

EUROPE

QUESTIONS OF CONSTITUTIONAL LAW IN THE BELGIAN FIGHT AGAINST COVID-19

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SUMMARY: I. *Introduction*. II. *Fundamental rights: confinement measures*.
III. *Democratic control: special powers*. IV. *Federalism: consultation and
coordination*. V. *Conclusion*.

I. INTRODUCTION

As anywhere else, Belgium recently witnessed the outbreak of a virus the like of which the world had not seen in a long time.¹ When the epicenter of the crisis moved to Europe, Belgium was not spared. On 30 June 2020, a total of 61,427 cases of COVID-19 had been reported. 17,759 people had been hospitalized while 9,747 patients had died.² Measures to fight the crisis and its consequences took many forms, including legally. In this overview, the focus is on three constitutionally relevant concerns: (II) confinement measures and

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¹ An earlier version of this overview, co-authored with J. Riemsdagh, was published on *Verfassungsblog* and is available here: <https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-belgium/>. Elsewhere in the blogosphere, for example F. Bouhon, A. Jousten, X. Miny and E. Slautsky, “States’ Reactions to COVID-19 Pandemic: An Overview of the Belgian Case”, *Int’l J. Const. L. Blog*, 14 April 2020, available here: <http://www.icconnectblog.com/2020/04/states-reactions-to-covid-19-pandemic-an-overview-of-the-belgian-case/>; J. Clarenne and C. Romainville, “Le droit constitutionnel belge à l’épreuve du covid-19”, *Jus Politicum Blog*, 23 April 2020, available here: <http://blog.juspoliticum.com/2020/04/23/le-droit-constitutionnel-belge-a-lepreuve-du-covid-19-1-2-par-julian-clarenne-et-celine-romainville/>; P. Popelier, “The impact of the Covid-19 crisis on the federal dynamics in Belgium”, *UACES Territorial Politics Blog*, 5 May 2020, available here: <https://uacesterrpol.wordpress.com/2020/05/05/the-impact-of-the-covid-19-crisis-on-the-federal-dynamics-in-belgium/>.

² See the epidemiological bulletin of 30 June 2020, available here: https://covid-19.scien.sano.be/sites/default/files/Covid19/COVID-19_Daily%20report_20200630%20-%20NL.pdf.

their impact on fundamental rights; (III) the granting of ‘special powers’ to the executive and its impact on democratic control; and (IV) the distribution of powers between the federal state and the federated entities. I conclude that these seem to correspond to concerns raised elsewhere, even if some features of the Belgian architecture may have complicated matters more than necessary (V).

II. FUNDAMENTAL RIGHTS: CONFINEMENT MEASURES

After some hesitation when the virus reached Europe, stringent measures were taken to reduce new infections in Belgium. On 13 March 2020, the federal Minister of the Interior declared the “federal phase” of the national emergency plan. This was immediately followed by a Ministerial Decree imposing measures to slow down the spread of COVID-19.³ Most cultural, recreational and sportive activities were prohibited. Bars and restaurants were closed, as were most non-food stores and malls. Classes were cancelled, although schools remained open for children without care alternatives. The governments of the Communities (a form of federated entities) adopted measures reorganizing or limiting school and youth activities, and limited physical access to care centers who work with seniors and vulnerable people.

As the virus spread, the Minister restricted those measures further. Physical distancing was introduced, access to super markets was regulated, telework for all ‘non-essential’ businesses and services was imposed. Non-essential businesses and services for which telework and distancing proved impossible were closed. Public transportation was reorganized. Colleges and universities switched to distance learning. Non-essential travelling from Belgium was prohibited. Note, however, that the government never imposed a ‘lockdown’ in the strictest sense of the word. Even at the height of the pandemic, people were allowed to do basic shopping, walk or sport outdoors.

In a later stage, those measures were gradually loosened.⁴ Nevertheless, they raised multiple concerns in view of fundamental rights. Two questions related to the legality principle. Firstly, it was unclear whether the (pre-ex-

³ The Ministerial Decree was based, among other grounds, on the Law of 15 May 2007 concerning Civilian Safety, available here: <http://www.ejustice.just.fgov.be/eli/wet/2007/05/15/2007000663/justel>.

