The state of emergency in Belgian constitutional law

In 2016, Geert Van Haegenborgh (law clerk in the Court of cassation) and Willem Verrijdt (law clerk in the Belgian Constitutional Court) conducted a study on the state of emergency in Belgian constitutional law.[1] It was discussed during the annual conference of the *Vereniging voor de Vergelijkende Studie van het Recht van België en Nederland* (Association for the Comparative Study of Belgian and Dutch law) in Leiden on 25-26 November 2016. The study on the state of emergency in Dutch law for the same event was conducted by Jan-Peter Loof.

The full text in Dutch is available behind this hyperlink: https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1838347&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1

The following lines provide a summary in English of that study. Please feel free to contact the authors for further clarifications. It goes without saying that the following summary does not bind the institutions employing the authors.

Another important *caveat*: the following summary is based on the 2016 study. It does not include a COVID-19-update, because several measures taken in order to fight this pandemic are likely to be challenged before the Constitutional Court, which is the employer of this summary's author.

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[1] G. VAN HAEGENBORGH and W. VERRIJDT, "De noodtoestand in het Belgische publiekrecht", in VVSRBN, *Preadviezen 2016*, The Hague, Boom Juridische Uitgevers, 2016, 11-85.

Introduction

Emergencies come in many shapes and sizes. They can be caused by wars, terrorist attacks, revolutions, seizures of power, weather phenomena, natural disasters, nuclear or industrial catastrophes, food crises, pandemics, etc. The law governing the state of emergency must therefore be sufficiently flexible in order to allow the government to take a wide range of measures under a wide range of crisis circumstances.

A vast majority of national constitutions contain a clause allowing State organs to declare a state of emergency.[2] Such clauses stipulate which State organs are allowed to make such a declaration, under which circumstances they may do so, which procedure they should follow and what consequences this declaration has. Usually, such a declaration leads to a temporary centralisation of powers and to the attribution of special powers to the relevant authorities enabling them to fight the emergency.

In the following lines, I first set out some relevant terminology. Next, I explain why the Belgian Constitution lacks an explicit state of emergency clause. Subsequently, I show that this has never impeded the Belgian authorities to fight the emergencies that did occur. I conclude by explaining our position in the debate whether Belgium should adopt a state of emergency clause.

1. Terminology[3]

A first distinction to be made is the one between *de facto* and *de iure* states of emergency. A *de facto* state of emergency is a crisis growing to such a scale or intensity that it can no longer be accurately dealt with within the existing legal framework. A *de iure* state of emergency enters into force if the competent authority declares the state of emergency because of that *de facto* state of emergency.

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[2] N.C. LAZAR, *States of Emergency in Liberal Democracies*, New York, Cambridge University Press, 2009, 2.

[3] See also J.P. LOOF, *Mensenrechten en staatsveiligheid: verenigbare grootheden? Opschorting en beperking van mensenrechtenbescherming*, Nijmegen, Wolf Legal Publishers, 2005, 19-27.

A second distinction is the one between *objective* and *subjective* emergency laws. Objective emergency laws are adopted in normal times, in order to frame and limit the emergency powers which will enter into force if a *de iure* state of emergency is declared or if a *de facto* state of emergency occurs. They comprise both the laws governing the *de iure* state of emergency and other legislation applicable in times of crisis.

But as emergencies are characterized by their unpredictable and rapidly evolving character, objective emergency laws only rarely manage to anticipate all possible events. In most countries, lawyers therefore accept the existence of subjective emergency law, i.e. the government's right and obligation to deviate from existing legislation whenever this is necessary in order to contain the emergency. But even the actions undertaken by the government in such circumstances must have a foundation in existing law and they must be proportionate to the aim of dealing with that emergency.

A third distinction relates to the type of measures the government may take. Objective emergency laws usually allow derogating from the constitutional provisions governing the functioning of the *political institutions*, as well as from the *constitutional rights* provisions. Derogating from constitutional provisions concerning the political institutions usually leads to a shift of power from the Legislative to the Executive Branch, and sometimes even to the army or the police.

Derogating from human rights should be distinguished from *limiting* human rights. Most human rights are not absolute and may thus be limited by the competent authorities, provided that all constitutional or treaty conditions for doing so are met. If a human right is limited, it still applies. A rights limitation can always be submitted to judicial scrutiny and the judge may sanction it and order redress. Derogating from human rights, by contrast, means that the human right itself is temporarily suspended. This implies that judicial scrutiny of the measures running counter to it is also suspended. A human rights derogation is therefore at odds with the rule of law.

2. No *de iure* state of emergency in Belgium

2.1. Article 187 of the Constitution

2.1.1. General rule

Over 100 countries have already declared a *de iure* state of emergency because of the current COVID-19-pandemic.[4] Belgium is not one of them, and it isn't even allowed to do so, because unlike most other constitutions, the Belgian Constitution does not contain a *de iure* state of emergency clause. On the contrary, Art. 187 of the Constitution reads: *"The Constitution can be neither wholly nor partially suspended"*. That provision prohibits deviating from constitutional provisions, even in case of a *de facto* state of emergency.

This is one of the Constitution's most fundamental provisions, confirming its supremacy and articulating the idea of constitutionalism itself. It stresses that all authorities must always respect the Constitution, regardless the circumstances, and it serves as the constitutional foundation of the principle of the continuity of the public service.[5]

This provision was inserted into the draft Constitution by an amendment dated 5 February 1831, submitted by Congressman VAN SNICK,[6] who was inspired by the teachings of the French liberal philosopher Benjamin CONSTANT DE REBECQUE.[7] This author's writings significantly influenced the drafters of the Belgian Constitution. He wrote that a constitution must be inviolable: all powers owing their very existence to the Constitution, they are by no means able to suspend it.

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[4] See https://verfassungsblog.de/the-state-of-emergency-virus/

[5] O. ORBAN, *Le droit constitutionnel de la Belgique*, I, Liège, Dessain, 1906, 331 ; E. VAN HOOYDONCK, "Het artikel 130 van de Grondwet als algemene grondslag van het bestendigheidsbeginsel in het administratief recht", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 1992, 82-86; J. VELU, *Droit public, I, Le statut des gouvernants*, Bruxelles, Bruylant, 1986, 211.

[6] The discussions in National Congress (Belgium's constituent assembly) have been published by E. HUYTTENS, *Discussions du Congrès National de Belgique 1830-1831*, II, Bruxographique Belge, 1944, 464-465.

