

KINGDOM OF BELGIUM

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It is not easy to use simple language to describe something that is not simple, and Belgian federalism is far from simple. Built without preconceived ideas or an overarching doctrine, it accumulates original - sometimes labyrinthine – solutions as it goes along. In this chapter we attempt to describe the distribution of powers in Belgium as briefly as we can, without doing violence to its richness and complexity - concentrating on major characteristics rather than on an exhaustive inventory of rules. After reviewing the evolution of Belgian federalism along with its social and historical context, our chapter examines the principles that govern the distribution of powers in Belgium, paying special attention to the asymmetry of this distribution. The logic behind the development of the distribution of powers, particularly the political logic, is also discussed, as are the various problem-solving techniques used to prevent or solve conflicts stemming from the distribution of powers. The conclusion reviews how the Belgian system is functioning today and deals with the system's prospects for the future.

HISTORICAL AND CULTURAL CONTEXT OF THE FEDERAL CONSTITUTION

Belgium has some 10,309,795 inhabitants; its territory measures 32,500 square kilometres. Gross domestic product per capita is €23,690 (or roughly US\$28,000). The kingdom's population is divided into three main groups: six million Dutch speakers (Flemish) in the north and the Brussels area; four million French speakers in the south (Walloons) and in the Brussels area as well; and 71,000 German speakers in a small territory in the east of the country, along the German border. French, Dutch, and German are the kingdom's three official languages (Articles 4 and 189 of the Constitution). These data illustrate that the fundamental patterns of force in Belgian political life are bipolar: Belgian politics are propelled by a duality - often a conflict – between the Flemish and the francophones.

From a Unitary Belgium to a Federal Belgium

Rooted in the traditions of Roman and Germanic jurisprudence, Belgium's present Constitution is the product of successive revisions of the original Constitution of 7 February 1831, chiefly those of 1893, 1921, 1970, 1980, 1988, and 1993. Between 1831 and 1970 the Belgian state had every characteristic of a decentralized unitary state. Its territorially decentralized subentities, the provinces and municipalities, did not have the power to make statutory law but only regulations, and they were under the central state's control. The shift towards federalism dates to 1970, but only in 1993 was the state officially declared federal (Article 1 of the Constitution). The transformation of Belgium from a unitary to a federal state originated with the intersection of Flemish demands for cultural autonomy and Walloon demands for economic autonomy. The first explicit demands for cultural autonomy according to a federal scheme date to 1937. They came from the northern part of Belgium, home of the country's Dutch-speaking Flemish population. These demands were made in reaction to the cultural and social hegemony of the French language and the French-speaking bourgeoisie, who pervaded the organization of the state and, in particular, the relationship between the citizen and the administration throughout the nineteenth century and the beginning of the twentieth. These cultural demands were at the root of the 1970 creation of the three communities: the French-speaking, the Flemish-speaking, and the German-speaking. These comprised the first type of federated political entities in Belgium.

Demands for economic autonomy, originating in Wallonia in the 1960s, aimed to spur the south's aging and declining industrial base. These economic demands led to the 1980 creation of the first two regions (Wallonia and Flanders) and the 1988 creation of the region of Brussels. These regions constitute a second type of federated entity.

In truth, the restructuring of the state did not follow a coherent federal doctrine. During its emergence in the 1970s and 1980s Belgian federalism was never perceived as an authentic political process built on a founding consensus but only as a pragmatic response to disputes to be resolved. Each successive constitutional revision may be analyzed as a pragmatic response of the political elites to a specific crisis. No agreement was ever reached on a global and coherent design aiming to stabilize the new structures of the state.

One of the principal obstacles to a stable and coherent theoretical model for Belgian federalism is the persistent disagreement about the final status of the Brussels-Capital region. Starting in 1970 the most influential Flemish politicians have based their federal doctrine on the division of the state into two large parts, the Flemish- and French-speaking communities. For them, Brussels is merely an extension of Flanders and Wallonia, and it ought not to have any status but that of a capital region under the control of the central government. To the contrary, the most influential French-speaking political agents support the division of the country into three regions: Wallonia, Flanders, and Brussels. The status given to Brussels in 1988, then, was a compromise between these two points of view.

Why this disagreement on the fundamental political balance of the system, with some advocating a division into two and others a division into three? The answer lies in the geographic division of the linguistic groups. Although the Flemish are the majority in Belgium, they are a minority in the Brussels region.¹ For this reason, the Flemish have never accepted that Brussels should be a region like the others. They feared that they would be rendered a minority if the Belgian federation came to be simply composed of three regions, with two being primarily francophone. Therefore, they demanded that, unlike Flanders and Wallonia, the Brussels region be subordinate to the federal government in certain areas, at least in *de jure* terms.

Individual and Collective Rights

The division of Belgian political society between the Flemish- and French-speaking communities is by itself sufficient to explain why such a small country has become so complicated. But there is also a division described as “ideological and philosophical” that must be taken into account if the Belgian system of political decision making is to be grasped in all its complexity. The interaction of these two divisions, linguistic and philosophical, explains why political scientists classify the Belgian political system among “consociational democracies.” Since 1831 the Constitution has guaranteed freedom of religion (Articles 19-21) at the same level as other individual liberties. It also provides for government salaries for the ministers of legally recognized religions (Article 181, Section 1). Currently, six religions are recognized by law: the Roman Catholic, Protestant, Orthodox, Anglican, Jewish, and Muslim faiths. It also recognizes the “secular” (non-denominational) philosophical community (Article 181, Section 2). The principle of equality forbids privileging any of these groups. However, the Roman Catholic Church profits from a number of advantages, owing to its long-standing preponderance in Belgian civil society, especially in the north.

In the 1970s, the era of the creation of the communities, this preponderance of Christian ideological and philosophical tendencies was centred in the new Flemish-speaking community. The opposite situation existed in the French-speaking community, which came to be dominated by secular ideological and philosophical tendencies. The secular minority in the Flemish-speaking community, then, found a natural ally in the secular majority in the French-

speaking community, while the Catholic minority there became allied with the Catholic majority among the Flemings. This counterbalancing symmetry of minorities produced by the advent of the communities is the reason for the only collective rights recognized by the Belgian Constitution since 1970: Articles 11 and 131. The first guarantees non-discrimination on the basis of ideological and philosophical tendencies, while the second grants the federal Parliament responsibility for guaranteeing such non-discrimination. Based on these provisions, an act passed on 16 July 1973 guarantees the protection of the “ideological or philosophical tendencies” that have come to have a minority position within the communities. They are entitled to certain collective rights: non-discrimination on the basis of ideology or philosophy in the area of cultural policies, all of which are under the communities’ jurisdiction, as well as various rights to participate in the development and implementation of these policies.

CONSTITUTIONAL SHARING OF RESPONSIBILITIES

Federated Entities

As already noted, the evolution described above led to the creation, by successive constitutional reforms, of two types of federated entities: the three communities (French-speaking, Flemish-speaking, and German-speaking) and the three regions (Wallonia, Flanders, and Brussels-Capital). The territories of these two levels of federated entities are superimposed on one another, which is why Belgian federalism is said to be in “superposition.”

On a strictly legal level, autonomy and equality characterize, in principle, the relations among the federated entities and those they have with the federal government.ⁱⁱ The federated entities thus have their own executive and legislative powers (governments and councils), in whose composition and operation the federal government as such has no right to interfere. This composition and operation are regulated exclusively by the Constitution, institutional reform laws, and, when appropriate, the “constitutive authority” granted to these federated entities (see discussion below under “asymmetry”). The Constitution gives each of the federated entities the power to enact legislation with the same hierarchic rank as federal law, with the partial exception of the Brussels region (see discussion below). The three communities and the Flemish and Walloon regions enact decrees, while the Brussels-Capital region enacts ordinances (explained below). Note that the Belgian federated entities do not have a judiciary of their own: the organization, operation, and responsibilities of the courts and tribunals derive in principle from the federal power.

The territorial jurisdictions of the three regions and three communities are defined according to four linguistic regions whose boundaries were demarcated in 1963, to wit: the Dutch language region in the north, the French language region in the south, the German language region in the southwest, and the bilingual Brussels-Capital region in the centre.ⁱⁱⁱ Accordingly, the Flemish region’s territory is defined by the Dutch language area, the Walloon region by the French and German language areas, and the Brussels region by the bilingual area.