⁴ The currently applicable Ministerial Decree of 30 June 2020, replacing the previous regulations, is available here: <http://www.ejustice.just.fgov.be/eli/besluit/2020/06/30/2020042036/justel>.

isting) delegation of authority to the Minister of the Interior to adopt the restrictions was clear enough and whether it could allow measures of such a scale in the first place. This is because in principle, limitations of fundamental rights have to be adopted by the legislature, curtailing the options to delegate such powers to the King (i.e. the Cabinet), let alone to an individual minister, and notwithstanding that the confinement decrees were taken after deliberation in the full Council of Ministers. In this respect, the Constitution goes beyond what the European Convention on Human Rights requires. Secondly, when police services started to enforce the measures with increasing intensity, it appeared that a number of confinement measures lacked clarity. The Ministerial Decree, which was repeatedly amended as the crisis unfolded, was supplemented by online guidelines to the general public. Well-intended as they were, certain types of confinement behavior were touted in those “FAQ”⁵ as legally obligatory, whereas the text of the Decree provided no basis for that, leading to confusion among the public and within police forces. As time went on, legal certainty suffered and criticism of the unsatisfactory drafting of the Decree and the status given to the FAQ increased. Some cases, to the extent people took the risk to reject a fine given in dubious circumstances, may still find their way to court. Finally, when the numbers of new infections started to fall, unequal enforcement of clear violations of the rules caused some outcry as well.

Beyond those concerns, agreement existed that the goal pursued by the confinement measures – protecting public health for the time the crisis lasted – was legitimate. The question was whether they were proportionate, notably in view of the freedom of movement and assembly, the right to property, the free exercise of religion, the right to privacy, and the right to equality. Remarkably, during the first stage of the crisis, the confinement measures did not cause a lot of litigation. There seemed to be a general willingness to abide, or at least to not go to court, even though technically any judge president could have issued injunctions.⁶ This changed somewhat when the government decided to relax some confinement measures. People and businesses who could not benefit from regained freedom, whereas others could, argued that the equality principle was violated. Nevertheless, the Council of State, as the competent administrative court, accepted the Minister’s piecemeal approach and ruled that “in light of the urgent fight against an unseen

⁵ This frequently asked questions section (which itself changed frequently) of the Belgian government’s COVID-19 website is available here: <https://www.info-coronavirus.be/en/faq/>.

⁶ More recently, at least one judge in Brussels was asked to roll back the confinement measures. He refused in scathing terms (as reported for example here: <https://www.vrt.be/vrtnews/nl/2020/07/03/zaak-hoeyberghs-en-co-intellectuele-armoede/>).

and most serious (international) health crisis that Belgium faces”, he could claim “the most discretionary powers of appreciation”.⁷ Other claims (including based on the right to free exercise of religion) failed for procedural reasons⁸ or were moot before the Council could decide.⁹ Interestingly, the crisis put a spotlight on science-based legislation and regulation. As the Minister’s measures were to a large extent driven by the advice provided by experts,¹⁰ their findings were also crucial for the Council of State to assess their pertinence.

III. DEMOCRATIC CONTROL: SPECIAL POWERS

In addition to the health crisis, political leaders feared a socio-economic backlash. Although the Constitution does not contain an emergency clause, Belgian constitutional law provides an instrument called ‘special powers’ legislation. Based on an expansive reading of Article 105 of the Constitution,¹¹ those allow unusually wide delegations of legislative powers to the Cabinet. They typically include the power to abolish, complement, amend or replace laws adopted by Parliament. Special powers are remembered mostly as an instrument used to fight the economic and financial turmoil of the 1980s and to guide Belgium into the Eurozone in the 1990s. They have not been properly put to use since then. As the COVID-19 crisis unfolded, they quickly became the center of political attention again.

Special powers legislation needs to meet a number of requirements. First, the presence of a ‘crisis’ or ‘exceptional circumstances’ is required. Notably, in 2009, legislation resembling special powers was adopted to fight

⁷ Council of State 27 April 2020, n° 247.452, nv Andreas Stihl and another, available here: <http://www.raadvanstate.be/arr.php?nr=247452>.

⁸ Council of State 28 May 2020, n° 247.674, Suenens and others, available here: <http://www.raadvanstate.be/arr.php?nr=247674>; see also Council of State 9 July 2020, n° 248.039, vzw Internationale Vakbeurs van het Meubel Brussel and another, available here: <http://www.raadvanstate.be/arr.php?nr=248039>.

⁹ Council of State 26 May 2020, n° 247.620, X and others, available here: <http://www.raadvanstate.be/arr.php?nr=247620>.

¹⁰ The crisis measures are discussed within the National Security Council (including several federal cabinet members), which is itself supported by a Risk Assessment Group, a Risk Management Group and a scientific committee. The details about the coordination of these bodies are available here: <https://crisiscentrum.be/nl>.

