives the speakers of a minority language a right to have schools where the medium of instruction is their mother tongue.

In contrast to the accommodating pluralist politics at the Centre, many of the states have pursued discriminatory policies towards their internal minorities. Moreover, the centre has been unable to protect such minorities from the opposition of the concerned state governments. Among the languages that have been disadvantaged are Urdu and other 'mother tongues' of Hindi and other larger languages. The struggle of linguistic minorities in various states has therefore had at least two aims: to enforce Article 350A and to ensure that their language is listed in the Eighth Schedule. Assimilationists in each of the states have tried to deny linguistic minorities these rights. Urdu has faced discriminatory policies in both UP and Bihar, which has contributed to a severe decline in its use as a medium of communication in northern India. Only one in four Urdu speakers in UP receives instruction in Urdu. Similarly, there is a proportionate decline in the number of newspapers in Urdu. The central government has been unable to intervene effectively in this matter. In Assam, there has been an alternate domination over time. To begin with, Bengalis tried to deny the separateness of the Assamese. Later, when Assamese was recognised as a separate language, and the Assamese took control of the state government, they began to discriminate against Bengali-speaking people. Generally, even languages listed in the Eighth Schedule confront difficulties outside their own homelands. The governments of Punjab and Haryana, for example, do not admit that there are linguistic minorities in their respective regions.

Nonetheless, it would not be unfair to say that the democratic and linguistic federalism of India has managed to combine claims to unity with claims to cultural recognition. No doubt citizen alienation exists, but this

is not due to the repression of cultural identities. A fairly robust political arena exists that allows for the play of multiple identities that complement one another.

I have also argued that, over time and despite all its problems, India has developed a distinctive form of federalism which should be compared to other federalisms, not with the aim of finding out where it is falling short of a Western standard, but rather to identify those features that broaden our very conception of federalism. Indian federalism today is not just of the 'holding together' variety but rather has come to possess features of the 'coming together' form of federalism. This shows that regional parties are becoming stronger not only in the regions but also at the centre. A stable centre has begun to emerge, not by force but by the consent and participation of regional groups that, at another level, are also self-governing. Indian federalism has also attempted to remove its own rigidities by incorporating asymmetries in the distribution of power between the centre and different states. What lessons might there be here for other parts of the world which need federalism but are uncomfortable with it? This is a difficult question to answer, and one that lies well beyond my own competence. But I believe three very general lessons can be drawn from the Indian experience that might be relevant to the future of federalism in other parts of the world.

First, every country, in responding to its own demands and needs, and nourished by its own traditions, will, over time develop its own distinct form of federal structure. Comparisons with other cases are in order, but only to illuminate the specificity of the particular case in question, rather than to judge whether it measures up to a yardstick derived from elsewhere. The federal structure of any polity may have lessons to learn from other federations, but it must ultimately be evaluated by standards which are partly shaped by the tradition and experience of that polity. Second, federalism is part of a larger democratic process. The very *raison d'être* of federation is to grant political recognition to a distinct people who, roughly speaking, are culturally similar and, to some extent, wish to govern themselves. Inter-group equality and self-governance are the two values underlying federalism. This means that federalism must be seen as a constitutional and democratic practice with which to check any form of cultural or ethnic domination. Federalism will not survive in a polity where one community is bent upon dominating others. Conversely, when they work well, federal institutions check the majoritarian and hegemonising potential of any one community within the polity.

However, a federal structure is not just an aggregation of federated political units. The whole is more than the sum of its parts. There is an irreducible federal level and therefore an urgent need to work out an appropriate working relationship between the federal centre and the states. The Indian experience shows that whenever the centre was non-manipulative and treated politicians and people of regional states with respect – indeed,

whenever regions identified with the centre and genuinely participated in governance at the federal level – the entire polity worked smoothly and peacefully. On the other hand, whenever norms of democratic functioning were abandoned and regions treated with disrespect, powerful, even violent, forces were unleashed, leading to grave instability and causing even greater harm to the general well-being of Indian society. In short, the second lesson to be drawn is that democratic functioning, and an accommodating spirit towards multiple communities and their multiple values is the only way to make a federal system successful.

Despite the initial unitary bias of the Indian Constitution, there are important constitutionally embedded differences between the legal status and prerogatives of different subunits within the same federation. Unlike the constitutional symmetry of American federalism, Indian federalism has been constitutionally asymmetric. In a sense then, just as, in some respects, India is less federal than the United States, in other respects it is more federal. To meet the specific needs and requirements of some subunits, it was always part of the original design to have a unique relationship with them or to give them special status. For example, the accession of Jammu and Kashmir to the Indian Union was based on a commitment to safeguard its autonomy under Article 370 of the Constitution. Kashmir is meant to be governed by its own constitution.

Second, the proper functioning of asymmetrical federalism in India requires contextual reasoning. This reasoning does exist in India. A remarkable degree of flexibility and pragmatism is built into several institutional designs in the Indian polity. Politics in India has rarely been a field for the implementation of single principles, and this is how it should be. In politics, one should not try to apply a principle. Rather, one should act while keeping principles in mind. Very occasionally, our actions may realise them fully. Sometimes they may partially embody them. But one must recognise that there are occasions when our acts are unable to realise them at all. This way of conceiving the relationship between political thinking and practice differs from a dichotomous way of thinking, according to which one acts either by implementing principles perfectly or by completely disregarding them. It also recognises that occasionally, in the very process of taking action, our principles are themselves modified or even transformed.

A context-sensitive conception of federalism embodies a certain model of contextual moral reasoning. This it must do, because of its character as a multi-value doctrine. Such a conception accepts the inevitability of value conflicts and admits that no general, *a priori* procedure can antecedently arbitrate between competing value claims. Rather, whether a value will outweigh or override others will be decided entirely by the context. Frequently, such situations necessitate a trade-off or compromise, albeit one that is morally defensible. A contextual model of federalism, then, encourages accommodation – not the giving up of one value for the sake of another

but rather their reconciliation and possible harmonisation. This accommodation may be accomplished in at least two ways (Austin, 1966, 308–25): by placing values at different levels and by seeing them, not as belonging to watertight compartments but as sufficiently separate so that an attempt can be made to recognise a value within its own sphere, without frontally conflicting with another value operating in a different sphere.

Such an attempt to make concepts, viewpoints and values work simultaneously does not amount to a morally objectionable compromise. This is so because nothing of importance is being given up for the sake of something less significant – something without value or with negative value. Rather, what is pursued is a mutually agreed middle way that combines elements from two or more equally valuable entities. The roots of such attempts at reconciliation and accommodation lie in a lack of dogmatism, in a willingness to experiment and to think at different levels and in separate spheres, and in a readiness to take decisions on a provisional basis. It captures a way of thinking characterised by the following dictum: 'Why look at things in terms of this or that, why not try to have both this and that.' In this way of thinking, it is recognised that though we may currently be unable to secure the best of both values, and therefore be forced to settle for a watered-down version of each, we must continue to have an abiding commitment to search for a transcendence of this second best condition.

