

**Breaking the territoriality principle:
non-territorial arrangements in multinational federations**

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Abstract

Granting territorial autonomy is considered to be a suitable mechanism to accommodate the demands of geographically concentrated national minorities within one state and to potentially prevent secession. Nevertheless, it requires an agreement on how to redraw boundaries that more often than not includes the creation of new minorities within the smaller territory. In comparison, non-territorial or cultural autonomy allows for the transfer of powers to communities without a clear-cut territorial basis. Therefore, it has been offered as possible supplement solving shortcomings of territorial autonomy by providing forms of self-government in the fields of education or culture to dispersed cultural communities. Comparing non-territorial arrangements in Belgium and Canada, the paper argues, that they more often increase conflicts between communities instead of working as helpful supplement. Non-territorial autonomy in multinational federations may be regarded as violation of the territoriality principle political actors had previously agreed upon as dominant mechanism for minority protection. Only if applied in a consociational tradition and separately at each level, non-territorial arrangements can serve as additional mechanism for protecting linguistic communities.

1 Introduction

Accommodating cultural diversity requires mechanisms of power-sharing in order to secure the survival of minority languages and distinct traditions. The last decades have yielded a resurgence of minority rights and non-assimilation as values in liberal democracies. Different kinds of arrangements have been discussed and applied in plurinational or culturally divided societies, including symbolic recognition, special protection or rights, as well as fields of independent decision-making and legislative autonomy (Kymlicka, 2007). Accommodating national or cultural diversity always requires a decision by political actors about which community is eligible based on different criteria (size, historical rights, and presence on the territory during state formation). Territorial autonomy is regarded as an appropriate mechanism to accommodate the demands of geographically concentrated national minorities. Several processes of decentralization and internal restructuring in Western Europe confirmed the preference for territorial solutions in these states. Whether federalization prevents secession or accelerates dissolution forms a reiterating question in the literature and empirical comparisons also don't offer one generalizable answer (Erk & Anderson, 2009; Kymlicka, 1998; McGarry & O'Leary, 2009). Non-territorial or cultural autonomy has sometimes been treated as an alternative mechanism of accommodating cultural or linguistic groups. Less dominant in the literature, the original writings of the Austro-Marxists Karl Renner and Otto Bauer on non-territorial forms of transferring autonomy, have recently gained more attention in the literature on deeply divided societies. While skepticism remains whether non-territorial autonomy serves as an alternative mechanisms for territorially concentrated communities, it is discussed as appropriate for dispersed minorities, aboriginal peoples or as supplement to territorial autonomy (Kymlicka, 2005; Nimni, 2007; Bauböck, 2004).

Based on the discussion of the applicability of territorial and cultural forms of autonomy transfer, the paper analyzes the tensions arising when the two mechanisms are combined in multinational federations. Sharing power based on the territoriality principle creates a new level of government with legislative and fiscal capacities. Power or some would even argue sovereignty is divided between the center and the federated entities. Once the decision is made to accommodate national communities by territorial autonomy, applying non-territorial autonomy for the same minorities outside their home-territory becomes increasingly difficult to justify. Non-territorial autonomy in these cases may be regarded as violation of the territoriality principle political actors had previously agreed upon as dominant mechanism for minority protection. Comparing territorial and non-territorial arrangements in Belgium and Canada, the paper argues, that the latter more often increases conflicts between communities because of the contradicting underlying principles. If non-territorial arrangements are applied at the federal level in a consociational tradition or are based on

the initiative of a federated entity within their territory, they serve as helpful supplement to territorial autonomy. By adhering to the territoriality principle, the support of linguistic communities outside their homeland does not contradict the underlying state architecture and allocation of power. However, if federal initiatives are directed at supporting linguistic minorities across the state based on the personality principle, they infringe on the autonomy of the federated entities. These initiatives will be regarded as encroaching into the fields of jurisdiction in which the territorial units perceive themselves as sovereign. Implementing non-territorial autonomous rights for linguistic minorities depends then on the willingness of the federated entities to support their minority communities. As visions about the state and its basic components are often contested in culturally diverse societies the acceptance of those mechanisms will be limited especially in those entities where the statewide minority forms the majority of the population.

2 Territorial and non-territorial modes of power-sharing

In multinational contexts, changes in the allocation of power are negotiated in order to accommodate internal nations and their demands for recognition or self-determination. Mechanisms of diversity management can be based on the territoriality or the personality principle. The distinction of these two principles goes back to Karl Renner who developed the concept of non-territorial autonomy for the distinct linguistic groups in the Austro-Hungarian Empire (Renner, 1918; Coakley, 1994). Although the Empire fell apart before these ideas were implemented and tested, they have experienced renewed interests after the transformation of the former communist states in Europe and for ethnic conflict regulation. The two principles have their benefits and shortcomings regarding the applicability and success of accommodating cultural diversity (McRae, 1990; Bauböck, 2004).

2.1 Territorial power-sharing mechanisms and national communities

Territorial power-sharing encompasses the creation of a new level of government with separate institutions that enjoys constitutional status and autonomous legislative power. In federal systems, “sovereignty is shared and powers are divided between two or more levels of government” (Hueglin & Fenna, 2006: 32-33). According to the classical definition of Daniel Elazar, federalism combines self-rule and shared rule components, meaning autonomous fields of jurisdiction for the substates as well as their representation in institutions and participation in decision-making processes at the center (Elazar, 1987: 12). Speaking of territorial autonomy, therefore, focuses on the self-rule component of federalism. Regarding national minorities, it emphasizes the aspect of self-determination instead of integration and participation in existing institutions.

In multinational contexts, the territorial concentration of a national community allows for the re-drawing of boundaries so that this community becomes a majority within the new territorial unit. Sovereignty will then be shared between the center and the regions or federated entities. National communities that live concentrated in one region, therefore, prefer territorial autonomy as mechanism of recognizing their distinctiveness. Depending on how jurisdictions are distributed, territorial autonomy allows a national community to define policies in the fields of education, culture, media or language rights according to their respective needs. It also comes closest to the idea of having the right to self-determination or being a sovereign nation within a state that several national minorities share.

