The Potential Relevance of Belgian Minority Protection for South Africa

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Introduction

Legal constructs and systems, especially those related to structure of government [1] and minority protection [2] cannot be transposed as such from one country to another. Nevertheless, we think that the Belgian experience of minority protection might in some respects be useful for the South African situation.

Although the degree of diversity in Belgium is not the same as it is in South Africa, the study of the Belgian situation is still interesting. Belgium has a long history of tensions between linguistic communities. Moreover, it had to deal with major conflicts in the education system, i.a. originating from differing views in assessing the influence of religion in education. Certain of these experiences may prove useful for South Africa in view of its high degree of linguistic and religious diversity.

Furthermore, Belgium has had an interesting development as to its constitutional structure towards a federal system [3]. The latter became the most important scheme on the basis of which techniques protecting minorities are devised. Federalism is indeed one of the several possible mechanisms which can be used to enhance minority protection [4].

I. Belgian Federalism

A. Some Typical Features of Belgian Federalism [5]

According to Article 1 of the Constitution, as amended in 1993, 'Belgium is a federal State, composed of the Communities and the Regions'.

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1 B. DE VILLIERS, *Regional Government: Guidelines for South Africa*. Pretoria, 1992, p. 73.

2 W. KYMLICKA, *Multicultural Citizenship*. Oxford, 1995, p. 1; H. HANNUM, Introduction. *Fletcher Forum on World Affairs*, Vol. 19, 1995, nr. 1, p. 2.

3 An extensive study of all aspects of Belgian federalism is, however, beyond the scope of this article. For more details: A. ALEN, *Handboek van het Belgisch Staatsrecht*. Antwerp, 1995; A. ALEN and R. ERGEC, *Federal Belgium after the Fourth State Reform of 1993*. Brussels, Ministry of Foreign Affairs, 1994; G. CRAENEN (ed.), *The Institutions of Federal Belgium*. Leuven, 1996. See also A. ALEN, *Treatise on Belgian Constitutional Law*. Deventer/Boston, 1992; Nationalism - Federalism - Democracy. The example of Belgium. *European Review of Public Law*, Vol. 5, 1993, nr. 1, pp. 41-88.

4 See e.g. Th. FLEINER and L.R. BASTA, Federalism, Federal States and Decentralization. In: L.R. BASTA and Th. FLEINER (eds.), *Federalism and Multiethnic States. The Case of Switzerland*. Fribourg, 1996, p. 38.

5 See also F. DELPÉRÉE, La Belgique est un Etat fédéral. *Journal des Tribunaux*, 1993, pp. 637-646.

In 1831, Belgium came into existence as a unitary decentralized state and as a French-speaking nation. In spite of the fact that the Flemish population constituted the majority, the Belgian State of 1831 was a creation of the French-speaking middle classes. The Flemish Movement devoted itself to the genuine recognition and development of the Dutch language, culture and education.

The demands of the Flemish Movement were met, on the one hand, by means of linguistic legislation creating as many linguistically homogeneous regions as possible, and, on the other hand, by the establishment of Communities with legislative power regarding cultural, educational and some other matters. The division of Belgium into four linguistic regions and the related territoriality principle are enshrined in Article 4 of the Constitution: the Dutch-speaking, the French-speaking, the German-speaking, all three unilingual regions and the bilingual region of Brussels-Capital. Article 2 of the Constitution recognizes the existence of three Communities: the Flemish Community, the French Community and the German-speaking Community. If 'communitarization' was principally a response to Flemish aspirations, 'regionalization' sought to meet the Walloon desire for economic autonomy. According to Article 3 of the Constitution, Belgium comprises three Regions with legislative power in economic and other matters: the Flemish Region, the Walloon Region and the Brussels Region.

The first typical feature of Belgian federalism is indeed *the existence of two kinds of federated entities*, namely the Communities and the Regions. These concepts correspond to the distinctive aspirations of the two major communities in the country. The difference in desire for autonomy explains also the gradual emergence of several institutional asymmetries [6]. More generally, it should be emphasized that despite the fact that Belgium has six federated entities, the State is characterized by its essentially bipolar nature at the federal level [7].

This *bipolar nature of the Belgian State* is reflected in the various protective mechanisms for the national French-speaking minority, which calmed their fears of permanent minority status. Firstly, Article 99 of the Constitution prescribes that the federal Council of Ministers needs to consist of an equal number of Dutch-speaking and French-speaking Ministers, with the possible exception of the Prime Minister. Secondly, Article 43 of the Constitution divides both Houses of Federal Parliament in two linguistic groups. Although the Dutch linguistic group is bigger corresponding to the demographic preponderance of the Flemish, the safeguard for the French-speaking minority is built into the requirement of special majorities for certain constitutionally determined matters as well as in the 'alarm-bell procedure'. Furthermore, it is important to stress that in Brussels-Capital where the national demographic proportion is reversed as the majority is French-speaking, analogous protections for the Flemish minority are instituted as those existing for the French-speaking minority at the federal level.

A special majority law requires that in each House of Federal Parliament, the majority of the members of each linguistic group is present and votes in favour

6 The asymmetry in the community and the regional institutions means essentially that in the Flemish part of the country the regional competences are exercised by the community bodies and that in the French part of the country certain community competences are exercised by the regional institutions: see Articles 137 and 138 of the Constitution and Article 1 of the Special Institutional Reform Act of August 8, 1980.

7 A. ALEN, *Belgium: Bipolar and Centrifugal Federalism*. Brussels, Ministry of Foreign Affairs, 1990.

of the bill and that the total of the affirmative votes in both groups together constitutes two thirds of the total votes cast [8]. Consequently, such bills cannot be passed against the will of one of the linguistic groups in Federal Parliament. According to Article 54 of the Constitution, the 'alarm-bell procedure' is initiated by a motion signed by at least three quarters of a linguistic group considering that a bill before it is likely to impair seriously the relations between the two major communities. This results in the immediate suspension of the parliamentary proceedings and the motion is referred to the Council of Ministers whose interference is obviously a safeguard considering its composition and its decision-making on the basis of consensus.

