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COVID-19 legislation in Belgium at the crossroads of a political and a health crisis*

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ABSTRACT

This paper discusses the corona virus crisis legislation in Belgium, against the background of a political crisis. It raises the questions how a minority government could find legitimacy to take drastic measures that impact upon fundamental rights and how the political crisis impacted the position of Parliament. This is examined from the viewpoint of input, throughput and output legitimacy, and with a comparison to the position of Parliament in Belgium during earlier crises and in the federated entities. The conclusions point to the increased importance of expert advice, an over-use of ministerial police powers, but also to a more important role for Parliament than what we could have expected under the reign of a majority government. While the political crisis did not hinder firm intervention in an initial phase, it is, however, problematic to deal with the effects of the crisis over the longer term.

KEYWORDS Corona virus COVID-19; political crisis; health crisis; emergency legislation; police powers; special powers; legitimacy

1. Introduction

The outbreak of the COVID-19 virus hit Belgium when the state was still going through a political crisis. After the federal (and subnational) elections held in May 2019, efforts to form a new federal government remained unsuccessful. At the start of the crisis the Belgian state was disabled on two fronts. The resigning minority government lacked a firm basis in the federal Parliament. And Belgium is a model of dual federalism, governed by regional parties, with a right-wing Flemish government and a left-wing Walloon government, making it more difficult to coordinate actions.¹ Still, Belgium managed to act fairly decisively, at least in a first stage – the exit strategy, in a later stage, created more confusion. The federalism aspects of the

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*This paper reports the situation in Belgium as to 16 May 2020.

¹Belgian institutional design revolves around the French and Dutch language communities, but the federal structure is officially composed of three Regions and three Communities: the French Community, the Walloon Region, the Flemish Community, the Flemish Region, the (bilingual) Brussels Region and the German-speaking Community, and two unofficial communities situated within the bilingual Brussels area.

Belgian crisis management are discussed elsewhere.² In this paper, focus is on how the federal government was able to act in the absence of (structural) majority support, and the implications for representative democracy. In particular, the question is raised how a minority government finds legitimacy to take drastic measures and whether the lack of a majority government weakened the position of the federal Parliament in emergency legislation.

The paper is structured as follows. First, the context is outlined, with a brief overview of the political crisis (section 2), the impact of the COVID-19 virus in Belgium (section 3), and the measures that were taken (section 4). Next, the legal grounds for the government to act in times of crisis are discussed (section 5). Finally, the paper examines the position of Parliament and other actors from the viewpoint of input, output and throughput legitimacy (section 6), before concluding (section 7).

2. The political crisis at the outset of the virus outbreak

The virus outbreak caught Belgium in the middle of a political crisis that started in December 2018, when the Flemish-nationalist party N-VA – the largest party in the federal coalition – changed its opinion on the desirability of supporting the Migration Pact (*Global Compact for Safe, Orderly and Regular Migration*). This led ultimately to her withdrawal, turning the remaining coalition into a minority government that, unable to find Parliamentary support, resigned ten days later, on 18 December 2018.

The elections for the federal Parliament (and the subnational and European Parliaments) took place in May 2019, as originally planned, and showed a more extreme gap between Dutch- and French-speaking votes than ever.³ Belgium is a dyadic federation, based on converging linguistic, ideological and economical cleavages between Flemings in the north and francophone people in the south. Yet, the constitution imposes language parity in the federal government, with as many French- as Dutch speaking Ministers.⁴ The country had been used to different voting results for some time, with the centre-right prevailing in Flanders and the left in the south, but this time electors voted for more extreme parties and in Flanders a substantial number of electors voted for the two parties with a separatist programme. Political antagonism, vetoes and demands made it impossible to form a government. All this

²Forthcoming – for now, see my blogpost <https://uacesterrpol.wordpress.com/2020/05/05/the-impact-of-the-covid-19-crisis-on-the-federal-dynamics-in-belgium/>.

³In more detail: P. Popelier, 'Crises, Elections and State Reforms in Belgium: A Long and Winding Road to Confederation?' in *Jahrbuch des Föderalismus* (Nomos 2019) 259–271. A survey showed that in reality, Flemings and francophone people take similar positions, but this is not reflected in the (region-based) party landscape and the voting results. See S. Walgrave *et al.*, Note based on the RepResent study, 'Vlaamingen en Walen stemden voor verschillende partijen maar verschillen van mening over het beleid dat ze willen', p. 3. The note is unpublished, but authority was given to quote it. It was also discussed in the newspapers.

⁴Art. 99 Belgian Constitution.

brought the N-VA's proposal for a radical form of confederalism on the political agenda.

As a result, more than a year after its resignation, the minority coalition, left with 38 seats out of 150 after the 2019 elections, was still in office as a care-taking government at the outbreak of the virus. Meanwhile, Prime Minister Charles Michel had left the government to take office as President of the European Union, and was replaced by Sophie Wilmès, the first woman to lead a Belgian government, albeit a resigning one.

Even the urgent need to combat the crisis while mitigating its impact on the economy, could not reconcile the largest parties on the Flemish and Walloon side to form a majority government, if only for as long as the crisis would take. In the end, the parties agreed to leave the minority government in power, with majority support, but with the promise to renew the request for the Parliament's confidence after six months. This was deemed necessary to grant the government special powers for an efficient response to the crisis. The government Wilmès II was restarted by royal decree of 17 March 2020,⁵ four days after the federal phase for the coordination of the corona crisis was announced and first measures had been taken.⁶ Prime Minister Wilmès gave her government statement before Parliament in the presence of her Vice-Prime Ministers and the fraction leaders only. The following day, 128 MPs out of 150 participated in the vote of confidence. Three parties refused to give support: the Flemish-nationalist party N-VA, the Flemish extreme right party Vlaams Belang, and the only nationwide political party, the extreme left PVDA-PTB. The other nine parties gave confidence to the 3-party coalition. From a legal perspective, the coalition, supported by the vote of confidence, was now a government with full powers. From a political perspective, the coalition was rather viewed as a temporary crisis government.⁷ At the same time, the minority government was granted special powers to take measures and amend statutes without the involvement of Parliament, under scrutiny of ten political parties,⁸ as discussed below.

Briefly, the situation was one of antagonism between the political parties, and especially between the largest parties on either side of the language border, the francophone socialist party PS and the Flemish-nationalist party N-VA, and a close scrutiny of no less than ten political parties – a shaky foundation on which the government's confidence rested. This raised the question

⁵Royal Decree of 17 March 2020, *Official Gazette (Off.Gaz.)* 18 March 2020, 2nd ed. In Belgium, specific terminology is used for subnational Acts of Parliament. As these nuances are not relevant for this paper, and the specific terms may confuse foreign readers, federal and subnational statutes are all called 'law' in this paper, and regulatory government acts are called 'decree'.

⁶Ministerial Decree of 13 March 2020 holding urgent measures to contain the spread of the coronavirus COVID-19, *Off. Gaz.* 13 March 2020, 2nd ed., err. 14 March 2020.

⁷Plenary Session, Integral Report, House of Representatives 26 March 2020, afternoon session, CRIV 55 PLEN 033, p. 37.

