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ON THE ROLE OF THE CONSTITUTION IN THE SPANISH TRANSITION 25 YEARS EXPERIENCE (1978-2003)

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REPORT ON

"Autonomy of Regions and Communities : the Belgian Experience"

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1. Introduction

Three indigenous languages are spoken in Belgium. In the north (Flanders) the language is Dutch, in the south (Wallonia), French, and in a smaller area in the east, bordering on Germany, German is spoken. In the centre - the Brussels conglomeration and surrounding area - both French and Dutch are spoken.

Following the separation from the Netherlands in 1830, government and education were to a great extent French influenced, even in the north of the country. French was the language of culture and government, and Dutch (or the Flemish versions of Dutch) was seen as a second-class language.

In reaction, a Flemish emancipation movement was established, which gradually became more successful, especially after the First World War. The equality of Dutch was recognised in gradual stages. This finally resulted in the establishment of the language border in 1963. The law recognised four language areas: the Dutch area, the French area, the German area, and the bilingual Brussels-Capital Region. In 1970, these areas were enshrined in the Constitution.

On the Flemish side, there was an increasing conviction that language equality as such was not sufficient. It was felt that the difference in language was accompanied by a difference in culture. This led to the demand for independent authority on cultural matters, without the intervention of French-speaking politicians and government officials.

A so-called cultural autonomy was established in response to these Flemish requests. In 1970, the Constitution recognised three cultural communities: the Dutch, the French and the German cultural communities. In the following years, the cultural communities were granted their own parliament (cultural board), their own government (committee of ministers), and their own administration. Initially the cultural communities were competent only for purely cultural matters in the language area concerned. In the bilingual capital of Brussels, the French-language cultural community was competent with regard to French-language cultural institutions, and the Dutch language community for the Dutch-language institutions. In 1980, the cultural communities became the actual communities: the Flemish, French, and German-language communities. Their powers were extended to matters relating to persons. This concerned certain aspects of health care and social policy. In 1989, they also became competent for virtually all matters concerning education.

The industrialisation of Belgium started and was most intensive in Wallonia, with an emphasis on the coal and steel industry. The decline first of the coal-mining industry, and later of the steel industry, in the 1960s and 1970s, stirred up Walloon regionalism. The impression in Wallonia was that the unitary state which was also governed by Flemish politicians and officials, was not sufficiently concerned with the economic crisis suffered in Wallonia at a time when Flanders was actually flourishing economically. Furthermore, there was little trust in the financial and economic decision-making centres elsewhere, particularly those situated in Brussels. Wallonia expressed the desire to obtain its own decision-making powers in socio-economic matters.

In response to this demand in Wallonia Regions were created. In 1970, the principle of three regions was enshrined in the Constitution: the Flemish Region, the Walloon Region and the Brussels Region. This principle was first elaborated for a provisional period (1974-1975), and

acquired a more permanent character in 1980, at least as regards the Flemish and Walloon Regions.

Because of the co-existence of the communities on the one hand, and the regions on the other hand, the Belgian federal system is very complex.

2. Belgium is a Federal State

Hitherto, each new round of State reforms has raised the question in Belgium of whether the new state structure was or was not a federal system. The fourth reform of the State (1993) leaves no room for doubt that it is. The new article 1 of the Constitution, indeed, now stipulates that « Belgium is a Federal state constituted of Communities and Regions ». A short analytical comparison with the essential elements of a federal system, notably internal autonomy, participation, and co-operation clearly demonstrates the real import of this provision.

2.1 Internal autonomy

A distinguishing feature of the Federal State, and what makes it more complex than the unitary state, is the existence of two distinct legal systems, that of the federal government and that of the sub- national (federated) units, each having its own systems of organs and laws. The Communities and Regions have distinct legal personality, having both their own legislative and executive organs as well as (theoretically, sole) legislative power in many areas, and financial autonomy.

Each Community and Region has its own legislative assembly (Council or Parliament), and executive body (Government), the composition and functioning of which are fixed by the Constitution and special-majority federal laws enacted in execution of it. All the Regional Councils or Parliaments are directly-elected for a five-year period, in principle on the same day as the elections to the European Parliament, with no possibility of early dissolution. Since the Communities and Regions overlap, the composition of the Community Councils is based on that of the Regional Councils, the sole exception being that of the « Council of the German-speaking Community », which is directly-elected independently of the other Councils.

