European Belgium

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1 For more than 50 years, Belgium has lived in harmony with Europe – in its various configurations.

Belgium has contributed to the emergence of strong legal thinking in several ways. This thinking cannot ignore national borders, but seeks to transcend them. It aims especially to bridge the barriers typically created between the disciplines of constitutional law, which are national by definition, and institutional law, now emerging at European level and distinct from classical international law.

Albrecht Weber's work, which is based on a comparative knowledge of our continent's political and social realities, perfectly illustrates this approach. It helps to break down old conceptual frameworks. At the same time, it paves the way for the establishment of an institutional "new world".

This transdisciplinary exercise is not always as simple as one might imagine or hope.[1] There are methodological difficulties, linked in particular to the use of various idioms. There are misunderstandings that arise from the development of stories and from cultures that are distinctive and sometimes conflicting. There is also political resistance – frankly speaking, nationalist and sub-nationalist resistance – which has resulted in unfinished business or obvious failures.

Now it is more important than ever to follow the advice of the poet *Boileau*: "Vingt fois sur le métier remettez votre ouvrage" (Your work must be polished and honed to perfection). Moreover, in the words of another writer, *L. Aragon*, we must be realistic and accept the idea that "Rien n'est jamais acquis à l'homme/Ni sa force, ni sa faiblesse, ni son coeur" (Nothing is man's forever, neither his strength, nor his weakness, nor his heart). The same can be said for the life of institutions. *Sisyphus* and his boulder spring to mind here.

In that context, one question needs to be asked. Why did Belgium, this small State in Western Europe, want and why did it manage to make its own contribution to the building of Europe? Why did it devise this contribution in both theoretical and practical terms? Why does it continue to invest so much energy in doing this?

[1] Delpérée 2013, p. 197 et seq.

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And why, in a world awash with Euro-scepticism, does it demonstrate so much faith in Europe? A faith that is said to be capable of moving mountains.

One explanation has been put forward. Belgium has faced institutional problems for half a century and done its best to deal with them. Despite making steady progress, it keeps an open mind as to future options. So it could be said that Belgium is better prepared than others to deal with the challenges – sometimes the very same ones – now faced by the European Union. These challenges stimulate Belgium to develop, so tenaciously and enthusiastically, a range of solutions. The country may one day call upon solutions like these in such circumstances, however troubled or confused the latter prove to be.

Belgium has Europe in its DNA, embedded in its traditions and political initiatives. Why then should it not at times humbly point the way forward for its European partners?

Though Belgium's citizens may struggle to imagine how their country will evolve, the country also believes that its future and maybe its very existence are closely tied up with those of the European Union. Could the EU provide some of the walls to prop up the nation's federal structure? Here, too, Belgium believes that this is a risk (or challenge) worth taking.

2 I always compare a State to a house. When I visit a house – to rent it, to buy it, or to live there, when I wonder which plan it was built on, when I want to understand how the inhabitants lived or worked there – it can be helpful to have one – or several – keys to enter that house.[2]

I offer the use of three keys to enter the Belgian house. The first one is the federal key, the second one is the parliamentary key and the third one is the European key. I would like to use these keys to explain, in broad terms, how the Belgian State is organised and how it functions in the heart of the European Union.

2.1 In most States worldwide, State structures are unitary structures. The law – known as national law – is the same for everyone. It applies everywhere on the State's territory, to all people, in all situations. "The Republic is one and indivisible", as it says in the French Constitution.

Belgium was born in 1830. For 150 years, it existed under a unitary system. The Constitution underlined this in Art. 10: "Belgians" are "equal before the law". They were obviously equal before the *same* law, in other words before the national law. In a unitary State, the law is "the same for every-one", in the words of the French *Déclaration* of 1789.