⁸Including the N-VA, which refused to give its confidence, but did give its vote to the Special Powers Act.

whether the government's position was solid enough to take forceful measures to contain the spread of the COVID-19 virus, thereby drastically limiting fundamental rights and freedoms, and to take measures to limit the impact on the economy and preserve purchasing power that would weigh on the budget for years to come.

3. The impact of the COVID-19 virus in Belgium

On 3 February, the first contamination was diagnosed. This person, returning from Wuhan, was put in quarantine until declared virus free. Public concern arose only during the spring break, end of February, when the number of corona cases suddenly rose dramatically, especially in the North of Italy, where many Belgians went skiing. Upon their return, more infections emerged. On 11 March 2020, the corona virus made its first fatality in Belgium. Two days later, the federal phase of the health crisis was announced and the first measures were taken. A more drastic lockdown took effect on 18 March 2020.

By the beginning of May, the death rate reached more than 8.000 fatalities. This put Belgium on top of corona deaths per capita. Two nuances put this in perspective. First, considering the nature of the virus spread, absolute numbers are probably more telling. Secondly, unlike other countries, Belgium included fatalities – mostly in elderly homes – that were probably caused by the corona virus, but this was not officially confirmed by testing.⁹ Hospitals were overburdened, but their maximum capacity was not exhausted. The main problems arose in (specific) elderly homes and residential care centres, where the virus spread quickly despite a visit ban.

On April, 3 the start of a stagnation of growth in the epidemic was reported, and in May the first exit measures were introduced.

4. Measures adopted to fight the corona COVID-19 virus

To coordinate government action in times of crisis or threat, the National Security Council meets, consisting of the Prime Minister, the Ministers of Justice, Defense, Home Affairs and Foreign Affairs, the Vice-Ministers, and other Ministers in matters under their competence.¹⁰ This time, to coordinate the management of the corona crisis, the National Security Council was extended to the regional Minister-Presidents. The National Security Council regularly¹¹ met to decide on the measures to be taken. It was

⁹Prime Minister Wilmès, Questions Plenary Session, Integral Report, House of Representatives 9 April 2020, afternoon session, CRIV 55 PLEN 035 (further Questions 9 April 2020), p. 5.

¹⁰Royal Decree of 28 January 2015 on the establishment of the National Security Council, *Off. Gaz.* 30 January 2015.

¹¹So far, on March, 10, 12, 17 and 27, April, 15 and 24, and May, 6 and 13, 2020.

supported by the National Crisis Center with three monitoring and advisory bodies: a Risk Assessment Group with health experts and authorities; a Risk Management Group, with federal and subnational health authorities and the Scientific Committee Coronavirus.¹² On 6 April, a Group of Experts was established to develop an exit strategy, consisting of medical, economic, statistical, legal and financial experts.

This section only gives a very brief overview of the measures, to give an idea of their impact on personal and economic life, and discusses how they were received by the public.

4.1. Measures

Five types of measures were adopted, at both the federal and regional levels:

- (1) Preventive measures to contain the spread of the virus;
- (2) Measures to give health care providers full capacity in terms of staff, infrastructure and equipment, such as regulations of the sale, distribution, commissioning and use of rapid self-tests, medical devices, personal protective equipment and biocides; the triage of possibly affected persons; or to simplify the procedures for the construction and exploitation of infrastructures for medicines or medical equipment.
- (3) Measures to mitigate the negative social and economic implications. These included measures to support ('viable') firms, self-employed persons and non-profit-organizations, for example through government guarantees for credits granted by credit institutions, or through subsidies for business and self-employed persons who were temporarily unable to carry on their activity. It also included measures to safeguard the purchasing power of individuals. Employees could fall back on an already available system of temporary unemployment, which was now amended to simplify the procedure and raise the wages that were paid under this system.
- (4) Measures to deal with the consequences of the preventive measures on ongoing obligations and requirements, for example to discontinue or extend terms.
- (5) Measures to strengthen the capacity of the government to act quickly. These are discussed in the next sections.

Gradually, a sixth type of measures took form, linked to an exit strategy, and consisting of a loosening of type 1 measures, as well as new measures to help businesses and services to restart.

¹²In more detail: <https://crisiscentrum.be/nl/news/crisisbeheer/covid-19-eeen-gemeenschappelijk-en-complex-crisisbeheer>.

This paper is mostly concerned with the federal measures, issued by a minority government – or only one Minister in that government – in the middle of a political crisis. Regional type 5 measures are discussed to better assess the federal situation.

Clearly, the type 1 measures were the most drastic ones, with the largest impact on fundamental rights. This included the (temporary)¹³ prohibition of all activities and the closing of shops, with some exceptions such as food stores, pharmacies and newsagents – first in the weekends, soon after full-time. Non-essential firms had to turn to teleworking or close. Essential and crucial firms and services (hospitals, care institutions, media, justice, the financial, energy and chemical sector, harbour, etc)¹⁴ had to facilitate social distancing and telework but kept functioning. Citizens were ordered to stay at home, except for walks, individual physical activities or essential purposes such as doctor visits, groceries, care taking or professional reasons. Lessons and activities in nurseries, primary and secondary education were suspended, and colleges and universities were to work through distance learning. Violation could lead to penalties, administrative fines or closure. Yet, these far-reaching measures were based on a Ministerial Decree only, with the first issued under a resigning care-take government with limited capacity.¹⁵

4.2. Reception by the public

The measures were generally well received and well complied with. Importantly, the (Flemish) public accepted the government's authority: a survey showed that by the beginning of April, it put much trust in the government (s), to an even higher degree than majority governments in other countries were trusted.¹⁶ However, surveys also showed that an increasing part of the population was experiencing anxiety and depression because of the crisis and the lockdown. Some discontent began to rise after two weeks. By the

¹³The first measures were in force until April, 3; this was extended to, subsequently, April 5 and 19, May, 3 and 10, and, in a more relaxed form, until June, 7 (with later dates for specific activities).

¹⁴The list was regularly adjusted, see the *Off. Gaz.* of 18 March 2020, 3th ed., 23 March 2020, 3 April 2020, 2nd ed., 17 April 2020.

¹⁵Ministerial Decrees of 13 March 2020, 18 March 2020 and 23 March 2020 holding urgent measures to contain the spread of the coronavirus COVID-19 and amending Decrees of 3 April 2020 and 30 April 2020.

¹⁶To a weekly survey, operated by the University of Antwerp, questions on trust were added on 7 and 28 April 2020 (3 resp. 6 weeks after the lockdown) by the interdisciplinary consortium of the UAntwerp GOVTRUST Centre of Excellence, coordinated by prof. Koen Verhoest, of which the author forms part. For a discussion, see GOVTRUST Centre of Excellence, 'Vertrouwen in het COVID-19 beleid', <https://www.uantwerpen.be/en/research-groups/govtrust/blog/05-05-2020-onderzoek/>. The survey was not representative – for example, mostly Dutch-speaking persons responded, and there is a self-selection bias – but given the unusually high response (over 224,000 resp. almost 120,000 respondents) it nevertheless gives a rough impression of how measures were received, especially in Flanders (only some 7000 respondents resided in the francophone part of the country).

end of April, this translated into a decrease in trust in the government, which seemed to correlate with inefficiency in government communication.

