

Organisation of External Relations

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1. Some basic assumptions:

1.1. From the centrally organised nation state towards multilevel governance structures

During the last decades, the organisation of state structures has evolved considerably in many countries all over the world. Past Forum of Federalism conferences, such as the ones in Delhi (2007) and Brussels (2004), have established that decentralisation and/or federalisation is gaining ground and is considered to be a viable solution or adequate remedy to tensions resulting from ethnic and/or linguistic differences. Moreover in many countries, decentralisation and/or federalisation is considered to result in better services to citizens and to be a natural way to involve local and regional authorities in the management of the state. In these countries, this has led to a variety of multilevel governance models, sometimes with very particular characteristics in order to meet specific needs or to address a specific situation in that country. It is therefore extremely interesting to study these different approaches to decentralisation and/or federalisation and to learn from them.

Belgium/Flanders:

A consecutive number of state reforms have turned Belgium from a unitary state into a federal country. The most radical changes up till now were introduced in 1993. Since 1993 the Belgian constitution states in its article 1 “Belgium is a federal state composed of communities and regions.” This bi-polar structure of regional entities has been introduced to address the economic differences, hence regional affairs, and the cultural and linguistic differences, hence communities. It also reflects the differing views between Dutch-speakers and French-speakers on devolution, and explains the asymmetric character of the Belgian federation, since Flemish regional and communitarian institutions have been merged into one single Flemish Authority, whereas the French Community transferred several competences to the Walloon Region and to Francophone institutions in Brussels. This is still an on-going process and political talks, in order to agree on a new state reform handing over more competences to the regions and communities, are on the agenda.

It is important to add that competences are attributed on an exclusive basis to either the central government or the regions. There are no shared competences, however the attribution of competences is not always homogenous and may lead to a conflict of competence, to be solved by the constitutional court. Equally important is the fact that

there is no hierarchy between the federal and regional level, federal laws can not overrule regional decrees.

1.2. Foreign Affairs – State affairs.

In most countries, the Department of Foreign Affairs belongs to the group of ministries that have existed since the origin of the country and is considered to be one of the classic constituent departments of the state. It reflects the image of the country towards its neighbouring countries and to the rest of the world. That is why in many decentralised or federal countries, foreign affairs are still considered to be an exclusive policy area of the central government. Arguments that are often invoked for this, are the need for a uniform foreign policy, the lack of international legal personality of federated entities, the sole recognition of states by international organisations and courts, the image vis-à-vis the international partners, their willingness to provide services to the regional governments so that there is no need to establish them by the regional authorities, etc. Consequently, Federal states often react reluctantly towards actions or initiatives of regional governments on the international scene.

Belgium/Flanders:

During the last quarter of the previous century, early but important steps were taken towards autonomy for the linguistic and cultural communities of Belgium. From the early start, the Belgian constitution attributed international competences to the communities (international cultural policies) – but not to the regions. The federal government remained in charge of negotiating and concluding international treaties concerning matters for which the communities had been given exclusive competences, but their parliamentary assemblies had to give their assent before such treaties could be ratified. In 1980 – for example – it was the Belgian federal government that concluded a treaty with the Netherlands concerning the creation of the Dutch Language Union (Nederlandse Taalunie), an international organisation that promotes and develops the Dutch language. However, since internally this competence was already considered to belong to the Flemish Community, the Flemish Council had to give its assent, and the execution of the treaty was a matter for the Flemish administration.

In the course of the 1980's, the powers of the federal government to act on the international level continued to erode. In 1985, for example, the Flemish Community signed, on its own behalf, a protocol with the German speaking community of Belgium and in 1989 with Quebec. During that period, the Communities also took over the responsibility of the Kingdom of Belgium to execute the Cultural Agreements signed with numerous countries since the Second World War. They were given the responsibility to negotiate with these partner countries on the implementation of the agreement and on the bi-annual or tri-annual working programmes as they had been given cultural autonomy on the internal level. The actual signing of the working programmes was most of the time still done by the Belgian ambassador on behalf of the Belgian Kingdom.

