Overview of the Belgian legal reaction to the covid-19 pandemic

Vue d'ensemble de la réaction juridique belge à la pandémie de covid-19

Prof. Dr Frédéric Bouhon – University of Liege (Belgium)

WCCL 2022 – Johannesburg
Workshop 8 (Constitutionalism, the COVID-19 Pandemic and Recovery)

Abstract:

This paper is submitted in my capacity of scientific co-editor of a voluminous book that has been published in French in February 2022 and which describes and analyses the Belgian State's response to the covid-19 pandemic: F. Bouhon, E. Slautsky and S. Wattier, *Le droit public belge face à la crise de covid-19 – Quelles leçons pour l'avenir ? [Belgian public law and the covid-19 pandemic – What lessons for future?]*, Brussels, Larcier, 2022, 1084 pages.

Thanks to the expert work of more than 50 legal scholars specialised in public law, this book covers all aspects of this subject and is expected to become a reference for legal research and practice on the pandemic. It is offered to present the main findings of this book in order to open to a comparative discussion with panel members who have observed the management of the pandemic in other states.

The main issues that will be addressed are the following ones:

1) Reinforcement of the governments: a centralisation movement has also been observed concerning the distribution of tasks between the government and the parliament. This is especially true for the most important and intrusive public health measures, which have been adopted by the government or even particular ministers, *i.e*. the minister for Home Affairs.

2) Challenge for the distribution of powers within the federal state: the pandemic has upset the distribution of powers between the federal authority and the federated entities, involving a centralisation movement that is not clearly provided for by the applicable law.

3) Conformity to fundamental rights: in some respects, the Belgian State has adopted very strict measures, whose legality and proportionality is questionable (e. g. ban on contact with more than one person, curfew for months, etc.), while it has been more liberal in other areas compared to other States (e.g. no compulsory vaccination, few restrictions on movement within the country, etc.). Regarding the principle of legality, it can be observed that most of the measures adopted by the state to deal with the virus were enacted on the basis of very broad legislation, leading to the expression of serious doubts concerning their adequacy by the courts and legal scholars. This led to the adoption of a 'Pandemic Act' in August 2021, which is itself currently being challenged in the Constitutional Court by one of the largest Belgian political parties. Another dimension of the problem is the absence of the notion of a state of emergency in the Belgian Constitution: unlike many countries, Belgium had to manage the crisis without being able to declare a state of emergency, as the Constitution prohibits such a mechanism. In practice, this led to the establishment of a *de facto* state of emergency.

Des développements en langue française sont proposés à la fin du présent document

In the context of this panel on constitutionalism and the pandemic, I would like to mention the recent publication of a book written in French on the Belgian State's response to the covid-19 pandemic. Together with two colleagues, Emmanuel Slautsky et Stéphanie Wattier, we have coordinated a large team of about fifty professors and researchers who have studied this issue through the prism of their subfield of public law. It means that the book deals not only with constitutional law and human rights aspects, but also with administrative law issues.

I would like to present some of the highlights of this broad research project.

The book was published in February 2022 and is entitled "Le droit public belge face à la crise du covid-19. Quelles leçons pour l'avenir?". This could be translated as follow: "Belgian public law and the covid-19 crisis. What lessons for the future?".

The project aims, on the one hand, at describing or analysing the legal rules that underpin the Belgian response to the Covid-19 pandemic and, on the other hand, at drawing the lessons from this response, which was often developed in an emergency, by assessing the strengths and weaknesses of the institutional arrangements implemented to deal with the pandemic.

It is of course impossible to present the details that are discussed in this one thousand pages book, so I have selected a few topics that could in my opinion be of interest for scholars from other countries than Belgium:

- What were the respective roles of parliaments and governments in the management of the pandemic?
- Did Belgian federalism undermine the management of the pandemic?
- Were the main health measures compatible with human rights?

I. Reinforcement of the governments: were (federal and regional) parliaments out of the game?

Several contributors to the book look back at the role played by the federal Parliament in the management of the Covid-19 pandemic. One of the striking features of the Belgian response to the health crisis is the dominant role played by the federal government and especially the federal Minister for home affairs. Between March 2020 and October 2021, the main measures – like lockdown, teleworking, ban of private and public meeting, closure of schools, worship places or shops, and so on, have been formally adopted by only one minister, using general policy power.

More than forty "covid-Decrees" were enacted by the Minister for Home Affairs alone and were based on powers conferred on the Minister by three legislative statutes. These statutes specify and define the aims of the measures that the Minister for Home Affairs may adopt (the protection of public order and public health and the protection of the population), but not the nature of these measures. They may take the form of regulations or individual decisions. There is judicial control of the use of these powers but no role for the legislature. The legality of the so called covid-Decrees has often been

challenged, especially because of the vagueness of the legislations on which the Minister relied to make various and highly intrusive decisions over a period of several months.

In this context, several contributors question whether the role of the federal parliament in the elaboration of health measures, should not have been greater, given the important effects of the measures adopted on the daily life of people.

