
The Parliament in the time of coronavirus

Belgium

The impact on parliamentary assemblies: the crisis triggered by the Covid-19 pandemic in Belgium

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From a legal point of view, the crisis triggered by the COVID-19 pandemic has raised several questions in Belgium, some of which are very different in nature¹. We limit ourselves here to a few observations on the impact of the crisis on parliamentary assemblies and their members.

1. The constitutional prohibition of the suspension of fundamental rights by members of parliament

In Belgium, restrictions to fundamental rights, provided that they can be objectively and reasonably justified, can only be decreed by legislative norms, voted by one or more parliamentary assemblies. It is irrelevant whether these restrictions are dictated by a crisis situation or not. However, these same legislative assemblies are not authorised to suspend, in whole or in part, these fundamental rights, even in the event of an acute crisis². It should be noted that the Belgian Constitution was not

¹ De l'auteur du présent rapport, cf. également M. VERDUSSEN, « [La Constitution belge face à la pandémie de COVID-19](#) », *Confluence des droits*, 26 juillet 2020 ; M. VERDUSSEN, « La crise du coronavirus et la menace sur les droits fondamentaux en Belgique », in Institut des droits de l'homme du barreau de Paris (IDHBP) et Institut des droits de l'homme des avocat(e)s européen(e)s (IDHAE), *Confinement forcé sur tout le territoire national et modalités d'application : des mesures disproportionnées dans une société démocratique ?*, Paris, 2020 ; M. VERDUSSEN, « [Droits humains et crise sanitaire : l'Etat mis au défi](#) », *La Libre Belgique*, 18-19 juillet 2020, pp. 42-43 ; M. VERDUSSEN (avec C. ROMAINVILLE), « L'état d'exception, nouveau régime de droit commun des droits et libertés ? Du terrorisme à l'urgence sanitaire. Belgique », *Annuaire international de justice constitutionnelle*, 2020, vol. XXXVI (à paraître en 2021). Le présent rapport s'inspire de ces publications antérieures. Sur les aspects constitutionnels de cette crise en Belgique, cf. également N. BERNARD, « Les pouvoirs du Gouvernement fédéral en période de crise : le Gouvernement Wilmès face à l'épidémie de COVID-19 », *Journal des tribunaux*, 2020, pp. 372-375 ; F. BOUHON, A. JOUSTEN, X. MINY et E. SLAUTSKY, « L'Etat belge face à la pandémie de COVID-19 : esquisse d'un régime d'exception », *Courrier hebdomadaire du Crisp*, 2020, n° 2446 ; J. CLARENNE et C. ROMAINVILLE, « [Le droit constitutionnel belge à l'épreuve du COVID-19](#) », *Jus Politicum*, 23 avril-4 mai 2020 ; S. GANTY, « [COVID 19 and States of Emergency. Belgium and COVID-19 : When a Health Crisis Replaces a Political Crisis](#) », *Verfassungsblog*, 21 avril 2020 ; T. MOONEN et J. RIEMSLAGH, « [Fighting COVID-19 – Legal Powers and Risks : Belgium](#) », *Verfassungsblog*, 25 mai 2020. *Adde* : « [Carnets de crise](#) », Centre de droit public de l'Université de Bruxelles.

² To suspend fundamental rights, or more precisely the application of these rights, is to put them on the back burner

designed to deal with crisis situations, which, on the contrary, were somehow neglected by the constituent. Adopted in 1831, Article 187 of the Constitution states that "*the Constitution may not be suspended in whole or in part*". It thus unambiguously prohibits that the Constitution be suspended in whole or in part. Consequently, in Belgium, the introduction of a "state of emergency" or a "state of exception" is not provided for in the Constitution and even formally prohibited.³

It seems that by adopting Article 187, the National Congress in 1831 wanted to obviate the risk of authoritarian and arbitrary suspensions that would exceed the legislature or the executive's powers. The author of the amendment that led to the adoption of Article 187, Mr. Van Snick, also quoted the decrees of Charles X suspending constitutional liberties⁴. No doubt the delegates also remembered certain unconstitutional acts carried out by King William of the Netherlands when the Belgian provinces were part of the Netherlands (1815-1830). More broadly, one might think that they considered that to offer constituted authorities the possibility of releasing themselves from their obligation to comply with the Constitution would be to open the way to the temptation to invoke this extra-constitutionality clause at all times.

