SOCIAL FEDERALISM

HOW IS A MULTI-LEVEL WELFARE STATE BEST ORGANIZED?

Lead Piece by
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Comments by
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Table of contents

Foreword

Bea Cantillon (University of Antwerp,
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This e-book collects written versions of the presentations made at Re-Bel's public event on social federalism, which took place in Brussels on June 3rd 2010. The lead piece was written by Patricia Popelier, Ninke Mussche and myself (UA/Forum Federalisme). Discussants were Benoît Crutzen (EURotterdam), Johanne Poirier (ULB), and Frank Vandenbroucke (UA). Danny Pieters (KUL) was also scheduled as discussant, but was unfortunately unable to attend the event.

The lead piece mobilizes both legal and social policy insights in order to re-think the way our social security and social policy system is organized. We basically call for abandoning the exclusivity principle in the social field, and for daring to think of other forms of power allocation, such as parallel, framework and concurrent power allocation, which would allow for more autonomy for the sub-national entities, while at the same time preserving solidarity.

Benoît Crutzen's discussion weighs the pros and cons of decentralization. His starting point is that a key issue is whether the rules of the game should remain federal (and thus decentralization should be limited only to the implementation of policies) or, rather, decentralization should apply to the whole system, thus de facto creating distinct sub-federal social security systems. The discussion clearly points to the fact that another key issue is whether decentralization should be directed towards the Communities or Regions, and how should decentralization be implemented in the Region of Brussels.

Johanne Poirier reflects on some potential advantages and risks of adopting alternative modes of distribution of competences, as the lead piece proposes. She also points to the risks of a "joint decision trap", to the potential of the introduction of "spending power" and to the potential and risks of cooperation.

Frank Vandenbroucke diagnoses two dilemmas in the social federalism debate. What he calls "the Pieters Dilemma" refers to the impossibility of having a de-federalisation of social security on a Community basis without contradicting the fundamentals of social insurance: either one allocates social policy competences to the Brussels Region, or one keeps social security at the federal level. The second dilemma is at the core of Vandebroucke's critique of the lead piece: introducing shared powers in social security would entail the introduction of a hierarchy among norms at the two levels of government, which nobody in Belgium would accept.

The e-book closes with a reply by the authors of the lead piece to Vandenbroucke's second dilemma.

Lead Piece

Patricia Popelier, Bea Cantillon & Ninke Mussche

On division of power and the Belgian layered welfare state

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By definition, federal states struggle with the division of powers between the central and sub-state levels. This process, inherent to the dynamics of federalism, leads to interesting combinations of power allocation: parallel powers,[1] concurrent powers,[2] framework powers[3] or exclusive powers,[4] etc. When federations choose to organize the powers on the basis of the exclusivity principle, as is the case in Belgium, tensions arise when different levels of government – each within the boundaries of their own powers – inevitably touch upon a similar policy field. Literature has pointed out that this is normal, that overlaps and interferences between different spheres of authority, are unavoidable, and that different levels are mutually dependent.[5] "In practice, experience has indicated that the inevitable overlapping of functions makes it impossible for governments within federations to operate exclusively", argues Ronald Watts. [6] Canadian authors Funston and Meehan claim that "Our complex society does not neatly break down into these same compartments. It is important to remember that society has evolved and technology has developed beyond those matters contemplated in the division of powers at the time the Constitution was written. As a result, there is often an overlap, and sometimes a conflict, between federal and provincial jurisdictions".[7] A policy field in which this is certainly bound to happen is social policy.

This paper looks at Belgian social federalism as it stands today and argues the following. 1) The Belgian welfare state has evolved towards a layered welfare state, where the classical national level of social security has become intertwined with the supra-national level (EU social policy and legislation) and the sub-national entities (Flanders, Wallonia, Brussels). 2) The layered welfare state is confronted with tensions arising between the different levels of government as a consequence of the "dogma" of the exclusivity principle. 3) The inevitable overlapping and crossing of each others' competences, means that homogenous competence packages and the exclusivity principle are outdated: to address the complexity of present day social policy, Belgium needs a system of shared (parallel or concurrent) or framework powers as well as a higher degree of coordination and cooperation between the different levels of government.

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1 *Parallel powers* are matters that are allocated to both the federal government and the federal entities, which they can exercise independently of one another and simultaneously each at their own level of control.

2 In the case of *concurrent powers*, both the federal government and the federal entities can regulate the same matter, but not simultaneously. In this case, preference usually goes to the federal government. That means that the federal entities can only act if and to the extent that the federal government does not act.

3 In the case of framework powers, the federal government sets the basic rules or the minimum standards, while the federated entities can regulate the matter within the federal framework. Framework powers can in their turn be either concurrent or exclusive. In the first case, the federal entities can issue framework regulations so long as the federal government does not act, in the latter case they are not competent to issue framework regulations even in the absence of federal regulation.

4 Exclusive powers are matters that are assigned either to the federal government or the federal entities, to the exclusion of the other powers.

5 JÜRGEN VAN PRAET, "Towards a two-speed social security system in federal Belgium?", *The Layered Welfare State, towards Flemish social protection in Belgium and Europe?*, Antwerp, Intersentia, 2010 (forthcoming).

6 R.L. WATTS, "Basic issues of the federal state: competitive federalism versus co-operative federalism", in R. BAUS, R. BLINDENBACHER AND U. KARPEN (ed.), *Competition versus cooperation. A German federalism in need of reform – a comparative perspective* (Baden-Baden: Nomos, 2007), 85-86 and 89.

7 B.W. FUNSTON AND E. MEEHAN, *Canada's constitutional law in a nutshell* (Toronto (Ont.): Carlswell, 2003) (3e editie), 54. See also W.R. LEDERMAN, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981), 236-45 and G. TAYLOR, *Characterisation in Federations : Six Countries Compared, (*Berlin: Springer, 2006), 49.

The Background: conflicts of competences in a layered welfare state

The Belgian welfare state is layered. Social security and social policy at large is taking shape through a complex interaction between policy processes that are situated on different levels of government: European, national, sub-national (as well as on the levels of the municipalities). Social protection is also the result of an interplay between a plurality of public (political parties, governments, administrations, agencies and courts) and private (employers, employees, insurers, consumers) actors.[8]

In Belgium, even though traditionally social security has developed on the national level of the unitary Belgian state, the various state reforms devolved substantial aspects of social protection and policy to the level of the Communities. This devolutionary trend has manifested itself most clearly since the 1980s. As of 1980 the Communities acquired powers regarding most social policy domains (education, family, housing, health prevention...) whereas traditional"social security" remained on the federal level. This evolution has resulted in a situation where different tools introduced at different policy levels nonetheless serve a similar purpose: childcare services at the community level, tax and child benefits as well as residual childcare services at the federal level; vaccinations by the Communities, but partly funded by the federal health insurance body (RIZIV); career break schemes and various reductions in social contributions at both policy levels; school bonuses from the Communities and child benefit from the federal government.

The devolution of powers to the sub-national entities has traditionally been organized in a framework of the principle of exclusivity. Originally, exclusivity was chosen as a principle for the allocation of powers, in order to avoid conflicts of authority,[9] but mainly because this was also considered to be an essential guarantee for the autonomy of the federal entities.[10] With regard to Flanders, this is not expressed in so many words in the Flemish resolutions of 1999, but is reflected in the discussions of the working paper underlying the resolution. The working paper regularly argues that transfer must take place on an exclusive basis. That choice still continues to enjoy support.

Next to the fact that Flanders expressed at regular intervals the desire to acquire more powers, Flanders also has made full usage of its existing competences – also regarding social assistance. On 30 March 1999 the Flemish Community indeed introduced a new – for Flanders only – form of social insurance: the Flemish Care Insurance. It added an important new dimension to the Belgian welfare state, as this is the first time a sub-national entity has supplemented the federal social security system with an entirely autonomous branch of social protection.[11] The Flemish Care Insurance was a first test case, which, despite objections from the legal division of the Council of State, successfully passed review by the Constitutional Court with regard to the largest and most fundamental part.[12] The pronouncement by the Constitutional Court gave wings to the Flemish yearning for its own social policy, outside the reform of the state and therefore without the need for consultation with the French community. The Flemish governmental agreement 2009-2014[13] leaves no room for misunderstandings in that regard: it seeks to develop a "basic decree with regard to Flemish social protection", which would include among other things basic hospitalisation insurance and a financial allowance for children.[14]

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[8] J. Beyers & P. Bursens, "Naar een gelaagde welvaartsstaat? Over de relatieve autonomie van regionaal sociaal beleid", in *B. Cantillon, P. Popelier & N. Mussche, De gelaagde Welvaartsstaat, Naar een Vlaamse Sociale Bescherming in België en Europa?*, Antwerpen, Intersentia, 2010, p. 40.

[9] A. Alen, 'De bevoegdheidsverdeling tussen de Staat, de gemeenschappen en de gewesten – enkele algemene bedenkingen na de derde staatshervorming', (1989) *TBP* 141; P. Peeters, 'Enkele algemene problemen van bevoegdheidsverdeling en bevoegdheidsuitlegging na de tweede Belgische staatshervorming', in A. Alen and L.-P. Suetens (eds.), *Zeven knelpunten na zeven jaar staatshervorming,* Brussels, Story-Scientia, 1988, p. 73.

