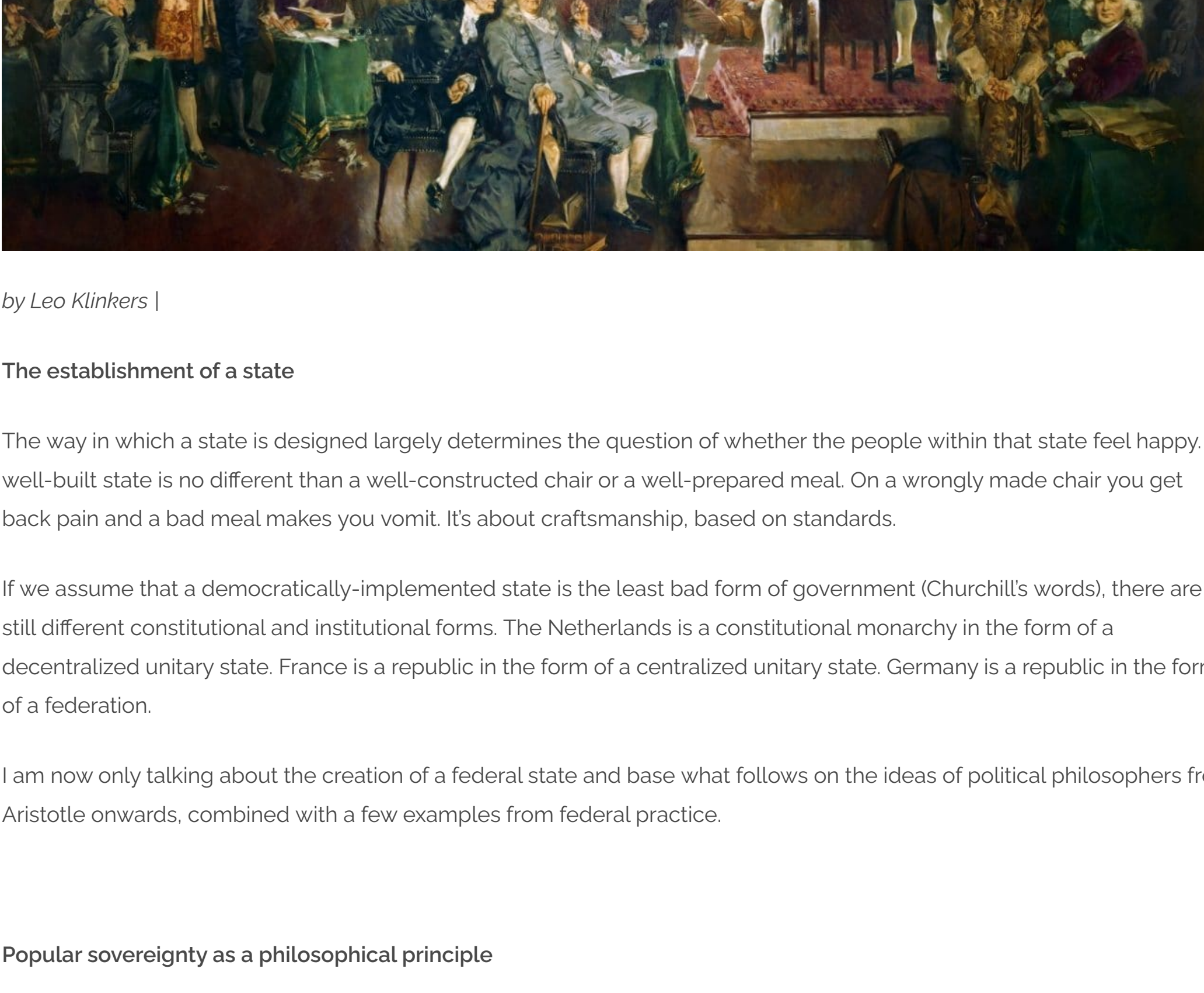


Standards of federalism

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by Leo Klinkers |

The establishment of a state

The way in which a state is designed largely determines the question of whether the people within that state feel happy. A well-built state is no different than a well-constructed chair or a well-prepared meal. On a wrongly made chair you get back pain and a bad meal makes you vomit. It's about craftsmanship, based on standards.