A simple system of public institutions took shape under this unitary perspective. "One" King, "one" government, "one" Parliament, "one" Supreme Court (*Cour de cassation*). Nothing could be simpler. Naturally, in this unitary State, there were – and there still are today – local authorities that we call municipalities (589 in number) and provinces (10 in number). But these authorities were subject to the rules established by national law. A rule established by the City of Antwerp or a

[2] Delpérée 2006.

rule established by the Province of Namur could, for example, be repealed by the Minister of the Interior if it did not comply with the national law or if it was not in the public's interest as defined by the unitary State.

Since 1970, however, this simple and practical situation has gradually been changed. Step by step (1970, 1984, 1988, 1991, 1994, 2014), Belgium has been developing into a federal State.

This is a major change. In a federal State, the law is no longer the same for everyone. It is based on what is known in the United States, Canada, Australia or India as the 'sharing of powers'. There are different legislative bodies at work at the same time. There are several laws, rather than just one. Various different laws apply to citizens, depending on where they live in the territory of Belgium.[3] The recurrent question is: "Who does what, who may do that, who has the power to do what?"

To take just one example, the rules on erecting, demolishing or renovating a building now vary, depending on whether you live in Flanders, Brussels or Wallonia. The rules on organising or providing education are no longer the same in the North and the South of the country. In addition to the federal law, there are now community laws and regional laws.

The federal law, and community or regional law (which we will call decrees), have identical value. Perfectly identical, to be precise. A law is the same as a decree. A decree is the same as a law. In theory, the federal law cannot intervene in the fields of competence of community or regional law. Competences are considered exclusive. As in other federal States, there are no concurrent competences.

[3] Delpérée and Verdussen 2005, p. 193–208: "The principle of equality, which is at the very heart of our political society, ordinarily serves as a backdrop against which the state of legal relations between individuals is assessed. This same principle is often used to measure the progress of democratic society. But what if it were also used to measure the state of legal relations between the various political entities comprising the federal State? It follows that the question of federal equality would have to be approached from a dual perspective, one that considers both functional and institutional dimensions. With respect to the functional perspective, we tend to consider the federal entity, on the one hand, and the federated units, on the other hand, as having equal footing in exercising their functions and powers. Sovereignty is shared; each partner being master of its domain of activity. However, if inequality is organised to the benefit or detriment of either of the partners, one should wonder whether institutional realities are properly reflected in formal arrangements and whether an authentic federal system can develop under these conditions. From an institutional perspective, we tend to think that a federal system of government, which rests on the functional equality of the constituent entities, does not necessarily require their institutional equality. For instance, the federated units can enjoy institutional arrangements differing with respect to the organisation of public authorities or the distribution of powers among them. In other words, equality does not signify identity. Certain institutional differences can be tolerated, accepted, and even encouraged. Admittedly these should not lead to a situation where one federated unit is placed in a subordinate position in relation to the other units or the federal entity. However, these differences can also serve to distinguish, in a very clear manner, the status of the political entities comprising the federal system. Thus, a federalism premised on the principle of equality produces a regime of shared sovereignty, and does not exclude the development of differentiated sovereignties".

Conversely, the community or regional law cannot intervene in the field of federal law. The exclusivity operates in both directions.

So we have a Belgium that is now part of the group of 30 federal States that are to be found around the world. However, federal Belgium has a number of unique features, which set it apart from the other federal States. Quite simply, it is engaged in "Belgian-style" federalism.

2.1.1 Federal States tend to be created by association – a method expressed by the motto *E pluribus unum*. The founding peoples come together, they meet, they associate to found a State.

Conversely, federal Belgium is being created by disassociation. It is a unitary State that is gradually turning itself into a federal State. This means that this State is transferring more and more competences and means to the communities and regions.[4] In brief, it is stripping and impoverishing itself.

This raises a rather worrying question. Just where will the process of disassociation end? Is not the disassociation paving the way for disunion or division? Is federalism just an intermediate step on the path towards the emergence of three new States? I do not have a definite answer to this question. We shall see.[5]

2.1.2 The other federal States are multipolar States: the United States (50 in number), Switzerland (26), Germany (16), Canada (10, not including the Northwest Territories), Mexico, Brazil, Austria, India, and so on.