The communities’ territorial jurisdiction is more remarkable: although their decrees apply to the institutions *and persons* in the Dutch and French language areas, the Flemish and French communities’ territorial jurisdiction also extends into the bilingual Brussels region, *but only to institutions*. These two communities, then, act concomitantly in this region, each within its sphere of power, but independently of each other. In practice, inhabitants of Brussels are subject to the decrees of one or the other community according to which one runs the institution they are using. For example, in the field of education, parents are subject

to the decrees of the Flemish-speaking community if they have chosen to send their children to a Flemish school. If they send another child to a French school, they will be bound, with regard to that child, by the laws of the French-speaking community. Thus, the community status of Brussels residents is neither direct, exclusive, nor definitive. The juxtaposition of the two communities' jurisdiction in the Brussels area is one of the most striking examples of personal federalism in Belgian institutional structure. As for the German-language community, its decrees apply only to the German language area.

Allocated Powers and Residual Powers

The Belgian federal system is the fruit of a decentralization movement acting on a formerly unitary state. It is thus logically and naturally inclined to allow the federated entities only those allocated powers specifically listed in the Constitution and in special majority legislation made by virtue of the Constitution. Residual powers are federal (central) jurisdiction.

However, the institutional reforms of 1993 added Article 35 to the Constitution, which reversed this division of power. The federal government would retain only those powers specifically given it by the Constitution and by special majority laws in virtue thereof, while the residual powers would go to the communities and regions. Nevertheless, this provision is not yet in force, and it is doubtful it ever will be. Two particularly delicate measures must take place first: a constitutional inventory of matters that will remain in federal jurisdiction; and the passing of a special majority law determining whether the regions or the communities will take on the residual powers. It can thus be said that, at this point in time, Article 35 is basically symbolic.

Matters Reserved "to the Law"

In some of its provisions, the Constitution reserves the power to deal with certain matters by or in the "law" alone.^{iv} One of the classic questions in Belgian constitutional law^v is whether by "law" the Constitution means only "an act of the legislative branch as opposed to the executive branch," or whether it means "federal law as opposed to community and regional ordinances and decrees." In the first case, the rules concerned would not be regulating the distribution of powers and therefore would not necessarily have to be modified in order for the matters concerned to be transferred to the jurisdiction of the communities or regions. In the second case, however, they would be power-distribution rules: they would absolutely have to be changed in order to transfer the matters concerned towards the federated entities.

Nobody at present claims to have a sure and definitive answer to this question. The simplest answer would be to note that, when the Constitution reserved a matter to the "law" before 1970^{vi} (when the Belgian central government as such was the only legislator) it could not have been distributing powers; whereas when the Constitution mentioned the "law" after 1970 (when several different federal entities with legislatures existed) it produced a distribution of power in favour of the federal government. Decisions on the 2001 reforms, handed down in March 2003 by the Belgian constitutional court (*Cour d'arbitrage/Arbitragehof*), tended to support this view on first reading;^{vii} but when examined more deeply, it appears that they do not support all of it.^{viii}

Powers Allocated to the Federated Entities

The powers assigned to the communities and regions by the Constitution and the Special Majority Laws on Institutional Reform correspond to the demands - cultural and economic -

that led to the creation of the two types of federated entity. Articles 127 to 130 of the Constitution give the communities responsibility for cultural matters in the broadest sense, including the arts, libraries, radio and television, continuing education, cultural activities, recreation, and tourism as well as sports, general education, language policy (in the administrative sector, education, and employee-employer relations) and so-called “person-related” matters (i.e., those involving “person-to-person relationships” such as health policy, social assistance, policy on disabled people, and youth protection).^{ix}

Unlike the communities’ situation, the regions’ legislative powers are only derived in small part from the Constitution; instead, Article 39 says that their powers shall be determined by special majority laws.^x In particular, regions are broadly responsible for large sectors of economic policy, foreign trade, energy policy, labour policy, public works, transportation, agriculture, and ocean fisheries. Furthermore, regions also have authority over planning, the environment, water policy, rural renewal, and nature conservation, even though these matters are only tenuously related to the economy in its broader senses. Finally, the regions have jurisdiction over the organization and control of the pre-existing decentralized political entities - provinces and municipalities (*communes/gemeenten*) - although these powers must be exercised within the constitutional limits applicable to these decentralized local entities. These limits include guarantees of municipal and provincial autonomy, direct election of their councils, and the openness of their meetings (Articles 41 and 162 of the Constitution).

However, the various areas of responsibility accorded to the communities and regions are larded with exceptions, specifying many domains in which the federal government alone has jurisdiction. The main justification given for these exceptions is concern for the protection of minorities. Thus, for example, Article 129, Section 2, of the Constitution states that the decrees of the Flemish and French-speaking communities will not apply to the use of language in certain municipalities located along the linguistic border. These municipalities have a special status with regard to language policy owing to the presence of “linguistic minorities” there. Likewise, although in principle the regions have jurisdiction to pass organic legislation relative to the municipalities, multiple exceptions were added during the 2001 institutional reforms to guarantee the rights of “linguistic minorities” in municipalities both along the linguistic border and in Brussels.^{xi}

Furthermore, there are a large number of exceptions to the powers of the regions based on the principle that Belgium must remain, despite its federal status, an “economic and monetary union” where the free circulation of persons, goods, services, and capital is ensured.^{xii} Based on this principle, special majority laws reserve to the federal government matters such as monetary policy, price and revenue policy, and competition, intellectual property, commercial, and labour law.

The Principle of Exclusive Legislative Powers

Belgian federalism rests on the central principle of jurisdictional exclusivity: for any given matter, only one authority has jurisdiction - the federal government, the communities, or the regions – to the exclusion of all others. With very few exceptions, Belgian federalism is not a federalism of execution or administration, in which the federated entities are called upon to implement the rules promulgated by the federal authority.^{xiii}

The principle of exclusiveness must, however, be applied in a reasonable way, respecting the proportionality principle.^{xiv} No authority, whether federal, community, or regional, may exercise its powers in such a way as to make the exercise of another authority’s powers impossible or excessively difficult.^{xv} Behind this principle, which the constitutional court has reaffirmed several times, one can see the traces of the principle of federal loyalty (known in

German federalism as “Bundestreue”), enshrined in Article 143, Section 1, of the Constitution.^{xvi}

Corollaries of the Exclusiveness Principle

Based on the principle of exclusiveness, Belgian federalism has no formally overlapping jurisdictions; that is, there are no cases where a matter falls under the authority of more than one level of government and must be resolved according to which level has priority or paramountcy (e.g., *Bundesrecht bricht Landesrecht*). Nevertheless, this principle forbidding overlapping jurisdictions has some exceptions. Some are provided for in the texts. For example, Article 170, Section 2, of the Constitution, as well as an act passed on 23 January 1989, provides that the communities and regions may only impose taxes in matters that are not yet subject to a federal tax; if a federal tax is later imposed, it takes priority over an existing community or regional tax. Article 6bis, Section 3, of the special law of 8 August 1980 also establishes a type of overlapping jurisdiction with regard to scientific research: it authorizes the federal government and Parliament, under certain conditions, to take initiatives, create structures, and budget funds for scientific research in matters that fall under community or regional jurisdictions. Besides these overlaps established in the texts, there are some others in the margins. These “unofficial” overlapping jurisdictions spring from the complexity of Belgian power-distribution rules and the inevitable blurring of boundaries between community, regional, and federal jurisdiction. Thus, the constitutional court recently ruled that the federal legislature may create a detention centre for young offenders, even though under a strict reading of the Special Majority Law on Institutional Reform of 8 August 1980, the communities have jurisdiction over young offenders.^{xvii} As justification, the court asserted that the federal intervention remained subsidiary and proportionate and was within the bounds of a cooperation agreement with the communities. A de facto form of overlapping jurisdiction was thus permitted.