*The important breakthrough concerning the international competence of the Belgian communities and regions followed in 1993 with the introduction of the key article 167 in the Belgian constitution. This article gives the various Belgian federated entities – i.e. now also the regions – the capacity to conclude treaties – (almost) completely independent from the federal government – concerning matters for which they are exclusively responsible on the internal level. The precedence of international and European law over domestic law in the Belgian legal order and the very active involvement of Belgium on the international scene led to the situation that the constitutional autonomy of the communities and the regions could be de facto overturned by the conclusion of a treaty or by the adoption of a European regulation or directive within their scope of competence. Therefore the communities and the regions have been given the *ius tractandi*, i.e. the right to conclude treaties that are entirely within the scope of their competences (so-called exclusive treaties).*

This unique distribution of powers is well summarized in the expression “in foro interno, in foro externo”. For every exclusive competence on the internal level, the federated entity is also exclusively competent on the international level. At the same time, since international affairs often do not follow the distribution of competences in Belgium, the communities and regions were also given the competence to participate in the negotiation of so-called “mixed treaties” (i.e. treaties concerning both federal and federated competences) and to participate in the activities of international organisations with “mixed competences”, first and foremost the European Union. As will be made clear later in this contribution, numerous intra-federal cooperation agreements were concluded to clarify this participation as well as for other matters, such as the accreditation of federated representatives in the Belgian embassies and permanent representations.

No other federal county in the world has given its federated entities this much freedom to act on the international level. In almost any other federation there is some kind of authorisation required of the federal state before a federated entity can conclude a treaty. In Belgium, this is a mere formality since the authorisation can only be refused in very specific and extreme circumstances.

The Belgian Constitution states that “the King (the federal government) conducts the international policy, without prejudicing the competence of the Communities and the Regions to deal with international cooperation including the conclusion of treaties for the fields that fall within their competence in conformity with the constitution or by virtue of the latter”. Therefore, the principle “in foro interno, in foro externo”, (i.e. the parallelism between internal and external competences), goes hand in hand with a number of mechanisms aimed at coordination and exchange of information in the field of international policy. The central institution for this coordination is – at least formally – the Interministerial Conference for Foreign Policy (ICFP). This institution assembles the ministers for foreign affairs of the communities and the regions as well as the federal ministers with an international portfolio (foreign affairs, development cooperation, defense, migration...). Many other coordinating bodies on the administrative level have been set up as a working group or sub-organ of the ICFP.

1.3. Recent developments with an impact on the organisation for foreign affairs

A number of important developments have reshaped our world and provide incentives for change. Because of these developments, foreign affairs can no longer be reserved to the central government level.

- Globalisation

Globalisation makes itself felt in all policy domains. Attention for what is happening in other parts of the world or on the international scene has become most evident and even a necessity to provide good governance.

- Decentralisation

Even in countries without a federal structure, decentralisation has become an issue. Regions, provinces, districts and communes manage their own affairs and look for opportunities to cooperate with their neighbours, even abroad. They get involved in specific projects that link them to other parts in the world. They undertake twinning, business promotion campaigns, attract foreign investors, present themselves at tourist fairs abroad, participate in EU-projects, join international networks, etc.

- Proximity, involvement of the citizen and subsidiarity

Governance has altered over the years. Citizens have become more involved. They want an accountable government, within their proximity and with a structure with which they can identify themselves. This automatically stimulates a trend towards subsidiarity. What can be done at a level that is close to the citizen should not be done at a higher level. This is equally true for activities that involve foreign partners.

- European integration

From the moment the EU started to provide structural assistance to the regions in the EU in order to enhance the cohesion of the internal market, the EU played a catalyst role for regions to engage in international cooperation. Regional policy indeed provided specific opportunities and a framework for cross-border cooperation. With the enlargement of the EU and the increasing importance of the regional and structural funds, the Union has continuously stimulated this type of cooperation. Due to the EU financial support the Union fostered also the autonomy of the regions from the central level, since they became less dependent on the financial support of the central level for such actions.

Belgium/Flanders:

These developments have also incited the regional entities in Belgium to develop an active autonomous foreign policy according to their own needs and priorities. The French speaking authorities started collaboration with many countries from 'La Francophonie'. The German speaking Community collaborated with other German speaking regions and nations. Flanders has developed an active policy towards Central

and Eastern Europe, South Africa and Chile, and of course maintains close relations – especially in the field of culture and infrastructure – with its Dutch neighbours. Brussels developed close ties with other capital cities or capital regions. All Belgian regions consider their neighbouring countries as priority partners and treaties (general framework agreements as well as treaties on very specific topics) were signed to provide a framework for intense collaboration.

The timing of important steps in the EU integration process coincided at crucial times with the internal Belgian state reform. That was the case with the treaty of Maastricht and the state reform of 1993. This has given extra momentum to the demands of the regional entities to become fully involved in the EU policy process and to participate in the management and benefit of EU programmes.

2. Organisation of external relations

How did the external relations develop? Who takes care of what? How far reaching is the autonomy of the local and regional entities?

