

THE 10TH IACL-AIDC World Congress 2018

Workshop 3 – State of Emergency

“*Ceci n’est pas un état d’urgence*”

Analysis of the Belgian legal framework for the fight against terrorism

by

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Introduction

Europe experienced a series of unprecedented terrorist attacks these past five years and has put the spotlight back on the classical tensions between the concept of national security, the state practices involving intrusive surveillance and the rule of law¹. As always, the terrorist threat is a practical and important test for the democracy² and the human rights³.

Belgium is one of the most affected State by the recent wave of terrorism in Europe, as these attacks are the deadliest Belgium has experienced for decades. Furthermore, several perpetrators of the various attacks were linked to Belgium, in one way or another. Indeed, the country sadly holds the record for highest number of nationals joining Islamist armed groups per capita of any nation in Western Europe.

Before the recent wave of attacks, Belgium had been spared the horrors associated with modern terrorism for an extended period⁴. Some terrorist acts were perpetrated, but most of them were carried out in the 1980's, either by extreme left-wing terrorist groups, the Combating Communist Cells, or by a local criminal gang, the “Brabant killers”⁵. Apart from these specific cases and some other isolated attacks, the country remained relatively peaceful until the recent spark of terrorist assaults brought a number of failures and deficiencies to light. Following the mass-killings and bombings, Belgium was heavily criticised around the world, mostly based on its allegedly weak security policies⁶ and its rather complex institutional structure, to the point Belgium-bashers dubbed the country a “failed state”⁷. These attacks have also underlined Belgium's apparent difficulties to provide a quick response when faced

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¹ L. HENBEL and D. VANDERMEERSCH, *Juger le terrorisme dans l'État de droit*, Brussels, Bruylant, 2009, 61-175.

² M. VERDUSSEN, “Les tentations des sociétés démocratiques dans la lutte contre le terrorisme”, *Annuaire international des droits de l'homme*, 2007, 345-364; P. KLEIN, *Le droit international à l'épreuve du terrorisme*, Académie de droit international de La Haye, Leiden/Boston, Martinus Nijhoff Publishers, 2007, 411.

³ E. M. HAFNER-BURTON, L. R. HELFER, and C.J. FARISS, “Emergency and escape: explaining derogations from human rights treaties”, *International Organization*, 2011, 673–707.

⁴ E. DEVROE and P. PONSAERS, “Terrorism and Governance Strategies in Brussels”, *Forensic Research & Criminology International Journal*, 2018.

⁵ J. VANDER VELPEN, *De CCC – Het terrorisme en de Staat*, Antwerp, EPO, 1986; J. MOTTARD and H. HAQUIN, *Les tueries du Brabant. Enquête parlementaire sur la manière dont la lutte contre le banditisme et le terrorisme est organisée*, Brussels, Complexe, 1990.

⁶ “Belgium's security problem - No Poirots, Belgian police are flummoxed by IS”, *The Economist*, 2 April 2016.

⁷ T. KING, “Belgium is a failed state – Brussels' nest of radicalism is just one of the failings of a divided, dysfunctional country”, *Politico*, 12 February 2015.

with obvious, current, and imminent danger.

This paper aims to study the impact of terrorist attacks on the Belgian public law. More specifically, it addresses the interactions between the fight against terrorism and the concept of a state of emergency in Belgium. It is structured in four different sections.

The recent wave of attacks has indeed not failed to spark a debate in Europe regarding the establishment of a so-called state of emergency. But Belgian constitutional law does not explicitly enshrine a specific provision concerning a state of emergency. While Article 167 of the Belgian Constitution does indeed mention the existence of a "state of war", there is no temporary regime which could be described as a state of emergency and which would allow a restriction of fundamental rights in peace time (*Section 1*). In other words, security management must be deployed in accordance with the usual constitutional and legal requirements.

The events of the last five years have profoundly changed the paradigm (*Section 2*) by placing the Belgian State at the forefront of the fight against (and the prevention) of terrorism. Faced with an emergency situation, but in the absence of a *sui generis* legal framework, the public authorities demonstrated pragmatism in managing the risk of armed actions, relying in part on the goodwill of the various actors who sometimes came under different levels of power in the Belgian federal structure.

The federal authorities in charge of the fight against terrorism finally acted in two ways. On the one hand, in order to stem the problem immediately, they used the legal means at their disposal, which already allow a rapid and effective response to the phenomenon (*Section 3*). At the same time, the ordinary legal environment was disrupted. Then, and in a fairly short period of time, a series of (more or less) *ad hoc* laws and regulations were adopted in order to further adapt the Belgian legislation to the particularities and importance of the contemporary terrorist threat (*Section 4*).

Section 1 – A notable constitutional absence

What should be understood by "state of emergency" or "state of exception", is a situation in which a state, while confronted to a severe, imminent and deadly threat, directed towards the state itself and its people, responds by taking actions that would never be acceptable under normal circumstances, given the working principles of that state⁸. The state of exception is activated – generally by the government – when the state is facing a challenge so intense and so exceptional that it leads the state to derogate from its own constitutional principles, among which civil liberties and institutional rules, for the sake of self-preservation⁹. The need to declare a state of emergency may arise from situations as diverse as an armed action against the state by internal or external elements, a natural disaster, civil unrest, an epidemic, a financial or economic crisis. It is during the eighteenth and nineteenth centuries that the European constitutions began to introduce the concept of state of emergency.

It could seem paradoxical to suspend the enjoyment of fundamental rights and key principles of a State¹⁰ in order to protect it. The State, however, has the responsibility and duty to safeguard its independence, its territorial integrity, its continuity and to preserve the constitution. Whereas emergency management tends to focus on collective needs¹¹, States are granted, in limited time, space, and scope, wider powers to restore a state of a normalcy

⁸ See ECHR, *Lawless v. Irlande case*, 1st July 1961.

⁹ K. L. SCHEPPELE, "Law in a time of emergency: states of exception and the temptations of 9/11", *Journal of constitutional law*, 2004, 1004.

¹⁰ J. FERREJOHN and P. PASQUINO, "Law of exception: A typology of emergency powers", *The International Journal of Constitutional Law*, 2004, 210.

¹¹ J. VELAERS, "Les principes généraux du droit à "valeur constitutionnelle" : des incontournables de notre ordre constitutionnel", in I. HACHEZ e.a. (dir.), *Les sources du droit revisitées*, vol. 1 – Normes internationales et constitutionnelles, Limal, Anthemis, 2012, 559.

under which its citizens can fully exercise their freedoms in a democratic system considered “as a system that lays down absolute limits for the unfailing observance of certain essential human rights”¹².

As the terrorist threat within Europe increases, as showed by the number of recent terrorist attacks, the debate regarding the possibility to implement such a state of emergency has been re-opened in several EU countries.

The day after the coordinated terrorist attack across Paris on the 13 November 2015, the French president François Hollande declared the first national state of emergency in France since 1961 and, via three decrees, activated Law No. 55-385 of 3 April 1955, which defines the contents of the emergency measures¹³.

In Belgium, such system does not exist¹⁴.

Article 187 of the Constitution – previous article 130 – provides that “[t]he Constitution cannot be wholly or partially suspended”. So, it forbids in plain and intelligible language all emergency situations. For historical and philosophical reasons, the constituent feared that such mechanism would have left open the possibility of abuse¹⁵.

This article was not included in the first draft of the Constitutional Commission. During the Congress debate of 5 February 1831, a member of Congress, Van Snick, proposed a constitutional clause inspired by the French author Benjamin Constant¹⁶: “The constitutional powers only exist by virtue of the Constitution. They cannot, in whichever case or under whichever pretext, suspend its action”. To support this amendment, Van Snick referred to the French political instability where every regime violated and suspended the constitutions of its predecessors:

“Vous le savez, messieurs, tous les pouvoirs qui se sont succédés en France ont tour à tour violé et suspendu les constitutions qui devaient régir immuablement ce pays, et ce, en invoquant chaque fois la grande loi : *Salus populi suprema lex esto*. Comme si le salut du peuple n’était pas toujours attaché à l’inflexible exécution des lois, et surtout de la loi fondamentale”¹⁷.