Similar observations apply to the question of spending powers. Belgian federalism, under the exclusiveness principle, technically prohibits spending outside the sphere of legislative or executive powers, both by the federal government and by the federated entities: an entity may finance an activity only if that activity falls within one of its areas of responsibility. However, certain embryonic forms of spending powers exist on the fringes of this principle. In the absence of legal justification, this development is explained on the one hand by a certain tendency to blur some of the rules of distribution of powers (as seen in a number of cooperation agreements), and on the other hand by the non-trivial disparities of wealth between the different federated entities. Thus, for example, the French-speaking community and the Walloon region agreed to have the latter finance certain activities that officially fall under the jurisdiction of the former.

The Exception to Exclusiveness: Implied Powers

Together, Articles 10 and 19 of the special institutional reform law of 8 August 1980 are the basis for implied powers. On these grounds, the communities and regions are able to legislate in matters that, in principle, fall under federal jurisdiction – including matters “reserved” to it by the Constitution, such as the organization, jurisdiction, and operation of courts and tribunals.

Constitutional case law, however, has consistently subjected the use of implied powers to three conditions.^{xviii} First, such an action must be necessary to the exercise of the powers allocated to the region or community concerned. Second, the matter in which the implied powers are to be used must lend itself to differing regulations. Finally, the concrete

measures adopted by the federated entity on the basis of its implied powers must not have more than a “marginal impact” on the matter in question. It is an open question whether the federal government itself can claim implied powers to adopt measures within the jurisdictions of the federated entities.^{xix}

Softening of the Exclusiveness Principle: Cooperative Federalism

Cooperative federalism, and in particular the cooperation agreements that are its concrete form, is not intended to be an exception to the exclusiveness principle in Belgium but, rather, to complement it. The Council of State (the judicial body dealing mainly with administrative law) and the constitutional court agree that a cooperation agreement “cannot involve the exchange, abandonment, or resumption of powers” as determined by or by virtue of the Constitution.^{xx} Cooperation agreements are governed by Article 92*bis*, Section 1, of the Special Majority Law on Institutional Reform of 8 August 1980, which provides that the federal government, the communities, and the regions “may conclude cooperation agreements calling in particular for the joint creation and management of common services or institutions, for the joint exercise of their powers, or for the development of joint initiatives.”^{xxi} It is left to the federal government and the federated entities to undertake to create and develop these agreements, under the rules establishing their respective areas of responsibility; they are in this sense “optional.” Besides these agreements, the special majority law provides for a range of matters – such as so-called “mixed” international treaties – where a cooperation agreement *must* be signed (“obligatory” cooperation agreements).^{xxii} In practice, a rather paradoxical tendency can be seen. Although the levels of government make heavy use of these “optional” agreements to resolve various matters, in some cases they neglect to conclude cooperation agreements that the special law describes as obligatory.

Disputes stemming from the interpretation or execution of an obligatory cooperation agreement are adjudicated by a cooperation tribunal (*juridiction de coopération/samenwerkingsgerecht*) whose members are named by the federal and/or federated entities involved (each naming one member). Such tribunals can also be set up, with the same purpose, in the case of optional cooperation agreements, if the parties to the agreement so decide. However, in practice, cooperation tribunals have never been used, with collaboration and compromise always having been preferred to date.

Instrumental Powers

The Constitution and the related laws give the federated entities a number of “instruments,” in a broad sense of the term, which allow them to exercise their responsibilities. Here we will discuss penal, international, and fiscal powers.

Penal powers of the communities and regions

Article 11 of the Special Majority Law on Institutional Reform of 8 August 1980 authorizes the communities and regions to define certain acts, within the bounds of their jurisdictions, as penal infractions with corresponding penalties. However, the federated entities’ penal autonomy is limited: the consent of the Council of Ministers (i.e., the Cabinet of the federal government) is necessary when a community or region wishes to establish a “new” penalty (i.e., one that is not already provided for by the federal government).

International powers of the communities and regions

Article 167 of the Constitution lays down the principle of parallelism between internal and external powers. Belgian federated entities have received treaty-making power in matters under their exclusive jurisdiction: the government of the community or region involved negotiates and signs the treaty, while that entity's council (legislative assembly) provides, through decree or ordinance, the necessary parliamentary assent for the treaty to come into force in the community or region.

The treaty-making power of the Belgian federated entities is, however, accompanied by a number of mechanisms for information, cooperation, and substitution in order to ensure the stability of Belgium's overall international relations and the coherence of its foreign policy. Therefore, upon engaging in negotiations for a treaty, the government of the federated entity involved must inform the federal Council of Ministers (Cabinet). The Council, in turn, may decide within thirty days to suspend the negotiations. In this case, the Interministerial Conference of Foreign Policy (*Conférence interministérielle de politique étrangère* [CIPE]/*Interministeriële Conferentie voor het Buitenlands Beleid* [ICBB]) – composed of representatives from the federal government and the governments of the federated entities – is informed; it then decides by consensus whether to let the process towards the signing of the disputed treaty continue. If the conference reaches no consensus, then the king may confirm the suspension of the negotiations, but only under four circumstances: (1) if the contracting party with whom the treaty is to be signed is not recognized by Belgium; (2) if Belgium has no diplomatic relations with the contracting party; (3) if a decision or act of state has ruled relations between Belgium and the contracting party to be broken, suspended, or badly compromised; or (4) if the treaty is contrary to Belgium's foreign obligations. In practice, this procedure has to date never been used.

There are special political and legal difficulties with so-called “mixed” treaties (i.e., treaties dealing with matters falling under the jurisdiction of several levels of government, such as European Union or human rights treaties). The consent of each entity involved would be necessary for such a treaty to enter into force in Belgium. This is why, in such cases, the special institutional reform law requires an obligatory cooperation agreement. This agreement, reached on 8 March 1994, set up a complex procedure of information, cooperation, and substitution, with the CIPE/ICBB in a central role.

Also, by application of the parallelism of powers principle, it is the responsibility of the federated entities to carry out Belgium's international obligations within their sphere of jurisdiction – including obligations stemming from primary or secondary European Union law. However, in order to guarantee the stability of Belgium's international relations, the Constitution (Article 169), supplemented by Article 16 of the Special Majority Law of 8 August 1980, allows the federal state to take over and carry out the obligations of a delinquent federated entity. This possibility of substitution is subject to several conditions, and under no circumstances can it be carried out unless the delinquency at issue has first been condemned by an international tribunal. It should be noted that this process has not yet been used.

Fiscal powers of the communities and regions

Very broadly, the “fiscal resources” of the federated entities come from different sources, including non-fiscal revenues from the exercise by the federated entities of their powers,^{xxiii} federal tax revenues that are transferred to them, and whatever loans they may take out.

Under Article 170, Section 2, of the Constitution, the communities and regions also have the power to raise their own taxes within their areas of responsibility. However, the same disposition allows the federal legislature to impose exceptions to this fiscal power. On this basis, an act of 23 January 1989 provided that “the [community and regional] Councils

are not authorized to raise taxes in matters that are already the subject of a federal tax.” (See also the discussion above on corollaries of the exclusiveness principle.)

In practice, the regions have already put their fiscal powers to use. The communities, on the other hand – specifically, the French- and Flemish-speaking communities – face an unsurmounted though not insurmountable obstacle to the use of their fiscal powers. This relates to the application of their decrees in Brussels: community decrees may not directly impose obligations on individuals in Brussels. A solution in which Brussels residents would be exempt from taxation by the French- and Flemish-speaking communities conflicts with the principle of equality of taxation of citizens.^{xxiv} Another solution would be to impose only some of the taxes of each community on the citizens of Brussels. However, this would conflict with the principle of “no taxation without representation,” inasmuch as Brussels citizens would have to pay taxes mandated by an assembly (for some the Council of the French-speaking community; for others, that of the Flemish-speaking community) in which they are not represented.^{xxv} Some authors therefore consider the only practical solution to this question to be a cooperation agreement between the Flemish- and French-speaking communities. However, this does not appear to be on the political agenda at the moment. The upshot of the above is that, at least for the present, the taxing powers of the communities remain theoretical.

LOGIC OF THE DISTRIBUTION OF POWERS

Here we concentrate on two key aspects of the distribution of powers: first, the responsibilities for the welfare state; second, the fundamentally asymmetrical nature of the federal arrangements.