One reason was the shortage of protective equipment, and mouth masks in particular, for which no strategic stock had been built.¹⁷ At a certain point, the police threatened to strike for this reason, but there was also a shortage for health workers, and dramatic situations emerged in elderly homes. There was a demand for more tests, for which there was also a shortage of equipment. A Task Force Shortages was created for this reason. Especially at the francophone side of the language border, sharp criticism was raised against the (Dutch-speaking) Minister of health, Maggie De Block.¹⁸

Linked to this was the outcry of the healthcare sector¹⁹ when the government – on expert advice – announced, on 15 April 2020 one of the first relaxing measures, that allowed residents of residential care centres to have one visitor. Precisely these institutions, struggling with a shortage of protective and testing material, had hardly been able to control the spread of viruses. The measure was suspended until more tests showed that the virus spread was problematic in only a minority of specific residential care centres.

The initial decision to keep hairdressers opened, under the condition that they would receive only one customer at the time and respect social distance, was not backed by experts and met with protest. For the hairdressers this was an impossible task, yet the rule kept them from enjoying the subsidies and arrangements for temporary employment. An amendment soon followed to also impose the closure of hairdressers,²⁰ and, like other contact professions, they were not allowed to reopen along with most shops in the first exit wave that took effect on 11 May.²¹

Displeasure also rose about the prohibition to go for a walk in more distant places, for example at the seaside or the Ardennes, even for people with a second home.²²

Next, the fact that the police raided homes without a search warrant to stop lockdown parties was much disputed. As a legal basis, the police pointed to the Police Office Act, as amended in 2018, that allows the police to enter a building without search warrant or the occupant's permission, when the danger

¹⁷See for example the open letter of by the staff of the university hospital in Liège, published in the newspaper *Le Soir* of 27 March 2020.

¹⁸See the open letter by mandataries of the CSC, French-speaking Christian union, for public services, published in *Le Vif/L'Express* of 31 March 2020.

¹⁹See for example the press releases on 15 April 2020 by VLOZO (vlozo.be) and zorgnet-icuro (zorgneticuro.be).

²⁰Ministerial Decree of 24 March 2020 holding amendment of the Ministerial Decree of 23 March 2020 holding urgent measures to contain the spread of the coronavirus COVID-19, *Off. Gaz.* 24 March 2020, 2nd ed.

²¹Ministerial Decree of 8 May 2020 holding amendment of the Ministerial Decree of 23 March 2020 holding urgent measures to contain the spread of the coronavirus COVID-19, *Off. Gaz.* 8 May 2020, 2nd ed.

²²See in particular S. De Somer, 'Kiezen tussen pesten en corona', opinion contribution in the newspaper *De Standaard* of 3 April 2020.

reported to them at this location is of an extremely serious and imminent nature that threatens the life or physical integrity of persons and cannot be averted in any other way.²³ This was considered to be a too flexible interpretation. The debate came on top of discussions about the ministerial circular in which the Minister of Home Affairs asked the police officers to enforce the measures in a rigorous and undifferentiated way.²⁴

Measures that prepared a gradual lockdown-exit were criticised for disrupting fair competition. On 21 April, the sector of garden tools retail challenged before the Council of State the ministerial decree that allowed the reopening of garden centres and DIY stores for violating the principle of fair competition. The Council of State rejected the petition, but only with the consideration that this was not an exit measure but a preventive measure – the consideration being that people are more motivated to keep isolation up if they are able to do handy-work at home or in the garden – for which the government enjoys the ‘widest’ discretion.²⁵ Hence, when the actual strategy was implemented, all shops, firms and services were reopened at the same time (subject to preventive measures to ensure social distancing), except for contact professions, and the catering, event and cultural industry.

Finally, the exit strategy triggered debate. It was debated in news and social media whether the reopening of business should get priority over social contact, considering the position of people in vulnerable situations, and children in particular. When a limited form of contact was allowed from May, 10 on (Mother’s Day), the rule that was communicated was unclear. For other measures as well, it was not always clear what was mandatory, and what was recommended.

5. Legal grounds for government action in times of crisis

As the course of the virus spread and its impact on public health was unpredictable, it was necessary that drastic measures could be taken and adjusted speedily. The question was to which extent the government could take action without the involvement of Parliament.

The constitution does not contain a provision that deals with a state of emergency. On the contrary, Art. 187 states that ‘the Constitution cannot be wholly or partially suspended’. The Constitution also requires a statutory basis for the limitation of fundamental rights. There are, however, two legal grounds for the government to take emergency measures: constitutional and statutory grounds for police regulatory powers, based on the

²³Article 4 of the Law of 19 July 2018, amending Art. 27 of the Law of 7 December 1998 on the office of police, *Off. Gaz.* 21 August 2018.

²⁴Ministerial Circular GPI 94 of 30 March 2020 on the guidelines concerning the measures taken to fight the virus COVID-19, *Off. Gaz.* 1 April 2020, 2nd ed.

²⁵Council of State, *Stihl and Fedagrim*, Nr. 247.452, 27 April 2020.

precautionary principle (5.1), and special powers to amend statutes on the basis of an Act of Parliament (5.2). Importantly, while, on these grounds, the government can limit fundamental rights and freedoms, it cannot derogate from them, considering Art. 187 of the Constitution. Any measure that affects these rights must therefore be necessitated by the emergency situation, and proportional.

5.1. Regulatory police powers

It is held that the government, by the nature of its function laid down in Art. 37 of the Constitution, can take measures that are necessary for the purposes of public safety, public health and tranquillity.²⁶ Autonomous police powers are only justified in the case of an emergency. This means that such measures must respond to a real threat of disturbance to public order or health, be limited to what is strictly necessary to maintain or restore order, and be of a temporary nature.²⁷

This doctrine of autonomous police powers is not unanimously accepted.²⁸ The Ministerial Decrees that issued the preventive measures therefore invoked three statutory grounds. Art. 4 of the Civil Protection Act states that the Minister for Home Affairs organises the resources and takes the measures necessary for civil protection for the whole of the country, and coordinates the preparation and application of these measures. Art. 11 on the Police Office Act enables the Minister to exercise the powers of the mayor or the municipal institutions if the public interest requires his or her intervention, including police measures that impose obligations or prohibitions on citizens.²⁹ Finally, Art. 181, 182 and 187 of the Civil Security Act allow the Minister, in the absence of available public services or sufficient resources, to claim the persons and matters (s)he deems necessary, and, in the event of threatening circumstances, to oblige the population, in order to safeguard their protection, to remove themselves from places or areas particularly exposed, threatened or affected, to designate their residence, or to prohibit any movement; disobedience is sanctioned by imprisonment or fines.