[10] A. Alen, *Handboek van het Belgisch Staatsrecht* (Antwerp: Kluwer, 1995) 340; P. Peeters, 'Enkele algemene problemen van bevoegdheidsverdeling en bevoegdheidsuitlegging na de tweede Belgische staatshervorming', in A. Alen & L.-P. Suetens (eds.), *Zeven knelpunten na zeven jaar staatshervorming,* Brussels, Story-Scientia, 1988, 69.

[11] Social security is defined very broadly as 'all provisions designed to help guarantee the financial security of citizens'. The notion encompasses social insurance and social assistance schemes, irrespective of the funding mechanism and the relationship with the factor of labour.

[12] J. Velaers, "Het sociaal federalisme in België in het licht van de bevoegdheidsverdeling", in *B. Cantillon, P. Popelier & N. Mussche, De gelaagde Welvaartsstaat, Naar een Vlaamse Sociale Bescherming in België en Europa?*, Antwerpen, Intersentia, 2010, p. 133.

[13] Flemish Governmental Agreement 2009-2014 dated 9 July 2009, *Een daadkrachtig Vlaanderen in beslissende tijden. Voor een vernieuwende, duurzame en warme samenleving,* p. 67. See also Government Declaration by the Flemish Government, *Parl.St.* Vl. Parl. 2009, 31/1, 6.

[14] J. Vanpraet, "Naar een Vlaamse sociale bescherming binnen het bestaande bevoegdheidsverdelend kader", in *B. Cantillon, P. Popelier & N. Mussche, De gelaagde Welvaartsstaat, Naar een Vlaamse Sociale Bescherming in België en Europa?*, Antwerpen, Intersentia, 2010, p. 155.

Decentralisation and exclusivity

There are many sound reasons for decentralising social policy more, such as increasing the potential for innovation and improving the connection with differing regional needs and preferences. Because of the still very immature Belgian social federalism it is indeed sometimes difficult to coordinate social security policy with the regional policy on work, education and care.

The development of sub-national social protection or forms of social security could be said to follow logically from a process of 'deepening' of social policy, whereby the emphasis has gradually shifted from the redistribution of income to the activation of benefit recipients, the creation of training and education opportunities, and the introduction of provisions for older and younger families. The new approach entails a much closer alignment to local requirements and consequently necessitates a more local implementation. The broadly supported notion in Flanders and Wallonia that the labour market institutions need to be further regionalised is also to be understood in this context.[15]

However, the growth of social policy on the basis of exclusivity on both national and sub-national level is not unproblematic for several reasons.

First, it has given rise to areas of tensions in the social policy field, e.g. between job placement and unemployment insurance, between prevention and insurance in healthcare, and in the fields of education and child benefits.

Second, the development of complementary forms of social protection in the current constitutional setting is occurring in a 'legally uncertain' manner. Flemish social protection as it is currently taking shape, is developing formally within a constitutional architecture of exclusive powers. In practice however one is confronted with a form of parallel or complementary powers. Indeed, the Constitutional Court confirmed that Flanders is empowered to introduce the Flemish Care Insurance, as this falls under the heading of 'assistance to individuals'. This form of social protection was thus deemed possible alongside federal social security. As a result, the older federal arrangement of Allowances for Assistance to the Aged is supplemented for an identical social risk (dependence on care). Consequently we have in effect arrived at a situation of parallel powers, despite the persistent rhetoric of exclusive powers. This situation has arisen as a result of jurisprudence of the Constitutional Court and of the European Court of Justice. Fundamental policy questions about the level at which policy must and can be conducted[16] are thus settled by the Constitutional Court without any prior democratic debate.

Third, 'case by case' exaction of Flemish social powers threatens to result in a policy architecture with little coherence. In the case of the Flemish Care Insurance for example we saw how the policy instrument was drawn at least in part on the basis of the motive of establishing Flemish competences with regard to social security. This is evidently not the right starting point for the development of adequate policies. Arguably, the enhancement of care services would have been more effective than the development of an additional benefit at the regional level.

In addition, it became clear (moreover not only in the case of health insurance) how an uncontrolled 'race to the top' in social protection arose: when sub-entities exercise new policy instruments, the federal level is inclined to react to this in order to safeguard its own role in social security. This inflationary aspect manifested itself three years after the introduction of the Flemish Care Insurance, when the federal government decided to substantially increase the generosity of the TAHB scheme: in 2003, some 36,000 elderly persons were entitled to up to 170 euro extra per month, at an additional cost of 31 million euros. The dynamics of Belgium's federal political structure had apparently induced this move. A similar phenomenon was observed after the introduction of the Flemish school bonus: at the start of the following school year, a supplementary (national) child benefit scheme was introduced. As a result, in a *de facto* situation of parallel powers, one arrives at a cost-increasing dynamic, which is difficult to justify in a period of major budgetary difficulties.

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[15] See Re-Bel E-book 2: *Does it make sense to regionalize labour market institutions?* Lead piece: Jean-Claude Marcourt and Frank Vandenbroucke (employment ministers for Wallonia and Flanders, respectively) Editors: Bart Cockx (UGent) and Bruno Van der Linden (UCLouvain) Published in April 2009, 36 pages.

[16] P. POPELIER, "Sociaal federalisme en bevoegdheidsverdeling in rechtsvergelijkend perspectief – Voorbij het exclusiviteitsbeginsel", in *B. CANTILLON, P. POPELIER & N. MUSSCHE, De gelaagde Welvaartsstaat, Naar een Vlaamse Sociale Bescherming in België en Europa?*, Antwerpen, Intersentia, 2010, p. 89.

Fourth, in the current context there is scarcely any apparent coordination between the policies of the different policy entities. Nevertheless in a layered welfare state it is inevitable that differing policy instruments are used at different policy levels in order to relieve certain social needs (as in the case of dependence on care, among other things the Flemish Care Insurance and service, the federal welfare assistance, pensions and service vouchers (*dienstencheques*)). A mature form of multilayered social protection requires coordination, coherence and accountability. The challenge that immediately arises as a result of this is therefore to develop parallel powers of the various levels in an appropriate and cost-effective manner. Complementary social protection must therefore be effectively complementary and coherent within the system as a whole.

Fifth, in the current legally uncertain context, the attempts on the Flemish side to establish its own social protection competences also result in the obstruction of the necessary modernisation of federal social security. Caught within the logic of exclusivity of powers, policy makers on the Walloon side are responding time after time by initiating legal proceedings at the Constitutional Court and the European Court of Justice. As a result of a fear of loss of powers, obvious reforms are also being obstructed. For instance the fear of a possible loss of powers is forming a not insubstantial obstacle to the necessary simplification of the system of child benefits, among other things.

Finally, the current dynamic is resulting in a relatively incoherent delineation of new solidarity circles. The Flemish government has been compelled by the European Court to open up the Flemish Care Insurance to residents of other member states who have ever lived in Flanders.[17] This has resulted in reverse discrimination against Walloons who find themselves in the same situation. It is very questionable whether it is opportune, as in the case of Flemish Care Insurance, to adopt a criterion that differs from what is applicable in the EU context and also runs counter to the historical dynamic of social protection systems.[18]

Towards alternative forms of power allocation

The increasing complexity and interdependence of social protection has developed against the background of exclusivity of powers. In the debate on the federalisation of social policy too, advocates of the transfer of powers generally plead in favour of exclusivity. According to Pieters, this necessarily results from the "specific nature of the Belgian federation, with its two major components": the decision of the federal government to regulate a matter after all immediately implies a choice in favour of or to the detriment of one of those two components.[19] Vansteenkiste although in theory not disinclined to the idea of concurrent powers, agrees with this as he sees the typical bipartite and centrifugal nature of Belgian federalism as an impediment.[20]

As mentioned, the result of exclusive powers is that, in a pursuit of so-called 'homogeneous packages of powers', policy areas that are transferred must belong exclusively to the power of the sub-entities, to the exclusion of any possibility of federal interference. The reality of social policy, however, is inevitably very complex. The risk of dependence on care for example is tackled with various policy instruments: insurance, welfare assistance, provision of service, service vouchers, statutory and supplementary pensions… Although doubtlessly various aspects should be better streamlined it would be an illusion to think that this could all be simply taken up in the Belgian context by one single (sub-national) entity. Virtually all fields of social policy are characterised by major complexity of social programs, measures and policy instruments. For example policy measures in the area of the costs of children consist of child benefits, tax reductions for dependent children and school costs; and, in the area of child care: the tax deductions for child care and the service vouchers.

For the time being then, pursuit of exclusive autonomy with regard to social security appears very difficult because of the numerous limitations that are imposed by the wider international framework, because of the interweaving of diverse policy areas, and because of the very particularly centralised and dense position of Brussels. Pursuit of exclusivity also does not appear desirable, partly because of the interweaving of policy fields

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[17] H. VERSCHUEREN, "Europese krijtlijnen voor een sociaal federalisme", in *B. CANTILLON, P. POPELIER & N. MUSSCHE, De gelaagde Welvaartsstaat, Naar een Vlaamse Sociale Bescherming in België en Europa?*, Antwerpen, Intersentia, 2010, p 227.