In Flanders, the organs of the Flemish Community also exercise the jurisdiction of the Flemish Region, so that all powers are vested in a single « Flemish Parliament » in the Dutch-speaking area. The same does not apply for the French-speaking part of the country, which has both a « Parliament of the French Community » and a « Walloon Parliament ». Because the jurisdiction of both the Flemish Community and French Community extends to the territory of the bilingual area of Brussels-Capital, members of the Dutch and French linguistic groups of the « Council of the Brussels-Capital Region » will also sit on the Flemish Parliament and the Parliament of the French Community, respectively.

The Community and Regional Governments are elected by majority vote of their respective Councils or Parliaments (Constitution, article 122). Although politically accountable to the

Council or Parliament concerned, the council can only force the resignation of the Government or any of its members by a « constructive motion of no confidence ».

The « merger » between the institutions of the Flemish Community and those of the Flemish Region has produced a single « Flemish Government », while on the French-speaking side, we find both a « Government of the French Community » and a « Walloon Government » (Government of the Walloon Region) whose members are, however, also entitled to sit as members of the Government of the French Community.

In most federal States, the federated entities are free to organise their own affairs, within the limits of the federal Constitution; this normally results in adopting their own Constitution. Prior to the Fourth State reform of 1993, the composition and functioning of the regional and community bodies were governed by the federal Constitution and the federal laws enacted in execution of it. The Fourth State reform only partially rectified what was becoming an increasingly illogical situation. The law-making autonomy invested in the Communities and Regions was given constitutional force in 1995 (articles 118, § 2, and 123, § 2) in matters relating to the election, composition and functioning of the Councils and Governments. This law-making autonomy is exercisable through « special-majority decrees » passed by a two-thirds majority vote in the Council concerned.

The Communities and Regions are invested with legislative power equal to that of the federal legislature. In many areas, the Communities and Regions have sole authority to legislate by « decrees » (or "ordinances" as the Brussels Capital Region is concerned) having the force of statute throughout the territory for which they are responsible. Decrees may repeal, amplify, amend or replace prevailing statutory provisions in the allocated areas of responsibility. Like statutes, they escape review by the ordinary courts and the administrative courts; for that reason they have been placed under the control of a constitutional court, the Court of Arbitration. The legal equality of federal, community and regional laws is a distinguishing characteristic of the Belgian federal system and averts the incidences of concurrent jurisdictions found in certain federal States which operate on the « Bundesrecht bricht Landesrecht » principle. In fact, in Belgian public law, concurrent jurisdictions are the exception to the general rule of exclusively divided jurisdictions between the federal authority and the federated entities. The Court of Arbitration has always emphasised in its judgements that jurisdictions are exclusive both rationae materiae and rationae loci. Considering that some aspects of one function may be the exclusive purview of one authority while other aspects of the same activity may fall under the sole responsibility of another authority, it is possible for cumulative and parallel measures to be enacted in the same area by and at distinct levels of authority without any one law being subordinate to any other. As the policy of one authority may conflict with that of another, but with neither acting ultra vires of its powers, the Court of Arbitration apply the proportionality rule, which is thus developing into a criterion of jurisdiction: no authority may, in administering a policy entrusted to it, take such radical steps without a minimum of good cause for doing so that another authority is seriously obstructed in the effective prosecution of its own policy.

The responsibilities of the Communities and Regions, albeit restrictively allocated are very broad. The Communities have responsibility for cultural affairs, education, personalised services, and the use of languages in certain matters. The Regions have exclusive or partial jurisdiction over land use and planning, the environment and water policy, rural redevelopment and nature conservation, housing, agricultural policy, economic policy, energy policy, local authorities, employment policy, public works and transport.

Policy on international relations rates a special mention: not only is it a key stages towards completion of the federalisation process, it is also producing decentralisation to a degree virtually without precedent in comparative federal law. Prior to the 1993 reform of the State, the division of international jurisdiction between the federal authority and the constituent sub-units had been the source of much controversy. The new provisions put in place by the 1993 reform are based essentially on two core principles: one is to extend the internal autonomy of the federated entities as widely as possible into the international arena, while preserving the coherence of Belgian foreign policy; the other is to strengthen federal authority jurisdiction over the implementation of international and supranational law by the federated entities.