[7] B. CONSTANT, *Cours de politique constitutionnelle*, 1820, 114-145.

The further discussions concerning this amendment in National Congress reveal that the Congressmen were also inspired by recent events in France. The 1830 July Revolution was sparked by the French King Charles X's abuse of emergency powers under the 1814 *Charte*. Adopting the so-called Saint-Cloud Ordinances, he had abolished the freedom of the press, dissolved the Parliament, excluded the middle class from the electorate and organised new elections because he wanted a more monarchist Parliament. According to the drafters of the Belgian Constitution, King Charles X would never have been able to do so if the 1814 *Charte* had contained a clause like Art. 187 of the Belgian Constitution.

Given that background, Art. 187 of the Belgian Constitution must be interpreted as the denial of the Ciceronian adage *"Salus populi suprema lex esto"*. It is formulated as an absolute prohibition of suspending the Constitution and its scope should therefore not be limited to specific circumstances. Neither the constitutional provisions governing the functioning of the institutions, nor the constitutional rights may ever be suspended based on *raison d'État* arguments. Therefore, legislation allowing the authorities to declare the state of emergency or to deviate from existing law in times of emergency must be deemed to be unconstitutional.[8] Even war or siege do not allow for the Constitution to be suspended.[9]

[8] O. ORBAN, o.c., 333; K. RIMANQUE, *De Grondwet toegelicht, gewikt en gewogen*, Antwerpen, Intersentia, 1999, 366; R. SENELLE, *Commentaar op de Belgische grondwet*, Ministry of the Exterior, 1974, 438; M. VERDUSSEN, *La Constitution belge. Lignes et entrelignes*, Brussels, Le Cri, 2004, 188 ; J. VELAERS and S. VAN DROOGHENBROECK, "Invoeging van een transversale bepaling in de Grondwet over het afwijken van rechten en vrijheden", *Parl. Doc.*, House of Representatives, 2005-2006, no. 51-2304/001, p. 61.

[9] A significant part of the legal doctrine used to adhere to the "peacetime Constitution doctrine". According to that doctrine, the National Congress conceived Belgium as a neutral State and did not envisage the hypothesis of war, so that Art. 187 of the Constitution only applies in peacetime (A. BUTTGENBACH, "L'extension des pouvoirs de l'exécutif en temps de guerre et la revision de la Constitution belge", *Belg. jud.* 1935, 394; W.J. GANSHOF VAN DER MEERSCH, *Preadvies. De schorsing van de vrijheidsrechten in uitzonderingstoestand*, in VVSRBN 1949-1950, Antwerp, De Sikkel, 21-22; R. ERGEC, "L'état de nécessité en droit constitutionnel belge", in Interuniversitair Centrum voor Staatsrecht (ed.), *Le nouveau droit constitutionnel*, Brussels, Bruylant, 1987, 145).

Present day legal doctrine no longer accepts this theory, because the Constitution has always contained specific wartime provisions (J. VELAERS, *De beperkingen van de vrijheid van meningsuiting*, II, Antwerpen-Apeldoorn, Maklu, 1991, 794-795; J. VELAERS and S. VAN DROOGHENBROECK, *o.c.*, 68). In our study, we have adhered to the latter theory.

2.1.2. Exceptions?

Nevertheless, the jurisprudence and the legal doctrine do accept two exceptions to this fundamental rule. The validity of the first exception is widely accepted, whereas the second one is heavily debated in the legal doctrine. In any event, both exceptions must be interpreted narrowly.

The first exception is *Force majeure*. In some exceptional situations, an emergency imposing itself to the government might render following the procedures laid down in the Constitution absolutely impossible. But even in such situations, the principle of the continuity of the public service, which is itself derived from Art. 187 of the Constitution,[10] requires that the essential State functions must remain operational. A total disruption of public service would constitute an even further-reaching violation of the Constitution than its exercise according to an unconstitutional procedure. Almost all authors therefore accept that, in case of *Force majeure*, the government may derogate from the constitutional provisions governing the functioning of the institutions.[11] The most notable examples are the Wartime Decrees (cfr. *infra*, 3.1).

The second exception relates to the even more exceptional situation in which Belgium's very existence is under threat. In 1952, the Council of State's Legislation Division delivered an opinion on a draft bill granting exceptional powers to the Executive in case of war. According to the Council of State, such a far-reaching delegation of powers would only be acceptable when absolutely necessary in order to preserve the existence of the Nation.[12] In a 1940 opinion, Advocate-General HAYOIT DE TERMICOURT had also accepted that all authorities must to take all measures necessary in order to preserve Belgium's independence.[13] According to that theory,

[10] E. VAN HOOYDONCK, *o.c.*, 82-86.

[11] W. J. GANSHOF VAN DER MEERSCH, *o.c.*, 60; C. HUBERLANT, "Etat de siège et légalité d'exception en Belgique", in *Licéité en droit positif et références légales aux valeurs*, Brussels, Bruylant, 1982, 427-429; J. VELAERS, *o.c.*, 796; L. WODON, "Sur le rôle du Roi, comme chef de l'Etat dans les cas de défaillances constitutionnelles", *Bulletin*, Académie Royale, 1941, 217-218.

[12] Council of State, Legislation Division, Opinion of 9 Jun. 1952, *Parliamentary Documents (House of Representatives)* 1952-53, No. 172, 11-14.

[13] Concl. R. HAYOIT DE TERMICOURT for Cass. 4 March 1940, *Pas.*, 1946, I, 497.

the authorities may derogate from the constitutional provisions governing the functioning of the institutions if four conditions are met: this derogation must be (i) absolutely necessary in order to (ii) preserve Belgium's independence, it must be (iii) of a temporary nature, and (iv) the decision must be taken by the Legislative Branch. Both the constitutional foundation and the constitutionality of this theory are, however, debated until present. Several authors have tried to develop a theory reconciling this right or obligation of the authorities with Art. 187 of the Constitution, but none of these theories is generally accepted.[14]

It must be noted that even in these two exceptional circumstances, only derogations from the constitutional provisions governing the functioning of the institutions are allowed. By contrast, these circumstances would not allow derogating from the constitutional rights, because such a derogation would not be imposed by the *Force majeure* or by the threat to Belgium's independence itself, but by the choice of the measures taken by the authorities.[15] Such exceptional circumstances may well require limiting human rights, but they do not require the exclusion of later judicial review of the measures taken.