[18] N. MUSSCHE, "De grenzen van het sociaal burgerschap in een federaal stelsel – De Vlaamse sociale bescherming en het territorialiteitsprincipe", in *B. CANTILLON, P. POPELIER & N. MUSSCHE, De gelaagde Welvaartsstaat, Naar een Vlaamse Sociale Bescherming in België en Europa?*, Antwerpen, Intersentia, 2010, p. 199.

[19] D. PIETERS, 'Het sociaal beleid en de federale rechtsorde', in S. VANSTEENKISTE & M. TAEYMANS, *Sociaal Beleid en Federalisme*, Brussels, Larcier, 1999,19-20.

[20] S. VANSTEENKISTE, 'Coherenties en incoherenties in de persoonsgebonden aangelegenheden', in S. VANSTEENKISTE & M. TAEYMANS, *Sociaal Beleid en Federalisme*, Brussels, Larcier, 1999, 98.

already mentioned, and partly because of the need to continue to organise the major redistribution flows at the highest possible level. From the point of view of the necessary reforms of social security it also does not appear to be a prior condition. This is because the challenges are largely common to the various sub-entities. With a view to the necessary cost savings and the efficiency improvement there is a particular need for coordination and for accountability of the individual players within social security, including the Communities and the Regions.

Conclusion

Taking into account Belgian federalism's own bipolar character, the policy complexity, the inevitable intermingling of policy fields and the well-founded need of sub-entities to conduct their own policy, it then appears desirable to abandon or at least put into perspective the debate on exclusive powers, homogeneous packages of powers as well as the division idea. None of these routes provides an adequate answer to the growing complexity of the definition of powers and needs. At the appropriate time every system must question its own assumptions: this also applies to the Belgian system of division of power, which takes exclusivity as its starting point. A more nuanced debate without taboos on parallel and composite (complementary) packages of powers would therefore be of more benefit to us. This certainly does not have to result in less autonomy, in fact the opposite.

In a layered context and in the dynamic of a federal state structure controlled use of shared (parallel or concurrent) powers is more suitable than the exclusive powers that currently remain the prevailing principle in Belgium . Shared powers can provide a way out in the case of federal paralysis; they allow supplementary arrangements based on regional needs and they offer possibilities for innovative experiments which subsequently can possibly be adopted at the federal level ; they provide the tools that are necessary in order to increase the accountability of the different authorities towards general interests.
In a *multilevel* context what is also primarily at stake is on the one hand exercising influence on the decision-making procedure at the other levels, but at the same time ensuring sufficient dynamism if the complex decision-making procedure threatens to result in paralysis. Shared powers based upon subsidiarity offer more guarantees in this respect than exclusive powers.

An obvious necessary condition for enabling such a complex landscape to succeed is the institutionalisation of collaborative mechanisms for the coordination and safeguarding of coherent, complementary packages of powers. With rising ageing costs (even more so in Flanders than in Wallonia) and limited budgetary means, it is essential that the efficacy and efficiency of the totality of measures should be assessed and that coordination should take place between policymaking at the Flemish and the federal levels of government.

In this way, if one wishes to take up a power, one would have to demonstrate that this is complementary or necessary given the specific needs in one's own region, and in this context no impairment would be permitted of the arrangements adopted in common.

The scope for the reinforcement of sub national social protection relates to the possibilities for innovation and complementarity and the need to achieve alignment with specific regional characteristics. In doing so policy-makers must have the sincere intention of improving the adequacy of the system. Efforts must be made to achieve meaningful models of complementarity. There is no sense in replicating existing systems and their implementing organisation at the level of other sub-entities. A multilayered system of social security is only useful if it also serves the advantages of decentralisation. Those arguments also rather point in the direction of a dynamic system with shared, supplementary and concurrent powers combined with coordinating and collaboration instruments.

Comments

The pros and cons of decentralization

Benoît Crutzen (Erasmus University Rotterdam, School of Economics)

Three initial caveats[21]

In this discussion, I will focus on a subset of the arguments put forward by Cantillon et al. in their lead piece, not because I believe the other arguments are not important, but simply because tackling all of them would require too much space. Furthermore, my arguments will focus on the economic side of the problem. Finally, even though I concentrate here on the spending side of social security, I would like to mention that any reform of social security should be comprehensive and address not only the spending, but also the revenue side.

Regardless of whether we focus on the revenue or the spending side of social security, a key question to address is: are we talking about the complete decentralization of both the goals and implementation of policy or of its implementation only? To be more explicit, which of the following two options are we thinking about: 1) the federal level sets the goals and rules of the game and the federated entities are put in charge of implementation (this is for example what the Marcourt-Vandenbroucke proposal advocated for the reform of labour market policies; see their lead piece in the second Re-Bel e-book); or 2) full decentralization of the system with the federated entities being in charge of the goals, rules of the game and implementation? If we want Belgium to remain a federation, then the first option should be preferred, as the other option seems more in line with the spirit of a confederation, not a federation. Clearly, the pros and cons of decentralization (both economic and non) depend to a very large extent on whether we are talking about option 1 or 2 above.

Finally, the main issue in any discussion of (social security) reform in Belgium is, unsurprisingly, how to deal with the presence of the region of Brussels (RBC in what follows). We return to some of the problems raised by the presence of RBC in the final part of this discussion.

Arguments in Favor of Decentralization

Decentralization is typically justified by the following 3 arguments:

1. Information asymmetries;
2. Homogeneity of preferences and willingness to give;
3. Accountability and common-pool/incentive problems.

Information asymmetries, requiring a close link between the rulers and the ruled, are a strong argument in favor of the decentralization of policies that come with conditionalities for potential beneficiaries. Conversely, policies that do not come with such conditionalites (demogrants in the wordings of Cantillon, Pestieau and Schokkaert 2009) are best managed at the federal level, as information about the personal characteristics of potential beneficiaries is not an issue. Thus, in as far as the Flemish FCI is a demogrant --it is a flat, Beveridgean lump-sum transfer of 125 euros to all care-dependent citizens regardless of their age, income and needs in terms of care-- the best level at which to manage and implement such a policy seems to be the federal one. Conversely, the efficiency of the implementation and management of the federal TAHB, whose access to and generosity is age-dependent, means- and needs-tested, could probably be enhanced if it were moved down to

[21] Our discussion also borrows from some of the arguments put forth in Cantillon, Pestieau and Schokkaert (2009) and Schokkaert (2009).

the federated level. On old age care insurance, my favorite solution would be to have the federal level set the goals and conditionalities linked to this policy and then let the federated entities implement this policy, delegating to the latter the collection of the necessary information for means- and needs-testing and management of the scheme.

The existence of differences in preferences is another strong argument in favor of decentralization, provided that by preferences we mean a polity's fundamental and relatively time-invariant preference for a type of system over another. In the Belgian context, I believe we should recognize that the North and the South of the country differ fundamentally along many dimensions that shape one's view of the role of social security. Accordingly, some decentralization is probably needed in order to better tailor the way the different groups of citizens see the role of social security in society. Yet again, the two thorny issues are 1) whether we should decentralize the whole system or its implementation only; and 2) whether we should also assume that the citizens of RBC have their own region-specific views when it comes to social security.
Differences in preferences also imply that, within each group, the higher degree of homogeneity will increase the willingness to give and thus foster the local forces that sustain social security. Yet, the obvious counter-argument is that such a narrowing of circles of solidarity through the decentralization of certain policies will make inter-group solidarity even harder to achieve than today, and could thus threaten not only the social security system, but the whole Belgian federation. I would thus not be shy to point out that this is a dangerous path to take. Furthermore, I would also suggest that such an argument is partially flawed, as it rests on the fortunes and willingness to give of different groups at a specific point in time and, as the history of Belgium and its neighbouring countries suggests, such fortunes can radically change in the space of a few decades.

The issue of accountability and the presence of common-pool/incentive problems are two additional arguments in favor of some decentralization of social security in Belgium. Indeed, both arguments rest around the idea that governments are responsible to their people and that therefore the people should be put in the best possible position to judge the decisions and choices of their policymakers. Sometimes, the rules governing social security imply that one level of government can freeride on another level taking the necessary and costly measures to balance the social security books. Clearly, such incentive problems should be corrected. In general, accountability requires that, for every policy, the level of the authority responsible for the revenue side should be the same as that of the authority controlling the spending side. This is consistent with both a fully centralized and a fully decentralized system. Yet, in the specific Belgian context, decentralization seems to have the edge over centralization as far as accountability is concerned, because, at the federated level, it is easier to identify the decisionmakers who are to be held accountable.

Arguments against Decentralization

Turning to the arguments against decentralization, the following deserve a comment:

1. Economies of scale, risk-spreading and spill-over effects;
2. Bureaucratic costs, complexity and limits to coordination;
3. Downward social competition and EU restrictions.