These Acts can either be seen as confirmations of the government's general police powers,³⁰ or as safety nets where this doctrine is contested.³¹ Like

²⁶See, amongst others, J-M Favreuse, 'Le pouvoir général de police du Roi' [2011] *Administration Publique* 1–48; M. Leroy, *Les règlements et leurs juges* (Brussels, Bruylant 1987) 70–76; A. Mast, *De verordeningsmacht des Konings in politiezaken en de wet van 5 juni 1934* (Antwerp, De Sikkel 1939) 172 p.

²⁷Favreuse, 'Le pouvoir général de police du Roi', 47; P. Popelier, *Democratisch Wetgeven* (Antwerp, Intersentia 2001) 276–277; F. Reyntjens, 'Een oude koe uit de gracht: de zelfstandige verordenende bevoegdheid van de Koning inzake politie' [1984–1985] *Rechtskundig Weekblad* 1265–1282.

²⁸C. Behrendt and M. Vrancken, *Principes de Droit constitutionnel belge* (la CHarte 2019) 341; J. Velaers, *De Grondwet. Een artikelsgewijze commentaar. Deel II* (Die Keure 2019) 71.

²⁹Included in the Police Office Act by Art. 165 of the Law of 7 December 1998, *Off. Gaz.* 5 January 1999.

³⁰Favreuse, 'Le pouvoir général de police du Roi', 43–47.

³¹Velaers, *De Grondwet* 71.

autonomous powers, they require that government action responds to a real threat, is proportional in view of what is necessary to restore public order, and has a temporary nature. In the parliamentary debate underpinning these Acts, it was emphasised that these powers were to be used only when indispensable to secure public order and health, and with respect of fundamental rights and freedoms.³²

These legal grounds enable the Government (Art. 37 Const) or even the sole Minister (statutes) to take measures to contain the spread of the corona virus. Still, the question remains whether this justifies the drastic limitation of fundamental rights, without parliamentary involvement, for a duration of, taken together, two months or more. Arguably, considering art. 187 of the Constitution, such measures can only be based on police powers for as long as there is an immediate threat that cannot otherwise be dealt with. This is no longer the case when a Special Powers Act has enabled the government to act, within specific limits and under certain conditions, discussed in the next section. In my opinion, statutes or Special Powers Decrees should have replaced the Ministerial Decrees. The same applies in particular to the softening of the measures, by widening the list of 'crucial sectors' or by gradually lifting prohibitions. Such an exit strategy concerns decisions about which sectors or activities can be released first, and whether education, economy or social contact should get priority. They imply policy choices based on a weighing of various interests, which demands more parliamentary and judicial control. They are not necessary to contain the virus spread, but have the purpose of bringing society back to normal life *given* the virus spread.

Nevertheless, these measures as well, although decided by the National Security Council, were issued by a mere Ministerial Decree.³³ This makes the Ministerial Decree vulnerable for legal action, even though the Council of State seems quite forgiving for the government's position in its fight against the virus spread.³⁴

Police powers, in any case, do not enable the executive to take measures to mitigate economic and other consequences that follow from these health measures. These measures have to be taken in execution of Parliamentary acts or, if deviation from statutory provisions is required, by Acts of Parliament or by government decrees based on a Special Powers Act. This is discussed in the next section. In this respect, the Council of State, Legislative Branch, presented it as a choice for the government to use the Special Powers Act, or a specific statutory basis.³⁵ One could, however, argue that

³²Explanatory Memorandum, *Parl.Doc.* House of Representatives 1990–1991, N° 1637/1, 2.

³³Ministerial Decrees of 8 and 15 May 2020, *Off. Gaz.* 8 May 2020, 2nd ed. and 15 May 2020, 3rd ed.

³⁴See Council of State, Stihl and Fedagrim, Nr. 247.452, 27 April 2020, referred to above and further in Section 6. See also the Council of State's stance as to multiple legal grounds in the next paragraph.

³⁵The Council's opinion was published along with the Special Powers Decree N° 7 of 19 April 2020, *Off. Gaz.* 24 April 2020, 1st ed.

Parliament issued the Special Powers Act to submit the entire policy concerning the corona Covid-19 virus to the same formal and substantial conditions.

5.2. Special Powers

5.2.1. Legal ground

According to the constitution, the King executes the law (Art. 108) and has no other powers than those formally attributed to him by the constitution and by specific laws passed by virtue of the constitution itself (Art. 105). Art. 105 of the Constitution was initially inserted to restrict the King's powers by making them depended upon the constitution and Parliament, but was later on used to justify the granting of special powers.³⁶ Some authors consider this a substitute for an explicit constitutional state of emergency,³⁷ although the circumstances that have usually justified the technique of special powers were not as grave.³⁸ In the Belgian system, the King can only act under the responsibility of his Ministers.³⁹ In this paper, I therefore refer to 'the government', even if it is formally the King that acts in his capacity of executive.

Special Power Acts enable the government to take regulatory measures in a wide range of policy domains, within its own guiding policy principles, and with the power to amend or abolish Acts of Parliament. This disrupts the normal relations between parliament and government and the hierarchy of statutory and executive acts. Important concerns are that these measures have a legislative nature, but lack the transparency and the contradictory debate that characterise the parliamentary procedure, and that control by the opposition is reduced.⁴⁰ Nevertheless, frequent use has been made of such Acts,⁴¹ with a peak in the 1980s. Reference was made to economic or social crises or to the requirements for participating in the European Monetary Union, but also to deal with the threat of the 'Mexican' flu H1N1 pandemic.⁴²

To meet these concerns, the Council of State and the Constitutional Court have subjected the granting of special powers to conditions. They must be (1)

³⁶See in more detail K. Rimanque, 'Kritische kanttekeningen bij de recente ontwikkelingen inzake de bijzondere machten' in *Liber Amicorum Robert Senelle: Vraagpunten van publiek recht* (die Keure, 1986) 250–251.

³⁷On the link between both, see T. Moonen, 'Bijzondere machten als oplossing voor een crisis. Of zelf in een midlife crisis?' in E. Vandenbossche (ed), *Uitzonderlijke omstandigheden in het grondwettelijk recht* (die Keure 2019) 182–183.

³⁸M. Leroy, 'Les pouvoirs spéciaux en Belgique' [2014] *Adm. Publ. Trim.* 493.

³⁹Art. 88 Constitution.

⁴⁰See, e.g. A. Alen, 'De 'bijzondere machten': een nieuwe 'besluitenregering' in België?' [1986] *Tijdschrift voor Bestuurwetenschappen en Publiekrecht* 209; Moonen, 'Bijzondere machten als oplossing voor een crisis', 180.

⁴¹See Leroy, 'Les pouvoirs spéciaux en Belgique', 487 for an overview until 2014.

