Executive Overreach

How to correct your government in times of crisis

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Introduction

1.1 Research question

In the spring of 2020, the Covid-19 pandemic forced political leaders all over the world to take strong and immediate action in order to control the coronavirus and its economic and social consequences. In order to take effective health measures, democracies saw no other option then to delegate powers to the executive that are usually divided among the different governmental branches. The executive was considered to be the only branch of government with the right instruments, capacity and information to control the damage.

Not only did the normal division of powers change during the Covid-19 pandemic. Emergency measures of executives also strongly effected fundamental rights such as the freedom of movement. People were subjected to travel restrictions, ordered to stay at home, obey curfews and (socially) distance themselves from their loved ones. But the restrictions also concerned civil and political rights, such as the freedom of expression, freedom of assembly and freedom of religion. News was censored, protests were forbidden and religious services were suspended. As to economic and social rights, schools were closed, businesses shut down and non-COVID related medical operations delayed. Last but not least, people's privacy was limited by massive collection of personal data and cell phone monitoring.[1]

Severe crises such as the Covid-19 pandemic can certainly justify some of these restrictions on fundamental rights. It is commonly accepted that human rights are not absolute. International human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) allow restrictions of fundamental rights when these are prescribed by law, strictly necessary, of limited duration and proportionate to achieved aim, such as the protection of public health. However, the question that this change in the constitutional framework in times of crisis raises, is what citizens of a democracy can do when executives do not meet these criteria.

In this thesis, I will assess in what ways the normal constitutional frameworks of liberal democracies change in times of crisis and will try to find out what ways are open in this context for citizens to correct their political leaders when they overstep their competences or infringe fundamental rights. The research question of this thesis will therefore be: "*How can citizens of liberal democracies correct their governments when executives violate their constitutional obligations in times of crisis?*"

1.2 Hypothesis

My hypothesis is that, given the considerable changes to the normal constitutional framework in times of crisis, the normal ways to correct governments do not work. In non-crisis situations, well-functioning democracies have built-in mechanisms that allows citizens to speak up when they do not agree with their governments policies. Their representatives in parliament can hold

[1] Ginsburg & Versteeg, p. 3.

the executive accountable, citizens can choose other leaders by means of elections, they can go out on the street to protest and speak their minds via newspapers and other media. However, given that the separation of powers and civil and political rights are severely altered during a crisis, I expect that these normal ways to keep governments in check are a lot more difficult. Given that the judiciary is the only governmental branch that is independent and therefore less affected by situations of crisis, courts may be the last resort for citizens to correct their governments.

1.3 Methodology

I will take the assumption that the law does and should constrain the executive as a starting point. This means that I assume that the problems I discuss are expected to arise in a state in which the executive carries out the plans of the periodically elected legislature and remains under the supervision of parliament. This *trias polica* is further complemented by the judiciary, which assures that politicians are committed to the constitution and other formal laws.[2] This starting point is also known as 'liberal legalism', although that school can be explained in multiple ways and usually goes hand in hand with (philosophical and political) liberalism, constitutionalism and deliberative democracy.[3]

This view will be contrasted to a school of thought which does not assume that strong executive power needs to be supplemented with a commitment to the rule of law. Authors of this school argue that there are sufficient informal ways in which executives can be corrected. I take the American legal scholars Eric Posner and Adrian Vermeule as the most articulated authors of this view, which argue that:

> We […] claim that politics and public opinion at least block the most lurid forms of executive abuse, that courts and Congress can do no better, that liberal legalism goes wrong by assuming that a legally unconstrained executive is unconstrained overall, and that in any event there is no pragmatically feasible alternative to executive government under current conditions.[4]

Because they have so clearly articulated this view, I will use their theory of what I call 'the executive model' as an anchor point to answer my research question.

1.4 Outline

In order to answer the research question, chapter 2 will first discuss in what ways constitutional frameworks of liberal democracies change in times of crisis. I will elaborate on authors that have argued that executives should not be restricted by constitutional values, regular law or other branches of government in times of crisis. Next, I will consider to what extent this position has actually been adopted by emergency constitutions, crisis legislation and extra-legal measures of liberal democracies.

In chapter 3, I will find out when there is a need for citizens to correct their governments in times of crisis, looking at ways in which the consolidation of emergency powers leads to executive overreach. I will therefore first set out three cases of executive overreach in the 21th

[2] Walker 2020, p. 23-24.
[3] Posner and Vermeule 2010, p. 3.
[4] Ibid., p. 5.

century: the American response to the attack on the World Trade Centre, the French response to the attack on the Bataclan Theatre and the Dutch response to the Covid-19 outbreak. I will analyse these cases and explain why executive overreach in times of crisis can occur. Moreover, I will discuss whether the threats liberal democracies are facing during a crisis justify such a derogation of constitutional norms.

Chapter 4 will review the solutions proponents of the executive model have suggested, that could prevent or correct executives, when they overreach their competences and infringe constitutional rights. I will first assess whether politics can take on this task, looking at members of parliament and periodic elections as possible controlling mechanisms. After this, I will evaluate whether public opinion can correct executive overreach, looking at the functioning of political rights such as the right to protest and freedom of expression in times of crisis.

In chapter 5, I will discuss the main benefits of judicial review of emergency measures in light of the solutions offered by authors such as Posner and Vermeule. I will assess the argument that courts lack political legitimacy, the objection that courts are not quick enough to prevent executive overreach and the empirical claim that courts tend to defer to the executives in times of crisis. Furthermore, I will explain how citizens can enhance judicial review by bringing more cases to the courts.

Chapter 6 will conclude.

Chapter 2
Executive powers in times of crisis

In this chapter, I will explain how political powers that are usually attributed to the legislator in liberal democracies are delegated to the executive in a state of emergency. Furthermore, I will assess in what other ways the executive is given the power to deviate from the normal constitutional framework in times of crisis. I will first elaborate on the idea that the executive is the designated political institution to delegate all power to in order to combat a crisis. More specifically, I will focus on the work of Eric Posner and Adrian Vermeule, who have argued that in order for the executive to take strong and effective measures, it must not find itself restricted by the rules of what they call "liberal legalism". In the second section, I will consider to what extent the theory of the 'unbound executive' is actually adopted by liberal democracies. I will conclude by arguing that the large amount of discretionary powers that the executive is granted by emergency constitutions, crisis legislation and extra-legal measures changes the constitutional framework of liberal democracies in a considerable way.