Just like a market's efficiency typically grows with the size of the market, so should the efficiency of social security grow with the size of the population of its beneficiaries. Indeed, as soon as there are economies of scale in the production of goods and services, increasing the size of the pool of customers is welfare enhancing. Further, social security programmes being largely insurance ones, maximizing the size of the pool of customers also implies maximizing the opportunities for risk-sharing and pooling. Finally, in the presence of potential spill-over effects between federated entities, centralizing social security seems preferable. Examples of policy areas in which spill-over effects are very important include education and training given that, in a small country as Belgium, a important fraction of the population works in a place that is located in a federated entity that is different from the one where they received their education and/or training (RBC is the obvious but not only example).

Secondly, (especially full, but also partial) decentralization of social security implies, automatically, a multiplication of the bureaucracies in charge of its management. In a country such as Belgium, where the financial room for manoeuvre is so scarce, policies that lead to an increase in the costs of bureaucracy seem

hardly the path to follow. In addition, after the decentralization of the system, firms and other economic actors that are present in more than one federated entity will have to deal with more than one bureaucracy. In a country already singled-out for its barriers to firm and job creation, policies that lead to such a multiplication of red tape and such an increase in the complexity of the system should simply be resisted.

Finally, the presence of restrictions from the EU on what the federated entities can impose on citizens living within their borders and the risk that decentralization may lead to downward social pressure should push policymakers to think carefully about the consequences of their choices before they act. The modifications the Flemish authorities had to adopt concerning the pool of potential beneficiaries of the FCI is a telling example.

Untouched Issues and Other General Problems

Whereas the paper by Cantillon et al. dealt with many important issues and arguments, I believe the crux of the matter lies very much in what it left out. I thus wish to devote a few words on two of these issues, as I believe a discussion surrounding these should be a top priority. These are:

1. Decentralization to the Regions or the Communities? And what about Brussels?
2. How to make sure the glue that holds a society together is not further dissolved by future reforms?[22]

Belgium, with its linguistic Communities and its economic Regions, poses an extra challenge when it comes to discussions about fiscal and social federalism: should decentralization take place at the level of its Communities, its Regions, or both? Most academic discussions are silent about this issue. Yet, this is probably the toughest Gordian knot to cut. Furthermore, the distinction between Regions and Communities would not be such a major issue if it were not for the presence of RBC and the joint management of some of its policies by the Flemish and the French-speaking Communities. The presence of RBC implies that there are two obvious ways to decentralize social security: 1) decentralize it towards the Regions; 2) decentralize it towards the Communities and let the joint communitarian commission in Brussels (the so-called COCOM/GGC) manage policy in the RBC. The advantage of the latter option is that it allows policymakers to stick to the Constitutional separation of policies Communities and Regions are responsible for (individual-specific policies to the Communities, economic ones to the Regions). An important disadvantage would be that accountability in RBC would be very low: in case of conflict between the two Communities over the best policies for Brussels, how to resolve the conflict, and how to convince the 'losing' side that it should still see positively the financing of policies it did not favor? Finally, if Belgian citizens living in Brussels truly feel Bruxelois/Brusselaars, they may resist being dictated policy by policymakers from outside RBC. The former solution in favor of the Regions would go against the Constitution, thus requiring its revision, but would probably have the advantage of its relative simplicity, clarity and accountability, with a well-defined local government in charge of local policies in every Region. Decentralization to the Regions would also score better in terms of preference matching. Yet, to be fully consistent, decentralization to the Regions may require the creation of a fourth, German-speaking Region, at least if German-speaking citizens desire it.

Turning to the second point above, I would like to argue that, in order for the Belgian federation to continue to be viable, any reform should make sure that the erosion of trust that has characterized the North-South relationship in the last few years is at a minimum stopped, if not reversed. Indeed, no reform of the system can ensure its viability as long as the North and South continue to view the game they are playing as a zero-sum one, in which each player's gain is another's loss. One contribution in this area would be to remind all actors involved, politicians and citizens alike, that, as Jacques Drèze (2009) stressed in the first Re-Bel e-book , social security programmes are not only transfer programmes but also (and especially?) nationwide welfare enhancing insurance programmes, independently of the level at which they are managed. Obviously, at any point in time, the lucky pay to help the less lucky. Yet, nobody should forget that, tomorrow, they may end up being part of the unlucky group...

[22] One could argue that this glue, this trust is not an economic issue. Yet, as the wealth of economic and interdisciplinary evidence has shown by now, trust is key for all economic institutions to meet their goals: for example, markets could not work efficiently if market participants did not trust each other and the workings of this institution. I thus feel entitled to including the issue of trust in this discussion.

Conclusion

Given the pressing problems Belgian social security faces, reforms are clearly needed, and progress thus needs to be achieved. Some decentralization of some policies will have to be decided, if anything to meet the requests of a substantial fraction of the population (the largest part being located in the North, but not only) and to break the policymaking deadlock that has characterized Belgium in recent years.

I would personally favor decentralization of the implementation only of some policies, leaving the setting of the rules of the game at the federal level. Further, accountability, preference homogeneity, transparency and the need to reinforce the Belgian federation make me favor decentralization to the Regions, not the Communities (these reasons could also justify the creation of a fourth, German-speaking Region in the East of the country). Finally, because accountability also dictates that social federalism should go hand in hand with fiscal federalism, the Special Finance Act governing the sharing and division of revenues between the different Belgian entities should be revised too.

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Layered social federalism: from the myth of exclusive competences to the categorical imperative of cooperation

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All political regimes rest on a number of founding principles, myths and taboos. In their provocative piece, Patricia Popelier, Bea Cantillon and Ninke Mussche call into question one of the founding principles on which the Belgian federal system is grounded: the exclusivity of the distribution of competences. The authors also pray for greater coordination between public actors in order to limit overlap and better articulate public action in the social protection sector.

Replacing the principle of exclusivity by a larger catalogue of options is an appealing invitation to creative – and policy-oriented – thinking. The thought-provoking proposal generates a number of concerns, however. After summarizing certain of the authors' main arguments (I), I would like to reflect on some potential advantages and risks of altering and or adopting alternative modes of distribution of competences (II); the potential legitimisation of the so-called "spending power" (III); the ghost of the "joint decision trap" (IV) and the virtues and hazards of cooperation (V). I will then offer some concluding remarks on the link between social protection and identity politics in a multinational context (VI).

I. The end of a myth: some (overly optimistic ?) advantages

The lead piece convincingly demonstrates that – at least with regards to social protection – competences are already largely parallel, complementary, overlapping and multi-layered. A large number of social policies require action by both the federal authorities and the Communities.[23] Rather than seek elusive – and often ineffective – homogeneous "packages of competencies", the three authors call for an end to the "dogma of the exclusivity principle". Competences with regards to social protection should, rather, be distributed on a shared (parallel or concurrent) basis, or allow for framework (federal) legislation to be implemented and complemented – if need is demonstrated – by the three Communities. This, in their view, should have a number of positive outcomes. The idea is not to replace one dogma by another, but to move from one form of distribution of competences (officially exclusive) to a number of options, that can be tailored to meet specific social policy challenges.

First, the formal mode of distribution of competences would actually align itself with what has become a practical – and even a timid constitutional - reality.[24] The end of the exclusivity taboo would thus bring some form of constitutional honesty to the social protection field. Secondly, allowing for shared competences at least should reduce the risk of policy paralysis. If I understand well, one of the underlying assumptions is that if the bipolar federal authority cannot get its act together, constitutive units would be able to adopt social protection policies. This should either discourage the use of vetoes against reforms in federal institutions, or at

[23] And, on the Francophone side, by the Regions either because there has been a legal transfer of the exercise of competences from the French Community to the Walloon Region or the COCOF, or because the Walloon Region, in practice, funds and organises services which are intimately intertwined with a given Community-based social policy.

[24] See, notably the discussion of the Constitutional Court's decision 11/2009 in VANPRAET, Jurgën, «Vers une sécurité sociale flamande complémentaire dans le cadre actuel de répartition des compétences ? », *Journal des Tribunaux*, 2010, no. 18, pp. 301-305.

least facilitate policy-making at other levels, if need be.[25] Thirdly, abandoning the dogma of exclusivity should reduce the competitive trend to "occupy the field" first, even when the added value in terms of social protection may not be clearly demonstrated. Fourthly, this should also reduce the costly "race to the top" between orders of government who all want to serve a similar public through distinct but related - and generally uncoordinated – public policies. In other words, moving from exclusivity to various forms of ordering of competences should reduce competition-driven factors unrelated to the social policy at stake.

It is undeniable that from a functional – as opposed to a purely formal - perspective, competences in the area of social protection are intricate, interconnected, intertwined. Hence, the call for an end to the mythologised principle of exclusivity is welcome. It is generally salutary to challenge ingrained taboos. The alternatives have their own inherent risks, however. The following section identifies a few, but also reinforces the potentially positive impact of the proposed paradigm-shift.