What situations are covered by Article 187 of the Constitution? It concerns exceptional situations. One thinks of the need to counter terrorism, but also to deal with a nuclear disaster, a deadly heat wave, devastating weather, an epidemic or a pandemic. For a State faced with such threats, it may be tempting for the legislative branch or even the executive branch to adopt exceptional measures suspending the application of constitutional provisions and especially fundamental rights. The response of the Belgian constituent is categorical: whatever the seriousness and intensity of the events or threat, institutions must function at all costs, citizens must be able to exercise their fundamental rights without hindrance and the legal regime of these rights cannot be changed in the circumstances. All public authorities are responsible for applying all of the provisions laid down in the Constitution.

The objection could be raised that Belgium has subscribed to international conventions which provide for a "state of emergency", which occurs "in the event of war or other public danger threatening the life of the nation", under the terms of Article 15 of the European Convention on Human Rights - several European States have already notified the General Secretariat of the Council of Europe of their wish to invoke Article 15 of the Convention because of the COVID-19 pandemic -, or a "public emergency" threatening the existence of the nation, according to Article 4 of the International Covenant on Civil and Political Rights⁵. However, the exceptional regimes provided for in these international instruments fall short of the protection that the Constitution intends to

temporarily, but in a *general* way. Justified by the urgency of an immediate reaction to a highly exceptional situation, derogations - often part of a "state of emergency" or "state of exception" - should not be confused with the limitation of fundamental rights. Limiting fundamental rights means allowing *particular* restrictions to be placed on them and setting the conditions for them. Thus, the system of suspensions applies in exceptional periods, whereas that of limitations is part of the ordinary law of ordinary times.

³ It would be futile to invoke here the decree law of 11 October 1916 relating to the state of war and the state of siege. (*Moniteur belge*, 15 October 1916), still in force, since both the state of war and the state of siege only apply in times of war.

⁴ E. HUYTTENS, *Discussions du Congrès national de Belgique 1830-1831*, Bruxelles, A. Wahlen et Cie, 1844, vol. II, pp. 464 et s.

⁵ See the Syracuse Principles on the Provisions of the International Covenant on Civil and Political Rights Allowing for Restrictions or Derogations, adopted on 28 September 1984.

establish.⁶ They apply only to fundamental rights not recognised by the Constitution.

The intransigence of the Belgian constituent is a challenge. Ignoring the possibility that crisis situations may emerge that call for the suspension of certain fundamental rights means that the State might possibly take refuge, outside any guidelines, behind notions as vague and insecure as the state of necessity and self-defence. Is it not tempting for a State faced with a pressing emergency, and therefore in *tempore suspecto*, to break down a tightly closed door, which prohibits any suspension under any circumstances, and jump in, without any restrictions? Is it not preferable to open this door, in *tempore non suspecto*, by placing material and procedural limits - including the intervention of the legislative assemblies - on the implementation of a dispensatory regime? The debate is open. In any case, it should be noted that Article 187 of the Constitution "*has not stood the test of time*", since wartime "*engendered a state of necessity which led to the implementation of a regime of exception suspending certain constitutional freedoms despite the Constitution...*".⁷