Such contextual reasoning was not atypical of the deliberations of the Constituent Assembly,[9] in which great value was placed on arriving at decisions by consensus. Yet the procedure of majority voting was not given up altogether. On issues that everyone judged to be less significant, a majoritarian procedure was adopted. It is by virtue of this kind of reasoning that the Indian Constitution appears at once federal and unitary, and why it favours both individual and group-specific rights. If federalism embodies contextual reasoning, it must be understood that this is not private-moral reasoning applied to politics, but rather public-political reasoning infused with a moral character.

Finally, it must be recognised that, even within the same polity, different communities have different, sometimes distinct needs. If so, the federal government cannot blindly treat them in the same manner. If the value of equality is at the heart of federalism, and if treating each region as an equal is at the heart of federal equality, then in some contexts different regions may have to be treated differently. In a diverse society with different levels of economic development and variable historical traditions, asymmetrical treatment is the only way of realising an appropriately interpreted equality. The demand that there be symmetrical treatment of all states, as made by those in India who oppose Article 370, can only lead to injustice and eventually to resistance against it. Federalism in other parts of the world must also discover its own legitimate asymmetries, because in most societies, it is rare to find symmetrical federalism realising justice.

I do not claim, however, that the linguistic reorganisation of states has been an unqualified success. I have already noted that minority language speakers are discriminated against by the dominant language speakers in several states. A more serious problem, however, is persistently present in parts of India along the border. Many of these parts such as Punjab, Kashmir and the Northeast have been wrecked by secessionist movements.[10] Here, the crisis of federalism is acute and has resulted in bitter, sustained and violent confrontations between those who claim that their secessionist movement is legitimate, the Indian Army and national paramilitary forces. As usual, the heaviest price for this volatile and violent situation has been, and is being, paid by ordinary people, and by the poorest of the poor. Let me briefly mention each of these three and then take up one group in the Northeast – the Nagas – for closer examination.

Punjab

Religious differences had always played a crucial role in political mobilisation in Punjab, which witnessed partition on religious grounds. Western Punjab, with a Muslim majority, was incorporated into Pakistan. Religion and politics could not be separated here because the formation of Sikhs as a distinct religious community was itself the product of a political movement. After India's partition, the Sikh demand for a separate Punjabi *suba* was not immediately met. Punjab was not only denied a special status in India but it was not even reorganised along religious lines, as desired by sections of the Sikh elite. Furthermore, even after the demand for a Punjabi *suba* was finally met in 1966, several outstanding issues between Punjab and its neighbouring states remained unresolved. For example, Chandigarh remained the capital of both Punjab and Haryana. Similarly, there has been a recurrent dispute over river waters between these two states.

On their own, however, these regional and religious factors do not explain the resurgence of a secessionist movement in Punjab. The 'green revolution' of the 1960s had created a new class of rich middle peasants. Sections of this group felt that Punjab's contribution to the rest of the country was incommensurate with the costs that it had to pay. In their view, the centre did not reciprocate the benefits bestowed on the rest of the country by Punjab. The privileged sections in Punjab, therefore, began to feel at a disadvantage and their allegiance to the very idea of India weakened. Matters got worse when profits in agriculture began to decline. Unemployed and angry youths then began to turn to militancy, directed against the centre. A new, soured form of religious nationalism began to take shape.

A wiser leadership at the centre might have helped to diffuse the crisis. But by this time, the Congress Party had weakened. As often happens as a party starts to lose its hold on power, the Congress Party began to use all kinds of unfair methods to enhance its power in states such as Punjab. Under Mrs. Indira Gandhi, unlike under Nehru who played the role of mediator

and was reluctant to intervene in state politics, the Congress Party played a deceitful and manipulative role against strong opposition parties in order to prop up its own local leaders, or politicians who could be made subservient to it (Brass, 1990, pp. 193–201). Over time, the Sikh leadership lost trust in the party at the centre. This led to the deterioration of relations between Punjab and the rest of the country. The political situation in Punjab has improved now, but only after a long and violent struggle that took the lives of several thousand innocent people and several politicians, including that of Mrs. Gandhi herself.

Kashmir[11]

The Kashmir problem is especially intractable. In British India, Kashmir was a semi-autonomous princely state. The conflict between India and Pakistan over Kashmir arose because, though the population of the state is predominantly Muslim, its ruler was Hindu. While he dilly-dallied on accession to India or Pakistan, the Pakistan forces marched towards the state capital of Srinagar in 1948. This precipitated its formal accession to India. However, Kashmir was informally partitioned, with a small portion of it going to Pakistan and the larger portion, consisting of three distinct cultural constituents, the Kashmir Valley, Jammu and Ladakh, remaining with India.

Kashmir is important in Indian politics for two reasons. First, Kashmir has remained a litmus test for India's secular nationalism and perhaps even for its linguistic federalism. If India's contestation of the two-nation theory is correct, then Kashmir remains integral to India.[12] On the other hand, if the two-nation theory is valid, then Kashmir belongs to Pakistan. While there is some truth in this argument, it does not fully take into account Kashmir's own understanding of its position, which is based on Article 370 of the Indian Constitution. According to this self-understanding, Kashmir remains, in important ways, unique and therefore deserves a special status within the Indian Union. If this special status is not possible, then it deserves its own separate state. The Kashmiris have always believed that they are a distinct society or nation. Its Muslim-majority character is an important factor here, as long as we remember that Kashmiri Islam is different from that found elsewhere on the subcontinent. Kashmir has always been a test case, therefore, of India's linguistic federalism and, in particular, of how asymmetrical it can be. This asymmetry has always been contested by homogenising forces that are opposed to any kind of autonomy for the people of Kashmir.

Following Paul Brass, I have written above on the strength of Nehru's accommodative politics, which had the potential of solving almost any crisis generated within India's linguistic federalism. However, Kashmir remains a blot on Nehru's politics. There are many explanations for Nehru's failure. The one I wish to emphasise is that, in Nehru's world view, while civic nationalism in the Indian context could be made congruent with

linguistically grounded ethnic subnationalism, it could never fall in line with religiously grounded substate nationalism. This made people like Nehru suspicious even of those who did not explicitly ground their politics in religion. Nehru was suspicious not only of Sikh politics within which religion and language overlapped, but also of the politics of Kashmiris like Sheikh Abdullah. When Abdullah imagined a politics of genuine regional autonomy, different from that envisaged by those who wanted it incorporated into either Pakistan or India, he was never entirely able to convince Nehru of his sincerity. This was due partly to the inter-penetration of religion and language in Kashmir, particularly in the case of its Muslim majority. When Muslim Kashmiris acted with an independent spirit, or spoke with an independence of mind, their Muslim-ness remained a source of suspicion even for secular-minded people such as Nehru. Perhaps this was due to his experience with the Muslim League, which demanded the separate state of Pakistan. Whatever the case, unless Kashmiri Muslims acted with a substantial degree of subservience towards the central government, their loyalty remained questionable. Kashmiri Muslims had to prove their loyalty to India by being anti-Pakistan.