The three highest courts, i.e. the Court of Arbitration (the Constitutional Court), the Court of Cassation and the Council of State, have to be composed of an equal number of Dutch-speaking and French-speaking judges. These requirements once more emphasize the bipolarity of the Belgian State. The splitting up of the political parties along community lines further exacerbates this bipolar nature of the Belgian State in that it is mainly responsible for the duality of the whole political system [9]. Finally, the mass media in Belgium have not, as in other federations, a centralizing impact, but on the contrary further strengthen the bipolarity. The latter occurs because the mass media are completely divided into separate networks, which hardly penetrate each other's linguistic region. The reception of communication reflects furthermore a great inward-looking mentality of the two major communities, even to the extent that in reporting, the other part of the country is viewed as 'foreign' [10].

A third feature of *Belgian federalism* is that it, contrary to the normal federal practice, *is centrifugal*: the federated entities have developed out of the erosion of a state which was originally unitary and decentralized. This devolutionary federalism [11] explains the present allocation of powers as in Canada: the powers of the federated entities are enumerated and the federal authority is vested with the residuary powers [12]. Unlike many other federal states, there is no supremacy clause for Belgian federal legislation, which also relates to the centrifugal origin of the Communities and Regions.

Another basic feature of Belgian federalism is *the territoriality principle* that underpins the general institutional structure of the Belgian State. The territoriality prinicple was given shape in the linguistic laws of 1932-1935 and especially in the ones of 1962-1963. The latter demarcated the linguistic boundary and divided the country into four linguistic regions. In principle, all public acts in the unilingual regions must be implemented solely in the language of the region, whereas only in the bilingual region of Brussels-Capital Dutch and French are on

8 See Article 4 of the Constitution.

9 A. ALEN, Nationalism - Federalism - Democracy: Belgium, *op.cit.*, pp. 74-75; W. DEWACHTER, *De dualistische identiteit van de Belgische maatschappij*. Amsterdam, Koninklijke Nederlandse Akademie van Wetenschappen, 1992, pp. 16-18.

10 A. ALEN, Nationalism - Federalism - Democracy: Belgium, *op.cit.*, p. 75; W. DEWACHTER, *op.cit.*, pp. 22-24.

11 See e.g. K. LENAERTS, Constitutionalism and the Many Faces of Federalism. *The American Journal of Comparative Law*, Vol. 38, 1990, nr. 2, pp. 206-207.

12 However, Article 35 of the Constitution provides a potential transfer of the residuary powers from the federal level to the federated entities.

a complete equal footing. Subsequently, the territoriality principle obtained an increasingly important role in the development of the federal state structure [13].

The linguistic regions indirectly determine the territorial competence of the Communities and Regions. In this respect, the Court of Arbitration has emphasized the 'system of exclusive territorial allocation of competences': the competences of the Communities and Regions are generally exclusive and always restricted to their territory so that every concrete situation is only regulated by one legislator [14]. Thus, the Court prohibited the attempts of the French Community to dissociate the concept 'Community' from all connection with a territory and to introduce the principle of personality. The latter principle would imply that the French Community would be competent towards every person speaking the French language, independent from the linguistic region where that person lives. In a later and important judgment, the Court of Arbitration has explicitly confirmed the principle of exclusivity for the territorial allocation of the community competences. Although each legislator is competent within its own sphere of competences to protect minorities according to Article 27 of the International Covenant on Civil and Political Rights, the Communities are not competent to protect the minorities in another linguistic region. On the other hand, the Court does not exclude the possibility that certain extra-territorial effects could result from the actions of a Community to promote its own culture. These spill-over consequences, however, may not make impossible the exercise by another Community of its cultural policy. Indeed, the territorial delimitation does not preclude someone from having the right to the cultural life he freely chooses in whichever linguistic region he lives [15].

Finally, the territoriality principle also has a strong hold on the electoral system. The Parliaments of the federated entities are directly elected on a regional basis so that the French-speaking people within the Flemish Region can only vote or be elected for the Flemish Parliament [16].

In a number of proceedings against Belgium, the European Court of Human Rights has accepted the territoriality principle as the framework for the complete Belgian state structure. In a case concerning linguistic legislation in educational matters, the Court held that legislation which is based upon an objective criterion of division into linguistic regions cannot be considered arbitrary. Moreover, the Court recognizes that such legislation pursues an objective of public interest. The territoriality principle requires that educational institutions organized by public authorities located in a unilingual region provide their education in

13 See e.g. P. PEETERS, Federalism: A comparative perspective - Belgium transforms from a Unitary to a Federal State. In: B. DE VILLIERS (ed.), *Evaluating Federal Systems*, Kenwyn, 1994, p. 195.

14 Court of Arbitration, Judgments Nos. 9 and 10, January 30, 1986. *Belgian Official Gazette*, February 12, 1986.

15 Court of Arbitration, Judgment No. 54/96, October 3, 1996. *Belgian Official Gazette*, October 10, 1996. See A. ALEN and P. PEETERS, The Competences of the Communities in the Belgian Federal State: The Principle of Exclusivity Revisited. *European Public Law*, Vol. 3, 1997, nr. 2, pp. 165-173. See also K. HENRARD. *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 1997, pp. 782-786.

16 This consequence of the territoriality principle has been approved by the Court of Arbitration (Judgment No. 90/94, December 22, 1994. *Belgian Official Gazette*, January 12, 1995) as well as by the European Commission of Human Rights (Decision of September 8, 1997, *Clerfayt et al.*, No. 27120/95).

the language of that region. This regulation has been found proportional because the organization of free education is not at stake [17]. In another case, the Court held that an electoral system which necessitates that members of a linguistic minority cast their votes for candidates who are able and prepared to use the language of their region is not necessarily a threat to the interests of such minorities, in particular when the political and legal order provides for multiple guarantees, as is the case in Belgium [18].

