

The judicial review of the proportionality principle over time in changing circumstances

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WCCL 2022 – Johannesburg

Workshop 20 (Proportionality Principle in Constitutional Law – New Challenges to a Conventional Judicial Construction), 8 December 2022

Introduction

Proportionality principle established by constitutional case law is presented as the keynote of the conformity of any restriction to fundamental rights and freedoms. This principle balances the measure of restriction of freedoms with the aim pursued by the authorities in adopting these measures: are these measures adequate to achieve the goal? Are these measures the least restrictive to achieve this goal? In this reasoning, effectiveness over time of the measure must be taken into account.

While a recurrent methodology can be identified in the review operated by courts when the principle of proportionality is at stake, it can be also noted that this process is casuistic and that a reasoning held with regard to a specific measure is not always transposable with regard to a similar measure adopted in a different context. Even when looking at the very same measure, the result of the proportionality test can change with the passage of time. For instance, the sanitary pass that was in application in many countries during fall and winter 2021-2022 has been found illegal by the First Instance Tribunal of Namur on the 1st of March 2022. The Tribunal 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 date¹. To ensure that fundamental rights guaranteed by constitutions and international conventions are effective, it seems essential that a measure that has been considered as proportionate at one point in time can be reviewed and found to be disproportionate – if appropriate – at a later date.

In this context, we offer food for thought on the basis of concrete cases concerning, on the one hand, measures restricting fundamental rights adopted by public authorities in an emergency situation (**A**) and measures that have not been adopted in such particular circumstances but which nevertheless lose their necessity and effectiveness over time (**B**), on the other hand. Judicial review over time will then be discussed (**C**). Finally, we will propose several illustrations of our subject (**D**).

A. Emergency situations

The emergency situation goes hand in hand with a flexible control of proportionality that allows a wide margin of appreciation for the public authorities in determining the measures to be adopted, especially when the events that lead to the emergency have a very short duration. In an emergency situation,

¹ First Instance Tribunal of Namur, 1st March 2022.

authorities must react quickly and do not always have the time to gather all relevant information to choose the most appropriate measures. The wider margin of appreciation let to the authorities allow them to bring efficient – if not ideally – response to the emergency in question.

However, to be compatible with the principle of proportionality, this relative tolerance towards the authorities cannot continue indefinitely. Once the authorities have had time to assess the situation and the various alternatives available to them, they are expected to adopt effective measures that restrict fundamental rights as little as possible. The difficulty is to determine the point at which a situation has lost its emergency.

B. Necessity and effectiveness over time

Beyond any emergency situation, the proportionality of a measure is assessed in terms of its necessity (is it useful? is it needed?) and its effectiveness (does it achieve the intended purpose? is it effective to reach it?). These two aspects are largely dependent on the factual circumstances that motivated the adoption of the measure. For instance, a measure may be necessary to deal with a danger, but then lose its relevance when the danger is otherwise managed or has disappeared.

For example, is it worth maintaining a sanitary pass for travelling or going to a restaurant when contamination levels have fallen sharply? In another matter, is it appropriate to maintain an inmate in an extremely restrictive detention regime when his or her behaviour in custody has positively evolved? We will now look at how continuous judicial review can be put in place to answer these questions.

C. Judicial review

How can compliance with the principle of proportionality be monitored in the case of a measure which, at first sight, seems appropriate in an emergency situation or at the time of its adoption but which, later is no longer appropriate because the emergency has ceased or circumstances have changed?

In Belgium, the Legislation Division of the Council of State first conducts an *a priori* review of draft decrees and laws. The Council of State then scrutinises the elements provided by the authority to justify the measure restricting rights and freedoms. In case of emergency, the authority may omit to submit its draft to the Council of State, provided that appropriate justification is given *in concreto*. This step in the drafting of legislations in Belgium thus obliges the authorities to justify their intervention and to take the principle of proportionality into consideration *ex ante*.