It was this anxiety and insecurity which made even Nehru adopt a manipulative and overly interventionist *realpolitik* in Kashmir. Sadly, the more he followed this approach, the more alienated the Kashmiri people became. After Nehru, the government at the centre treated the state government of Kashmir as its own fiefdom. A vast supply of patronage was made personally available to politicians who monotonously asserted the finality of Kashmir's accession to India. Over time, such governments were thoroughly discredited in the eyes of the Kashmiri people, particularly its youth, who responded to the demands of militants partly because they were constantly ridiculed for being timid and feminine. The more people said that Kashmiris were incapable of revolt, the more the youth turn to insurgency. Once an insurgency started, an attempt was made to suppress it violently and with this, the alienation of Kashmiris from India was nearly complete.

The Northeast[13]

Problems in Assam result from the intersection of different kinds of ethnic confrontations. These involve Hindus and Muslims, Assamese and Bengalis, plains people and tribal hill people, plains tribals and non-tribals and the indigenous population and a large migrant population. Most of these problems centre, however, around the demands of the tribal people who fiercely rejected an Indian identity.

Secessionist movements in the Northeastern tribal areas were based not only on their cultural distinctiveness – in many cases both language and religion are different from mainstream Indian languages and religions – but also because of the initial failure to grant self-government rights to these regions. The Nagas rebelled because the Assam government violated an

agreement with the Naga National Council (NNC) to recognise it as the principal political and administrative force in the Naga Hill district. The Mizos were victimised when the Assam government failed to given them adequate relief after a famine in the late 1950s. As noted above, the policies of the government in the Nehru period was to suppress forces of secession and to encourage and negotiate with moderate non-secessionist leaders. Thus, it was by adopting a conciliatory attitude to the moderates among the Nagas that the state of Nagaland was formed in 1963 and Mizoram was formed into a union territory in 1971.[14]

These moves have not, however, put an end to all insurgent activity and secessionist problems continue to this day. Why has this been the case? Despite all the laudable features of Indian federalism, why does it not work in the case of several border states? I begin with a brief historical account of the relations between Nagas and the Indian state.

The Naga struggle for a separate homeland

For most periods, the struggle for a Naga Homeland has been aimed at the complete secession from the Indian state. One of the world's least-known, bloodiest and the most protracted militant movement in post-independence India, it has raised fundamental questions about Indian federation as well as the nature and function of the Federal Indian nation state.

Who are the Nagas? According to Naga oral history, they had migrated to their present homeland in two waves, passing through the Yunan Province of western China. The first wave crossed upper Burma and settled in present Arunachal Pradesh. In the second wave, they settled down in Burma, with a section migrating westwards in present-day Nagaland, Manipur and North Cachar Hills of Assam. Over time, the Nagas have developed a distinct social life – a set of unique laws, customs and a system of administration which centres around the village. Every village is an independent unit in the 'tribe' and is managed by a council of elders elected by the village.

Part of the Naga territory was annexed by the British in the first half of nineteenth century. Between 1835 and 1851 at least seven military expeditions were conducted to subjugate the Nagas. In 1878, the British occupied Kohima, and by 1881, the Naga Hills District was established covering the southeastern part of the Naga inhabited areas, within the province of Assam. But the north and eastern parts, which constituted two-thirds of the Naga territory, were not annexed.

The conquest was not assimilationist and the distinctness of Nagas was implicitly recognised by the 1919 GOI Act. The Naga Hills District was declared a 'Backward Tract'. This unfortunate term clearly signalled that nothing passed by the Indian legislature would be applicable in this area.

Peaceful resistance to this conquest began early in the twentieth century, with the formation of the Naga Club in 1918, the first ever Naga organisation. The demand for self-governance was made as early as 1929, when

the Simon Commission (the Indian Statutory Commission) visited Kohima under the chairmanship of John Simon and Committee member Clement Attlee. The Committee wanted the Nagas to accept the scheme of governance later formulated as the 1935 GOI Act. In response, the Naga Club submitted a memorandum to the Commission which demanded that the Nagas be 'left alone' whenever the British departed from India.

Formed in March 1945, the NNC represented the aspirations of the Nagas. Its representatives met the Cabinet Mission in April 1946, and asserted, as did several groups and princely states in India, that they would not accept any constitutional arrangement within the Indian Constitution. A nine-point agreement was arrived at that recognised the distinctness of the Naga nation, and gave them the option of deciding within ten years to either join or be independent of the Indian Union. At the same time, enough signals to the Naga leadership were sent to warn them that if they chose not to join the Indian Union, military force would be used.

The NNC launched a process of a voluntary plebiscite in 1951 to further their demand for self-governance. This is widely considered a landmark in Naga history. It aimed at determining whether or not the Nagas wanted to remain in India. According to Naga historians – 99 per cent voted for a free Naga Homeland (Brass Rule 3). In the next year, they boycotted the first Indian parliamentary elections, and opted to continue the freedom struggle. 'These two events are the building blocks of a modern Naga national project and are reiterated to emphasize the legal continuities of the struggle of oppressed peoples and the process of decolonization.' Yet it was not entirely clear whether this was a vote for a separate nation state or for a separate homeland within the Indian Union. Moreover, this ambiguity may have been deliberate, given that inflated demands are established norms of negotiations in a hard bargain.

Unfortunately, the GOI preferred to see things in a more clear-cut manner. They chose to see these aspirations of the Nagas *as* secessionist and used brute force uninhibitedly to suppress the movement (Rule 1). This hardly encouraged any hope of a negotiated settlement. On 22 March 1956, the Nagas declared the formation of the 'Naga Federal Republic', a federated unit including 'free Nagaland' and all the areas inhabited by the Nagas across the state and India's international boundary. An armed unit known as 'Naga Home Guards' was formed that later became the Naga Army. Henceforth, the Indian Army and the Nagas were on the warpath, till a ceasefire agreement was signed in September 1964 between the Indian Government and the Nagas.

Effected exactly nine months after the formation of the state of Nagaland in December 1963, the ceasefire was a result of the efforts of the Peace Mission consisting of Jayprakash Narayan, Rev Michael Scott and B. P. Chaliha. Offering a new perspective and approach to the problems of Nagas, the Peace Mission's proposals marked a sharp departure from

the accepted position of the centre and the Congress leadership on Naga struggle. It was acknowledged that the Naga struggle was not a mere law and order problem egged on by the proverbial 'foreign hand', but an expression of Naga national sentiment. The Peace Mission clearly stated that it 'appreciates and understands the desire of the Nagas for self-determination and their urge to preserve their integrity'.

The Peace Mission became the first attempt by civil society to bring about normality in Nagaland without expounding on what self-determination means: political autonomy or independence. Confusion surrounding this term – the GOI and the Naga underground gave opposing interpretations – has remained the major obstruction to the success of future negotiations.