Despite the fact that the division of the country into linguistic regions has established significant homogeneous areas, the homogeneity is not total. This absence of complete linguistic homogeneity can be explained by three factors. Firstly, the region of Brussels-Capital is constitutionally bilingual. Consequently, the Flemish Community and the French Community are only competent towards unilingual institutions and not towards persons in this territory, since there are no subnationalities. Secondly, there are linguistic minorities who speak another language in the unilingual regions for which 'linguistic facilities' are provided (see *infra*, II). Finally, the territoriality priniciple does not prevent the application of the international and constitutional guarantees prohibiting discrimination.

A last basic feature of Beligan federalism is *the lack of constitutional and judicial autonomy* for the federated entities [19]. Belgian Communities and Regions cannot pass their own constitutions [20]. They are also not vested with an autonomous power to organize judicial authorities within their sphere of government.

B. The Potentially Relevant Features of Belgian Federal Structures for South Africa

South Africa obviously has not the aforesaid bipolar feature and its numerous population groups furthermore lack the strong territorial concentration of the linguistic groups in Belgium. Some more general remarks or suggestions by analogy, however, are still possible and can prove useful.

Generally, the way in which Belgium struck the balance between unity and diversity in the development of its federal structure in successive stages has been rather successful as it has been able to calm the waves of secessionist demands that occasionally emerged.

First of all, the mainly exclusive allocation of powers between the several authorities and related autonomy for the federated entities goes hand in hand with

17 European Court of Human Rights, July 23, 1968, *Belgian Linguistic Case*.

18 European Court of Human Rights, March 2, 1987, *Mathieu-Mohin and Clerfayt*.

19 Compare with Th. FLEINER and L.R. BASTA, *op.cit.*, p. 28: '(Then), we cannot speak of a federal state in the proper sense'.

20 However, Articles 118 and 123 of the Constitution provide the possibility for certain federated entities to regulate by special majority act some matters enumerated in the Constitution and its enacting special majority laws, i.e. some aspects with regard to the election, the composition and the working of their Parliaments and Governments.

specific limitations of these competences in favour of national unity [21] and is also countered by the growth of co-operation mechanisms [22].

Secondly, certain institutional asymmetries, linked to the different aspirations of the ethnic groups concerned, were allowed to develop. This feature proved to be positive for the continuation of the state structure. A different kind of asymmetry is to be found in Spain where the degree of self government can be wide or restricted according to the wishes of the nationalities and regions [23].

Thirdly, a certain criticism, especially on the French-speaking side in Belgium, on the use of the territoriality principle as cornerstone of the state structure is important for South Africa. The critical observation is made that even if the federated entities are more ethnically demarcated, there is still the need for minority protection within these entities as well. In case South Africa will elaborate more legislation dealing with linguistic or cultural issues of importance for the distinct ethnic groups, it might want to secure additional supervision structures in particularly sensitive areas.

Fourthly, the fact that from the beginning of the federalization process additional protection for the French-speaking minority existed in the federal structures, exemplifies that federalism is not sufficient to achieve an adequate minority protection [24]. This observation is of course particularly true in a country as South Africa where the several population groups only have relative territorial concentrations.

II. Specific Regulations Aimed at the Protection of Linguistic Minorities

A. Belgian Regulation [25]

Belgium has three official languages namely Dutch, French and German. It is particularly interesting to note that German, only spoken by less than 1% of the population, is nevertheless an official language. It does not, however, have the same status as the languages of the two major communities in that federal legislation and regulation does not automatically have an official translation and is never an authentic version [26]. The Court of Arbitration has ruled that this distinction in status does not amount to a violation of the equality principle while at the

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21 One of the general limitations on the powers of the federated entities is the concept of an economic and monetary union: see A. ALEN, *Treatise on Belgian Constitutional Law, op.cit.*, pp. 140-141.

22 The inevitable interdependence and mutual influence in the exercise of powers has entailed a variety of co-operation mechanisms between the State, the Communities and the Regions: see R. MOERENHOUT and J. SMETS, *De samenwerking tussen de federale Staat, de Gemeenschappen en de Gewesten*. Antwerp, 1994.

23 L. MORENO, *Asymmetry in Spain: Federalism in the making?* (unpublished paper, XVIth World Congress of the IPSA, August 21-25, 1994, p. 10).

24 J. THEUNIS, *De bescherming van minderheden in het internationaal en nationaal recht*. Ghent, 1995, pp. 80-81.

25 See also A. ALEN, *Patterns of Multilingualism: the Case of Belgium* (unpublished paper, Workshop Multilingualism - The Baltic Republics Today, University of Joensuu, November 11-13, 1995).

26 The fact that the Constitution only had its authentic German version in 1991 can also be linked to this 'lesser status'.

same time urging for the systematic translation of the federal legislation and regulation in German [27]. More generally this can be seen to exemplify the fact that most linguistic regulations are an expression of the essential bipolar nature of the Belgian State.

The linguistic legislation of the 60's abolished the language census [28], demarcated the linguistic boundary definitively [29], established four linguistic regions and adapted the provincial, municipal and administrative districts' boundaries accordingly and instituted the territoriality principle (see *supra*, I). With the exception of the bilingual region of Brussels-Capital and the recognition of 27 municipalities with facilities (i.a. the whole of the German-speaking region), the choice was made for homogeneous linguistic regions and thus for the assimilation of linguistic minorities [30]. The federal structure and the specific allocation of powers entail not only the protection of the French-speaking minority at the federal level but also of the linguistic minorities in Brussels-Capital, the German-speaking region and the other municipalities with facilities in that the legislative competence of the use of languages is situated at the federal level where the balance is restored for the Dutch-speaking and the French-speaking group [31]. This increased protection for linguistic minorities in certain sensitive areas is further extended by the 1993 State reform in which the division of the province Brabant in two, namely the province Flemish Brabant and the province Walloon Brabant, went hand in hand with enhanced protection of the French-speaking population in the six peripheral municipalities in the Dutch-speaking region (situated in the new province of Flemish Brabant). The latter was in turn compensated by the same protection for the Flemish minority in the bilingual region of Brussels-Capital [32]. This enhanced protection is realized through an increased control on the implementation of the linguistic legislation. [33]

27 **Court of Arbitration, Judgment No. 59/94**, July 14, 1994. *Belgian Official Gazette*, July 30, 1994. See J. VAN NIEUWENHOVE, De minimis non curat praetor? Over de Duitse vertaling van normatieve teksten. *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 1997, pp. 297-307.