Although the Council of State can foresee certain changes in circumstances that could occur and would justify providing for certain safeguards *ab initio*, the institution does not have the gift of divination and may not have anticipated all the problems that may arise *a posteriori*, once the norm has been implemented.

Thereafter, a judicial review *sensu stricto* is possible.

Firstly, it is possible to criticise the measure within a more or less short period following its adoption. The people affected by the measure in question may thus contest it before the Council of State in the case of a regulation issued by an administrative authority, or before the Constitutional Court in the case of an act adopted by a legislative power. However, these legal remedies which relate to the legal norm as such do not seem appropriate when the question of the continuous effectiveness and necessity is at stake. Indeed, in order to be admissible, appeals before these courts must be lodged within a short period of time. It could be that once this time limit has expired, the measure in question become

disproportionate due to a change in circumstances. However, because of procedural rules, it is not possible to lodge an appeal anymore.

Secondly, the people who suffer harm as a result of the application of the contested measure can ask the courts to find that their fundamental rights have been violated and to order the authorities to act in a way that comply with these rights. On this occasion, they can ask judges to scrutinise the norm in the light of fundamental rights. In the case of an act of a legislative power, the court may ask the Constitutional Court for a preliminary ruling; in the case of a decree, any Belgian court may itself review its compliance with the fundamental rights of the individual through the principle of indirect legality review of administrative acts. The responsibility of the authorities can thus be engaged several months or even several years after the adoption of the regulation in question.

The Belgian jurisdictional landscape thus makes it possible to carry out a diffuse and quasi-continuous control of the respect of fundamental rights, including when the legal norm has been elaborated by a democratically elected parliamentary assembly. The authorities are therefore aware that when they restrict fundamental rights, it is in their interest to provide safeguards as soon as the regulation is adopted or even to amend or repeal a regulation that has become useless or ineffective and therefore disproportionate, rather than risk being held liable for the damage caused by this measure.

D. Illustrations

Two issues, common to many states, illustrate our point well: the management of the Covid-19 pandemic and the fight against terrorism.

With regard to the first topic, we can take the example of compulsory vaccination. In Belgium, the obligation to vaccinate healthcare workers against Covid-19 appeared *a priori* to comply with the principle of proportionality on the basis of all the scientific data available at the moment of the decision without prejudice to the development of these data if the obligation in question were to be maintained². The scientific data available have therefore shown the need for and the effectiveness of this measure in the context of an ongoing epidemic situation, although it seems possible to reconsider this finding in the light of later scientific data which are not yet available. Furthermore, in the *Vavříčka and Others v. Czech Republic* judgment of 8 April 2021, the European Court of Human Rights has held that it is not disproportionate to provide for compulsory vaccination of children against a dozen of serious childhood diseases, where it appears that a policy of voluntary vaccination is insufficient to obtain and preserve herd immunity³. We might then ask what will happen in a few years' time if this herd immunity is acquired. Will the requirement still be necessary? At the very least, a periodic reassessment would seem useful.

Another example can be taken in the context of counter terrorism. The Brussels Court of Appeal accepted the detention of some convicted terrorists in an *ad hoc* wing of the prison involving special supervision, but sanctioned the lack of an effective remedy to challenge their continued detention under this regime⁴, since these persons may themselves evolve in their thoughts and degree of radicalisation. The Court of Appeal thus emphasised the need for a periodic proportionality assessment to ensure the necessity and effectiveness of this measure over time. More recently, the First Instance Tribunal of

² Council of State, Opinion No. 70.542/AG, 24 December 2021, para. 60

³ ECtHR, *Vavříčka and Others v. Czech Republic*, 8 April 2021, para. 288.

⁴ Brussels Court of Appeal, 12 April 2021, 2019/AR/1276.

Brussels considered that this control should be carried out within a reasonable time and that the authority that leaves a detainee without a response to his request for reassessment commits a fault⁵.

Covid-19 crisis and counter-terrorism offer plenty of other examples, which we propose to develop during the workshop at WCCL.

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⁵ First Instance Tribunal of Brussels, 3 November 2022, R.G. 21/5873/A.