2. Executive dispossession of MPs

On 23 March 2020, the Minister of the Interior relied on rather imprecise legislative provisions - taken from the law of 31 December 1963 with regard to civil protection, the law of 5 August 1992 with regard to the police function and the law of 15 May 2007 with regard to civil security - to adopt a ministerial order which has proved to be the legal basis for substantial emergency measures to limit the spread of COVID-19⁸ : closures of the main shops; restrictions on access to supermarkets; closure of markets; obligation for "non-essential businesses" to work from home; prohibition in principle of "gatherings", "activities of a private or public nature, of a cultural, social, festive, folkloric, sporting and recreational nature", "school excursions", "activities within the framework of youth movements", or "activities of religious ceremonies"; suspension of lessons and activities in nursery, primary and secondary education; distance learning in colleges and universities; prohibition of "non-essential travel" from Belgium; regulation of residential confinement. The measures adopted restrict many fundamental rights (freedom to come and go, freedom of assembly, right to respect for private and family life, right to education, freedom of religion, right to cultural development).

It is surprising that such drastic interference in terms of citizens' fundamental rights has been decided by the Minister of the Interior alone. Admittedly, the laws invoked in support of these decisions enabled this. Admittedly, the Council of Ministers was consulted. Admittedly, the Minister

⁶ J. VELU, « Le droit pour les États de déroger à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales en cas de guerre ou d'autre danger public menaçant la vie de la nation », in *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruxelles/Louvain-la-Neuve, Bruylant/Cabay, 1982, pp. 71-147 ; R. ERGEC, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles*, Bruxelles, Bruylant, 1987.

⁷ R. ERGEC et S. WATTHEE, « Les dérogations aux droits constitutionnels », in M. VERDUSSEN and BONBLED (dir.), *Les droits constitutionnels en Belgique – Les enseignements jurisprudentiels de la Cour constitutionnelle, du Conseil d'Etat et de la Cour de cassation*, Bruxelles, Bruylant, 2011, vol. 1, p. 396.

⁸ *Moniteur belge*, 23 mars 2020, 2^e éd. This is, in fact, the third ministerial decree adopted for this purpose by the Minister of the Interior, two previous decrees having been adopted on 13 March 2020 (*Moniteur belge*, 13 March 2020, 2nd ed.) and 18 March 2020 (*Moniteur belge*, 18 March 2020, 3rd ed.). Other ministerial decrees have also been adopted, which contain more specific urgent measures.

of the Interior enjoys extensive administrative police powers (albeit subsidiary to those of the municipal authorities). It is also true that the ministerial order in question was adopted on 23 March 2020, i.e. four days before the adoption on 27 March 2020 of the Special Powers Act (discussed below). The urgent nature of the situation certainly justified it. However, while the ministerial order provided that the measures adopted were only applicable until 5 April, it was amended several times to extend this deadline. Whatever the arguments put forward, the fact remains that, in a State governed by the rule of law and concerned about respecting fundamental rights, it is not normal to leave the Minister of the Interior alone with responsibility for interference of such magnitude.

This is all the more regrettable since the *a posteriori* scrutiny by the Administrative Jurisdiction Division of the Council of State has proved to be largely ineffective here, for reasons linked to the temporal nature of the proceedings. Does the procedure of extreme urgency allow the circumvention of the complexities of the ordinary annulment and suspension procedures? It must be noted that, in the context of the health crisis, the appeals lodged in extreme urgency against the measures adopted by ministerial order (but also by the municipal authorities) were all rejected. The Council of State considered that the conditions of extreme urgency had not been met, because the appeals had become moot following the modification or annulment of the contested standards, or because the grounds for dismissal were not serious⁹.

3. Self-exclusion by MPs

The COVID-19 crisis is challenging the relationship between legislative assemblies and governments, particularly in that the so-called "special powers" procedure allows the legislature to temporarily forego legislating on certain matters that it entrusts to the executive. The parliamentary system specific to the Belgian constitutional system has been more or less destabilised as a result. So what does this mean?