II. Parallel, concurrent, shared competences: broadening the catalogue of options

There are a number of means of distributing competences in a federal regime. In some cases, constitutive units have explicitly attributed competences, the federal order enjoying residual ones (the case, so far, in Belgium). Sometimes, the opposite is true (to some extent, the United States). Sometimes, there are twin lists of exclusive competences (in Canada). In addition, however, competences can be shared between orders. As the lead piece underlines, this "sharing" can take three distinct forms: parallel or concurrent competences, or framework legislation to be complemented/completed/implemented by constitutive units.[26]

Framework legislation allows for common ground rules to be adapted to "local" preferences and implemented in a differentiated manner. An approximate analogy would be European directives. In some areas, this can be a decent mid-point between full-fledged transfer of federal competences, or a structured – institutionalised – means of ensuring cooperation between federal and federated entities. The key here is 1) that federal authorities must agree on those ground rules, something which is arguably increasingly difficult in Belgium, at least with regards to social policy reform and 2) that the framework rules not be so detailed that they act as a *façade* for full-fledged federal legislation, leaving little room to manoeuvre to constitutive units.[27]

Concurrency allows for action by different orders of government (federal and Communities, for instance), but requires a "rule of supremacy" in case of conflict. In most federations, federal law takes precedence when there is a clear contradiction with norms adopted by a constitutive unit, although there are exceptions.[28] In fact, there is no logical necessity that the rule should apply in one direction only, or that the same rule should apply in all cases of concurrency. In any event, opting for concurrent competences would require to determine which order should take precedence in case of conflict between legislative provisions adopted by different orders. This would clearly run counter to another founding principle (myth?) of the Belgian federal system: that of the equality between the federal and federated authorities.[29] This assertion of constitutional equality was – at least originally – understood as a means of securing the autonomy of the recently constituted federated units. Arguably, however, one could imagine that some specific areas of social protection could be subject to this form of distribution, with a clearly determined rule of supremacy. Unless all components of the federation act in good faith, the order with the supremacy rule could attempt to deliberately adopt conflicting rules to annihilate their "concurrent's initiative (but I might be overly pessimistic here…). In other words, this method does not necessarily reduce competition, but it may play itself out in a different manner…

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[25] The power to intervene in case of paralysis at the center is far less clear in the case of framework legislation, which by design require consensus at the federal level.

[26] See footnotes 1 to 3 of lead paper

[27] GARCÍA MORALES, María Jesús, ARBÓS MARÍN, Xavier, "Intergovernmental Relations in Spain in POIRIER, Johanne, and SAUNDERS, Cheryl, eds., *Intergovernmental Relations in Federal Systems, A Global Dialogue on Federalism*, vol. 8, McGill/Queen's University Press, Montréal/Kingston, forthcoming 2011, p. 8 of the manuscript

[28] In Canada, for instance, contributory old age pensions are a concurrent competence with provincial supremacy. In other words, in case of conflict between federal and provincial rules, the latter would take precedence (art. 94a of the 1867 Constitution Act). In practice, only Québec has set out its own pension plan. In other provinces, the federal regime applies. There is a high degree of coordination between the Québec and Canadian plans, so that the provincial supremacy clause has never had to be invoked.

[29] DELPÉRÉE, Francis, VERDUSSEN, Marc, « L'égalité, mesure du fédéralisme », *in* GAUDREAULT-DESBIENS, Jean-François, GÉLINAS, Fabien (dir.), *Le fédéralisme dans tous ses états: Gouvernance, identité et méthodologie / The Sates and Moods of Federalism: Governance, Identity and Methodology*, Carswell/Bruylant, Montréal/Bruxelles, 2005, pp. 193-208, at pp. 199 ff.

At first sight, **parallel competences** do not run into such problems but they also have their inherent drawbacks. Basically, this form of distribution allows all federal partners to legislate with regards to a common policy area, to the extent that each order acts within its own – exclusive - sphere of competences. In Canada this is called the "double-aspect" doctrine.[30]

For a number of reasons, notably the age of the federation (created in 1867), the Canadian Constitution provides very few clear rules concerning the distribution of competences in the field of social protection.[31] With a few exceptions, courts have been called upon to rule on the constitutionality of federal or provincial legislation in social policy. Some periods have favoured provinces (which enjoy most of the competences in the area), others the federal authority. In the last few years, however, the trend seems to have been to consider a significant number of legislative initiatives to fall within the "double-aspect" doctrine, which allows intervention by both orders.[32] The advantage is that once a programme has been designed by one order, another can also design a similar (even identical !) one, so long as it can link it with one of its – I repeat, exclusive - constitutional competences. [33] However, the risk of duplication or overlap is obvious, and, consequently, effective coordination and cooperation between the various actors is essential.[34]

It bears pointing that parallel competences also require a rule of conflict in case of a clear contradiction between otherwise valid federal and provincial norms. In other words, the potential impact of a supremacy clause on the principle of equality and non-subordination is relevant in the context of parallel competences, just as it is in the case of concurrent competences. In practice, however, Canadian courts seek to find conciliatory interpretations of the respective competences, so as to avoid having to declare a particular legislative scheme invalid. For instance, the fact that provinces adopt stricter protective rules, over and above those provided in federal legislation, are generally not considered to raise a conflict requiring the application of a supremacy rule (which would favour the federal order), since both sets of rules (the less and the more stringent) can be respected simultaneously.

Parallel competences allow for greater flexibility and, in some cases, positive forms of asymmetry. For instance, some provinces may wish to introduce a programme, while others are happy to leave the federal order handle the matter.[35] In a sense, the message given by the Supreme Court to federal and federated authorities is: "you can both intervene, so get your act together and cooperate". While at first sight, no one should be against cooperation, this reluctance of the highest Court to clarify constitutional competences can favour power games within a federal system, particularly when some federal partners have greater financial capacities than others (see section III, *infra*)….[36]

Whether such a system could work in the Belgian bipolar political and constitutional environment remains to be seen. In theory, as the three lead authors suggest, parallel competences could limit the risk of blockage within federal institutions, as actors would know that if a programme/reform cannot be undertaken at that level, Communities could take over…. In other terms, vetoes would have a cost. Could this have diminished resistance by some (French-speaking) ministers concerning reforms of Unemployment Insurance scheme at

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[30] POIRIER, Johanne, « Le partage des compétences et les relations intergouvernementales : la situation au Canada » *in* FOURNIER, Bernard, REUCHAMPS, Min (dir), *Le fédéralisme en Belgique et au Canada : Un dialogue comparatif*, de Boeck, Bruxelles, 2009, pp. 103-118. In Canada, « shared » competences is often used as a synonym for parallel (rather than as a category that includes both concurrent and parallel competences). The distinction proposed by Popelier, Cantillon and Mussche is much clearer.

[31] Exceptions are pensions and Unemployment Insurance which were explicitly transferred to the federal authority after having been recognised as lying within the provincial sphere of competences by Courts: POIRIER, Johanne, « The Canadian Social Union : Solution or Challenge for Canadian Federalism », *in* VANSTEENKISTE, Steven et TAEYMANS, Marc (dir.)., *Sociaal Beleid en Federalisme*, Vlaamse Juristenvereniging, Staatsrechtconferentie 1998, Larcier, Brussels, 1999, pp. 25-84.

[32] Parental leave, for instance, can both be covered by federal authorities (pursuant to its competences relative to Unemployment Insurance) and provincial ones (family policy). Coordination, to avoid duplication and balance funding, is essential: Reference re *Employment Insurance Act* (Can.), ss. 22 and 23, [2005] 2 S.C.R. 669, 2005 SCC 56.

[33] LECLAIR, Jean, « The Elusive Quest for the Quintessential 'National Interest' » (2005) 38 *The University of British Columbia Law Review* 355-374.

[34] See VANPRAET, supra, note 2.

[35] This is partly the case of early child care provisions. Pursuant to its competence over family policy. Québec chose to heavily subsidise day care centers (to increase accessibility). The federal government then developed a programme through which it provides funds to families who can chose modalities of care (including payment for stay at home parents). The system relies mostly on tax cuts to parents for the cost of care (based on Ottawa's fiscal competences. Québec sought in vain to obtain some financial compensation for the programme it had set up earlier, but Ottawa refused. In other words, there was a heavy premium on asymmetry in this case: Québec pays for its system frpm its general budget, while Québec *parents* can get a federal tax cut. The result has to be higher taxes in Québec… In the absence of a financial settlement with Ottawa, other provinces, who were tempted to follow Québec's policy initiative, have not done so, even when they agree with the early child education value of the project.

[36] POIRIER, Johanne, «Les ententes intergouvernementales : Une contractualisation paradoxale du droit constitutionnel canadien », *in* vol. 1, *Revue québécoise de droit constitutionnel,* 2009, 20 pp. : http://www.aqdc.org/public/main.php?s=1&l=fr

the federal level, and thus avoided the subsequent claims for a further regionalisation of employment policy (by Flemish political actors) ? Perhaps.

Similarly, could parallel competences have prevented Flemish autonomists from rejecting a proposal to introduce a Dependency Insurance programme within the overall federal social security system, since having a federal one would not necessarily exclude the introduction of a Flemish equivalent?[37] Maybe. But the risk of competition, and the need for very effective and constant dialogue and coordination cannot, once more, be under-estimated. Particularly if a constitutive unit which organises its own programme then calls for financial compensation by federal authorities, discussions are likely to be unending…[38]

III. Legitimising the "spending power" ?

In many federal regimes, there is no necessary connection between substantive (or material) competences (what a public authority can do) and competences over funding (what it can spend money on). For instance, in Canada (or the United States, or Australia, or Germany, or Spain), federal authorities can fund projects – or make direct payments to individuals or groups – even in areas over which they do not have constitutional competences. To give a concrete example, even though education is a provincial matter, Ottawa can fund scholarships or research projects, so long as it does not formally "regulate" the matter (adopt detailed legislation). It can simply determine under what conditions it is willing to provide funding.