This workshop will focus on how regions with legislative power organize their external relations. We can discuss the following questions:

- What is the relationship between the region and the central government in developing foreign policy?
- How do policy priorities affect the structure, the organisation and the instruments of a region's foreign and external relations policy?
- Is there a specific department and/or a central agency with political responsibility for foreign affairs and external relations? Do individual departments, strongly affected by international relations, have units or responsible officials looking after that aspect of the department's responsibilities?
- Does a region have representative offices abroad? Are these offices maintained for primarily commercial reasons or do they serve other purposes?
- How are the international activities and interests of municipal governments, particularly major cities (centres of international commerce, location of transportation nodes, home of multicultural populations, host of important business organizations with international interests) managed vis-à-vis both the constituent and federal governments?
- What is the relationship between the region and the central government in developing foreign policy? Is there any coordination or consultation on foreign affairs issues at such meetings as governors'/premiers' conferences, meetings of ministers, or at the level of officials?
- ...

2.1. Political framework

Clear agreements and working arrangements between the central and regional structures are necessary to develop foreign relations. Foreign partners need a trustworthy counterpart, acting within the limits of its powers and able to fulfil their commitments. If regions develop their own foreign policy, their counterpart will want to know if a region can engage itself in firm commitments. They will want to know more details concerning the constitutional or legal operational framework for their foreign relations. In some states arrangements have been made and laid down in the constitution. In other countries specific laws or decrees were adopted. Practices differ strongly from country to country and arrangements that fit one country can not automatically or easily be transposed to another. However, examples of good practice can often stimulate officials to find acceptable solutions and appease the anxiety of centralistically thinking politicians or government officials. If it works in one country, then it may work in their country as well or give an incentive to look for similar solutions.

Belgium/Flanders:

As seen before, the Belgian constitution provides a sound basis for the development of foreign policy by the regions and communities. The Belgian federated entities are allowed to set up their own foreign relations mechanisms and to conclude treaties concerning matters for which they are exclusively responsible on the internal level. To make this legal framework work on a day-to-day basis, a number of intra-federal cooperation agreements were concluded between the federal and regional government (e.g. on representation in the EU or collaboration with international organisations) to structure their relations.

Nonetheless this great liberty of Belgian regions and communities to develop foreign relations, the constitution states three main limitations to their exclusive powers to conclude treaties. The first can be found in article 167§1 which states that the king (federal government) has the general responsibility for the international relations of the country. This means that however far-reaching the international powers of the federated entities, in the conduct of these powers they must abide to some basic principles of federal loyalty, namely by informing the federal level about their intentions to enter into international agreements. A second limitation is that in certain (very strict) conditions the king can oppose to the intention of a federated entity to conclude a treaty. For example when a region wants to conclude a treaty with a county with which Belgium has severed diplomatic relations. A third mechanism consists in the federal government having the right to substitute federated entities after Belgium has been condemned by an international jurisdiction.

2.2. Institutional framework

Development of foreign policy and fostering of foreign relations requests investments in structures and personnel. A broad variety of organisational models are being implemented across the globe. Some regions have gone far in setting up a specific governmental structure to execute their foreign policy. Others kept foreign policy as a

matter of “Chef Sache” and located the responsibility within the administration of the regional president. Sometimes specific foundations or non governmental bodies were created with or without the support of the private sector, to overcome legal obstacles or to solve administrative or institutional problems if the country’s legal framework didn’t provide the necessary instruments or freedom to set up proper governmental structures.

Usually the structures and agents of the central government remain available to the regional entities, but it is obvious that this does not always accommodate the wishes and aspirations of the regional bodies. Often a feeling of competition reigns and colours the relations between central and regional governments.

Agreements may be concluded between central and regional governments on the institutional framework. Some regions are rather autonomous in developing their own structures. Others have to negotiate or organise interministerial meetings with the federal level before going ahead with their foreign partners.

Establishing priorities in foreign policy and choosing partners may result of negotiations involving all partners or may be the prerogative of the individual partners. Sharing of information on the execution of the foreign policy and the positions taken in international dossiers are crucial for the regions to be considered as a valuable partner.

Belgium/Flanders:

Belgian regions (and communities) have set up their own departments for foreign affairs. They started as semi-governmental structures and have grown into fully fledged government departments. The regional parliaments have specific commissions on foreign affairs. A minister of European and foreign affairs is responsible, often in close collaboration with the Minister-President, who may play an important role as well. Within their own policy domains, individual ministers may collaborate with foreign partners and be responsible for EU policy

A number of structures are foreseen to look after the coherence of the Belgian foreign policy. During interministerial conferences sectoral ministers discuss EU and international relations. If there can’t be found an agreement in this body, the aforementioned Interministerial Conference for Foreign Policy (ICFP) takes over. And finally, when also they can’t agree, the issue is brought to the committee of concertation between the federal prime minister and the regional minister presidents. The ICFP is set to decide on the main headlines for Belgian foreign policy. In practise, however the federal level still operates rather autonomously in the field of political foreign policy and consults the regions only if they have known vested interests. The other way around is also valid. After informing the federal level of its intentions to start new foreign relations with specific states, the regions are autonomous in their engagements and commitments.