28 The language census had resulted in the continuing loss of Flemish territory, especially in the Brussels conurbation.

29 This linguistic demarcation is final in that it is not affected by the national population census effectuated every ten years. The boundaries of the linguistic regions can only be changed by a special majority law (Article 4 of the Constitution).

30 See the final report of April 24, 1958 by the Centre-Harmel (set up in 1948) that has prepared the linguistic laws: even the linguistic facilities should have a tendency to die out, since the linguistic minorities 'must adapt to their entourage': *Parliamentary Documents* of the House of Representatives, 1957-1958, No. 940, p. 344. See also *ibidem*, p. 310: '(...) Thus, the personal element is sacrificed to the advantage of the territorial element'.

31 With the exception of the use of languages in education in the German-speaking region: since the constitutional provision of May 20, 1997, the German-speaking Community is empowered to regulate the use of languages in education within its territory.

32 Brussels-Capital is no longer part of any province.

33 See P. VAN ORSHOVEN, Brussel, Brabant en de minderheden. In: A. ALEN and L.P. SUETENS (eds.), *Het federale België na de vierde Staatshervorming*. Bruges, 1993, pp. 260-264; P. VANDERNOOT, La scission de la province de Brabant et la protection des minorités. In: *Les réformes institutionnelles de 1993. Vers un fédéralisme achevé?* Brussels, 1994, pp. 325-336.

There is, however, apart from the regulation concerning the 27 municipalities with linguistic facilities, no other protection for the linguistic minorities in the unilingual regions exactly because the territoriality principle underpins the general institutional structure of the Belgian State [34]. There are furthermore no other specific legislative provisions, the constitutional provisions on equality and non-discrimination aside [35], aimed at protecting these minorities. All the existing linguistic legislation and enforcement procedures are basically aimed at strengthening the linguistic homogeneity in the unilingual regions.

The following paragraphs will subsequently deal with the use of languages in administrative matters, in court proceedings and in legislation, all of which are matters of interest to minorities.

The legislation regarding *the use of languages in administrative matters* is to be found in the legislation coordinated by Royal Decree of July 18, 1966 and embodies the territoriality principle in that the language of the region is said to be the language in administrative matters. The latter is of course mitigated for the municipalities with a special linguistic status. Normally in a unilingual region, the holders of a public office in *local* services have to use the language of the region in their dealings with the public and with other services. In the municipalities with facilities, on the other hand, the notices and public acts may or must be drafted in both the language of the region and in that of the protected minority and the public authorities must furthermore address private citizens in the language chosen by the latter. Regarding those 27 municipalities, it should be pointed out that the rules governing the use of languages in administrative matters, in education and in labour relations may only be modified through a special majority law [36].

The *central* services, covering the whole country, are bilingual, once again underlining the bipolar character of the Belgian State, but they have to use the language of the region with which they are dealing and in the contacts with individuals they have to use the national language the latter used. An interesting feature is the detailed regulation of the language to be used by *regional* services with an area of competence larger than one municipality but smaller than the whole country as they can cover municipalities from different linguistic regions. Except for the Brussels Region, all the services in the other federated entities are basically unilingual with certain regulations regarding the municipalities with facilities in their territory. The regulation regarding the services in the *bilingual region of Brussels-Capital*, however, is more complicated. For the local services, several rules depending on the location of the acts determine which languages are to be used in the internal service or in dealings with other services. Notices, communications and forms are made in Dutch and French and in their dealings with private citizens, officials use the language used by them in so far as it is Dutch or French. The services of the Brussels Region are bilingual.

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34 See *supra*, I. This feature of Belgian federalism was further enhanced during the 1993 State reform with the replacement of the province Brabant by the province Flemish Brabant and the province Walloon Brabant while not assigning the bilingual region of Brussels-Capital to any province.

35 Articles 10 and 11 of the Constitution.

36 In every way with the exception of the use of languages in education in the German-speaking region (see note 31).

Although generally the regulation of the use of languages in administrative matters is aimed at the confirmation and protection of the linguistic majority of a linguistic region, the regulation regarding the central civil service, the civil service of the Brussels Region and the Brussels municipalities' administration does contain provisions that are more conducive to protection of linguistic minorities. For the higher posts in these administrations, an equal amount of Dutch-speaking and French-speaking civil servants have to be hired. It is obvious that this regulation exemplifies once more the bipolar nature of the Belgian State and the parallel but inverse protection schemes for linguistic minorities at the federal and the Brussels-Capital level (see *supra*, I).

The use of languages in court proceedings is differently conceived for civil and criminal matters [37]. Whereas in civil matters, the territoriality principle reigns, in criminal matters the rights of defence take precedence. Court proceedings in civil matters in a unilingual region are in the language of that region whereas for the bilingual region of Brussels-Capital, the choice is left to the defendant. The rights of defence in criminal matters entail that the accused may ask for translations of any document and may even ask for the referral of his case to a court that uses his national language.

The use of languages in legislation is completely regulated at the federal level, even concerning the rules of the federated entities. The Law of May 31, 1961 provides that federal legislation needs to be adopted, promulgated and published in Dutch and French, both versions being equally authentic. It has already been pointed out that this does not cater for German, the third national official language; which is nevertheless partially remedied by the fact that the district commissioner of the German-speaking region has a federal budget to translate federal regulations after which these can be made official (but not authentic) by Royal Decree.

Similar rules as for the federal legislation apply to the ordinances, i.e. the legislative rules of the Brussels Region. The decrees (i.e. the legislative rules) of the Flemish Community and the French Community are published with a translation in the other major national language, whereas the decrees of the German-speaking Community are published with a translation in Dutch and in French. Finally, decrees of the Walloon Region are published with a translation in both other national languages.