2.1.3. Conclusion

A *de iure* state of emergency does not exist in Belgium. Its creation would require a prior revision of Art. 187 of the Constitution. This explains why there are only very few objective emergency laws in Belgium (see *infra*, 2.3). It also implies that *de facto* emergencies can only be dealt with using subjective emergency laws (see *infra*, 3).

[14] For a recent critical overview of these theories, see J. VELAERS and S. VAN DROOGHENBROECK, "L'article 187 de la Constitution et la problématique de la protection des droits et libertés dans les états d'exception", in E. VANDENBOSSCHE (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, Bruges, die Keure, 2019, 17-23.

[15] S. VAN DROOGHENBROECK, "L'article 187 de la Constitution", *Revue belge de Droit Constitutionnel* 2006, 295.

2.2. No possibility to use derogation clauses in international treaties

According to Art. 15 of the European Convention on Human Rights, any High Contracting Party may, in time of war or other public emergency threatening the life of the nation, take measures derogating from its obligations under that Convention. Certain substantive and procedural conditions apply, such as the obligation keep the Secretary-General of the Council of Europe posted, the exigencies of strict necessity and consistency with other obligations under international law, the temporary nature of the measures taken, and the non-derogable character of some Convention rights.[16] Art. 4 of the International Covenant on Civil and Political Rights contains a similar public emergency clause.

Can the Belgian authorities use these treaty-based public emergency clauses in order to circumvent Art. 187 of the Constitution? If the answer is yes, they would be able to derogate from several human rights after all, despite their being guaranteed not only by the ECHR and the ICCPR, but also by the Belgian Constitution. This would deprive Art. 187 of the Constitution of a significant part of its meaning.

According to Advocate-General VELU and according to several scholars, the principle of precedence of the most far-reaching human rights protection, laid down in Art. 53 of the ECHR, is the key to answering this question. If the national constitution of a Council of Europe Member State does not allow a *de iure* state of emergency, this Member State is, according to them, unable to use Art. 15 of the ECHR.[17] ERGEC disagrees with that point of view. According to him, *Force majeure* and invoking the state of emergency are general principles of Belgian law. This suffices, in his view, as a connecting factor between Belgian law and Art. 15 ECHR.[18]

[16] Art. 2 (right to life), art. 3 (prohibition of torture and of inhuman or degrading treatment), art. 4.1 (prohibition of slavery) and art. 7 (*nullum crimen, nulla poena, sine lege*).

[17] Concl. Adv.-Gen. J. VELU for Cass. 23 September 1976, *Pas.* 1977, I, 88; J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM*, 2.II, Antwerp, Intersentia, 2005, 194-195; J. VELAERS and S. VAN DROOGHENBROECK, "L'article 187…", *l.c.*, 35.

[18] R. ERGEC, *o.c.*, 169.

In our study on the state of necessity in Belgian constitutional law, we have adhered to the majority point of view.[19] The Constitutional Court has often stressed that the human rights guaranteed by the Belgian Constitution and analogous provisions in international treaties must be interpreted as an “inextricable unity”. The substantive scope of the constitutional rights must, according to that caselaw, be aligned to the minimum standard of the corresponding supranational human right, as interpreted by the ECtHR and the ECJ, except if the Constitution offers a further-reaching protection.[20] This analogy doctrine should not only apply to the substantive scope of human rights, but also to the possibility of derogation. Art. 187 of the Constitution offering a further-reaching protection than Art. 15 ECHR and Art. 4 ICCPR, it must prevail over these treaty provisions. The Belgian authorities can therefore only fight *de facto* states of emergency by limiting human rights, but not by derogating from them. The main difference between these two concepts consisting in the possibility or the absence of later judicial review of the measures taken, the majority point of view also seems to be more consistent with the right of access to a judge, a human right guaranteed by the analogous Art. 13 of the Constitution and Art. 6 ECHR.[21]

2.3. A very limited set of objective emergency laws in Belgium

The only objective emergency laws in Belgium are a couple of constitutional provisions and one Wartime Decree (on that concept, see *infra*, 3.1) concerning war and siege.

By virtue of Art. 167, § 1 of the Constitution, the King commands the armed forces and declares the state of war, as well as the cessation of hostilities. His command is, however, limited in three ways. First, the same provision requires Him to keep the Parliament posted as soon as possible. Second, the concept “King” in the Constitution should actually be read as “the federal Government”, as no act of the King can take effect if it is not countersigned by a minister who by doing so assumes full responsibility

[19] G. VAN HAEGENBORGH and W. VERRIJDT, *o.c.*, 40.

[20] CC no. 136/2004, 22 July 2004; CC no. 202/2004, 21 December 2004; CC no. 170/2008, 27 November 2008; CC no. 29/2010, 18 March 2010.

[21] CC no. 195/2009, 3 December 2009.

for it (Art. 106 of the Constitution). Third, Art. 185 of the Constitution stipulates that foreign troops may not be admitted in service of the State, nor occupy the territory or traverse it other than by authority of an Act of Parliament. Most scholars agree that these limits do not go far enough. They advocate a revision of Art. 167, § 1 of the Constitution in order to provide for a more important role for the Parliament.[22]

Art. 196 of the Constitution forbids amending the Constitution during time of war or when the Houses of Parliament are hindered from meeting freely on the federation's territory. And Art. 157 of the Constitution allows Courts Martial to be established as soon as a state of war has been declared.

The Wartime Decree of 11 October 1916 concerning the state of war and the state of siege was adopted during the First World War, but the Court of Cassation has ruled that it is a permanent piece of legislation which automatically enters into force if the King declares the state of war.[23] The state of war starts when the King mobilises the armed forces and it ends when He ends the mobilisation.[24] During the state of war, the King may declare the state of siege, either for the entire territory or for parts of it.

During the state of war, the King may take all necessary police measures or order the governors to do so. All publications and all gatherings which can provide strategic information to the enemy are forbidden. A further censorship may be imposed. Seizures of persons or goods are also allowed in order to assure the proper functioning of public service. Civil and military authorities may be authorized to search personal premises. Gatherings which may have a disorderly effect can be forbidden. All postal correspondence may be limited or even seized.