There is no question that the extended jurisdiction of the communities and Regions is most to be seen in the conclusion of treaties. Treaties falling within the exclusive jurisdiction of a Community or a Region are concluded by its Government and approved by its Council or Parliament. The Community or Regional Government concerned must, however, inform the federal Cabinet that negotiations have been entered into; the Cabinet then has thirty days in which to notify its objections to the proposed treaty, the effect being to suspend negotiations. The matter is then referred to the Inter-Ministerial Conference on Foreign Policy (ICFP), which consists of the relevant ministers of the federated and federal Governments. They must then reach a consensus within thirty days on whether negotiations should proceed further or not. If the ICFP fails to reach a consensus, the King may confirm the suspension of negotiations on four grounds. To avoid undue encroachment on the autonomy of the federated entities, these grounds are based on objective, exhaustively enumerated criteria. They can be reduced to two main alternatives:

- either Belgium does not recognise, or does not maintain diplomatic relations with, the country concerned, or it transpires from a decision or an act of the federal State that relations with that country are seriously disrupted; or
- the proposed treaty is incompatible with Belgium's supranational or international obligations.

If, notwithstanding these various obstacles, the treaty is concluded and enters into force, the King may suspend its execution, but only on the same two grounds as above. In such a case, the procedure is identical in all respects with the treaty-making process as described above.

In order to take effect in the Belgian legal system, so-called « mixed » treaties, i.e., those crossing areas of federal, Community and/or Regional jurisdiction, must be assented to by all the legislative assemblies concerned, federal and federated alike. If an instrument like the Maastricht or Nice Treaty, for example, impinges at once on federal, Community and Regional matters, the assent of all (nine) different legislative assemblies - federal, Community and Regional - will be required. The withholding of assent by any one of those assemblies, therefore, would effectively prevent the federal Government from ratifying the treaty.

Because of the complex issues involved, the special legislature laid down the procedure for concluding mixed treaties in a mandatory co-operation agreement between the federal authority and the federated governments.

Mixed treaties are signed by the federal Minister for Foreign Affairs or by a representative invested with full authority, as well as by the Minister appointed by the Government of the Communities and/or Regions concerned, or by a representative invested with full authority.

The Crown ratifies mixed treaties, but not until all the legislative assemblies concerned have assented to them.

The representation of Belgium abroad follows the same principle of extending Communities and Regions' domestic powers into the sphere of foreign representation, while ensuring a minimum measure of coherence to Belgium's foreign policy. As a result of the constitutional principle that the Crown conducts international relations, the decision to recognise foreign States and maintain diplomatic relations with them falls to the King. Under article 107 of the Constitution, the Crown also holds the power of appointment to foreign relation's posts.

Consequently, neither Communities nor Regions can establish their own diplomatic or consular representation abroad. This does not prevent them appointing their own foreign representatives, including economic or commercial attachés, and instructing them directly under the co-operation agreements concluded with the federal authority. However, these representatives are subject to the authority of the head of mission appointed by the federal authority, which is thereby invested with management and co-ordination duties. The Communities and Regions obviously can appoint, and have appointed, representatives with fully independent powers abroad and to international institutions. But they have no diplomatic or consular status.

Representation of the Communities and Regions in international and supranational organisations is also governed by co-operation agreements concluded between the federal entities and the federated entities. The European Union is, of course, a special case. European Union matters are dealt with through a central co-ordinating body within the federal Ministry of Foreign Affairs' Directorate for the Administration of European Affairs. It calls regular concertation meetings with the representatives of the Communities and Regions. The positions to be argued within the Council of Ministers of the European Union are decided by consensus. If no consensus can be reached, the matter can be referred to the ICFP. If no agreement is reached or in urgent cases, the representative in the Belgian seat on the Council of the European Union « may on that occasion only adhere ' ad referendum ' to the position most likely to address the general interest ». Belgium's final position will then be notified to the presidency after the matter has been settled internally, within three days at most.