Constant was still fresh in the constituent mind. In his comments on the Belgian Constitution, a former member of Congress, Thonissen considered the article 187 (130 at the moment) as a guarantee against the floodgates to despotism:

“Les ministres téméraires qui se permettent de violer la Constitution déguisent ordinairement leurs projets sous l’apparence du désir de sauver les institutions nationales, menaces, disent-ils, par la violence des passions politique. ‘Ils s’écrient, dit Benjamin Constant, qu’une Constitution est une citadelle, et que, lorsqu’une citadelle est bloquée, la garnison peut en sortir pour disperser les assiégeants qui la bloquent’.

¹² Report by the UN Special Rapporteur, Mr. Leandro Despouy, on the Question of Human Rights and State of Emergency, 23 July 1997.

¹³ Decrees No. 2015-1475; No. 2015-1476 and No. 2015-1478 of 14 November 2015. See S. HENNETTE VAUCHEZ, “La France sous état d’urgence (14 novembre 2015- 1^{er} novembre 2017)”, *Revue trimestrielle des droits de l’homme*, 2018, 341.

¹⁴ See G. VAN HAEGENBORG and W. VERRIJDT “De noodtoestand in het Belgische publiekrecht”, *Preadviezen van de Vereniging voor de Vergelijkende studie van het recht van België en Nederland*, La Haye, Boom, 2016, 11-85 and S. VAN DROOGHENBROECK, “L’article 187 de la Constitution”, *Revue belge de Droit constitutionnel*, 2006, 293-297.

¹⁵ Voy. C. HUBERLANT, “État de siège et légalité d’exception en Belgique”, in *Licéité en droit positif et références légales aux valeurs. Contribution à l’étude juridique du règlement des conflits de valeurs en droit pénal, public et international*, Brussels, Bruylant, 1982, 401.

¹⁶ 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, 81.

¹⁷ E. HUYTTENS, *Discussions du Congrès National de Belgique 1830-1831*, vol. 2, Brussels, Société typographique Belge, 464.

Mais l'histoire de la France moderne répond victorieusement à ces sophismes ; elle nous a fait connaître les effets inévitables de cette étrange politique constitutionnelle qui conduit en droite ligne au despotisme. Ce n'est pas en anéantissant les formes tutélaires de la liberté et de l'ordre que les gouvernements peuvent espérer de se maintenir; ils sont déjà perdus lorsqu'il ne leur reste d'autres ressources que les mesures illégales et vexatoires"¹⁸.

A discussion took place over its formulation¹⁹, but proposal was eventually approved. Article 187 became one of the few explicit cross-section clauses of the Belgian Constitution²⁰. But this excessively optimistic²¹ "peace-time" constitution²² did not survive the passage of time²³. On 8 August 1831, facing the invasion of Belgium by the Dutch army, King Leopold the 1st asked the help of the French army without the parliament's consent even though article 185 (former article 121) of the Constitution forbade it²⁴.

It is mainly during the two World Wars that the constitutional rules had to conform to the state of necessity. First, the "arrêtés-lois" (legal executive orders or Decree-law) were adopted in time of war²⁵ and given the same legislative status as law, despite the fact they were enacted without the assistance of the Parliamentary Assembly, which couldn't be gathered²⁶. These Decree-law were adopted by:

- King Albert the 1st and the de Broqueville Cabinet (during the First World War);
- King Léopold the 3rd and the Pierlot Cabinet (at the beginning of the Second World War);
- the Ministers meeting within the Council during the King Leopold the 3rd's impossibility of reigning (during the Second World War).

In its judgements *Geubelle* of 11 February 1919²⁷, and *Leemans* of 11 December 1944²⁸, the Court of Cassation recognized the legislative nature of these acts. We can read in the Court's opinions that the King, as the third branch of the legislative power, had taken the necessary legal measures required to defend the territorial and the vital interests of the Belgian Nation.

Secondly, the Decree-Law of 11 October 1916²⁹ on the state of war and the state of siege restricts essential rights, as it allows prior censorship, violation of the principle of confidentiality of correspondence, and so on. Furthermore, the Decree-Law of 12 October 1918³⁰ empowers

¹⁸ J.J. THONISSEN, *La Constitution belge annotée*, 2nd edition, Brussels/Paris, Bruylant/Librairie A. Marescq, 1876, 391.

¹⁹ E. HUYTENS, *Discussions du Congrès National de Belgique 1830-1831*, vol. 2, Brussels, Société typographique Belge, 465.

²⁰ E. BREMS, "Vers des clauses transversales en matière de libertés dans la Constitution belge?", *Revue Trimestrielle des Droits Homme*, 2007, 351-383.

²¹ A. PASTOR Y CAMARASA, "Constitution et lutte antiterroriste : le cas belge", *Annuaire international de Justice constitutionnelle*, Vol. XXXII, 31; See also F. DELPÉRÉE and M. VERDUSSEN, « Table ronde - Lutte contre le terrorisme et protection des droits fondamentaux : Belgique », *Annuaire international de Justice constitutionnelle*, vol. XVIII, 91-110.

²² A. BUTTGEBACH, «L'extension des pouvoirs de l'exécutif en temps de guerre et la révision de la Constitution belge», *Belgique judiciaire*, 1935, 394.

²³ R. ERGEC, "L'état de nécessité en droit constitutionnel belge", *Le nouveau droit constitutionnel*, Brussels, Bruylant, 1987, 145.

²⁴ Y. LEJEUNE, "Article 185", in M. VERDUSSEN (dir.), *La Constitution belge - Lignes & entrelignes*, Brussels, Le Cri, 2004, 422.

²⁵ See 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 », *Revue de Droit de l'ULg*, 2007, 537-542.

²⁶ Voy. J. DE MEYER, « Over de legitimiteit van de besluitwetten van de oorlogsregeringen in 1914-1918 en in 1940-1944 », in *Liber Amicorum August De Schryver, minister van Staat*, Gent, 1968, 296-304.

²⁷ *Pasicrisie* 1919, I, 9.

²⁸ *Pasicrisie* 1945, I, 65.

²⁹ *Belgian Monitor* (further in the paper, see *B.M.*), 15 October 1916.

³⁰ *B.M.*, 13 October 1918.

the Minister of Justice to intern persons suspected of relations with the enemy³¹.

These Decrees-Law gave rise to a lively and stormy debate about its compatibility with Article 187. Some argued that article 187 only covered the hypothesis of a voluntary suspension of the Constitution³², not the case of *force majeure*³³ or external aggressions³⁴. According to the case law and the “legisprudence” of the Belgian Council of State, a distinction should be made, in the context of war, between unconstitutional acts and extra-constitutional acts³⁵. Other authors have declared that the measures could be justified by the state of necessity³⁶. Moreover, the Court of Cassation referred to evidence that the constituent’s intent was to grant a security right and to ensure the continuity of the State³⁷. This view was confirmed afterwards³⁸.

The situation is however radically different when the public institutions are not unable to work because the country is occupied by a foreign army. There is no case-law to support the plea that the Constitution could be suspended in the hypothesis of either insecurity or terrorist threat³⁹. However, during the 60’s, proposals were made to establish a state of emergency in case of internal crisis:

“At first sight, a not-expressly-provided-by-the-Constitution state of exception may seem unconstitutional. The exercise of powers granted by the Constitution is an obligation for the authorities it designates. These powers cannot, in principle, be exercised in any other way than that provided for in the Constitution; but that is to give too much importance to the formal aspect of things and to sacrifice the spirit of the Constitution. Above all, it wants to safeguard the survival and permanence of the State, the supreme guarantee of the common good and safeguarding the general interest”⁴⁰.

The aforementioned proposal ignores one of the fundamental rules of the Constitution and can be criticized on many counts, especially since the establishment of the Constitutional Court⁴¹. Under our constitutional system, in all circumstances, including the fight against terrorism, the public institutions must keep functioning normally and the exercise of fundamental human rights and freedoms can only be limited within the constraints of common law⁴². In our mind, a real emergency state could only be implemented by following the constitutional amendment procedure provided by Article 195 of the Constitution, which is

³¹ *Doc. parl.* Ch., sess. 2004-2005, 20 February 2006, No 2304/001.

³² See F. DELPÉRIÉ, *Droit constitutionnel, t. II, Le système constitutionnel. Les procédures de crise*, Brussels, Larcier, 1989, 460; L. WODON, “Sur le rôle du Roi comme chef de l’État dans les cas de défaillances constitutionnelles”, *Bulletin de la Classe des lettres et des sciences politiques et sociales*, 1941, 217-218.

