

Bipolar Federalism and the Social Welfare State: A Case for Shared Competences

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Comparative studies on the organization of the welfare state in federal systems have referred to Belgium as a model for future federalism, because of its devolutionary nature. In reality, its dyadic or bipolar nature turns Belgian federalism into a unique and highly unstable experiment. However, as long as Brussels obstructs the exit option, the two linguistic groups are doomed to coexistence. Therefore, for Belgium more so than for any other devolutionary state, accommodating both centrifugal dynamics and the need for cohesion is vital. We argue that although dual federalism, including the equality of federal and sub-federal entities and the exclusive allocation of powers, typifies bipolar federal states, a system of shared powers is more suitable when it comes to matters related to social security.

Comparative studies on the organization of the welfare state in federal systems regard Belgium and Spain as “a model for the future,” since “federalisms of the twenty-first century are likely all to be fragmenting unitary states rather than federal start-ups” (Obinger, Castles, and Leibfried 2005). Belgian federalism, however, presents a particular feature in that it is essentially dyadic or bipolar. Duchacek (1988) defines as bicomunal or dyadic those polities where two, and only two, distinct communities dominate the political arena. The term “bipolar” describes the Belgian federal state, in which the relations between the two linguistic groups that dominate Belgian society are fundamentally antagonistic (Burgess 2006). In federal theories and comparative studies, bipolarity has proved to be a crucial factor of instability in federal states. Belgium, although a rare example of a longer lasting bipolar federal state, is no exception to this reality. The Belgian case lays bare the paradox of bipolar federalism: While dual federalism and centrifugal dynamics are essential for the survival of the state, at the same time, by institutionalizing instability, they become a threat to its existence.

In this article we argue that while dual federalism, including the equality of federal and sub-federal entities and the exclusive allocation of powers, is the logical outcome of centrifugal bipolar federalism, a system of shared powers may enhance

cohesion and cooperation, in particular when it comes to matters related to social security.¹ As we indicate below, social security is one of only two stabilizing factors in the centrifugal dynamics of the Belgian federation. Not surprisingly then, social insurance (referring to the compensation of social risks) and social protection (including social assistance) are a salient and highly sensitive—if not “explosive” (Jeffery 2011)—topic in the political interactions in Belgium. For decades interpersonal solidarity organized by the social security system has caused significant transfers of funds from the more affluent Flemish North to the less affluent Walloon South and Brussels region. This has given rise to serious frustration on the Flemish side and is one of the most important sticking points in the political negotiations in federal Belgium. Social security is also the most important spending component of the Belgian state: It accounts for about 70 percent of the federal authority’s expenses.

In this article we first explain why, although all factors for secession seem to be in place, the agreement between the political parties on the basis of which a coalition government was formed in 2011 (henceforth 2011 coalition agreement) takes as a starting point the consolidation of the federal state structure. We then turn to the issue of social security. We argue that in order to accommodate both devolutionary pressures and the need to preserve social redistributive mechanisms at the central level, the dogma of exclusivity should be abandoned in this domain. We illustrate this claim with the Flemish social care insurance case and conclude with some reflections on whether the 2011 coalition agreement has found a balance between devolution and centralization in matters related to social security.

A Federal or Confederal Future? Belgium at a Crossroads

Federal theories and comparative studies highlight several factors determining the stability or instability of federal states. Cultural homogeneity is generally a highly stabilizing factor, potentially even with a considerable centralizing effect, as is the case in Austria (Erk 2004). This is related to the existence of a national identity, which is an important factor enhancing cohesion in many federal states (Elazar 1987; Gardner and Ninet 2011; McGarry and O’Leary 2007). In contrast, ethnic conflicts may negatively affect multinational federalism (Elazar 1987). If this leads to the emergence of competing political elites without a common spirit of solidarity, mutual respect, trust, and common interest, the federal state is left with few prospects for success. Franck (2011) considers ethnic conflict the most important factor for failing federalism, while Duchacek (1988) notes that a “federal commitment to a composite nation” is essential, especially for bipolar states. Separatism, then, is a serious threat. McGarry and O’Leary (2007) note that multinational federations make it easier for sub-entities to separate, as they already have political and institutional structures in place. The creation of homogeneous

regions, moreover, provides the political and economic resources to develop even stronger distinct identities, which become a resource for regional political elites to mobilize support for competitive nation building (Choudry and Hume 2011).

Bipolarity is in itself an important destabilizing feature as it hinders variety in coalitions (Duchacek 1988; Elazar 1987; Pinder 2007; Watts 2007). Also, as one party is usually bigger or richer than the other, the smaller or poorer entity feels threatened, while in the other entity gradually dissatisfaction grows with the ongoing concessions or transfers (Watts 2007). Political or de facto asymmetry, that is asymmetry in the political influence of the substates, deriving from differences in size, fiscal capacity, and social risks (Swenden 2006; Watts 2008), is a common feature of federal states. However, comparative studies demonstrate that political or socioeconomic asymmetry has a strong destabilizing impact when differences are important and structural (Elazar 1987; Tarlton 1965; Watts 2008). As history made clear, this is particularly true when various social divisions mutually reinforce each other. In that case a polarization process emerges which increasingly complicates compromises thereby giving high emotional and symbolic value to specific issues in negotiations, the outcome of which is expressed in terms of winning or losing (Watts 2008). Also, as Watts (2008) notes, federal strategies with a focus on the quest for autonomy have a destabilizing effect if they are not accompanied by cohesion or loyalty enhancing instruments.