Apart from the benefits of this mode of power-sharing, re-drawing boundaries and granting territorial autonomy runs into several problems. First, new minorities will be formed with the creation of substate entities that will raise the same demands for protection from majority rule and assimilation within the smaller territory. Second, geographical concentration of minorities is always incomplete. New internal boundaries may follow historical legacies but may not coincide entirely with the area in which the people belonging to one cultural community reside. Ethno-federalism serves only those living within the defined territorial units while those living outside will not benefit from the administrative and legislative capacities established for the communities in the regions (Bauböck, 2004; McGarry & O'Leary, 1993). Third, federalism may strengthen or stimulate secessionist aspirations instead of reducing them. Incomplete transfer of power or the lack of financial resources may, on the one hand, limit the authority of the federated entities and leave a substantial degree of control with the central level. In consequence, demands for further autonomy or secession pure and simple may be induced by what is felt to be an inadequate and inefficient allocation of power. On the other hand, positive experiences in deciding autonomously on policy initiatives and public spending may also yield in positive evaluations of complete independence (Erk & Anderson, 2009; McGarry & O'Leary, 2009). In order to avoid a spiral of increased decentralization and reduce the shortcomings of territorial solutions, non-territorial modes of power-sharing have been suggested as supplement to federalization.

2.2 Non-territorial mechanisms of power-sharing and national communities

Non-territorial or national cultural autonomy includes transfers of the jurisdiction over education and culture to national communities independently of their territorial concentration. Similar to the connection between territorial autonomy and federalism, non-territorial autonomy relates to consociationalism focusing on the authority of the communities in the transferred fields of jurisdiction. The requirement of elite-consensus between the distinct groups prominent in consociationalism, however, does not exist in the concept of national cultural autonomy (see

Lijphart, 1985; Nimni, 2005). According to Renner, the concept allows the state to recognize cultural communities as its basic components without the necessity to be restructured into a multinational federation. As his concept was not based on regional identities but on linguistic groups, Renner argued in favor of a consolidation of the German linguistic group and against the preservation of local identities like 'Kärntner' or 'Steirer' within the German community. Although he acknowledged a certain degree of territoriality and group size as necessary for being eligible for special recognition as a group, his idea of protecting diversity was directed at linguistic groups, not at territorial distinctiveness. Based on individual membership and affiliation, the distinct communities are supposed to have authority over those policies related to cultural distinctiveness, like language, education, literature and art (Renner, 1918: 81; Brahm Levey, 2005: 151-152).

Similar to territorial autonomy and federalism, non-territorial forms of power-sharing face some obstacles in political practice. Although the voluntary membership is in line with individual liberal rights and offers the advantage of staying connected even when moving into a different region, it requires a decision from each individual. Attachments can however lie with more than one community; they can be mixed due to intercultural marriages, or change over time. The question arises how membership registration can allow for flexibility or changes in affiliation. Furthermore, granting special rights based on cultural differences may induce the elites and members of the communities to emphasize differences between them while downplaying similarities or shared positions (Bellamy, 2000). Instead of reducing the potential of falling apart connected to territorial autonomy, non-territorial arrangements may also increase conflicts between distinct communities. Non-territorial arrangements have been suggested as helpful addition to accommodate the dispersed parts of otherwise territorially concentrated national communities holding territorial autonomy. Under certain conditions, however, the underlying principles of the two modes of power-sharing work against each other when applied simultaneously.

2.3 Power-sharing and dividing sovereignty between territories and communities

Distinct cultural communities regard themselves as internal nations within a shared state architecture. Self-identification of communities can go as far as being a sovereign nation with the right to self-government that voluntarily continues to be part of the same state or secedes if it wishes so. In this framework, any form of power-sharing will be negotiated between equal partners and come into force only by mutual consent. Transferring territorial or segmented autonomy can also be framed as dividing sovereignty between different levels of government in the first case or between distinct communities in the latter. Defining sovereignty as indivisibly resting with the central level, like in the British constitutional tradition of parliamentary sovereignty or the mainstream constitutional doctrine in Germany, deprives internal nations of their equal position and self-

identification. In order to be treated as equal partners, their options are limited to secession and the founding of a separate state. However, the liberal constitutional doctrine in Germany prior to 1871 as well as recent studies in international relations allow for the concept of divided sovereignty in the face of European integration and the creation of supranational institutions. According to Oeter, sovereignty is divided in federal states between the federal level and the smaller units. This vertical division can be extended to include the European Union as supranational order with partial sovereign power (Oeter, 1995: 667-669, 686-687; see also Pauly & Grande, 2005; MacCormick, 1999). Sovereignty in this concept is still connected to territorial units with clearly defined borders. Granting territorial autonomy to those communities that are geographically concentrated, matches with the concept of vertically divided sovereignty. However, every federated entity participates in this division, not only those that contain a national community.

In a similar way, Stephen Krasner distinguished different elements of sovereignty in order to explain the increased authority of supranational institutions and international organizations over those spheres generally connected to a sovereign state.¹ His 'domestic sovereignty' refers "to the organization of public authority within a state and to the level of effective control exercised by those holding authority" (Krasner, 1999: 9). According to Krasner, sovereignty comprises authority and control and can be divided between governments, institutions or international organizations. By voluntary contract, a state could therefore share its domestic sovereignty with either sub-state entities or national communities thereby limiting its own authority and control over certain policies. If substate entities or cultural communities also have the authority to sign international treaties in their fields of jurisdiction or to establish rules for immigration, they also hold parts of international legal sovereignty. In this concept either territorial entities or non-territorially organized institutions can hold authority and control over a limited number of policies although they may not be involved in every element of sovereignty.