³³ O. ORBAN, *Droit constitutionnel de la Belgique*, vol. I, Liège/Paris, H. Dessain/Giard & Brière, 1906, 334-335.

³⁴ R. ERGEC and S. WATHÉE, “Les dérogations aux droits constitutionnels”, in M. VERDUSSEN and N. BONBLED, *Les droits constitutionnels en Belgique : les enseignements jurisprudentiels de la Cour Constitutionnelle, du Conseil d’État et de la Cour de cassation*, I, Brussels, Bruylant, 2011, 405-406.

³⁵ Cass., 4 March 1940, *Pasicrisie*, 1946, I, 493 and the conclusion of the Attorney General R. Hayoit de Termicourt.

³⁶ See F. DUMON, “Over enkele grondwettelijke problemen gerezen tijdens de tweede wereldoorlog”, *Academia Analecta*, 1983, 47.

³⁷ Cass., February 11, 1919, *Pasicrisie*, 1919, I, 9.

³⁸ Cass., 10 January 1950, *Pasicrisie*, 1950, I, 304; Cass., 8 January 1952, *Pasicrisie*, 1952, I, 244.

³⁹ N. BONBLED, “Les aspects contemporains de la continuité de l’État : l’exception, l’urgence et la transition”, *Journal des Tribunaux*, 2014, 643.

⁴⁰ “Proposition de loi portant l’installation d’un état d’urgence”, *Doc. parl.*, Senate, 31 January 1962, 105.

⁴¹ See S. VAN DROOGHENBROECK, “L’article 187 de la Constitution”, *Revue belge de Droit constitutionnel*, 2006, 293-297; contra: R. ERGEC and S. WATHÉE, “Les dérogations aux droits constitutionnels”, in M. VERDUSSEN and N. BONBLED, *Les droits constitutionnels en Belgique : les enseignements jurisprudentiels de la Cour Constitutionnelle, du Conseil d’État et de la Cour de cassation*, I, Brussels, Bruylant, 2011, 406.

⁴² F. DELPÉRIÉ and M. VERDUSSEN, « Table ronde - Lutte contre le terrorisme et protection des droits fondamentaux : Belgique », *Annuaire international de Justice constitutionnelle*, vol. XVIII, 96.

particularly cumbersome⁴³. Moreover, Article 187 is currently not declared to be revisable⁴⁴.

For lack of better tools, however, the parliament may, in accordance with Article 105, have recourse to the *special powers laws*⁴⁵, delegate specific and wide powers to the executive⁴⁶, including the ability to amend the law with the *a posteriori* concurrence of the Parliament. That being said, on the one side, this *special powers* mechanism was never used in the matter of security breach and cannot be confused with a state of emergency. On the other side, when used, it doesn't relieve the executive power from its obligation to respect the fundamental rights.

It will be noted from the foregoing paragraphs that the national Constitution is more protective than international conventions⁴⁷ which provide, in a controlled manner, derogation provision, especially Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights. The two articles are quite similar, as they allow States Parties to "take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation"⁴⁸. Both conventions provide a list of non-derogable rights, from which it can never be necessary to derogate even in cases of emergency situations.

Significant and thoughtful constitutional reform proposals have been made on the basis of these international conventions over the past ten years, especially given the new threat posed by terrorist groups⁴⁹.

Section 2 – A fundamental change of paradigm – A clear and present terrorist danger

One of the most significant issues that has an impact on the coexistence and security of the citizens of Europe and Belgium is the threat of international terrorism. Shortly after the 9/11 attacks, fingers were pointed at the lack of state of emergency in our constitutional law. After the Paris attacks, almost fifteen years later, this issue has been taken over by the politics, who wish to take the current emergency measures a step further. Such measures must indeed nevertheless be taken in accordance with both the fundamental freedoms of the Kingdom⁵⁰ and the federal structure of the country.

A) 2006 – A concrete proposal

On the basis of the case law of the European Court of Human Rights in relation to terrorism⁵¹, legal experts who participated in a parliamentary working group specialising in fundamental rights suggested in 2006 the inclusion of a derogatory clause⁵². Such a provision would have allowed the adoption of exceptional measures within a clearly defined constitutional

⁴³ Firstly, Parliament must adopt a list of constitutional provisions which are declared to be revisable. Then the Parliament is dissolved. After the elections, the freshly composed Parliament has the power to modify the constitutional provisions which were declared open to revision, and only them. For this last step, two thirds of the members of each Chamber of Parliament ought to be present and two thirds of the present members must approve the amendment.

⁴⁴ Declaration of revision of the Constitution of 25 April 2014, *B.M.*, 28 April 2014.

⁴⁵ Y. LEJEUNE, *Droit constitutionnel belge : fondements et institutions*, 2nd edition, Brussels, Larcier, 2014, § 58.

⁴⁶ Opinion of the Council of State, *Doc. parl.*, Ch., sess. 95-96, 7 June 1996, No 609/1.

⁴⁷ N. BONBLED et C. ROMAINVILLE, "États d'exceptions et crises humaines ambiguës : débat recent autour du terrorisme et des nouvelles forms de crise", *Annuaire international de justice constitutionnelle*, 2008, 429-459.

⁴⁸ ECHR, Grand Chamber, *A. e.a v. the United Kingdom* case of 19 February 2009.

⁴⁹ S. SOTTIAUX, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution*, Oxford and Portland, Hart Publishing, 2008, 30.

⁵⁰ G. DE BRAECKELEER, L. MYS, K. VAN AELST, P. VANDE VELDE-VAN RUMST, J. GOOSSENS, and S. DEVRIENDT, "Nood aan noodtoestand in België?", *Belgian Constitutional Law Blog*, 21 February, 2017,

⁵¹ ECHR, May 26th, 1993, *Brannigan and McBride v. the United Kingdom* case.

⁵² *Doc. parl.*, Ch., sess. 2004-2005, 20 February 2006, No 2304/001. See E. BREMS, "Vers des clauses transversales en matière de libertés dans la Constitution belge?", *Revue Trimestrielle des Droits Homme*, 2007, 367-368.

frameworks, which preserve the strengthening of the principles of the rule of law⁵³. This recommendation has not been acted upon.

B) The State of emergency back on the table

Even if the federal government proudly announced that the implementation of a state of emergency was not on the agenda⁵⁴, there were serious discussions about the opportunity to implement state of emergency powers⁵⁵, mainly after the Paris attacks⁵⁶. The “most far-reaching safety measures”⁵⁷ was the safety plans of the Flemish political party N-VA, presented in September 2016, as “Niveau V. Verandering voor veiligheid”. This security plan provides a state of emergency declared by the National Security Council. This situation would allow preventive detentions and the establishment of separate courts dealing with terrorism cases. National Security Council and municipalities would be able to deploy troops, to forbid public meetings, to control internal borders, to give house arrest, to filter social media and put websites offline. This state of emergency would be endorsed by the Parliament within five days and be valid for three months.

According to the N-VA, this plan still remains within the limits of the Constitution, according to the Supreme Court’s case law on state of war. Referring to Attorney general Hayoit de Termicourt’s reasoning⁵⁸, the Flemish nationalists argued that the necessity to safeguard national sovereignty and the continuity of government power have supra-constitutional value, allowing for extra-constitutional measures when State’s institutions or the country’s existence as a civil community are imperilled.

However, a lot of scholars pointed out the legal weakness of such reasoning, regarding article 187⁵⁹ and article 146⁶⁰ of the Constitution.

C) A pragmatic response to major emergencies

From 21 November to 25 November 2015, the federal government of Belgium imposed a security lockdown on Brussels due to information about potential terrorist attacks in the wake of the series of coordinated terrorist attacks in Paris by the Islamic State. During this period, the threat level was increased by the Coordination Unit for Threat Assessment (CUTA) to 4 (on a scale of four) for the Brussels region. As we will explain later, CUTA has been, since 2006, the official Belgian public authority that coordinates the police and intelligence services and that assesses whether Belgium is a target of terrorist and extremist threats.

Following a National Security Council to which the Communities (federated entities) chiefs of governments were invited, the Prime Minister took some measures and *recommended* others.