Destabilizing Factors in the Belgian Federal State

This analysis leaves little hope for the Belgian case. When Belgium separated from the United Kingdom of the Netherlands in 1831, it consisted of a francophone population concentrated in the South, and a Dutch-speaking majority in the North, where the high society elite was also French-speaking. As the Flemish mainly spoke dialects, in contrast to the internationally recognized French language used by the elite, and as Dutch was associated with the United Kingdom of the Netherlands, Belgium was organized as a unitary French-speaking state. Importantly, the language boundaries corresponded with social and economic boundaries—at first, the industrialized Wallonia was more prosperous than rural Flanders—as well as ideological cleavages, opposing a Catholic Flanders to an anticlerical majority in Wallonia.

Over time, a Flemish political movement developed as a reaction to increasing French influence in Flanders. The introduction of a general voting right rendered political meaning to the Flemish Movement, which adopted a more radical program. After World War II, Wallonia experienced an economic relapse, which reversed the balance of economic power. The Walloon distrusted the national economic policy and aspired economic autonomy as a means to revival. The Flemings, on the other hand, aspired recognition of their own language, culture,

and education. These diverse ambitions would ultimately give Belgium its unique shape: a federal state consisting of two types of overlapping substates. On the one hand, the Walloon, the Flemish, and the Brussels “regions” respond to Walloon aspirations to economic autonomy. On the other hand, the French, the Flemish, and the (small) German-speaking “communities” accommodate Flemish aspirations for autonomy in linguistic and cultural domains and education.

Meanwhile, the existence of Brussels adds complexity to the political dynamics. Once a predominantly Flemish-speaking city, it developed into a bilingual but predominantly francophone capital, situated within Flemish territory, and is part of both the Flemish and the French communities, blurring the territorial boundaries of the latter substates.

The construction of six substates aside, Belgium, in fact, consists of only two constituent entities. The opposition between Flemings and francophone citizens shapes the entire institutional design in Belgium. Illustrations are, among others, linguistic groups in the federal parliament, the linguistic parity in the council of ministers and in the composition of the Constitutional Court, and the veto rights for linguistic groups in certain matters. Strong factors of instability characterize the state structure: structural socioeconomic differences between the regions; ensuing transfers from the richer Flemish region toward Brussels and the poorer Walloon region; asymmetry in the political landscape (Swenden 2002); and a system of power allocation based upon exclusivity leaving little room for coordination instruments.

The lack of social, economic, and linguistic homogeneity was the impetus for the federalization process, consisting of five consecutive state reforms since the 1960s and a sixth state reform taking place at this moment. This centrifugal process was closely interrelated with other mutually reinforcing factors of disintegration. Against the background of language and ideological divisions, regional nation concepts developed (Van Goethem 2011) competing with a never fully developed process of Belgian nation building (Billiet, Maddens, and Frogner 2006). In fact, according to Keating, Belgian national identity is the weakest in the European Union (Keating 1999).

So, linguistic and societal cleavages brought about a devolutionary process and the institutionalization of bipolarity. This, in turn, strengthened bipolarity (Swenden and Jans 2006). The initially national political parties split up in regional parties, with increasingly regionalist programs (De Winter, Swyngedouw, and Dumont 2006). As the electoral districts coincide with the regional borders and parliament is divided into two linguistic groups, the representatives in the federal parliament are accountable only to the voters in their own linguistic community. Radio and television broadcasting are subnational competences and media corporations are also regionalized. This is a consequence of cultural and linguistic divergence, but, as media are monolingual and people rarely follow the media in the other language community, this in turn leads to further cultural

divergence and the development of diverging social sensitivities (Billiet, Maddens, and Frogner 2006). All this strengthens centrifugal dynamics, enhances decentralization, and hampers the establishment of a Belgian political space crucial for democratic legitimacy.

Belgium is now a “divided society,” where political claims are framed in terms of regional identity, and political conflict is often translated as a conflict among linguistic groups (cf. Choudry and Hume 2011). Bipolarity constitutes the main destabilizing feature of Belgian federalism, from which other institutional factors of instability derive. The differences between the French and Dutch linguistic communities have initiated devolutionary dynamics, they lie at the basis of a fundamental distrust between the most important actors in the federal state, and they explain why the institutional design and the allocation of competences are aimed at isolation instead of cohesion.

This situation leads to an important paradox. Federalism was introduced as a solution to a bipolar society, but at the same time it reinforces this bipolarity. In other words: The state structure that was established with the purpose of fostering cohesion and coexistence has incorporated structural instability. The recent political crisis in Belgium, culminating in a regime crisis, is the painful illustration of this ongoing process.

Separatism as an Exit Option?

The question, then, arises as to whether dissolution represents a serious exit option.