After the ceasefire agreement, the Government of Nagaland and the NNC signed a peace accord – called the Shillong Accord – with the GOI in 1975. The former unconditionally agreed to lay down arms and to accept the Constitution of India. But soon thereafter the National Assembly of the Nagas, held in August 1976, condemned the Accord which it regarded as a shameful capitulation to the enemy. The Assembly elected Isak Chishi Swu and Th. Muivah respectively as the Vice President and General Secretary of the NNC. Following this, setting aside the Shillong Accord, the unity of the Eastern and Western Nagas was effected by January 1980. Subsequently, the NNC gave way to the new National Socialist Council of Nagaland (NSCN) that had carried out armed struggle against the Indian Army. In 1996, the NSCN and the Naga Federal Government entered into another ceasefire agreement with the GOI, hoping for a political solution through a dialogue. In response, the Indian Government recognised the unique history of the Naga people.

I have provided the bare bones of this fraught history. Where has it brought us today? Fifty years of insurgent politics have made all sides of the conflict wiser. The Indian state seems to have realised that it is suicidal to steamroll the wishes and aspirations of even the smallest nationalities which make up this deeply diverse country. Those struggling to achieve an independent Nagalim seem to have accepted the need for a negotiated settlement. Prior to the British, the idea of a well-defined territory for the Naga or the other tribes was virtually non-existent. It has been a long journey from the Naga 'village republic' to the concept of a unified Nagalim covering approximately 120,000 square kilometres of land that includes all those who consider themselves Naga, regardless of whether they are domiciled in the states of Assam, Manipur or Arunachal.

'Why does a multicultural democracy like India lack a stable framework to tackle some of the more radical and enduring demands of ethnic groups and nationalist movements, other than by coercion?' Initially, there was little effort on the part of the GOI to understand the Naga mindset. According to Udayon Misra, prejudiced assumptions about Nagas obfuscated the centre's ability to properly see a viewpoint articulated outside the framework of

the 'mainstream' of Indian politics and culture. This is an interesting but ambiguous claim. What does the framework of mainstream politics and culture mean? This is precisely what I have from the start suggested in this chapter. The differences between Nagas and the rest of India lie not just in their languages but that they are 'racially', religiously 'different' with distinct local customs. These layered, deep differences require nuanced responses from the state instead of a ham-handed, panicked xenophobic response. The composite-culture mindset of the democratic state, interpreted to mean a historically evolving syncretism, a harmonious amalgam of what once were distinct strands with different origins, was barely accustomed to the political articulation of deep cultural difference. This mindset was always ill-equipped to handle the quality of distinctiveness of the Nagas. The Nagas are a truly separate people who, in other contexts and circumstances, should have had a separate nation state – they were part of the Indian Union solely because of British conquest and the way boundaries were drawn by them but given the nuanced constitution India developed, they could equally be accommodated as a distinct part of the Indian Union. The demand for recognition by a group with such complex layers of difference threw the Indian state off balance, when all that was required was the long-overdue, much-needed finessing of the simplistic notion of composite culture. Thus, the NNC's demand for the protection of the Naga way of life within an autonomous framework (the NNC was never clear on what it actually meant by self-determination) was viewed by the centre as a demand for secession from India. Once put in a national security frame, it left itself little option but to apply force (Brass Rule 1).

Second, the impact of the army's brutality transformed deep difference into a deeper sense of alienation from the rest of India, the chancy desire for autonomy into a legitimate demand for secession. But physical force alone could not have brought about this transformation – it was the hidden message in the use of force that was far more critical.

I recently visited Imphal, the capital of Manipur. Manipur has a large, Meitei community which is Hindu, Vaishnav to be precise. The Meiteis live in plains surrounded by hills inhabited by the Nagas. Though they have their own reasons for feeling deeply alienated from India, the principal conflict of Meiteis is with the Nagas. As mentioned above, the Nagas are dispersed not only in different states in India, in Manipur, Arunachal Pradesh, Assam and Nagaland (where they are in a majority), but also in the neighbouring state of Myanmar. One of the Naga participants of the conference told me that this struggle against the Indian state might not have erupted in the early 1950s had the Indian Army not killed three village elders and paraded their bodies in the marketplace. The Nagas always had a sense of collective individuality and claims of authenticity that spring from it, but, at best, this would have led to a demand for greater autonomy within the Indian Union. What made many into secessionists is the killing of the elders, an affront

to their collective dignity. This killing was not just a murderous assault on individuals but much more. The undiluted message of the Indian state to the Naga people was that their collective self-worth did not really amount to much and that their self-respect and spirit could be damaged and broken with ease. The governing elites of India not only misunderstood the original demand of Nagas – secession when they sought self-determination – but also failed to see that recognition and self-respect are intertwined. Recognition is an affirmative notion. To recognise a cultural community may not entail endorsing every aspect of its overall practice and belief but it does entail a positive attitude, more than mere toleration. If this is true, a failure to recognise and a deliberate denial of self-respect is a double blow. Killing village elders constituted not just a physical assault but was a fundamental misrecognition of what they deeply value and therefore inflicted a humiliating mental wound. The need for recognition and reassertion of the dignity of their community spurred the Naga movement for secession.

I have spoken of a mental wound, but perhaps the term 'ethical injury' is equally apt. The relationship between Nagas and the village elders murdered by the army was no ordinary relationship. Four features characterised it. Village elders are not just older, more experienced folk, but figures of reverence, even to be worshipped. They are not just people from whom advice is sought but moral exemplars worthy of emulation, whose virtues must be integrated into one's own personalities. It is a lived ethical relationship. Deep resentment caused by the use of force against elders flowed from a sense that their relationship to the elders has been violated in a deep, ethical and spiritual sense. Village elders are not just sacred as much as akin to prophets. They are certainly imbued with a quasi-religious character. Second, it is a deeply intimate relation. The use of force by the army is an invasion of their territorial autonomy as well as an intrusion in an intimate relationship. Third, because it is an affective relationship, the anger emanated at seeing mutilated bodies had to emanate from the gut; it was at once psychological, physiological and emotive. Finally, the injury inflicted was felt not just individually but it also jolted the collective well-being of a people. It was an affront to their sense of collective self-esteem and self-respect. Each is an ingredient in what might be called a collective ethical sensibility. The reason I call it ethical injury is because it was a deep affront to this sensibility. The modern state and its governing elites lack resources to understand this sensibility and fail to *see* or understand the injury it causes.

Let me sum up. When Nagas spoke of maintaining their distinct way of life, that included, among other things, the protection of this ethical sensibility. What transpired with the killing of village elders was not only a rebuff to their demand but a violation of this sensibility. This led to the emergence of the tight, narrow 'nationalist' sentiment, a belief that this way of life can be protected only by one's own army and state.