⁵³ Venice Commission, “Les pouvoirs d’exception”, Strasbourg, Sciences et technique de la démocratie, n° 12, CDL-STD(1995)02; see also J. FERREJOHN and P. PASQUINO, “Law of exception: A typology of emergency powers”, *International Journal of Constitutional Law*, 2004, 158-173 and D. MCGOLDRICK, “The Interface of public emergency power and international law”, *International Journal of Constitutional Law*, 2004, 380.

⁵⁴ See V. SOUTY, “Les dérogations en cas de circonstances exceptionnelles : un régime en demi-teinte”. *Revue trimestrielle D.H.*, 2017, 90. On 22 March 2016, the Minister of the Interior stated to RTBF that he did not want to think about the special powers Acts: “Ce n’est pas dans la culture de notre démocratie. Je ne sais pas ce que ça rapporte. On a pris beaucoup de mesures [...]. Je pense qu’on doit rester cool, vraiment maîtriser la situation et voir si on doit ajouter des mesures”.

⁵⁵ L. VANOOST, “Noodtoestand in Frankrijk, kan het in België ook?”, *DeWereldMorgen.be*, 17 November 2015.

⁵⁶ M. BUXANT, “Le gouvernement étudie la possibilité d’un couvre-feu en cas d’état d’urgence”, *L’Echo*, 21 January 2016, 4.

⁵⁷ P. POPELIER and W. VANDENBRUWAENE, “Niveau V. Verandering voor veiligheid (Level V. Change for safety)”, *Osservatorio sulle fonti*, January 2017 (<https://www.osservatoriosullefonti.it/rubriche/sources-of-law-in-the-european-union-member-states/belgium>).

⁵⁸ *Pasicrisie*, 1946, 493.

⁵⁹ P. POPELIER and W. VANDENBRUWAENE, “Niveau V. Verandering voor veiligheid (Level V. Change for safety)”, *Osservatorio sulle fonti*, January 2017 (<https://www.osservatoriosullefonti.it/rubriche/sources-of-law-in-the-european-union-member-states/belgium>).

⁶⁰ “No extraordinary courts or commissions may be created, no matter under which designation”.

The Brussels subway, the public transport, the schools, the universities, restaurants were closed and some events, such as football games, were cancelled. The communes and provinces were invited to cancel events on their territories. The communication was rather confused and, as the journalist Bertrand Henne said:

“In a few days, Belgium and especially Brussels’ reputation has been tainted as ever. In a nutshell, the federal government has not been up to the task, and the regions and communities stayed in the background”⁶¹.

It must be acknowledged that the institutional structure of Belgium does not help the centralisation of capacity decisions. Belgium is a federal State composed of two kinds of federated entities: the Regions and the Communities. The Federal authority, the Communities and the Regions are on an equal footing but have powers and responsibilities for different fields. At a lower level, the provinces are supervised by every higher government authorities, in the context of the federal, community or regional powers. At the bottom of the pyramid, we find the communes (or municipalities).

Among other things, the federal government is responsible for security and home affairs and for justice. It is hard to get a centrally controlled decision-making because of that fragmented authority. Moreover, the Brussels region is composed of 19 municipalities, each with their own mayor and institutions. At the same time, these 19 municipalities are covered by six different police zones. In sum, the federal structure of the country and the multitude of decision-making layers easily leads to paralysis. That is also the case in fighting terrorism. “Een samenhangend antiterreurbeleid gaat in tegen de federale logica van België”, said Marc Hooghe, professor at the KUL⁶².

Inevitably, this has prompted the question of whether public authorities could react in case of direct terrorist threat.

Section 3 – A reaction by an ordinary legislative arsenal

Despite the absence of an institutionalised state of emergency – or state of exception – in Belgium, the Belgian government had to face a scourge of an inconsiderate scale. From 24 May 2014, the date of the attack on the Jewish Museum in Brussels, Belgium was brought, via an ordinary legislative arsenal, to adapt to the new terrorist threat. A series of measures have been taken, sometimes in haste, sometimes in the medium or long term.

In a brief retrospective of the resources deployed over the last five years, the aim of this section will be to assess the impact, in practice, of the absence of a state of emergency in Belgium. Of course, it is not for us to evaluate the relevance of the action of the government of the Kingdom during these difficult moments but to examine the general structure of action in the field of the fight against terrorism.

First of all, it is important to say that, following the attacks in Brussels on 22 March 2016, a parliamentary inquiry committee was set up to clarify the way in which these tragic events took place and were dealt with, as well as to reveal any political responsibilities. This committee, which has worked for several months, benefited from a significant asset, namely the access to a series of confidential documents⁶³. For this particular reason, we shall take the liberty of

⁶¹ B. HENNE, “Les Coulisses des Pouvoirs - 13 Novembre : la Belgique à la limite”, *Rtbf*, 14 November 2016.

⁶² C. CILLEKENS, “De tragiek van Belgistan”, *De Limburger*, 3 April 2016.

⁶³ Indeed, according to art. 4 of the statutes of the inquiry committee, the latter “may hear any person whom it deems necessary to bring before it and may have at its disposal all the documents it deems necessary for the performance of its duties”. Furthermore, it “may at any time decide to meet in closed session” (art. 7). See Proposal to set up a parliamentary inquiry committee to examine the circumstances leading to the terrorist attacks of 22 March 2016 at Brussels National Airport and the Maelbeek underground station in Brussels, including the development and management of the fight against radicalism and the terrorist threat, *Doc. parl.*, Ch., sess. 2015-2016, 11 April 2016, No. 54 1752/001, 11-12.

referring to the committee's intermediate reports.

The Belgian legal system does not lack the legal means to deal with an emergency situation such as it has been known to face in terrorist matters. The Royal Regulation of 16 February 2006 defines the emergency situation (Article 6, § 2) as follows:

“any event which causes or is likely to cause harmful consequences for social life, such as a serious disorder of public security, a serious threat to the life or health of individuals and/or to important material interests, and which requires the coordination of disciplines in order to eliminate the threat or limit the harmful consequences”⁶⁴.

As a result of this emergency situation, several reactions have been put in place following the attacks of recent years, especially in Paris and Brussels. We will discuss successively the emergency plans (A.), the role of the Coordination Unit for Threat Analysis (CUTA) (B.) and the Operation Vigilant Guardian (C.). As regards to the Brussels lockdown, having already dealt with it previously, please refer to our dedicated commentary.

A) Emergency plans

During that day on March 22, one was first able to count on the existence of emergency planning. Emergency planning in Belgium consists of three types of plans: multidisciplinary emergency and response plans, developed by local authorities, monodisciplinary response plans, which local authorities check against certain criteria, and internal emergency plans of companies and institutions at risk, that local authorities take into account in developing their own emergency planning.

The whole has four phases⁶⁵. Phases 1 and 2 are coordinated at the municipal (local) level, while phase 3 involves coordination by the governor at the provincial level. Phase 4, used during the terrorist attacks, is coordinated by the Minister of the Interior at the federal level⁶⁶. The national alert or “phase 4 alert” is triggered by the Minister of the Interior and may be preceded by an early warning phase (Crisis Centre)⁶⁷.

In addition to these emergency plans, there may be other emergency and contingency plans, specific to particular areas, which are in principle confidential. Thus, in the documents given as a confidential document to the members of the parliamentary inquiry committee relating to the attacks in Brussels were the emergency plan for Zaventem airport as well as the emergency plan of the STIB (Brussels public transport company).

The committee's intermediate report recounts the first moments following the attack in Brussels:

“On March 22, 2016, the federal phase took time to begin. Very quickly (after a few minutes), it had already become clear on the ground that the explosions in Zaventem were the work of terrorists.

Very quickly a series of measures were taken from the Crisis Centre. At 08:45, the CUTA announces the passage to threat level 4 for the whole territory, with particular

⁶⁴ Royal Regulation of 16 February 2006 on emergency and intervention plans, *B.M.*, 15 March 2006.

⁶⁵ Royal Regulation of 31 January 2003 establishing the emergency plan for events and crisis situations requiring coordination or management at national level, *B.M.*, 21 February 2003.

⁶⁶ Parliamentary inquiry to examine the circumstances leading to the terrorist attacks of 22 March 2016 at Brussels National Airport and Maelbeek underground station in Brussels, including the development and management of the fight against radicalism and the terrorist threat - Intermediate and provisional report on the ‘assistance and relief’ aspect, *Doc. parl.*, Ch., sess. 2015-2016, 3 August 2016, No. 54 1752/006, 27.