Combining territorial and non-territorial autonomy in multinational democracies, divides sovereignty on the one hand between the federal level and all federated entities. On the other hand, the distinct national communities are supposed to be equal and sovereign partners. As multinational federations are created so that a national minority forms a majority in one of the entities, this minority performs both functions at the same time but shares sovereignty with other entities that do not necessarily

¹ Krasner distinguished 'domestic', 'interdependence', 'international legal' and 'Westphalian sovereignty' as central elements of sovereignty. Later he developed his concept further defining three central elements: international legal sovereignty with the basic rule of recognizing juridically independent territorial entities with rights and privileges and the ability to sign contracts or treaties; Westphalian-cum-Vattelien sovereignty based on the right to determine its own authority structures and the rule of non-intervention into the internal affairs of others; and domestic sovereignty comprising the authority structures and actual capacities within a given state. With regard to external partners, sovereignty in this concept can be shared by using international legal sovereignty to give up some of the state's Westphalian-cum-Vattelien sovereignty (Krasner, 2005: 70-71, 76).

contain another distinct cultural community. Members of the national minority that live in these other federated entities are then subject to the rule of the regional governments but at the same time supposed to be protected by the provisions of non-territorial autonomy for their national community. Both modes of power-sharing collide especially in the fields related to culture and language that has been decentralized to give the territorially concentrated minority leeway to secure their survival, promote their distinctiveness and regulate policies autonomously.

3 Territorial and non-territorial arrangements in Belgium

Belgium has been a field of experimentation regarding ethnic conflict regulation and power-sharing mechanisms. Starting with consociational practices in order to accommodate the interests of Catholics and Liberals, and later also Socialists, conflicting issues turned quickly towards the use of languages and discrimination of the Flemish population. The territorialization of the conflict took place prior to the first decentralization reform and non-territorial mechanisms were agreed upon as supplements to territorial ones from the beginning. With the transformation of Belgium into a federal state, however, the continued existence of non-territorial arrangements came under pressure. While the demands for more decentralization have not diminished on the Flemish side, conflicts repeatedly arose regarding the non-territorial mechanisms of protecting the Francophone minority in Flanders as well as the Dutch-speaking minority in the region of Brussels.

3.1 Regulating the linguistic conflict prior to federalization

The Equalization Act of 1898 introduced Dutch as official language apart from French. It signaled the first victory for the Flemish Movement that had quickly formed after the state foundation in 1831 defending the Flemish culture and language. Nevertheless, the discrimination of the population speaking Dutch or Flemish dialects did not end. The Flemish Movement had also demanded special bilingual status for Flanders but was powerless until the democratization of the electoral franchise. The first language laws passed at the end of the nineteenth century aimed at establishing an asymmetrical bilingualism with only the Flemish provinces being bilingual and the rest of the country operating monolingual (Dunn, 1974: 144-145). Reducing bilingualism to the Flemish provinces and controlling predominantly the knowledge of French of Flemish citizens while public services in the Walloon provinces continued to use French only, was again felt as discrimination. The special regulations for Brussels also served little to protect the Dutch speaking population from being slowly but steadily outnumbered by Francophones. The situation changed slightly when in 1893 a new legislation was passed extending the use of Dutch in school education. Again, exceptions were made for Brussels and large cities in Flanders containing a substantial number of francophone households.

Dutch became the second language of the education sector although not equal to French. Further extensions of the use of Dutch in the judicial sector, the administration and the military followed. Since decisions were made by consensus according to the established consociational mechanisms, the francophone side accepted the extensions only in exchange for special rights for the francophone minorities living in Flanders. In contrast, they declined any special protection to the Dutch-speaking minorities in Wallonia. For the Walloon provinces, the territoriality principle was already applied and defended while no strict use was made of it for the Flemish provinces (Witte & Van Velthoven, 1999: 81-98; Hooghe, 2004: 58; McRae, 1986: 25-27). The unequal status of both languages at state foundation and the deep felt inferiority of the Dutch language on the side of the Francophones prevented a bilingual option for the entire territory but also the equal treatment of minorities outside the mainland of each community.

As the language laws of the nineteenth century produced no lasting appeasement of the linguistic conflict further adaptations became necessary. In 1921, Belgium was divided into three monolingual linguistic regions (Dutch, French, and German) and one bilingual region (Brussels). The territorial dimension of the linguistic conflict, that had been dormant before, now fully unfolded. The use of language for the public sphere was connected to the territory thus creating monolingual Dutch or French speaking regions (also one small German region but without being part of the conflict). With the introduction of the territoriality principle for language of the education sector in 1932, teaching in elementary and secondary schools was bound to the language of the respective region. Further legislation extended the principle to the administration, the judiciary and the military. In consequence, the administration in Flanders changed and began operating in Dutch only thereby also offering more career opportunities for Dutch-speakers. The legislations of the 1920s and 1930s proved to be of lasting effect for the public service in Flanders (Gerard, 2006: 145). Bilingualism was limited to the Brussels linguistic region and achieved mostly by doubling administrative units each shaped monolingual. But implementation in Brussels was slow or sometimes circumvented so that the opportunities were still unequal between Dutch- and French-speakers. Nevertheless, Dutch became more prominent in the public sphere and its usage in the Belgian Parliament increased significantly at that time (Hooghe, 1991: 12; McRae, 1986: 179).

With the creation of the linguistic regions, local and provincial administrations developed differently in the regions. Although no legislative autonomy was transferred to the linguistic communities back then, the transformation already meant administering the communities separately in their respective regions of territorial concentration while conflicting issues at the center were decided in consensus according to the consociational tradition. Conflicts over the use of languages and the discrimination of Dutch focused on the slow or failed implementation of bilingualism for the central institutions in Brussels as well as on the census that led to several shifts of municipalities from one region to

another. Especially the Flemish communes that were added to the bilingual region of Brussels increased the frustration on the Flemish side who considered themselves deprived of their homeland. Protests against the 'frenchification' of the Brussels periphery led to further language laws in 1962, fixing the borders of the linguistic region of Brussels and shifting municipalities one last time. In exchange for the termination of this shifting, the so called '*communes à facilités*' were created in the Brussels peripheries and at the borders of linguistic regions. In these communes with facilities the respective linguistic minority enjoys special rights like translations of official documents, id-cards or on request also elementary school education in the minority language (Witte & Van Velthoven, 1999: 202-205; Deschouwer, 2009a: 46-47).

Prior to the federalization of Belgium, the creation of the linguistic regions formed a first recognition of the multilingual character of the state and special rights were granted to those minorities living dispersed across the state. They were, however, meant to be of temporary nature in order to acquaint oneself with the language of the territory (Mabille, 2000: 329-332). Authority and control over the policies related to the use of languages and culture remained at the central level. Changes in the language laws, however, were made only by consensus between the two large linguistic communities. The idea of a contract between the communities was therefore respected leading to the introduction of simultaneous protective mechanisms for the underprivileged Dutch-speaking majority as well as the dominant francophone minority.