2.1 The executive model

The way in which the legislator creates general rules which the executive has to enforce is usually considered to be sufficient in guiding the executive in performing its task. However, this system may fall short in times of crisis. After all, crisis situations by definition take people by surprise and require rapid solutions to unpredictable issues; decisions must be made quickly. A sudden dyke breach asks for very different measures than the spread of a contagious disease and a nationwide cyberattack requires different executive powers than the crash of an airplane in a densely populated area. Therefore, ever since the rule of law was given a prominent place in democratic theory, political theorists have argued that there can be no room for legislative restrictions on governmental power in times of crisis.[5]

According to these theorists, the extensive process that the legislator has to go through before a law is ready to be enforced is unsuitable for a crisis situation.[6] Members of parliament typically go through an extensive deliberation process, during which they decide which legislation to pass. In order to prevent overheated or panicky legislation, most democracies require additional approval from the senate. This system of bicameralism is enforced not only to add a long-term perspective to the 'on the fly'-decision-making that representatives can sometimes be receptive to, but also to slow enforcement down.[7] Modern criticism on this extensive deliberation process in times of crisis has been most prominently expressed by the American legal scholars Eric Posner and Adrian Vermeule. In *The Executive Unbound*, they

[5] For example, John Locke already argued for an unbound executive in times of crisis. Although he was generally a strong proponent of the rule of law, in his *Second Treatise* he argued that in emergencies the government should have the unconstrained power to "*act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it*". The Roman Senate also sometimes appointed a dictator for a limited period of time, in order to restore the constitutional order and maintain citizens' rights. For an historical overview of emergency powers, see Ferejohn & Paquino 2004; Scheppele 2008.
[6] Schmitt 2005 [1922]; Schmitt 2007 [1932]; Gross 2003; Tushnet 2005; Posner & Vermeule 2010.
[7] Posner & Vermeule 2010, p. 41.

explain that: "*The very complexity and diversity that make legislatures the best deliberators […] also raise the opportunity costs of deliberation during crises and disable legislatures from decisively managing rapidly changing conditions*".[8] Posner and Vermeule argue that "*problems or threatened problems require immediate response and large-scale, extremely rapid shifts in government policy*".[9] According to them, the only suitable organ that can handle such rapidly changing conditions of a crisis is the executive.

In their analysis, Posner and Vermeule mainly draw upon the thought of Weimar jurist Carl Schmitt, who was a strong proponent of a powerful executive that is not bound by the legislature in general. In *Political Theology*, Schmitt criticizes the rule of law and proposes an administrative state in which the executive is granted a large amount of discretionary power and the authority to implement *ad hoc* measures.[10] During the economic crisis in the 1930's, he noticed how legislators and courts were unable to anticipate future problems because they were "*oriented to the past*".[11] According to Schmitt, these branches are in essence reactive, responding to problems that have already presented itself. The increasing pace of economic and social change of the 20th century called for a strong political institution that was able to react to new problems.[12] The only political branch that could offer such a present- and future-oriented way of governance was the executive. With respect to the state of emergency, Schmitt took his position even further. Because emergencies are inherently unpredictable, the legislator will not only be unable to specify what will qualify as an emergency, but also to decide prior to a specific emergency how to allocate emergency powers. The executive must have the absolute power to decide on emergency procedures and substantive measures.[13]

In *The Executive Unbound,* Posner and Vermeule endorse Schmitts analysis and argue that the executive in times of crisis has and should have as much discretionary power as possible. The executive is argued to be the only political institution with enough resources, power and flexibility to be able to pull the strings.[14] The executive is in charge of a complex network of different ministries with different sorts of expertise and competences that interact with each other and are able to jointly produce relevant and applicable measures for any given situation. Moreover, it is by far the largest branch of government and therefore possesses an amount of information concerning matters such as national secrecy and foreign policy that the legislator can only dream of. It is not just the cabinet or possibly a president and their employees, but also civil servants that work for administrative agencies such as the Tax and Customs Administration and the Secret Service. Finally, the executives can enforce new policy quickly enough to keep up with the pace of events in a crisis. Basically, all people that exercise power in the name of government, and that do not belong to the legislative of the judicial power - such as the police, the army and the civil servant who certifies new drivers licenses - belong to the executive branch. The executive, in short, "*has the capacity to take action in the real world, outside the law books*" that the legislator is unable to offer.[15]

[8] Ibid., p. 43
[9] Posner & Vermeule 2010, p. 32
[10] Schmitt 2005 [1922].
[11] Posner & Vermeule 2010, p. 4 & 33.
[12] Ibid, p. 32.
[13] Ibid., p. 91.
[14] Ibid., p. 4-5.
[15] Ibid., p. 11.

According to Posner and Vermeule, the legislator "*lack[s] the information about what is happening*" when society faces major threats, does not have enough control over the armed forces such as the police and the military and is unable "*to act quickly and with one voice*".[16] The authors do not see any room for the judiciary in times of crisis either. According to them, as shall be further explained in chapter 5, the judiciary is also too slow and rigid to respond to a crisis. This analysis lead Posner and Vermeule to conclude that legislators and courts only play a reactive and marginal role in dealing with such crises. In a recent article about the executive's role during the COVID-19 pandemic, Posner once more repeated that: "*Political conditions and constraints, including demands for swift action by an aroused public, massive uncertainty, and awareness of their own ignorance leave rational legislators and judges no real choice but to hand in the reins of the executive and hope for the best"*.[17]

2.2 The executive model in modern liberal democracies

In the section above, we have seen how Posner and Vermeule elaborate on the theory of Carl Schmitt by arguing for the necessity of a powerful executive that is equipped with the means and competences to combat the threats that characterize a crisis. When the public safety in a liberal democracy is seriously endangered, the ordinary law-making and law-interpreting process can pose an obstacle to quick and effective action. Although Posner and Vermeule's analysis is mainly based on the United States' reaction to 9/11 and the economic crisis of 2008, in this section we will see how their plea for a strong executive in times of crisis is also adopted by other liberal democracies. Indeed, we shall see that most democracies recognize that crisis situations require a certain adaptiveness that the legislator can simply not offer. Therefore, when a crisis presents itself, most democracies provided the executive with extra tools and competences by means of emergency constitutions, crisis legislation or extra-legal measures.

2.2.1 Emergency constitutions

In a majority of the legal frameworks, the legislator has tried to solve the problem of rigid legislation that is not apt to deal with a crisis by adding a special chapter to the Constitution that deals with emergency situations.[18] In a cross-country study of 2018, these so-called 'emergency constitutions' were analysed by economists Christian Bjørnskov and Stefan Voigt. They observed "*a clear long-run trend to allocate more, rather than less, powers to the executive during times of emergency"* and found that the central position of the separation of powers in liberal democracies had overall decreased during a crisis.[19] They also noticed that reasons to declare a state of emergency have become broader. Events listed in the constitution that may justify a state of emergency include a war and aggression, threats to internal security, national disasters, economic emergencies and threats to the constitutional system.[20]

In some emergency constitutions, the power of the executive is curtailed by leaving the decision to declare an emergency up to the legislator. However, most countries allow the state

[16] Posner & Vermeule 2007, p. 47.
[17] Posner 2020.
[18] Ferejohn & Pasquino 2004, p. 210; Bjørnskov & Voigt have calculated that a total of 90% of the constitutions worldwide include emergency provisions. See Bjørnskov & Voigt 2018, p. 101.
[19] Bjørnskov & Voigt 2018, p. 125.
[20] Ibid., p. 106-107.

of emergency to be declared by the head of state or the cabinet.[21] Some constitutions require another organ to approve of such a declaration. Forty percent of the emergency constitutions require the state of emergency to be approved by parliament and twenty percent require the use of the emergency constitution to be approved by both chambers. Additionally, most constitutions attribute the power to end an emergency to the legislator or put an automatic expiration date to executive emergency powers. The latter is also known as a 'horizon'-clause.[22]

Once the state of emergency is activated, constitutions allow the head of state to rule by decree and suspend certain constitutional rights.[23] Specifications as to which powers the executive may use in order to combat the crisis range from a detailed instruction to a simple prescription that the executive may use "*all powers necessary*".[24] The measures that an executive acting under the state of emergency may take include the prohibition of public manifestations, the limitation on the freedom of speech and the freedom of religion, the ability to censor the press, the deviation of habeas corpus and the authority to search private homes without a warrant.