Indeed, various institutional features making secession a realistic option (Anderson 2004) are present in the Belgian federal state. This is certainly the case for Flanders, the strongest advocate for more autonomy. Flanders has the economic, governance, and institutional capacity to organize a viable welfare state. Also, the existence of the European economic and monetary union makes it less crucial for small entities to remain part of the internal market of the national state (Beyers and Bursens 2013; Piattoni 2010). For more than a decade, some have predicted that the component parts of Belgium are headed toward independence in Europe (Keating 1999). Moreover, independence is considered legitimate in Flemish political discourse: Separatism is a more or less explicit claim in the political programs of regional political parties which attract a considerable electorate. Although it is true that they do not necessarily reflect the opinion of their community (Swenden 2006), they do have the power to steer public opinion toward more confederal or even separatist thinking.

So, why does Belgium still exist? Two factors prove to be genuine stabilizing elements.

First, there is the need for redistributive mechanisms to sustain social protection and, more generally, the welfare model in Brussels and Wallonia. Mainly because of

structural higher levels of unemployment, Brussels and Wallonia are unable to finance their own social security requirements. Before social transfers, income in Flanders is about 19 percent higher than in Wallonia. Thanks to the redistributive effect of the social security system, the interregional income and welfare gap between the two regions is reduced to some 10 percent. This interregional redistribution is occasioned by the fact that Flanders is a net contributor (due to higher employment rates and higher wages), while Wallonia is a net recipient. Without these social transfers, poverty in Wallonia would increase from 13 to 18 percent, making it twice as high as in Flanders and comparable to levels observed in Greece, Poland, and Lithuania (Cantillon 2011). At the same time, however, redistributive mechanisms are also a source of big tensions.

The second stabilizing factor has to do with the strategic position of Brussels, not only as the capital of Belgium and Europe but also as an important generator of prosperity and employment (Swenden and Jans 2006). Neither the French-speaking nor (most) Flemish parties seem willing to give up Brussels. While Brussels is a multilingual city, the francophone population clearly dominates. However, Brussels is surrounded by Flemish territory. This brings the bilingual district of Brussels in a special position, resulting in a complex interconnection between the French and Flemish communities on the one hand and the Brussels region on the other. As the protection of language was the main determinant for the transfer of competences to the communities, the territorial domain of competences in the field of culture, education, and person-related matters of both the Flemish and the French community extends to the territory of bilingual Brussels. Yet, for competences in the field of territorial and economic matters, Brussels is an autonomous region. Although it constitutes a minority, the Flemish community is competent in Brussels territory regarding monolingual Dutch institutions, such as schools, public libraries, or university hospitals—similar to the French community, which is equally competent in Brussels territory, regarding monolingual French institutions. For person-related matters regarding bilingual institutions (such as museums and hospitals), a new institution, the Common Community Commission, was created, composed of a Dutch and a French linguistic group and with blocking rights for the Flemish minority. For the Flemings, this is an additional reason to reject the francophone option for a region-based federal structure (Flanders, Wallonia, and Brussels) instead of a community-based federalism (the Flemish community, the French community, and the German-speaking community): In the former, Flanders would be opposed by a francophone majority, since two of the three regions would be (mainly) French-speaking, whereas in the latter, Flanders maintains its links with the Dutch-speaking population in Brussels.

So Brussels is an important factor impeding an exit option, forcing the Flemings and francophones to coexist within the realm of one state organization. This

conclusion is strengthened by the observation that Brussels is a seriously hindering factor for scenarios aimed at splitting social security and the Belgian welfare state. We come back to this issue later.

Options for the Future

Although the 2011 coalition agreement gives more recognition to Brussels as a full-fledged substate, a complete abandonment of Brussels by the Flemings is not on the agenda. Therefore, Belgium is in need of a state structure accommodating a bipolar society. According to Duchacek (1988), a dyadic community can only survive either as a confederation or, more difficult, as a federal state with confederal features. This leaves two options for Belgium: either it transforms into a loose, confederal state structure or it creates more cohesion within the federal structure.

While several Flemish political parties advocate the former option, francophone political parties favor a more integrated federal state. As a result of these divergent views, the Flemish striving for further decentralization results in long and difficult negotiations. After federal elections in 2010, this led to a long-lasting political crisis, requiring a year and a half of negotiation in order to form a government coalition of Flemish and francophone parties agreeing on the implementation of a sixth phase in the Belgian devolutionary process. The agreement includes the transfer of more competences to the communities and regions, including matters in social policy and social security, a revision of the redistributive system in the finance law, and the transformation of the Senate into a chamber for the representation of the substates—however, with limited competences and only an indirect representation of the Brussels region. This will almost certainly not be the final state reform. In a so-called “postmodern federation” such as Belgium, characterized by decentralization, linguistic protection, and regionally based nationalist political parties, the process of accommodating demands for greater autonomy will continue indefinitely, despite concessions by central governments (Marchildon 2009). The question whether the Belgian state structure should evolve toward confederalism or should aim for more integration will therefore continue to dominate the political agenda.

Obviously, both options have important consequences, in particular for the organization of social security and social redistribution. A confederal construction would amount to an association of quasi-autonomous sub-entities, collaborating on equal footing in matters that are necessarily decided jointly such as the management of Brussels, the regulation of cross-border issues, the coordination of social security and eventually defense, and the economic and monetary union² (insofar as intra-confederal relations are not regarded as cross-border activities in the sense of the EU Treaty). For proponents of confederalism, the transfers from

the—richer—North to the—poorer—South associated with the federal social security system are regarded as an important reason to select this option (Sottiaux 2011).

