Belgium and COVID-19: When a Health Crisis Replaces a Political Crisis

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"Welkom in de corona-dictactuur, waar verkiezingen onbelangrijk is". These are the words of Theo Francken, Member of the Chamber of Representatives, pro Flemish-independence and liberal conservative of the 'New Flemish Alliance' party (NVA), on 17th March after the government *Wilmès II* was appointed by King Philippe I, in the context of the COVID-19 health crisis. What Theo Francken criticised in his statement was the minority aspect of the government, which indeed represents less than a quarter of Belgian voters. However, the vote in the Chamber of Representatives two days later proved Theo Francken wrong: the minority government received the support (*la confiance*) of 82 votes to 44, which constitutes a comfortable majority to give the government authority and to eliminate doubts regarding its use of special powers in a time of crisis. In fact, such a significant majority to support a minority Government is unique in Belgian history.

The COVID-19 health crisis is happening in the context of a political crisis in Belgium. As the virus was spreading in the EU in early March, political parties were still negotiating the formation of a federal government. The need to provide a unified and strong answer to the situation added another layer to the political crisis and seems to have put the main political disagreements on the backburner. Indeed, from an institutional point of view, the difficulties linked to the absence of a government were democratically overcome (1). From a constitutional point of view, regarding the delegation of powers in light of COVID-19, Belgium does not have any emergency powers – as opposed to France. However, the system of "Special Powers Decree" allows Parliamentary assemblies to delegate the exercise of powers to governments for a temporary period of time. This is the system currently in place on a federal level and in most of the federated entities (2). Many institutional and constitutional challenges have been solved without considerably affecting basic democratic principles. This is not true when it comes to fundamental rights, especially fundamental rights of vulnerable groups such as migrants and prisoners, female victims of violence etc. (3).

1. Institutional Questions: Minority Government and the Federal Nature of the State

In early March while the COVID-19 crisis was spreading all over Europe, Belgium was still without a proper federal government, and had been since December 2018, despite the election on 26th May 2019. The country had been ruled by a caretaker government – *Michel I* and then *Wilmès I* since October 2019 – for fifteen months. The caretaker government was limited to public affairs, day-to-day management of pending cases as well as urgent cases ("les affaires courantes").

It quickly became clear that the federal government would need special and extraordinary powers via the "Special Powers Decrees" (see section 2) to deal with the COVID-19 crisis. It appeared that without the support of a majority, the minority government could not exercise such extraordinary powers constitutionally and in a legitimate way. Indeed, Belgium is a parliamentary regime meaning that the government is held accountable by the Chamber of Representatives – it keeps its powers as long as it has the confidence of the majority in the Chamber.

This is why a new minority government – Government *Wilmès II* composed of exactly the same members as the previous one – was appointed by King Philippe I on the 17th March. As explained, it received the support of a large majority of the members of the Chamber of Representatives on the 19th March for the

duration of the health crisis, and on the condition that the parties which had voted for the government (+ the NVA) would be kept informed of decisions taken by the government.

Another institutional issue was also raised: the federal nature of the state involving shared jurisdiction between the federal states and the federated entities. Of course, there is no jurisdiction for the "management of pandemics" as such, because the COVID-19 crisis affects many fields which are spread between the Federal state, Regions and Communities. For instance, aspects related to health are spread between different entities, communities are in control of education while the federal state and the regions share jurisdiction regarding the economy and already adopted several measures in order to control the socioeconomic impact of this crisis. On the 13th, 18th and 23rd of March and the 3rd and 17th of April, the Federal Minister of Security and Home Affairs – Pieter De Crem (CD&V) – adopted ministerial decrees in order to give a unified answer to limit the spread of the virus. These decrees impose quarantine on the population and concern important limitations of many economic, social, cultural etc. activities explained on this blog. The adoption of such decrees might come as a surprise given the fact that they touch upon jurisdiction of other federated entities and are adopted by *one* Minister only (see section 3). This is justified by civil protection, police function and civil security which are explicit jurisdiction of the Home Office. Although these ministerial decrees contain some constitutional flaws, there were adopted after consulting with federated entities and with non-formal agreement from them.

Finally, and most importantly, despite some institutional difficulties the federal nature of the Belgian State actually appears to be an important safety net for the Rule of Law. All powers have not been given to one unique government, which could become extremely powerful with a significant risk of abuses, such as countries with a strong centralised powers like France or Hungary. In this context, federalism in an effective way to fight against the risk of abuses of power: "[p]ower being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government", as said by Alexander Hamilton in the context of drafting the United states constitution (the Federalist No. 28). This seems particularly true in times of crisis where the executive sees its powers significantly increased with limited intervention from the Chambers.

2. Solving Constitutional Challenges through Special Powers Decrees

The crisis also raises the important question of the relationship between parliaments and their governments and the need to act quickly. This seems to be difficult with parliamentary procedures, especially in a time where some parliaments temporary suspended their activities, or greatly limit them using special methods, such as the Chamber of Representatives, and allow MPs to work from home (with all the difficulties it raises).