If we assume that a democratically-implemented state is the least bad form of government (Churchill's words), there are still different constitutional and institutional forms. The Netherlands is a constitutional monarchy in the form of a decentralized unitary state. France is a republic in the form of a centralized unitary state. Germany is a republic in the form of a federation.

I am now only talking about the creation of a federal state and base what follows on the ideas of political philosophers from Aristotle onwards, combined with a few examples from federal practice.

Popular sovereignty as a philosophical principle

A federation is based on a philosophical and a practical starting point. The philosophical starting point is based on popular sovereignty. In other words, all sovereignty rests with the people. This sentence dominated the *Declaration of Independence* of 1776 and the first federal constitution in America in 1787. In other words, for the first time in Earth's history, a number of politico-philosophical considerations were contained in concrete binding law (constitutional) and a form of organization attached to it (institutional). Those who do not accept that sovereignty rests with the people accept that all power is in the hands of an autocrat. And then the people are always the losers.

Representation of the people as practical principle

But the people cannot meet every day on the square to make all the decisions. So, it must be represented. That implies elections with the guarantee that they are free, can take place in seclusion and guarantee that minorities are also represented. The latter – representation of minorities – means that elections based on the adage 'the winner takes all' should be avoided in any case. See the misery with the two-party system in America and England.

The federal state from the bottom up

The sovereignty of the people plays in layers, from the bottom up. The first and bottom layer is the family. It can make decisions autonomously. However, the family has interests and/or concerns that it cannot control itself. It therefore asks a higher level – for example, a neighborhood body – to share the sovereignty of the family with some of the family's powers in order to represent these interests/concerns. In this way, a federal state is built from the bottom up. From layer to layer.

A simple example: if, on the occasion of the World Cup football, many people in the Netherlands want to show the colour orange (which is the colour of the royal family), but not one family in the street can provide orange in the entire street, then an occasional body can be set up that, with a donation from all the families in that street, will provide a beautiful orange scene.

That is federal organizing. But the federal body that takes care of orange throughout the street does not have the authority to decide that only hamburgers may be served on the joint barbecue after the final victory, unless the residents of that street have granted that authority to that federal body. The powers of a federal body are always limited and precisely defined. The fact that, in practice, public officials will always try to push the limits of these limited powers and even go beyond them is not a characteristic of the structure of a federation, but of the quality of the people within a federation who are looking for more and more power. This is a characteristic of political functioning and not of federal organizing.

The most important values of a federal state: freedom and happiness

The most important value that the federal state must guarantee is to support the people in freely pursuing their own happiness. Nothing more and nothing less. In order to clarify the essence of this, I recently wrote a (new) preamble for a European federal constitution: see <https://www.faeu.eu/the-europe-of-the-citizens/>.

A preamble to a constitution describes the values that need to be preserved and guarded. Next, the articles of the constitution determine how this preservation and monitoring will be guaranteed.

These concepts of 'freedom' and 'happiness' played a central role in the *Declaration of Independence* of 1776 and the first federal constitution eleven years later in 1787 in America. The concept of happiness within freedom then became the basis of those rules in the constitution that were to be called the 'checks and balances'. Just as the English had curtailed the autocratic powers of King John Lackland in the Magna Carta in 1215, and the Netherlands in 1581 the *Declaration of Abandonment* said adieu to the Spanish ruler, so the thirteen colonies in America in 1776 said that they would no longer wish to obey the English king. But to say that you want to be free is one thing, to make sure that this is legally valid is two. And that's what they did by designing the federal constitution.

They knew from philosophers like Aristotle and Rousseau what popular sovereignty meant, they knew from Althusius what the building blocks of federal thinking were, they knew from Montesquieu what the trias politica meant and for the first time in the history of mankind they came up with a political form in which those different pieces of the politico-philosophical puzzle were put together.

The 'trias politica' and the 'checks and balances'

But the 'trias politica' are just two words. The underlying meaning is as follows: 'You shall separate the three branches of the state – the legislative, the executive and the judiciary – in order to prevent one from taking over the other and re-establishing autocratic rule'. However, they also knew that it would be inevitable that these three branches would have to intervene in the territory of others from time to time. So, the trick was: build in so-called 'countervailing powers'. So, if one of the branches were to operate in the territory of another, that other branch would have to have the power to push that one back into its own territory.