Those who think that this is a way of doing indirectly what cannot be done directly would not be far from the truth. Be that as it may, this phenomenon is common in federal practice around the world. This has sometimes had positive impact in terms of public policy: the public health system initially introduced by one province was generalised across Canada through the use of the federal spending power.[39] Nevertheless, this capacity to circumvent the formal distribution of competences can certainly distort constitutional architecture and favour power games: s/he who holds the purse, can dictate (even indirectly) policy options…

In theory, in Belgium, funding and substantive competences are linked. The reasons are complex.[40] From a comparative perspective, I have always thought this rule to be logical, coherent and – oddly – rare. This limitation on the capacity of public authorities to fund initiatives in areas over which they have no legislative capacity has known some exceptions,[41] but overall, it still governs public spending. One of its principal advantages is that it keeps the lines of accountability more transparent: the order that regulates, funds, and can (in theory) be held accountable for its decisions and management. By contrast, splitting legislative competences and spending power renders public action far more opaque.

In a sense, shared competences (at least if they are widespread) would have the effect of removing the constitutional obstacle to the "spending power". If you can legislate, you can spend. If two orders can legislate in relation to a particular social policy, both can spend in that area. This can also lead to distortion.[42] In most other federations, the greater spending capacity of federal authorities, coupled with this "spending power" has lead to federal intrusion into spheres of competences of constitutive units. The situation is somewhat different

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[37] This, it seems to me, is a good example that it is not always the « French-speakers » who forestall reforms within federal institutions….

[38] It may be, however, that a richer Flemish Community would chose to finance such a programme without seeking compensation from a fiscally very tight federal order. I would surmise that this would lead some to denounce the resulting indirect financial transfers from North to South, as the federal programme, funded by the Belgian wide federal budget, would only benefit non-Flemish citizens… This, in itself, in likely to fuel blockage at the center…

[39] This is the archetypical example of the "innovation" or "laboratory" potential of a federal regime with regards to public policy.

[40] They are essentially linked with the territorial competence of the communities. Disconnecting funding from material competences would have allowed the French Community to fund cultural centres in Flanders: CA 54/96 (03.10.1996) ; CA30/2000 (21.03.2000) ; CA 56/2000 (17.05.2000).

[41] Hence, Regions can « pre-fund » some railway projects despite the fact that rail transportation is a federal matter. There has also been some very creative funding arrangements by the Walloon Region in areas which a priori are still within the competence of the French Community : DELGRANGE, Xavier, DETROUX, Luc, « Tout s'achète, même les compétences: le "pouvoir de dépenser" fleurit sur le terreau de l'autonomie fiscale », Journal du Juriste (Belgique), no. 4, 2002, 4 ; VANDER GEETEN, Valéry, « Le pouvoir de dépenser en Belgique et au Canada : gage d'efficacité ou entorse au fédéralisme ? », available on the collaborative website « Le droit public existe-t-il ? », under the theme : L'État doit-il être efficace ?: http://dev.ulb.ac.be/droitpublic/index.php?id=31&tx_ttnews[pointer]=1&cHash=bf631284b0ht (access Novembre 16, 2010), also found in *Revue belge de droit constitutionnel*, vol. 38, no. 4; POIRIER, Johanne, « Le droit public survivra-t-il à sa contractualisation ? Le cas des accords de coopération dans le système fédéral belge », *Numéro spécial de la Revue de droit de l'ULB*», vol. 33, 2006-1, pp. 261-314, at pp. 276-280.

[42] Although such a system would arguably remain more theoretically coherent than those in which spending is not aligned with substantive competences …

in Belgium, where, given Flanders' higher degree of spending capacity, parallel competences could lead to better social services in the North, even in areas in which federal authorities enjoy shared competences (but where it has lessen resources to spend, or cannot gather the necessary consensus to spend…). While uniformity is neither compatible with federalism, nor a guarantee of substantial equality, fiscal and financial differences in the bipolar Belgian system, are likely to be a source of renewed and continued tension…

IV. The ghost of the "joint-decision trap" ?

In Belgium, the distribution of competences concerning social protection has been incremental, haphazard and is not always either transparent or coherent. This is not unusual in a federal regime. In theory, abandoning the myth of exclusivity in the sphere of social protection would allow for a clarification of the actual situation (taking stock or a sort of "*état des lieux*"). It would also potentially facilitate a policy-oriented reflexion on the best method for ensuring generous, effective, equitable social protection to all citizens, while respecting cultural differences and policy preferences.

The question would not (simply?) be : "who should do what" ? But "how should they do it (together or not?). And it they chose to act "together" how should they do it? Through framework schemes? Parallel or concurrent competences? And in that latter case, which order should enjoy paramountcy in case of conflict? And – while we are at it – even if policy-makers agree that the matter should remain (or become) exclusive, should some coordination mechanisms be explicitly provided to ensure a certain degree of mobility and continued communication in terms of policy orientation and innovations? In this sense, cooperation and coordination could be an integral part of the reframing of social protection. In other words, redefining competences could be made conditional on some formalised cooperative mechanisms and processes. A range of institutional design and tools would then be available to social policy-makers. This has great potential for creativity and innovation.

But it can also lead to a quagmire of discussions and – potentially – to what German political scientists have called the "joint-decision-trap".[43] Interestingly, over the last decade, Switzerland - probably the multinational polity that is least prone to internal tensions - has attempted to disentangle competences and responsibilities. The objective of this complex project was notably to clarify lines of responsibility, which joint-decision making had often blurred. In the case of Belgium, introducing a system of shared competences – or of framework legislation – which would increase the need for constant negotiations and joint-decision making could be an interesting enterprise. It could indeed potentially lead to better communication and coherent policy-making. However, given the current stalemate of discussions concerning almost any aspect of public affairs, the risk of policy paralysis may be heightened, not reduced….

V. Cooperation, communication, coordination… : a cure-all ?

"Intergovernmental relations" (the term commonly used in English) or "cooperative federalism" (as more frequently used on the European continent) are an unavoidable component of any (working !) federal regime. Mechanisms to coordinate inter-related action are simply part of the "federal destiny". A large number of techniques are used – or should be used ! - to articulate the exercise of closely related exclusive competences. Mechanisms and processes are also required to clarify "who should do what" in the case of parallel ones, in order to limit duplication. In other words, no method of distribution of competences will obviate the need for cooperation, although the failure to cooperate may not have the same consequences in all cases.

True to its reputation, the Belgian federal system includes an impressive variety of complex and sometimes original cooperative methods. Some are clearly under-used, most are under-studied. One of the pragmatic advantages of moving from a model of exclusivity of competences to one of a range of modes of distribution is that it would require a fresh look at "who does what ? for whom ? and how?" Cooperative methods could be systematically included in any proposal for alternatives to the *status quo*. At the very minimum, a domestic

[43] Though this phenomenon may have been overstated : see LHOTTA, Roland, Von BLUMENTHAL, Julia, "Intergovernmental Relations in the Federal Republic of Germany", in POIRIER, Johanne, and SAUNDERS, Cheryl, eds., *Intergovernmental Relations in Federal Systems, A Global Dialogue on Federalism*, vol. 8, McGill/Queen's University Press, Montréal/Kingston, forthcoming 2011, at p. 32 of manuscript.

"Open Method of Coordination" should be introduced to ensure the sharing of information between public actors from different constitutive units and the federal order.[44] In a political environment in which informal and spontaneous cooperation is weak (as is arguably the case with federalism of dissociation), institutionalising them offers greater potential for improved coordination.

This being said, intergovernmental relations and other forms of cooperation also have their down-side. Again, they have a tendency to blur lines of political (and arguably even legal) responsibility. They also have a tendency to reinforce the role of the respective executive branches of government, thus restricting both parliamentary and judicial control of public action. This is not to deny the virtues of coordination, but a warning that in designing cooperative tools, care must be taken to promote as much transparency and accountability as possible.

VI. Social protection and identity politics

In a large number of policy areas, the actual distribution of competences is a rather technical affair which should not raise identity politics issues. A *priori*, what do competencies in aeronautics, financial institutions, vaccination or highways have to do with culture/language/history or, more globally, the sense of "nationhood" in a multinational country, such as Belgium or Canada?[45] Yet, in some cases, constitutive units which host a "nation" may draw a sense of security (or even pride) from knowing that even in technical matters, they can make their own – final - decisions. This is not unique to Flanders.[46]

Social protection is not, however, merely a technical affair. And here, the link with identity politics is, *a fortiori*, undeniable.[47] The search for "congruence" between cultural preferences and social protection mechanisms is commonplace in multinational countries.[48] Social protection is a very visible and effective tool of "nation-building". This was – and is – true in "mono-national" states. It is also true of multinational ones. In that case, however, social protection will likely be a battlefield aimed at consolidating/preserving/enhancing distinct, senses of belonging and "circles of solidarity".