Primary Responsibilities of the Welfare State

Belgium has a long tradition of state intervention through the operation of a welfare state aiming to help the kingdom’s inhabitants to deal with the vagaries of chance. To this end, after the Second World War the country put together a system of social security offering a high degree of coverage.

The progression from a unitary Belgium to a federal Belgium led to a division of powers over the welfare state, which we here describe very broadly. Communities are responsible for person- related matters pertaining to individuals (Article 128, Section 1 of the Constitution), including, in particular, under the heading of “assistance to individuals,” family policy, social assistance, adaptation and integration of disabled people, general policy on disabled people, policy on the elderly, and so on. Nonetheless, in each of these community matters there are some responsibilities that are reserved to the federal government. This is the case, for example, with regard to rules and funding for disabled persons’ benefits as well as with regard to the determination of the minimum amount, conditions, and funding for the legally guaranteed income supplements for elderly people. More generally, the Special Majority Law on Institutional Reform of 8 August 1980 reserves the otherwise undefined jurisdiction of “social security”^{xxvi} to the federal legislature, confirming the intention of Article 128 of the Constitution.

In the actual state of the law, the distinction between community “assistance to individuals” and federal “social security” is a delicate legal matter and has provoked controversy between French and Flemish legal authors.^{xxvii} The former promote a broad interpretation of federal powers, while the latter support an expansive interpretation of community powers. The controversy is all the more delicate for involving very important underlying financial stakes: having a great number of federal social programs would cause a

redistribution of wealth from the economically flourishing north of the country to the weaker south.

The Belgian Council of State and the constitutional court have ruled on this delicate question; however, even though their decisions were more or less in agreement, they have not met with unanimous approval in the legal world on either side of the linguistic divide.^{xxviii} In a decision rendered on 13 March 2001 the constitutional court put forward a broad interpretation of community responsibilities with regard to assistance to individuals as well as a narrow interpretation of reserved federal powers pertaining to social security - specifically, that they apply only to those social benefits that are currently organized by federal legislation.^{xxix} Any benefits not already provided for by such legislation could be introduced by community legislatures to deal with new needs.

Asymmetry

In Belgian constitutional law the concept of asymmetry relates to the lack of uniformity in the rules governing the *organization* and *powers* of federated entities of the same type (i.e., the regions and the communities). *Organizational asymmetry* can be seen, for example, in that the institutions of entities of the same type obey different rules. We will not expand on this here. *Asymmetry of powers*, however, means that there is a difference in the scope of competences among federated entities. One or more entities has more formal legal powers than do the others. In the Belgian case this arises, on the one hand, directly from the Constitution and Special Majority Law on Institutional Reform and, on the other hand, from the decision of certain federated entities to exercise or not to exercise certain options open to them under the Constitution. We examine these two cases in turn.

Asymmetries “imposed” on federal entities by the Constitution and Special Laws

The Walloon and Flemish regions have identical responsibilities and powers; from this point of view, their situation is symmetrical. However, the Brussels-Capital region is subject to an asymmetry: its legislative acts, called ordinances, are subject to a broader judicial control than is imposed on Flemish and Walloon decrees;^{xxx} the Brussels ordinances are also subject (purely theoretically to date) to direct control by the federal government in certain matters.^{xxxi} Likewise, the powers and responsibilities of the French- and Flemish-speaking communities are a priori identical. However, the German-speaking community is largely deprived of a competence enjoyed by the other two: language policy.^{xxxii}

Note too that the Constitution (Article 118, Section 2) gives the Walloon region, the French-speaking community, and the Flemish-speaking community a “constitutive authority” of which the German-speaking community and the Brussels-Capital region are at present deprived. “Constitutive authority” is, in essence, the right of a federated entity to modify, to a limited extent and in matters that concern it alone, the organizational rules imposed on it by the special institutional reform laws.

Asymmetries “authorized” by the Constitution

The Constitution contains three mechanisms by which a region may come to exercise the powers of a community or vice versa. First, Article 137 allows special majority legislation to organize a sort of “merger” or “absorption” between communities and regions. In other words, the councils of the French or Flemish-speaking communities could come to exercise the powers of the Walloon and Flemish regions, respectively. Such a “merger” has in fact been carried out in the north between the Flemish region and the Flemish-speaking

community but not in the south between the Walloon region and the French-speaking community: another source of asymmetry.

Second, Article 138 of the Constitution allows the French-speaking community to transfer the exercise of one or another of its powers to the Walloon region (with regard to its powers in the unilingual French language region) and to the French-speaking community commission (with regard to its powers in Brussels).^{xxxiii} Such transfers, unlike the foregoing, do not require special majority law;^{xxxiv} some have already taken place (e.g., in matters such as professional training, sports facilities, tourism, school transport, and several powers relating to social assistance). The Constitution does not provide for the equivalent among the federated entities in the north (Flemish region, Flemish-speaking community, and Flemish-speaking community commission for Brussels): another example of asymmetry of power.

Third, Article 139 of the Constitution allows the Walloon region to transfer certain regional responsibilities to the German-speaking community, which would then exercise them in the German-speaking region of the country. Such transfers have also taken place (e.g., in regards to tourism and protection of monuments and sites). These transfers also deepen the asymmetry between the regions, on the one hand, and the communities, on the other.

Logical basis for the asymmetries

The various asymmetries described above have, on the one hand, led to a refocusing of Belgian federalism around “community federalism” in the north and “regional federalism” in the south and, on the other hand, allowed the Brussels-Capital region’s distinct status relative to the other regions to persist.

This dual phenomenon is largely explained by the demographic composition of Belgium. Although the Flemish are plainly in the majority in Belgium, they are a minority in Brussels, and Flemish speakers in Brussels make up no more than 2 percent of the total Flemish population of Belgium. This is why the Flemish movement does not want to see Brussels obtain the status of a full region. Conversely, the Flemish movement did not have any objection to the absorption by the Flemish-speaking community of the Flemish region as the community provides a link between Flemish speakers in Flanders and in Brussels. In contrast, the demographic and political weight of Brussels in the total French-speaking population of Belgium is much greater (more than 20 percent). This explains why the Walloons, protective of their identity, have avoided an absorption of the Walloon region by the French-speaking community (which links the francophones of Wallonia and Brussels) and why they have chosen instead to divide up the community’s powers pursuant to Article 138 of the Constitution.

THE EVOLUTION OF THE CONSTITUTIONAL DISTRIBUTION OF POWERS

The distribution of powers has undergone frequent revision. Since the first reform of the state in 1970 there have been no fewer than four reforms: in 1980, in 1988-89, in 1993, and in 2001. These reforms have not involved systematic changes to institutional structure; rather, each one has devolved federal powers to the communities or regions. There has been no movement in the other direction. These multiple transfers of power have not been without consequences for the relations among the different levels of government or for the operation of some of the powers concerned (such as in foreign policy).

The Centrifugal Dynamics of Reform

The constitutional or legislative changes that bring about new transfers of powers are often the result of extended negotiations between representatives of the two main cultural communities. It can also happen that some powers are given to the regions and communities outside these large institutional reform processes. For example, the power to grant licences for the import and export of weapons and ammunition was attributed to the regions by a special majority law of 12 August 2003. Nevertheless, these transfers have been the subject of debate between the country's two main communities. It also happens that certain levels of government attempt, alone or with others, to change the existing division of power by political agreements or unilateral legislation. Furthermore, the constitutional court and the legislative division of the Council of State also participate in the definition of this dynamic institutional structure. In general, these three elements have tended towards the progressive diminishment of federal powers.

Institutional Reform through Negotiation of the Two Main Communities

The motor of this centrifugal evolution is to be found in the conflict between the communities and the will, mainly on the part of Flemish political parties, to obtain more autonomy for the federated entities. Even though Flemish and francophone institutional points of view agree at certain points – for example, on the July 2001 regionalization of organic laws on local powers – this is not the usual state of affairs; most often, the topic of and approach to the negotiations vary according to the community.