B. Relevance of the Belgian Regulation for South Africa

Language is a particular sensitive issue in South Africa as well, i.a. considering the apartheid regime where the constitutional protection of English and Afrikaans went hand in hand with the neglect and undervaluation of African languages.

In general, that the differential treatment of the German-speaking Community in Belgium does not give rise to serious problems, needs to be stressed as it has obvious relevance for the extreme linguistic diversity in South Africa. The several ethnic groups in South Africa do have different fears as to domination and loss of their distinct identity what consequently could be met by different degrees of autonomy and/or other group protections, specifically with regard to the consequences of the status of 'official language'.

37 See the Law of June 15, 1935.

Regarding the legislation on the use of languages, it was already emphasized that this is all closely linked to the bipolar character of the Belgian State and thus obviously less directly relevant for South Africa. In principle, the regulation of the use of languages in administrative matters, in education and in labour relations are competences of the Flemish and French Communities and thus linked to the strong territorial concentrations of the linguistic groups in Belgium. Consequently, the possible relevance for South Africa will be restricted to an analogous implementation of certain principles.

The principle that the language of the region is the language of administration could be seen to find a certain degree of reflection in the declaration of one or more official provincial languages as being the languages predominantly spoken in the province or in specific parts of it. In this respect, the detailed regulation in Belgium of the use of languages for 'regional administrative services' going beyond a single municipality and covering more than one linguistic region should be mentioned. It is in any event interesting to note that the Final Constitution of South Africa enumerates 'usage' and 'regional circumstances' as factors to be taken into account by provincial governments when they determine which particular official languages they will use for 'purposes of government' [38].

A final principle that could be relevant for South Africa is the increased supervision and control on linguistic regulations in areas particularly sensitive as to linguistic issues.

III. The Belgian Protection of Ideological and Philosophical Minorities and the Relevance for South Africa's Ethnic Minorities

A. Belgian Regulation [39]

The category of ideological and philosophical minorities emerged in Belgium with the establishment of new legislative entities, i.e. the Communities, as a step in the realization of cultural autonomy. This cultural autonomy was feared to disturb the ideological equilibrium between Catholics and non-Catholics. The former are a majority in Flanders whereas the latter dominate in Wallonia.

Obviously, the protection for this type of minority, caused by the federalization of the country, had to rely on other mechanisms. The different kind of protection for the aforesaid minorities can also be seen to be related to their lesser degree of territorial concentration, what makes it more appropriate to certain group rights. The 1970 revision of the Constitution consequently did not only entail a State reform but also added specific safeguards for the ideological and philosophical minorities and this in two constitutional provisions.

38 Section 6 (3) (a) of the Final Constitution. This Subsection stipulates that each provincial government should use at least two official languages.

39 See i.a. H. DUMONT, *Le pluralisme idéologique et l'autonomie culturelle en droit public belge*. Brussels, 1996; G. VAN HAEGENDOREN, Religious and Ideological Accommodation in Belgium. *Plural Societies*, 1987, pp. 23-28.

First of all, Article 11 of the Constitution not only provides a general prohibition on discrimination [40] but also includes more specifically an obligation for federal and community legislators to guarantee the rights and liberties of ideological and philosophical minorities. Secondly, Article 131 of the Constitution compels the federal Legislature to enact statutory provisions aimed at preventing any discrimination based on ideological or philosophical grounds in the Community Parliaments.

By way of implementation of Article 131 of the Constitution an ideological or philosophical 'alarm-bell procedure', similar to the linguistic 'alarm-bell procedure' (see *supra*, I), was introduced by the Law of July 3, 1971. The former 'alarm-bell procedure' can be used in the Community Parliaments by at least one quarter of its members to bring the matter to the Federal Parliament, when they are of the opinion that a bill is ideologically or philosophically discriminatory. The involvement of the Federal Parliament in the procedure prevents the potential minorisation of some ideological or philosophical 'tendencies' (groups) at the Community level.

Precisely because the fear of ideological and philosophical discrimination was not completely alleviated by this procedure at the legislative level, the political parties concluded a Cultural Pact dealing with such discrimination in cultural matters at the executive level, which was incorporated into statutory law on July 16, 1973. Although the provisions in said law are not confined to minorities but are aimed at 'all tendencies' whether minority or majority, it nevertheless obviously implies protective measures for the minority groups.

Although the statute starts off with enshrining an individual right to non-discrimination on ideological or philosophical grounds, it distinguishes itself in that it mainly shapes group rights since the beneficiaries of the several guarantees are in the first place the groups as such rather than the individuals in their capacity as members of a group [41].

The guarantees for the ideological and philosophical groups provided for in the statute vary from rights of participation in cultural policy, to access rights to cultural infrastructure and job allocations. The right to participate in the elaboration and implementation of the cultural policy is secured through representation of all the groups in the advisory bodies set up to this end by the public authorities. Furthermore, public authorities must associate the groups with the administration of cultural institutions, ensuring them 'fair representation' in the boards of such institutions. Everybody should have equal access to cultural infrastructure without discrimination or intervention on the part of the authorities. All groups, represented in a Community Parliament, should furthermore have access to public broadcasting and should be involved in its administration according to the principle of proportional representation. Subsidies for cultural activities have to be granted on the basis of objective standards legally established. A final guarantee deals with decisions of recruiting and promoting personnel exer-

40 As of January 1989, the Court of Arbitration's competence was enlarged so as to be entitled to annul legislation violating the general prohibition on discrimination provided in Article 11 of the Constitution.

41 G. VAN HAEGENDOREN, *op.cit.*, p. 25. The field of application of the statute, however, is rather limited as it only provides protection against the actions of the executive authorities in cultural matters and the rights are not attributed to mere political or linguistic groups but to all ideological and philosophical groups.

cising cultural functions. These decisions should be made in such a way that the functions are equitably spread over all groups while securing a minimum representation for each and preventing any monopoly or unjustified predominance of one of the groups.