3.2 Minority protection under the federal architecture

Unequal economic developments in the north and south of Belgium aggravated the conflict between the two linguistic groups after the Second World War. The decline of the coal and steel industry in Wallonia as well as structural changes in Flanders turned the tides and Flanders into the more prosperous region. The austerity policy of the central government at the beginning of the 1960s also affected the Walloon provinces as they were already struggling with higher unemployment rates. The feeling of being neglected in terms of investments into the regional infrastructure made decentralization of economic policies attractive for the Walloon side. In comparison, the Flemish nationalist party *Volkswaak* focused on culture, language and education and demanded decentralization of these policy fields. Their electoral success in the 1960s supported their claims and put pressure on the established parties (Deschouwer, 1999, 2009b).

As the decision to change the power allocation was taken again in consensus between the two large communities, negotiations resulted in the creation of a dual federal structure with regions and communities as entities. Apart from recognizing the linguistic communities as components of the state, three regions were created based on the already established linguistic regions. In consequence, two regions are monolingual while the region of Brussels-Capital is bilingual. The

communities received jurisdiction over personalized matters (like culture, education, media, health care) and the regions were granted autonomy in those policy fields that have a territorial connection (like economic policy, transport, infrastructure, or labor market) (see Swenden, Brans, & De Winter, 2006; Covell, 1993). While the borders of the regions are clear-cut, the jurisdiction of the two large communities overlaps in the region of Brussels. Outside Brussels and especially in Flanders, the territory of the regions almost coincides with the jurisdiction of the Flemish community institutions since only about 15% of the Dutch-speaking population lives in the Brussels region. Therefore, the Flemish decided to merge the institutions of the Flemish community and the Flemish region in 1980 when receiving constitutive autonomy. The creation of the region of Brussels was accompanied by enshrining several mechanisms of minority protection for the Dutch-speaking population that resembled those for the Francophone minority at the federal level. Although legally possible, a similar merger of the institutions on the Francophone side is complicated by the situation of Brussels with its francophone majority and geographical position in the region of Flanders. Creations like "Fédération-Wallonie-Bruxelles" have gained only informal status so far (Deschouwer, 2009a: 61). In contrast to the situation at the beginning of the 19th century, the territoriality principle is now more established for the Dutch-speaking community. On the Francophone side attempts are made to strengthen the connections between Wallonia and Brussels but geographical factors and differences in attachments prevent a similar merging of institutions.

The final federal structure of Belgium incorporates several characteristics of Renner's concept of national cultural autonomy. First, the linguistic groups have been recognized as basic components of the state - all three of them - and given autonomy in those policy fields that relate to language (like culture, education, and media policy). Although the German community forms a very small minority in comparison, it has its own parliament and government with almost the same power as the two large communities. Second, the Francophone and Flemish communities are also recognized in federal institutions and protected by mutual veto regarding institutional change as well as areas of community conflicts. The old consociational tradition established for balancing ideological differences has been converted to represent the diverging interests of the two main linguistic communities (Deschouwer, 2002, 2006). Parity of ministers in the federal cabinet as well as in the Brussels regional government, guaranteed seats for the Flemish minority in the Brussels regional parliament, the parliamentary mechanisms of alarm-bell-procedure or the special majority laws are only a few of the mechanisms agreed upon in order to protect one linguistic community from domination by the other. Third, where minorities overlap like in the region of Brussels-Capital, the personality principle predominates for the community services while the territory officially stayed bilingual. However, no registration to one of the communities is required for the citizens living in Brussels. Fourth, minorities outside the mainland of their respective linguistic communities fall under

special protection of so called 'linguistic facilities' that have been kept up despite the original intentions of being only a temporary solution. Finally, the Flemish minority within the region of Brussels enjoys even more privileges since the principle of parity in government or guaranteed parliamentary representation enshrined into the regional institutions exceeds the estimated percentages of the Flemish population in Brussels significantly. While all these instruments and protective rights have been negotiated in consensus between the two large groups, several of them produce conflicts between the communities instead of appeasing them.

3.3 Conflicts over and problems with the non-territorial arrangements

In theory, non-territorial autonomy may serve as supplement in multinational federations reaching out to those members of the community who live outside the mainland. However, these non-territorial mechanisms limit the territorial autonomy of the entities in which dispersed minorities live increasing community conflicts. Regarding the institutions where both mechanisms are combined – like in the Brussels region – questions about efficiency and functionality have been raised as well. Apart from keeping the conflict alive, non-territorial provisions in Belgium also affect the capacities for reform of the federal system.

With the creation of the linguistic regions, a first decision had been made to introduce the territoriality principle for the use of languages and transforming Belgium into a federal state has reinforced aspects of territoriality. Nevertheless, both linguistic communities negotiated exemptions from the territoriality principle from the beginning especially for Brussels. During the transformation, the bilingual province of Brabant was split into monolingual parts in 1993 thereby confirming to the territoriality principle. Afterwards, the community conflict focused on the still bilingual, electoral district of Brussels-Halle-Vilvoorde and the communes with linguistic facilities. The community conflict shifted towards the exemptions of the territoriality principle and especially to those established to protect the francophone minorities outside Brussels. The existence of the electoral district BHV fueled the community conflict until 2012 when a split into monolingual parts was finally agreed upon. The district spanned across the borders of the regions allowing members of the francophone minority in the Brussels periphery to vote for the lists established for Brussels – meaning they could vote for the francophone lists while only lists of the Dutch-speaking parties were offered in the rest of the province Flemish Brabant. The Supreme Court, however, had ruled in 2003 that the electoral district was unconstitutional in size and character. Furthermore, Dutch-speaking minorities in Wallonia did not share similar voting rights as the Francophones in BHV. A split of BHV was necessary but the terms were contested. While the Flemish side argued in favor of a clear-cut split according to the equal treatment of citizens and the laws for the use of languages, francophone parties wished to continue special rights for the minorities living in the periphery. Similarly, the

special linguistic rights in the communes with facilities in the Brussels periphery were a thorny issue for the Flemish. In their view, these special rights were another violation of the territoriality principle for the use of languages as well as of the integrity of the Flemish territory (Van Wynsberghe, 2013). Interestingly, the communes with linguistic facilities at the border between the German and Francophone communities are no cause for conflicts as are the protection mechanisms of the German community in general.