As for federal Belgium, it is bipolar. What we are engaged in is two-sided federalism. I know that we have Brussels and we have the German-speaking Community, which cannot be reduced to two blocs. But the institutional arrangements are organised around two major political communities: Flanders and Wallonia.

We are two. Still two. The North and the South. The Council of Ministers: seven French-speaking ministers, seven Dutch-speaking ministers; the Constitutional Court: six French-speaking judges, six Dutch-speaking judges; the parliamentarians: two language groups. Not three, not four, not five.

This situation has serious consequences. Bipolar federalism is not a federalism of cooperation. It is more a federalism of confrontation, of competition and even of conflict. Belgians spend a great deal of time solving (or trying to solve) a number of political conflicts, at the end of which no political authority wants to be a loser. It can be hard to find "win-win" solutions.

2.1.3 The other federal States are, in general, organised around a simple structure. There is a first stage, that of the federal State. There is a second stage, comprising the federated authorities. They are called "States" (in inverted commas), *Länder*,

[4] In Belgium, the federated entities have jurisdiction only by devolution. Residual powers belong to the federal State. Certainly, the Constitution contemplates the future transfer of the residual powers to the federated entities. However, in order for that to happen, there would have to be a constitutional accord, and this is not foreseeable at present. As the Constitutional Court has said, this provision is therefore of no effect (n° 76/98).

[5] Delpérée 2007; Hasquin 2014.

cantons, regions, and so on. Yet these federated authorities are all of the same kind. They have identical competences. They have similar means.

However, federal Belgium practises a layered federalism. At the federated level, there is no single type of authority. There are two of them. There are communities – which match linguistic and cultural concerns. There are regions – which match economic and social concerns.

This may seem surprising. But, when all is said and done, we experience the same realities at European level: the Europe of 28 is not the Europe of the Euro, nor is it the Europe of Schengen. There are European policies with a variable geometry.[6]

To further complicate this presentation of the institutions, the two authorities that are present in the North of the country, the Flemish Community and the Flemish Region, decided to merge their institutions, administrations and budgets. The same movement has not yet happened in the South of the country.

Within each community and each region, there is a government, a parliament, and an administration – but there is no real network of justice institutions. This institutional system is, broadly speaking, modelled on the one that exists at the federal level.[7]

2.2 Parliamentarianism is a political system in which a parliament can control a government (and its administration) and possibly vote it out of office. It is also a political system in which a government can dissolve a parliament. In short, it is a system of mutual revocability.

Belgium fits well into this perspective.

Here is a recent example. In April 2010, the parliamentary majority was divided on an issue of major political significance: the definition of electoral constituencies in and around Brussels. At that time, the French-speakers made use of the so-called alarm bell. What could the *Y. Leterme* government do? *Leterme* had only one solution. He resigned on 26 April. A few weeks later, on 7 May 2010, efforts to put together a new government with the same majority came to nothing. The government brought about the dissolution of the houses, in the hope that the election would offer results that would lead to a solution to this political conflict. Just the opposite happened. The legislative elections were held on 13 June in the same year. The government of *E. Di Rupo* came into being on 5 December 2011, one and a half years later, at the end of an interminable political crisis.

Belgium therefore has a parliamentary system just like Westminster. But the country has three special features that should be highlighted.

2.2.1 Belgium's Parliament has two houses, two parliamentary assemblies. We use the same terms as the United States: the House of Representatives and the Senate.

[6] This illustrated a major concern in Belgian federalism. Let's solve problems one at a time, one after another. Let's build institutions in response to specific needs, and not according to an abstract political scheme.

[7] Delpérée and Depré 1998; Lejeune 2010; Uyttendaele 2014.

The bicameral system, as practised in Belgium, is not egalitarian. This will always be the case.

The House has most of the political control over the government. If necessary, it can vote the government out of office.

The House has exclusive control of the budgetary function.

The House plays a key role in the legislative function. Notably, the government presents all bills that it wants to become law to the House.