⁶⁷ Parliamentary inquiry to examine the circumstances leading to the terrorist attacks of 22 March 2016 at Brussels National Airport and Maelbeek underground station in Brussels, including the development and management of the fight against radicalism and the terrorist threat - Intermediate and provisional report on the ‘assistance and relief’ aspect, *Doc. parl.*, Ch., sess. 2015-2016, 3 August 2016, No. 54 1752/006, 27.

attention for international stations, regional airports, all means of public transport, nuclear power stations and the port of Antwerp. Notification to all intended recipients is made by fax at 09:04.

Following this evaluation, a number of specific actions were taken at the coordination meeting that started in the meantime.

The federal crisis management phase was only triggered at 09:03, and the 'coordination meeting' became a 'crisis unit' in accordance with the Royal Regulation of 31 January 2003. This decision was not clear on the ground and some witnesses stated that they were aware of the activation of this federal phase before that time. In the meantime, several meetings of the National Security Council have been held with the aim of taking general measures within the framework of threat level 4⁶⁸.

Despite this apparent preparation, the analysis of the inquiry committee is not very optimistic: "distressing observation on information management: lack of overall vision and strategy; increased information overload; abundance of data banks; insufficient analytical capacity; compartmentalization and, consequently, insufficient sharing; inefficient and outdated processing processes". It also stresses that "the fragmentation of information is aggravated by two dividing lines: between the judicial and administrative aspects; between the federal police and the local police". We will come back to this last point⁶⁹.

B) The role and functioning of the CUTA

The Coordination Body for Threat Analysis, CUTA, is a body established by the Law of 10 July 2006 and is responsible for threat assessment⁷⁰. After a little less than ten years of relatively peaceful existence, the CUTA has become, during the wave of attacks perpetrated on Belgian soil, an essential institution. At the time its existence was revealed to the broad public, a host of questions were asked about its legitimacy and way of functioning. It is therefore up to us first draft a brief portrait of this body.

The CUTA succeeded the Inter-Agency Group against Terrorism (GIA) and is placed under the joint authority of the Ministers of Justice and the Interior (Article 5 of the Law). In addition to its directors, it is composed of experts and specialized analysts (art. 7). Its tasks are to carry out periodically a joint strategic assessment to evaluate whether threats may arise or how they are evolving, to carry out a joint assessment on an *ad hoc* basis and to ensure specific international relations with foreign or international counterparts (art. 8). The CUTA is also the receptacle of a whole series of intelligence and police information, enabling it to carry out its missions successfully.

The CUTA is not exempt from parliamentary oversight since it is subject to the oversight of both the Standing Committee on the Oversight of Police Services (P Committee) and the Standing Committee on the Oversight of Intelligence and Security Services (R Committee). The Circular FTF of 21 August 2015 sets out the responsibilities and tasks of the CUTA, which is also responsible for the exchange of information on hate preachers⁷¹.

Its most important prerogative is certainly to assess the threat and determine its level.

⁶⁸ Parliamentary inquiry to examine the circumstances leading to the terrorist attacks of 22 March 2016 at Brussels National Airport and Maelbeek underground station in Brussels, including the development and management of the fight against radicalism and the terrorist threat - Intermediate and provisional report on the 'assistance and relief' aspect, *Doc. parl.*, Ch., sess. 2015-2016, 3 August 2016, No. 54 1752/006, 37.

⁶⁹ Parliamentary inquiry to examine the circumstances leading to the terrorist attacks of 22 March 2016 at Brussels National Airport and Maelbeek underground station in Brussels, including the development and management of the fight against radicalism and the terrorist threat - Third interim report, on the 'security architecture' aspect, *Doc. parl.*, Ch., sess. 2015-2016, 3 August 2016, No. 54 1752/008, 55.

⁷⁰ Act of 10 July 2006 on threat analysis, *B.M.*, 20 July 2006.

⁷¹ Circular of 18 July 2016 on the exchange of information and follow-up of hate preachers.

According to Article 11 § 6 of the Royal Regulation on the CUTA⁷², there are four levels of threat: level 1 or low; level 2 or medium; level 3 or serious and level 4 or very serious. Threat assessments are intended for different political, administrative or judicial authorities with any security responsibilities. It is important to recall, at this stage, that these very authorities must ultimately take appropriate measures to counter a possible threat as soon as it is detected.

On 22 March 2016, the CUTA, as one can foresee, stated that it had assessed the threat level at 4, very serious. Almost automatically, the government seized the information and declared the lockdown on the city of Brussels. Thereafter, the CUTA's statements were examined in an unprecedented way.

At this stage, it is important to make an observation on the functioning of the CUTA, which marks a first illustration of the "*administrativisation*" of the treatment of the terrorist threat, on which we will look further below. Indeed, this semi-independent body of experts has taken on considerable importance in the fight against terrorism and more particularly in legitimizing political decisions. There is, in fact, a kind of transfer of responsibility for the decision on exceptional measures taken during or after the attacks, of which this direct quote from the inquiry committee's report on the 22 March 2016 attacks is a perfect illustration:

"Some confusion and dissatisfaction was sometimes expressed about maintaining level 3 while some occupational categories (e.g. police) had already moved to level 2. These reactions illustrate that subjectivity and self-interest are still often dominant in the services concerned, which sometimes have difficulty accepting CUTA decisions"⁷³.

Thus, the use of the terms "accepting CUTA decisions" induces the idea of automaticity between the CUTA's opinion on a possible level of threat and the government's decision to take it into account and act accordingly. This is all the more striking as the CUTA does not carry out a risk analysis but only a threat analysis. In the same way, the Minister of the Interior himself has, on the occasion of a Flemish television programme, said that the CUTA determines the level of threat and that the government "*prend acte*" of it⁷⁴, which basically means that he does not have a say about it.

In reality, it is the *CGCCR* that evaluates the effects related to the level of threat set by the CUTA. If necessary, the NSC provides for additional measures⁷⁵. The *CGCCR* (Strategic Intelligence and Security Committee) submits proposals to the NSC (National Security Committee), which has sole decision-making authority. This is logical, because the latter is a purely governmental body since it is chaired by the Prime Minister and is composed of the Deputy Prime Ministers and the Ministers of Justice, Defence, Foreign Affairs and the Interior.

While this is only of *de facto* importance, the CUTA is also taking on a new importance, since its reasoned opinion has become a formal obligation on the faculty to refuse to issue an identity card, provided for in the new Article 6 of the Law of 19 July 1991 on population registers⁷⁶. We

⁷² Royal Regulation of 28 November 2006 implementing the Law of 10 July 2006 on threat analysis, *B.M.*, 1st December 2006.

⁷³ Parliamentary inquiry to examine the circumstances leading to the terrorist attacks of 22 March 2016 at Brussels National Airport and Maelbeek underground station in Brussels, including the development and management of the fight against radicalism and the terrorist threat - Third interim report, on the 'security architecture' aspect, *Doc. parl.*, Ch., sess. 2015-2016, 3 August 2016, No. 54 1752/008, 44.

⁷⁴ See the reference to it in the course of a parliamentary question, *Doc.*, Question No. 199 by Raoul HEDEBOUW, MP, 13 February 2015 (DO 2014201501718), sess. 2014-2015, No. QRVA 54 017, 19.

⁷⁵ Parliamentary inquiry to examine the circumstances leading to the terrorist attacks of 22 March 2016 at Brussels National Airport and Maelbeek underground station in Brussels, including the development and management of the fight against radicalism and the terrorist threat - Third interim report, on the 'security architecture' aspect, *Doc. parl.*, Ch., sess. 2015-2016, 3 August 2016, No. 54 1752/008, 153.

⁷⁶ Law of 9 November 2015 on various provisions of the Interior, *B.M.*, 30 November 2015. See also M.-A. BEERNAERT, « Renforcement de l'arsenal législatif anti-terroriste : entre symboles et prévention », *Journal des Tribunaux*, 2015/40, 835 and V. LAFARQUE, « Terrorisme : impact sur la délivrance des cartes d'identité », *Bulletin social & juridique*, 2015/549, 16.

will come back to that.

C) Operation Vigilant Guardian

Following the attacks on Charlie Hebdo's editorial staff in Paris in early 2015, the Belgian government was able to set up a major operation, which was already legally possible for several decades. It is the presence of soldiers on the streets.