Looking at the debates in the last state reform of 2012, one can clearly distinguish the two principles of power-sharing working against each other. While the francophone parties argued with the protection of the linguistic minorities and in favor of the continuity of exemptions from the territoriality principle, the parties on the Dutch-speaking side defended the integrity of the Flemish territory and the autonomy of the Flemish government. As the Belgian government is composed of both linguistic groups and changes to the communes with linguistic facilities fall under the double majority rule, a solution for BHV and the special rights of the francophone minorities in the Brussels periphery required again a consensus between the two linguistic groups. In consequence, the electoral district was split, but the voting rights for the lists in Brussels were kept for the six communes with language facilities. The continuation of special rights was much criticized by the Flemish opposition in parliament.² The continuation of exemptions from the territoriality principle is likely to induce more conflicts the closer the next federal elections of 2014 get.

A second set of problems with non-territorial mechanisms of minority protection affects the reform capacities of the federal state and of institutions in the Brussels region. With regard to further decentralization and federal reform, the demands of the Flemish side are directed at an increase in fiscal autonomy and an entire split of the social security system that fall into the jurisdiction of the communities. Without a system of registration for the members of two communities within Brussels, a split of social security is hard to achieve. So far, citizens of Brussels have the liberty to choose between the services of the two communities. Following the discussions about state reform, initiatives tend towards the introduction of special agencies for Brussels instead of making registration an obligation (Accord institutionnel 2011). Furthermore, the communities are still largely dependent on bloc transfers from the federal level. Transferring tax levying power to the communities, however, is difficult without clearly defined borders or registration of its members. In order to protect the Flemish minority in Brussels, reforming the institutions of the region has remained under federal control. The region has not been granted constitutive autonomy so far and reforms require votes by special majorities in the federal parliament. However, several politicians from both sides are arguing that these mechanisms are hindering necessary changes and efficient

² See the parliamentary discussion in the Senate and the Chamber of Representatives: Sénat doc. n° 5-1560/4 (18 Juin 2012), S. 25, 27; Chambre, doc. n° 53-2281/004 (9 Juillet 2012).

administration in Brussels. They demand constitutive autonomy for the Brussels region – equally to Wallonia and Flanders – so that the regional institutions can be reformed thereby reducing the protective mechanisms for the Flemish minority.³

Summarizing, the consociational mechanisms and the recognition of the two large linguistic communities collide with the federal structure that recognizes three regions and three communities as its entities. Especially within the region of Brussels and in its periphery non-territorial and territorial autonomy apply simultaneously causing internal frictions. Established for the protection of the Dutch-speaking minority in Brussels and the francophone minority outside the bilingual region, the consociational mechanisms of decision-making as well as the non-territorial autonomy provisions have become the center of the conflict itself. They are keeping the community conflict alive without reducing the potential for an entire split of the country.

4 Territorial and non-territorial arrangements in Canada

In comparison with Belgium, Canada has been founded as federal state due to the presence of the Francophone population. Federalism and the creation of the province of Quebec were intended to protect Francophone citizens and their cultural as well as religious distinctiveness. While the French language was protected in Quebec, linguistic minorities outside the province were left vulnerable to discrimination and assimilation. Only in the second half of the twentieth century, non-territorial mechanisms of minority protection became more fashionable as means for protecting francophone minorities outside Quebec as well as the anglophone minority within Quebec. Anglophone provinces as well as Quebec were reluctant regarding the implementation of non-territorial protection based on arguments of defending provincial autonomy and of being sovereign on their territory. Again, the division of power between the federal level and the provinces as well as provincial autonomy in the fields of jurisdiction related to language and education, forms a protection mechanism for those who live concentrated in the province of Quebec. But the introduction of non-territorial arrangements as supplements collides with the underlying territorial principle of accommodating diversity.

4.1 Federalism as mechanism of protecting minority languages

Due to the French presence in North America, Canada has been founded as federal state. After several attempts of assimilating the francophone and predominantly catholic population into the British culture, boundaries were drawn so that Francophones formed a majority in the province of Quebec (Creighton, 1964: 145). Significant francophone communities could also be found in Ontario and New Brunswick. Several provisions of the BNA Act 1867 allowed for distinct legislation, separate

³ *Le soir*, 28.01.2013: Vande Lanotte: « La situation à Bruxelles est désastreuse ».

institutions as well as protection of linguistic minorities. Provinces received jurisdiction over those policies relevant for the continuation of cultural differences, like education, school regulations, family or social policy. Religious freedom, the tradition of civil law as well as denominational school rights were enshrined into the constitution (sect. 122, 93, BNA Act 1867). Furthermore, Quebec was supposed to be protected against centralization of competences favored by the other provinces. The Constitution (sect. 94) provided that the consent of Quebec was required to any centralizing changes before they would come into effect in that province as well (LaSelva, 1996: 53).

With regard to the protection and survival of the French language, two provisions were especially relevant: first, the provinces held jurisdiction over the education sector so that Quebec could regulate the language of school and higher education in its province autonomously. Second, English and French were recognized in sect. 133 as official languages in parliaments and courts at the federal level and in Quebec. Bilingual institutions were limited to the federal level and the province of Quebec and supposed to protect not only the francophone community but also the anglophone minority in Quebec (Domenichelli, 1999: 89-90). The anglophone minority in Quebec enjoyed special representation in the national assembly of the province as well as protection with regard to school instructions in English. However, implementation of bilingualism at the federal level turned out to be slow or incomplete in comparison.