It is no doubt true that eventually Indian civil society organisations and ultimately even the state recognised this sentiment. The Peace Mission Proposals I referred to above were preceded by the 16-point agreement between the GOI and the Naga People's Convention, paving the way for the formation of the Naga Hills–Tuensang area as a separate state within the Indian Union. This agreement provided for a large degree of autonomy for the Nagas, with Clause 7 reiterating clauses of the 1919 Act for which no act or law passed by the Union Parliament that affected the religious and social practices of the Nagas, their customary laws and procedure and criminal justice system contingent on their customary law was to have any force in the new state 'unless specifically applied to it by a majority vote of the Nagaland Legislative Assembly'. Clause 8 of the agreement stated that every tribe must retain powers of rule making and administration of its own affairs through local bodies like the Village Council, the Range Council and the Tribal Council. These bodies would also retain their power to deal with disputes involving breaches of customary laws and usages. Thus, despite their limitations, the 16-point agreement and the subsequent formation of the state of Nagaland were a major step towards satisfying the aspirations of the Naga people.

In the light of all this it may be said that the Thirteenth Amendment of the Constitution of India (1962) by which the state of Nagaland was formed not only proved the flexibility and accommodative power of the Indian Constitution, but it also indicated that the Indian state, its repressive face notwithstanding, was also slowly learning to adjust itself to the autonomy demands of the small nationalities. By inserting clause 371A (and thereby incorporating all the demands mentioned above along the lines of Article 370), this amendment reasserted the deeply asymmetrical character of Indian federalism. Thus the Indian parliament cannot on its own change (a) religious and social practices of the Nagas, (b) Naga customary law and procedure, (c) administration of civil and criminal justice involving decisions according to the Naga customary law, and (d) ownership and transfer of land and its resources shall apply to the state of Nagaland. These special provisions go a long way in protecting the Naga 'way of life'.

Perhaps the one thing that can be said against Naga nationalism concerns its demand for greater Nagalim which fails to take into account the aspirations of other neighbouring groups. In short, it violates Brass' Rule 4. It is not as if Nagas have no plausible claim, but the reality is that colonial administration has drawn boundaries in such a manner that severely limits options. The change demanded by Nagas could trigger a major crisis in the entire region. Moreover, Nagas and Manipuri Meiteis have constructed their own history, collective memory and identity. Nagas emphasise their continuing independence, the freedom enjoyed by them, their unique history and distinct culture. The Meitei rendering of their history stresses the syncretic nature of 'Manipuri' identity, and the traditional bonds of culture and

economy between the hills and the plains. Meiteis must be made a party to any resolution of the Naga problem. But for this to happen, 'there needs to be an alternative institutional imagination, and the discovery of a source of fresh ideas that nourishes an entirely different political discourse than that of making and breaking states'.

Tension persists in Manipur. A couple of years ago the United Committee of Manipur (UCM) declared an 'emergency' to deal with the situation arising from T Muivah's statement in New Delhi that he was born in Ukhrul, part of Nagalim. The UCM is of the view that the centre has assured the NSCN (I-M) leadership that as part of the deal the three Naga-populated districts of Manipur, namely Ukhrul, Tamenglong and Senapati, would be part of Nagaland. The merging of these districts with a greater Nagaland would halve Manipur's territory. The Asom Jatiyatabadi Yuva Chatra Parishad of Assam declared that not an inch of Assam's territory would be ceded to the Nagas and if the state's boundaries were redrawn by the centre, then a 'thousand Muivahs will be born in Assam'.

Institutional structures designed to resolve the conflict must coexist alongside Manipur and not at its expense. The solution will have to 'recognize Naga identity, *alongside* both the sovereignty of India and Burma [where a significant population of Nagas reside] and the territorial integrity of states like Manipur and Assam'. Without this, as Sanjib Baruah notes, it is unlikely that the Naga peace process can overcome these obstacles (Baruah, 2001).

So, what becomes now of my assertion that multinationality has not been properly recognised by the Indian state? Here, I make two points. First, the pivotal role of timing in politics. This decision came after an underground extremist movement for secession had been strengthened already. Too late. Second, it is one thing for a Peace Mission to recognise the national sentiment, quite another for the state to do it. Even if the state recognises it, it is one thing for it to legally recognise a group and another to inscribe it substantially into practice. The fact is that the governing elite and the army act contrary to the relevant law of the Constitution. They act differently with 'normal' and 'deviant' states, with a coalescent conception of nationalism with the former but with a unitary conception with border states. Faced with difference, the state responds with contextual reasoning and negotiation. When faced with deeply layered difference, it abandons reason and reacts with force.

The linguistic reorganisation of states could only work if it followed certain rules. The most important of these is that non-violent regional demands of autonomy are to be treated with sympathy, compassion and subtlety. A non-manipulative negotiation and deliberation is the most appropriate response to the legitimate demands of regions with a distinct culture and language. With this model of contextual moral reasoning, wise politicians sought to accommodate the needs of one region, also keeping in mind the aspirations of neighbouring regions and the good of the entire country. Linguistic

federalism succeeded only when and as long as this principle was followed. Problems occurred when an insecure government at the centre dealt with regional aspirations in a ham-fisted, manipulative and self-seeking manner. Sadly, Indira Gandhi's policies were different from that of her father's. Instead of isolating the extremists, she began to hobnob with them – part of a calculated, interventionist strategy to loosen the hold of moderate regional leaders and in order to bolster her much weakened leadership and party. Mrs. Gandhi continued to blur the all-important demarcating line between party and state. Always a dangerous policy, it undermines the relatively impartial and mediatory role of the central government and strengthens militancy in these regions. Moreover, the policy of 'carrot and stick' simply does not work for self-respecting people. The assumption that carrots would work for an elite that can be hoodwinked into cooption and the stick would eventually instil fear in masses prone to violence is entirely wrong. For a start, regional elites can be equally manipulative: take the carrots and give nothing in return. Second, people can be fearless and ethical. As Dolly Kikon puts it, 'The Indian state's paternalistic carrot-and-stick policy of using military force intermixed with liberal doles of "development" money has not gone well with the people in the region.' Moreover, the continual military presence only reinforces the idea that the Indian state is inured to democratic demands and aspirations of its citizens and immune to their rights and the desire to have an autonomous way of life. In the Northeast, low-intensity conflict between militants and the army is inevitable and a system of dual loyalty has yet to develop.

Two further points emerge from the problems of linguistic federalism in India. First, whenever a hitherto dominant political party begins to loose its grip, becomes anxious and insecure about its own future, it abandons the very principles that brought it success in the past. When the Congress enjoyed dominance throughout India, it made a distinction between the party and state, remained relatively impartial in inter- or intra-state disputes and adopted a conciliatory stance towards ethnic communities that used democratic procedures to demand greater autonomy for themselves. But once its dominance waned, it blurred the distinction between party and state, becoming increasingly and blatantly partisan in troubled states. If it helped firm up its self-interest, the Congress did not hesitate to bolster even extremism. Unprincipled, manipulative and interventionist politics of parties in power has caused the eruption of violent ethnic conflicts and plunged linguistic federalism in India into crisis. Failure to abide by basic principles of constitutional democracy, in my view, remains one of the principal causes of the crisis of Indian federalism.