They designed a brilliant system of checks and balances within a brilliant constitution. The most important aspect of the brilliant constitution was to make as few articles as possible. So not a millimeter of rules that would be about the interests of the individual states. Only the general interest of the thirteen should be regulated jointly. So they made a constitution of only seven articles, the core of which was a) the countervailing powers of the thirteen states vis-à-vis the federal body, b) the countervailing powers between the three branches within each state (it should be noted that in a federation the member states remain independent and each has its own legislative, executive and judicial power) and c) the countervailing powers between the three branches at the federal level.

A small example from the American constitution that Herbert Tombeur and I have adopted in the draft of the European federal constitution (see our *European Federalist Papers 2012-2013*): the legislative branch consists of the House of Citizens and the Senate. Both can make laws. If the House drafts a law, it must be submitted to the Senate. If it rejects it, they have to start over. If both Houses agree it goes to the President. He must decide within ten days: agreement or a well-founded veto. If a veto, then return to the House which either throws it away or accepts it again by a two-thirds majority, with or without adjustment based on the President's arguments. Then back to the Senate. Same procedure. If both bodies agree, the President must also accept it.

This structure is perfectly transparent. Whether or not it meets the value of the state supporting the people in their free pursuit of happiness does not depend on that structure but, once again, on the level of quality of the people/politicians in that structure. At the moment, we can see that the US President is trying, through an outdated and therefore retarded system of elections, to achieve autocratic monopoly. But it is precisely the ingenious system of checks and balances that puts him in his place.

Only if he succeeds in creating an international conflict – after provocations – in such a way that it becomes an armed conflict will he be the master of some constitutionally based 'emergency laws'. And then the 'shit hits the fan', because then he no longer has to answer to anyone. De-escalating action is now required. Although, if at all it will be possible to de-escalate the conflict with Iran created by Trump himself, he will immediately start a new conflict because he knows that he can only establish autocratic rule if he gets his hands on the emergency laws. On the other hand, I think it is conceivable that he will then start a new civil war within America, which he will lose anyway.

The rule of law as the core of a democratic state

As an administrator, being accountable to a people's representative body is at the heart of a democratic constitutional state. This refers to the rule of law. That means: no one is above the law. If there is one principle that must be observed, it is this. It is one and indivisible with federalism. And thus, the absolute counterpart of the intergovernmentalism of the European Union.

In this intergovernmentalist system, administrators – based on a treaty instead of a constitution – take all the important decisions, binding on the citizens, without having to justify them to a transnational parliament freely elected by the people. Rousseau has already made it clear that within a democracy there will always be a tendency to turn it into an 'elective aristocracy', which then always tends towards an oligarchy. In this way, the most important functions are divided among themselves in a small circle.

These tendencies are to some extent present in every democratic state. Also, in the Netherlands. In scientifically substantiated figures: approximately 2% of the electorate (approximately 300,000 people) divide the most important posts among themselves in the political, administrative and official bodies, in the permanent and ad hoc committees, in science and in industry. Governing on the basis of a Coalition Agreement strengthens this process to the detriment of the strength of the parliament that must be in place as the representative of the adage 'all sovereignty rests with the people', which implies that the executive power is always accountable to the parliament. But in reality, the parliament is there to cover the pre-cooked measures of the Coalition Agreement. Only when a minister operates too bad, he or she will be sent away. The way in which the executive power determines what the legislative power of the House of Representatives should find and decide has now also reached the decision-making spectrum of the Senate. It is no longer a body that, regardless of the political delusion of the day, assesses whether a law is good or bad, but follows – albeit often under protest – what the Coalition Agreement prescribes.

This is extremely important in an intergovernmentalist system such as that of the European Union. Look again at the way in which two to three leaders of the European Council recently set aside the 'Spitzen Candidates' earmarked by the European Parliament for the Presidency of the European Commission, preferring someone who would not endanger the unbridled power of the European Council.

In the long run, any intergovernmentalist system will crack and squeak, conflicts will arise because there is top-down government without accountability. Member States do not comply with agreements under treaty law, decisions are not taken on the basis of a vision of the general European interest of the Member States as a whole, but on the basis of an exchange of the national interests of nation states. And then we have to wait for the ignition of the fuse in the powder keg.

The Convention of Philadelphia

Between 1776 and 1787, the 55 members of the Philadelphia Convention realized this. The thirteen states were about to attack each other with weapons. What was done? Contrary to the task of repairing the errors in the treaty, they threw away their confederal treaty and in two weeks they came up with the basis for designing a draft federal constitution. They took a few more months to work it out and presented it to the people of the thirteen states. If the people of nine states agreed, the federation would legally enter into force. And that took place in 1789.