While federalism was a guarantee for the survival of the French presence in Quebec, the francophone minorities outside the province were left vulnerable to assimilation. The provinces of New Brunswick, Ontario as well as Manitoba abolished subsidies for denominational schools which affected especially francophone schools, or reduced the share of French as language of instruction. Immigration further reduced the share of francophone population in these provinces. The government of Quebec supported the protests of francophone minorities in these provinces but its interventions were equally unsuccessful as appeals at provincial courts at that time (Silver, 1982: 185, 206-215). As culture and education fell into the exclusive jurisdiction of the provinces Quebec had little chance to intervene into the legislative initiatives of other provinces without the support of the federal level. Provincial legislation outside Quebec supported the dominance of the English language and culture after confederation. These approaches were backed by federal governments similarly reluctant with the implementation of bilingual institutions and services at the federal level (Waddell, 1986: 76; Pelletier, 1990: 212-213).

After the Royal Commission on Bilingualism and Biculturalism had published their reports on the status of minority language groups in the 1960s, the federal government changed its policies recognizing the equality of the two languages and supporting linguistic minorities across Canada. The Commission had pointed to the insecure situation and decline of francophone communities the further away their settlements were from Quebec and the bordering regions in Ontario and New

Brunswick. Federal protection was too ambiguous to secure the survival of francophone communities and the policies of the provinces accelerated their marginalization. Instead of having an equal partnership between, Francophones were even economically discriminated in the province of Quebec (Canada, 1967: 24-30, 34-37, 48-55, 69). At the same time, the transformations of the Quebec society led the Quebec government turn towards the situation within the province and strengthen the French language in the business sector and school education. With the *Charte de la langue française* (or Bill 101) of 1977, the Quebec government made French the language of business communication. It also ruled that immigrants were obliged to send their children to francophone schools unless one parent had received an education in the English language in Quebec. The Quebec government, therefore, took a clear territorial approach thereby neglecting the francophone communities in the rest of Canada (Waddell, 1986: 86-88). While Quebec thought it necessary to strengthen provincial autonomy for reaching equality within Canada, federal legislation turned towards the protection of dispersed linguistic communities across Canada including the promotion of the French fact in federal institutions.

4.2 *Non-territorial arrangements as supplement to territorial autonomy*

In reaction to the results of the B&B Commission, the federal government issued the Official Languages Act of 1969. The legislation emphasized the equality of the two languages in Canada and introduced the position of a Commissioner of Official Languages with the task to annually report on the implementation of equality and on further deficiencies. Canadians received the right to communicate in both languages with federal institutions and in court. Although the provisions largely repeated sect. 133 of the BNA Act, they were formulated as a legal right and federal oversight introduced in order to remedy persisting inequalities. The federal government took a clear position of strengthening the personality principle. The provinces reacted controversial to this attempt of renewed bilingualism as Anglophones regarded bilingual institutions as a threat to their career opportunities. However, the federal legislation did not respond to the demands of Quebec regarding its influence on immigration and integration into the French language as well as the underprivileged status of French in the business sector (Tanguay, 2002: 152). The reactions in Quebec were therefore mixed despite the general approval of better representation and equal status of Francophones in federal institutions.

In the constitutional debates that followed, the federal government under Pierre Trudeau continued to emphasize cultural diversity and linguistic duality across Canada and denied explicitly a special status to Quebec (Trudeau, 1978). Furthermore, Trudeau thought the federal government to have special responsibility for the protection of the francophone communities thereby reducing the relevance of the province of Quebec in that task. The federal government settled for non-territorial

means of accommodating linguistic minorities instead of increasing provincial autonomy as demanded by Quebec (McRoberts, 2001: 702-703). With the Constitution Act 1982 and the introduction of the Charter of Rights and Freedoms, individual rights were emphasized while the special character of Quebec was not enshrined into the constitution. Similarly to the Official Languages Act, English and French were recognized as equal thereby obliging the federal government and the provinces to offer services and school education in both languages. According to sect. 23 of the Charter of Right and Freedoms, citizens of Canada have the right to have their children educated in one of the official languages if they have received their primary education in English or French in Canada and reside in a province where the language of their education forms the minority. That right applies where the numbers of children are sufficient to warrant instruction in the minority language. Several provinces with francophone minorities, however, criticized these provisions and tried to reduce their responsibilities in the support of francophone education – like British Columbia and Manitoba – or fought successfully against becoming officially bilingual like Ontario. Regarding the rights for the use of languages and school education the federal government was successful in defending them without the opportunity for the provinces to override these rights. Provinces with francophone minorities were bound to provide French education but so was Quebec regarding school education in English for the anglophone minority. Where there is a significant concentration of linguistic communities either francophone or anglophone schools are supposed to provide public education in the minority language, while being supported by public funding and autonomous in the regulation of school boards.

4.3 Collisions of territorial and non-territorial arrangements

Several examples were already addressed above in which the territorial autonomy of the provinces collided with federal legislation protecting linguistic communities based on the personality principle. The provinces had received exclusive power in the fields of education and culture at the time of confederation which was explicitly directed at protecting the francophone population of Quebec. Federalism proved to be essential for the survival of the francophone presence but also offered the opportunity for anglophone provinces to neglect linguistic minorities on their territories. Provincial autonomy in that field of jurisdiction rendered any intervention from the Quebec government against discriminating francophone communities outside Quebec unsuccessful. Only New Brunswick opted for becoming a bilingual province, while Manitoba abolished its restrictive policy towards French school education after a Supreme Court ruling in 1985.

In the vision of Quebec, the federal state forms a contract between two founding nations that can only be changed by mutual consent. When Quebec finally focused more on the territorial aspects of provincial jurisdiction as means of protecting the French presence, the federal level raised its

attention towards the dispersed minorities across Canada. As the province of Quebec has not agreed to the constitutional reform in 1982, federal initiatives directed at linguistic minorities are felt as violation against the original contract and allocation of power between the levels of government. Granting special representation in federal institutions for the francophone minority was met with skepticism from the anglophone provinces but without causing further conflicts since the federal level holds the power to regulate federal institutions.

