

SOCIAL FEDERALISM:
THE CREATION OF A LAYERED
WELFARE STATE

The Belgian case

Edited by

Bea CANTILLON
Patricia POPELIER
Ninke MUSSCHE



intersentia

Cambridge – Antwerp – Portland

Distribution for the UK:
Hart Publishing Ltd.
16C Worcester Place
Oxford OX1 2JW
UK
Tel.: +44 1865 51 75 30
Email: mail@hartpub.co.uk

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Tel.: +1 503 287 3093
Email: info@isbs.com

Distribution for Austria:
Neuer Wissenschaftlicher Verlag
Argentinerstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:
Intersentia Publishers
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

Social Federalism: The creation of a layered welfare state. The Belgian case
Bea Cantillon, Patricia Popelier and Ninke Mussche (eds.)

© 2011 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com

ISBN 978-94-000-0166-4
D/2011/7849/6
NUR 825

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.

CONTENTS

Allocation of competences and solidarity circles in a layered welfare state. The case of social policy in Belgium Bea CANTILLON, Patricia POPELIER and Ninke MUSSCHE	1
1. Belgium for beginners.	2
1.1. Belgium's institutional design	2
1.2. Social federalism in Belgium	5
2. The book's main arguments.	7
2.1. The Layered Welfare State	7
2.2. Conflicts of competences in a layered welfare state	8
2.3. Towards alternative forms of power allocation	11
3. The structure of the book.	13
3.1. The idea of division in historical perspective: how did questioning national solidarity come to be in Belgium?	14
3.2. The emergence of multilayered welfare states in Belgium and in Europe	15
3.3. Concerning the necessity and desirability of multilayered social security in Belgium	16
3.4. From exclusive to concurrent and/or parallel powers: which division of power for the layered welfare state?	16
3.5. Social citizenship and solidarity circles: who enjoys which rights? . . .	17
4. Some concluding remarks	19
 Belgium – challenging the concept of a national social security. A short history of national partition Herman VAN GOETHEM.	 21
1. The linguistic situation in Belgium – now and in the nineteenth century. .	22
2. The period of the census voting system, 1831–1893	24
3. The critical juncture of 1893	26
4. Flanders and administrative monolingualism	29
5. The 1930s: the first steps towards Belgian federalism	31
6. 1940–1960: Flanders and Wallonia drift further apart	32
7. The emotional breaking-point of Belgium: language facilities	34

8. The economic breaking-point of Belgium: responsibilities, power and money	38
9. The end of Belgium?	40

Towards a multilevel welfare state? On the relative autonomy of regional social policy

Jan BEYERS and Peter BURSENS	45
1. Introduction	45
2. Why do sub-national entities seek more autonomy in social policy?	49
2.1. Institutional preferences	49
2.2. Policy preferences	51
2.3. Nuances in the exclusivity principle	51
2.4. Creating identity	55
2.5. Nuances in the exclusivity principle	56
3. Hollowing out the central welfare state or evolving towards a multilevel one?	57
3.1. Hollowing out the central welfare state upwards?	57
3.2. Is the central welfare state being hollowed out downwards?	61
4. Conclusions	64

On the possibilities and limitations of a layered social security system in Belgium.

Considerations from a social efficacy perspective

Bea CANTILLON	67
1. The Flemish Care Insurance and the emergence of a layered social security system	69
1.1. Centralisation and decentralisation in Belgium's social security system	69
1.2. From federal proposal to Flemish decree on the introduction of a care insurance	72
1.3. The Flemish care insurance scheme and Belgium's social security system: between complementariness and a race-to-the-top	74
2. The benefits and drawbacks of decentralisation: what does theory say?	76
2.1 The classical theory of fiscal federalism	77
2.2. The benefits of decentralisation	80
3. Interpersonal solidarity and territorial redistribution in Belgium: what do the figures tell us?	84
3.1. The social security transfers from Flanders to Wallonia	85

3.2. Intraregional differences	86
3.3. Are there alternatives to national interpersonal solidarity?	89
4. Social federalism: an answer to the great challenges facing social security?	91
5. Conclusion	94
6. Appendix.	95

Social federalism and the allocations of powers in a comparative law perspective – the case for shared powers

