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Panel 139 - Constitutional shocks and transition

The production of legal provisions in situations of emergency

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I. Introduction

Unforeseen circumstances sometimes disturb states' daily-life and expose them to situations of emergency to which authorities must then expeditiously respond.

These situations can be due to several factors. One can under more think of emergencies caused by

- *natural factors* – for example, when climate is so arid that significant risks of drought arise –,
- *security concerns* – one can think of terrorist threat –, or by

- *economic reasons* – for example, when a serious epidemic is ravaging animal farms and crippling trade.
  Some of these risks are foreseeable while others are unforeseeable.

In order to deal with these changes and to react as quickly as possible, States often set up *specific legislative procedures* which derogate from the usual ones. One main difficulty is to determine the best way to react: by adopting preventive measures? By accelerating the legislative procedure? By giving competence to new authorities, specifically in charge of managing emergency situations?

In that respect, it's not uncommon that in these circumstances the distribution of powers between the Legislative, the Executive and the Judiciary, as it is enacted in the Constitution or in other legal texts, is temporarily altered. Some states have put in place a proper "state of exception", that is *a situation in which a country, when confronted with a severe and imminent threat, responds by taking actions that would not be acceptable under normal circumstances, given the constitutional principles of that country*. This definition is broad enough to cover situations of emergency caused by the three different factors we have mentioned above.

Our presentation seeks to give an overview of how situations of emergency are dealt with in Belgium.

Then, we would be happy to discuss with all members of the panel what are the similarities and the differences between your respective countries and Belgium.

II. Absence of a constitutional opportunity to suspend Constitution

In most European countries, recent situations of emergency have been the consequence of the wave of terrorist attacks that affected them. For example, we think of:

- the attacks in Paris, at the headquarters of the *Charlie Hebdo* magazine's (7 January 2015), and simultaneously at the national football stadium and inside the *Bataclan* music venue (13 November 2015);

- the attack in Berlin perpetrated with a truck that went into the crowd at a Christmas market (19 December 2016);

- the attack in London, in front of Westminster Parliament (22 March 2017).

Belgium did not escape this terrorist wave and faced, under more, a terrorist attack at the Jewish museum in Brussels (24 May 2014), and another one simultaneously at Brussels airport and inside the Brussels metro (22 March 2016). Especially the last two attacks, which caused more than 30 casualties, underlined Belgium's patent difficulties in providing a quick response when faced with obvious, current, and imminent danger.

Indeed, Belgium's constitution – which dates from 1831 and which is, alongside those of the US and Norway, one of oldest constitutional documents still in force –

does not explicitly enshrine a specific provision concerning situations of emergency. Quite the contrary: its article 187 *explicitly forbids* a scenario in which the Constitution is suspended "in part or in the whole". This prohibition of suspension of one or several of its articles – which dates from 1831 – can be explained by historical reasons, specific to the 19th century: the Dutch King William of the Netherlands had suspended some provisions of the Dutch Constitution, and the French King Charles X had also enacted several unconstitutional bye-laws, which had in France to the revolution of July 1830[1].

These historic experiences convinced the Belgian constitutional assembly (the National Congress) that any possibility of suspension of the new Constitution which was about to be adopted could leave open the possibility of abuse[2]. This is why an article was included (article 130; current Article 187) which, since then, is written as follows: "'[t]he Constitution cannot be wholly or partially suspended'. Thus, it forbids in plain and intelligible language all emergency situations. It is a strict illustration of the *Delegatus non potest delegare* principle[3]: under *any* circumstances, the Constitution must be strictly applied and respected. This Article has never been amended since, despite the fact that the Constitution has been subject to very far-going changes on other points.

III. In practice: need to circumvent Article 187 and to find a way out

Belgium however *did* face emergency situations in which it was absolutely essential to react quickly by adopting legislations : authorities had thus to find solutions to circumvent Article 187 and the traditional legislative procedures provided by Articles 74 and following of the Constitution.

One of the first time authorities faced such an emergency situation was during the First World War. Parliament was materially unable to gather and it was also impossible to organize new elections. Consequently, the solution was found – although no provision of the Constitution says so – to allow the King to pass **statutory orders in time of war** ("Decree-law", "Arrêté-loi") in order to defend interests of the country. After the war, the Belgian Supreme court ("Cour de cassation") recognized the constitutionality of these decrees-laws, arguing that the intent of the 1831 constitutional assembly had certainly been to ensure the continuity of the State (judgment of 11 February 1919, *Geubelle*).