Federalists have been making, for many decades, a classic mistake in their pursuit of a federal Europe. A mistake that stubbornly blocks the intended result – a federal Europe. That is the repeated and pointless attempt to adapt the treaty basis of the intergovernmental EU system in such a way that it automatically becomes a federation. Well, you may disagree as to whether an apple is tastier than a pear, but there is no point in disagreeing as to whether you can turn an apple pie into a pear pie.

There is only one way to create a federal Europe, and that is to follow exactly the same procedure that the founding fathers of the Philadelphia Convention did in 1787: throw the treaty in the bin, never look after it again and, from the point of view of European philosophers, design a federal constitution in accordance with the standards that apply to it: from, for and by the people. I could also put it another way: because the standards are known, but two hundred years after the first federation in 1787, and seventy years after the Second World War, there is still no European federation, then there has always been a wrong way of operating. Time to stop pumping around opinions and to start studying how things should be done. Namely as the founding fathers did in 1787.

Exactly the same procedure should be used for the United Nations. Stop making pointless attempts to amend the UN Charter so that the UN can finally become a federal body that provides for a number of common interests that individual Member States can no longer take care of on their own. All the energy that is directed towards the wrong construction will only lead to more back pain and the need to vomit. These include the 60 million refugees in camps and the many refugees who are drowning in the Mediterranean. The recent appeal by the United Nations to the European Union to resume rescuing refugees in that sea marks the meaningless control of both intergovernmentalist operating systems. They are at the end of their political life cycle and therefore belong in the bin. Trying to repair system errors in a non-functional treaty only leads to new problems in the 2+4-8-16 series and so on.

The concept 'federalism' and the most important standards

Federalists have an inexhaustible tendency to speak out on policy issues in endless debates. However, there is no federal agricultural policy, no federal migration policy, no federal education policy and so on. You do not have to be a federalist to have a particular view of a particular political and social issue. In other words, federalism is not about specific policies, but only about the way in which cooperation between independent entities is regulated in legal and organizational terms. When it comes to a combination of states, it is the organization of the state. When it comes to private cooperation, such as the relationship between individual football clubs, their national federal bond, their European UEFA bond and their FIFA as a world bond, we are talking about a private federation. There are many hundreds of them in Europe. Big and small. But after 200 years of claiming, there is still no federal Europe. Why not? Because there is no craftsmanship. European federalists lack sufficient knowledge how to make a federal Europe.

Providing craftsmanship requires a) acquiring fundamental knowledge about elementary federalism (i.e. the task of educating the federalists), b) increasing the degree of organization of all single federal movements (i.e. federating the federalists) and c) building a federal Europe with the standards of federalism (i.e. applying standard operational procedures). And zero energy to spend on things that have nothing to do with it.

Not only is there no federalist policy, but there is also no diversity of federal systems, contrary to what many federalists claim. Some talk about Dual Federalism, Co-operative Federalism, Competitive Federalism, Fiscal Federalism, New Federalism and other inventions. Nonsense.

There is only one concept of 'federation', based on standards. If these standards are 100% adhered to, it is a strong federation. If one is unwilling or unable to adhere 100% to these standards – as is the case with the Belgian federation, for example – then we are dealing with a weak federation. The further one deviates from the standards, the greater the risk of the federation collapsing. This has happened a few times in Africa, Asia and Europe. Nevertheless, 40% of the world's population now lives in 27 – partly strong, partly weak – federations. It is this way of talking about federalism, which deviates from the standards, that has led some federalists to the misconception that the intergovernmentalist EU also looks like a federation.