What about the Senate? It no longer has control over most of the legislative function, it no longer has political control, and it has lost its budgetary function. The Senate has turned into a think tank.

If it is able, if it has the means, the Senate can compile, for the government or the first house, a number of dossiers, including legislative ones, which these authorities will have to see through to completion.[8] I pick out just one example. A senatorial commission looked carefully at the way in which the King and members of the royal family carried out their activities. This commission drafted a report on this subject, which was used as a platform for an important discussion in this field, including in the House of Representatives.

2.2.2 The Parliament can vote out the government. The government can dissolve the assemblies. However, it should never be forgotten that the government and Parliament are allies, not opponents. In political science, this is called "majority rule" and also applies in Belgium. It can be found within a party in the Parliament as well as in the whole government.

The difficulty lies in the fact that this majority is automatically a composite majority. Neither do we have homogeneous governments, nor do we have minority governments. There is a simple explanation for that. For more than a century, we have practised proportional representation. Given that the main party in the government is the Dutch-speaking New Flemish Alliance, which represents 20.3 % of the electoral body, one might assume that the governments are always governments with a broad coalition: four (as is the case today), five or six partners.

Another reason for the difficulty is that the Belgian government must have equal representation on both sides. That means, from a mathematical viewpoint, that it must include seven French-speaking ministers and seven Dutch-speaking ministers. Above all, from a political viewpoint, this means that the government benefits from having a majority in both the North and the South of the country.[9]

The length of the crisis – one and a half years in 2010–2011 – highlights the difficulty of putting together governments like this.

The division within the governmental majority, which is also the parliamentary majority, is the main cause of political crises that may arise in Belgium.

[8] Sägesser and Istasse 2014; Delpérée 2014a.
[9] Delpérée 2014b.

2.2.3 Given this context, it is tricky to define the King's role.

Belgium adopted its Constitution on 7 February 1831. At that time, the nation lacked a king. A delegation travelled to London. It met with Prince *Leopold of Saxe-Coburg*. He was the widower of *Charlotte*, the aunt of the woman who would become Queen *Victoria*. He was hesitant about accepting the Belgian crown. He said he wanted to read the text of the new Constitution. He was allowed to do so, and then announced to the delegation members: "Gentlemen, you have rudely treated the monarchy, which was not there to defend itself."

Which provisions of the Constitution did the future King find so shocking? More than likely it was Art. 105 ("The King has no powers other than those formally attributed to him by the Constitution") as well as Art. 106 ("No act of the King can take effect without the countersignature of a minister, who, in doing so, assumes responsibility for it").

So the monarchy's power was limited and shared.

There can be no doubt that the King has official duties. He signs laws. He concludes treaties. He appoints ministers. He appoints judges and civil servants. All this is done with the consent of a minister.

There can also be no doubt that he has an unofficial duty. To take but one example, the King of the Belgians makes a speech on 21 July, for the national holiday. This is not a speech from the throne, as is delivered in Westminster. The King drafts this speech himself, with the assistance of his immediate staff. The text is then sent to the Prime Minister, who is allowed to make one or two comments, on style and content. The King then makes his speech, which really is his "own" but which is agreed with the Prime Minister.

2.3 As already highlighted, Belgium clearly has a European vocation. It is not just the city or Region of Brussels that aspires to become the seat, or one of the seats, of the European Union. The entire country and its citizens fall into this category.[10]

This option is not really debatable. Belgium sometimes does have reservations about European initiatives. It discusses their merits, it questions the terms of their implementation, and it balks at the adoption of measures which, especially in terms of the budget, significantly limit the country's sovereignty. In all circumstances

[10] Delpérée 2001: "In 1970, i. e. fifteen years after the appearance of the first steps towards European integration, Belgium modified its Constitution and introduced a 'general clause of integration'. It states that the 'execution of specified powers' could be entrusted by a treaty or a law 'with institutions of public international law'. This constitutional clause allows important transfers of competence – especially with the treaties of Maastricht and Amsterdam – in fields of economic or financial policy. However, it raises major constitutional problems. For example, constitutional problems arise when Community treaties not only consider the transfer of a national matter to the European order, but also turn their attention to solving questions of internal organisation of the Belgian state or of its political collectivities, notably by defining the conditions of the municipal electorate. It is also the case when Community treaties do not only consider the transfer of a national matter to the European order but also turn their attention to handling questions of federal competence. In order to avoid conflicts within the internal order, it is made clear that the communities and the regions have to approve such treaties."

though, it seeks to show how favourably it is disposed towards action at European level. This choice is significant in itself.