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[22] T. RUYS, "Kroniek van een nakende grondwetswijziging? Parlementaire controle op het inzetten van strijdkrachten in het buitenland", *RW* 2009-2010, 514-530; M. VAN DAMME, "De Grondwet en het inzetten van strijdkrachten. Een inleidende situering", in A. DE BECKER, G. LAENEN, M. VAN DAMME and E. VANDENBOSSCHE (eds.), *De Grondwet en het inzetten van strijdkrachten*, Antwerp, Maklu, 2005, 22-25; J. VELAERS and S. VAN DROOGHENBROECK, "Invoeging…", *l.c.*, 84.

[23] Cass. 4 March 1940, *Pas.* 1946, I, 493, concl. Adv.-Gen. R. HAYOIT DE TERMICOURT.

[24] During the First World War, the state of war lasted from 31 July 1914 until 30 September 1919. During the Second World War, it lasted from 26 August 1939 until 15 June 1949. The latter date postdates the armistice by four years. This allowed for the Courts Martial to remain operational in order to judge those who had collaborated with the Nazi regime. This was an abuse of the "state of war" concept (C. HUBERLANT, "Etat de siege et légalité d'exception en Belgique", in *Licéité en droit positif et références légales aux valeurs*, Brussels, Bruylant, 1982, 424).

During the state of siege, the possibility to take police measures is transferred from the civil authorities to the Minister of Defence or to the army. This includes all measures limiting human rights mentioned above.

Although said measures may only be taken “with the aim of defending the country and securing the safety of the army”, they are generally considered to be very problematic under the constitutional rights guaranteed by Title II of the Belgian Constitution. Several Belgian constitutional rights provide for a further-reaching or more specific human rights protection than the ECHR. The Wartime Decree is said to violate the ban on censorship in Art. 25 of the Constitution, the freedom of assembly in Art. 26 of the Constitution, and the inviolability of postal correspondence in Art. 29 of the Constitution, among others. So many human rights are limited to such a degree that the Wartime Decree comes down to a derogation from the constitutional rights protection, and thus to a violation of Art. 187 of the Constitution.[25]

The Wartime Decree’s unconstitutionality was not justiciable as long as Acts of Parliament were inviolable. But this inviolability lies in the past: since 1971, Acts can be reviewed against directly applicable international treaties, including the ECHR, by any ordinary or administrative judge, and since 1989, they can be reviewed against the constitutional rights by the Constitutional Court. If a new state of war would be installed today, several measures in the Wartime Decree would not survive judicial scrutiny.

That is not the only reason why this Wartime Decree is in need of a major reform. The other reason is that it is completely outdated. It has never been adapted to changes in society, in technology or in techniques of warfare.[26]

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[25] K. CALLEBAUT, “De staat van oorlog en de staat van beleg”, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 1959, 281; W.J. GANSHOF VAN DER MEERSCH, “Preadvies…”, *l.c.*, 29-36; J. VELAERS, *De beperkingen van de vrijheid van meningsuiting*, II, Antwerpen, Maklu, 1991, 797-802; J. VELAERS and S. VAN DROOGHENBROECK, “Invoeging…”, *l.c.*, 32.

[26] K. CALLEBAUT, *o.c.*, 287; R. GERITS, “De staat van oorlog en de staat van beleg: uitzonderingsregimes die aan een herziening toe zijn”, in E. VANDENBOSSCHE (ed.), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, Brugge, die Keure, 2019, 100-103.

3. Subjective emergency laws

The absence of a *de iure* state of emergency and the very limited number of objective emergency laws in place in Belgium has never prevented the Belgian authorities to fight the *de facto* states of emergency which did occur. They did so by adopting subjective emergency laws. The most important examples will be discussed in the following paragraphs: Wartime Decrees (3.1), Exceptional Powers Acts (3.2), Special Powers Acts (3.3) and ordinary legislation in times of crisis (3.4).

3.1. Wartime Decrees

Wartime Decrees (*"besluitwetten"*) are not mentioned in the Constitution. This concept emerged during the First World War due to *Force majeure*.

As a rule, federal legislative authority is exercised collectively by the King, the House of Representatives and the Senate (Art. 36 of the Constitution). During the First World War, however, the vast majority of the Belgian territory, including Brussels, was occupied, and it was therefore impossible for Parliament to convene. King Albert I was the only part of the Legislative branch which could still operate. Therefore, He exercised the Legislative branch alone, but always after consulting the Council of Ministers in Le Havre. The preamble of the Wartime Decrees He thus adopted, mentions the impossibility of the Parliament to convene, and the necessity to continue producing legislation. These Wartime Decrees were always promulgated, sealed and published in the same way as regular Acts of Parliament. This situation lasted from October 1914 until November 1918. During that time, 144 "Wartime Decrees of Le Havre" were adopted.[27]

[27] C. BEHRENDT, "Excursion à l'orée de la chasse gardée du juge constitutionnel. La Cour constitutionnelle et le contrôle de la constitutionnalité des arrêtés-lois de temps de guerre, des arrêtés-lois de pouvoirs extraordinaires et des décrets du Congrès national", *Rev. Fac. Dr. Liège* 2007, 529-550 ; F. DUMON, "Over enkele grondwettelijke problemen, gerezen tijdens de Tweede Wereldoorlog", Brussels, *Academiae Analecta*, 1983; J. DE MEYER, "Over de legitimiteit van de besluitwetten van de oorlogsregeringen in 1914-1918 en 1940-1944", in *Liber amicorum A. De Schryver*, 1968, 296-304.

Immediately after the First World War, the Court of Cassation accepted the validity of this technique. It explained that, being the only operational part of the Legislative branch, and being forced to take the measures necessary in order to protect the vital interests of the country, the King was allowed, and even forced, by the circumstances to proceed as He did. It added that the Wartime Decrees of Le Havre possess the same force of law as ordinary legislation and can only be amenden by an Act of Parliament.[28] Prosecutor-General TERLINDEN's conclusion explains that the Court of Cassation thus applied the theory of *Force majeure*.

During the Second World War, the Legislative branch was even more handicapped. Parliament was again unable to convene in Brussels, and next to that, the King was held captive, and was therefore unable to reign. In such a case, a Regent would normally have to be appointed by Parliament (Article 93 Constitution). But this was, in turn, impossible as long as Parliament was prevented from assembling. All three parts of the Legislative branch were thus dysfunctional. In order to ensure the continuity of government, the King was therefore replaced by his Ministers, who had fled to London in order to continue fighting. The Legislative branch was thus exercised by the Ministers, who adopted the Wartime Decrees of London. This situation lasted from 28 May 1940 until 20 September 1944. During that period, some 250 "Wartime Decrees of London" were adopted. Only then, Parliament could convene again, and appoint a Regent, as King Leopold III was still held captive abroad.