The current policy, however, fits more closely with the second option, a federal structure with confederal features. On the one hand, core matters such as social security and labor law remain mainly federal. On the other hand, the federal decision-making process displays confederal features, as it is based upon consensus making and veto rights (Duchacek 1988; Rimanque 1993), thereby reducing federal powers in “a continuous search for compromise between the two larger communities” (Peeters 2007). Belgium is unique in this difficult combination of federal and confederal features. In order to succeed, it is obviously necessary to enforce cohesion as a counterweight against centrifugal dynamics.

The Case for Shared Powers in Social Security

Cooperation in federal states can be placed on a continuum ranging from “dual federalism” to “organic federalism” (Swenden 2006). In a dual federal state the different entities function isolated from each other, while in an organic federal state functions are interwoven, making entities interdependent. Hence, allocating powers on the basis of exclusivity characterizes dual federalism, while shared powers will dominate in organic federalism. Exclusivity also seems self-evident in multiethnic or multinational states, at least in cultural and linguistic matters. This flows from the need to leave space for the ethnic or national groups to develop their diversity within one state structure (Watts 2007).

For these reasons, exclusivity is the logical technique for the allocation of powers in Belgium: Matters are assigned either to the federal level or the subnational entities, to the exclusion of the other powers. Instead of investing in instruments aimed at cohesion, the Belgian federal design is based upon instruments and techniques with the deliberate purpose of avoiding collaboration (Swenden and Jans 2006). Also, exclusivity avoids the introduction of a priority rule, which is considered as the expression of a hierarchy, contrary to the principle of equality of federal and subnational entities underlying bipolar federalism (Vandenbroucke 2011).

Our claim, however, is that the principle of exclusivity cannot and should not be the rule in matters related to social security. In order to reinforce cohesion it is essential to decentralize competences while retaining central redistributive mechanisms. For that matter, in the realm of social security, shared powers are more suited to keep a necessary balance between devolution and autonomy on the one hand and cohesion and solidarity on the other. We support this thesis first by explaining why devolution in social security is necessary and subsequently by listing

the drawbacks of exclusive (federal and subnational) powers in this domain as well as the potential for shared powers.

Concurrent Powers and the Notion of Shared Rules

At the outset, we need to clarify that we define “shared powers” broadly, in contrast to “exclusive powers.” The notion encompasses a varied set of techniques, such as concurrent powers and framework powers as well as “executive” or “administrative” federalism, implying regional implementation of federal law.³ Also, it includes techniques such as the Canadian doctrine of spending power, allowing the federal authorities to sustain federal benefits paid directly to citizens or to support—possibly on specific terms—subnational social programs (Banting 2005; Poirier 1999).

Within this set, the system of concurrent powers faces many obstacles in Belgium because precedence of federal law should lead to centralization (Edwards 1996). This centralization trend, however, can be countered by the institutionalization of the subsidiarity principle, for example, by compelling the federal authority to intervene only if necessary for social cohesion or maintaining the economic and monetary union, and based upon impact assessments. In the Belgian system, political parties fear that a system of concurrent powers would have the reverse effect, with the Flemish majority hampering federal intervention in favor of subnational regulations (Vanpraet 2011).⁴ In any case, as the central authority already has to a large extent made use of its powers in the domain of social security, the transfer of concurrent competences to the subnational entities would merely allow them to develop innovative niches within the social protection system—unless primacy is conferred to subnational legislation, as is, for example, the case in the field of old age pensions in Canada (Poirier 1999).

As to the objection that concurrent powers imply hierarchy, contrary to the principle of equality of the federal and subnational entities, underlying Belgian bipolar federalism (Vandenbroucke 2011), it is important to note that concurrent powers imply ad hoc priority rules, which may be different for different sets of competences, rather than hierarchy of legal orders. The priority rule is softened by the principle of participation—subnational entities participate in the federal rule—and the subsidiarity principle.

Finally, the “double aspect doctrine,” developed in Canada but gradually gaining ground in Belgium as well (Vanpraet 2011), provides for a special case. According to this doctrine, exclusivity does not prevent the federal and subnational governments from enacting similar norms in a subject matter that can be considered from different angles, one angle bringing the matter within the competence of the first, another angle bringing the matter within the competence of the latter. We do not consider this as a case of shared powers, because powers

are still allocated on the basis of exclusivity, although the “double aspect” doctrine moderates its effects, similar to those of parallel powers. While this doctrine alleviates the risk of paralysis, its operation remains unstable, as the Constitutional Court will decide to what extent the government has remained within its sphere of competence. Above all, it enables governments to act in perfect isolation rather than inciting them to provide for coordination instruments, although, as Poirier (2011b) notes, the risk of duplication or overlap does necessitate coordination and cooperation.