Since article 146 of the Maastricht Treaty allows Member States to be represented on the Council of Ministers of the European Union by ministers sent from the governments of their federated entities, there is nothing to prevent the Belgian State being represented at Council meetings by a member of the community or Regional Governments. The co-operation agreement of 8 March 1994 subdivides European Councils of Ministers into four categories. In category I - exclusively federal matters (finances, budget, justice, development, etc.) - Belgium is represented by the federal authority alone. In category II - areas of shared competence (agriculture, health, energy, environment, etc.) - the Belgian federal representation is assisted by a representative of the Communities or Regions. The opposite obtains for category III matters (industry and research), while category IV meetings - matters which are exclusively of Community (culture, education, etc.) or Regional (housing and regional planning) competence - the Belgian representation to the Council is through a Community or Regional Minister.

These different arrangements do not detract from the general rule that each Member State has only one spokesman and one vote on the Council. The Belgian delegation is therefore headed by one Minister only from the federal or a federated authority as the case may be. The Communities and Regions take part according to an agreed system of rotation.

As regards the representation of Belgium in organisations other than the European Union, a further distinction must be made between international organisations which deal with matters regarded as mixed competencies from the viewpoint of the Belgian legal system, and those whose areas of concern relate exclusively to matters within the competence of the Communities or Regions.

Representation to organisations in the first category is governed by the framework co-operation agreement of 30 June 1994 which lists the international organisations concerned by name – essentially the Council of Europe, the OECD and organisations in the UN system.
The agreement requires the federal authority and the federated entities to hold preliminary consensus consultations to work out a joint position to be argued at meetings of the international organisation, and to settle the composition of the Belgian delegation in which all authorities concerned by the agenda can be represented. If no joint position can be agreed, and if the prevailing rules of the international organisation prevent the « ad referendum » procedure from being used, or if no agreement is reached by consensus consultations, the head of the Belgian delegation may on that occasion only, abstain. A federal Minister or a Minister of a federated authority, depending on the agenda will head the Belgian ministerial delegation. The Communities and Regions may also have their own representative in Belgium's permanent representation to the international organisations concerned.

There are two possibilities as regards representation to international organisations whose activities fall within the exclusive competence of the Communities or Regions. One is that the federated entities represent themselves this is what happens, for example, at summits of the world French-speaking community where the French Community of Belgium is represented as such by the Leader of its Government with the status of Head of Government in his own right alongside the Federal Prime Minister. The other is that the federated entities represent Belgium : this is the case in particular at the « Nederlandse Taalunie », a Belgo-Dutch cultural organisation in which Belgium is represented by the Flemish Community.

As can be seen, the Fourth State reform of 1993 invested the Communities and Regions with extensive jurisdiction in internal relations, which some observers claim has left a confederate imprint on the State set-up. It must be stressed, however, that the Crown retains the conduct of the federal authority's international relations, that it has control of defence policy and diplomatic representation proper, notwithstanding the various arrangements for consensus consultations, not to say constraint, which enable the Sovereign to maintain the coherence of Belgian foreign policy. The principle of allegiance to the federation, however, is what will mostly orchestrate the working of this new, equally subtle and delicate, balance designed to preserve the exclusive Regional and Community jurisdictions.

The jurisdictions of the Communities and Regions are certainly exclusive, but they are not conferred in toto: some excepted aspects are devolved neither to the Communities nor Regions but remain vested in the federal authority. It would, however, be incorrect to construe Community and Regional responsibilities narrowly since they are allocated powers. The Court of Arbitration places a restrictive interpretation on the exceptions to Community and regional responsibilities reserved to the federal authority, such that they cannot prejudice the scope of Community and Regional jurisdictions. The Court also takes the view that the responsibilities allocated to the Communities and Regions should be interpreted broadly, such that (the narrowly construed exceptions aside) they are to be regarded as transferred « globally » and « in their entirety ». The Communities and Regions may also have jurisdiction over federal matters, including those constitutionally reserved to federal law, where this is « necessary » to the

exercise of their powers and responsibilities. The Court of Arbitration tends to construe this « implicit jurisdiction » of Communities and Regions narrowly: to be compatible with the system of exclusive jurisdiction, « implicit jurisdiction » is acceptable only where differential arrangements are possible and where the impact on the federal matter will be no more than peripheral.