In general, the Flemish political parties have pushed for continuing devolution towards the regions and communities, as has been going on since 1970. Now that their initial linguistic and cultural demands have led to the creation of communities with a large sphere of responsibilities, the Flemings are calling for further autonomy, this time in the economic domain. Thus, following a Flemish demand, the special majority law of 13 July 2001 gave the regions the power to levy and collect new taxes and to give tax reductions to their citizens. French-language political parties denounce these demands for the separate management of revenues, coming, as they do, now that the Flemish region enjoys a more favourable socioeconomic position than do the other two regions. They note also that Flanders has benefited in its turn from interpersonal and interregional solidarity (i.e., the merging of the community and regional administrations).

From a strictly legal point of view, the transfer of new powers is the work of the federal government; it alone can modify the Constitution and the laws establishing the institutional structure of the state. Neither the electorate nor the federated entities as such take part directly in this process. Constitutional revisions follow the three-step process outlined in Article 195 of the Constitution: the national Parliament identifies the parts of the Constitution that need to be altered; immediately thereafter, the two houses of Parliament (the House of Representatives and the Senate) are dissolved and an election is held; then, the new Parliament and the king (which means, in practice, the government) decide on the revision and its nature, subject to a two-thirds majority vote with at least two-thirds of the members in each chamber present. This procedure has not been altered since 1831 and does not involve the federated political entities created in 1970; its usefulness and legitimacy is therefore a current object of debate among constitutional scholars and in the political arena. Since 1970 most institutional reform laws have required not only a two-thirds majority in order to be passed but also a majority among both of the two linguistic groups in both Houses of Parliament.

In this process the Senate is not functioning as a truly federal chamber (i.e., a chamber in which all the federated entities are represented directly as governments [the German model] or where their people are represented on an equal footing for each constituent unit

[the American model]). Therefore the regions and communities cannot be said to participate in the development of the federal structure via the upper house. The most that can be said is that the constitutionally required linguistic parity within the federal government as well as the “special majority” required for votes on institutional reform laws – in particular, the requirement for a majority within both linguistic groups in the federal assemblies – allow a partial and indirect expression of the two large linguistic communities in institutional reform.^{xxxv}

However, in practice, votes on constitutional or legislative reform simply confirm agreements negotiated between the representatives of political parties from the north and south of the country, each representing the interests of their own community and region. The institutional history of Belgium contains an impressive number of “round tables,” “conferences,” or “community-to-community dialogues” in which French-speaking and Flemish-speaking parties have squared off against each other. Owing to Belgium’s essentially bipolar structure, negotiators tend to side with their linguistic or community affiliation rather than with the federal authority or the federated entities. At the last round of institutional negotiations in 2001 each party’s delegation was composed of ministers from all three levels of government. Furthermore, before the negotiations, parliamentarians or ministers from federated governments, less constrained than their federal colleagues to reconcile their views with those of their coalition colleagues from the other community, can prod the negotiations by adopting very pointed resolutions. In Flanders, just before the federal and regional legislative elections of 13 June 1999, all the parties of the Flemish parliament adopted a common basis for negotiation, calling for broad transfers of power and a substantial modification of the structure of the state. Considering the absence of “national” parties, as well as the importance of political parties in Belgian political and institutional life as connectors between the various legislatures and levels of government in the federation, this stance on the part of all the political parties of the Flemish parliament could not help but influence the course of past and future institutional discussions. In sum, while it is plain that the federal Parliament has the legal right to oppose any new transfer of powers or modification of institutional structures, in practice this exclusive power does not prevent the continual “downsizing” of federal responsibilities.

Institutional Reform by Exceptional Cases

Institutional changes of a political nature also take place outside the negotiations described above. They are usually of controversial legitimacy vis-à-vis the existing legal framework. Some of them are the fruit of decisions negotiated between the federal authority and the regions with regard to an individual issue, whereas others are the work of regional legislatures or governments.

Among the negotiated decisions, we can take as an example the cooperation agreement signed by the federal state and the three regions with regard to the development and funding of railway infrastructure. The governments decided that the regions could, if they wished, accelerate investment beyond the agreed-upon pace by providing bridge financing without interest. The Council of State, however, concluded that, by allowing the regions to take on some of the cost of railway investment (even by absorbing the cost of interest that would not be reimbursed by the federal government), the agreement violated the Special Majority Law on Institutional Reform of 8 August 1980, under which the federal state has exclusive jurisdiction over railways. From a legal perspective it would have been better to change the law, but this solution faced two political obstacles. Since the French speakers had traditionally opposed the regionalization of the railways, they could not agree to amend the law without giving the impression of going back on their previous stance. On top of this, the

government did not have the majority in the federal parliament that would be necessary to amend the law.

To take another case, the Flemish government has adopted circulars (providing administrative guidance), and the Flemish parliament has passed decrees, which, without violating legal or constitutional norms, nevertheless interpret them in highly autonomist ways. This was the case with the Flemish government's circular on federal laws over the use of languages in administration. Although according to the Constitution the official language used in administration is a federal matter, the Flemish government advised its regional administration and subordinate authorities to restrictively interpret the linguistic laws guaranteeing the French-speaking minority certain rights in administrative matters. By a decision of 23 December 2004 the Council of State has decided that the circulars, whose legality had been disputed in French-speaking political and legal circles, are not illegal.

Similar initiatives have appeared in the Walloon region. In order to preserve the Formula 1 Grand Prix at Francorchamps, whose survival was threatened by a federal law forbidding all tobacco advertisement, the Walloon legislature used its economic powers to justify the adoption of a decree permitting dispensations from the federal law for international sporting events. However, when proceedings for annulment were referred to the constitutional court, it struck down the Walloon interpretation of the law.

Institutional Reform Imposed by the Courts

Through the reforms and the agreements between levels of government, the federal level of government has lost powers to the regions and the communities. However, political agents are not solely responsible for this phenomenon. The courts – both the constitutional court and the legislative division of the Council of State - have also tended to favour this trend.

In the last few years, the constitutional court has rendered several important judgments in disputes over areas of responsibility. On the other hand, and more generally, the court has exercised only a light control over the institutional reform laws that ratify political agreements between the two communities.

The constitutional court has played an important role in interpreting the areas of responsibility – both material and territorial – of the various levels of government. In particular, by applying the proportionality principle in disputes over areas of responsibilities, the court has given its tacit blessing to the principle of federal loyalty. Even so, the court also permitted certain transfers of powers, for example by recognizing a sort of joint responsibility in the very touchy area of social security (see above).

However, it is clear that, when the court is called upon to rule on challenges to new institutional reform laws that transfer powers to the regions and communities, it has kept constitutionality firmly in check, refusing to challenge political balances arrived at through negotiation. Since these laws aim at ratifying political agreements produced by give-and-take and delicate compromises between the two communities, the court's striking down part of the agreement for legal reasons would risk weakening one of the parties relative to the other. In practice, it can be seen that constitutional judges have acted with extreme prudence and have deliberately limited their range of action. They have made no secret of avoiding the disturbance of political compromises and, consequently, of favouring a light touch with the legislative text. Instead of forcing politics to respect constitutional principles, the constitutional court has borne in mind the political reasons for the adoption of the acts.

Consequences of the Federalization of the State for Relations between Levels of Government

The centrifugal movement in the evolution of Belgian federalism is far from over. All

indicators point to the various political movements at the root of the pressures for reform (for federalism, even for confederalism) continuing their activities in the years to come. It is therefore difficult to take stock definitively of the power relations between different levels of government or to identify the exact consequences of all of these developments. However, two main patterns of force can be identified.

First, although the federal government has been weakened after thirty years of continual “downsizing” of its powers, it is still an essential part of the structure of Belgian federalism. The federal level remains a meeting place between the two communities: even though the north and south regularly disagree over health care, justice, youth protection, or railway policy, the fact of their presently unavoidable cohabitation in the federal government forces coalition partners to compromise despite the tensions (even at the risk of costly or irrational solutions). In practice, the French- and Flemish-speaking partners in the federal government are induced to exchange peace offerings or “loyalty guarantees” when a federated entity attempts an institutional show of force or opposes federal decisions. The existence to date of nearly identical majorities in the different levels of government has probably contributed to this dynamic of appeasement.