The Need for a Partial Decentralization of Social Security

In the vast majority of federal countries, the most important mechanisms for protecting citizens against social risks, such as unemployment insurance, pensions, and health care, are primarily organized at the federal level (Broadway and Shah 2009). Nevertheless, sub-entities in many federal and regionalized states tend to strive for decentralization in these fields (Beyers and Bursens 2013), for reasons including the existence of regional differences in preferences and needs, the fact that solidarity is more easily achieved within homogeneous circles (see, more nuanced, Poirier 2007), the benefits of a smooth information flow, better opportunities for innovation, considerations of cost saving, and adequacy of policy making (Ambrosanio, Flavia, and Bordignon 2006; Broadway and Shah 2009; Wilson 2006). Moreover, devolving social competences may increase federal loyalty (Poirier 1999; cf. also Marchildon 2009).

From this follows that the Flemish striving for decentralization of matters related to social security is justified and, moreover, of vital importance to secure legitimacy. However, the option for a federalist instead of a confederalist system implies the organization of social security at the federal level. The reason is that social security enhances both social and economic cohesion, crucial for the stability of federal states. Social security constitutes a redistributive mechanism on an interpersonal level but indirectly also on an interregional level (Cantillon 2011; Cantillon et al. 2006). Moreover, social protection has proven an effective instrument of nation building (Banting 2005), which, in multinational states, may enforce national as well as regional identity (Poirier 2007, 2011a). Social security is obviously important for the maintenance of the economic and monetary union and hence for the creation of economic cohesion: As social security is paid by contributions on wages, separate Flemish, Walloon, and Brussels tariffs would be troublesome for enterprises with different business locations. Most importantly, while Flanders has the financial resources and fiscal capacity to pursue its own social security, the same is certainly not the case for the other substates (Cantillon 2011).

Moreover, social security matters are hard to split. First, because highly developed systems of social security are very complex while they touch the daily life

of large numbers of benefit recipients. Therefore, splitting social security systems inevitably becomes an expensive and politically risky operation that requires a vast investment, time, and money. The implementation of the option, inserted in the current coalition agreement, to transfer the system of child benefits, will illustrate this in the coming years. Belgium has three different systems of child benefits (for employees, for the self-employed, and for civil servants), each one financed in its own way, with its own very complicated entitlement rules and benefits that are intertwined with other benefits (such as unemployment benefits).

Second, Belgium faces the difficult problem of Brussels. Social security is not just another insurance. It is *social* insurance: It is affordable for weaker groups because the stronger groups contribute more than they actually should from a sheer insurance technical point of view. That is why social insurances do not tolerate freedom of choice: Insurers are not allowed to make a distinction between good and bad risks and the insured cannot choose for the system that suits them best. Therefore, if a competing Flemish and Walloon social security would exist in Brussels, a system must be found to assign all Brussels residents objectively to one or the other system. This requires a form of subnationality: Flemings, Walloons, and newcomers would have to commit themselves and their children more or less permanently to one or the other community and its accompanying system. As the political choice is to avoid this,⁵ there is no other option than to accept the development of a separate social security system for Brussels. In that case, the architecture of Belgian social federalism becomes “region” based, contrary to the Flemish aspirations for a “community”-based autonomy. Moreover, a transfer of competences to the regions is problematic due to the scale and the exceptionally large asymmetry in risks and contribution capacity in Brussels: The strong concentration of a socioeconomically weak population and hence of social risks in Belgium’s capital goes hand in hand with great prosperity and hence contribution capacity that is, however, generated by commuters.

Finally, the limiting European rules on free movement of workers in the case of cross-border situations involving other Member States have to be taken into account (Verschuere 2012). When designing subnational social security systems, entitlements are tied to residence, because the competence of substates in federal systems is usually limited to residents within their territory (Verschuere 2011). This residence principle will bring complexity, as it will inevitably clash with the workplace principle that currently governs the entire body of entitlement rules in social security and is also used by European regulation on the subject.

Therefore, neither splitting nor the status quo of a centralized social security system—that is, exclusive powers either for the regions or for the federal authorities—are options for the future. As there are good reasons both for the continued organization of the principal redistributive instruments of social security at the highest level of government as well as for greater competences for

subnational entities, the construction of a layered system of social protection, with shared competences where appropriate, is inevitable.

The Case for Shared Powers in Social Security

Exclusivity of federal powers in social security is specifically problematic in Belgium because the confederal features of federal decision making result in many veto opportunities which easily lead to deadlock (Obinger, Castles, and Leibfried 2005). Moreover, sub-entities are not allowed to regulate in the domain of exclusive federal powers, thus hindering the introduction of innovations and the adaptation of redistributive systems to specific regional needs and preferences.

Conversely, the transfer of social competences to subnational entities under the exclusivity rule also meets with several drawbacks. First, exclusivity may hinder the necessary decentralization. It is much more difficult to negotiate the transfer of competences on the basis of exclusivity, because the federal state would lose important instruments for regional redistribution. This reluctance to hand over power may, second, lead to fragmentation. In Belgium, the transfer of social policy competences to substates in the realm of health-care prevention, labor market policies, or elderly care was accompanied by explicit exemptions in favor of the federal order, in order to keep social security at the federal level. As a result, the substates only play a minor role in domains such as health care, which explains the Flemish call for the allocation of “homogenous competences” regarding health policy and social security (Vansteenkiste 1999). By contrast, it is conceivable that the federal authorities would have been less reluctant to transfer domains of competences in a less fragmented way, had they remained competent to intervene where necessary.