¹¹ An English version of the Belgian Constitution is available here: https://www.dekamer.be/kwvcr/pdf_sections/publications/constitution/GrondwetUK.pdf.

the H1N1-influenza outbreak.¹² Second, special powers can only be granted for a limited period. Third, the goal and object of the special powers have to be narrowly defined. Fourth, special powers legislation does not allow the government to violate higher norms, including the Constitution. If special powers touch upon matters that are constitutionally reserved for Parliament, finally, the decrees adopted in application thereof are subject to ratification by Parliament. It can also subject special powers to other conditions, such as reporting.

Special powers are to be dealt with carefully in a parliamentary democracy. Until the current crisis broke, Belgium's federated entities (Communities and Regions) had never made use of special powers. On 17 March 2020, however, the Parliament of the Walloon Region granted sweeping special powers.¹³ In order to guarantee the continuity of public services, it even granted powers in case it would be adjourned because of COVID-19. Remarkably, the Walloon framework allowed the government to skip requesting legal advice from the Council of State, which in principle is mandatory. In the following days, the Walloon government took budgetary measures, suspended home evictions and temporarily transferred powers from the municipal councils to the municipal executives. At the latest one year from their adoption, Parliament will have to ratify those decisions. Other federated entities adopted special powers legislation as well.

On the federal level, granting special powers was delayed for political reasons. Until 19 March 2020, the federal government was a caretaker government. This means that the first, far-reaching confinement measures (cf. *supra*) were actually taken by a caretaker Minister. Whereas a caretaker government's powers are in principle limited, they include taking 'urgent' measures, so there was little doubt that the confinement rules fell within his power. Nevertheless, the government did not command a majority in Parliament. It had remained in power since the 2019 elections, following which the formation of a new cabinet had failed. In light of the country's deteriorating health situation, after tumultuous negotiations, a majority of members of Parliament agreed to adopt a motion of confidence, elevating the Cabinet to standard operating capacities. Politically, it agreed however to limit itself to dealing with the COVID-19 crisis. Minority cabinets are

¹² Law of 16 October 2009 providing powers to the King in case of an influenza epidemic or pandemic, available here: <http://www.ejustice.just.fgov.be/eli/wet/2009/10/16/2009024377/justel>. Interestingly, however, this law was adopted retroactively.

¹³ Federate Law of 17 March 2020 providing special powers to the Walloon government with regard to the COVID-19 health crisis, available here: <http://www.ejustice.just.fgov.be/eli/decree/2020/03/17/2020040687/justel>.

a highly unusual phenomenon in Belgian institutional history. Eventually, special powers bills were adopted on the federal level as well.¹⁴ The federal government, too, would be able to forego the advice of the Council of State, but only for measures directed at halting the spread of the virus. Here as well, all special powers decrees are subject to ratification by Parliament within one year of their coming into force.

Unsurprisingly, a minority cabinet with reluctant parliamentary support which resorted to a crisis technique that had fallen into disuse caused skepticism. The Council of State aired criticism with regard to the precise wording and delimitation of the special powers, but accepted that this was a time that could warrant their use.¹⁵ On the suggestion of the Council, Parliament better framed the scope of measures that would allow tinkering with judicial proceedings. To somewhat compensate for the lack of democratic support for the Cabinet, a parliamentary committee was asked to monitor the Cabinet's usage of the special powers.¹⁶ More importantly, the political parties who had supported the special powers set up an informal weekly deliberation for the core members of the Cabinet and opposition party leaders. This body (for which there was no constitutional basis) emphasized how Belgium is, politically speaking, a partitocracy.

Given that the most urgent confinement measures were already taken before granting special powers and given the speed by which the (nowadays largely single chamber) Parliament can operate if the need arises, it is fair to wonder whether the special powers, which ended on 29 June 2020, were necessary at all. Indeed, although a number of measures were taken by special powers decree, after a couple of weeks the Cabinet also started introducing bills following the ordinary legislative procedure. To some extent, this was even necessary, as the special powers law restricted the Cabinet's options to change tax and social security laws. At the same time, it is understandable that at the start of an unprecedented crisis, the Cabinet wanted to

¹⁴ Laws of 27 March 2020 authorizing the King to take measures in the fight against the spread of the COVID-19 coronavirus, available here: <http://www.ejustice.just.fgov.be/eli/wet/2020/03/27/2020040937/justel> (I) and here: <http://www.ejustice.just.fgov.be/eli/wet/2020/03/27/2020040938/justel> (II).