In several judgments of the Court of Arbitration [42], however, the latter provision obliging the public authorities to establish group representation in the civil service has been held to violate the equality principle of Articles 10 and 11 of the Constitution. It should be stressed that in this way, the Court of Arbitration has ruled that a provision meant to be an implementation of the non-discrimination provision is actually violating it. The judgments of the Court of Arbitration, giving priority to individual equality over the equilibrium between the groups, can be situated against a background of diminished political sensitivity regarding ideological or philosophical discrimination [43].

The evaluation of the Act embodying the Cultural Pact will focus only on the issues specifically relevant considering the topic of this paper. Although the aim of the statute is to go beyond protection and also stimulate and increase the participation of all ideological and philosophical groups in cultural matters, in the actual implementation it has been largely reduced to a problem of distribution of subsidies. A positive aspect though, has been the eradication of forms of 'small apartheid' at the local level whereas before the majority all too easily disregarded the aspirations of the minorities. On the other hand, the regulation has enhanced the politicization. One of the most striking examples in this regard is the provision requiring that the representation of the ideological and philosophical groups is based on their presence in the representative body of the political authority concerned.

B. Relevance of certain Belgian Regulations for South Africa

Although the ideological-philosophical division in Belgium has no direct counterpart in South Africa, a more indirect analogy can be found in the existence of several ethnic groups with their distinct cultural identity. The latter indeed often involves differences in 'Weltanschauung' and is obviously closely linked to the issue of cultural rights.

The kind of provisions in the Statute embodying the Cultural Pact seems to be the regulation that has most potential for an analogous application in South Africa regarding the several ethnic groups there. First of all, the application of analogies of the several guarantees provided in that statute would be very appropriate in South Africa against the background of neglect and discrimination of the several African cultures. Secondly, Section 30 of the Final Constitution could be said to warrant positive obligations on the part of the public authorities possibly including certain group rights, thus providing another link with the Belgian legislation.

Concerning the jurisprudence of the Court of Arbitration with regard to the provision on the civil service, it should be taken into account that the related in-

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42 The following judgments all dealt with preliminary rulings: Court of Arbitration, No. 65/93, July 15, 1993. *Belgian Official Gazette*, September 18, 1993; No. 86/93, December 16, 1993. *Belgian Official Gazette*, March 5, 1994; No. 7/94, January 20, 1994. *Belgian Official Gazette*, March 23, 1994. See H. DUMONT, *op.cit.*, pp. 485-493.

43 J. THEUNIS, *op.cit.*, p. 88.

terpretation of the equality principle has to be seen against the historical and societal circumstances. In South Africa, the Constitutional Court is unlikely to hold that an analogous statute would violate the equality provision, especially considering the fact that the latter explicitly allows affirmative action for groups historically disadvantaged by unfair discrimination [44] and considering the current atmosphere and thrust of national reconciliation and reconstruction.

Finally, it should be stressed that the specific type of solution in Belgium for the ideological minorities is related to their lesser territorial concentration and entails a clear focus on group rights other than federalism.

IV. The Way in which Belgium protects its Religious Diversity and its Relevance for South Africa

A. Belgian Regulation [45]

In Belgium, the several religious beliefs can not only draw on the more general constitutional rights and freedoms that also apply in religious matters such as the freedom of education [46] or the freedom of assembly [47], but there are additionally two constitutional provisions dealing with individual human rights and one constitutional provision dealing with organizational matters that are more directly aimed at religious freedom. All these constitutionally guaranteed rights in combination with the equality principle obviously provide protection for the (members of) religious minorities. The most remarkable feature of the Belgian regulation regarding religious groups, however, is the peculiar 'separation' of Church and State dating back to the establishment of the Belgian State in 1830.

Whereas Articles 19 and 20 of the Constitution are more related to the spiritual freedom of religion by guaranteeing freedom of worship, Article 21 is more focused on the organizational aspect in that it guarantees freedom of ecclesiastical organization allowing an ecclesiastical authority to chose its internal structure itself. The constitutional provisions implementing the equality principle entail that all religions are equal before the law and are equally protected - which is of obvious importance to religious minorities. Furthermore, it is important that the Court of Cassation has ruled, and this already in 1834, that in determining what is a religion, no subjective value judgments are allowed [48].

The peculiar 'separation' between Church and State in Belgium comes about because of the fact that, although there is no established State Church, certain religions are recognized or officially endorsed by the State entailing mostly financial consequences. The public endorsement is done either by law or by virtue of a law and on the basis of the societal value of the religion as a service to the

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44 See Section 8(3) of the Interim Constitution and Section 9 (2) of the Final Constitution.

45 See A. ALEN, *Handboek van het Belgisch Staatsrecht*, *op.cit.*, pp.817-824; *Treatise on Belgian Constitutional Law*, *op.cit.*, pp. 265-268.

46 Article 24 of the Constitution.

47 Article 26 of the Constitution.

48 Court of Cassation, November 27, 1834. *Pasicrisie*, 1834, I, 330. For an overview of the factors taken into account by the Belgian courts: see i.a. G. VAN HAEGENDOREN, *op. cit.*, pp. 19-20.

community without further formal criteria. At the moment, six religions are endorsed in this way, namely: Catholicism, Protestantism, Judaism, Anglicanism, Islam, and finally the Greek and Russian Orthodox Church. Although most consequences of this public endorsement are of a direct financial nature, others only have indirectly financial implications or none at all.

The financial consequences include the state obligation to pay the salaries and pensions of the ministers of recognized religions [49] and to subsidize when an endorsed religion wants to build or renovate its buildings. Another benefit is the fact that the ecclesiastical administrations charged with the temporal needs of the Church are attributed with legal personality and eventual deficits must be paid by the municipalities. Ministers of recognized religions must be given appropriate housing and any expenditure for this purpose is chargeable to the municipalities or to the provinces. Apart from this financial help, the recognized religions also are allotted free time on public radio and television broadcasting. Only recognized religions are entitled to provide religious education in the public schools [50]. Nevertheless, it needs to be acknowledged that the recognition and, most of all, the ensuing financial obligations for the State entail an increased degree of government supervision without, however, encroaching on the constitutional liberties outlined above. At any rate, the whole regulation concerning recognized religions makes clear that there is no major concern regarding the theoretical principles of 'separation' of Church and State in Belgium.