However, as soon as federal initiatives turn towards regulating language education and support linguistic minorities across Canada, they are regarded as encroachment into exclusive provincial jurisdiction. The allocation of power followed the principle of exclusive jurisdiction rendering each level as autonomously from the other as possible. According to the constitution, the provinces hold exclusive jurisdiction over education in their territory. British Columbia and Manitoba tried to defend their autonomous jurisdiction in the field of language education similarly to Quebec with regard to the anglophone minority. The personality principle adopted in Charter of Rights defined it as a right to have school education in one of the two official languages where numbers warrant. The Charter, therefore, limits provincial autonomy in that policy field. The violation of provincial autonomy is resisted in every province independently of belonging to the majority or minority population. However in Quebec, these restrictions are furthermore felt as limitations of being a sovereign nation within a Canadian state that is based on equal partnership between two nations.

5 Combining territorial and non-territorial mechanisms of power-sharing

The combination of territorial and non-territorial forms of power-sharing results in the simultaneous application of two contracts: one between levels of governments and the other between peoples. While in Belgium both principles have been enshrined into the constitution stating the federal state is composed of regions and communities, the constitutional debates in Canada have not led to a similar statement. Both visions – compact between the federal level and ten provinces or compact between two founding nations – still compete against each other and find expressions in non-constitutional declarations and parliamentary motions. In both cases, however, the simultaneous application leads to conflicts between governments and communities.

The federal structure and territorial autonomy protects those parts of the communities that reside territorially concentrated. Culture-related policies are decentralized and sovereignty is divided between different levels of government thereby protecting those statewide minorities or underprivileged communities that form a majority in the smaller territorial units. Powers have been divided between the levels to allow for a high degree of autonomy. In Belgium, legislation of the

federal level, the Regions and Communities have not been placed in a hierarchical order so that laws of the federated entities are not subordinated to federal laws.

Based on this separation of powers along territorially defined borders, non-territorial arrangements introduced by the federal level for the support of linguistic communities will always be framed as illegitimate encroachment into jurisdictions of the entities. The empirical illustrations demonstrated that conflicts especially arise when non-territorial arrangements are set up for those communities that also enjoy territorial autonomy and participate in the federal architecture. Fewer conflicts are recorded for the German Community in Belgium that successfully negotiated the transfer of more policies from the Walloon region. The opportunities for the federal level to support linguistic minorities rest more with consociational mechanisms at the federal level. However, consociational modes of decision-making and a mutual veto for the distinct communities has in both cases reduced the options for federal reform or prevented reform attempts from being successfully ratified. In consequence of unsuccessful reforms community conflicts have been again increased in Canada leading to the rejection of secession only by a small margin in the 1995 referendum.

Adapting non-territorial mechanisms of power-sharing and legislative autonomy as supplement in multinational federations, therefore, has proven to stimulate community conflicts more than reducing the shortcomings of mechanisms based on the territoriality principle. The distinct regional identity and contexts of those communities that share the same language has also been neglected in the original concept of non-territorial autonomy. Despite the coordination mechanisms between Francophones in Brussels and Wallonia, differences in political and civic culture as well as economic circumstances remain.

Non-territorial mechanisms seem to work to the advantage of small minorities that still reside roughly concentrated but have no part in the federal contract. Nevertheless, these provisions also require the willingness of the governments of federated entities to respect linguistic minorities and support their survival. Provisions for the francophone Arcadians in New Brunswick have been more favorable from the beginning than the attempts to assimilation made by the provincial governments of Manitoba and Ontario. The underlying territorial principle of power-sharing and state architecture, therefore, always forms a hurdle, non-territorial arrangements have to overcome at first.

- Accord institutionnel pour la sixième réforme de l'Etat. Un état fédéral plus efficace et des entités plus autonomes. Available online: http://www.dekamer.be/kvvcv/pdf_sections/home/FRtexte%20dirrupo.pdf (25.01.2013).
- Bauböck, R. (2004). Territorial or Cultural Autonomy for National Minorities? In A. Dieckhoff (Ed.), *The Politics of Belonging. Nationalism, Liberalism, and Pluralism* (pp. 221-257). Lanham: Lexington Books.
- Bellamy, R. (2000). Dealing with Difference: Four Models of Pluralist Politics. In D. Austin & M. O'Neill (Eds.), *Democracy and Cultural Diversity* (pp. 198-217). Oxford: Oxford University Press.
- Brahm Levey, G. (2005). National cultural autonomy and liberal nationalism. In E. Nimni (Ed.), *National Cultural Autonomy and its Contemporary Critics* (pp. 150-165). London and New York: Routledge.
- Canada. (1967). Report of the Royal Commission on Bilingualism and Biculturalism: Book I: General Introduction, Vol. 1: The Official Languages Ottawa: Queen's Printer.
- Coakley, J. (1994). Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-territorial Autonomy. *International Political Science Review*, 15(3), 297-314.
- Covell, M. (1993). Belgium. The variability of ethnic relations. In J. McGarry & B. O'Leary (Eds.), *The Politics of Ethnic Conflict Regulation* (pp. 275-295). London, New York: Routledge.
- Creighton, D. (1964). *The Road to Confederation*. Toronto: Macmillan.
- Deschouwer, K. (1999). From consociation to federation. How the Belgian parties won. In K. R. Luther & K. Deschouwer (Eds.), *Party Elites in Divided Societies. Political Parties in Consociational Democracy* (pp. 74-107). London & New York: Routledge.
- Deschouwer, K. (2002). Falling Apart Together. The Changing Nature of Belgian Consociationalism, 1961-2001. *Acta Politica*, 37(1-2), 68-85.
- Deschouwer, K. (2006). And the peace goes on? Consociational Democracy and Belgian Politics in the twenty-first Century. *West European Politics*, 29(5), 895-911.
- Deschouwer, K. (2009a). *The Politics of Belgium. Governing a Divided Society*. Basingstoke: Palgrave Macmillan.
- Deschouwer, K. (2009b). The Rise and Fall of the Belgian Regionalist Parties. *Regional & Federal Studies*, 19(4-5), 559-577.
- Domenichelli, L. (1999). *Constitution et régime linguistique en Belgique et au Canada*. Bruxelles: Bruylant.
- Dunn, J. A. (1974). The Revision of the Constitution in Belgium: A Study in the Institutionalization of Ethnic Conflict. *The Western Political Quarterly*, 27(1), 143-163.
- Elazar, D. J. (1987). *Exploring Federalism*. Tuscaloosa: The University of Alabama Press.
- Erk, J., & Anderson, L. (2009). The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions? *Regional & Federal Studies*, 19(2), 191-202.
- Gerard, E. (2006). La Démocratie rêvée, bridée et bafouée 1918-1939. In M. Dumoulin, V. Dujardin, E. Gerard & M. Van den Wijngaert (Eds.), *Nouvelle histoire de Belgique Volume II: 1905-1950* (pp. 2ème partie). Bruxelles: Éditions Complexe.
- Hooghe, L. (1991). *A Leap in the Dark: Nationalist Conflict and Federal Reform in Belgium* (Vol. 27). Ithaca: Western Societies Program: Occasional Paper.
- Hooghe, L. (2004). Belgium. Following the Centre. In U. M. Amoretti & N. Bermeo (Eds.), *Federalism and Territorial Cleavages* (pp. 55-92). Baltimore: John Hopkins University Press.
- Hueglin, T. O., & Fenna, A. (2006). *Comparative Federalism. A Systematic Inquiry*. Peterborough: Broadview Press.
- Krasner, S. D. (1999). *Sovereignty. Organized Hypocrisy*. Princeton: Princeton University Press.
- Krasner, S. D. (2005). Building Democracy after Conflict. The Case for Shared Sovereignty. *Journal of Democracy*, 16(1), 69-83.
- Kymlicka, W. (1998). Is federalism a viable alternative. In P. B. Lehning (Ed.), *Theories of Secession* (pp. 111-150). London: Routledge.