2.3. The extent of a regional foreign policy

Foreign policy is more than being involved in international programmes or collaboration on the basis of projects. The impact of foreign policy must also be measured to the extent that regional entities can conclude binding agreements and treaties (*ius tractati*) and send out their own delegates (*ius legationis*). And on this point, there are still a lot of questions to be answered. What is the status of an international treaty between a state and a federated entity? To what extent are federated entities responsible for the violation of the treaties they themselves have concluded? Contemporary international law – based the Westphalia state-centred idea - does not provide clear solutions.

First of all, the 1969 Vienna Convention on the law of treaties (VCLT), states in its article 2 that, for the purposes of the VCLT, “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. At the same time, the VCLT states that it does not preclude other international agreements from being qualified as treaties.

Second, as it comes to a separate international responsibility of federated entities, one finds that also on this question international law only “knows” states. The European Court of justice, for example, states clearly that states can not invoke their constitution as a justification of none adherence to EU law.¹ This assumption is also reflected in the VCLT, whose article 27 says: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. This was restated by the International Court of Justice in the famous La Grand case, holding the US responsible for the violation of international law by the governor of Arizona.

As we’ve seen foreign policy is to a large extent based on the principles laid down in the VCLT. Although the international activities of federated states were discussed during the preparatory conference of the VCLT, far less countries had a regional or federal state structure at that time and no agreement could be reached to consider them as actors on the international scene. Therefore a whole set of new provisions and models still needs to be developed to provide answers for the needs of regions and local authorities on the international scene. This is still work in progress. Regions sign memorandums of understanding, political declarations, etc to commit themselves to their foreign partners. Nearly none of them sign internationally recognised agreements governed by international law.

A number of regions developed structures to establish representations abroad. Quebec was among the first to set up a large network of economic delegations to look after its own interests. They evolved into fully fledged delegations with political representatives taking over the lead but still assisted by a range of sectoral attachés such as their economic counsellors. In Brussels, a wide range of regional representations were set up by the regions to look after their vested interests in European affairs. However the variety of structures is enormous. Some are set up as a non-governmental structure, some as a

¹ ECJ 2 February 1982, cases 61/81, 68/81, 78/81 en 72/83 (Commission / Belgium).

foundation, some have a private structure behind them, others are a branch office of the regional governmental structure linked in different ways to their bilateral embassy to the Kingdom of Belgium or to their national European Permanent Representation.

Belgium/Flanders:

As stated above, the Belgian constitution explicitly confirms the possibility for the regions and communities to conclude treaties that are governed by international law. This is a rather unique feature of the Belgian federal state. The regional entities have actively made use of this possibility and concluded a broad range of treaties with their neighbouring countries but also with partners everywhere in the world e.g. since 1994, Flanders signed a number of specific treaties with the Netherlands and with France and concluded framework treaties for cooperation with all the countries of Central and Eastern Europe, which eventually became member states of the European Union. A similar framework treaty was concluded recently with Croatia. As stated above, the status of these treaties in international law is not completely clear, since such treaties were not foreseen in the VCLT. However it is clear that in practice the treaties between (for example) Flanders and e.g. the Netherlands, having all the characteristics of a treaty between states, have to be fully recognised as international obligations of Flanders, for which it has proper international responsibility. In other words, only Flanders is responsible for violation of these treaties, and the Netherlands, having implicitly accepted this by concluding the agreement, can not turn to Belgium, which is not a party, for reparation.

With the transfer of specific competences during the consecutive state reforms, the federal agents looking after these specific domains were transferred to the regions. They became representatives of the regions abroad. Since then, the Belgian regions have a broad network in the world of economic and agricultural counsellors, tourist offices, representatives for development cooperation and last but not least have added to them political delegates functioning as fully fledged diplomats, represented on the diplomatic list of Belgium in the partner states. In many capitals around the world they have also set up their own delegations separate from the Belgian embassy, but working under the diplomatic umbrella of the embassy, as an integral part of the overall Belgian diplomatic structure of the federation.

Concluding remark:

Belgium and its communities and regions are certainly breaking grounds for federated entities to manage their foreign and external affairs. Some of these structures and arrangements can serve as a model for other regions and countries, others will need to be adapted to the specific characteristics of other states.