Patricia POPELIER	97
1. Starting-point: the judgements on care insurance call the exclusivity principle into question	98
2. The allocation of powers embedded in a theory of state structures	100
2.1. Forms of State	100
2.2. Techniques for the allocation of powers	101
2.3. Techniques for the allocation of powers, autonomy and cohesion	102
3. Division of authority in Belgium: exclusive powers, deviations and nuancing.	104
3.1. The principle: the exclusivity of powers	104
3.2. Nuances in the exclusivity principle	104
3.2.1. The splitting up of subject matters, and cooperation obligations	104
3.2.2. Implied powers.	107
3.3. Deviations from the exclusivity principle.	108
3.3.1. Parallel powers	108
3.3.2. Framework powers	109
3.3.3. Concurrent powers.	110
4. Exclusive powers: an exclusively Belgian principle? An overview of comparative law.	111
4.1. Basic points for the system of allocation of powers.	112
4.1.1. Observation 1. Variation in the power-division system is the rule	112
4.1.2. Observation 2. Exclusivity as a principle is not per se a guarantee of more autonomy.	113
4.1.3. Observation 3. A concurrent power system also leads to centralisation	114
4.1.4. Observation 4. The technique of concurrent powers is not isolated: the quest for a balance between autonomy and coherence	115
4.1.4.1. Guarantees regarding the question of whether the federal State may act	115

4.1.4.2. Participation of sub-national entities in the case of the federal exercise of authority	116
4.1.4.3. Federal State policy space in the case of the exercise of federal authority	118
4.2. Allocation of powers regarding social policy: Austria, Switzerland and Germany.	120
5. The care to achieve a balanced distribution of powers: lessons for Belgium.	123
5.1. Is it desirable to supplement the system of exclusive powers with a system of concurrent powers?	123
5.2. Compensatory guarantees in the Belgian constitutional system	125
5.2.1. Guarantees regarding the question of whether the federal State may act or not.	125
5.2.2. Participation of federated entities in the case of the federal exercise of authority	128
5.2.3. Federal entity policymaking space in the case of the exercise of federal authority	130
6. Conclusion	132

Social federalism and the distribution of competences in Belgium

Jan VELAERS.	137
----------------------	-----

1. The foundations of Belgium’s social federalism	138
2. The material distribution of competences in social matters.	140
2.1. The lacunal constitutional distribution of competences	140
2.2. The federal competence regarding social security	141
2.3. Community competences in social assistance.	144
2.4. The relationship between the federal competence in matters of social security and the community competence in matters of social assistance	146
3. The territorial distribution of competences in social assistance	148
3.1. The principle of territorial exclusivity.	148
3.2. The place-of-residence criterion and person-related matters	149
3.3. The place-of-employment principle and European coordination	151
3.4. European free movement law and the territorial distribution of competences	152

Towards a two-speed social security system in federal Belgium?

Jürgen VANPRAET	159
---------------------------	-----

1. Community authority regarding “health care” and “assistance to persons”	160
--	-----

2. The traditional starting-point: social security is an exclusively federal power	160
3. A Flemish social security system based on the double aspect doctrine? ..	161
3.1. The double aspect doctrine in social policy and social security	161
3.2. Are the “modalities” of a social programme decisive in determining which level of government has the (exclusive) power?	164
3.3. The interference of federal and regional social security norms	166
4. Conclusion: towards a two-speed social security system in Belgium?	168

Social citizenship vs. the territoriality principle: lessons for Flanders’ solidarity circle

Ninke MUSSCHE	171
1. Introduction	172
2. Social citizenship in federations requalified	173
2.1. Social citizenship as dominant paradigm	173
2.2. Social citizenship and federal states	176
2.3. Territoriality behind social citizenship	177
3. The development of the territoriality principle in Belgium	179
3.1. Labour accidents – 1903	179
3.1.1. The Act’s proposal	180
3.1.2. The Parliamentary Debate	181
3.1.2.1. International positioning	181
3.1.2.2. Equal treatment in favour of Belgians	182
3.1.2.3. Humanitarian concerns	182
3.1.3. The actual Labour Accidents Act	182
3.2. Family Allowances – 1930	183
3.2.1. The Act’s proposal	183
3.2.2. The Parliamentary Debate	184
3.2.2.1. Belgium’s good international relations	185
3.2.2.2. More policy motives	185
3.2.2.3. Result of the debate	186
3.2.2.4. Territoriality in practice	187
3.3. Welfare: 1845–1971	188
3.3.1. The pre-modern welfare as territoriality’s cradle	188
3.3.2. Belgian welfare in the nineteenth century	189
3.3.2.1. The first Belgian Welfare Act – 1845	189
3.3.2.2. The Welfare Act of 1876	192
3.3.2.3. The Welfare Act of 1891	192
3.3.3. The guaranteed incomes	193
4. Conclusion	195