On 17 January 2015, a Memorandum of Understanding was approved by the Council of Ministers and concluded between the Interior and Defence Ministers⁷⁷. It sets up 'Operation Vigilant Guardian', a gigantic operation of occupation of the public space by the army, never seen before in Belgium in peacetime for decades. Two types of missions are possible for the military: patrols or fixed posts. Street patrols provide protection for all users of public space. As for fixed posts such as buildings, they are considered as sensitive places. In this case, the aim is to provide protection for people working in these places. These measures are further reinforced in Brussels, where the terrorist threat is higher than in the rest of the country. The number of military personnel mobilized has increased through the years until now. There were 1.800 soldiers on the streets in the wake of the 22 March attacks⁷⁸.

Legally, everything already existed to rapidly deploy such an operation. A Law as well as a Royal Regulation of 1994 mark out these missions⁷⁹. Thus, the military, whether on the basis of a memorandum of understanding or a requisition⁸⁰ – i.e. without having to seek parliamentary approval –, may be assigned to a police support mission, provided that the police services' resources are not sufficient to maintain public order⁸¹. Under article 7/5 of the Law on the Police Function, however, the direction of operations remains the exclusive prerogative of a police officer⁸².

Section 4 – A new criminal framework

The terrorist attacks in Paris in January and November 2015 and in Brussels in March 2016 prompted Belgian authorities to announce two sets of measures to fight terrorism. The first is a package of 12 counterterrorism measures, released in January 2015. The second set of 18 measures was announced in the days following the Paris terrorist attacks of 13 November 2015⁸³. From the very first pages of its report, the parliamentary inquiry committee wrote that "Belgium, like other countries, has shown a willingness to strengthen the legislative arsenal available to the services in the fight against terrorism"⁸⁴. Here we leave immediate action, facing an emergency situation as described above, to focus on delayed action. The main

⁷⁷ It should be noted that this Memorandum of Understanding remains, for obvious reasons, classified. At most, we can capture bits of it by indirect means. The authors of this article have therefore not been able to become aware of it.

⁷⁸ Motion for a resolution to disengage the Defence from Operation Vigilant Guardian in favour of a specific police force, *Doc. parl.*, Ch., sess. 2016-2017, 16 November 2016, No 54 2156/001, 4.

⁷⁹ Law of 20 May 1994 on the periods and positions of military personnel in the reserve framework and on the implementation and conditioning of the Armed Forces, *B.M.*, 21 June 1994 ; Royal Regulation determining the forms of operational engagement and preparatory activities for the implementation of the Armed Forces, *B.M.*, 20 July 1994.

⁸⁰ Article 6/2 of the Royal Regulation of 6 July 1994 determining the forms of operational engagement and preparatory activities for the implementation of the armed forces, *B.M.*, 20 July 1994.

⁸¹ Article 43 of the Law of 7 December 1998 organising an integrated police service, structured at two levels, *B.M.*, 5 January 1999.

⁸² N. LAGASSE, « L'emploi de la force sur le territoire national par les militaires en dehors des situations régies par le droit des conflits armés », *Revue belge de Droit constitutionnel*, 2013, 35.

⁸³ S. ANDRÉ and V. SERON, "30 measures against terrorism: penal populism between expected efficiency and potential collateral damage", in T. RENARD (ed.) *Counterterrorism in Belgium: key challenges and policy options*, Egmont Paper 89, Brussels, Egmont, January 2016, 10-22.

⁸⁴ Proposal to set up a parliamentary inquiry committee to examine the circumstances leading to the terrorist attacks of 22 March 2016 at Brussels National Airport and Maelbeek underground station in Brussels, including the evolution and management of the fight against radicalism and the terrorist threat, *Doc. parl.*, Ch., sess. 2015-2016, 11 April 2016, No. 54 1752/001, 5.

difference is the intervention, to this end, of the legislator alongside the executive branch.

There are two ways of dealing with the terrorist phenomenon through legislative action. On the one hand, it involves adopting new laws or amending existing laws in order to create a special regime for terrorist offences and persons suspected of terrorism or dangerous radicalisation (A.). This first aspect is marked by the pre-eminence of the judiciary in the treatment and evaluation of these situations deemed dangerous. On the other hand, it raises a question of regulating the public space, most of the time through Royal Regulations (B). The actors put forward are no longer the judges but the administration and the police, who act by the notion of public order. We can see in it a movement of *administrativisation* of the terrorist and jihadist phenomenon.

A) Legislative amendments in criminal matters/power to the judge

Several ordinary legislative changes have taken place since the first attack on the Jewish Museum in Brussels in 2014⁸⁵. Among these, several will be of interest to us, namely the Law of 20 July 2015 to strengthen the fight against terrorism⁸⁶; the Law of 27 April 2016 on complementary measures to combat terrorism (1)⁸⁷, the Law of 2 August 2016 containing various provisions on combating terrorism (III) (1)⁸⁸; the Law of 14 December 2016 amending the Criminal Code as regards the suppression of terrorism (1)⁸⁹; and the Law of 17 May 2017 amending the Code of Criminal Procedure with a view to promoting the fight against terrorism (1)⁹⁰.

Of course, most of these laws are more or less an extension of existing terrorism legislation. Thus, the inclusion in ordinary legislation of a new offence relating to travel abroad for terrorist purposes in article 140sexies of the Criminal Code by the Law of 20 July 2015 should first be highlighted. As the doctrine emphasizes, “this will certainly raise important evidentiary problems, especially since the conduct will be punishable ‘regardless of whether or not the terrorist offence is committed’⁹¹. Indeed, it is no longer the commission itself that is punishable, but the intention of the alleged jihadist. While the punishment of intent already exists to some extent in the Criminal Code, it is taken to its extreme here in that it presupposes a particularly thorough faculty of investigation. Consequently, the “ambiguous dimension” of this new legislation is bound to arise⁹².

Secondly, and not least, the legislator has extended the possibility of using “particular research methods” to terrorist offences. With the amendment of a single article of the Code of Criminal Procedure – 90ter –, a large number of criminal procedure locks are being broken, just like a chain reaction⁹³. From now on, a wide range of measures may be authorised in the context of the search for terrorist offences, including private telecommunications surveillance measures, proactive investigations, temporary freezing of bank accounts, discreet visual checks, infiltration, observation in a home, full anonymous testimony, telephone tracing or even the protection of threatened witnesses, in short, a whole series of mechanisms which derogate from ordinary law and which, *a priori*, do not respect the principle of adversarial proceedings

⁸⁵ J. ROELANDT, “De strijd tegen het terrorisme: een overzicht van de recente wetgevende ingrepen in het straf(proces)recht”, *NC*, 2017, Vol. 12, 10-21.

⁸⁶ *B.M.*, 5 August 2015.

⁸⁷ *B.M.*, 9 May 2016.

⁸⁸ *B.M.*, 11 August 2016.

⁸⁹ *B.M.*, 22 December 2016.

⁹⁰ *B.M.*, 3 July 2017.

⁹¹ M.-A. BEERNAERT, “Renforcement de l'arsenal législatif anti-terroriste : entre symboles et prévention”, *Journal des Tribunaux*, 2015, 834. See also J. VELAERS, “La lutte contre le terrorisme et les droits de l'homme : développements récents en Belgique”, in *Les visages de l'État*, Brussels, Bruylant, 2017, 788.

⁹² C. DE VALKENEER, “Les réponses face au terrorisme : les glissements du judiciaire vers l'administratif”, *Journal des Tribunaux*, 2017, 709.

⁹³ M.-A. BEERNAERT, “Renforcement de l'arsenal législatif anti-terroriste : entre symboles et prévention”, *Journal des tribunaux*, 2015, 834.

and the rights of the defence.

Thirdly, Belgium has extended the possibility of revoking Belgian nationality for dual nationals. Although anecdotal, this measure is certainly marked by an important symbolic weight, as we have seen during the debates on its adoption in the French Republic. Under Belgian law, the Nationality Code has been amended for this purpose. It should be noted that the main novelty in relation to the possibility of forfeiture of existing nationality is the abolition of any time limit. Thus, regardless of how long has elapsed since the commission of the terrorism offence, the judge will be able to order forfeiture. According to the legislator, this can be explained by the fact that terrorism “can be interpreted as a form of rejection of the country, its institutions and its values”⁹⁴. The Constitutional Court has endorsed this reform⁹⁵. Nevertheless, some questions remain⁹⁶.

