

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 powers³ 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and crossing of each others’ competences, means that homogenous competence packages and the exclusivity principle are outdated: to address the complexity of present day social policy, Belgium needs a system of shared (parallel or concurrent) or framework powers as well as a higher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.

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 JURGEN 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.): Carswell, 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 2009-2014¹³ 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

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 staats hervorming’, (1989) *TBP* 141; P. PEETERS, ‘Enkele algemene problemen van bevoegdheidsverdeling en bevoegdheidsuitlegging na de tweede Belgische staats hervorming’, in A. ALEN and L.-P. SUETENS (eds.), *Zeven knelpunten na zeven jaar staats hervorming*, 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 staats hervorming’, in A. ALEN & L.-P. SUETENS (eds.), *Zeven knelpunten na zeven jaar staats hervorming*, 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. VI. 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 conducted¹⁶ 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.

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

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.