However, other contributors also point out that the major role of the government in managing the health situation did not imply that the federal parliament was entirely absent from this management. On the one hand, the federal parliament never interrupted its legislative and government control activities; on the contrary, it adapted its *modus operandi* to the health imperatives. On the other hand, it is the federal legislator that is the author of the legal bases that have given the federal government a leading role in the management of the crisis: it is indeed on the basis of legislative authorisations that the health measures were adopted and, until now, the highest Belgian courts (including the Court of cassation) have decided that the legal bases used by the government were satisfactory.

Since October 2021, a new *Pandemic Act* is applicable. It partially clarifies the distribution of roles between the parliament and the government in a sanitary crisis situation.

II. Challenge for the distribution of powers within the federal state: did Belgian federalism undermine the management of the pandemic?

Several contributions in the book examine how the rules and principles of Belgian federalism conditioned and sometimes hindered the Belgian response to the Covid-19 pandemic. Belgium is organised as a complex multi-level government, with one federal authority and three communities whose territories overlap those of three regions. In principle, legislative and executive powers are distributed between the federal authority, the communities and the regions, so that everyone has exclusive competences. In principle, each competence (for example, justice, education or energy) belongs to one and only one level.

However, it has to be said that the Legislation Section of the Council of State has, years before the sanitary crisis, made it clear on several occasions that the power to manage pandemics include a variety of competences and is not a unique competence belonging, as such, to one level of government.

Rather, it is a task for all the entities making up federal Belgium. All components of federal Belgium must assume within the scope of their respective competences, by consulting each other, if necessary, within a special organ called the Concertation Committee. Several contributors point out that the management of the Covid-19 pandemic revealed that the limits and scope of the respective responsibilities of each

component of the federal state were not always clear to the actors involved, which was a source of hesitation and delay. Moreover, some measures required the joint intervention of several entities, which also lengthened the time taken to adopt decisions, for example when elaborating procedures for identifying and monitoring cases of contamination (tracing).

Finally, there may have been situations where authorities have exceeded their competences in their response to the health crisis, in particular when the federal authority ordered the general closure of sectors under the jurisdiction of the communities, such as schools or theatres, especially when it defined the teaching methods itself, or when the regions *de facto* set curfew times during the autumn and winter of 2020-21.

This experience could lead to rethink the principle of exclusivity which is so far a key-element of the distribution of competences within the Belgian federal system.

III. Conformity to human rights: were the main restrictions compatible with national and international human rights law?

From March 2020, the Federal Government has taken extraordinary measures to try to limit the spread of the pandemic among the population, in an attempt to protect (the right to) life of the most vulnerable and to prevent the saturation of the health care system. This is obviously not a Belgian specificity, even if some of the measures that have been adopted were quite peculiar. This is notably the case of the system of "bubbles" which affected the lives of the inhabitants of Belgium during long months: it was prohibited to enter in contact with more people than a number determined by the minister (which varied over time between one and ten), so people had to limit their personal contacts with people included in their "bubble".

These measures and many others created very significant restrictions on many fundamental rights and freedoms: freedom of movement, right to private and family life, freedom of religion, *etc.*

In various cases, courts have ruled that the measures adopted were not compatible with human rights, for example because it lacked a sufficiently precise legal basis. This can be connected to the comments made above about the powerful role of the federal Minister of home affairs and the doubts regarding the adequacy of the broad legal bases.

However, many other cases have been rejected by various courts, as the measures appear to be based on an appropriate legal basis and proportionate to the purpose of protecting health and the right to life. The book examines in detail how, from a legal point of view, the articulation between the mission assigned to the public authorities to protect life and its obligation to respect other fundamental rights must be understood.

Courts, especially the Council of states, have been seen by some contributors as (too) deferential to the strict measures adopted during the pandemic. It is true that they are relatively few examples of judicial rejection of a covid measure. I however mention here two significant cases.

- On 8 December 2020, the Council of State ruled that the restrictions on the collective exercise of religious freedom were disproportionate, as only weddings (with four people) and funerals (with 15 people) were allowed. It instructed the Federal Government to adopt new measures within five days, in dialogue with representatives from the religious communities. The Ministerial Decree of 11 December 2020 authorized religious gatherings (not only weddings and funerals) of up to 15 people.

- My second example is more recent and concerns the "covid safe ticket" or "sanitary pass" that was in application in Belgium and in many other countries during fall and winter 2021-2022. On the 1st of March 2022, the Tribunal of first Instance of Namur decided that the obligation to be vaccinated or tested to access many public places was no more proportionate to the purpose of protecting health at that date (it was the end of the Omicron variant wave). A few days later, the system of the covid safe ticket has been repealed by the relevant authorities.

The book also examines whether the protection of fundamental rights would not have been better ensured if the possibility for Parliament to declare a state of emergency was enshrined and framed in the Belgian Constitution. Unlike many countries, Belgium had to manage the crisis without being able to declare a state of emergency, as the Article 187 of the Constitution prohibits any suspension of the constitutional provisions. In practice, this led to the establishment of a *de facto* state of emergency. In such a situation, where the authorities are forced to go beyond the limits set by the Constitution, there is no clear boundaries anymore for the extraordinary powers that the authorities arrogate to themselves in order to fight the crisis. In such a configuration, one can only trust their good intentions and management capacities or – alternatively – start to worry seriously.