The legislator is not the only one to have acted during this recent period. Indeed, the Constituent itself intervened to revise an article that had remained unchanged since the birth of the Kingdom in 1831, namely article 12. The latter enshrines the maximum time limit for police arrest – the “*garde-à-vue*” – of 24 hours before having to obtain a warrant from an investigating judge. On 24 October 2017, the Constitution was revised to increase this period to 48 hours⁹⁷. The constitutional amendment is different from the interventions dealt with so far in that it affects all citizens for, *a priori*, all types of offences. However, “the reading of parliamentary documents gives rise to this feeling that the ‘Salduz’ case law was only a pretext for the Constituent Assembly which, to tell the truth, was more concerned about the fight against terrorism”⁹⁸.

B) The “administrativisation” of the fight against terrorism / power to the executive

The terrorist threat is a global phenomenon and must be understood both *a priori* and *a posteriori*. “Our country has many more foreign fighters going to Syria and Iraq than other countries. This worrying observation requires that we look for the causes”, stresses the inquiry committee⁹⁹. It is from this premise that the federal authorities have started to adopt a series of measures that more or less infringe public freedoms in order to prevent the commission of terrorist attacks but above all in order to stem the radicalisation of young people. In this context, it is usually the Belgian government that is at work. Moreover, it is above all a question of giving more power of action to the authorities on the ground, most often local, whether they are administrative or police.

First, a 2017 law amended the Communal Law in order to allow the mayor of a commune, the first administrative chief of his locality as well as the chief of the local police, to order the closure of establishments suspected of harbouring terrorist activities¹⁰⁰. This new prerogative of the mayor, which offends *a priori* the constitutional freedoms of assembly and association, offers him an important power on his territory.

Second, a law adopted the same month aims at relaxing the obligation of professional secrecy

⁹⁴ *Doc. parl.*, Ch., sess. 2014-2015, No. 54 1198/001, 8.

⁹⁵ Constitutional court, case No. 85/2009 of 14 May 2009.

⁹⁶ P. WAUTELET, « Priver les djihadistes de leur nationalité belge : les garde-fous à respecter », *Journal des Tribunaux*, 2015, 183-184.

⁹⁷ Revision of 24 October 2017 of Article 12 of the Constitution, *B.M.*, 29 November 2017.

⁹⁸ M. VERDUSSEN, « Révision de la Constitution : le délai maximal d'arrestation judiciaire est doublé », *Journal des Tribunaux*, 2018, 388.

⁹⁹ Proposal to set up a parliamentary inquiry committee to examine the circumstances leading to the terrorist attacks of 22 March 2016 at Brussels National Airport and Maelbeek underground station in Brussels, including the evolution and management of the fight against radicalism and the terrorist threat, *Doc. parl.*, Ch., sess. 2015-2016, 11 April 2016, No. 54 1752/001, 7.

¹⁰⁰ Law of 13 May 2017 inserting an article 134septies in the New Communal Law in order to allow the Mayor to close down establishments suspected of harbouring terrorist activities, *B.M.*, 16 June 2017.

which weighs on certain professionals¹⁰¹. From now on, agents of the Public Social Action Centres will be required to inform “immediately” the Public Prosecutor’s Office of any information that may constitute “serious evidence” of a terrorist offence. Although stemming from a legitimate desire to benefit from the best possible information in order to thwart possible attacks, the law does not completely reassure in that it places in the hands of these agents the responsibility to evaluate themselves the quality of the confidences received and their possible dangerousness¹⁰².

In another vein, in March 2017, the Council of Ministers reached an agreement to extend the competences of private security organisations: installation of surveillance cameras, use of flying/mobile camera systems, carrying weapons, searching¹⁰³. One year later, a law was adopted to extend the possibility of using surveillance cameras, supplemented by a Royal Regulation¹⁰⁴. The adoption of these new provisions is very clearly motivated by the desire to combat terrorism, although the new legislation applies indiscriminately. For example, the new law now allows intelligence services (State Security (VSSE) and the General Intelligence and Security Service (SGRS)) to consult live police surveillance footage, which they were previously unable to do.

Still in the administrative field, it is now up to the Minister of the Interior or his delegates to refuse to issue an identity card or to decide to withdraw the same card from a person suspected of wanting to carry out terrorist activity abroad¹⁰⁵. Two clarifications should be noted. On the one hand, as we have already seen, the new legislation closely associates the CUTA with this decision, since its opinion is necessary to pronounce the measure. On the other hand, it should be noted that the measure “may also apply to minors as well as adults”¹⁰⁶. This also illustrates the administrativisation of the handling of the terrorist phenomenon can be illustrated in particular by the new power to refuse to issue identity documents or to withdraw them, although this legislative amendment is largely the result of the implementation of a United Nations Security Council resolution¹⁰⁷.

Among the many other Royal Regulations adopted with a view to strengthening the power of the executive and the administration, we should mention: the Royal Regulation of 2 June 2015 establishing the Strategic Committee and the Intelligence and Security Coordination Committee¹⁰⁸; the Royal Regulation of 1 May 2016 establishing a national emergency plan for the approach of a terrorist hostage or terrorist attack¹⁰⁹; the Royal Regulation of 21 July 2016 on the joint Foreign Terrorist Fighters database and implementing certain provisions of Section

¹⁰¹ Law of 17 May 2017 amending the Code of Criminal Procedure with a view to promoting the fight against terrorism, *B.M.*, 3 July 2017.

¹⁰² In all honesty, it should be pointed out that there is a Circular dated 20 July 2017 relating to this law which states that staff members may, in any event, seek advice from their immediate superior. However, this only places the problem raised above on another person.

¹⁰³ Parliamentary inquiry to examine the circumstances leading to the terrorist attacks of 22 March 2016 at Brussels National Airport and Maelbeek underground station in Brussels, including the development and management of the fight against radicalism and the terrorist threat - Third interim report, on the ‘security architecture’ aspect, *Doc. parl.*, Ch., sess. 2015-2016, 3 August 2016, No. 54 1752/008, 113-114.

¹⁰⁴ Law of 21 March 2018 amending the Law on the police function, in order to regulate the use of cameras by police services, and amending the Law of 21 March 2007 regulating the installation and use of surveillance cameras, the Law of 30 November 1998 organic intelligence and security services and the Law of 2 October 2017 regulating private and private security, *B.M.*, 16 April 2018 and the Royal Regulation on the Declarations on the Installation and Use of Surveillance Cameras and the Register of Camera Image Processing Activities, *B.M.*, 23 May 2018.

¹⁰⁵ Law of 10 August 2015 amending the Law of 19 July 1991 on population registers, identity cards, foreigner's cards and residence documents and amending the Law of 8 August 1983 organising a national register of natural persons, *B.M.*, 31 August 2015.

¹⁰⁶ M.-A. BEERNAERT, « Renforcement de l'arsenal législatif anti-terroriste : entre symboles et prévention », *Journal des Tribunaux*, 2015, 835.

¹⁰⁷ Resolution No. 2178 of the United Nations Security Council, § 6, a).

¹⁰⁸ *B.M.*, 5 June 2015.

¹⁰⁹ *B.M.*, 18 May 2016.

1bis “Information Management” of Chapter IV of the Law of the Police Functions¹¹⁰; the Royal Regulation of 16 February 2017 laying down the procedure according to which the King may recognize an act of terrorism within the meaning of article 42bis of the law of 1 August 1985¹¹¹.

Criticisms from the judicial world were not long in coming¹¹². This “shift from the judicial to the administrative”¹¹³, denounced by the Prosecutor General Christian de Valkeneer, is certainly one of the constants to be underlined since the beginning of the recent wave of attacks in Europe. For the author, the current model gives an increasing place to the administrative police and the concept of public security to the detriment of the criminal approach to the phenomenon. The Attorney General considers this movement dangerous as it provides important prerogatives to the administrative authorities¹¹⁴.