⁴²Alen, 'De bijzondere machten', 201, 207, 209, 214–215; Rimanque, 'Kritische kanttekeningen', 248–249; W. Dewachter, *De mythe van de parlementaire democratie* (Leuven, Acco 2001) 24–25. For the most recent overview: Moonen, 'Bijzondere machten als oplossing voor een crisis', 190–202.

justified by special circumstances, (2) explicit and well-defined as to purposes and subject matters, (3) temporary, and (4) in matters reserved to Parliament, ratified by Parliament within a reasonable time, in the absence of which the executive acts based on special powers are abolished with retroactive effect.⁴³ Statutory provisions have added an obligation to consult the Council of State, Division Legislation, for independent legal advice on draft special powers decrees; to communicate the decrees, the ‘report to the King’ with the explanatory memorandum, and the Council of State’s legal opinion to the President of the House of Representatives and the Senate; and to publish them in the Official Gazette.⁴⁴

Conditions are less stringent when the government is authorized to amend statutes in a more narrowly specified range of policy domains. In that case, the authorisation must be explicit and well-defined, and decrees that affect policy domains reserved to Parliament by the constitution, have to be ratified by Parliament within a reasonable time.⁴⁵

5.2.2. *The federal Special Powers Acts: content*

At the federal level, the Special Powers Acts⁴⁶ were initiated by MPs, but the Council of State was nevertheless asked for legal advice. The Council of State gave the green light, apart from mostly technical comments, most of which were followed up in the final text, but stressed that all decrees issued on the basis of this law would still have to be assessed in the light of higher fundamental rights and freedoms, which require, in particular, that measures are clear, foreseeable and proportional.⁴⁷

The Special Powers Acts give the government the power, in view of reacting to the coronavirus-19 epidemic or pandemic and of dealing with the consequences, to take measures to (1) contain the spread of the coronavirus, (2) secure capacity, (3) give direct and indirect aid to or take protective measures for the affected financial, economic, profit and non-profit sectors, firms and households, to reduce the consequences of the pandemic, (4) protect the continuity of the economy, the country’s financial stability and the operation of the market, (5) make adjustments in labour law and social security law in view of the protection of employees and the population, the proper organisation of business and government, safeguarding the country’s economic interests and the continuity of critical sectors, (6) suspend or extend terms laid

⁴³See for example Const. Court 18/98, 18 February 1998. In more detail: P. Popelier, *Democratisch Wetgeven* (Antwerp, Intersentia 2001) 182–184, J. Velaers, *De Grondwet en de Raad van State, afdeling wetgeving* (Maklu 1999) 359–365.

⁴⁴Art. 3*bis* coordinated acts on the Council of State.

⁴⁵See W. Pas and B. Steen, ‘Met het nodige voorbehoud’ [2004] *TvW* 375–380.

⁴⁶Laws I and II of 27 March 2020 authorizing the King to take measures to combat the spread of the coronavirus COVID-19, *Off. Gaz.* 30 March 2020, 2nd ed. Two Acts were adopted due to the specific bicameral system, which is further of no relevance to this paper.

⁴⁷Council of State, Legislative Division, Opinion N° 67.142/AG of 25 March 2020, p. 8.

down by statutes, (7) adjust the organisation of the judiciary and other jurisdictional bodies, including the Public Prosecution Service, bailiffs, experts, interpreters, notaries and legal officers, adjust rules concerning competences and procedure, including terms, with regard to the judiciary as well as the Council of State, Administrative Division and other administrative courts, and adjust rules and procedures concerning pre-trial detention and the execution of sentences, and (8) to comply with EU decisions adopted in the context of the joint management of the crisis.

These decisions may abolish, complete, amend or replace existing statutes and may include administrative, civil and penal sanctions. They can be retroactive until 1 March 2020. Also, the decisions to contain the spread of the virus can be issued without complying with consultation requirements. However, decisions other than those that fall under category 1, must be sent to the Council of State for its legal opinion within five days.

The Special Powers Act does not point out in which policy domains exactly, apart from labour and social security law and laws on the organisation of the judiciary and administrative courts, the government can act. The authorisation is therefore broad, albeit limited by the purpose of containing the spread of the virus and managing its consequences. 3 substantial requirements were added, which reflect the concerns of left-wing supporters of a right-wing government: (1) The government cannot lower the purchasing power of families and the social protection in force; (2) it cannot change contributions to social security, taxes and duties, in particular tariffs and taxable bases, and (3) acts in category 7 have to respect fundamental principles of independence and impartiality of the courts, the rights of defense, the proper functioning of courts and the continuity of the administration of justice.

Finally, the government's special powers are constrained by 3 procedural requirements: (1) Decrees have to be adopted by the Council of Ministers; (2) the powers can be exercised during a period of three months after the law enters into force; and (3) at least for matters which the Constitution reserves to Parliament, the Decrees have to be ratified by Parliament within a period of one year after their entry into force. In the absence thereof, they are deemed to have never had effect.

The explanatory memorandum also offered transparency on the government's approach and promised that the decisions would be communicated to the President of the House of Representatives and that the government would report periodically to the House of Representatives.⁴⁸ These political promises were not inserted in the provisions of the Act, but, as mentioned above, there is a general legal obligation to inform the President of the House. In practice, the government was closely monitored by the ten parties that approved the Act, through weekly meetings in the person of

⁴⁸Explanatory Memorandum, House of Representatives 2019–2020, No. 55-1104/1, 3.

the party leaders of the nine political parties that supported the confidence vote, and the fraction leader of the N-VA. Also, a parliamentary commission was established with the particular task to follow up the government's actions in the corona COVID-19 crisis.

The first Special Powers Decree was issued ten days after the Special Powers Act was adopted, without consulting the Council of State, to create a separate and temporary system of administrative sanctions for violation of the preventive corona measures.⁴⁹ The other decrees took even more time.⁵⁰ For some, finding a consensus between the different parties took time, and adjustments had to be made following the Council of State's substantial comments.

5.2.3. Discussion

The Special Powers Act that gave large autonomy to a 3-party minority government was supported by a majority in Parliament consisting of ten political parties, one of which – the N-VA – had refused the vote of confidence. As a result, even fractions that approved the Act, were cautious: they had insisted on consulting the Council of State,⁵¹ warned that Parliament would retain its control function⁵² – which is why a standing Parliamentary commission had been established⁵³ – and clarified that Parliament was still functioning and special powers should only be used in the case of extreme urgency,⁵⁴ and with the involvement of the social partners representing employers and employees.⁵⁵ The monitoring of the government by (mainly) political party leaders was heavily criticised as a symbol of partitocracy by fractions that opposed the Act, as well as the N-VA, the only monitoring party to send its fraction leader instead of the party leader.⁵⁶ Opposition parties criticised the technique of 'negative criteria', meaning that the government can act in all policy domains as long as some substantial reservations are respected.⁵⁷ They also maintained that a political debate is vital precisely in these circumstances.⁵⁸

Outside of Parliament, the frank exposure of the Belgian partitocracy was commented upon, but – apart from the social media – the granting of special powers as such was not heavily criticised. An exception – based on the bill, not the final text – was an opinion written by Hendrik Vuye and Veerle Wouters,

⁴⁹Royal Decree N° 1 of 6 April 2020, *Off. Gaz.* 7 April 2020, 2nd ed.

⁵⁰So far, 23 Special Powers Decrees were issued.

⁵¹Plenary Session, Integral Report, House of Representatives 26 March 2020, afternoon session, CRIV 55 PLEN 033, p. 36, 37.

⁵²*Ibid.*, p. 35, 48, 49.

⁵³*Ibid.*, p. 37, 38, 48, 49, 54, 55.