Social federalism and EU law on the free movement of persons	
Herwig VERSCHUEREN	197
1. Introduction	198
2. The European strand of social federalism	199
2.1. No separate European social protection	199
2.2. The impact of the European principle of the free movement of persons on social protection schemes in the Member States	201
2.2.1. European social security coordination	201
2.2.2. Determination of the legislation applicable in cross-border situations: State of employment and State of residence	202
3. The impact of European social federalism on social federalism in the Member States	206
3.1. Can European Union law intervene in a regionalised Member State's internal distribution of competences in the field of social protection?	207
3.2. Some critical reflections on the application of the European right of free movement of persons in matters concerning interregional relations within a Member State	211
3.2.1. Failure to recognise that the internal distribution of powers in the field of social protection is a matter of national social security legislation of the Member States	212
3.2.2. Legal uncertainty over who precisely has recourse to EU law	213
3.2.3. The (non-)applicability of the place-of-employment principle to purely internal situations and the issue of reverse discrimination	217
3.2.4. The treatment as Member States of sub-national entities of a regionalised Member State in the application of EU law on the freedom of movement for persons flouts the singular nature of those States	219
4. Conclusion	223
 European legal limitations to the repartition of fiscal competences in a federal state structure	
Bruno PEETERS	227
1. Introduction	228
2. The repartition of fiscal competences and the European state aid regulation	228
2.1. General	228
2.2. Community jurisprudence concerning regional selectivity of state aid measures and fiscal autonomy	232

2.2.1. Jurisprudence factual data	232
2.2.1.1. The Judgement of the Court of Justice concerning the Azores dated 6 September 2006.	232
2.2.1.2. The judgement of the Court of Justice dated 11 September 2008 concerning UGT Rioja	233
2.2.1.3. The decision of the Court of Justice dated 17 November 2009 concerning the region of Sardinia	234
2.2.1.4. The decision of the Court of First Instance (now General Court) dated 18 December 2008 concerning Gibraltar	234
2.2.2. Regional selectivity of fiscal state aid measures	236
2.2.2.1. The difference between aid and special burden	236
2.2.2.2. The delineation of the frame of reference	236
2.2.2.3. Symmetrical repartition of competences	237
2.2.2.4. Asymmetrical repartition of competences	239
2.2.3. Consequences for the Belgian state structure	245
3. European legal limitations to the exercise of fiscal competences by regional (and local) authorities	249
4. Conclusion	252

Reflection by Arthur Benz.

Federalism and social policy in Belgium

Arthur BENZ.	255
----------------------	-----

Reflection by Fritz W. Scharpf.

Multilevel government – Suggestions for and learning from Belgium

Fritz W. SCHARPF	261
----------------------------	-----

1. Belgian institutions and politics	261
2. A comparative perspective on Belgium: the role of the judiciary	262
3. What Europe should learn from Belgium	264
Reference	265

Belgium, as seen from elsewhere

Charlie JEFFERY	267
---------------------------	-----

In praise of cowboy federalism: juridical and political federalism in
Belgium and Canada

Keith BANTING.	273
------------------------	-----

References	277
----------------------	-----

Layered social federalism: from the myth of exclusive competences to the categorical imperative of cooperation ...
 Johanne POIRIER 279

1. The end of a myth: some (overly optimistic?) advantages. 279
2. Parallel, concurrent, shared competences: broadening the catalogue of options 281
3. Legitimising the “spending power”?. 285
4. The ghost of the “joint-decision trap”?. 286
5. Cooperation, communication, coordination...: a cure-all? 287
6. Social protection and identity politics 288