However, the question could be raised whether there are still “federal interests” different from those of the two main communities. Both in government and in Parliament disagreements appear more and more often to be based on a community division rather than on an ideological one. It is reasonable to perceive that the necessary collaboration between French- and Flemish-speaking political parties leads to a common management of more and more divergent interests, no matter which parties are involved in the coalition. This is not enough to condemn Belgian federalism’s current way of operating; but the question is raised whether the “federal” character of the state masks anything more than a simple conjunction of more or less contradictory interests.

Next, it appears that the necessary collaboration within the federal government (and in the Brussels government, which also includes French- and Flemish-speaking members) carries over to other levels of government. As is seen in the next section, the airtight division of powers between different levels of government does not prevent continuing dialogue between them. On the contrary, the “shared” division of exclusive areas of responsibility naturally leads those in charge in the different levels of government to harmonize their policies, whether within the peak intergovernmental body called the Coordinating Committee (*Comité de concertation/Overlegcomité*) or within the various interministerial conferences under it.

This cooperation is even more apparent in international relations since the Belgian system is characterized by the parallelism between internal and external powers (see above). The federal government, therefore, does not take the place of the federated entities in the negotiation and ratification of treaties or in the adoption of positions within international organizations in matters that are within the areas of responsibility of the federated entities. It is thus not surprising that the federated entities participate in meetings of international bodies – including the European Union and the Council of Europe – when their areas of responsibility are concerned. (This issue of participation in European Union matters is discussed below.)^{xxxvi}

MAINTENANCE AND MANAGEMENT OF POWER SHARING

The constant dynamic of the Belgian federal model is explained in part by the many conflicts over management of the division of power. These tensions, however, do not prevent cooperation between the different levels of government. These institutional advances have, however, led to a governmental landscape that is largely incomprehensible to most citizens.

There are many causes for conflict in the area of division of powers. First, these conflicts can result from lack of legal precision on the extent of the powers. The constitutional or legal criteria for the attribution of powers generally emerge from negotiations and political compromise, and in the process some imprecision can emerge in the definition of these criteria. As a result their interpretation can lead to controversy.

Conflicts may also stem from a desire on the part of a level of government – usually a region or community – to expand its area of responsibility or from its refusal to accept the consequences of a law passed by another level of government. It can also happen that the communities and regions agree on a way to put forward a common argument to representatives of the federal government. This type of informal agreement and negotiation, coming before discussion with the federal government, generally appears on particular, immediate topics where the federated entities have a common interest.

Resolution of the many conflicts over areas of responsibility are in principle under the jurisdiction of the constitutional court (*Cour d'arbitrage/Arbitragehof*) if a law is under dispute. Such a dispute may arise through right of action (at the request of the government, of a parliament, or of a citizen who proves to have an interest) or by exception (an interlocutory question posed by a trial judge during a proceeding). A number of criteria for the attribution of powers have therefore been established by the Court's jurisprudence. When a legal controversy arises over administrative jurisdiction, the dispute comes before the Council of State.

In many cases, however, the tensions end in a compromise between levels of government. In practice, the number of disputes over areas of responsibility adjudicated by the constitutional court has dropped over the last few years. This can be explained by several factors. In particular, where there are politically symmetrical coalition governments on several levels, they are probably less inclined to initiate legal disputes, preferring to settle certain more legally delicate questions by agreements (such as cooperation agreements) as the process is simpler and there is less call for legal intervention. It is also more difficult for citizens to prove that they have an interest in disputes over areas of responsibility than in disputes over rights and freedoms.

Cooperation, Collaboration, and Compromise in the Management of Powers

It is clear that the conflicts over management of the division of powers has not prevented organic^{xxxvii} cooperation (e.g., in the Coordinating Committee), procedural cooperation (by assent, consultation, information procedures, etc.), and conventional cooperation from increasing in significance over the last few years.

Thus the exclusiveness of jurisdictions has not ruled out dialogue and cooperation between the different levels of government. On the contrary, owing to the interdependence between the powers of the different levels of government, cooperation has been a necessary consequence. It can concern matters as diverse as employment, environmental protection, transportation, youth protection, or international relations. Furthermore, it has taken diverse forms, whether as informal contacts between members of government, protocols on the order of gentlemen's agreements, or full cooperation agreements. We saw above that, although many of these agreements have been reached voluntarily, special majority legislation has mandated the regions and communities to make agreements with each other or with the federal government in certain matters (e.g., management of roads, waterways, and public transit networks that pass through more than one region).

The Coordinating Committee, a veritable intergovernmental discussion forum, serves as a space for meeting and exchange between the representatives of the different levels of government. It has been the scene of the discussion and conclusion of many agreements both

formal and informal. The specialized subgroups of this committee bring together the ministers involved with certain specific portfolios (interministerial committees on external relations, agriculture, etc.).

The matter of international relations deserves special attention. Despite the parallelism of internal and external responsibilities, the Belgian state has a single voice in the decision-making bodies of international organizations, such as the Council of Ministers of the European Union. Unless Belgium is no longer to have a single voice at the European Union, that voice cannot be multiplied and spread among various concerned internal levels of government. Therefore, collaboration is required, first to decide whether a regional, community, or federal minister will represent the Belgian position in the body concerned and, second, to decide together on the position to be put forward by the nominated representative.^{xxxviii} Whatever the matter in question, this dual collaboration is required: when the European ministers of culture meet, the communities take turns representing Belgium, with the agreement that each of them will present the position agreed upon together with the two others. This collaboration on making a common decision may appear paradoxical to the extent that it partially goes against Belgian federalism's natural trend towards diversity.

Besides the rare exceptions examined above, which have remained largely theoretical up to now, the Constitution does not provide for any exceptions either to this cooperative logic or to the underlying principle of the equality of the federated entities. Since the Constitution cannot be "suspended either in whole or in part" (Article 187), it does not allow for any possibility of interference by the federal authority in regional or community powers - not even, for example, during war. There is therefore no doctrine of emergency powers. The only exceptional powers ever activated were used during the First World War (i.e., before the advent of the federal system) and concerned only public freedoms.

In some cases, cooperation is pushed to excess. For essentially political reasons, certain aspects falling under the sole purview of special majority legislation have been left to cooperation agreements. For instance, as just noted, an agreement between the federal state, the regions, and the communities defines how Belgium shall be represented before international and supranational organizations, and how the various levels of government will arrive at Belgium's positions within these organizations. Likewise, a cooperation agreement lays out how "mixed" treaties - that is, treaties that deal with matters under the responsibility of more than one level of government - shall be concluded.

RELEVANCE AND FUTURE OF THE DISTRIBUTION OF POWERS

To conclude, we offer a brief evaluation of the distribution of powers in the Belgian federal system by looking at it from four points of view: (1) that of effectiveness, (2) that of financial efficiency, (3) that of administration, and (4) that of its prospects for future stability, in light of the various political positions that are being expressed about it.

Clarity of the System

The Belgian system of division of powers is opaque to the vast majority of citizens - a state of affairs that seems to bother very few. However, it only adds to the confusion that elections for Belgium's federal parliament (every four years) are separate from those for the assemblies of the federated entities (every five years), especially since political parties sometimes campaign on issues that are not directly linked to the areas of responsibility of the assembly for which the election is being held.

Effectiveness of Rules for the Distribution of Power

The distribution of power as it is actually practised seems in general to conform to the legal rules that govern it. This may be due to the relatively recent adoption of the rules (i.e., through sets of reforms since 1970) compared with the more ancient federal constitutions elsewhere.

However, when comparing theory and practice in more detail, certain differences between law and practice can be observed. It is difficult to determine the breadth of these gaps owing to certain delicate controversies about the interpretation of the rules in effect, which hinders definitive measurement. As long as these controversies are not decided in court, the very existence of a gap between law and practice is debatable. Furthermore, certain legal decisions have not affected the doctrine, whereas other anticipated decisions have never occurred (due to the lack of a petitioner with an interest sufficient to make the case admissible).

Leaving aside these points of confusion, certain gaps are undeniable. Some are explained by the rigid procedure for revising the Constitution or by the large quorum required for votes on modifying special majority laws. Political actors thus sometimes lack the patience or the majority required to conform to these procedural requirements. They therefore outpace constitutional change by passing a law of dubious constitutional footing.