- Kymlicka, W. (2005). Renner and the accommodation of sub-state nationalisms. In E. Nimni (Ed.), *National Cultural Autonomy and its Contemporary Critics* (pp. 137-149). London & New York: Routledge.
- Kymlicka, W. (2007). *Multicultural Odysseys. Navigating the New International Politics of Diversity*. Oxford: Oxford University Press.
- LaSelva, S. L. (1996). *The Moral Foundations of Canadian Federalism. Paradoxes, Achievements, and Tragedies of Nationhood*. Montreal & Kingston: McGill-Queen's University Press.
- Lijphart, A. (1985). Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories. *Publius*, 15(2), 3-15.
- Mabille, X. (2000). *Histoire politique de la Belgique. Facteurs et acteurs de changement*. Bruxelles: Editions du Centre de recherche et d'information socio-politiques.
- MacCormick, N. (1999). *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*. Oxford: Oxford University Press.
- McGarry, J., & O'Leary, B. (1993). Introduction: The macro-political regulation of ethnic conflict. In J. McGarry & B. O'Leary (Eds.), *The Politics of Ethnic Conflict Regulation* (pp. 1-40). London, New York: Routledge.
- McGarry, J., & O'Leary, B. (2009). Must Pluri-National Federations Fail? *Ethnopolitics*, 8(1), 5-26.
- McRae, K. D. (1986). *Conflict and Compromise in Multilingual Societies. Belgium* (Vol. 2). Waterloo: Wilfried Laurier University Press.
- McRae, K. D. (1990). Theories of Power Sharing and Conflict Management. In J. V. Montville (Ed.), *Conflict and Peacemaking in Multiethnic Societies* (pp. 93-106). Massachusetts: Lexington Books.
- McRoberts, K. (2001). Canada and the Multinational State. *Canadian Journal of Political Science*, 34(4), 683-713.
- Nimni, E. (2005). Introduction: the national cultural autonomy model revisited. In E. Nimni (Ed.), *National Cultural Autonomy and its Contemporary Critics* (pp. 1-13). London & New York: Routledge.
- Nimni, E. (2007). National Cultural Autonomy as an Alternative to Minority Nationalism. *Ethnopolitics*, 3(3), 345-365.
- Oeter, S. (1995). Souveränität und Demokratie als Probleme in der „Verfassungsentwicklung“ der Europäischen Union. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 55, 659-712.
- Pauly, L. W., & Grande, E. (2005). Reconstituting Political Authority: Sovereignty, Effectiveness, and Legitimacy in a Transnational Order. In L. W. Pauly & E. Grande (Eds.), *Complex Sovereignty. Reconstituting Political Authority in the Twenty-first Century* (pp. 3-21). Toronto: Toronto University Press.
- Pelletier, G. (1990). 1968: Language Policy and the Mood in Quebec. In T. S. Axworthy & P. E. Trudeau (Eds.), *Towards a Just Society. The Trudeau Years* (pp. 207-225). Markham, Ontario: Viking Penguin Books.
- Renner, K. (1918). *Das Selbstbestimmungsrecht der Nationen in besonderer Anwendung auf Oesterreich. Erster Teil: Nation und Staat*. Leipzig und Wien: Franz Deuticke.
- Silver, A. I. (1982). *The French-Canadian Idea of Confederation, 1864-1900*. Toronto: University of Toronto Press.
- Swenden, W., Brans, M., & De Winter, L. (2006). The politics of Belgium: Institutions and policy under bipolar and centrifugal federalism. *West European Politics*, 29(5), 863-873.
- Tanguay, A. B. (2002). The Politics of Language in Québec: Keeping the Conflict Alive. In S. Brooks (Ed.), *The Challenge of Cultural Pluralism* (pp. 147-170). Westport: Praeger Publications.
- Trudeau, P. E. (1978). A Time for Action. Available online: <http://www.solon.org/Constitutions/Canada/English/Proposals/tfa.html>.
- Van Wynsberghe, C. (2013). Bruxelles, sa périphérie et l'Europe. In R. Dandoy, G. Matagne & C. Van Wynsberghe (Eds.), *Le Fédéralisme belge. Enjeux institutionnels, acteurs socio-politiques et opinions publiques* (pp. 62-84). Louvain-la-Neuve: Academia-L'Harmattan.

- Waddell, E. (1986). State, Language and Society. The Vicissitudes of French in Quebec and Canada. In A. C. Cairns & C. Williams (Eds.), *The Politics of Gender, Ethnicity and Language in Canada* (pp. 67-110). Toronto: University of Toronto Press.
- Witte, E., & Van Velthoven, H. (1999). *Sprache und Politik. Der Fall Belgien in einer historischen Perspektive*. Bruxelles: VUB University Press.