The extent to which the executive's substantive powers are controlled by the legislator in a state of emergency differs per country. In some countries, the executive is almost given a *carte blanche* in times of crisis. For example, the French Constitution allows the president to both decide when to proclaim an emergency and what measures to take. Although it forbids the National Assembly to dissolve during a state of emergency and it requires the President to consult the Council with regard to the measures, the President is not obligated to adopt any of these recommendations. The French Constitution has therefore been described as the "*broadest grants of emergency powers to the executive in a modern constitution*".[25] Other constitutions have specified the emergency powers of the executive in more detail. For example, the constitution of Germany has specified the competences of the executive in times of crisis to such an extent that it has been called a "*constitution within a constitution*".[26] This is mainly due to its bad experiences with the use of emergency decrees in the Weimar Republic.[27]

2.2.2 Crisis legislation

When constitutions have a special section regulating emergencies, and executives decide to proclaim a state of emergency, the entire constitutional framework shifts. It means that from then on, the constitution *attributes* the powers of the legislature and the executive in a different way than it normally would. Therefore, although constitutions do feature an emergency section,

[21] Ibid., p. 108-109. Respectively 80% of the constitutions attributed the power to proclaim an emergency to the head of state, 10% to the cabinet and 10% to the legislator.
[22] Ibid., p. 109.
[23] Bjørnskov & Voigt have estimated that a total of 69% of the constitutions allowed the executive to suspend basic rights. See Bjørnskov & Voigt 2018, p. 111 and also Ginsburg & Versteeg 2020, p. 14.
[24] Bjørnskov & Voigt 2018, p. 111.
[25] Dyzenhaus 2012, p. 445.
[26] Ibid., p. 449.
[27] Article 48 of the Weimar constitution gave the President the authority to rule by decree "*in order to restore public safety and order*". This provision allowed the government to remove the opposition in Prussia "*with the stroke of a pen*", contributing to the rise of the Third Reich. Remarkably, one of the lawyers that represented the government when this provision was challenged was Carl Schmitt. See Dyzenhaus 2012, p. 448-449.

most countries rarely choose to formally declare a state of emergency.[28] Instead, they adopt ordinary legislation, which *delegates* powers to the executive. This allows the legislature to stay in control, allowing the legislature (instead of the constitution) to decide which powers it hands over to the executive. As already mentioned, different sorts of crises require different sorts of measures. Contrary to emergency constitutions, which specify the substantive conditions of an emergency prior to any particular event, "normal" crisis legislation grants power to the executive when a crisis is expected or when it has already presented itself.

Compared to emergency constitutions, the legislative model could therefore be beneficial for the preservation of checks and balances. As political scientists John Ferejohn & Pasquale Pasquino point out: "*Constitutional emergency powers are thought to be especially dangerous in that they give the executive special and difficult-to-control new powers; to undertake this danger is warranted only in dire circumstances"*.[29] The legislative model allows the legislator to decide when a situation calls for emergency powers and delegate the powers to the executive that are necessary for that specific threat. However, it should be noted that legislators also frequently work with 'enabling acts'. These laws anticipate unknown crises in the way in which an emergency constitution does, enabling the executive to activate this act whenever he deems this necessary, whereby a substantial body of legislative power will be delegated to the executive.[30]

The downside of the legislative model of dealing with a crisis is that it could lead to what legal philosopher David Dyzenhaus has called 'legal black holes'. This type of legislation seemingly constrains the executive, but actually codifies such an amount of discretionary power to the executive that it is practically unbound. Because the crisis that the legislator is trying to regulate is usually already present, it may be too willing to enact emergency legislation, thereby forgetting to include the necessary checks and monitor mechanisms.[31] As Dyzenhaus describes it: "*it is an absence of law prescribed by law under the concept of necessity"*.[32] This phenomenon has also been described by political scientist William Scheuerman as the difference between 'rule of law' and 'rule by law', the latter being a way in which "*vague constitutional language*" essentially leads to worthless restrictions. According to Scheuerman: "*Rule by law simply asserts that political officials can do whatever they want as long as some reasonable basis in the legal order can be found"*.[33]

2.2.3 Extra-legal power

As seen in the above, emergency constitutions and crisis legislation enable the executive with the strong emergency powers that Posner and Vermeule deem necessary, but also add some controlling mechanisms such as horizon clause that automatically ends a state of emergency after a certain period of time and tailor-made legislation that specifically lists the measures executives may take. However, as Bjørnskov and Voigt also emphasize, we must distinguish

[28] Ferejohn & Pasquino 2004, p. 215; Scheppele 2008, p. 174.
[29] Ibid., p. 218.
[30] Democracies that used enabling acts include the United States, Canada, France and Germany. See Scheppele 2008, p. 174-175.
[31] Ferejohn & Pasquino 2004, p. 220.
[32] Dyzenhaus 2012, p. 447.
[33] Scheuerman 2006, p. 262.

between *de jure* restrictions on executive power and *de facto* restrictions.[34] In reality, in the first moments of a crisis, executives often find themselves neither restricted by emergency constitutions nor by crisis legislation. Usually, as the executive handles the first wave of the crisis, it just assumes it will be granted the power or authority to do whatever it takes to combat the threat *ex ante* or employs a creative reading of the law in order to find the competences it needs.[35] It is often only at a later stage of the crisis that the legislature steps in to legally grant the executive the powers it is already using.

As Posner and Vermeule also remark "*sometimes, existing institutions simply claim more power than it was understood that they had. At other times, Congress rouses itself to act, but only for the purpose of confirming a seizure of power or discretion by the executive, or in order to delegate large new powers*".[36] According to them, it is this phenomenon that shows the legislators inherent inability to respond to a crisis at the moment it presents itself. Of course, this mainly has to do with the problem that we started this chapter with: the legislator's inability to predict the executive's needs in times of crisis could make the executive decide to simply take the action it deems necessary. This is also why some authors actually argue for extra-legal emergency powers. For example, referring to the work of Schmitt and Posner and Vermeule, Constitutional Law professor Mark Tushnet suggests that it is better to admit that laws "*provide executive officials with a fig leaf of legal justification for the expansive use of sheer power"* and that we must let go of the ambition to curtail executive power in any way.[37]

Conclusion

We have seen how political theorists such as Schmitt and Posner and Vermeule argue that times of crisis do not allow for extensive legislative procedures. The executive is the only branch of government with enough resources, power and flexibility to keep up with the pace of the events of a crisis. According to them, the executive could therefore be given all the powers necessary to combat a crisis. We have also seen that emergency constitutions of liberal democracies do indeed attribute more powers to the executives in times of crisis. During these state of emergencies, the executive is authorized to rule by decree and limit individual rights to a greater extent than usual. When legislators delegate emergency powers to the executive by normal legislation, executive power will be better adjusted to the crisis at hand. However, the legislator also has the tendency to codify the discretionary powers of the executive in such a way that it is actually legally unbound. Moreover, because crises mostly require quick and decisive action, executives do not always try to find a legal basis for their measures. They simply assume that a legal basis will be found somewhere or hope that a legal basis for their actions will be subsequently provided by the legislator. To conclude, emergency constitutions, crisis legislation and extralegal powers of the executive are at odds with the regular constitutional norms and values. Not only does the executive model deviate from the constitutional framework by bypassing checks and balances and the separation of powers, but it also allows the executive to take strong and decisive action that can greatly limit constitutional rights. In the next chapter, we will see whether the executive is able to handle such a responsibility.

[34] Bjørnskov & Voigt 2018, p. 126.
[35] Posner & Vermeule 2010, p. 44.
[36] Ibid., p. 32.
[37] Tushnet 2005, p. 49. See also Gross 2003 for a plea for extralegal powers.