But most of the gaps between law and practice have other explanations. They usually stem from the extreme complexity of certain rules for the division of powers (to the point where they are widely unknown among practitioners), from the political impossibility of simplifying them due to lack of a consensus on doing so, and from the necessity of nevertheless agreeing on pragmatic solutions, especially for putting in place and financing certain policies. This is particularly the case with cooperation agreements, with matters in the jurisdiction of the federated entities but where the distinction between community and regional responsibilities is difficult to respect, and with Brussels (where the network of applicable rules and competent organizations forms a morass that is particularly hard to sort out).

Efficiency of the Distribution of Powers on the Financial Level

The extension of regional fiscal autonomy in 2001 partly pursued the laudable goal of making the distribution of powers more coherent and practicable than it had been before. Since then, the same fiscal autonomy applies to all regional taxes: the regions alone have the right to determine their tax base, rates, and exemptions. Further, the entire revenue from all these taxes now goes to the regions. This reform fortunately came with certain safeguards, in particular to avoid incentives for migration for fiscal reasons and to preserve budget neutrality. It is too early to say how much effect can be expected from these mechanisms; instead, we discuss the increasingly fragile revenue of the Brussels-Capital region.

The revenue situation for Brussels is unique for two reasons. First, owing to the density of its building wealth, regional property-based taxes make up more than twice as large a proportion of its total revenue as they do in the other two regions. The proportion made up by income tax on individuals is correspondingly less. However, Brussels has not been sufficiently buffered against the risk of decreasing revenues from the new regional taxes. Further, due to its geography, it is the region most exposed to fiscal competition. Finally, and most important, it is discriminated against by the application of a common method of financing that does not take its unique characteristics into account.

Bearing in mind that structural underfunding of the French-speaking community was the political impetus for the last two reforms of the system (1993 and 2001), we may

anticipate that yet more negotiations and give-and-take will begin when the Brussels-Capital region starts to complain vigorously that it is being fiscally strangled.

As for the reform of regional fiscal autonomy with regard to personal income taxes, it also began by having to clarify the previous system. And, as often happens, this necessary clarification provided the opportunity to go further by increasing regional autonomy. In and of itself, this increase is quite appropriate to the logic of the federal model. But it is first necessary to channel this autonomy with measures to reduce the damaging effects of fiscal competition. And there it becomes clear that the safeguards – the respect for certain margins, the ban on reducing the progressiveness of the tax system, the forbidding of all unfair fiscal competition — suffer from several gaps and deficiencies. It is inevitable that these will also lead to new demands for reform.

Finally, one should comment briefly on the 2001 refinancing of the communities. This was indispensable because of the excesses of the previous federal government, which had left a legacy of structural problems to the French-speaking community (and it alone, due to the merger of community and regional budgets in the north of the country). However, the means to put into practice the fiscal power of the communities, in theory provided by Article 170, Section 2, of the Constitution, has still not been found. Some believe that an act of institutional imagination must still be agreed upon in this area since a political entity without its own fiscal powers, such as the French-speaking community, is structurally weak. For others, this deficiency is quite incurable because the technical and political difficulties that would have to be resolved (given the communities' inability to impose direct obligations on individual citizens of Brussels) seem insurmountable.

Administrative Efficiency of the Distribution of Powers

Each regional and community government has its own administration, institutions, and personnel. It has the responsibility to decide on the organization of its administration and on the status of its personnel, although bound by some general rules established by federal law. It would seem broadly that the federated entities have the administrative means to exercise their powers. Due to a lack of systematic study of this question, however, it is difficult to verify this hypothesis. Yet there are a number of cases in which a federated entity, inheriting responsibilities from the federal government, has lacked the administrative know-how to deal with the newly transferred responsibilities. This was the case, for example, with the Brussels-Capital region's new powers in external commerce.

Politics and the Future of the Distribution of Powers

Has the Belgian federal system achieved a satisfactory equilibrium, or are new changes necessary to the rules on distribution of power between the federal government, the communities, and the regions? It is of course this subject that attracts the liveliest debate. It may be that federal structures are unstable by definition, subject to constant adjustments to resolve conflicts between its members. These conflicts may not be negative but, instead, feed the internal dynamism of all federal political systems. However, there are a great many reasons to suggest that Belgium's case might be different. Its instability runs much deeper and is of a more structural nature than does that of other federal systems. This arises from the combination of current political movements and the state of the law.

First of all, it does not appear that the successive reforms of the Belgian federal structure have given certain of its federated entities the degree of autonomy they want. Even though the French-speaking side is essentially satisfied with the autonomy attained and does not want to get involved in a discussion that might put the present broad equilibrium into

doubt, the Flemish side is calling for more autonomy. Though the Flemish political parties, on the whole, want more autonomy for their community, some are concentrating on more transfers of powers within the framework of a federal political system, whereas others go so far as to call for “confederalism.” The latter term is used non-specifically: it could mean further transfers of power towards the federated entities or an agreement between separate, sovereign states. All these different demands have been the subject of great debates in the Flemish Parliament, ending with the adoption of certain resolutions on 3 March 1999. Since only part of these resolutions was implemented by the most recent reform in 2001, they are still a major issue. The as yet unfulfilled demands deal in particular with interregional financial transfers, which are judged too favourable to the south; further fiscal autonomy for the regions; and sharply increased decentralization of policy on the economy, employment, certain branches of social security, and the railways, among other policy fields.

Besides these demands regarding the distribution of powers, other arguments in the same set of Flemish resolutions depart from the current institutional layout. They favour not a federal Belgium with communities and regions as specified by the Constitution but, rather, a Belgium made up of two federated states, one Flemish and the other francophone, flanked by two entities (Brussels and the German-speaking community) that would be of a different nature. The French-speaking political parties, for their part, have a different vision: while they do call for adjustments and improvements to the system, they do not favour a complete reorganization. Further community tensions are thus certainly on the horizon.

The state of the law also favours instability. Born of difficult compromises, the legal texts that deal with the distribution of powers in Belgium have gaps and unclear parts, which will almost inevitably lead to further debate. Given the disagreement on the overall vision of the political system, the only political logic that can transcend the succession of reforms, crises, and negotiation is that of a steady erosion of federal powers: each partial transfer of responsibilities from the federal government to the communities and regions leads to demands for a larger transfer.

It is therefore particularly difficult to hazard guesses on what Belgium will come to look like in the long term. If one had to guess, current trends suggest that the most probable future for the Belgian state (though not necessarily the most desirable one) would be its transformation into a unique and very lightweight structure, resembling a confederal model more than a federal one. This structure would not be far from reducing the federal government to little more than a passport and a mask, with its own unique system of autonomies (but without cutting the Gordian knot of the status of Brussels) and occupying the single seat that each member state may have in the Council of Ministers of the European Union.

ⁱ Going by electoral results, Brussels contains about 85 percent French speakers and 15 percent Flemish speakers.

ⁱⁱ For a general discussion on these community competences see André Alen, “The Competences of the Communities in the Belgian Federal State: The Principle of Exclusivity Revisited,” *European Public Law* 3, 2 (April 1997): 165-173.

ⁱⁱⁱ See Article 4 of the Constitution. According to this rule, the boundaries of the linguistic regions cannot be modified except by a law adopted by special majority in the national Parliament (i.e., a majority vote within each linguistic group and an overall two-thirds majority of the total vote).

^{iv} For example, Article 22 (“Everyone has the right to the respect of his or her private and family life, except in the cases and under the conditions established by the law”); Article 146 (“No tribunal or court may be established except by a law”).

^v See, among many others, Wouter Pas, “De door de Grondwet aan de ‘wet’ voorbehouden aangelegenheden: Vroeger en nu,” *De vijfde staatshervorming van 2001*, ed. André Alen (Bruges: Die Keure, 2002), pp. 27 to 63; Xavier Delgrange, “Les matières réservées: faut-il choisir entre rationalité et constitutionnalité ?” *Les lois spéciales et ordinaires du 13 juillet 2001: La réforme de la Saint-Polycarpe* (Brussels: Bruylant, 2002), pp. 45 to 66. See also the contributions of Marc Uyttendaele and Jean-Claude Scholsem in *Administration Publique*, 2002/2-3-4, *Numéro spécial: Saint-Polycarpe, Lombard et Saint-Boniface - une réforme à plusieurs visages*, pp. 153-160 and 161-172, respectively.