Residual jurisdiction, i.e., that jurisdiction not specifically allocated to any authority, still remains vested in the federal authority. Admittedly, article 35 of the Constitution (included in 1993) establishes the principle that residual jurisdiction may be transferred to the Communities and/or Regions. But the transitional provision in this article provides that such residual competencies shall be transferred only after a new provision has been included in the Constitution enumerating the exclusive powers and responsibilities of the federal authority and after a special-majority federal law has been enacted laying down the conditions and procedures by which such residual jurisdiction is to be transferred. It is open to question whether such transfer will come about in the immediate or near future, if only because of the undoubted difficulty of « rethinking » the existing system of allocation of responsibilities. It will also be noted that the liberal construction placed by the Court of Arbitration on the jurisdictions allocated to the federated entities tempers the principle that residual powers still as yet remain vested in the federal authority.

The Communities and Regions have substantial financial resources with which to fund the responsibilities allocated to them. In this respect, the Belgian Communities and Regions are in no wise inferior to the federated states of America or Australia, the German Länder, the Canadian provinces or the Swiss cantons. Their financial resources are comparatively substantial for such a relatively restricted, although in 2001 enlarged again, tax-levying power.

2.2 Participation

Their autonomous powers aside, participation by the constituent units in federal decision-making is another essential characteristic of a federal state: the federal constitution, which embodies the apportionment of responsibilities between the federal authority and the constituent units can be amended only with the assent - or at least the involvement - of the federated entities. The legislative organ of the Union is comprised of the constituent units as such, on a theoretically equal footing which gives them an effective say in the framing of federal laws, at least in matters affecting their interests.

In the 1993 reform of the State, the autonomy of the federated entities was strengthened by the introduction of directly elected assemblies, while the federal bicameral system was radically reshaped. The two main principles of this reform were, firstly, to transform the Senate into a chamber for reflective debate as a stage in the legislative process, and, secondly, to provide the federated entities with representation in that second Chamber. The reform came into effect in 1995. The direct election of Community and Regional Councils or Parliaments necessitated a reduction in the number of members of the federal Parliament so as to not to create an « inflation of offices ». The problem was that having directly-elected Councils or Parliaments would have increased the number of elected politicians if all forms of « plurality of offices » were abolished. The number of elected or appointed Senators was therefore reduced from 184 to 71 and the number of Representatives form 212 to 150 (Constitution, articles 63 and 67). To this end, some forms of « plurality of offices » have been retained: members of the Walloon Parliament are also

members of the Parliament of the French Community; some of the members of the Council of the Brussels-Capital Region also sit on the Flemish Parliament and the Parliament of the French Community; some members of Community Councils are also senators.

The House of Representatives is the policy chamber, with sole powers of budgetary and political control of the federal Government (Constitution, articles 101 and 174). The two legislative Chambers - the House of Representatives and the Senate - share equal jurisdiction on the revision of the federal Constitution, assent to international treaties and co-operation agreements between the federal authority, the Communities and the Regions, as well as legislation organising the courts and the federal structure of the Belgian State (Constitution, article 77). In the other areas, the Senate provides the opportunity for second thoughts. It may « assume cognisance » of government bills passed by the House and amend them within clearly defined periods, after which they are returned to the House for a final decision. A similar procedure exists for private members' bills originating in the Senate itself (Constitution, articles 78 to 82).

As well as providing an opportunity for second thoughts on legislation, the Senate affords representation for the Communities, despite its somewhat hybrid composition. It also has a role in preventing and settling conflicts of interest between the federated and federal parliamentary assemblies (Constitution, article 143, § 2).

In addition to senators by right, the Senate comprises three categories of member (Constitution, article 67). Firstly, there are the 40 directly elected senators: 25 elected by the Dutch Electoral College, 15 by the French electoral college. The second category is the 21 Community senators elected by and from within the Community councils. It is these senators - who thus hold a plurality of offices - which give the Communities a voice in the Senate in matters concerning the revision of the federal Constitution and the amendment of federal laws governing their status. The Flemish community and the French Community are each represented by 10 senators; the German-speaking Community is represented by one senator only.

The final category is the 10 co-opted senators. They are elected by the directly elected senators and the Community senators of each linguistic group: 6 by the Dutch linguistic group and 4 by the French linguistic group.