It is useful to make the link to Thornberry's statement regarding the meaning of Article 27 of the International Covenant on Civil and Political Rights for religious minorities in where he underlined that 'for Article 27 to have additional meaning for minorities as compared to the universal human rights of freedom of religion, it should be interpreted to promote the material equality of religious communities' [51]. The Belgian practice of officially recognizing *de facto* a whole list of minority religions next to Catholicism and the financial consequences attached to this recognition can be seen to do exactly that. Moreover, since the 1993 revision of the Constitution, the salaries and pensions of the representatives of organizations recognized by law, which offer moral services on the basis of a non-confessional philosophy, are also charged to the State [52].

B. Relevance of Belgian Mechanisms for South Africa

It needs to be emphasized that among the recognized religions in Belgium, all except Catholicism are numerically very small. In South Africa, however, there is a general tendency to dismiss the religious cleavage as unimportant or even to call the smaller religious groups 'insignificant minorities'. Belgium could serve as an example in this respect in that its practice of recognizing smaller religions can be seen to be a correct implementation of Article 27 of the International Covenant on Civil and Political Rights. Moreover, this practice weakens the potential for religious mobilization since the State shows that it takes the needs and demands of the several religious communities into account. It should be kept in

49 Article 181, par. 1, of the Constitution.

50 Article 24, par. 1, of the Constitution.

51 P. THORNBERRY, *International Law and the Rights of Minorities*. Oxford, 1991, p. 193.

52 Article 181, par. 2, of the Constitution.

mind that the religious cleavage in South Africa might come more to the forefront in the post apartheid era as it used to be completely overshadowed by the struggle against apartheid.

The option chosen in Belgium to cater for religious diversity can be related to the lack of territorial concentration of the different religious groups, with the relative exception of the Catholics. The focus on group rights in addition to the individual human rights, while not relying on territorial federalism at all, might be a useful guideline for South Africa considering its demographic situation.

V. The Right to Education and the Importance of its Regulation for the Protection of Minorities

A. Belgian Regulation [53]

In Belgium, the right to education has proven to be especially contentious as it was the focus point of the linguistic as well as the ideological-philosophical groups. The 'vernederlandsing' (dutchification) of the (higher) education was the crucial point for the Flemish Movement from 1895 onwards whereas the ideological-philosophical groups clashed several times on the so-called 'School Question' about the allocation of government funds to the co-existing public and private school networks. The ideological-philosophical minorities in the respective Communities also had an important impact during the 1988 State reform in that the almost wholesale transfer of competences in education to the Communities [54] had to be accompanied by additional safeguards regarding the right to education, provided for in Article 24 of the Constitution and had to be supervised by the Court of Arbitration to calm their fears of minorisation.

The linguistic dispute regarding education was solved on the basis of the establishment of territorial unilingualism by the Law of July 30, 1963; a solution that was subsequently incorporated and build upon in the 1970 State reform. The latter gave certain limited educational competences to the Communities with their territorial competence defined on the basis of the linguistic regions. The linguistic homogeneity principle has been endorsed by the European Court of Human Rights in the Belgian Linguistic Case of July 23, 1968 (see *supra*, I).

The second School Question was ended by the successful negotiation of a political agreement, 'the School Pact' resulting in the School Pact Act of May 29, 1959. This Act distinguishes between two school networks, the official network established by the State (now the Communities) as well as the provinces and municipalities, on the one hand, and the 'free' network, on the other hand, and determines that both networks should be put on an equal footing with regard to subsidizing their working, the wages of the staff and the building of schools. These subsidies require compliance with certain conditions such as the drafting of cur-

53 A. ALEN, *Handboek van het Belgisch Staatsrecht*, *op.cit.*, pp. 609-618; *Treatise on Belgian Constitutional Law*, *op.cit.*, pp. 197-198. See also Federalisering van het onderwijs. *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 1990, Nr. 1; *Quels droits dans l'enseignement?* Bruges, 1994.

54 There are only three exceptions to the Community competences, viz. the determination of the beginning and the end of compulsory education; minimum criteria for the issuing of diplomas; pension schemes (Articles 127, par. 1 and 130, par. 1, of the Constitution).

ricula conforming a minimal standard program; respecting the linguistic legislation; recruiting qualified teachers, and the like. A crucial difference between the two networks is that whereas the official network has to provide pluralistic education, the schools of the private network may be set up on a religious or philosophical basis. It cannot be denied though, that such a system is extremely expensive for the public authorities since about the same amount of money is to be given to both the public and the private or 'free' schools.

The constitutional provision on the freedom of education, dating back to 1831, was said to have an active and a passive aspect both of which have importance for minority groups. The 1988 revision of the Constitution, as compensation for the virtually complete transfer of the competences in education to the Communities, added to this provision the most important safeguards of the School Pact [55] and entrusted the supervision of Article 24 of the Constitution to the Court of Arbitration. The active freedom of education embodies the right for everyone to establish and run educational institutions according to one's personal vision, formally as well as substantively, and this without preventive measures. The passive freedom of education on the other hand entitles parents to chose the type of education they think to be appropriate for their children. It is obvious that these provisions *in se* provide a certain degree of minority protection [56] in that minorities are entitled to set up their own educational institutions and that their members cannot be obliged to send their children to official schools or any type of school that is contrary to their convictions [57].

The jurisprudence of the Court of Arbitration [58] is important and very much relevant in that it underlines the links between the freedom of education in its two aspects and subsidies. For the active freedom of education not to be merely theoretical, the Court of Arbitration argues that the private or 'free' schools have to be able to claim subsidies from the competent public authorities. The Court identifies two sets of limitations and conditions that could be used by the Communities: first of all, certain requirements in the public interest such as minimum educational standards and secondly, the necessity to spread the available financial means over the several tasks of the Communities. Furthermore, the Court emphasizes that also the passive aspect of the freedom of education and thus the freedom of choice of the parents, is dependent upon the active freedom of education as combined with the principal right to subsidies of those 'free' schools.