^{vi} According to Article 19§1 of the Special Majority Law of 8 August 1980 on Institutional Reform as amended by the Special Majority Law of 13 July 2001, by which the “distributive effect” of these constitutional provisions referring to “the law” is limited to constitutional provisions enacted after the coming into force of the Special Majority Law of 8 August 1980, (i.e., 1 October 1980). Most scholarship, however, holds that this date is not correct as the constitutional reform of 24 December 1970, in creating the communities, brought forth the first new political entities whose standards had the force of law. More fundamentally, there is currently a controversy over whether the theory of matters reserved to the law is based on the Constitution itself or on Article 19 of the special law.

^{vii} Cour d’arbitrage, n°35/2003, 25 March 2003, *Moniteur belge*, 15 April 2003.

^{viii} See Pascal Boucquey, Pierre-Olivier de Broux, Xavier Delgrange, Luc Detroux, Hugues Dumont, Isabelle Hachez, Bruno Lombaert, François Tulkens, and Sébastien Van Drooghenbroeck, “La Cour d’arbitrage et Saint-Polycarpe: Un brevet de constitutionnalité mal motivé,” *Journal des Tribunaux* n.v. (2003): pp. 525-528.

^{ix} Certain community responsibilities discussed by Articles 127 to 130 of the Constitution are detailed in Articles 4 and 5 of the Special Majority Law on Institutional Reform of 8 August 1980.

^x These attributions are listed in Articles 6 and 6*bis* of the Special Majority Law on Institutional Reform of 8 August 1980.

^{xi} See Article 6, sect. 1, VIII, 1°, 4°, 5°, of the Special Institutional Reform Law of 8 August 1980. See also Articles 7*bis* and 16*bis* of the same law.

^{xii} Article 6, sect. 1, VI, para. 2, 2°, 2nd para., of the Special Majority Law on Institutional Reform of 8 August 1980.

^{xiii} See Article 6, sect. 1, IX, 3° (application of rules concerning the occupation of foreign workers).

^{xiv} See Cour d'arbitrage, n°58/95, 12 July 1995, *Moniteur belge*, 31 August 1995, pt. B.8.5.

^{xv} See Cour d'arbitrage, n°42/97, 14 July 1997, *Moniteur belge*, 3 September 1997, pt. B.10.2.

^{xvi} Also Cour d'arbitrage, n°49/ See 94, 22 July 1994, *Moniteur belge*, 6 July 1994. On the issue of federal loyalty in federal theory and practice, see Bertus deVilliers, "Intergovernmental Relations: 'Bundestreue' and the Duty to Cooperate from a German Perspective," *SA Public Law* n.v. (1994): 430-437.

^{xvii} Cour d'arbitrage, n°166/2003, 17 December 2003, not yet published in the *Moniteur belge*. Available on the Web at <<http://www.arbitrage.be/>> (accessed 1 May 2004).

^{xviii} See, among many others, Cour d'arbitrage, n°58/2003, 14 May 2003, *Moniteur belge*, 8 October 2003, pt. B.5.3.

^{xix} The Council of State decided in the affirmative on this question (Conseil de l'État, 4 April 1986, *Journal des Tribunaux*, 1987, note Yves Lejeune). For discussion of the doctrines related to this question, see among others Johan Vande Lanotte and Geert Goedertier, *Overzicht Publiek Recht* (Bruges: Die Keure, 2001), p. 1031.

^{xx} Cour d'arbitrage, n°17/94, 3 March 1994, *Moniteur belge*, 13 April 1994.

^{xxi} Under Article 92*bis*, sect. 1, para. 2, of the Special Majority Law on Institutional Reform of 8 August 1980, "cooperation agreements are negotiated and signed by the authority with jurisdiction. Agreements dealing with matters ruled by decree, as well as agreements that could burden the community or region or bind individual Belgians, come into effect only after being ratified by decree. Agreements dealing with matters governed by law, as well as agreements that could burden the State or bind individual Belgians, come into effect only after having been ratified by law."

^{xxii} See Article 92*bis*, sects. 2, 3, 4, 4*bis*, 4*ter*, 4*quater* of the Special Majority Law on Institutional Reform of 8 August 1980.

^{xxiii} For example, for the regions, revenues from forestry exploitation or the sale of hunting permits.

^{xxiv} See Elisabeth Willemart, *Les limites constitutionnelles du pouvoir fiscal* (Brussels: Bruylant, 1999), p. 35

^{xxv} In August 1991 the federal government submitted to the legislative section of the Council of State a draft bill for a special law modifying the special law of 16 January 1989 regarding the financing of the communities and

regions. The intent of the draft bill was to make the French- and Flemish-speaking communities fiscally autonomous. The draft provided for Brussels citizens to pay 80 percent of French-speaking community taxes and 20 percent of Flemish-speaking community taxes, with the revenues from Brussels being divided in the same proportion between the two communities. In an opinion handed down on 28 August 1991 the Council of State ruled that this would have given the community legislatures the power to tax citizens they did not represent and was, therefore, incompatible with the principle of consent to taxation enshrined in Article 170 of the Constitution (Avis n° 21.104/2/V of 28 August 1991, *Documents parlementaires* Chambre, 1990-1991, n° 1767/1).

^{xxvi} Article 6, sect. 1, VI, para. 5, 12° of the Special Majority Law on Institutional Reform of 8 August 1980.

^{xxvii} On this question and the various positions on it, see Xavier Delgrange and Hugues Dumont, “Bruxelles et l’Hypothèse de la défédéralisation de la sécurité sociale,” *Autonomie, solidarité et coopération : Quelques enjeux du fédéralisme belge au XXIème siècle* (Brussels: Larcier, 2002), pp. 235 et seq., and, from the same collection, Jan Velaers, “Brussel en de hypothese van de defederalisering van de sociale zekerheid,” pp. 267 et seq.

^{xxviii} See Xavier Delgrange, “La Cour d’arbitrage momifie la compétence fédérale en matière de sécurité sociale,” *Revue belge de droit constitutionnel*, 2001: 216 et seq.

^{xxix} Cour d’arbitrage, n°33/2001, 13 March 2001, *Moniteur belge*, 27 March 2001.

^{xxx} Article 9 of the 12 January 1989 special law on Brussels institutions provides, in essence, that the judicial courts and tribunals and the Council of State may ensure the compliance of Brussels ordinances with the special law itself as well as with constitutional dispositions whose oversight would not yet have been handed over to the constitutional court.

^{xxxi} See Article 45 of the 12 January 1989 special law on Brussels institutions, which puts the international role of Brussels and its function as capital under this kind of federal control. The federal government may intervene in public works, transportation, urban planning, and land use. In the case of a dispute between the region and the federal authority, the House of Representatives will decide by a majority of the two linguistic groups. This makes the use of this control rather improbable.

^{xxxii} The German-speaking community has no powers in language policy except with regard to education.

^{xxxiii} This includes the members of the Council of the Brussels-Capital region who are from the French linguistic group.

^{xxxiv} Three decrees are all that is needed: one adopted by a two-thirds majority by the French-speaking community and two others adopted by a simple majority by the Walloon region and the French-speaking community commission.

^{xxxv} See Article 99, Section 2, of the Constitution: “With the possible exception of the Prime Minister, the Council of Ministers includes as many French-speaking members as Dutch-speaking members.”

^{xxxvi} See also Robert Senelle, “The Role of the Communities and the Regions in the Making of Belgian Foreign Policy,” *European Public Law* 5, 4 (December 1999): 601-618.

^{xxxvii} Organic cooperation involves the presence of authorities representing different political entities (state, communities, or regions) within a single government body.

^{xxxviii} When the matter in question falls primarily under the responsibility of the regions and communities, the federal authority steps aside to allow one of the regions or communities to represent Belgium. A cooperation agreement sets out the procedures for this substitution as well as for information exchange, the creation of a permanent structure for collaboration, and rules for the composition of delegations.