Chapter 3
Executive overreach

In chapter 2 we have seen how executives in liberal democracies are given an exceptional amount of power in times of crisis. Although an executive may be restricted on paper by emergency constitutions and crisis legislation, in reality it may take the freedom to do whatever it takes to combat the crisis, hoping that its actions will be legitimated by law *ex post*. In this chapter, we shall see that the consolidation of emergency powers indeed often leads to situations in which executives overreach their competences and in which fundamental rights are limited to a further extent than can be justified. In section 3.1, I will clarify how executive overreach can manifest itself, discussing three case studies of crisis management over the past two decades. In section 3.2, I will analyse these cases and offer three characteristics of modern crises that could be a reason for any executive to overreach its powers. In section 3.3, I will analyse whether the threats liberal democracies are faced with during a crisis justify such a derogation of constitutional norms. I will conclude that the starting point of all liberal democracy must be that the question whether a threat to people's security justifies restrictions on fundamental rights must principally be answered by citizens or their representatives. Furthermore, governments must provide good reasons to limit the rights of citizens and must always question whether the measures are proportionate to the impact they have on people's lives.

3.1 Executive overreach

In this section, I will look at three different types of executive overreach by looking at three responses of liberal democracies to different crises in the 21th century. I will look at the Dutch response to the COVID-19 epidemic that erupted in 2020, the French response to the attack on the Bataclan Theatre in Paris in 2015 and the American response to the terrorist attack on the World Trade Centre in 2001. As these cases will illustrate, although executive emergency powers might *de jure* be restricted by laws that give specific instructions or define the purpose and period of the measures, the *de facto* crisis measures show how executives tend to overreach.

3.1.1 A Dutch account of a sound legal basis

First of all, although emergency constitutions and crisis legislation usually specify which measures of the executive must be subjected to scrutiny of the legislator, executives tend to keep a creative reading of what qualifies as a sound legal basis for the emergency measures they take.[38] As the Dutch measures after the outbreak of COVID-19 illustrate, once executives are in 'emergency'-mode, they could be tempted to take matters into their own hands and dissociate themselves from the need of legislative approval as much as possible.

The Dutch government initially responded to the COVID-19 pandemic in March 2020 with rules laid down in decentralised emergency regulations (*noodverordeningen).* Children could not go to school anymore, relatives could not visit their grandparents in nursing homes, cafes and restaurants were shut, churches were only allowed to admit a limited number of people and public gatherings were prohibited. Although the Dutch Constitution basically

[38] See also Dworkin 2002; Ackerman 2006; Posner & Vermeule 2010; Scheppele 2009; Scheppele 2011.

requires all laws that limit fundamental rights to be approved by the legislator, these *noodverordeningen* of the Ministry of Health were merely approved by the minister himself.[39] After criticism of legal scholars and the Council of State, who argued that parliament should be involved in order to decide upon such massive limitations of fundamental rights, the Ministry eventually developed an Act of Parliament to replace those *noodverordeningen*.[40]

However, the draft of this Temporary Corona Act (TCA) gave rise to even more criticism. Commentators called it a ministerial 'blank cheque', basically permitting the minister of Public Health to take all necessary measures to combat the virus. Additionally, the bill included 'draconian' penalties of up to 400 euros (and a criminal record) of anyone who would violate the COVID-19 measures. At this point, parliament woke up. It demanded that the general enabling clause would be removed, that the requirement of proportionality and subsidiarity would be added and that the emergency powers would end within three months, unless parliament gave permission to renew the emergency powers.[41]

Soon after the revised TCA was finally enacted by parliament in December 2020, new discussion about the legal basis of the COVID-19 measures arose. The curfew that the Dutch government proclaimed in January 2021 turned out not be based on the TCA, but on a law that was adopted in response to the Dutch dyke breach (de '*Watersnoodramp'*) of 1952. This law gave another blank cheque to the minister of Public Health, allowing him to adopt emergency measures without approval of parliament in extraordinary circumstances. This time, the District Court of Amsterdam intervened, judging that these were not extraordinary circumstances and that government had enough time to consult the legislator.[42]

The Dutch example illustrates what is also known as 'constitutional pragmatism'. In order to take quick and decisive action, executives tend to choose legal routes that sidestep approval by the legislator. This raises concerns about the executive's commitment to the Constitution, as the Dutch COVID-19 measures limited constitutional rights for over nine months, without the necessary approval of parliament or a formal state of emergency declaration. These concerns shall be further discussed in section 3.3.

3.1.2 A French account of necessity

The problem of finding a proper legal basis for curtailing constitutional rights in times of crisis was circumvented by the French president after the attack on the Bataclan Theatre in Paris in 2015 by immediately proclaiming a state of emergency. This allowed him to suspend a number of fundamental rights without the need of approval of the National Assembly. As already mentioned in chapter 2, the French constitution directly attributes emergency powers to the president. He therefore did not need the approval of the chambers in order to decide how to react to an emergency.

The emergency measures that president Hollande took after the attack in Paris were

[39] Art. 6.2 Dutch Constitution (DC), Ar. 7.1 DC, Art. 8 DC, Art. 9.2 DC.
[40] Kamerstukken II 2020/21 (*Act of Parliament*), 25295, no. 312.
[41] Julicher & Vetzo 2021.
[42] District Court of The Hague (2021, 16 February), ECLI:NL:RBDHA:2021:1100. Surprisingly, the court also judged the COVID-19 situation not to be urgent enough to legitimate a curfew. However, this part of the decision of the District Court was crushed at the Court of Appeal.

based on a law dating from 1955 that was enacted in order to confront the war in Algeria.[43] It permits the executive to suspend a number of fundamental rights in case of a '*calamité publique'*, enabling him to prohibit gatherings and demonstrations, censor the press, introduce curfew and close cinemas, theatres and cafes. Moreover, the police could detain anyone who gave reason to think that he or she would pose a threat to the public order or security or place them under house arrest and search their homes, day or night. Suspicion of a criminal offense was not necessary.[44]

The latter two powers were used extensively by the police during the first weeks after the attack. According to Amnesty International, over 3200 houses were searched and 400 assigned residence orders were imposed.[45] Surprisingly, these executive powers were also used to control unrest about the United Nations climate summit that was held in Paris two weeks after the attack on the Bataclan. Several homes were searched and climate activists were ordered to stay at home or to report at the police station three times a day. Moreover, protests against the summit were prohibited and marches were cancelled.[46] Remarkably, only 29 of these actions actually led to a prosecution, mainly of people that were suspected of exceeding the freedom of expression.[47]

The law of 1955 required the president to ask for permission of the legislator if the president wanted to extend the state of emergency after twelve days. However, three days after the attack, the Senate and the National Assembly decided to change the law and give the president permission to extend the state of emergency for another three months. Remarkably, the Council of Ministers thereafter decided that it would also be necessary that the state of emergency would be applicable to all French territories overseas. After five extensions, the state of emergency eventually ended in November 2017, two years after the attack on the Bataclan Theatre.