Although the Communities as such have only limited representation in the Senate (21 Community senators out of 71), it should not be forgotten that linguistic groups exist in both federal Chambers, which makes it almost inconceivable that laws which infringe the interests of either of the two major communities should be passed in the federal Parliament, firstly because of the qualified majorities necessary to amend the federal Constitution and pass special-majority federal laws. The Communities and Regions whose status - their organs and competencies - is entrenched in the Constitution and special-majority laws, thus enjoy an additional, albeit indirect, protection.

The composition of the Senate reflects the bipolar structure of the Belgian State, centred on the two major communities, but does not wholly disregard the Regional factor in the equation, in that at least seven senators, six of them French-speaking, must reside in the bilingual area of Brussels-Capital. The composition of the Senate is the result of combining proportional representation for the two major Communities with a limited equal representation, direct election by universal suffrage with an indirect election system. There is an imbalance in the bicameral system in favour of the House of Representatives. It is anything but a symbolic bi-cameralism, however: the Senate remains a major factor of law-making power both as regards fundamental legislation and in matters affecting the interests of the federated entities.

2.3 Co-operation

To the classic principles of autonomy and participation, modern federalism has added a third principle, that of co-operation. In modern federal set-ups, the emphasis is more on complementarity and co-operation than separate, autonomous powers. This type of « co-operative federalism » has prompted many different, often informal, types of co-operation, such as intergovernmental conferences.

The exclusive allocation of powers in Belgium and the autonomy of the respective authorities were in some ways obstacles to co-operation. However, the inevitable mutual impingement's between the federal State's exercise of its jurisdiction and the federated entities' exercise of theirs, led to the emergence between 1980 and 1988 of types of co-operation not based on written law, such as the « management agreements » in health policy, for example. The Third State reform of 1988 addressed certain legal objections based on the principle of autonomy and extended the scope for co-operation. Hence, Belgian public law as it stands today recognises a variety of forms of co-operation between the State, the Communities and the Regions, such as: reciprocal representation in management and decision-making bodies; co-operation agreements, which may even on occasion be mandatory; a multitude of consultation procedures, more particularly at executive level, ranging from simple « formal consultations » to an « agreement »; a concertation committee and inter-Ministerial conferences comprised of members of the federal Government and those of the Governments of the Communities and Regions.

Since co-operative federalism often leads to an increase in executive power at the expense of parliamentary controls, extreme developments of co-operative federalism have been the target of trenchant criticism. The Fourth State reform of 1993 addressed this criticism by increasing the participation of the parliamentary assemblies, by whom the majority of co-operation agreements must henceforth be approved.

3. Conclusion

Belgium has within a period of around 25 years peacefully evolved from a unitary decentralised State into a federal State with Communities and Regions, each having its own Legislature, Executive and civil service, and being competent for educational, cultural and economic matters. A Constitutional Court with limited powers, the Court of Arbitration, was set up in 1984 to settle disputes between the federal legislator and the legislators of the Regions and Communities about their respective legislative powers. The Court played from the outset an important role in clarifying these respective spheres of competencies and to uphold the constitutional rules in this respect.

In 1989 the competencies of the Court were extended to the review of the compliance of legislative rules with some fundamental rights enumerated in the Constitution: the principle of equality and non-discrimination (art. 10 and 11) and the right to and the freedom of education (art. 24). The Court took the view that any violation of a fundamental right guaranteed under the Constitution or under a treaty might entail an infringement of the principle of non-discrimination. Nowadays only a minor part of the caseload of the Court deals with the original function of the Court: reviewing federal, regional and community legislation for observing the

respective legislative powers of the federation and the federated entities. This could be interpreted as a sign that the Belgian federal system is meanwhile working relatively well and that most of conflicts of competencies can be avoided before they occur.

Recently the competencies of the Court of Arbitration were extended again by Special Act of March 9th 2003. The Court is now competent for reviewing all federal, regional and community legislation for compliance with al the rights and freedoms contained in Title II of the Constitution and in the articles 170, 172 (fundamental rules dealing with taxation) and 191 (protection of foreigners). This shows that the old mistrust against constitutional review in Belgium is gradually fading away.