A second reason has to do with the intransigent nature of any religiously grounded politics in the subcontinent. The roots of this intransigence go back to the formation of extremist Muslim and Hindu political parties that eventually led to the partition of the country. Suspicion about religiously

grounded nationalism and subnationalism made it impossible for framers of the Constitution to even consider the possibility of a deeper asymmetry in constitutional arrangements. Could the country have evolved a constitution with a secular state in a multi-religious society, one that organised some states on the basis of language and others on the basis of religion? A federal state with *all* its subunits organised wholly along religious lines was legitimately unacceptable to the leaders of the national movement. In their political imagination, the furthest one could go was to give political recognition to linguistic communities. But what if *some* religion-based subunits were permitted? It is hard to tell. But what is certain is that even the presence of a differently religious ingredient in the overall culture of a group raises the hackles of the governing elite. Alas, this is a major obstacle to a peaceful, democratic resolution to the problem.

Overall, it is the failure to realise that only a deeply asymmetrical federal system could work in a country with India's size and diversity that constitutes the source of the problem. As I said, this is a form of asymmetry which is not just about different legal provisions but about the organising principle of the federation itself. Unless India recognises that the grounding principles themselves could vary from state to state (at least in the case of some states), the problem of secession will persist with legitimate complaints that 'the Indian state often contradicts the constitution that promises the protection of deep cultural diversity and guarantees a pluralist political system'. Neither the electoral system nor the 'solutions' such as carving a state out of Nagaland from Assam in 1963 has addressed the core of Naga aspirations.

To conclude, a deeply asymmetrical, open and democratic framework, based on the recognition of emerging discourses of human rights, minority rights and indigenous rights, will only strengthen Indian polity as well as pave the way for successful negotiation of the Indo-Naga conflict. India has to strengthen tendencies in some of its parts to be assertively multinational. A coalescent nationalism of the self-effacing multinational variety may be insufficient. Alas, by now, in some cases, the Indian state has gone too far with its repressive strategy that stems from a major conceptual flaw alluded to above. Now, respecting rights will not be enough. Public acknowledgement and apology for wrongs committed by the state will have to be part of the solution.

Notes

1. The British government attempted a series of reforms to address the problems of their empire in India. The first of these reforms resulted in the 1919 GOI Act. This Act introduced substantial changes in provincial administration such as the transference of subjects including local self-government, education and law and order becoming the preserve of provinces. Legislative and executive power in the provinces increased on an unprecedented scale, though a small franchise and

limited availability of finances continued to present serious limitations. Similarly, in the early 1930s, the imperial government invited prominent Indians to three Round Table Conferences in London in which along with British politicians they discussed the making of a new constitution with which to govern India. These discussions finally took shape in the 1935 GOI Act. The Act was a recognition by the government that the continuation of the empire in India posed a massive political problem for which an immediate political solution had to be found. Its main aim was to 'buttress the empire not to liquidate it'. However, for all its limitations it was a major experiment in the devolution of power in a non-white part of British Empire. For details, see Brown (1994, Chapter 4, pp. 205–9, and Chapter 5, pp. 251–316).

2. The Indian National Congress was formed in 1885 by Indians educated in Britain. It was inspired by Dadabhai Naoroji who lived in the imperial capital and attempted not only to foster a sense of Indian identity but to pressurise British rulers to make public policies more sensitive to Indian needs. Until the First World War, it remained a pressure group, composed of elites who wanted more recognition from the British Empire and greater participation in its activities. Later, largely due to efforts of Gandhi, it became a mass organisation and demanded, at first a greater degree of autonomy and later complete independence from the British Empire.
3. The Cabinet Mission put forward a plan for a three-tiered constitution of a federation, groups of provinces which chose to act together for agreed topics and provinces at the base. This plan was at the centre of a fierce controversy between the Indian National Congress and the Muslim League. The Congress President, Nehru, made it clear that once an Indian Constituent Assembly came into being it would not be bound by the Cabinet Mission Plan, particularly on the issue of voluntary grouping by provinces. The League then rejected this plan on the ground that the new Constituent Assembly might not safeguard the interests of Muslim-majority areas (see Brown, 1994, p. 334).
4. Partition came about because Bengalis with a strong linguistic identity felt that the imperial government had sought illegitimately to divide them. This led to a burst of solidarity. Once Bengal was divided, however, it also created a Muslim majority in East Bengal and a Hindu majority in West Bengal. This helped foster the politicisation of religious identities and the birth of the idea that a religious community can be the sole bearer of all economic, social and political interests. The annulment of partition destroyed the 'communal' hopes of Muslim elites in East Bengal.
5. The reference to dual polity clearly suggests a commitment to a form of federalism. However, several other features of the Constitution suggest that this federalism was hugely attenuated. The reference to dual polity was initially made by B. R. Ambedkar, the main architect of the Constitution. Introducing the draft Constitution, he said, 'The proposed Indian Constitution is a dual polity with a single citizenship. There is only one citizenship for the whole of India ... There is no State citizenship' (Constituent Assembly Debates, 1999, p. 34).
6. On 26 June 1975, the President of India, at the request of the Indian Prime Minister, Mrs. Indira Gandhi, imposed a national Emergency on the ground that there was a grave internal threat to the security of the country. In fact, the move was propelled by a massive opposition to her continuation in office. In 1973–74, food shortages and rising prices had produced violent demonstrations in several Congress-ruled states. In 1974, Jayaprakash Narayan, a one-time

Congress member, a socialist and a friend of Nehru, took the leadership of the agitation in the Indian state of Bihar and offered a direct personal challenge to the authoritarian rule of Mrs. Gandhi. In June, 1975, the Allahabad High Court invalidated the election of Mrs. Gandhi on grounds of corrupt practices. A mass mobilisation campaign was launched against Mrs. Gandhi who responded by arresting all her principal opponents and unleashing a short period of terror.

7. On official and dominant state languages, see the table in Brass (1990, p. 176).
8. The various Schedules, 12 in all, each of which is attached and relevant to specific Articles of the Constitution, are to be found at the end of the Indian Constitution. Eighteen languages are currently listed in the Eighth Schedule of the Constitution.
9. The Constituent Assembly was set up in December 1946 to draft the Constitution of independent India. It completed its work in December 1949 and the new Constitution was implemented when India was declared a Republic on 26 January 1950. Between 15 August 1947 and 26 January 1950, the Constituent Assembly became a provisional Parliament.
10. On the crises of linguistic federalism, see Brass (1990, pp. 192–227).
11. On Kashmir, see Puri (1993); Ganguly (1999) and Behera (2000).
12. In the early 1940s, the Muslim League launched the theory that Hindus and Muslims were two nations and therefore, according to the nationalist principle, should have a separate state of their own. This was called the two-nation theory. This theory was vehemently opposed by the Indian National Congress which argued that religion was irrelevant to nationality and citizenship and that the Indian nation was composed of one people regardless of religious affiliation.
13. On the Northeast, see Baruah (2001); Hussain (1992, pp. 1047–50) and Gohain (1989, p. 1377).
14. The Union Territories are centrally administered, unlike states which have substantial autonomy. Initially, only Part D states such as Andaman and Nicobar Islands were deemed a Union Territory. Later, others were added, such as Delhi and Pondicherry. Many territories, such as Manipur and Tripura, began as Union Territories but later became states.