These French emergency measures illustrate how executives may feel the need to continuously renew emergency powers, because new dangers are always lurking. With this, the state of emergency loses its exceptional status. Moreover, the ways in which the French president used his emergency powers show how political leaders may have a very broad understanding of the measures that are necessary to combat a crisis. A month after the state of emergency was activated, a collective of citizens all over the country warned about the authoritarian nature of the measures, arguing that under the guise of fighting terrorism, emergency measures actually pose a serious threat to the democratic, individual, social and political freedoms and democracy.[48] Similarly, five United Nations Special Rapporteurs uttered their concerns about the rule of law in France, given the continuous extension of the state of emergency.[49]

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[43] Loi n° 55-385 du 3 avril 1955 relatif à l'état d'urgence.
[44] Loof 2017, p. 158.
[45] Amnesty International 2016.
[46] Le Monde. (2015, November 27). *Perquisition dans un squat du Pré-Saint-Gervais avant la COP21.*
[47] Loof 2017, p. 159-160.
[48] Liberation. (2015, December 3). *Appel des 333 pour la levee de l'état d'urgence*.
[49] United Nations Human Rights Office of the High Commissioner. (2016, February 2019) *UN rights experts urge France to protect fundamental freedoms while countering terrorism.* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16966&LangID=E

3.1.3 An American account of proportionality

The most notorious example of executive overreach in the 21th century are the emergency measures that were taken by the Bush administration after the terrorist attack on the World Trade Centre in 2001. It is the go-to example of political theorists that try to explain what strong executive powers could lead to.[50] Although the American Constitution does not allow for many suspensions of fundamental rights, it does say that the writ of habeas corpus could be suspended "*when in Cases of Rebellion or Invasion the public Safety may require it*".[51] This exception turned out to be a toxic combination with the 'USA Patriot Act' that was adopted by Congress a month after 9/11. The Patriot Act authorized the president to "*use all necessary and appropriate force against those […] he determines planned, authorized, committed, or aided terrorist attacks […] on September 11, 2001"*.[52]

The Act was used by Bush to claim legislative authority and enforce measures that "*would have been unthinkable before*".[53] He authorized the Attorney General to deviate from the normal burden of proof ("*beyond reasonable doubt"*) and detain anyone who could be suspected of terrorism or aiding terrorism. As a result, thousands of aliens were detained without being convicted. Most of the suspects were only charged with minor immigration offenses that were insufficient in itself to justify a prison sentence; some of these people merely overstayed their visa.[54] Moreover, because they were suspected of acts of terrorism, they did not receive any protection of the criminal justice system. People did not receive any information about the reasons why they were imprisoned, were forbidden to speak to their own lawyer and were monitored when they spoke to the ones that were assigned to them. Many of these detainees eventually ended up at the notorious Guantanamo Bay prison, where the detainees where subject to "enhanced interrogation methods".[55]

At the fourteenth anniversary of this prison in 2006, Amnesty International described the prison as a human rights scandal. It argued that Guantánamo had become "*emblematic of the gross human rights abuses perpetrated by the US government in the name of terrorism"*.[56] Of the 779 men that were taken to the prison in those years, only seven were convicted. Five of those men pleaded guilty under a pre-trial agreement, in return for the guarantee that they would be moved to a different prison. The camp is an extreme example of how executives can become so keen on fighting threats, that they forget that limitations on fundamental rights must be proportionate to the risk they are trying to prevent.

3.2 Causes of executive overreach

The examples above illustrate how the attribution or delegation of more discretionary powers to the executive in times of crisis could quickly lead to the derogation of constitutional values.

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[50] See, for example, Beck 2002; Dworkin 2002; Cole 2003; Waldron 2003; Freeman 2003; Scheuerman 2006; Ackerman 2006; Dyzenhaus 2012.
[51] U.S. Const. art. I, §9.
[52] United States (2001). *The USA PATRIOT Act.* Washington, D.C.: U.S. Dept. of Justice.
[53] Dworkin 2002.
[54] Cole 2004, p. 1753.
[55] Alford 2017, p. 3.
[56] Amnesty International UK (2020, May 18). *Guantánamo Bay: 14 years of injustice.* https://www.amnesty.org.uk/guantanamo-bay-human-rights

Executives may dodge the permission of the legislator, lose sight of the purpose of emergency measures, try to hold on to emergency powers for as long as possible and take measures that are disproportionate to the crisis it is trying to prevent. Of course, it has been known for ages that political power can corrupt. Much has been written about ways to prevent abuse of power. As recent examples during the COVID-19 epidemic also show, the obvious danger of the executive model is that political leaders may exploit crisis situations in order to strengthen their personal and institutional position.[57] However, as the examples above illustrate, executive overreach does not always have to happen because of malicious incentives. In this section, I will offer three characteristics of modern crises that could be a reason for any executive to overreach its powers.

3.2.1 The pressure of public expectations

First of all, executives in the 21th century are expected to tackle all possible risks that citizens may encounter and take the lead during an emergency. As sociologist Ulrich Beck explains: "*Pre-modern dangers were attributed to nature, gods and demons. Risk is a modern concept. It presumes decision-making. As soon as we speak in terms of 'risk', we are talking about calculating the incalculable, colonizing the future*".[58] It is assumed that the right political decisions are able to solve everything. Illustratively, within weeks after the financial market collapsed in 2008, the Bush administration was criticized for not taking enough action.[59] No matter how big and impossible the task is, executive will be held accountable if they fail.

As attorney David Feldman emphasizes, the risk-assessment that executives have to undertake in times of crisis is not only a matter of statistics, but also of informed speculation. When dealing with major threats such as terrorism, "*it is often difficult […] to assess both the probability of the risk materializing and the seriousness of the consequences if it materializes*".[60] Due to the great promise of welfare states that governments are capable of protecting its citizens from all sort of dangers, governments are usually not in the position to acknowledge that they often find it difficult to estimate the nature, scale and immediacy of a threat and are therefore also incapable of knowing exactly which measures are necessary.[61]

One could argue that the high expectations of the public and the impossibility of knowing exactly what measures will prevent the risk, can give the executive a perverse stimulus to use all the necessary means in order to reach those expectations for as long as possible. Because the executive is expected to control crises that are not easy to solve, they may think it is better to be safe than sorry, and take measures that in hindsight would be deemed disproportionate. This could perhaps be the reason why the French government searched over 3200 houses of innocent people and why the American government detained almost 800 people without a proper trial. These are measures that show the determination of governments to do whatever it takes to prevent another attack.

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[57] Scheppele 2020.
[58] Beck 2002, p. 40. This is also acknowledged by Posner and Vermeule, that mention that *"events that in earlier centuries would have been seen as the punishment of the gods or as bad luck, and thus merely to be suffered, became a problem for government to solve*". See Posner and Vermeule 2010, p. 31.
[59] Posner & Vermeule 2010, p. 43.
[60] Feldman 2006, p. 378.
[61] Beck 2002, p. 41.

3.2.2 The pressure of time

The onerous position in which the executive finds itself may also motivate it to quickly find or create a legal basis in order to take action. In times of crisis, executives may feel like their most important task is to prevent more damage from happening and take away the fear that something could happen again. Because of the panic that can arise among citizens, executives may not see any possibility to calmly asses what solution is required and whether or not the law provides him with a proper legal basis in order to take the necessary actions. As we have seen in the example of the *noodverordeningen* the Dutch government initially used in order to take anti-COVID-19 measures, governments may be tempted to pretend they are stronger and better equipped than they actually are. They may be aware that the action they take is not in accordance with constitutional norms, but hope that this will be condoned given the crisis at hand. They assume that legal basis on which this can be done is of secondary importance.

The executive may also be tempted to quickly create a new legal basis that provides the executive with all the necessary tools, without following the usual legislative procedures. As Scheuerman also points out: "*In the context of a foreign attack, internal disorder, or severe economic downturn, a climate of fear typically inconsistent with reasonable public deliberation tends to emerge.*"[62] As the Dutch draft of the TCA shows, governments in the heath of a crisis may just not be as concerned with their commitments to the constitutional framework as they are in normal times or do not see a possibility for a thorough discussion in parliament about the great impact some measures may have on people's lives.