The Court of Cassation has also accepted the validity of the Wartime Decrees of London.[29] Combining *Force majeure* with the principle of the continuity of the public service and the King's impossibility to reign, it ruled that even these Wartime Decrees possess force of law.[30] Therefore, they can only be amended by an Act of Parliament, and their constitutionality may only be examined by the Constitutional Court.[31]

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[28] Cass. 11 February 1919, *Pas.* 1919, I, 9, concl. Proc.-Gen. M. TERLINDEN. See also Cass. 4 March 1940, *Pas.*, 1946, 493, concl. Adv.-Gen. R. HAYOIT DE TERMICOURT.

[29] Cass., 11 December 1944, *Arr.Verbr.* 1945, 60.

[30] Cass., 18 October 1949, *Arr.Verbr.* 1950, 54.

[31] CC no. 115/99, 10 November 1999; CC no. 101/2000, 11 October 2000.

3.2. Exceptional Powers Acts

3.2.1. The concept of exceptional powers

Another typical wartime phenomenon are the two Acts of Parliament granting the King "exceptional powers". The first one was adopted on 7 September 1939, when Parliament was still able to convene, and completed by an Act of 14 December 1944, when it was again able to convene. The second one was adopted on 20 March 1945.

The Act of 7 September 1939 granted the King exceptional powers for as long as the state of war would endure. It authorized the Executive branch to take all necessary and urgent decisions in order to assure the security and the defence of the territory, the assurance of *ordre public*, the functioning of the Judiciary, the provinces and the municipalities, public health, credit, food distribution, and the economic and financial interests of the country and its inhabitants. The Executive was also allowed to take tax measures deviating from existing legislation on the State income and expenditure. The consequence of this Act was that public policy decisions in vast and vaguely defined areas shifted from the Legislative to the Executive branch, until the Executive would decide to demobilize the army. Furthermore, it was up to the Executive branch to decide whether a matter was necessary and urgent.

The Act of 20 March 1945 had a more limited scope, both *ratione materiae* and *ratione temporis*. The exceptional powers were only granted to the Regent for a period of six months, and only with the aim of continuing the fight, together with the "united peoples", against the Nazi regime.

3.2.2. Constitutional basis

The Parliament being the directly elected representation of the people, it has the residuary powers, whereas the King only has attributed powers: He only has jurisdiction insofar as the Constitution or an Act of Parliament says so. The Constitution often even reserves certain matters to the Legislative branch. Nevertheless, delegating the exercise of parts of the legislative competences to the King is not per se unconstitutional: Art. 105 of the Constitution even explicitly allows a delegation of

powers to the King. It is generally accepted that the legislator may thus confer upon the King the power to repeal, to complete, to amend or to replace existing Acts of Parliament. The legislator makes ample use of this technique, for example in order to delegate to the King the power to further specify the measures adopted in annual budget laws.

Usually, the legislator makes all important policy decisions himself and only delegates non-essential aspects to the King. Moreover, delegations usually only concern matters for which the Constitution does not explicitly require that they must be regulated by an Act of Parliament, the so-called “residuary powers”. They should not include the so-called “reserved matters”, which must be regulated by an Act of Parliament (e.g. the Judiciary, the armed forces, education, the use of languages, taxation, criminal indictment, and limiting constitutional rights).

Exceptional Powers Acts go a lot further than these normal delegations: they attribute policy-making itself to the King, in vast and vaguely described areas, which do include matters reserved by the Constitution to the legislator, and - concerning the Act of 7 September 1939 - for a period which was unclear at the outset.

The question whether the delegations in the Acts of 7 September 1939, 14 December 1944 and 20 March 1945 were constitutional, was less relevant during the Second World War, because Acts of Parliament were still inviolable. Nowadays, delegations must meet the substantive and procedural standards developed in the Constitutional Court’s caselaw and in the advisory opinions of the Council of State’s Legislation Division. These standards are further discussed *infra*, because they also apply to “Special Powers Acts” (see 3.3). Most authors agree that the technique of exceptional powers is rather impossible to reconcile with these standards.

3.2.3. Exceptional Powers Decisions

The King has adopted a total of 412 Royal Decisions based on the Act of 7 September 1939 and 102 Royal Decisions based on the Act of 20 March 1945. These Royal Decisions (“Koninklijk Besluit”) should not be confused with the Wartime Decrees described above. The Wartime Decrees were pieces of formal legislation,

whereas the Royal Decisions based on Exceptional Powers Acts are, just like all Royal Decisions, acts of the Executive branch.[32]

These Royal Decisions should therefore, following Art. 159 of the Constitution, be subject to full judicial review against formal legislation and against other higher-ranking norms. Nevertheless, the Court of Cassation has ruled that the Acts of 7 September 1939 and of 20 March 1945 have implicitly excluded this judicial review. In several judgments predating the establishment of the Constitutional Court, the Court of Cassation disallowed judges to examine whether the Royal Decisions respect the Constitution, because such a review would come down to examining whether the Exceptional Powers Acts respect the Constitution. The Court of Cassation added that the judge should not second-guess whether it was "necessary and urgent" to regulate the matter concerned with an Exceptional Powers Decision. It also specified that the Royal Decisions may not be reviewed against other legislation either, because the Acts of 7 September 1939 and 20 March 1945 have authorized the King to deviate from existing legislation.[33] Judges are therefore only allowed whether the Royal Decisions respect the boundaries of the Exceptional Powers Acts. Such a review has very limited relevance, because of the vagueness of the exceptional powers.

3.3. Special Powers Acts

In the fight against the COVID-19-pandemic, several Belgian legislators have used the technique of granting "special powers" to their respective Executive branches. The Chamber of Representatives,[34] as well as the Chamber and the Senate,[35] have granted special powers to the federal Government. The Parliament of the French Community has granted special powers to the French Community Government,[36] the

[32] Cass. 27 January 1943, *Pas.* 1943, I, 32; Cass. 13 November 1946, *Pas.* 1946, I, 411.

[33] Cass. 27 January 1973, *Pas.* 1943, I, 32; Cass. 13 November 1946, *Pas.* 1946, I, 411; Cass. 27 February 1947, *Pas.* 1947, I, 118; Cass. 28 November 1955, *Pas.* 1956, I, 295; Cass. 4 September 1961, *Pas.* 1962, I, 15; Cass. 8 October 1985, AR 9653.