In other words, in a country with evolving, multiple and often competing identities, it is not surprising that social protection plays a complex role in identity politics. The question is whether moving from "exclusive" to largely shared (or framework) modes of distribution of competences would have an impact on this competition for allegiances.

In my view, this is unlikely. Each negotiations concerning the proper order which should be primarily responsible for a particular policy area, and/or for the method of distribution of competences to be used (framework federal legislation, complementary rules, exclusive ones, etc.) would also reflect this desire to maintain a certain Belgian identity (for those who wish to keep matters federal) or to promote another form of identity (primarily Flemish, *in casu*).

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[44] See also : CANTILLON, Béa, De MAESSCHALCK, Veerle, « Sécurité sociale, transferts et fédéralisme en Belgique », R.B.S.S. 2007, no 2, pp. 365-396, à la p. 388. Participants in the Open Method of Coordination on social cohesion revealed that the process had allowed - within a EU context - to a sharing of information between the Belgian authorities, which had not taken place otherwise: VANHERCKE, Bart, HARMEL, Marie-Pierre, «Politique nationale et coopération européenne : la méthode ouverte de coordination est-elle devenue plus contraignante? », R.B.S.S. 2008, no 1, pp. 73-111.

[45] I personally have no doubt that the Flemish (as the Québécois, the Catalans or the Scots) form a nation within their overall country. The fact that the sense of nationhood is far more complex for the rest of their respective countries (is there an « English Canadian nation » by opposition to a « Canadian » one ? or are Walloons a nation ?) does not negate the simple « constat » that Belgium, Canada, Spain or Great-Britain are not uni-national polities.

[46] Again, in Canada, the use of the federal spending power has generated a reaction amongst many Québécois politicians and constitutionalists that the "original" 1867 contract is simply being ignored for apparently pragmatic policy reasons, with derogations being banalised by the Supreme Court. For a minority, the sense that the "original deal" should be respected is arguably far more significant than for the majority. In other words, even in rather technical affairs, with little connection with culture-in-a-strict-sense, parallel competences, particularly when coupled with a federal "spending power" may feel threatening: ADAM, Marc-Antoine, "The Spending Power, Co-operative Federalism and Section 94" Queen's Law Journal, vol. 34, Number 1, Fall 2008, 175 at pp. 180-181. Of course, given the majority status of the Flemish in Belgium, and the general weakness of the federal authorities (compared to Ottawa or Madrid), the risk that parallel competences would weaken the autonomy of Regions or Communities is not as great.

[47] I have argued elsewhere that social protection in multinational states play three functions : redistributive, bureaucratic legitimation and consolidation of complex multi-layered and often competing identities : POIRIER, Johanne, "Protection sociale et (dé)construction de la citoyenneté dans les fédérations multinationales", *in* JENSON, Jane, MARQUES-PERRERA, Bérangère, REMACLE, Éric eds., *L'état des citoyennetés en Europe et dans les Amériques*, Les Presses de l'Université de Montréal, Montréal, 2007, pp. 195-214.

[48] McEWEN, Nicola, MORENO, Luis, eds., *The Territorial Politics of Welfare*, Routledge, Oxford/New York, 2005, pp. 1-40

Arguably, in a multinational federation, there may be concentric circles of solidarity. This can be interpreted as a "*repli sur soi*", when a circle is being tightened (by moving a competence or a programme from the federal to the federated order). It can be also understood as a logical consequence of having multiple identities and multiple allegiances. It may be that moving from "exclusive" competences to more flexible multi-layered modalities, could render those circles of solidarity even more complex, fluid and overlapping.

That is not necessarily a bad thing. Sharing would not only occur either between all Belgians (in federal matters), or exclusively within each Community (in Community ones). Sharing could take different forms, and different degrees of intensity, depending on the policy area. An optimist may see this has having the potential of reducing the constant bipolarity and dualism which institutional reforms have reinforced. Policy specialists may see the end of the myth of "exclusive competences" as a way of (re)focussing the discussion on the promotion of social protection for those who need it. These potential blessings certainly justify that Popelier, Cantillon and Mussche's proposal be given serious consideration.

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Two dilemmas in institutional reform: the Pieters dilemma and the Cantillon dilemma

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It is a pity our friend Danny Pieters cannot attend the debate today. I know his view on social federalism, and I disagree; that would have made for a nice discussion, but there may be other occasions to come. I must say I also disagree with Popelier, Cantillon and Mussche (PCM). Yet, if Danny were here, I would disagree starkly with him, whilst with Bea and her co-authors I disagree gently.

Since a long time, I believe the Flemish movement is running up against a dilemma when it comes to de-federalizing social security. Let me call it the "Pieters dilemma", because Danny is a staunch defender of the idea that you can split our federal social security system in two parts, a "Dutch Community Social Security" and a "French Community Social Security". I believe that that perspective contradicts fundamental features of what constitutes social insurance, which you will find well explained in Danny's general writing on the subject, notably the fact that social security must be based on general, compulsory insurance. Admittedly, in intra-Flemish political discussions the idea that social security would be de-federalized, has been defended most of all with regard to health care insurance and child benefits. The argument, often repeated in Flemish circles, was that health care insurance and child benefits constitute "social policy" rather than "social insurance". Hence, it was deemed both appropriate and feasible to decentralize those policies towards the two main Communities, the Dutch- and the French-speaking, whilst there were more doubts about income-replacement branches of social security. Danny Pieters believes that one can also split the income-replacement branches of social security on a "Community basis". I think it is neither possible to do that for health care and child benefits, nor for pensions or unemployment, without contradicting the essential characteristic of social insurance (which also holds for health care and child benefits): allowing people to *shop* and choose their social security regime is incompatible with social insurance. If you de-federalize social insurance towards the two Communities, *shopping* is inevitably what you have to admit in Brussels, in one or other way. I summarize and simplify the argument now, but this is, in my mind, an insurmountable problem for any proposal to split our social security in two parts. Depending on the branch we are discussing and on the degree and modalities of "choice" for residents in the Brussels Region (i.e. choice between a "Dutch Community" and a "French Community" system), the result will be technical infeasibility, or instability, or huge inadequacies in coverage. The only solution for de-federalization of social security which is, theoretically, feasible is a regionalisation, whereby each of the three regions would organize a compulsory insurance system with no shopping. I know that the Flemish care insurance system is put forward as "proof" that a community-based approach *is* possible, with people in Brussels having a choice between participating in the Flemish scheme or not participating in it, but I think that case is unconvincing for reasons which I cannot pursue here. (To summarize my argument, on this, briefly: with the current architecture it will be impossible to develop the Flemish care insurance into much more than a marginal benefit, and even the current architecture entails important practical difficulties.) Danny Pieters does not want to de-federalize the country on a regional basis, so he is confronted with a real dilemma here: either one regionalizes social security (creating a Brussels social security system), or one leaves it at the federal level.

I now turn to the argument put forward by PCM. I have three difficulties with their approach. But let me first point out in what sense their approach is an interesting departure from the traditional discourse on institutional reform. The traditional discourse on institutional reform often refers to the necessity of having "homogeneous competences" at each level of authority. In practice, there is no homogeneity: in the domains of employment

policy, health policy, housing policy… we have both federal and regional competences. *Pure* homogeneity is, at least in some broad policy fields, very difficult to reach. The reason is partly related to the Pieters dilemma. Take employment policy. Labour market legislation is a crucial component of employment policy, yet it seems difficult to imagine that we de-federalize labour market legislation. If we are ready to decentralize labour market legislation on a regional basis (creating Flemish, Walloon, and Brussels labour market legislation), de-federalization is theoretically feasible, but that would obviously create an extremely complex situation. De-federalizing labour market legislation on a community-basis and allowing economic actors in Brussels to shop between a "Dutch" and a "French Community" variety of labour market regulation is, even on a theoretical level, a *contradictio in terminis*. Labour market regulation is "coercive" by its very nature. So, whilst it is useful and feasible to regionalize activation policies, we better leave labour market legislation where it is today. That destroys homogeneity. But even without reference to the Pieters dilemma, it seems very hard to achieve pure homogeneity within broad policy fields, for fundamental reasons as pointed out by PCM. First, the multi-layered character of governance to which the growing influence of both the EU and the local level contributes, contradicts the idea that "good governance" presupposes pure homogeneity. And, on an even more general level, it seems that the neat distinctions between what we traditionally consider to be "employment policy", "education policy", "social policy", are becoming harder to sustain, given the increasing emphasis on the links between employment, education and social protection, notably in the framework of "social investment". So, when we argue for homogeneity, and the question then is "homogeneity of *what*?", the answer is less evident than ever. Here I agree with PCM. You will hardly ever hear me reason about institutional reform with the quest for homogeneity as the main motive and perspective. (Sceptics of the homogeneity discourse, may also remark that the demand for "fiscal autonomy in income taxation" creates heterogeneity, instead of homogeneity.)