Belgium contributes to the gradual development of a common culture and constitutional practice, within which the country finds the foundation of its political organisation. It is irresistibly drawn to positioning itself firmly in favour of "multi-level government".

2.3.1 A common constitutional culture has been developed for more than 60 years in the heart of Europe. A pioneering culture that is based on the three States which make up Benelux. This culture also draws on the institutional experience of Belgium's two large neighbour States, France and the Federal Republic of Germany.

This culture is that of a Romano-Germanic legal system. It is statutory law. A law developed by parliamentary and governmental authorities, working together on the same political tasks. This constitutional culture is not that of other European States. *A fortiori*, it is not yet that of the Union.

Belgium has no hesitation in explaining its impatience with the Union's tardy embrace of constitutional culture. When necessary, it points out European law's lack of coherence, certainty and stability, including in the field of institutional law.

The coherence of EU law is problematic. There are too many texts. At the same time, there are too few that include proper legal rules. Certainly, there are legal rules in due form. These are, for example, rules found in the Treaties or in secondary legislation. They stand alongside a set of proposals, statements, recommendations, roadmaps, and so on. They coexist with various political, economic and financial instruments whose status is unclear – which is a euphemism[11]. This coexistence is damaging. The time is right for making law, real law. In Europe, bad law typically prevails over good law. Now is the time to restore a better balance.

There is also a lack of legal certainty. In theory, the law establishes a hierarchy of rules. It links the different standards to each other. In Europe, there are legal rules. Some are part of Community law, while others belong to international law.[12] Their provisions overlay one another and are sometimes contradictory. To take just one example, the famous Treaty on Stability, Coordination and Governance

[11] In September 2010, the European Council launched the first European Semester. To that end, it modified the "Code of Conduct on the implementation of the Stability and Growth Pact". This document was the basis for the European Semester of 2011. The Semester only became binding after another year had passed, following pressure from the European Parliament. Today, it is integrated as one of the rules that make up the *Six-Pack*. Another example can be seen in the "Euro Plus Pact". Signed in March 2011 by the Heads of State or government of the Member States of the Eurozone and six other Member States, it includes a number of commitments on competitiveness, employment, public finance and financial stability. However, it is not a treaty or a Community act. It is still no more than a political commitment. All the same, it is included in the European Semester and is being assessed by the Union's institutions. What value should be attached to the recommendations that are based on non-compliance with this pact?

[12] The Treaties establishing the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM), just like the "Fiscal Compact Treaty" (TSCG), are not a matter for Community law. They are international treaties, respectively linking 27 Member States (EFSF), 17 Member States (those of the Eurozone – ESM) and 25 Member States (TSCG).

in the Economic and Monetary Union modifies the provisions of the *Six-Pack* by tightening them. This means that an international treaty, signed by 25 Member States, corrects an act of Community law adopted by 27 Member States.[13] It is high time to build an ordered and structured legal system. There is still a distinct lack of legal stability in Europe. In principle, law is long-lasting and sustainable. Yet this is an area where impermanence dominates. The ink on the treaty had barely dried before some were calling for a new institutional negotiation, sometimes on the key points. The *Six-Pack* was just coming into effect when the *Two-Pack* was added. Is this a good way to proceed at a time when economic and social behaviour must be controlled? Empiricism, not to mention institutional tinkering, is not the best way to work. We need to give time to the rules and institutions to acclimatise before reviewing provisions or modifying the key elements.