Moreover, fragmentation requires cooperation. To that end, federal and subnational authorities can and are obliged to conclude cooperation agreements or to consult one another. However, as the allocation of powers is based upon exclusivity precisely because of the wish to conduct separate policies and to avoid having to negotiate, an institutional framework and the will to cooperate are often lacking. It is, for example, striking that the current reform of the Senate further reduces the Senate’s competences, excluding, as before, participation even in fragmented domains such as social security (*Parl. Doc. Senate 2011–12, 5-1734, 5-1735, 5-1736*). Arguably, if the notion of shared powers were more embedded in the Belgian system of power allocation, the Senate could have been given more powers instead of less. Also—considering the argument that shared power may heighten the risk of policy paralysis (Poirier 2011b)—blocking mechanisms in the House of Representatives could simultaneously have been reduced in these matters.

All this, in turn, may lead to inefficient policy designs and overlap. In Belgium different tools are introduced at different policy levels serving similar purposes: job placement at the regional level overlaps with unemployment insurance at the federal level; childcare services at the community level overlap with tax and child benefits as well as residual childcare services at the federal level; prevention (e.g., vaccinations) at the community level overlaps with insurance in healthcare at the federal level; and school bonuses from the communities overlap with child benefits from the federal government.

Finally, for the reasons explained above, Brussels hinders the transfer of important parts of social security.

In contrast to these drawbacks of the use of exclusive powers in matters of social security, shared powers offer appealing advantages. While the dominance of exclusive powers tends to compromise the capacity to cope with more comprehensive governing problems, shared powers promise to enhance this capacity (Peters 2006). Federal systems characterized by the use of shared powers are organic in nature, defined as “a situation of maximum joint federal-regional cooperation or interdependence” (Swenden 2006). Shared powers may promote a more dynamic balance between subnational autonomy and federal cohesion (Popelier 2011). For example, if concurrent powers were coupled with a commitment to the subsidiarity principle, the use of federal powers would require justification. Also, shared powers are usually coupled with participatory instruments. For example, in the case of executive federalism, predominance of the subnational entities in the implementation process forces the federal authority to take subnational interests into consideration.

This is interesting when dealing with matters of social security. First of all, a system of shared powers is more inclined to establish cooperation and coordination instruments, important to social security matters considering the fact that they are, unavoidably, interwoven with other policy domains. In Belgium, the planned transfer of powers in the field of labor market policy and health care is an example of “converse” executive federalism or shared implementation federalism, as the subnational entities will remain dependent on the existing federal administrations⁶ for the implementation of their policies. This administrative intertwining can, if successful, lead to a strengthened common interest and legitimacy with all entities that will be responsible for guaranteeing fundamental social rights to citizens. Second, if competences in this field are shared, substates may be less inclined to “occupy the field” in matters of social security, even where this has no added value for social protection. Instead, by enhancing alliance to different, more fluid and overlapping circles of solidarity (cf. Poirier 2007), shared powers may reduce “*the constant bipolarity and dualism which institutional reforms have reinforced,*” allowing to refocus “*the discussion on the promotion of social protection for those who need it*” (Poirier 2011b).

The Flemish Care Insurance Case

The case of the Flemish care insurance illustrates how exclusivity can create problems of deadlock, incoherency, and fragmentation. Even when circumvention of these obstacles is sought through a creative interpretation of competences, backed by the Constitutional Court, the result is dissatisfactory, due to a cloudy demarcation of competences, competitive behavior, and the lack of accompanying cooperative instruments. The case study also shows that the Flemish option for decentralized social security on a community basis is problematic, considering the special position of Brussels as well as in the light of European rules on free movement of workers.

In the era preceding the sixth state reform, the communities in Belgium acquired powers regarding several social policy domains such as education, health prevention, and labor market policies, whereas traditional social security matters operating as levers of redistribution, such as health insurance, family allowances, unemployment, and pensions, remained at the federal level.⁷

Therefore, the idea of an insurance against care dependency was first tabled within the federal government, but was never substantiated.⁸ When in 1995 the federal government decided to expand the Allowance for Assistance to Elderly Persons (AAEP) scheme with a system of service vouchers, the Flemish government invoked a conflict of interest—which leads to the suspension of the legislative process and opens intra-federal negotiations—claiming that service vouchers fall within the ambit of community competences. From then on, Flanders took the lead in the design of a Flemish care insurance, thereby taking the opportunity to expand its social competences, which eventually resulted in the Act of March 30, 1999, concerning the organization of the care insurance. This act provides for monthly allowances to anyone who is care-dependent. It is funded by means of small individual contributions supplemented with substantial government subsidies. This case is interesting, as it illustrates several of the points raised above.

In the first place, it illustrates the bipolar nature of the Belgian federal state, opposing francophone versus Flemish interests, rather than federal versus subnational interests. The Flemish community, when enacting the Flemish Care Insurance Act, defended a broad interpretation of subnational competences, while the francophone parties contested this extensive interpretation. It is striking that both the French community and the Walloon region, instead of the federal government, acted in defense of the federal interests by challenging the Flemish Act before the Constitutional Court (Constitutional Court nos. 33/2001 and 51/2006).

