



Executive summary

The modernisation of emergency law

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Executive summary

The regulatory framework of Dutch emergency law concerns the actions of the government in emergency situations. It provides the basis for various emergency measures that can be used by the government to cope with (impending) crises. A crisis can relate to ‘major’ emergency situations, such as the Covid-19 pandemic, or ‘minor’ emergency situations, such as a football match that threatens to get out of hand. The circumstances in which emergency law can be used are called ‘extraordinary circumstances’. The powers that can be used to deal with extraordinary circumstances are ‘extraordinary powers’. Hence, emergency law is extraordinary law that can only be applied in emergency situations.

Dutch emergency law consists of a multitude of laws and regulations, some of which are in need of revision. On 3 July 2018 the Minister of Justice and Security expressed the Cabinet's intention to modernise Dutch emergency law in a letter to the House of Representatives. To this end, the Cabinet introduced five proposals. By means of a quick scan, this report examines whether these proposals require modifications and/or additions in light of current and future threats, social developments and the 2020 evaluation of the Security Regions Act (*Wet veiligheidsregio's*, hereinafter: *WvR*), bearing in mind the following research question:

To what extent do the proposals to modernise Dutch emergency law announced by the Cabinet in a letter to the House of Representatives in 2018 require adjustment and/or additions in light of current and future threats, societal developments and the 2020 evaluation of the Wet veiligheidsregio's? It concerns the application of emergency law in both the European and Caribbean Netherlands.

This research question is answered as follows.

Chapter 2 introduces and explains the structure and key concepts of Dutch emergency law.

Chapter 3 discusses the Cabinet's proposal to introduce the term ‘crisis circumstances’ (to replace the term ‘extraordinary circumstances’) in the standard provision for the activation of emergency powers outside of the state of emergency. In the literature it has been argued that this proposal fails to recognise that the term ‘extraordinary circumstances’ does not indicate a factual description of the (seriousness of the) situation, but rather an assessment of the situation and the required response in light of the principles of proportionality and subsidiarity. Additionally, the definition of ‘extraordinary circumstances’ and ‘crisis



circumstances' would be materially identical. The interpretation of the term 'extraordinary circumstances' that underlies this criticism is widely supported in literature and is confirmed in recent case law (the so-called *Avondklok* (Curfew)-judgement of the Court of Appeal of The Hague). This may form a reason for the Cabinet to reconsider the introduction of the term 'crisis circumstances'.

Chapter 4 discusses the proposed simplification of the procedure to activate emergency powers outside the state of emergency. This proposal is discussed in light of the debate on the 'parliamentary veto', introduced in a temporary chapter of the Public Health Act (*Wet publieke gezondheid*) in the winter of 2020 in the context of Covid-19 crisis management. On the basis of a parliamentary veto ministerial regulations pursuant to provisions in this temporary chapter can be set aside by the House of Representatives. It is concluded that the critique of the parliamentary veto as formulated in the literature is not applicable to the Cabinet's proposal to simplify the procedure to activate emergency powers. However, since particular importance was attached to timely and regular information provision by the Minister to parliament, the Cabinet could consider introducing stipulations on information provision in the revised procedure to activate emergency powers. More generally, experiences with the decision-making process during the Covid-19 crisis could be considered while further developing a revised procedure to activate emergency powers outside the state of emergency.

Finally, this episode may give reason to reconsider the role of the Advisory division of the Council of State in the procedure as proposed by the Cabinet. In the proposed procedure, the Council of State is no longer involved in the decision-making process regarding the continuation of the use of emergency powers once they have been activated, possibly to render the process less time-consuming. However, during the Covid-19 pandemic the Council of State in several instances provided advice on very short notice. It is therefore questionable that the Council of State, for reasons of urgency, could not play a meaningful role in the amended procedure.

Chapter 5 discusses the Cabinet's intention to leave intact the existing procedures regarding the declaration of a state of emergency and the deployment of emergency powers within a state of emergency. The regime includes a general and a limited state of emergency and is set out in the States of Emergency Act (*Coördinatiewet uitzonderingstoestanden*, hereinafter: Cwu). This regime has been criticised, also in relation to government's Covid-19 crisis management. In the past, several proposals have been made to adjust the regime, as did the 2020 evaluation of the *Wet veiligheidsregio's* which proposed integration or harmonisation of (parts of) the Cwu with the revised *Wvr*. If the Cabinet takes up this proposal, attention should be paid to the scope of the resulting scheme of emergency powers in relation to the Dutch islands Bonaire, Sint Eustatius and Saba (BES), as this scheme would require harmonisation with the Security Act BES (*Veiligheidswet BES*).

Chapter 6 discusses the Cabinet's proposal to modernise emergency powers and to bundle a number of emergency laws. Based on the consulted sources, an overview of laws, regulations and provisions has been compiled that could be included in the investigation of the desirability of modernisation. A number of general points of attention have been identified: the appendix to the letter to the House of Representatives that lists laws qualifying for a review to see if they require amendment in the context of modernisation, is incomplete; not all emergency law provisions came into force; lists A and B belonging to the Cwu have shortcomings and the majority of emergency powers in the Wvr require attention.

Additionally, the Cabinet intends to combine a number of emergency laws into one law in order to strengthen the coherence of the available emergency powers. Although the proposal to bundle emergency legislation is in line with the consulted sources, these sources also suggest the possibility of a more comprehensive bundling and harmonisation of emergency legislation.

Chapter 7 concerns the Cabinet's intention to re-evaluate the role of the *rijksheer* (a representative of the minister authorised to exercise emergency powers on his behalf). The proposals are in line with the consulted sources, albeit with the comment that according to the researchers' interviewees, it is not always desirable to designate only one type of representative per ministry. The introduction of a system of mandates is also largely in line with the consulted sources. It is noted that the criterion it replaces, the requirement of area isolation, may still have some relevance, especially in relation to the Caribbean Netherlands, since the possibility of a breakdown of communication channels during a crisis response on the BES islands may be a point of attention. Finally, it is concluded that the position of the Commissioner of the King (*commissaris van de Koning*), the State representative (*Rijksvertegenwoordiger*), and the governors (*gezaghebbers*) of the BES islands also require attention in this context.

Chapter 8 concerns the question whether the modernisation proposals of the Cabinet, in addition to the topics identified in chapters 3 through 7, require other adjustments and/or additions in the light of current and future threats, social developments and the 2020 evaluation of the Wet veiligheidsregio's. For the purposes of this quick scan the researchers are unable to exhaustively answer this question. By way of initial exploration, they have chosen to focus on developments related to the digitalisation of society, and the increasing societal complexity and interconnectedness it entails. These developments may require a more in-depth consideration of the types of crises that society can expect in the coming years and what the implications of these crises might be for Dutch emergency law. A number of possible implications have been identified as a first step towards such a consideration.

Firstly, the categorisation of vital processes may quickly become outdated and it may be necessary to keep this categorisation up to date in order to assess whether



exceptional circumstances exist that justify the use of state emergency law. Secondly, it may be necessary to fall back on unwritten state emergency law more often in the future. This may call for additional ex post accountability mechanisms and/or possibilities for parliament and the courts to exercise control during the use of unwritten emergency powers. Thirdly, the possible increase of cross-border crises and the possible erosion of the state's capacity to combat crises through a command-and-control approach, deserve attention when modernising state emergency law. These considerations give rise to further research.



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