3.2.3 The pressure of modern crises

Other than the pressure executives might feel from society to take strong and decisive actions and the related pressure of taking these measures as soon as possible, executives also have to deal with the fact that modern crises are difficult to get a grip on. Modern threats to public safety can occur anywhere, at any moment and do not have a clear ending.[63] It is therefore impossible for the executive to say at one clear moment that the crisis has been resolved and that the constitutional order can go back to normal.

The unpredictable and indistinct character of modern crises is described by sociologist Ulrich Beck as the 'world risk society'. According to him, modern crises such as global warming, mad cow disease, gene technology threats, the financial crisis and 9/11 (and we can now add the COVID-19 pandemic) all have in common that they are not clearly delineated in space and time.[64] Modern risks are usually not confined by national borders, but spread across the world. For example, the attack on the Bataclan was one out of many attacks all over Europe by 'lone wolves' who were inspired by the rise of ISIS in Syria. Furthermore, modern risks are not clearly delineated in time. There used to be clear moments in which, for example, a war would be declared and when a peace agreement was signed. However, there will probably be

[62] Scheuerman 2006, p. 264.
[63] Ferejohn & Pasquino 2004, p. 228. See also Cole 2004 and Dyzenhaus 2006, p. 2.
[64] Beck 2002, p. 41.

no univocal moment in which the world declares that the COVID-19 disease has disappeared everywhere or that ISIS has been defeated forever.[65]

Because modern crises are usually dormant, the attendant executive emergency powers also have no clear ending. There will always be new information of intelligence agencies about the rise of a new terrorist group, new advices of health experts about a new type of virus and new technologies that could fall into the wrong hands. As we have seen with the French response to the attack in Paris, this allows the executive to constantly find new reasons to ask the legislator to extend emergency powers. Related to this, emergency legislation can slowly become entrenched in normal legislation. As political scientist Tiberiu Dragu explains: "*Because [executives] are always worse off when civil liberties are expanded and better off when they are reduced, agencies seek to make the emergency reductions in civil liberties permanent*".[66]

3.3 Putting the executive back on the right track

The above characteristics of a crisis may explain why executives of normally well-functioning democracies may be tempted to overreach their competences and limit fundamental rights to a further extent than is strictly necessary. Although this monocratic position of the executive may be unusual for a liberal democracy which holds dear to the separation of powers and the protection of individual rights, one could still argue that the deviation from these constitutional values is permitted in times in which the survival of society itself is at stake. Or, as the US Supreme Court once said: "*While the Constitution protects against invasions of individual rights, it is not a suicide pact*".[67] In this last section, I will assess this argument. I will conclude that, even in times of crisis, it is still important that people (or their representatives) have agreed with limitations on their rights, that executives still try to prove that the measures that are taken are necessary and proportionate given the impact they may have on people's lives.

3.3.1 Democratic legitimacy

First of all, while it is understandable that executives do not always have time to wait for an Act of Parliament during the first days of a crisis, executives should try to get as much consent from the legislator about emergency measures as they can. Usually, there is more time for this than the hurried executive assumes. As the District Court of Amsterdam decided, the Dutch government still had plenty of time to consult the legislator. Indeed, after this decision of the court, the minister quickly drafted an Act of Parliament, before the Court of Appeal could even reconsider. This new bill was enacted by parliament and the senate that same week.

Political leaders should not think too lightly of the value of democratic approval. When the District Court in The Hague pointed out to the Dutch government that laws that limit fundamental rights have to go through parliament first, the Dutch prime-minister responded in a press conference by saying that, even if the law lacked a proper legal basis, that did not mean that the curfew was not necessary. He therefore asked everyone to adhere to the curfew, even

[65] See also Tushnet 2005, who points out that statements by the Bush and Reagan administration seem to suggest that the war on terror would be one of indefinite duration.
[66] Dragu 2011, p. 64-65. See also Feldman 2006, p. 377-378.
[67] *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, §160.

if the Court of Appeal would uphold the decision of the District Court.[68] However, what the prime minister seemed to forget is that approval of the legislator is not just a formality. The Dutch constitution requires laws that greatly affect individual's rights to go through parliament because the starting point of liberal democracies is that people should have a say in rules that greatly impact their lives.[69] Our representatives should in principle have the opportunity to deliberate about the necessity of limitations on fundamental rights. This cannot be a decision made solely by an executive. When executives have the slightest doubt about whether measures would be approved by parliament, it ought to ask.

3.3.2 Necessity

But even if a decision to suspend individual rights is democratically legitimate, executives as well as representatives must be wary that they not take measures just to comfort the people. Any interference with constitutional rights must be clearly and rationally related to the aim of preventing risks.[70] Although it may be comforting for people to see their governments take strong and decisive action against prisoners in Guantánamo Bay or climate activists in Paris, one must always wonder if such hard measures are really necessary in order to fight the threat. As philosopher David Cole emphasizes: "*The public may well have been reassured by the Justice Department's frequent announcements of how many hundreds of "suspected terrorists" it had apprehended in the weeks after September 11. But […] such reassurance is a fiction paid for by innocents*".[71] A reassurance for a public in panic that the government is willing to do whatever it takes to protect their safety does not suffice as a justification for detention without suspicion or a constant renewal of a state of emergency and the additional executive powers.[72]

A government needs to have solid proof and a strong argument to argue that such measures will be effective.[73] As philosopher Jeremy Waldron emphasizes: "*Fear is only half a reason for modifying civil liberties: the other and indispensable half is a well-informed belief that the modification will actually make a difference to the prospect that we fear*".[74] Although it is often hard to predict which measures will actually work, one at least can make sure that measures are not merely symbolic. Instead of reacting to what has happened or responding to the fear that something like this could happen again, it is important for executives to stay calm and take rational decisions.

3.3.3 Proportionality

Finally, the emergency measures must not go further than required. Governments must always question whether the measures it is taking are proportionate to the aim it serves.[75] When fundamental rights are gravely limited in order to gain a little more security, one could wonder whether it is worth the sacrifice. As Feldman rightfully argues, the right emergency measures

[68] NOS. (2021, February 2021). *Rutte: houdt u ondanks rechterlijke uitspraak aan de avondklok.*
[69] Alford 2017, p. 7.
[70] Feldman 2006, p. 371.
[71] Cole 2004, p. 1758.
[72] Ibid., p. 1985.
[73] Waldron 2003, p. 200.
[74] Ibid., p. 198.
[75] Feldman 2006, p. 371.

do not only have eye for the benefits they could potentially have for the security of citizens, but should also take into account the toll these measures have on people's actual lives. That task, according to Feldman, is not just a matter of statistics:

> [It] intertwines morality, social policy and law, and requires us to ask (among other things) what sort of society we want to live in and how far we are prepared to compromise our ideal to achieve an enhanced degree of security. It requires a qualitative rather than quantitative assessment.[76]

Indeed, executive overreach could eventually lead to a massive alteration of a country's political identity, renouncing important commitments to the separation of powers and the protection of individual rights.