Special Powers Acts are laws by which, if certain conditions are met¹⁰, the federal legislator temporarily empowers the King - i.e. the Federal Government - to regulate a certain number of matters which are normally regulated by the federal legislator, and this by royal decrees of special powers¹¹. In practice, rather than acting jointly with the federal assemblies (the House of Representatives and the Senate), the federal government acts collectively but alone, which allows it, in a crisis context

⁹ See Concil of State., decree n° 247.674, 28 May 2020; judgment no. 247.714, 4 June 2020; judgment no. 247.939, 26 June 2020; judgment no. 248.108, 3 August 2020; judgment no. 248.132, 10 August 2020; judgment no. 248.145, 13 August 2020.

¹⁰ In an [opinion given on 31 May 1996](#), the Legislation Division of the Council of State has indicated that, in order to be compatible with Article 105 of the Constitution, special powers must meet the following conditions: (1) special powers must be justified by certain factual circumstances, generally described as exceptional circumstances or circumstances of crisis; (2) special powers may only be granted for a limited period, determined according to the circumstances that justify them; (3) the special powers must be precisely defined, with regard to both the objectives to be achieved and the matters in which measures may be taken and their scope; (4) when granting the special powers, the legislator must respect supranational and international norms, but also the constitutional rules on the distribution of powers between the federal and federated entities.

¹¹ The legal literature on special powers is extensive. See M. LEROY, « Les pouvoirs spéciaux en Belgique », *Administration publique*, 2014, pp. 483-504; T. MOONEN, « Bijzondere machten als oplossing voor een crisis : of zelf in een midlifecrisis ? », in E. VANDENBOSSCHE (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, Bruges, die Keure, 2019, pp. 177-213.

requiring prompt action, to intervene "*faster and more effectively than the normal functioning of the legislative assemblies permits*"¹². Based on a bold interpretation of article 105 of the Constitution, the use of special powers is all the more acutely justified when these same legislative assemblies are unable to meet physically in the buildings of Parliament.

Royal decrees of special powers have regulatory value, unless they are subsequently confirmed by the legislator, in which case they acquire legislative value (force of law). Constitutionally, this confirmation is required when the Royal Decree of Special Powers regulates matters reserved by the Constitution to the federal legislator (criminal offences, criminal procedure, taxes, etc.). In practice, however, the laws of special powers generally require confirmation by the federal legislature of all royal decrees of special powers, even in matters not reserved to the legislature. As Professor Yves Lejeune rightly points out, "*initially designed as a legal correction of the powers granted to the King in matters constitutionally reserved to the law, the confirmation laws (...) have thus become a new means of political supervision over the exercise of the special powers granted in all matters*"¹³. It should be noted that the legislative confirmation of decrees confers on them the value of legislative standards retroactively, i.e. to the date on which the decree comes into force.

Since Belgium is a federal state, the federated authorities - the regions and communities - can logically also make use of special powers, on the basis of Article 78 of the special law on institutional reforms of 8 August 1980. Essentially, the principles governing special powers apply, *mutatis mutandis*, at federal level.

The crisis triggered by the COVID-19 pandemic has prompted the federal legislature to make use of special powers. On 27 March 2020, two special powers laws were passed empowering the King to take measures to combat the spread of the virus¹⁴. It provides that the special powers will expire three months after the entry into force of the law. They therefore expired on 30 June. The adoption of a new law on special powers was possible, but this did not occur. Furthermore, it is required that the decrees adopted be confirmed by law within one year of their entry into force, it being specified that, if they are not confirmed within this period, they are deemed never to have had effect.

Since Belgium is a federal state, the federated authorities - the regions and communities - can logically also make use of special powers, which most of them have done. The nature and extent of the special powers granted by the legislators of these federated entities are quite variable when compared to each other but also when compared to federal laws of special powers, some special powers resembling full powers.