Second, the principle of exclusivity proved unsustainable because of the intertwining of matters assigned to either the federal or the subnational level. As a result, the Constitutional Court, implicitly applying the double aspect doctrine, saw indications for federal as well as community competences. The court therefore

recognized both the Flemish competence to introduce the Care Insurance Act and the federal competence to intervene, the precise relation between the Flemish law and possible federal measures, however, remaining unclear (Constitutional Court no. 51/2006).

Third, the use of exclusive powers by both federal and community levels resulted in a policy architecture with little coherence. Contrary to a vast literature concluding that federalism hinders the development of welfare programs (Obinger, Castles, and Leibfried 2005), the introduction of the Flemish scheme parallel to the existing federal system initiated a cost-increasing dynamic. In an attempt to maintain its hegemony over the competences related to care, the federal government substantially increased the generosity of the federal AAEP scheme three years after the introduction of the Flemish Care Insurance. A similar phenomenon was observed after the introduction of a Flemish “school bonus” when, as a response, the federal government adopted a supplementary school-related child benefit. This illustrates that the application of the “double aspect” doctrine, while circumventing paralysis at the federal level, has certain disadvantages because it is not accompanied with instruments for cooperation and coordination.

The care insurance case also illustrates the special position of Brussels. While compulsory in Flanders, the care insurance allows for voluntary adherence of Brussels residents, due to the lack of subnationality. Obviously, as social insurances do not tolerate freedom of choice, this is feasible only when confined to marginal systems.

Finally, the case displays the important role of Europe. According to Belgian constitutional law, residence is a criterion which determines community competence. Hence, the care insurance is compulsory for all persons residing in Flanders, irrespective of their place of employment. According to EU law, however, the place of employment determines whether persons who have previously exercised their right to free movement are entitled to national or subnational social security advantages. In the case of the Flemish care insurance, this resulted in a right for persons in a cross-border situation to join the Flemish care insurance system, if they work in Flanders or Brussels but live elsewhere—for instance, residents of neighboring France or the Netherlands (ECJ C-212-06, 2008)—whereas other persons can only join if they live in Flanders or Brussels, which excludes residents of Wallonia, even if they work in Flanders. This leads to so-called “reverse discrimination,” as persons within the ambit of EU law enjoy more social security rights than persons in purely internal situations (Verschuere 2011, 2012).

Although the exclusivity principle restricts Flemish competence to persons residing in Flemish territory (Velaers 2011), the Constitutional Court allows for the Flemish community to regulate these cross-border situations on the basis of the workplace criterion (Constitutional Court no. 11/2009). The court held that this expansion of competence was acceptable because it was necessary pursuant to EU

law and concerned only a relatively small group of persons. It also held—rather obscurely—that it was up to the French community or the federal authority to solve reverse discrimination. If the Constitutional Court means that reverse discrimination *should* be resolved, this implies that Flemish regulations may necessitate the French community or federal legislator to introduce a similar system of protection.

The assertion that shared powers would have provided a better solution, obviously, remains largely speculative. We can, however, point out the potential of shared powers in this case. First, a system of concurrent powers would have given the Flemish community the uncontested power to act. This may have prevented this case from becoming a symbol for the Flemish struggle for power. Also, it would have avoided a period of uncertainty ending with the Constitutional Court decision. If sustained by a procedural necessity requirement, and dependent on the priority rule, a subsidiarity principle could have forced the federal or regional authors to substantiate the need to act instead of indulging in cost-increasing dynamics. Finally, the Flemish Care Insurance system could have functioned as an experiment, so that the federal government could have adopted the system and expanded it to the other regions if it proved successful, thereby dealing with problems of reverse discrimination, the situation in Brussels, and the incapacity or unwillingness for the French community to provide for a similar system of protection.

Conclusion and Prospects

The Belgian case still leaves undecided the debate in federal theory of whether federalism can be a tool for managing ethno-national conflict (Choudry and Hume 2011). Bipolarity is a complicating and destabilizing factor in this respect. The implosion of the Czechoslovakia into two independent nation states is exemplary for Belgian, sharing features of bipolar and political asymmetric federalism. Pakistan before the segregation of Bangladesh, and Serbia and Montenegro are other dyadic federations that did not succeed. Besides Belgium, only few federations consist of two entities, such as St. Kitts and Nevis, and Bosnia and Herzegovina. The Cyprus case demonstrates the extreme difficulty of bringing together two distinct cultural communities as a dyadic federation (Burgess 2006).

The unique experience of Belgian federalism, therefore, is of specific interest to federal theory, but may attenuate its suitability to serve as a “model” (Obinger, Castles, and Leibfried 2005) for future federal states. Above all, the Belgian case shows the risks of devolutionary dynamics which are also visible in states such as Spain, Italy, and the United Kingdom. The importance for devolutionary states to invest in instruments aimed at cohesion and loyalty has already been pointed out (Watts 2008). The key for making devolutionary federalism a success lies, indeed, in the crucial importance and at the same time the extreme difficulty of retaining

cohesion. The grounding of cohesion beyond the confines of the traditional nation-state has been called “*a major contemporary challenge*” (Fossum and Poirier 2009), and proves even more challenging in bipolar federalism. The allocation of powers in the field of social security and social policy proves in this regard to be a challenging but understudied question.