Of course, it is not always possible for executives to know exactly what results certain measures will have. As the Dutch prime minister also said in his first press conference after the COVID-19 outbreak in march: "*In crises like these, you have to make 100 percent of the decisions with only 50 percent of the knowledge*".[77] He argued that it is important that governments do not take too little action, but also that they do not take too much action. Feldman points out: "*Life is always risky. We have to balance the maintenance of life against the quality of life, taking account of the need to maintain the sort of society in which it is worth living and which it is worthwhile to fight to protect*".[78]

Conclusion

As we have seen in this chapter, modern crises may cause political leaders of normally well-functioning democracies to overreach their competences and limit fundamental rights to a great extent than necessary. The need they may feel to take strong and decisive action, could rush them into finding or creating a legal basis that often turns out not to be as valid as they would hope. Because society expects them to do as much as possible to control a crisis, they may also feel the need to take more measures than necessary. And the uncertainty of whether or not disaster will strike again may also make it difficult for executives to decide at some point that the crisis is over and that the constitutional order can go back to normal again. As a result, the executives model may slowly become entrenched in normal legislation. Some may argue that all is fair in times of crisis. But the prevention of risks does not always require the derogation of constitutional values. Whenever there is time for an executive to consult the legislator before (or during) the execution of measures that limit fundamental rights, they should. Whenever there is doubt if measures actually work or are merely symbolic, they should not be executed. And if measures that may be helpful to prevent a crisis take a disproportionate toll on people's lives, they should not be taken. As liberal democracies dispose of important constitutional values in an attempt to control indefinite external threats, they must be wary that they do not become the threat itself. In the next chapters, I will assess what may be done when governments are taking the wrong turn. I will see if parliaments, public opinion or possibly courts could correct the executive when they overreach.

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[76] Ibid., p. 378.
[77] NOS. (2020, March 12). *Rutte: we hebben iedereen nodig, 17 miljoen mensen*. https://nos.nl/video/2326873-rutte-we-hebben-iedereen-nodig-17-miljoen-mensen
[78] Feldman 2006, p. 372.

Chapter 4
Politics and public opinion

In the last chapter, we have seen the ways in which executive may overreach when they are given a large amount of power in times of crisis. Given that the separation of powers and fundamental rights must be respected whenever possible, democratic theorists have therefore uttered that as strong executive in times of crisis should go hand in hand with other political institutions that are constantly alert.[79] That is, liberal democracies may have to build in more *interim* and *ex post* controls in order to prevent and compensate for executive overreach. In the next two chapters, I will assess which monitor- and control mechanisms are equipped to function in an emergency situation.

Proponents of strong executive powers in times of crisis generally argue that executive overreach will be kept within bounds by political constraints.[80] For example, Posner and Vermeule argue that: "*Liberal legalism's essential failing is that it overestimates the need for the separation of powers and even the rule of law. The administrative state itself generates political substitutes for legal constraints on executive power*".[81] In this chapter, I will therefore assess whether members of parliament and public opinion could be a good substitute for legal constraints. In section 1, I will focus on opposition in parliament and (the prospect of) new elections. In section 2, I will assess whether public protests and free speech could pose a good controlling mechanism on executive powers. I will conclude that political constraints and public scrutiny are not strong enough in times of crisis to rely on.

4.1 Politics

4.1.1 Parliaments in times of crises

The most obvious candidate to control the executive in times of crisis is of course the elected legislature. In a parliamentary system, the government is dependent upon the support of the representatives in parliament in order to execute its policy. If the legislator no longer supports the way the executive executes emergency measures, it can adopt a non-confidence vote. In a presidential system, the executive is also dependent upon the trust of the legislator. Although the president usually has its own democratic mandate, parliament is usually in charge of the funds, adopt laws that can guide the executive's actions and can impeach public officials in case of serious malfunction.[82] In short, when executives overreach, the legislature is traditionally the designated political branch to call it to account.

However, as we have seen in chapter 2, proponents of the executive model such as Posner and Vermeule argue that the legislature is unable to handle emergency situations. Due to its lacks of expertise, the legislature cannot supply "*new policies and real-world action*" as

[79] See *i.a.* Ferejohn & Pasquino 2004; Cole 2004; Scheppele 2004; Ackerman 2006; Feldman 2006; Scheuerman 2006; Dyzenhaus 2012.
[80] Gross 2003; Tushnet 2005; Posner & Vermeule 2010.
[81] Posner & Vermeule 2010, p. 15.
[82] See for example article 1 sect. 2.5 of the US Constitution and article 67 and 68 of the French Constitution.

fast as crisis situations require.[83] Subsequently, they also argue that the legislature cannot carry out *ex interim* or *ex post* controls on the executive during a state of emergency:

> [legislatures] often stand aside passively while the executive handles the first wave of the crisis, and then come on to the scene only later, to expand the executive's de jure powers, sometimes matching or even expanding the de facto powers the executive has already assumed.[84]

Indeed, as Posner and Vermeule illustrate with some examples in which American presidents overreached their competences, Congress merely choose to ratify the *fait accompli*. They conclude that the legislature does not (and should not) play a prominent role in times of crisis, because it would only lead to "*hasty*" and "*panicked*" law-making.[85]

The analysis of Posner and Vermeule that the legislature either does nothing or freely gives out new powers to the executive in times of crisis is something that many liberal legalists have also worried about. Although Ferejohn and Pasquino prefer crisis legislation over emergency constitutions because it allows for more democratic control, they still worry that the delegation of emergency powers to the executive will *de facto* go at the expense of valuable checks and monitor mechanisms.[86] They point out that, once a legislature has recognized an emergency and has given the executive a full mandate to deal with it, it is politically difficult to criticize those powers afterwards.[87] Similarly, Feldman utters his contempt about the systematic refusal of the British House of Parliament to properly assess the execution of emergency powers during a crisis. He emphasizes that modern legislators tend to confer much powers to the executive, without providing any checks upon possible abuse.[88]

Scholars have also pointed out that the majority in parliament is usually unwilling to challenge the executive exhaustively because they belong to the same political party or simply lack the motivation to oppose the executive in times of crisis for other political reasons. As Scheuerman notes, especially in times of crisis, the legislature tends to ally with public officials:

> In a parliamentary system, the executive is likely to have been chosen by the legislature and probably exercises de facto political control of his or her party and its elected representatives. In a presidential system with a strict separation of powers, during a violent crisis even members of hostile political parties tend to turn to the executive for political guidance. Thus, the mere fact that executive action requires legislative endorsement may function as no more than a rubber stamp for familiar forms of executive-centered prerogative.[89]

Just as executives do not want to be responsible for the failure to stop an attack from occurring or a disease from spreading, legislatures are also susceptible to that pressure. This is why liberty-reducing policies pass through legislature with little or no opposition when disasters are

[83] Posner & Vermeule 2010, p. 7.
[84] Ibid, p. 8.
[85] See Posner & Vermeule 2010, p. 11-12. They mention how Congress did nothing when Lincoln exceeded his legal powers during the Civil War and when Clinton violated the War Powers Resolution in Kosovo.
[86] Ferejohn & Pasquino 2004, p. 219.
[87] Ibid., p. 236.
[88] Feldman 2006, p. 383.
[89] Scheuerman 2006, p. 272.

still vivid in everyone's memory.[90] Democratic theorists therefore generally do not expect representatives to strongly oppose the policy of executives in times of crisis.