⁵⁴*Ibid.*, p. 36.

⁵⁵*Ibid.*, p. 39.

⁵⁶*Ibid.*, p. 36, 41, 51–52.

⁵⁷*Ibid.*, p. 45.

⁵⁸*Ibid.*, p. 46–47.

the first professor constitutional law at the university of Namur, and both former MPs but expelled from their party N-VA.⁵⁹ They claimed that the Special Powers Act was unnecessary, since the government could act – and had already done so – on the basis of crisis legislation, and that the real reason for delegating legislative powers was the seclusion of decision making. They also criticised that the delegation was much too broad, and that all checks and balances were eliminated: Parliament, the Council of State, and the media.

However, as discussed in Section 5.1., the government's police powers were insufficient to manage the economic and social consequences of preventive measures, and surrounded by fewer safeguards. Also, unlike what happened in the past, the government was not acting behind closed doors, considering the scrutiny of ten political parties, seven of which were not part of the coalition – even if this was a purely political agreement without legal basis. Yet, transparency was indeed lacking as no public reports were made of these meetings. The authors were also listened to, where they proposed to establish a parliamentary commission to follow up on the government's actions.

Two comparisons, one with a previous Act that dealt with another health crisis, the other with subnational Acts to fight the corona crisis, point to the conclusion that the government was under more scrutiny than usual.

Admittedly, the Act, adopted ten years earlier, that gave the (majority) government powers to prepare for and react to another health threat posed by the N1H1 ('Mexican') flu,⁶⁰ was more detailed. It contained five very specific categories, such as regulating the distribution of medicines, and one broad category, allowing the government to act in any policy domain, but only to deal with situations flowing from the N1H1 virus that jeopardised public health and had to be resolved urgently.⁶¹ In that case, however, the health crisis was only emerging, and never got so serious as to pose a threat to the Belgian health care system. Strikingly, Parliament had been much swifter to give authorisation: the delegation act was adopted before the outbreak of an epidemic was officially established, which is why the measures could only take effect after such declaration was issued, 12 days later.⁶² Moreover, the government had already taken some measures, without legal ground, which is why the delegation act could enter in such detail. Presently, the Special Powers Act was only adopted two weeks after the state of crisis was declared.⁶³

⁵⁹H. Vuye and V. Wouters, 'Volmachten? Dit is de installatie van een voorzittersbewind' *Knack.be* 25 March 2020.

⁶⁰Law of 16 October 2009, *Off. Gaz.* 21 October 2009.

⁶¹Which is why the Council of State, Legislative Division, in its Legal Opinion N° 47.062/1/V of 18 August 2009, p. 4, did not object.

⁶²Royal Decree of 28 October 2009, *Off. Gaz.* 3 November 2009, 2nd ed.

⁶³By Ministerial Decree of 13 March 2020, *Off. Gaz.* 13 March 2020, 2nd ed.

Further, in 2009, apart from the Prime Minister's promise to frequently report to Parliament, no special follow-up measures were taken.

At the subnational level, the francophone and Brussels federated entities were the first to adopt Special Powers Acts,⁶⁴ and the Walloon government used it most extensively. The Walloon government was given very broad powers to take 'all useful' measures to prevent and deal with any situation that causes problems in the context of the COVID-19 pandemic and its consequences and that have to be dealt with at pain of serious danger, for a period of three months. The Act also provides that in case of possible adjournment of the Walloon Parliament due to the corona crisis, the Walloon government can take all useful urgent measures within the competences of the Walloon Region. In both cases, the measures can amend or abolish Acts of the Walloon Parliament, and impose administrative, civil and penal sanctions, and the consultations that are normally required can be skipped. The measures have to be notified to the President of the Walloon Parliament before their announcement in the Official Gazette, and have to be ratified by the Walloon Parliament within one year, in the absence of which they retroactively lose any effect. The Council of State was not consulted for a legal opinion of the Act or of any of the (so far) 37 special power decrees that were subsequently enacted. No special follow up measures were adopted until 15 April, when a follow-up commission was established.⁶⁵

The breadth of the subnational special powers was unheard of, especially since so far regions had been reluctant to use this technique.⁶⁶ Moreover, the Parliaments of the regions and communities that granted special powers, had either adjourned or seriously reduced their activities.⁶⁷

Strikingly, no Special Powers Act was adopted by the Flemish Community. Most measures were issued by the Flemish government within the boundaries of Flemish legislation. Specific Flemish laws already had provisions that had stood the Council of State's test and enabled the government to either specify conditions,⁶⁸ provide support when economic activity is affected by a crisis or take initiatives to contain the spread of infections,⁶⁹ or even

⁶⁴Special powers were granted by the respective Parliaments to the executive of the Walloon Region (laws of 17 March 2020, *Off. Gaz.* 18 March 2020, 3th ed.), the French Community (law of 17 March 2020, *Off. Gaz.* 20 March 2020, 1st ed.), the Brussels Region (law of 19 March 2020, *Off. Gaz.* 20 March 2020), the Joint Community Commission (law of 19 March 2020, *Off. Gaz.* 20 March 2020, 2nd ed.); the executive of the French Community Council (law of 23 March 2020, *Off. Gaz.* 3 April 2020, 2nd ed. The German Community followed later: law of 6 April 2020, *Off. Gaz.* 14 April 2020.

⁶⁵Parl. Doc. Walloon Parliament, 2019–2020, Nr. 125/2.

⁶⁶F. Bouhon, A. Jousten, X. Miny and E. Slautsky, 'L'Etat belge face à la pandémie de Covid-19: esquisse d'un régime d'exception' [2020] *Courier Hebdomadaire Crisp* n° 2446, 26.

⁶⁷*Ibid.* 33.

⁶⁸Art. 39 of the Flemish law of 26 April 2019 regarding basic accessibility; Flemish law of 20 April 2012 on the organisation of childcare for babies and toddlers, for just a few examples. Several government decrees mostly concerned amendments of other executive decrees.

⁶⁹Art. 35 of the Flemish law of 16 March 2012 on economic support policy; art. 44 § 2 the Flemish law of 21 November 2003 on preventive health policy.

deviate from these particular Acts in emergency situations or to protect the population against contagious diseases.⁷⁰ The Flemish Parliament did adopt an Act to give the Flemish Government more leeway, modelled on a previous emergency act,⁷¹ to declare the state of civil emergency and enable simplified procedures for constructions and exploitations to produce medicines and medical equipment, or improve the capacity of hospitals and care institutions, and to adjust procedural terms and procedural and administrative requirements imposed by Flemish laws.⁷² Here, the powers granted to the government were limited in time and very specific. Because of this specificity, the Act was not considered a Special Powers Act, and no requirement was inserted to submit those decrees that deviate from statutory provisions for ratification by Parliament.