The most important standards are:

- The people of a collection of independent states decide to form a federation. They do so because there are interests and concerns that individual states can no longer take care of themselves.
- The people of the member states ratify a federal constitution – from, for and by the people – that defines the limited powers of the federal body and the articles that guarantee the checks and balances.
- The Member States themselves remain sovereign, independent with their own cultural identity, i.e. with their own parliament, government, judiciary, their own monarchy if any, their own tax system, their own policy areas.
- They allow a federal body to share in that sovereignty by means of a vertical separation of powers. In other words, the federal body may, with the powers of the Member States, deal with those limited matters of which the Member States say, 'Please, would you look after that for us, because we can no longer take care of that ourselves'.
- Both the Member States and the federal body have parliaments. The executive power of the federal body is accountable to it.
- Unlike in America, for example, the members of the federal parliament are elected transnationally on the basis of proportional representation.
- What the policies of that federal state will be depends on the members of that parliament. The political composition of the parliament determines whether Europe will be a fortress or whether it has open borders. Whether or not a joint army will be deployed in areas of conflict. Whether the sanctions against other states will be continued or abolished. Whether or not agricultural subsidies will be phased out.
- One can speak of 'the policy of a federation', but not of 'federalist policy'.

Within the use of standards there is room to vary. Two examples. In one federation one can conclude that foreign affairs as a whole must be at the federal level. In other federations, for example in Belgium, foreign affairs have been identified as a common interest to be promoted by the federation, but Flanders and Wallonia are allowed to pursue their own foreign policy for subjects that do not fall under the federal authority. Another example concerns the tax system. Normally, a fiscal unit is built within a federation. For example, in America the Member States levy tax for the federal body and therefore pay it off. The federal body pays out money to the Member States in the event of investments or calamities. In practice, it may then be the case that a Member State pays more federal tax one year than it receives benefits in return, and the opposite situation the following year. The Member States themselves retain their own tax systems and are allowed to compete with them. Texas, for example, tries to attract with low rates companies and individuals from California, which has the highest rates. These examples therefore relate only to space that exists within fixed standards for the construction of a federation.

In short: striving for a federal Europe is only the professional construction of a safe and sustainable house. Which furniture should be in that house is not a property of a federation, but of the taste of those who are going to live in it.

Our assignment and task

And that – the construction of the federal house – is what still needs to be done in Europe: zero energy spending on the senseless attempts to transform the Lisbon Treaty into a federation. This will exacerbate the internal conflict, the external weakness of the geopolitical position and the antagonistic cooperation on policy issues that have to be considered in the general interest, even more than is already the case.

Here, too, is a task for the world's federalists to stop trying to amend the UN Charter and, above all, to stop spending all their energy on considering policy issues, however essential they may be for the survival of our Earth. These important issues can only be addressed within a state structure that acts on the basis of the common interest of the Member States.

If countries want and need to cooperate but are no longer able to control certain interests or concerns on their own and still want to remain sovereign, then only a federal state can guarantee that. An intergovernmental operating system cannot do that. Making Europe a federation, building a federal house in which those policy issues are in good hands, that is the task we face.

This task can only be carried out successfully if the approach to the pursuit of a federal Europe changes in accordance with the adage: 'If you continue to do today what you did yesterday, you will get the same results tomorrow as you received today. If you don't like those results, you have to change today. Then you will get different results tomorrow. Change starts with yourself. If you don't, why would your neighbor want to change?'

I hope that this brief note will provide some clarity about standards of federalism. Supporting information can be found in 'Connectivity, Security and Prosperity' trailer: <http://www.faeu.eu/trailer/>. It also contains a draft of a ten-article federal constitution for Europe and a scenario for a Citizens' Convention in accordance with the set-up of the Philadelphia Convention in 1787, the founding fathers of the first federal constitution.

This article has been published also in the autumn issue 2019 of the magazine 'Een Wereld' of the Dutch World Federalist Movement Netherlands (WFBN).

Leo Klinkers – Editor

Leo Klinkers graduated in 1968 from the Faculty of Law at the University of Utrecht in the Netherlands. After a few years working in local government, he became responsible for research and education in public administration at the University of Utrecht from 1971 until 1983. He wrote his Ph.D. thesis in 1974 on open access to Government documents.

Between 1971 and 1983 Leo Klinkers developed a method for interactive bottom-up policymaking. This methodology has been published in a number of books and articles and applied in many projects in the Netherlands and abroad.

Since 1983 he has worked as an independent consultant in public administration in several countries, as well as for the EU and the UN. In 2013 he was co-author of the 'European Federalist Papers' with Herbert Tombeur.

He recently finished his last book 'Sovereignty, Security and Solidarity, arguing why and how the present intergovernmental administrating system of the EU should be replaced by a federal system and thus creating The United States of Europe, making America Europe's little brother.

He is actually a co-founder and member of the Promoting Committee of FAEF (Federal Alliance of European Federalists)

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