[34] Act of 27 March 2020 II (www.ejustice.just.fgov.be/eli/wet/2020/03/27/2020040938/justel).

[35] Act of 27 March 2020 I (www.ejustice.just.fgov.be/eli/wet/2020/03/27/2020040937/justel).

[36] Decree of 17 March 2020 (www.ejustice.just.fgov.be/eli/decreet/2020/03/17/2020040696/justel).

Walloon Parliament to the Walloon Government,[37] The Brussels-Capital Parliament to the Brussels-Capital Government,[38] the Council of the Joint Community Commission to its Executive,[39] and the Council of the French Community Commission to its Executive.[40] Only the Flemish Parliament and the Parliament of the German-Speaking Community have not made use of this technique: they have mainly taken measures by adopting ordinary legislation, which sometimes contained more specific delegations to their respective executives.

These special powers were all limited to a period of three months after their entry into force and they all had to be exercised with the aim of fighting the pandemic and its consequences. Most of them were delimited *ratione materiae* to several federal or federated competences, including public health, public order, logistics, supply, financial support in order to overcome the crisis' economic and social consequences, financial stability, the functioning of the market, measures of labour law, measures concerning civil servants, the proper functioning of the Judiciary and the administrative courts, and the implementation of measures taken by EU organs. The Walloon Parliament and the Joint Community Commission did not delimit the substantive scope of the delegation, but simply referred to the goal of fighting against the pandemic and its consequences which had to be urgently addressed.

3.3.1. The concept of special powers[41]

Special Powers Acts grant the King or the federated Executives a vast delegation, mostly in the field of socio-economic measures, allowing them, during a specified period, to take all necessary actions in order to overcome a crisis situation. The

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[37] Decree of 17 March 2020 (www.ejustice.just.fgov.be/eli/decreet/2020/03/17/2020040687/justel).

[38] Ord. of 19 March 2020 (www.ejustice.just.fgov.be/eli/ordonnantie/2020/03/19/2020040737/justel).

[39] Ord. Of 19 March 2020 (www.ejustice.just.fgov.be/eli/ordonnantie/2020/03/19/2020040738/justel).

[40] Decree of 23 March 2020 (www.ejustice.just.fgov.be/eli/decreet/2020/03/23/2020030544/justel).

[41] For a recent overview, see 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, 177-213.

Executive is thus provided with an unusually large manoeuvring room for taking policy decisions. The delegations usually include the power to repeal, to complete, to amend or to replace existing legislation. They often include measures in areas for which the Constitution requires an Act of Parliament, such as tax law and criminal indictments.

When granting special powers, the legislator implicitly indicates that the situation is too urgent or the measures to be taken are too technical in order to follow the entire legislative procedure. Most Special Powers Acts stipulate that the measures taken by the Executive - or at least the measures taken in areas which constitutionally must be regulated by an Act of Parliament - are to be confirmed by a legislative Act within a specified delay.

Special Powers Acts must be distinguished from *Exceptional* Powers Acts for two reasons. First, Special Powers Acts are not limited to wartime crises. In the past, they have often been used in order to overcome economic and financial crisis, or in order to meet important goals, such as the Maastricht euro convergence criteria.[42] Second, the delegations to the King or to the federated Executives in such Acts are less vaguely formulated than the ones contained in the Exceptional Powers Acts. But apart from that, the legal principles applicable to both types of delegations are rather similar.

The Act of 16 July 1926 is generally considered to be the first Special Powers Act. It allowed the King to take all measures necessary for improving Belgium's financial situation. The King adopted 46 Royal Decisions based on that delegation, which was granted for a period of six months. Since then, several crises have been fought by conferring special powers upon the Executive. In a study conducted in 1986, ALEN already counted 26 Special Powers Acts and he calculated that during 9 out of the last 60 years, special powers had been in place.[43]

Since 1996, all draft Royal Decisions and draft federated Government Decisions based on special powers must be submitted to the Council of State's Legislation Division for

[42] Act of 26 July 1996 (http://www.ejustice.just.fgov.be/eli/wet/1996/07/26/1996021235/justel).

[43] A. ALEN, "De bijzondere machten: een nieuwe besluitenregering in België?", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 1986, 214-215.

a prior advisory opinion if they aim at repealing, completing, amending or replacing existing legislation. Even in case of urgency, this obligation may not be set aside. The advisory opinion must be published in the Belgian *Official Gazette* alongside the Royal or federated Government Decision.[44]

3.3.2. Constitutional basis

As mentioned above (see 3.2.2), delegation of powers is a difficult concept under the Belgian Constitution. As a general rule, delegations of powers must be considered as a violation of Art. 33 of the Constitution, which stipulates that all powers must be exercised in the way specified by the Constitution. Moreover, Art. 108 of the Constitution defines the King's regulating powers: *"The King issues orders and decrees which are necessary for the implementation of laws, without ever being able to suspend the laws themselves or to grant any exemption from their implementation"*.

Some authors have argued that Special Powers Acts are nevertheless allowed because of the "necessity theory": the urgency of a crisis situation being incompatible with the sluggishness of the legislative procedure, the Parliament must, according to these authors, be considered to be in a moral impossibility to function properly, and therefore attribute the powers necessary to combat the crisis to the King.[45] Present day constitutionalists reject this theory, because it is at odds with Art. 187 of the Constitution. Moreover, concepts such as "moral impossibility" can easily be abused.[46]

The only sound constitutional basis for Special Powers Acts is Art. 105 of the Constitution,[47] which stipulates that the *"King has no powers other than those which*

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[44] Art. 3*bis* of the Coordinated Act of 12 January 1973 on the Council of State.

[45] E.g. P.M. ORBAN, "De grondslag van de 'volmachtgeving' in België", *Rechtskundig Tijdschrift* 1938, 127. See also the majority opinion in Centre d'Etudes pour la réforme de l'Etat, *La réforme de l'Etat*, Brussels, Ravenstein, 1937, 85-87.

[46] A. ALEN, *o.c.*, 199-200; A. MAST and J. DUJARDIN, *Overzicht van het Belgisch Grondwettelijk Recht*, Ghent, Story-Scientia, 1983, 234.