[1] JAN VELAERS, SEBASTIEN VAN DROOGHENBROECK, "L'article 187 de la Constitution et la problématique de la protection des droits et libertés dans les Etats d'exception", *in* EMMANUEL VANDENBOSSCHE (ed), *Uitzonderlijke omstandigheden in het grondwettelijk recht*, Brugge, die Keure, 2019, p. 6.
PAUL ERRERA, *Traité de droit public belge*, Paris, Giard & Brière, 1918, p. 18.

[2] CHARLES 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, at 401.

[3] This principle has been mainly popularized by the jugde Coke in England (E. COKE, *Institutes of the Laws of England* : *second part*, Londres, E. and R. Brooke, 1797, p. 597), who has taken it from work of Roman law commentators (P.W. DUFF et H.E. WHITESIDE, « Delegata Potestas Non Potest Delegari A Maxim of American Constitutional Law », *Cornell Law Review*, vol. 14, 1929, p. 171).

These decrees-laws had the same normative value as a statute passed in Parliament (cfr. Cass., 11 February 1919, and ; Cass., 11 December 1944, *Leemans*) and thus the Constitutional Court is competent to review their constitutionality (judgment nr. 115/99, 10 November 1999).

What however when the country is *not* at war, when it is *not* occupied by foreign troops? Could the King pass statutory orders in situations of insecurity or react after a terrorist attack? The answer to this question seems to be negative[4]. The public institutions must thus in all circumstances enact legislation according to the regular parliamentary procedures ; and the exercise of fundamental human rights and freedoms can only be limited by a statute adopted pursuant to these procedures.

New procedures of emergency could only be implemented by following the constitutional amendment procedure laid down in article 195 of the Constitution, which is particularly cumbersome.

This does however not mean that no solution whatsoever is available. Indeed, parliament can use the procedure of article 105, provision which makes it possible to enact **'special power laws'**, by which specific powers are delegated to the executive[5]. Theses powers can include the ability to amend, to repeal or to replace statutory provisions. The use of these "special powers" allows thus the King to adopt measures that could normally only be taken by Parliament itself, pursuant to the ordinary legislative procedure.

That being said, this 'special powers' mechanism has never been used in the field of national security or of natural catastrophes; its use has so far been limited to economic, budgetary and financial questions, and to reforms in the areas of social security and labour law; also, article 105 does not exonerate executive power from its obligation to respect the fundamental rights.

Given all these elements, it has been considered to *amend* article 187 of the Constitution. This was considered on three occasions …but never materialized. Also, amendment does not seem politically likely in the near future.

IV. What about other parts of the World? Discussion

The Belgian Constitution is more protective than international conventions[6], which provide, in a controlled manner, derogation provisions, particularly 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 similar, as both allow State

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[4] NICOLAS BONBLED, « Les aspects contemporains de la continuité de l'État: l'exception, l'urgence et la transition », *Journal des Tribunaux*, 2014, at 643.

[5] Cass., 3 mai 1974, *Le Compte*, *Pas*., I, p. 910.

[6] NICOLAS BONBLED AND CELINE ROMAINVILLE, « États d'exceptions et crises humaines ambigües: débat recent autour du terrorisme et des nouvelles formes de crise », *in* : *Annuaire international de justice constitutionnelle*, 2008, at 429.

Parties to ‘take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation’.[7] Both conventions provide a list of rights from which no derogations are possible, even in cases of emergency.

Thus, international human rights law allows countries to enact constitutional and/or statutory provisions that set out and provide for a legal “state of emergency”, and the latter can even entail the – temporary – reduction of individual rights. One of the most prominent examples is article 16 of the French Constitution, which allows for a delegation of legislative powers to the President in exceptional circumstances.

We would be delighted to take advantage of this panel in order to discuss how these questions are dealt with in the different legal systems from which its participants are originating.

[7] ECtHR, Grand Chamber, 19 February 2009, *A. e.a v. the United Kingdom case*.

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