All things considered, the Flemish practice raises doubt as to whether special powers were really needed. Why did the Walloon Government need special powers to organise contact tracing as an accompanying measure to the exit strategy, if the Flemish Parliament was able to do the same thing by an Act of Parliament?⁷³

Generally, it has been observed that even at the federal level the use of special powers gradually watered down after the 1980s, and more recent acts were more confined.⁷⁴ Especially the reform of the bicameral system, which allowed Parliament to act rapidly, reduced the need to bypass Parliament in order to act more quickly.⁷⁵ For a minority government, of course, this is different, because it cannot rely on a majority to swiftly adopt the proposed measures. But in the end, the special powers regime secures more parliamentary involvement than the usual government action on the basis of more specific delegations.

6. A legitimacy test

The question structuring this paper was how a minority government finds legitimacy to take drastic measures and how this affects the position of Parliament. The argument in this section is that where representative legitimacy is reduced, other forms of legitimacy become more important; and that the political crisis put Parliament in a better position to play its role in this alternative constellation.

⁷⁰Art. 6 § 3 of the Flemish law of 6 February 2004 concerning a guarantee scheme for small, medium and large companies; Art. 28 of the Flemish Law of 16 January 2004 on cemeteries and funeral services. This Act, however, was a MP initiative for which the Council of State was not consulted.

⁷¹Flemish Law of 17 October 2018, *Off. Gaz.* 19 October 2018.

⁷²Flemish law of 20 March 2020, *Off. Gaz.* 24 March 2020. So far, nine decrees were issued on the basis of this act.

⁷³Decree N° 35 of the Walloon Government of 5 May 2020, *Off. Gaz.* 11 May 2020 vs Flemish Law of 8 May 2020, *Off. Gaz.* 8 May 2020, 2nd ed.

⁷⁴Moonen, 'Bijzondere machten als oplossing voor een crisis', 208–209.

⁷⁵*Ibid.*

In doctrine, input, throughput and output legitimacy have been discussed as alternative forms of legitimacy.⁷⁶ Input legitimacy refers to the people's participation in decision-making. Throughput legitimacy is judged in terms of the efficacy, accountability and transparency of the governance process, and the inclusiveness and openness to consultation with the people.⁷⁷ Output legitimacy is linked with policy outcomes: how effective they are, and how they are received by the public. These forms of legitimacy are also part of representative democracy: as the people's representative, Parliament provides input legitimacy; it is assumed to act on the basis of an inclusive and informed debate; and its decisions are considered the best possible outcome for what is defined as the public interest. The maturity of a representative democracy can be measured as the extent to which these aspects are not merely assumed, but also safeguarded and tested. When representative democracy is constrained, input, throughput and output legitimacy have to be attained through alternative ways and with more control, by Parliament and courts.

6.1. Input legitimacy

A ministerial decree clarified that 'legislative powers and their services' were considered 'essential services'.⁷⁸ The House of Representatives' procedural rules were changed on 26 March, to allow MPs to vote electronically, and contribute to the quorum even in their physical absence.⁷⁹ The buildings were closed when there were no meetings and staff worked from home, but parliamentary commissions and the plenary still gathered. MPs participated through zoom sessions, and when present respected social distancing. In plenary, only two members per fraction were allowed. The press could still attend meetings, though only in the press stands. Visitors were not allowed, but transparency was secured through streaming. This was not an ideal situation: remote meetings are not conducive to political debate. But at least, unlike some subnational Parliaments, the federal Parliament kept functioning.

During the lockdown, parliamentary commissions met regularly, and the plenary gathered on a weekly basis. On these occasions, the Rules of Procedures were amended, bills were discussed and Acts of Parliament were adopted, including Acts that dealt with the consequences of the preventive measures.

Ultimately, Parliament was pushed to the background. Yet, input legitimacy was better secured than what was usual for special powers. The

⁷⁶See V.A. Schmitt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput' (2013) 61 *Political Studies* 2–22, adding throughput legitimacy to Scharpf's famous dichotomy of input and output legitimacy.

⁷⁷*Ibid.*, 2.

⁷⁸For the last version so far: *Off. Gaz.* 3 April 2020, 2nd ed.

⁷⁹The amendments were published in *Off. Gaz.* 2 April 2020.

weekly meetings with the party leaders – only 2 of which were MPs – and one fraction leader, was a novum that was assumed to benefit Parliament indirectly: the idea was that the party leaders would inform their fractions. What was shocking, was the blunt admission that Belgian democracy is really a partitocracy, though this was hardly a revelation. It can be criticised that two political parties and one independent MP were excluded from these gatherings, and could therefore not initiate and discuss proposals for government action, as the involved parties claimed to do.⁸⁰ Then again, on other occasions, no opposition party has the chance to do so when special powers are used. Interestingly, in practice, the weekly party meetings gave way to more involvement of Parliament. With the consent of the party leaders, some measures were laid down in bills for speed approval by Parliament. By wrapping them up as an MP's initiative, consultation of the Council of State could be avoided, which suddenly made Parliament the quicker avenue. In the end, the Council was sometimes asked for advice after all.⁸¹

Yet, although the government owed its existence to the need that was felt to fight the crisis with special powers – this is why Parliament approved the motion of confidence – this was not the only means, and certainly not the most visible one, that the government used. The decisions pertaining to the lockdown, social distancing measures and exit strategy, were defined by the National Security Council, i.e. the federal government, in consultation with experts and the subnational Minister-Presidents. Some of the federal measures were laid down in Acts of Parliament, others in special powers decrees or royal decrees, but the most important ones in a mere Ministerial Decree, without the direct involvement of Parliament or party representatives. Compared to the spotlights that were put on the Special Powers Act, in Parliament and in the media, the loss of input legitimacy linked with the use of Ministerial Decrees received surprisingly little attention. Yet, it strengthens the case against the legal admissibility of Ministerial Decrees where Parliament provided for the avenue of special powers, as discussed in section 5.1.

6.2. Throughput legitimacy

In the case of emergency legislation, the decision process is streamlined to enable swift and efficient decision making, which gives less opportunities to transparent and inclusive consultation processes. There was, in any event, little transparency as to the extent to which societal actors and social partners were consulted. Obviously, the measure to relax the visit ban in residential care homes, mentioned in section 4.2. had not been talked through with

⁸⁰Plenary Session, Integral Report, House of Representatives 26 March 2020, afternoon session, CRIV 55 PLEN 33, p. 37, 52.

⁸¹E.g. Law of 30 April 2020, *Off. Gaz.* 4 May 2020, 3th ed. and the opinion of the Council of State of 17 April 2020.

the health care sector. Remarkable was one politician's claim that they had (wrongly) assumed that when the experts proposed the measure, they had talked it through with the health care sector,⁸² thereby blurring responsibilities.

Throughput legitimacy, however, was secured by extra emphasis that was given to accountability and rationality.

Accountability was secured through the parliamentary commission established to follow up on the government's actions. The commission gathered regularly to discuss special power decrees. In other commissions and plenary the government was held to account on several occasions per week. On these occasions, the government was questioned or even heavily criticised on about every aspect of the corona virus measures, but especially reproaches for insufficiently testing and a shortage of protective and medical equipment returned regularly. Gradually, the exit strategy also became an important topic, including economic issues, but also discussions such as the wearing of mouth masks by the public, or privacy concerns related to possible tracking-apps.