¹⁵ Advice of the Council of State of 25 March 2020 concerning a bill delegating powers to the King to fight the spread of the coronavirus Covid-19, available here: <http://www.raadvst-consetat.be/dbx/adviezen/67142.pdf>.

¹⁶ The report of its first meeting is available here: <https://www.dekamer.be/doc/CCRI/pdf/55/ic145.pdf>. Note that the functioning of the parliaments during the crisis was a matter of constitutional attention, too. For example, the federal Parliament amended its rules and procedures to enable electronic (distance) voting. Even during plenary sessions, only a small number of MPs was allowed in the hemicycle.

secure substantial room for maneuvering. If Parliament's role had been limited to merely approve the Cabinet's proposed legislative measures without a meaningful debate, the added democratic value of following the normal legislative process would have been limited in any case.

IV. FEDERALISM: CONSULTATION AND COORDINATION

Belgium is a federal country. Although the initial response to the COVID-19 crisis had a federal origin, this was not the case for many of the following (socio-economic) measures. The complex distribution of competences, which under normal circumstances regularly gives cause for debate and litigation, now lead to some confusion and coordination problems. Belgian federalism is based on the idea of exclusivity and the absence of hierarchy, meaning that in principle, only one level of government can be competent to adopt a specific policy measure. In practice, this ideal has been nuanced, among other things, by the fact that many general policy areas are *shared* exclusive, meaning that some parts are taken care of by the federal government and others by the federated entities (in this case, the Communities). Notably, regarding health care, the federal government is competent for public health (including hospitals), but the Communities are responsible for other care institutions (including elderly homes) and a number of other aspects of healthy policy (including prevention).¹⁷ At the same time, the federal government remains competent for civil security and, more generally, for maintaining public order. This has enabled it to take measures which deeply impact matters that are, by themselves, community turf. For example, the Minister of the Interior ordered the schools to close, even if education is not a federal matter. Interestingly, however, he adopted such confinement measures based upon the conclusions of the National Security Council, where consultation had taken place with the governments of the federated entities. Under normal circumstances, consultation or cooperation between the different levels of the federal state is not spontaneous, but dependent on complicated rules.

Despite all efforts to consult, the distribution of competences itself, which some claim is overly complicated, was also a source of problems. On

¹⁷ See article 5, § 1, I of the special law on the reform of the institutions, available here: <http://www.ejustice.just.fgov.be/eli/wet/1980/08/08/1980080801/justel>. The 'special' in 'special law' refers to a supermajority requirement and is not to be confused with special powers legislation as discussed above.

the one hand, coordination was an issue. For example, it appears that considerable time was lost in determining which level would purchase medical mouth masks and for whom. On the other, sometimes it appeared more fundamentally obscure which level of government was competent to adopt certain measures. For example, the development of a tracing system at the federal level was stalled after criticism by the Council of State, which considered that also to be a matter for the Communities.¹⁸ At the height of the pandemic, some pleaded for a simplification of the federal structure, although there was no consensus whether that would mean concentrating powers back on the federal level or allocating them all to the Communities. In a way, those discussions reflected the pre-existing debate about the direction Belgian federalism should take.

V. CONCLUSION

The constitutional questions the COVID-19 crisis sparked in Belgium are similar to what we have seen in other countries: the concerns are about fundamental rights, democratic control and, where applicable, the efficiency of federalism. During the crisis, some regrettable features of the Belgian political system, which reflect on the constitutional architecture, were however overexposed: unstable federal politics, the dominance of the executive branch and the political parties, an all too complicated competence distribution.

On the federal level, a parliamentary committee has been tasked to examine the way government(s) took care of the COVID-19 crisis. It will focus on preparation, financing of the health care sector, communication, coordination, and other issues.¹⁹ How governments performed is subject to disagreement, and it was also a matter of debate whether this commission should have been granted special investigative powers. That would have allowed it to proceed with quasi-judicial competences. Whatever the need for those, hopefully its conclusions will help the country to prepare for future challenges.

¹⁸ As reported for example here: <https://www.hln.be/de-krant/raad-van-state-stuurt-ook-lance-ring-tracing-afb-in-de-war~a8be092e/>.

¹⁹ See the press release by Parliament of 10 July 2020, available here: https://www.dekamer.be/kwcr/pdf_sections/news/0000012309/20200710_covid19-comm.pdf.