In federal states, coherence is usually organized through an economic and monetary union fostering economic cohesion, redistributive and solidarity mechanisms, as well as cooperation and coordination instruments. The particular nature of devolutionary bipolar states such as Belgium, however, either decreases the capacity of these instruments to maintain cohesion or calls their legitimacy into question. In Belgium, due to its bipolar structure, the absence of national political parties, and the fundamental distrust between the linguistic groups which govern the institutions, several participatory tools threaten to become blocking instruments in the struggle for power between the two linguistic communities, rather than instruments for negotiation. For this reason, state reforms aim at the transfer of competences on the basis of exclusivity, so as to avoid the need for further cooperation (Pas 2004). The Belgian case displays how the organization of dual federalism was initially vital for its sustainability but at the same time created a destructive centrifugal dynamic. Nevertheless, as long as Brussels hinders an exit option, both francophone citizens and Flemings are doomed to coexistence.

After difficult negotiations, which hindered the formation of a new federal government for a year and a half and destabilized the preceding governments since 2007, the coalition agreement concluded in December 2011 confirmed the choice for Belgium to remain within a federal structure with confederal features. This, however, presupposes the curbing of destabilizing devolutionary dynamics. To that end, the institutional design of the Belgian federal state should concentrate on four prerequisites. First, tensions between linguistic communities should be solved or neutralized as much as possible. Second, the sub-entities should have sufficient autonomy to develop diversity and meet specific circumstances or preferences. Third, more cohesion, participation, and policy coordination should be created, implying—among others—a more frequent, varied, and tailored use of shared powers, while, finally, avoiding a joint decision trap leading to paralysis of the decision-making process. Externalizing costs for social programs to actors not involved in the negotiation process and turning to courts and supranational actors to provide stimulus for policy reform should be avoided (Obinger, Castles, and Leibfried 2005).

The plan for the sixth state reform laid down in the 2011 coalition agreement provides promising prospects as well as pitfalls. The question arises whether the reform will meet the challenge to provide, simultaneously, decentralization and cohesion through cooperation enhancing shared powers. Three points are noteworthy.

First, it is striking that the 2011 coalition agreement emphasizes the need to create a cooperative federal state, with an urgent need for coordination between federal and subnational policies (2011 coalition agreement, 17).

Second, as for social security, the coalition agreement states as a principle that social security in the strict sense remains a federal competence (35). Nevertheless, several social competences are transferred to the communities, including matters such as child benefits and adoption premiums which, according to the Council of State and the Constitutional Court, fall within the ambit of the Belgian concept of “social security” in a strict sense (Velaers 2011). In Brussels, the Common Community Commission will be competent for these matters, allowing for distinct policies in the capital from the ones adopted in the other regions. As a compensation, the plan is to include in the Constitution the right to child benefits. As before, these matters are transferred on the basis of exclusivity. Some transfers solve the inadequacies described in the previous sections. For example, the AAEP, which overlapped with the Flemish social care insurance, is transferred to the communities. However, in Brussels the Common Community Commission is competent for the former, whereas the Flemish social care insurance also applies to Brussels, which, arguably, is an impediment to the coherence sought.

Third, especially in domains regarding labor law, some forms of executive federalism and framework powers are used in order to allow for targeted regional policy. Also, the need for cooperation is confirmed in several domains, including the domain of social policy. Interesting in this respect is the plan to establish an inter-federal institute for health care (38). Also, the coalition agreement frequently provides for the conclusion of cooperation agreements (41–42).

It follows that the current government coalition recognizes the importance of cooperative federalism as well as the need for decentralization of aspects of social policy together with the need for coordination between federal and subnational policy. Despite some toning down, exclusivity remains a dogma in the distribution of powers in this domain. It is to be seen whether the cooperation instruments provided in the coalition agreement will prove sufficient to overcome the centrifugal dynamics enhanced by the exclusive nature of social competences.

Notes

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1. Social security is defined 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 labor factor.

2. The term “economic and monetary union” is still a concept used in Belgian power allocation rules (e.g., Feyen 2012), although monetary policy has become a supranational matter. Some aspects are still partly governed by law, for example, the organization of the Central Bank.
3. Hence, we do not follow Watts’s (2008, 88) definition of shared powers as occurring “where both orders of government have related powers,” but “distinct from concurrency over a specific common head of power.”
4. However, the most important example of concurrent powers in Belgium, regarding taxes, gives no evidence to that effect.
5. The refusal is, among others, based upon the fact that it is not always easy to put Brusselers in one or the other category and that, in any case, it would be difficult in the case of mixed marriages. Perhaps another reason is the fear that this would make transparent the overrepresentation of Flemings in the Brussels political institutions.
6. The National Social Security Office as well as the National Employment Office (for labor market policy) and the National Health Insurance Office (for health care) remain the sole administrative and technical operators. At least in the transition phase, which will take long in view of the complexity of the operation, the communities will also remain dependent on the administrations that pay the child benefits.
7. The material distribution of competences in social matters is more amply explained in Velaers (2011).
8. In 1985, the (Flemish) Minister of Social Affairs, Jean-Luc Dehaene, introduced the idea of an allowance toward the cost of home care. In 1990, his (francophone) successor, Philippe Busquin, proposed a dependency insurance and his (francophone) successor, Philippe Moureaux, included this idea in a policy document of the federal cabinet.

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