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Conclusion

Michel Seymour in collaboration with Alain-G. Gagnon

We now wish to offer brief concluding remarks. What are the lessons to be learned from contributions to this volume? One conclusion is perhaps that there is no magic solution to the problems raised by multinational societies. At the very least, a lot more research must be done if we want to identify basic principles that ought to be applicable in all multinational states.

Theories that have been devised for dealing with the challenges raised by multinational societies are certainly relevant, but they cannot provide in absolute terms answers to current uncertainties. In the social sciences, there is no such thing as a 'one size fits all' solution to the political accommodation of many different peoples living within a single country. The problem is that ethnopolitical dynamics may vary considerably from one country to another. A model that is applicable in a certain type of society may not be workable elsewhere. In some cases, multinational federalism may be the best outcome, but in some other cases, peoples might be better off forming distinct (unitary or plural) nation states or else creating loose confederations of sovereign states.

Ultimately, the question arises whether we should operate on a case by case analysis and whether models must be tailored in such a way that they are made to apply to each particular country. This may be the best approach to adopt when dealing with multinationality, as long as we simultaneously adhere to universal principles such as democracy, liberalism and a charter of rights and liberties for persons and peoples.

Not the solution, but perhaps a solution

So, a variety of models should be considered as equally valid in principle: mononational unitary states, multinational unitary states, mononational federations, multinational federations and confederations of sovereign states, or even a mix of these different models. Depending on prevailing situations in different countries, we may put forward territorial federalism, *de jure* multinational federalism or consociationalism. We may also instil

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different norms of internal self-determination: an adequate representation in central government's institutions, self-government for each people or a special constitutional status.

Some political actors will perhaps want to make a case against the instauration of a federal model, especially when the state is multinational. The argument runs as follows: there are of course many federations all over the world, but the most successful ones are not said to be clearly multinational (USA, Germany, Australia). Moreover, many multinational federations have failed. Former USSR, Yugoslavia and Czechoslovakia are no longer around. Of course, one could suggest that these states have disappeared because of the demise of the communist regimes. These countries were neither liberal nor democratic and this would largely explain why they were not able to survive (McGarry, 2004). It would therefore not tell much about potential virtues of multinational federalism. But one could reply that the collapse of those states can also be explained by the fact that they were unable to survive without imposing an anti-democratic regime. As anti-democratic regimes were removed from these countries, nothing could keep all component nations into a common political community.

In addition, some still continuing multinational federations find themselves into trouble (Burgess and Pinder, 2007). For instance, Belgium can hardly be mentioned as an example to be emulated, given tremendous challenges and pressures the country is under. Is Canada a good example? The systematic violation of the federal principle, in the name of the federal spending power, and the pervasive fiscal imbalance have created enormous pressures on the political and fiscal autonomy of Canadian federated states. Canada is constitutionally a highly decentralised state, but it is increasingly being pulled in the direction of centralisation. Perhaps a better example could be India. Its ability to survive with so many languages and ethnic groups is something that comes close to a miracle. But it is a very young democracy and its cast system, poor regions and huge inequalities do not yet allow us to mention it as an example to be followed, and to make predictions on its viability as a long term multinational federation. Switzerland could perhaps have been mentioned, but according to some political analysts, it is not clearly multinational (Grin, 2002; Stojanovic, 2000).

We want to offer some sobering thoughts by arguing that even if multinational federalism is perhaps not the perfect model, it is certainly a model that may in principle gain to be applied under certain conditions. However, it is hard to compare the relative merits of federalism and confederalism. At first glance, one might think that a federal model is more easily applied when countries contain a limited number of distinct peoples, whereas the confederal model would be required when many nations are living side by side, since it is much challenging to find a common ground between all of them. In the latter case, it seems that the supranational entity should be less than a sovereign state, the reason being that a political organisation

involving many different nations calls for a more flexible and adaptable structure. But we may adopt a very different perspective on the comparative advantages of these two political models in their relationship to the numbers of component nations. If the confederal model implied a right of veto for each constituent nation concerning most policies adopted in the confederal institutions, then a confederation of, say, twenty-five countries in Europe would quickly become dysfunctional, and this provides ammunitions for those who argue in favour of establishing some federative structures in order to keep countries together. For the same reason, confederalism might seem a preferable option when only a small number of peoples are involved. A certain degree of already existing economic interdependency and integration is an element too often neglected in the implementation of a confederal model. Deadlocks that are often associated with vetoes exercised by members of a confederation will be less damaging usually if sovereign countries involved in this political arrangement are already part of a strong economic union.

No matter how we adjudicate one's success in assessing merits and weaknesses of multinational federalism, one may question whether federal states are better suited to accommodate national diversity when compared to unitary units. It is after all possible for unitary states to allow for a constitutional devolution of powers to their component nations. Call it a 'federacy' if you will (O'Leary, 2005), such an arrangement is different from a multinational federation. And, from the vantage point of the central state, it is possible to imagine a very nationalistic government leading a federation that is reluctant (when not simply opposed) to accommodate, recognise or empower its own national minorities. For instance, the least we can say is that the Russian federation is unable to accommodate Chechnya. The same can be said in the case of the Serbian federation, which proved unable to accommodate Albanian Kosovars.

So it is not clear that federalism as such presents many advantages when compared to other models of power-sharing. Far more important than the relative merits of federalism, confederalism and unitary states, are power struggles at play. For while academics discuss the merits of various models, struggles for recognition of national minorities go on and the nation building policies of central governments are being pursued.

A solution for Europe?

At the political level, it could be argued that there are various conditions that must be met for the multinational state to survive and be viable. It might very well be that the state must be created in accordance with the compact theory. It must be created by the democratic approval of its constitutive peoples. Furthermore, the population must see itself as part of a multinational society. That is, it must represent itself as constituting an

aggregate of different societal cultures. Third, the state must constitutionally recognise its constitutive peoples and must formally accept the institutional consequences of this recognition. That is, it will have to secure the internal self-determination of all its peoples, whether this entails political representation, self-government or a special constitutional status.