¹² M. UYTENDAELE, *Trente leçons de droit constitutionnel*, Bruxelles/Limal, Bruylant/Anthemis, 2014, p. 520. On the time constraints on parliamentarians in the exercise of their duties, see. M. BORRES, M. SOLBREUX et M. VERDUSSEN, « Les Parlements belges et le temps », in G. TOULEMONDE et E. CARTIER (dir.), *Le Parlement et le temps – Approche comparée*, Paris, Institut Universitaire Varenne, 2017, pp. 227-255, spéc. pp. 232-253.

¹³ Y. LEJEUNE, *Droit constitutionnel belge – Fondements et institutions*, 3^e éd., Bruxelles, Larcier, 2017, p. 666.

¹⁴ *Moniteur belge*, 30 mars 2020, 2^e éd.

4. The challenge of federalism to MPs

The crisis triggered by the COVID-19 pandemic has tested the balance between the different levels of power, especially in a federal State marked by strong divisions between those levels. Previous crises already raised this type of question, but the health crisis of 2020 has exacerbated the tensions inherent in the Belgian federal system.

There has been an increase in the number of measures taken to fight the COVID-19 pandemic, which is justified by the fact that the areas involved are fragmented between the different levels of power. In an opinion given on 13 May 2013, the Legislation Division of the Council of State emphasised that *"it is not because measures relate to the fight against a crisis affecting public health that the federal authority can be deemed competent. On the contrary, each authority is responsible for combating a crisis affecting public health within the limits of its own material competences, which does not exclude, however, that a cooperation agreement may be concluded in this regard"*¹⁵. The situation in Belgium is particularly complex in this respect. While some matters are (almost) exclusively the responsibility of one level of government - such as education which is the competence of the communities and justice which comes under federal jurisdiction - other matters are shared between different levels of government, such as health policy and economic policy.

This overlapping of competences not only undermines the need for a coherent and effective policy in response to the crisis, but may also lead, here again, to the parliamentary assemblies being put offside. An example of this is given with regard to tracing. Belgium is indeed a State in which citizens can download an application on their smartphone that records their movements and the people with whom they have come into contact. The aim is to be able to identify and isolate people who may be infected. In particular a tool like this affects the protection of privacy and the role of the legislator in regulating what constitutes interference with this fundamental right. In an effort to initiate a democratic debate on the subject, several members of the Belgian House of Representatives tabled a motion for a resolution that sought to establish a set of essential guarantees to govern this kind of digital tool (minimisation of recorded data, transparency through publication of the application's source code, etc.)¹⁶. A parliamentary committee suggested to include this resolution in a legislative proposal, which has been done¹⁷. However, following objections raised by the Legislation Division of the Council of State, a draft cooperation agreement between the competent levels of power was prepared. While its entry into force was delayed, a Royal Decree of Special Powers was adopted¹⁸. When the cooperation agreement will be concluded by the governments involved, the subsequent assent of the parliaments will be purely formal. However, this is a problem that calls for in-depth parliamentary debate. The main question raised is that of the need for such a measure¹⁹. Some

¹⁵ [Avis n° 53.018/AG du 13 mai 2013](#) sur un projet d'arrêté royal relatif au contrôle sanitaire du trafic international.

¹⁶ Proposition de résolution relative au développement potentiel d'une application mobile pour lutter contre le coronavirus (COVID-19) et à la nécessité de respecter les droits humains, en particulier le droit au respect de la vie privée (*Doc. parl.*, Ch. repr., 2019-2020, n° 55-1182/1).

¹⁷ Proposition de loi relative à l'utilisation d'applications numériques de traçage de contacts par mesure de prévention contre la propagation du coronavirus COVID-19 parmi la population (*Doc. parl.*, Ch. repr., 2019-2020, n° 55-1251/1).

¹⁸ Royal Decree No. 44 of 26 June 2020, published in the Belgian Official Journal (*Moniteur belge*), 29 June 2020 (2nd ed.). On special powers, see above.