2.3.2 A common constitutional practice grows through the courts, which still operate within separate institutional groups. These are constitutional courts (with the exception of the Netherlands), Councils of State or administrative courts, Supreme Courts or Superior courts of justice, the Court of Justice of the European Union, the European Court of Human Rights, and so on.

It is important to align their concerns and interventions. Formal or informal modes of operation are implemented to this end. For example, the constitutional standard may expressly refer to a conventional standard or the constitutional court may always return to the same international standard. *R. Arnold* notably quotes the decision of the German Federal Constitutional Court of 14 October 2004: "The European Convention on Human Rights is in force in the German legal system [...] It has the value of a federal law. It must be taken into account in the interpretation of national law, including human rights and the rule of law." To quote that other decision of 30 June 2009 on the Lisbon Treaty: "The State is open [...] domestic standards should be interpreted in accordance with international law."

The conventional standard may refer, even if only through national traditions, to constitutional texts. But the reference is mainly to the institutional structures of the States, or at least the way they view the protection of fundamental rights. It is still possible for the judge to use catalogues that are not applicable strictly speaking, but which he will use for the purpose of comparison or as an integral element of an internationally recognised *opinio juris*.

2.3.3 Belgium's future cannot be separated from that of the European Union. It is no coincidence that Belgium's capital aspires to be one of the most effective seats for the Union's institutions. This aspiration is not supposed to antagonise any other city in Europe. The Belgians have understood the strategic importance of Europe for the existence of their small nation.

[13] A further example is the separation of competences between the Union and the States, which is not made with reference to a clear dividing line. A number of competences are concurrent rather than exclusive. Under these conditions, the principle of subsidiarity must be used to allow either the Union or the States, depending on the situation, to assert their authority and exercise their responsibilities.

If divided, how could the Belgians possibly lay claim to the title of being 'Europe's star pupil'? If separated, how could they recommend that their own motto, "L'union fait la force" (strength through unity), be applied on a wider scale?

Belgium's best chances are to be found in Europe, which obliges the Belgians to look further ahead and to keep their eyes on the horizon. If Europe struggles, that is bad for Belgium. If federal Europe moves forward, that is good for federal Belgium.

The opposite is also true. If Belgium were not to make a success of its institutional restructuring,[14] the country would be living proof that two peoples cannot live together within the same State. How then could 27 other Member States reconcile themselves with that? However, if Belgium were to find itself on a path to a new balance, albeit at the cost of arrangements that are sometimes conceptually complex and tricky to implement,[15] it would demonstrate to everyone through example that it only takes a little imagination and knowhow to build and live in a new structure. It would also show that living in such a structure is not always wonderful, but at least the experience can be orderly and comfortable.

3 The fusion between Belgium and Europe is complete. Nobody would dare to suggest that Europe's future belongs solely to the Belgians. Yet it is tempting to think that Belgium's future largely belongs to its European partners.

The European partners should think carefully about their responsibilities! They must not get side-tracked by the financial disputes that EU citizens struggle to comprehend, even though these disputes can sometimes affect them so hard! It would be better for the partners to help citizens by offering innovative and dynamic policies that encourage them to be supportive! For instance, citizens should also be invited to collaborate with their counterparts from other continents! Lastly, the partners should strive to resolve political and social issues, instead of focusing on economic and financial difficulties!

Europe needs more soul, something that does not fall under the law – be it treaties, directives or case law. This extra soul will ultimately be forged from the mindset of the Union's leaders and citizens. Ideally, it will one day be incorporated into the legal sphere – in our thoughts and actions!

[14] Many Belgians hope that the consolidation will be successful one day. A small minority believes it is the first step towards even greater "detachment", or even secession, within the Belgian State.

[15] The explanation of the institutional system – European Belgium – may seem clear. But the system is complicated. It gives rise to a number of difficulties and conflicts. Conflicts over competences, conflicts of interest, political conflicts, and so on. Most importantly, conflicts over the vision of Belgium's immediate future or definitive future. Belgium is not at ease. I doubt that it will be in the short term.

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