The literature produced around the concept of multinationality over the last two decades has now led to a significant normative shift in various fields among which constitutional law, political theory and comparative politics. The concept has become a potent conceptual tool to be used by states characterised by national diversity. As revealed by the crisis in Greece or even more recently by a wave of riots in UK's multiethnic neighbourhoods and ancient industrial quarters, ethnic tensions are often times expressing deeper economic problems, problems of social integration and discrimination. It comes as no surprise to be told that large segments of the German population think that structural problems in Greece are caused by the weakness of its productive workforce or that UK fingers are being pointed at Afro-Caribbean population for the riots.

Following events unfolding in Greece, Italy, Spain, Portugal and elsewhere in Europe, we are becoming aware of the difficulties involved in trying to maintain a European common currency. To arrive at such a plan, there must be stronger fiscal and economic links between member states. And this suggests more federalism at the supranational level. But how can this be achieved if national economies are of unequal strength? Difficulties faced by Greece, Ireland, Italy, Portugal, and Spain cannot be simply explained by incompetent administrations. In the case of Greece, it is clear that the central government did not require a sufficiently large fiscal contribution on the part of its corporations and taxpayers. But it is certainly not the only problem. It is very difficult for a weak economy to borrow money on international markets when currency involves high interest rates as is the case with the Euro. For when the country borrows money, its debt increases significantly and this may become difficult to bear when it goes beyond 100 per cent of its gross national product (GNP).

What should we do then to resolve economic problems faced by Greece, but also by Ireland, Portugal, Spain and Italy? Potential solutions may not involve a choice between federalism and nationalism. We must perhaps rather consider two aspects: developing federalism, yes, but at the same time it must be one that is truly multinational, in that it takes into account all national economies of countries involved (Germany and France, of course, but also Greece, Ireland, Portugal, Spain, Italy, etc.). In short, according to this particular hypothesis, the only acceptable federalism in Europe would be one that respects the economic national interests of all the EU countries. And this in turn might imply that the wealth created by all EU members should serve the purpose of a more equal economic development for all EU members. Two columnists of Quebec newspapers, André Pratte (2011) and

Serge Truffaut (2011), have used the Euro crisis to justify a general argument in favour of federalism at the expense of nationalism. Pratte, for instance, echoes the words of Jean-Claude Trichet, President of the European Central Bank, who estimates that 'the Europeans will have to agree to further integration of their economic policies', and then opposes it 'to people who are afraid to surrender their national sovereignty to European institutions perceived as bureaucratic'.

Again, what may very well be a sterile opposition is established between federalism and nationalism. However, it is not simply by creating a European Ministry of Finance, and thus another bureaucratic level, as proposed by Pratte, or even a department like this, but that would be composed of elected officials, as accepted by Truffaut, that we would reach the ideal of multinational federation. The problem, in both cases, is perhaps not only that the authors envisage 'top down' measures, imposed from above to the component countries by officials, elected or not. Even more importantly, the problem is that it is a measure that does not go to the roots of the problem. It is perhaps not enough to just bail out a country when it is on the verge of bankruptcy, or to accompany each participating country in trying to avoid deficits. It is not enough to harmonise economic and fiscal policies. It may also not be enough to adopt some equalisation measures, especially if the monetary policy remains attached to the strongest country. Once again, favouring a more equal economic development may be the solution. It may even be a solution that should in general be implemented before the creation of a common currency.

A lesson for Belgium

In Belgium, economic inequalities between Flemish and Walloons are fuelling tensions between the two communities. Walloons' economic disadvantage is being accounted for by 'cultural' explanations on the part of Flemish co-nationals. Such a position seems ill founded, but reveals how far we are from a solution to their long lasting political impasse. Belgium's political situation is in such a political mess that it is hard to see how the country will be able to survive. And, in that case, the solution may very well be to create an independent state for Flanders and the Flemish people. But the case of Belgium may serve to illustrate once again the extent to which federalism requires a certain form of economic mutinationalism.

It is not enough to talk in abstract way about Belgium and its federal system. Contrary to what so many French Belgians believe, Belgium is definitely not postnational. The identification of so many French Belgians to Belgium is a national attachment, and there is clearly a very legitimate Flemish people whose nationalism should be accommodated within (or without) Belgium. But what are we to do in order to save Belgium as a multinational federation? It is not our purpose here to pretend that we have

the answer to this complex question. But if we want to explore the socio-economic consequences of multinational federalism, it is perhaps fruitful to examine the following line of argument.

It is useful to imagine a new scenario for Belgium, even if it may come at a late hour. Walloons could accept that the Brussels' Region would go under the control of the Flemish region, as part of a larger Flemish territory, but only on the condition that the federal government be strengthened and that the wealth created by the country as a whole be used to foster economic development in the Walloon region. This would be an instance of a true multination federation respecting its different national economies and securing their development. Once again, as it was stressed earlier, it may very well be too late for Belgium to turn around its political misfortune.

A lesson for Canada?

The above remarks also provide lessons for Canada where people also too often distinguish between 'federalism' and 'nationalism', like Truffaut and Pratte did in their newspapers comments about Europe. Federations are never clearly 'postnational', because they are often hiding the presence of majority nationalisms (Gagnon, Lecours and Nootens, 2011). Thus, for decades, just as the European Central Bank adopted a policy of high interests rates that were best suited for the Germans, the Bank of Canada established its own rate based on the Ontario economy, often times ignoring the specificities of the West, Quebec or, for that matter, the Atlantic provinces. When there was economic overheating in Ontario and this province was subject to inflationary pressures in the 1970s, the Bank of Canada increased interest rates, and this created enormous pressures in the rest of the country. Federal economic policies have also historically been used to develop the economy of Central Canada but especially Ontario as its main economic heartland. With a Conservative government led by Westerners since the mid-2000, these policies have been adjusted somewhat and have gradually become more sensitive to resources-led regions, especially in the fields of gas and oil development.

Were it not for the natural resources available in Alberta, Quebec and now Newfoundland, Nova Scotia and Saskatchewan, we would have witnessed a true nationalist concentration of economic power in Toronto. So we should perhaps understand and even welcome the importance and inevitability of minority nationalism and economic regionalism emanating from different Canadian quarters. These are often healthy reactions to a nationalist domination that is present in almost every state, including a federal state like Canada. This is one reason why we should perhaps not oppose 'federalism' and nationalism as if they were two opposing notions, if we neglect for the moment Michael Burgess's distinction between federalism and federation. A federation like Canada, according to some experts, may perhaps be

a true expression of 'federalism', but it may also at the same time exemplify a certain form of cultural and economic nationalism.

To emphasise, it is misleading to oppose federalism and nationalism as if they were two mutually exclusive options. Those concepts are revealing contexts that are intertwined. Federalism often hides a nationalism that does not dare to speak its name, and minority nationalism is often a healthy opposition to the nationalism of the dominant majority. The only acceptable form of federalism in a multinational country is one that takes into account minority nationalisms and that gives a voice to all partners while empowering weaker members. Seeking solutions in a diversified multipolar world require leadership, fairness, and a constant desire of accommodation in a context that is becoming more and more complex.

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