Conclusion

“I would rather wish, actually, that we have a state of emergency “à la française” than we touch the core of our criminal law because it would threaten the rule of law and the situation of all citizens”, said Christophe Marchand, a Belgian attorney¹¹⁵. By definition, the state of emergency entails a modification in the protection of fundamental rights and in the balance between the state powers, as it grants mainly the executive with wider powers to effectively overthrow a terrorist threat or a crisis situation. However, due to the lack of such mechanism, there is no specific measures in Belgium that could be activated only in the hypothesis of specific circumstances such as a clear and present risk for the State. Of course, that does not mean there is no action in that cases, but the constitutional control would be the same as other acts.

Recent events have clearly required stronger measures to fight terrorists. From the different examples highlighted, we can see the incredible range of legislation and regulations available to the authorities, both administrative and judicial, to deal both with emergency situations relating to terrorism and with the more global phenomenon of radicalism. However, no exceptional regime has been used to exercise these existing prerogatives. How, then, can we explain that the advocates of the creation of an institutionalised state of emergency in Belgium still exist, as we have seen in the first part of our article? To answer this question, it is necessary to define the way in which the Belgian system functions in the field of terrorism and to compare it with the main salient features of a “classic” state of emergency.

Belgium functions, as we have seen, by amending or creating ordinary legislation, although often limited to the terrorist field. It is important to ask what separates the Belgian way of dealing with the terrorist phenomenon, without a state of emergency, from the way used by countries in a state of emergency. Is it only, as Jan Velaers has pointed out¹¹⁶, the restriction of the scope of the measures to terrorist offences and the failure to transfer the means of action to the executive branch that separate the two systems? Let us examine these two aspects.

On the one hand, the restriction of the scope of the newly created measures to terrorist offences would be an important difference with the state of emergency. While most of the measures adopted by the federal authority are aimed exclusively at terrorist offences, some are not. Thus, amending the Constitution to extend the period of police custody potentially

¹¹⁰ *B.M.*, 22 September 2016.

¹¹¹ *B.M.*, 3 March 2017.

¹¹² K. VAN CAUWENBERGHE, “Kan terrorisme de rechtsstaat onderuit halen?”, *Juristenkrant*, 2015, 13.

¹¹³ C. DE VALKENEER, « Les réponses face au terrorisme : les glissements du judiciaire vers l’administratif », *Journal des Tribunaux*, 2017, 707-711.

¹¹⁴ C. DE VALKENEER, « Les réponses face au terrorisme : les glissements du judiciaire vers l’administratif », *Journal des Tribunaux*, 2017, 710.

¹¹⁵ J. QUATREMER, « La Belgique aimerait résister à la tentation de l’état d’urgence », *Libération*, 23 march 2016.

¹¹⁶ J. VELAERS, « La lutte contre le terrorisme et les droits de l’homme : développements récents en Belgique », in *Les visages de l’État*, Brussels, Bruylant, 2017, 791.

concerns any person and any offence. Beyond this remark, it is a chimera to think that the scope of terrorist offences constitutes a homogeneous and determined whole. Moreover, although normally circumscribed, the interpretation of these new criminal measures very often constitutes an open door to the arbitrariness of the judge (or the administration) since they have an eminently subjective scope, by wanting to incriminate intentionality. This explains why some see in this “legislative frenzy [...] a subjectification of criminal law”¹¹⁷.

On the other hand, the lack of transfer of the means of action to the executive power would be an important difference with the state of emergency. Here too, this statement needs to be challenged. Admittedly, broad powers have not been given temporarily to the Belgian government as it may have been the case in France or in other states under a state of emergency. Nevertheless, important decisions on action to prevent and suppress terrorism and potentially violate individual and collective human rights can be taken by governmental or executive actors. One example is certainly the preponderance of the federal prosecutor’s office in this matter, marked by its subordination to the executive power¹¹⁸. One can also mention the role of the mayors or the CUTA, seen above.

We would tend to think that the difference does not necessarily lie in these two criteria, but, more insidiously for the Belgian system, in its permanence, contrary to the state of emergency marked by its temporary character. Indeed, the presence of soldiers in the streets is not linked to an exceptional power that the executive should “return” at the end of a given time since its possibility is provided for in permanent legislation. Similarly, the list of Foreign Terrorist Fighters and the power to detain or refuse to issue identity papers are not linked to the existence of the Islamic state but will remain in force until they are repealed by a new parliamentary majority.

At the end, we will object that a final difference may lie in the severity of the measures, that are supposed to be more flexible in the Belgian system since they must respect the Constitution, which has not been suspended by a possible state of emergency. According to Jan Velaers, the use of ordinary legislative amendments to deal with the terrorist phenomenon has at least one advantage, namely that it remains within the scope of respect for the fundamental rights enshrined both in the Belgian Constitution and in international conventions¹¹⁹. Thus, if one examines the various measures taken by the Belgian legislator after the attacks on the Jewish Museum in Brussels, they were subject to *a priori* control by the Council of State, as well as *a posteriori* by the Constitutional Court, in particular as to their compatibility with a series of fundamental rights including the freedom of expression, the prohibition of deprivation of liberty or the freedom of movement. Here again, the border is porous. Indeed, the Constitutional Court tends to be more lenient with repressive texts justified by the fight against terrorism¹²⁰. On the basis of these reflections, some do not hesitate to assimilate the state of emergency and the repressive system specific to terrorism in Belgium. For example, J.-C. Paye considers that “this type of legislation, by generalising exception procedures at all stages of the criminal procedure, puts us in a permanent state of exception, in which what was the rule, the guarantee of certain constitutional rights, is constantly violated”¹²¹.

¹¹⁷ J.-C. PAYE, « État d’exception sans état d’urgence », *La Libre Belgique*, 22 December 2016.

¹¹⁸ J.-C. PAYE, « Belgique : une “lutte antiterroriste” ordinaire », *Pyramides*, 2012, 16/1, 3.

¹¹⁹ J. VELAERS, « La lutte contre le terrorisme et les droits de l’homme : développements récents en Belgique », in *Les visages de l’État*, Brussels, Bruylant, 2017, 791.

¹²⁰ An older example than the current period is striking in this respect¹²⁰. Following the attacks of 11 September, a Law of 6 January 2003 on special research methods was adopted by parliament. Following an annulment by the Constitutional Court – at this time the Court of Arbitration – for failure to respect fundamental rights, the legislator revised its copy and adopted a new version of the law, almost identical to the previous one, the Law of 27 December 2005, but this time insisting on the framework of the fight against terrorism. The Court approved. See J.-C. PAYE, « Belgique : une “lutte antiterroriste” ordinaire », *Pyramides*, 2012, 16/1, 8.

¹²¹ J.-C. PAYE, « Belgique : une “lutte antiterroriste” ordinaire », *Pyramides*, 2012, 16/1, 6.

At this stage, we will lend an ear to some authors. “When a State is confronted with a serious threat, such as terrorism, it may be tempted to proceed with what Mireille Delmas-Marty calls a ‘circumvention of the rule of law’, by ‘a duplication of the criminal system between a common law that respects the principles and a parallel circuit that is gradually freed from them by a tightening of procedural and substantive rules,”¹²². The conclusions of part of the Belgian legal doctrine are unequivocal. They see in these reforms “a concern to intervene ever more upstream”, to “play on the register of symbols”, with, in the end, a risk of “being counterproductive”¹²³.

In conclusion, we must ask ourselves the question of the relevance of introducing a state of emergency in Belgium since the government already enjoys broad powers in this area, helped by the administrative movement to combat terrorism, the relative consensus within parliament in this area and the leniency of the Constitutional Court when it comes to defending fundamental rights in this particular field. In short, we will say with another author that while the fight against terrorism is undoubtedly the challenge of contemporary European societies, “the rule of law does not enshrine the principle that the end justifies the means”¹²⁴.

¹²² M. DELMAS-MARTY, *Aux quatre vents du monde - Petit guide de navigation sur l'océan de la mondialisation*, Paris, Seuil, 2016, 29, quoted by M. VERDUSSEN, « Révision de la Constitution : le délai maximal d'arrestation judiciaire est doublé », *Journal des Tribunaux*, 2018, 388.

¹²³ M.-A. BEERNAERT, « Renforcement de l'arsenal législatif anti-terroriste : entre symboles et prévention », *Journal des Tribunaux*, 2015, 836.

¹²⁴ J. VELAERS, « La lutte contre le terrorisme et les droits de l'homme : développements récents en Belgique », in *Les visages de l'État*, Brussels, Bruylant, 2017, 791.