In this context, the Federal State and most of the federated entities – with the exception of the Flemish and German Communities – fell back on the mechanism of Special powers Decrees, which is enshrined in Article 105 of the Belgian Constitution on the federal level. According to this mechanism, the legislator authorises the Government (formally the King at federal level) to abrogate, complete, modify or replace legislative act through royal decrees, under some conditions. The special powers act adopted under exceptional circumstances determine the *rationae materiae* scope of the measures that can be taken and is always time-limited. The special powers royal decrees have to be confirmed by an act of the legislator within one year of them coming into effect – which is usually a very formal procedure, even if the minority government makes it slightly less certain in this case –, otherwise they will be considered as never having produced effect. Once they are confirmed, they are considered as legislative acts.

In the context of COVID-19, on a federal level, two legislative (1 and 2) acts of the 27th March were adopted by the federal parliament granting special

powers to the King (i.e. the Federal Government) for three months from when the two acts came into effect (30th March). The scope of action concerns the urgent measures in the field of public health, public order, social provision and the safeguard of the economy and citizens (see section 3). The measures adopted by the King can have a retroactive effect to the 1st March, 2020. So far, the federal government has adopted (and published) five Special Powers Decrees on administrative sanctions, co-ownership and corporate law, criminal procedure, enforcement of sentences and prescriptions, time limits to act and written procedure before courts and tribunals and the postponement of the appointment of the High Council of Justice's members. The act sets some important material limits by forbidding the King to hinder the purchasing power of families and existing social protection – which is essential given the large number of temporary unemployed people due to the crisis – or to adapt, repeal, modify or replace social security contributions, taxes, duties and charges. The draft proposal explains that the government has to keep the Chamber of Representatives informed about the measures it takes in virtue of its special powers. However, this obligation was not formalised in the final act.

The use of special powers is not new and has already been used in the past. For instance, during the 2009 swine flu pandemic, the Chamber of Representatives granted the King special powers via the Act of 16th October 2009. However, this time, the powers granted to the federal government are much broader and make the situation quite peculiar, given the fact that the federal government is a minority.

Regarding the control of the government, Members of the Chamber of Representatives ask parliamentary questions regarding the actions of the government on a regular basis and a monitoring Commission (the COVID-19 Commission) was put in place in order to control the government's actions, as in other federated entities. At any time, Members of the Parliament can decide to adopt a new act withdrawing the special powers from the government if they go beyond these powers. Moreover, the fact that it is a minority government adds more pressure to strictly follow its mandate. Finally, as explained on this blog, the special powers acts and the special powers decrees can be attacked before the Constitutional Court and the Council of State respectively.

3. A Difficult Period for Fundamental Rights

If the Belgian federal and federated entities seem to have found a balance regarding institutional and constitutional difficulties, especially in light of the Rule of law, the same cannot be said for the respect of Fundamental Rights regarding the measures taken, and those not adopted.

The ministerial Decrees of the 13th, 18th and 23rd of March and the 3rd and 17th April imposed important quarantine measures – in effect until the 3rd of May – greatly limiting *inter alia* the freedom of movement: many places are inaccessible, people cannot leave the country and have been ordered to stay at home, only being allowed to go out (for a walk or to workout) with family members who live in the same household or with one friend, provided that the distance of 1.5 metres is respected. The federal government recently authorised municipalities to fine people who do not respect such measures – the practice of such administrative fines was already ongoing without legal basis until recently which raised serious controversy. If the right to life justifies quarantine measures, they should be proportionate, especially the way in which they are implemented. The control of such measures by the police is likely to raise important questions regarding fundamental rights – including the right to life itself – such as the tragic death of a 19-year old man trying to flee the control of the police a few days ago. This event provoked riots and dozens of arrests were made by the police. Moreover, the closure of restaurants and most shops (except supermarkets, pharmacies and, since the decree of the 17th of April, other shops such as garden centers), bans on group gatherings and the fact that people can be questioned at any time on where they are going, hinders other important rights and freedoms such as the freedom of association and religion, property rights, and the right to private and family life. The right to education is also affected because all schools and universities are

closed, as well as socioeconomic rights – such as the right to health – especially regarding hospital workers who are particularly exposed.

As pointed out by some, it is also legally questionable that *one* Minister can limit fundamental rights to such an extraordinary extent while the Constitution clearly states that the limitation of fundamental rights is the jurisdiction of legislators.

Another crucial question which seems to be completely ignored by the government is the absence of special protection measures for vulnerable groups which are in extremely difficult situations because of quarantine–such as migrants, female victims of domestic violence and prisoners– especially in light of the right to a fair trial and the right to an effective remedy, as well as the prohibition of torture and inhuman treatment, which is an absolute right. For example, the monitoring commissions for prisons were forbidden to enter prisons to monitor the way prisoners are treated, while accounts of ill-treatment continue to be given by prisoners. The terrible conditions in which irregular migrants are detained have also been denounced and it is even more problematic that, as argued by some, the legal ground of their detention could be challenged since these migrants have no prospect of being sent back to their countries. The situation of migrants is even more questionable given the fact that all jurisdiction has been adapted in order to accommodate people during the crisis (e.g. extension of delays), except for the Council for Alien Law Litigation, greatly undermining the effective remedies for migrants. This situation was vehemently criticised by the Legislative Section of the Council of State.

To conclude, while the special powers granted to some Belgian governments seem to be balanced out by monitoring mechanisms, the weak government on a federal level which is a minority as well as the federal nature of the state itself, much more alarming conclusions regarding the respect of fundamental rights deserve urgent consideration by citizens, MPs and Courts.

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