Yet, I disagree with PCM on three issues.
First, I believe there is confusion between "goals" and "policy domains" in the development of PCM's argument. Hence, their scepticism about "homogeneity" in what they call "policy fields" too easily turns into an argument against exclusivity in what I would call "policy domains". A "policy domain", as I define it, is a narrower concept than a "policy field" as they seem to define it: let us say that a "policy field" is defined by policy goals, and a "policy domain" is defined by a combination of goals and a set of instruments. To give but one example, the fact that both the federal government and Community governments would have "child welfare" as a fundamental *goal*, creating a "policy field" which is best defined as "child welfare", does not make it impossible to distinguish neatly "child benefits" and related cash advantages from "child care", and to confer the first exclusively to one authority and the other to another authority. "Child benefits" and "child care" are two distinct domains of policy (a domain being defined by a combination of goals and types of instruments), yet they serve the same fundamental goal, child welfare. In other words, the fact that we would allow for some "heterogeneity" of competences in the broad policy field "child welfare" (defined by that goal, child welfare) does not make it impossible to apply a principle of exclusivity. When it comes to practical policy domains, "exclusivity" does not presuppose "homogeneity" on the level of broader policy fields.

Second, I do not see what the practical implementation of their proposal would change in (or add to) our current institutional set-up, as defined by the current Constitution and Special Laws. In many domains, the kind of multi-layered policy development they call for is already possible. I do not see a domain in which the application of the PCM principle would really necessitate a new round of institutional reform. To put it bluntly, what PCM argue for is already largely present.

Third, and most fundamentally, I am strongly in favour of exclusivity where it is possible. PCM explain well how "competitive nation building" has led to inefficient policies in the domain of elderly care and long term care, and financial support for kids going to school. There are other examples too. The fundamental tensions in our country greatly add to the natural tendency of politicians to be expansive with the powers conferred to them. I would say to any institutional architect: please, make it *more difficult* for politicians, situated at different levels of power, to compete with each other in the same policy domain! Hence, try to avoid shared powers. Try to organize exclusivity, where it is possible.

Now, PCM give us one argument in favour of their variety of multi-layered governance, shared powers, and one important constraint. The argument has to do with policy innovation. However, that requires some guarantee that policy competition would always be truly innovative, in one way or other. Indeed, the shared powers they argue for are "controlled": "if one wishes to take up a power, one would have to demonstrate that is

complementary of necessary". Such a setup requires strong mechanisms for resolving conflicts, based on a *hierarchy of norms*. For historical reasons, neither the South nor the North in this country ever accepted the idea of a hierarchy of norms, which would give the federal level predominance over the regional and community levels. That is the fundamental Cantillon dilemma: to make shared powers a concept that is both productive and stabilizing, you need hierarchy of norms, which we do not have and will not have for the foreseeable future.

Let me add a nuance and clarification. I think the PCM variety of "shared powers" leads to instability and inefficiency in this country, as it is and will stay. But that is not to say that exclusivity is always possible, and certainly not that multilevel governance is always to be avoided. One type of multilevel governance, which may be further developed in Belgian institutional reform, is "framework powers", as mentioned by PCM. When it comes to employment policy, some of the proposals I have tabled in the past are examples of "framework powers" at the federal level, and "implementation" at the regional level. But such a model implies a neat distinction of competences, not policy competition.

Reply to Comments

Patricia Popelier, Bea Cantillon & Ninke Mussche

Reply to Comments

Patricia Popelier, Bea Cantillon & Ninke Mussche
(University of Antwerp)

Our reply to the comments on our paper focuses on what Frank Vandenbroucke (FVDB) called the "Cantillon dilemma": meaning that introducing shared powers in Belgium, as opposed to sticking to uniquely exclusive powers, would entail that Belgium introduces the principle of "hierarchy of norms" between the federal and federated entities – which nobody wants. FVDB claims that "neither the South nor the North in this country ever accepted the idea of a hierarchy of norms, which gives the federal level predominance over the regional and community levels. That is the fundamental Cantillon dilemma: to make shared powers a concept that is both productive and stabilizing, you need hierarchy of norms, which we do not have and will not have for the foreseeable future".

We disagree with the diagnosis. The Cantillon dilemma is not a dilemma as long as 'hierarchy' is put in a proper and nuanced perspective. To begin with, not all forms of power allocation require the introduction of hierarchy between levels of government: framework powers and parallel powers, for example, do not require this. Framework powers already exist in Belgium, for example in the field of economic policy. The federal government is competent to develop general rules regarding for example public works and consumer protection. The Regions can complement these rules with other norms and can take individual measures when applying the set of federal and regional rules. This means that each level of government is assigned a certain part of policy making, without any level being able to impose anything in the domain of the other. Nobody needs to justify its policy choices to the other level of government, yet both levels are competent in the same specific policy field – so there is no question of hierarchy. One could additionally level the field even more, by allowing the Regions to have a say in the drafting of the 'general framework' by the federal level. This exists already for the specific domain of aid to corporations regarding economic expansion: if the federal level wants to change the maximum level of aid, the Regions must agree (Popelier, 2011). Such an arrangement of framework powers has potential in the social policy and social security field also. One can think of child benefits as a framework power: the federal government sets the floor regarding the minimum level of benefits. But it leaves it to the federated entities to fill in for example whether the first child receives less of more than the second one, whether the money is paid to the mother, how to deal with re-composed families, whether extras are given at the start of the school year, etc. When the federal level decides to amend the basic benefit levels, the federated entities join the table and try to come to an agreement.

Another form of power allocation that does not involve any hierarchy concerns parallel powers, of which quite a few exist in Belgium already, albeit regarding instrumental competences (namely competences that allow you to fulfil your substantial competence properly): both levels of government are competent to act in the same policy domain. In Belgium this is the case for undertaking scientific research, or to develop penal law in the domains one is competent for. Parallel powers in social policy are perfectly thinkable. To come back to the child benefits for example, both the federal and the federated entities can be allowed to grant child benefits parallel to each other, without any interference among each other. The first critical question would then be – as FVDB suggested – that this would give too much leeway for politicians to be expansive and to spend too much. Not doubting the wisdom of this statement, we point to other federations where such expansion indeed occurred, but where this trend was curbed. In Canada for example, a period of competitive expansion of social policy existed from the 1960s onwards. Keith Banting asserts: "during the

early phases of this process, the two levels of government often became competitive, in a process similar to recent experience in Belgium. Each level sought to strengthen its leadership and protect its jurisdiction by enriching its social programs or moving aggressively into newly emerging programming areas.... In the final decades of the 20th century, the competitive dynamics eased. As the fiscal position of both federal and provincial governments weakened in the 1980s and 1990s, both levels sought to protect themselves from the budgetary exposure inherent in social programs (Banting:2011)." Next to the fact that governments tend to sooth down their expansive urge in times of budgetary austerity, it is clear that exclusive powers in the field of social policy is certainly not a guarantee for budgetary restraint. Quite on the contrary. As Johanne Poirier puts it so aptly: "abandoning the dogma of exclusivity should reduce the competitive trend to "occupy the field" first, even when the added value in terms of social protection may not be clearly demonstrated". She adds that letting go of the dogma of exclusivity could even reduce the costly "race to the top" between orders of government (Poirier, 2011).

This brings us to one model of power allocation which does touch upon the concept of hierarchy, but in a much less dramatic way than the word hierarchy implies. Concurrent powers allow for one level of government to act in a policy domain when the other level does not do so. This system exists in Belgium in the field of taxation. In such a system, when one level of government acts, the other cannot do so anymore. This form of 'hierarchy' however, should not be seen as a system where one level is completely subservient to the other level. Concurrent powers work in a much more subtle way, as a sort of network. They mostly concern priority rules, but that doesn't mean that one level would always have the priority. True, in Germany *Bundesrecht bricht Landesrecht* most of the time. But in Canada for example, the opposite occurs, where priority is given to the subnational rules. And even in Germany regarding certain matters, both the federal level as well as the *Länder* can deviate from the rules in force. Another hierarchy softening aspect of a system of concurrent powers is that the level of government which has to give priority, can be involved in the decision making process. Additionally, the subsidiarity principle can be applied: the federal level of government is competent as long as the federated entities is not able to properly handle a competence. Then the federal government, in case it wants to legislate in a particular field, has to prove on rational (evidence based) grounds that it is necessary to legislate in a policy domain federally in order to keep things uniform across the country. When we apply this to our child benefit example, this would mean that both the federal and federated entities can introduce a child benefit, but that one will stop doing so when the other introduces one. Here, priority can be given both to the federal as well as the federated entities. If priority is given to the federal level, the federated entities can be involved in setting the standards. And based on the subsidiarity principle, the federal level will have to prove that its actions are necessary for the balance in the federation. Of course this scenario starts from a situation in which one would 're-draft' the child benefits system entirely, which is not likely. As Belgian social security is already fully developed, not much room is left to give concurrent powers to the federated entities, except for smaller innovations such as the Flemish Care Insurance. In any case a concurrent system would require the development of an institutionalised form of participation in the decision making process by the federated entities, for example by turning the senate into a fully-fledged chamber of the federated entities.

To conclude, the "Cantillon Dilemma" should be rephrased as the "PCM Opportunity": hierarchy is not what it sounds like, and is only relevant if one would think about introducing concurrent powers in the social policy and social security field. Additionally, allowing framework powers and parallel powers to be used in this policy domain can grant the desired increased autonomy to the federated entities while at the same time ensuring that solidarity remains intact.

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