The general duty to communicate special powers decrees to the President of the House before their publication has the purpose of facilitating parliamentary control, but the experience is that MPs have rarely reacted upon them.⁸³ This time a more efficient tool was added. Apart from the special commission to follow up on the special decrees, especially the weekly meetings with the ten political parties made sure that the government would abstain from actions that could find no support in Parliament. In particular, the parliamentary debate on the Special Powers Act had made clear that a close watch would be kept on the prohibition to lower purchase powers and social protection. All in all, the government was given little leeway to abuse its powers. While ratification used to be a mere formality,⁸⁴ this time, the government could not simply trust that its acts would get ratified, for the simple fact that it could not rely on a majority in Parliament. Therefore, it had to develop a strategy that kept it in close contact with the political parties that were willing to support special powers.

Courts also play an important role to keep the government accountable, both before and after its acts are issued. The Council of State's substantial comments on the legality and proportionality of the federal Special Powers Decrees shows the necessity of judicial control, especially when drastic measures are issued. By contrast, the Council of State was not consulted for the Walloon Special Powers Act and the government's Special Powers Decrees, despite an overly broad mandate, encroachment on federal

⁸²Minister of health Maggie De Block in a Radio 1 interview on April, 16, 2020.

⁸³Leroy, 498.

⁸⁴Leroy, 500.

competences,⁸⁵ and the broad mandate for local executive bodies to take all urgent decisions instead of the representative local assemblies for a period of 30 days.⁸⁶ In that light, the Minister of Justice's statement that the federal parliamentary track could be preferred over the use of special powers to avoid delays at the Council of State is an unfortunate trade-off. So far only one case was handled before the Court of State, division administration, in which corona crisis measures were challenged.⁸⁷ Although the Council showed unusual restraint in this case, it is a warning that measures that are not strictly related to the prevention of virus spread will be scrutinised against rules and principles such as proportionality, equality and fair competition.

Further, experts were brought in. Most government decisions were based on expert advice, and experts also took care of most of the crisis communication. This was also the case elsewhere, but, arguably, experts were relied on more heavily in Belgium in order to de-politicize decisions and find the support of ten ideologically very disparate political parties. Decreased representative legitimacy, then, was compensated by increased rationality. This was highly appreciated by the public: the survey mentioned above showed that while the (Flemish) public put much trust in the government(s), it trusted – and kept trusting – the experts most of all.

Such reliance on experts is, of course, easier for measures issued to prevent the spread of the virus and maintain the capacity of hospitals and health care. The measure to relax the visit ban in residential care homes, discussed above, shows that scale-back measures cannot rely on expert advice only, but need public or sectoral support. Also, an exit strategy cannot rely on medical, virological and economic expertise alone, which is why the lack of diversity of the exit strategy group was criticised in the media. An exit strategy, as well as supporting social-economic measures, imply fundamental policy options, and an imagining of the society to come. So far, the Belgian welfare state already provided for safety nets, which only had to be fine-tuned. But already in the parliamentary debate on the adoption of the Special Powers Act, MPs anticipated on the debate still to come on the recovery of the economy and the social welfare state.⁸⁸

6.3. Output legitimacy

The corona crisis dominated the people's daily lives and was the almost exclusive topic in the news. The people's behaviour and the news comments, then,

⁸⁵Also critical: Bouhon *et al.*, 'L'Etat belge face à la pandémie de Covid-19', 27 and T. Moonen and J. Riemsdagh, 'Fighting Covid 19 – Legal Powers and Risks: Belgium' *Verfassungsblog* 25 March 2020.

⁸⁶The provision in the other Special Powers Acts that enables an extension of the term in which special powers can be used by simple decision of the Parliament's bureau is even a blatant violation of the constitution, in view of the Council of State's jurisprudence.

⁸⁷Council of State, Stihl and Fedagrim, Nr. 247.452, 27 April 2020, see section 4.2.

⁸⁸Plenary Session, Integral Report, House of Representatives 26 March 2020, afternoon session, CRIV 55 PLEN 033, p. 37, 40.

functioned as barometers for output legitimacy. The fact that the measures were generally well adhered to and that a stagnation in the growth of the crisis was reached little more than three weeks after the first fatality, can be seen as signs of output legitimacy. This is confirmed by the high level of trust that the authorities enjoyed during the corona crisis, a sustained trust as to the reliability of information, and a robust yet decreasing trust as to the effectivity of the measures, and – more diffusely – their appropriateness. The decline in trust shows that output legitimacy has to be continually sustained. The same parameters signalled where throughput legitimacy had to be fine-tuned, for example to adjust decisions that were not backed by expert advice, or gave competitive (dis)advantages.⁸⁹

7. Conclusion

The question that structured this research paper was whether the fact that Belgium was governed by a minority government weakened or strengthened the position of the federal Parliament in emergency legislation.

Basically, the crisis hindered the functioning of Parliament. Preventive measures made it difficult to convene for discussions, but efforts were made to keep going as much as possible. The unpredictability of the course of the crisis and the need to act quickly, weakened the position of Parliament. The National Security Council, at the intergovernmental level, took the most important policy decisions, and measures were mostly taken by the government. These actions required ratification by Parliament if they were taken on the basis of special powers, but most measures were simply issued on the basis of the government's regulatory police powers, or in execution of statutory provisions.

On the other hand, the political crisis probably put the federal Parliament in a better position than it would have been in if the government had relied on a majority in Parliament. The government could not take the Parliament's approval for granted, especially not as soon as the dust would have settled and the government's report would be made. Few weeks into the crisis, there was already talk of the future establishment of a parliamentary committee of inquiry, to examine failures that caused the shortage of mouth masks.⁹⁰

The fact is that, with or without crisis, the Belgian partitocracy gives Parliament little room for action. The corona crisis, however, gave a forum to other actors: (health) experts. It was maintained that the fact that Prime Minister Wilmès did not have a big ego that got in the way, facilitated this

⁸⁹See for example the hairdresser's case and the litigation before the Council of State, discussed in section 4.2.

⁹⁰Proposal, *Parl.Doc.* House of Representatives 2019–2020, n° 55-1130/1.

government-by-experts.⁹¹ Then again, Wilmès only took this position because of the ongoing political crisis, in a resigning government with Ministers, including Prime Minister Michel, dropping out one by one. Also, in the absence of structural majority support, and closely observed by not less than ten political parties represented (mostly) by their party leader – precisely when the government was supposed to act swiftly and efficiently – turning to experts for an alternative legitimacy basis, was simply the best option, at least in the initial stage of the lockdown.

Strikingly, rather than being a stumbling block, the political crisis enabled a more or less efficient first response to the health crisis. This, however, does not guarantee an equally adequate long-term approach. With the first exit steps, political antagonism is re-emerging. Once the health crisis has been overcome, the extent of the economic and social damage will become clear. This recovery will require fundamental choices that cannot simply be suggested by scientists, but are inspired by ideological principles that, in a democracy, need electoral representative legitimacy.

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⁹¹D. Draulans, 'Het kleinste ego overwint', in the weekly *Knack*, Vol. 50, n° 14, 1–7 April 2020, 11.