¹⁹ See E. DEGRAVE, « [Le suivi numérique des citoyens : un pacte avec le diable ?](#) », *La Libre Belgique*, 24 April 2020.

governments tend to consider this to be a political issue falling within their sovereign appreciation, whereas the issue is a legal one. The European Court of Human Rights further recalled, on 3 March last, that any interference with the right to privacy must be "necessary in a democratic society" in the sense of Article 8 § 2 of the Convention, which implies that "*the reasons adduced by the national authorities to justify it are relevant and sufficient*"²⁰. Is the process under consideration sufficiently effective to justify such an intrusion into privacy? To date, there has been no evidence for this. Moreover, it seems disproportionate, for reasons beyond the scope of this contribution.

5. The vagaries of parliamentary scrutiny

Two periods should be distinguished: the period of special powers and the subsequent period. During the period of special powers, the parliamentary assemblies retain their full powers. Parliamentarians may resort to the usual techniques of government oversight and, in particular, the questioning procedure. They may reappropriate, by tabling bills, matters entrusted to the government under special powers and, of course, retain legislative control over matters not covered by the special powers.²¹ They may initiate the adoption of resolutions intended to address recommendations to the government and its members²². Now that the period of special powers has expired, political oversight will be exercised in three main ways: the right of parliamentary questioning; the power of the assembly to set up special committees²³, or even parliamentary commissions of enquiry; the vote of the assembly on whether or not to confirm special powers orders. On this last point, let us not delude ourselves: the parliamentary debate - if there is one - on the measures adopted under the cover of the special powers "*will take place only after they have all been definitively stripped of their effects*" and "*it is highly unlikely that they will not all be validated*"²⁴.

That said, the exercise by the assemblies of their powers during a period of lockdown and social distancing makes logistical adaptation measures aimed at guaranteeing the continuity of parliamentary work indispensable. Assemblies have generally decided to make use of the digital technique of videoconference (remote discussions and voting), whether this is combined with the physical participation of a limited number of elected representatives or not. However, the outright adjournment of the assembly seems to us to be difficult to reconcile with the imperatives of a parliamentary system. The role of parliamentary assemblies is central, since they are empowered to adopt regulations within the framework of their organic autonomy. New provisions have been

²⁰ ECHR, *Convertito and others vs. Romania*, 3 March 2020, § 48.

²¹ For example, the Belgian Official Journal (*Moniteur belge*) of 29 May 2020 published an Act of 20 May 2020 containing various provisions on justice in the context of the fight against the spread of the coronavirus COVID-19 and an Act of 27 May 2020 relating to the Act of 20 May 2020. As another example, the Belgian Official Journal of 11 June 2020 publishes a law on various urgent fiscal measures due to the COVID-19 pandemic.

²² See motion for a resolution on the potential development of a mobile application to combat the coronavirus (COVID-19) and the need to respect human rights, in particular the right to privacy, cited above, which gave rise to lengthy debates and expert hearings in the Committee on Economic Affairs, Consumer Protection and the Digital Agenda.

²³ Thus, the House of Representatives adopted on 25 June 2020 a text calling for the establishment of a special committee to examine Belgium's management of the COVID-19 epidemic and set it up on 2 July 2020.

²⁴ See A. SCHAUS and V. LETTELIER, « [Les droits et libertés à l'épreuve de la crise sanitaire \(COVID-19\)](#) », *Carnets de crise* #15, 17 April 2020.

adopted which are applicable in the event of a health crisis dangerous to human health. They include the possibility of adjourning Parliament and the possibility of bypassing the committee stage in the event of an urgent legislative proposal. These measures help to restrict parliamentary control over the government and limit the democratic debate. They are all the more problematic in that, in Belgium, the rules of procedure of assemblies are, in principle, not subject to any jurisdictional control and thus enjoy almost full impunity²⁵.

²⁵ M. VERDUSSEN, *Justice constitutionnelle*, Bruxelles, Larcier, 2012, p. 115.