B. Relevance of Belgian Regulations for South Africa

First of all, it needs to be stressed that South Africa's most pressing problems regarding the education are closely related to the apartheid regime and its lega-

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55 The Belgian constitutional provisions on the right to education go beyond the corresponding standards to be found in human rights conventions.

56 The linguistic minorities, however, are constrained by the implications of the territoriality principle.

57 The freedom of parents to chose a school themselves, means that under reasonable conditions, that have to be translated into objective standards, they should have a school of their choice at their disposal.

58 See R. WITMEUR, La Cour d'arbitrage (1989-1995) et le droit de l'enseignement. *Journal des Tribunaux*, 1996, pp. 825-839.

cies [59] and thus not comparable to the issues dealt with in Belgium. The Belgian regulation of languages in education is not helpful at all because the basic choice was made to promote the homogeneity of the unilingual regions. The Final Constitution indeed has other objectives. It gives a right to everyone to '(...) receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable (...)'. The factors to be taken into account for the determination of the ways to fill in this right more concretely clearly aim at redressing the results of past racially discriminatory laws and practices, without being unreasonable towards the claims of the afrikaner, linguistic minority [60].

The issue of linguistic minority protection left aside, however, the jurisprudence of the Court of Arbitration regarding the active freedom of education could provide guidelines regarding the way in which Section 29 (4) of the Final Constitution should be filled in by the competent authorities. Whereas Section 29 (3) states that the right to establish independent educational institutions needs to be done 'at own expense', Subsection 4 leaves the possibility open of state subsidies for independent educational institutions. The restrictions on the right to subsidies in the abovementioned jurisprudence of the Court of Arbitration are perfectly suited to be implemented in a way attuned to the specific circumstances of South Africa.

VI. Conclusion

When we mention that certain Belgian regulations, techniques etc. have potential relevance for South Africa, we are definitely not suggesting a wholesale transfer of the specific Belgian regulations since the details are obviously related to the specific demographic, historical and societal circumstances in the country. But what we do have in mind are analogies that take South Africa's specific circumstances into account, while leaving the detailed elaboration to people with more extensive knowledge about South Africa and the regulations that are politically palatable for it.

Generally, what seems to be highly relevant for South Africa is the different kind of solutions in Belgium for its categories of minorities as related to a different degree of territorial concentration. Concerning the highly territorial concentrated linguistic groups, the emphasis is on territorial federalism providing autonomy for the distinct groups in the ethnically demarcated federated entities while

59 In addition to the issue of language in education which will be dealt with *infra*, reference should be made to two cases in terms of Section 32(3) of the Interim Constitution as they give an indication of some of the other sensitive issues. A Constitutional Court case (CCT No. 39/95) deals with the question whether or not the right to establish educational institutions on the basis of a common culture, language or religion as encompassed in Section 32(3) entails positive state obligations (state funding - establishment by the State etc). The other case was heard in the Provincial Transvaal Division and is referred to as the Potgietersruscase (case No. 2436/96). This case underlines the fact that the provision in Section 32(3) 'that there shall be no discrimination on the basis of race' is not all that straightforward and thus needs to be interpreted rather broadly.

60 Section 29(2) of the Final Constitution regarding language in education ends with the following sentence: 'In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account (a) equity, (b) practicability, and (c) the need to redress the results of past racially discriminatory laws and practices'. Compare with Section 32(2) of the Interim Constitution which is more concise/less detailed.

also using certain group rights at the federal level. The latter include, for example, the linguistic 'alarm-bell procedure' and the legislation concerning allotment of civil service posts as it requires parity for the higher posts in the central civil service, just like in the Brussels regional administration and in the Brussels municipalities. Regarding the ideological and philosophical groups which have less territorial concentration but are still more linked to a certain federated entity, there are explicitly provisions for group rights other than federalism while nevertheless using these relative concentrations by relying on the federal structures for their 'alarm-bell procedure'. Finally, the religious groups are generally even more dispersed and the protection of religious diversity is realized through a combination of individual human rights and group rights with no territorial connection whatsoever.

An analogous differentiation of several types of minority protection could be devised in South Africa where the general lack of territorial concentrations of the country's several population groups has a different degree for the ethnic/linguistic groups as compared to the religious ones.

As to more specific regulations, the different treatment of German as an official language, the legislation and practice concerning subsidies for private schools, the provisions in the statute embodying the Cultural Pact and the practice of recognizing religions with its consequences - all have potential relevance for South Africa. It has to be acknowledged, however, that certain of these suggestions entail major expenses.

As a final remark, we would like to point to a feature of South Africa's current development that seems interesting for Belgium. South Africa's focus on the need for nation building and the successful methods used by it to achieve that should at least be noticed by Belgium as the feeling of having a national Belgian identity is diminishing without, however, giving rise to serious secessionist sentiments.

Summary: **The Potential Relevance of Belgian Minority Protection for South Africa**

This paper focusses on the Belgian constitutional and legal regulations which are clearly and relatively directly linked to minority protection as well as their relevance for South Africa by way of analogy, taking into account South Africa's specific circumstances.

Generally, what seems to be highly relevant for South Africa is the different kind of solutions in Belgium for its three categories of minorities as related to a different degree of territorial concentration. Going from an emphasis on territorial federalism, providing autonomy, for the highly territorial concentrated linguistic groups, over the use of the relative concentrations of the ideological and philosophical groups in certain federated entities, to a combination of individual human rights and group rights without a territorial connection whatsoever for the religious groups which are highly dispersed throughout the country.

An analogous differentiation of several types of minority protection could be divised in South Africa as the general lack of territorial concentration of the country's several population groups has a different degree for the ethnic/linguistic groups as compared to the religious ones.