[47] Cass. 3 May 1974, *RW* 1974-1975, 78, concl. Proc.-gen. GANSHOF VAN DER MEERSCH; A. ALEN, "De grondslag van de bijzonderemachtenwetgeving", *Rechtskundig Weekblad* 1983-1984, 418-428; F. DELPÉRÉE, *Le droit constitutionnel de la Belgique*, Brussels, Bruylant, 2000, 771; J. MERTENS, *Le fondement juridique des lois de pouvoirs spéciaux*, Brussels, Larcier, 1945, 115-119.

the Constitution and Special Delegation Acts passed under the authority of the Constitution itself, expressly confer on Him". This provision allows the legislator to extend the King's regulatory powers beyond the ones mentioned in Art. 108 of the Constitution. Article 78 of the Special Majority Act of 8 August 1980 contains a similar provision in the relation between the federated parliaments and their governments.

3.3.3. Limits to the special powers

As a consequence of that constitutional basis, the use of special powers is limited by the principles governing the relation between the Legislative and the Executive branches. Both the Council of State's Legislation Division and the Constitutional Court have developed several substantive and procedural conditions which must be met by Special Powers Acts.[48] These conditions differ based on whether the delegations concern the legislator's residuary powers or his reserved matters.

If the legislator only delegates the exercise of parts of his *residuary powers* to the King, three conditions apply. First, special powers may only be attributed to the King in exceptional circumstances. The legislator enjoys a large margin of appreciation in order to determine whether an issue amounts to an exceptional circumstance.[49] Second, the special powers must be limited in time: a period of some 14 months is considered to be the maximum duration. Third, the matters delegated to the King must be defined with great precision. Merely mentioning the aim of the measures to be taken, is insufficient. The scope of the delegation must be interpreted restrictively.[50]

If the legislator also delegates the exercise of essential aspects of the *reserved matters* (see 3.2.2) to the King, three further conditions apply. First, such a delegation is only acceptable if it is impossible for the legislator to regulate all essential aspects of the

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[48] CS, opinion of 23 December 1981, *Parl. Doc.*, Chamber, 1981-82, no. 28/1, p. 5; CS, opinion no. 47.062/1, 18 August 2009, *Parl. Doc.*, Chamber, 2008-2009, no. 52-2156/001, p. 17; CS, opinion no. 50.472/1/2, 20 December 2011, *Parl. Doc.*, Chamber, 2011-2012, no. 53-1952/13, 5; CC no. 32/2000, 21 March 2000, B.7.2; CC no. 88/2004, 19 May 2004, B.8.4; CC no. 195/2004, 1 December 2004, B.16.3; CC no. 40/2011, 15 March 2011.

[49] CC no. 124/2002, 10 July 2002, B.4.20 (Belgium's ambition to participate in the eurozone, requiring severe austerity measures).

[50] CC no. 68/99, 14 June 1999, B.5.4; Cass. 19 January 1959, *A.C.* 1959, 397.

reserved matter himself. Second, the Special Powers Act must explicitly specify which reserved matters may be regulated by the King. Third, the Special Powers Act must order that the Special Powers Royal Regulations adopted by the King must be confirmed by an Act of Parliament within a specified delay. If confirmation is granted within that delay, the Royal Regulation is retroactively considered to have been an Act of Parliament since its adoption. But if confirmation is not granted within that delay, the Royal Regulation is deemed never to have had any legal effect.[51] [52]

3.3.4. Special Powers Royal Regulations

Similar to the *Exceptional* Powers Royal Regulations, the *Special* Powers Royal Regulations (SPRR) are acts of the Executive, which should be subject to full judicial review, i.e. incidental review by the ordinary courts and tribunals and annulment review by the administrative courts. Even if an SPRR repeals, completes, amends or changes existing legislation, it still is an executive norm.

If an SPRR is not confirmed by an Act of Parliament in time, judges must, after the expiry of the delay, refuse to apply it in pending cases. If it is confirmed in time, its legal nature changes, and the ordinary or administrative judges cease to have jurisdiction to review it against the Constitution.

The uncertain timing of the confirmation complicates and delays judicial protection. If the petitioner challenges the SPRR before the Constitutional Court prior to its confirmation, the Court will simply declare the case inadmissible for lack of jurisdiction.[53] If the petitioner wants direct access to the Constitutional Court, he must await the SPRR's confirmation, but waiting that long is not always an option. If he challenges the SPRR before the Council of State, he must hope that it renders its

[51] CC no. 195/2004, 1 December 2004, B.16.3; CC no. 83/2008, 27 May 2008, B.5.2.

[52] These three additional conditions apply for all reserved matters, except education, criminal indictments and socio-economic rights. In the Constitutional Court's caselaw, delegating essential elements of the reserved matters concerning education and criminal indictments is never possible (CC no. 40/2011, 15 March 2011). By contrast, in the field of socio-economic rights, it suffices if the legislator indicates the topic of the subject matter to be regulated; he can thus grant a significant delegation to the King in these matters (CC no. 151/2010, 22 December 2010).

[53] CC no. 163/2005, 9 November 2005.

judgment before the SPRR's confirmation, as the confirmation pending the proceedings takes away the Council of State's jurisdiction. The same holds true if he challenges the SPRR before an ordinary judge. The only other option the judge or the Council of State have, is to send the case to the Constitutional Court for a preliminary reference on the confirming Act's constitutionality.

Apart from that procedural hurdle, the review of an SPRR by the ordinary or administrative judge is also hampered by the vagueness of the Special Powers Act. If the SPRR violates the Constitution, while it does not violate the Special Powers Act, the only logical conclusion is that the Special Powers Act violates the Constitution. Yet, the ordinary and administrative judges lack jurisdiction for making that statement, and will therefore be forced to send the case to the Constitutional Court anyway.

After the expiry of the special powers, the SPRR can no longer be amended by the King. Any further amendment will require an Act of Parliament. The King can only regain jurisdiction to amend it if he is granted, during a later crisis situation, special powers concerning the same subject matter.

3.4. Ordinary crisis legislation and judicial review

Crisis situations do not necessarily call for exceptional measures adopted through arguably unconstitutional procedures. Quite often, measures adopted by ordinary legislation may suffice. The review of such legislative crisis measures against the Constitution falls under the Constitutional Court's jurisdiction. In our study on the state of necessity in Belgian constitutional law, we have only made one case study in this regard, i.e. the legislation adopted in the fight against terrorism.

Terrorism challenges the rule of law from two opposing angles. The techniques used by the terrorists are inconsistent with the western societal model, as they violate several human rights with the aim of putting the very foundations of that societal model under pressure. But conversely, the measures taken by the authorities in order to protect their citizens against terrorist attacks risk impairing that very same societal model, as they often involve several limitations to human rights. While being under the

obligation to fight terrorism, the authorities are also bound to do so within the framework of the rule of law. Or to put it in the words of the Supreme Court of Israel: *"This is the destiny of a democracy: it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back"*.[54]

The Belgian federal legislator has taken several measures in the fight against terrorism. Some of these measures criminalize certain terrorist activities, such as the spreading of terrorist ideology or traveling abroad with the aim of committing terrorist acts. Other measures provide for a more severe punishment if a criminal offence is committed with a terrorist intent. Such measures are often challenged in light of the freedom of opinion, the *lex certa* principle or the equality principle. Some measures allow the police, the Justice system and the Intelligence services to keep track of potential terrorist threats. Such measures are often challenged in light of the right to privacy.

This is not the place to elaborate upon this legislation. Summarizing the most important features of that caselaw is nevertheless revealing:

1) The Constitutional Court's general position on the relation between the ECtHR, the ECJ and national constitutional courts is one of loyal collaboration.[55] This is also reflected in its jurisprudence on legislation concerning the fight against terrorism: the Constitutional Court uses the same concepts as the ECtHR and the ECJ and its caselaw contains ample references to the ECtHR's and the ECJ's jurisprudence.

2) One of these concepts is the distinction between the human rights which are not open for derogation in times of emergency according to Art. 15 ECHR and the other human rights. For example, the Constitutional Court has stressed that the prohibition of a retroactive criminal indictment is an absolute human right, even if the legal provision at hand has been adopted with the aim of punishing a foreign terrorist who

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[54] HCJ no. 5100/94, *Public Committee Against Torture in Israel e.a.* (1999) PD53(4)817, § 39.

[55] See A. ALEN and W. VERRIJDT, "The Dialogue Between the European Court of Human Rights and Domestic Constitutional Courts: The Belgian Example", in K. LEMMENS, S. PARMENTIER and L. REYNTJENS (eds.), *Human Rights with a Human Touch. Liber amicorum Paul Lemmens*, Antwerp, Intersentia, 2019, 155-202.

was hiding in Belgium after having committed a murder with terrorist motifs in her own country, and who could not be extradited to that country, because she would then risk the death penalty for that crime.[56]

3) When reviewing anti-terrorism legislation against the human rights which are open for derogation in times of emergency, it grants the legislator a large margin of appreciation. It accepts almost all measures limiting such human rights, provided that their individual application is always open to judicial scrutiny with full jurisdiction.[57]

4) Anti-terrorism legislation must also meet all substantial and procedural requirements laid down in primary and secondary EU law. For example, the Constitutional Court implemented the ECJ's *Digital Rights Ireland* judgment[58] by annulling its transposition into Belgian law for exactly the same reasons.[59] In a later case, concerning the Act containing a new data retention scheme, it has referred the case to the ECJ for a preliminary reference, with the aim of convincing the ECJ to soften its caselaw on bulk interception of communication data.[60]

All in all, the Constitutional Court's general stance towards anti-terrorism legislation is the same as the ECtHR's. This jurisprudence shows that human rights are not an obstacle in the fight against terrorism, but rather an additional technique in upholding the values of the western democratic societies.[61]

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[56] CC no. 73/2005, 20 April 2005.

[57] E.g. CC no. 202/2004, 21 December 2004; CC no. 105/2007, 19 July 2007; CC no. 145/2011, 22 September 2011.

[58] ECJ 8 April 2014, *Digital Rights Ireland Ltd. and Kärnter Landesregierung*, C-293/12 and C-594/12.

[59] CC no. 84/2015, 11 June 2015.

[60] CC no. 96/2018, 19 July 2018.

[61] L.-A. SICILIANOS, "The European Court of Human Rights at a Time of Crisis in Europe", *EHRLR* 2016, 135; S. SOTTIAUX, *Terrorism and the Limitation of Rights. The ECHR and the US Constitution*, Oxford, Hart Publishing, 2008, 406; F. VANNESTE, "Het Europees Hof voor de Rechten van de Mens en de overheden die terrorisme bestrijden: brothers in arms?", *RW* 2003-2004, 1665.

4. Should Art. 187 of the Constitution be amended?[62]

The final question is whether Art. 187 of the Constitution should be replaced by a provision allowing the competent authorities to declare a *de iure* state of emergency.

Those in favour of such an amendment point out that it would be wise to turn the subjective emergency laws adopted in the past into objective emergency laws. Thus, their substantive and procedural boundaries would also be constitutionally guaranteed, making it impossible for legislators and governments to set them aside in later crisis situations. Such a constitutional provision could also specify the actors, the procedure and the consequences of declaring a *de iure* state of emergency, and it could stress that such a situation must be limited in time.[63]

We have defended the view that Art. 187 of the Constitution should not be amended. First, this is one of the Constitution's most fundamental provisions, which expresses the idea of constitutionalism itself. Second, the subjective emergency laws adopted in the past show that the Constitution is sufficiently flexible to deal with emergencies. Third, in a democratic state governed by the rule of law, limiting human rights is by far preferable over suspending them, as the latter technique would imply an absence of later judicial review of the measures taken. Fourth, legislation adopted in emergency situations can also stipulate its temporary nature. Conversely, recent foreign examples show that *de iure* states of emergency can also last several years. And fifth, the possibility to declare a state of emergency is often abused for other motifs, such as pushing through controversial measures, excluding their judicial scrutiny and strengthening the position of the central authorities.

Willem Verrijdt, 30 May 2020

[62] See also, more recently, S. VAN DROOGHENBROECK and J. VELAERS, "L'article 187 de la Constitution et la problématique de la protection des droits et libertés dans les états d'exception", in E. VANDENBOSSCHE (ed.), Uitzonderlijke omstandigheden in het grondwettelijk recht, Bruges, die Keure, 2019, 1-49.

[63] R. ERGEC, *o.c.*, 170-171; S. SOTTIAUX, "Nood aan een noodgrondwet ?", *Juristenkrant* 9 December 2015, 12; S. VAN DROOGHENBROECK, "L'article 187 de la Constitution", *Revue belge de droit constitutionnel* 2006, 295-296.