The passivity of the legislator is also seen in the examples of chapter 3. Two months after president Hollande proclaimed the state of emergency in France after the attack on the Bataclan, the national human rights institute of France (*l'institution français de protection et de promotion des droits de l'homme*) opened a hotline where people could report their experiences with the exercise of emergency powers. As a result, the institute published a report in which it strongly criticized emergency powers and warned the government for executive overreach. However, the National Assembly decided to extend the state of emergency that same week.[91] Furthermore, it was the American Congress who authorized the executive to freeze assets, criminalize speech and detain and deport non-American citizens after the attacks of September 11, 2001.[92] And although the Dutch legislator eventually demanded that the *noodverordeningen* would be subject to parliamentary scrutiny, the discussions in parliament usually end up in a reluctant approval of the coalition with new COVID-19 measures. When a people is in fear, coalition as well as opposition parties tend to be mild to executives.[93]

4.1.2 Elections

Although both the proponents of strong executive powers as well as liberal legalists are skeptical about the role the legislator could play in correcting executives in times of crisis, some do have hopes that elections will correct executive overreach. According to Posner and Vermeule, the prospect of upcoming elections "*shapes the horizon*" of executive decision-making because executives want to keep their position in office and worry about their legacy after their rule has ended. Posner and Vermeule argue that "*the president needs both popularity, in order to obtain political support for his policies, and credibility, in order to persuade others that his factual and causal assertions are true and his intentions are benevolent*".[94] This is why they expect political leaders to execute policy according to the interests of a large part of the population and commit their selves to institutional mechanisms such as a constitution in order to increase their popularity and credibility.[95] They expect the prospect of elections to have the same effect as the liberal legalists expect of the rule of law.

However, Posner and Vermeule are perhaps unrealistically optimistic in thinking that executives will not dare to postpone elections in times of crisis.[96] One of the most commonly used emergency powers is the power to suspend elections. Reasons to postpone elections differ from natural hazards such as tsunamis and widespread diseases to man-made hazards such as conflicts and famines.[97] That governments are not afraid to use this power is also endorsed by

[90] Drague 2011, p. 75.
[91] Loof 2017, p. 159.
[92] Cole 2004, p. 1764.
[93] Bruce Ackerman has uttered that these problems with legislative checks on the executives can be solved by what he calls a 'supermajoritarian escalator'. However, as David Cole rightfully argues, this would only be a solution to situations in which emergency powers have formally been declared and last long after the actual emergency has vanished. For this debate, see Ackerman 2008 and Cole 2004.
[94] Posner & Vermeule 2010, p. 13.
[95] Ibid., p. 15-16; 115.
[96] Ibid., p. 12.
[97] See James & Alihodzic 2020 for an analysis on the postponement of elections during emergencies.

recent data on global COVID-19 measures. According to the International Institution for Democracy and Electoral Assistance (IDEA), in Europe alone, 27 different elections have been postponed.[98] Although these postponements can of course be legitimated for a number of reasons, such as public health, it does gravely affect the ways in which elections can correct executive overreach by public deliberation, contestation and participation of citizens.[99]

Moreover, just as the executive and the legislator may be dominated by fear of a crisis, the electorate may be too. This climate of fear may do more harm than good for the democratic process. As Ackerman warns, if anything, "*competitive elections will tempt politicians to exploit the spreading panic to partisan advantage […] depicting civil libertarians as softies who are virtually laying out the welcome mat for our enemies".*[100] It may be easier to win an election by campaigning that others are insufficiently "tough on terrorism", than it is by criticizing a popular government on its disrespect for constitutional values. As Cole points out: "*the reality for both the executive and the legislature is that they will take a bigger political "hit" if another terrorist attack occurs under their watch than if they violate the constitutional rights of innocent persons*".[101] Indeed, the separation of powers and a catalogue of human rights are usually enshrined in a constitutional framework that is hard to amend in order to compensate for such deficiencies of majority rule.[102] Elections are therefore also unlikely to help correcting executives when they overreach.

4.2 Public opinion

Apart from such political constraints, scholars have also uttered that explicit discontent of citizens about the policy of their government will correct executives when they overreach.[103] Contrary to political control, this type of safeguard is not about majority rule, but about public watchdogs and other individual critics that may ring the alarm when the government is not sticking to its constitutional role. In this section, I will therefore assess if public opinion could pose a possible correction mechanism to executive overreach. I will first explain what role proponents of the executive model see for public scrutiny and will subsequently assess the status of political rights that should normally enable the people to articulate their discontent.

4.2.1 Public scrutiny

Posner and Vermeule suggest that public opinion poses an extra safeguard to opposition from MPs. According to them, the public is intelligent and informed enough to constantly check upon executive measures on their own initiative:

> The very economic and political conditions that have created powerful executive government, in the modern administrative state, have also strengthened informal political checks on presidential action. The result is a president who enjoys sweeping de jure

[98] International Institute for Democracy and Electoral Assistance (IDEA) (April 7, 2021) *Global Overview of Covid-19 Impact on Elections*. https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections These include parliamentary elections, regional elections and referenda.
[99] James & Alihodzic 2020, p. 358.
[100] Ackerman 2006, p. 2.
[101] Cole 2004, p. 1765.
[102] Posner & Vermeule 2010, p. 116.
[103] Gross 2003; Tushnet 2005; Posner & Vermeule 2010.

> authority, but who is constrained de facto by the reaction of a highly educated and politically involved elite, and by mass opinion.[104]

Posner and Vermeule argue that the economic and political conditions of modern democracies require a strong executive, but simultaneously help to produce a "*wealthy and highly educated population*" that is capable of controlling this powerful executive.[105] Additionally, control via public opinion seems easier than ever before. Indeed, as Posner and Vermeule argue: "*whistleblowers can easily find an audience on the Internet; people can put together groups that focus on a tiny aspect of the government's behavior; gigabytes of government data are uploaded […] and downloaded by researchers who can subject them to rigorous statistical analysis"*.[106] Posner and Vermeule therefore argue that public opinion controls "*the most lurid forms of executive abuse*" in a better way than the legislatures ever could.[107]

Legal scholar Oren Gross goes even further and argues that public deliberation and strong executive powers go hand in hand in times of crisis. According to Gross, extralegal emergency measures are perfectly legitimate as long as the executive uses them in such a transparent way that the public is able to start an open and informed discussion about it. "*Such deliberation is important both as a deterrent against governmental agents rushing too easily to exercise unlawful powers and as a means of providing opportunity for an open discussion of such matters in light of the recent crisis and in anticipation of possible future ones*", says Gross.[108] He argues that public debate will not only prevent executive overreach, but also forces citizens to empathize with the hard choices the executive is forced to make. *Ex post* validation of emergency powers will assure that the public is more likely to take a moral, political and legal position than it would if the constitution or legislation attributes restricted emergency powers beforehand.[109] Gross thereby puts the protection of constitutional values in the hands of the people, arguing that "*ideas such as liberty, freedom, democracy, and the rule of law must exist in the hearts of the people if they are to survive the whirlwind of crisis and emergency*".[110]

4.2.2 Political rights in times of crisis

The question that these pleas for public opinion as a control mechanism evokes is whether political rights that enable the public to deliberate about governmental policy, such as the freedom of expression and the freedom of assembly, are as stable in times of crisis as they are in normal times. Just like elections can be more easily suspended in times of crisis, we must not forget that emergency constitutions and crisis legislation also allow other (political) rights to be limited to a further extent than normal.[111] This is indeed on of the major reason why strong emergency powers require control mechanisms in the first place.

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[104] Posner & Vermeule 2010, p. 177.
[105] Ibid., p. 14.
[106] Ibid., p. 208-209.
[107] Ibid., p. 5.
[108] Gross 2003, p. 1126.
[109] Ibid., p. 1127.
[110] Ibid., p. 1129.
[111] For example, article 15 of the European Convention of Human Rights (ECHR) allows member states to derogate from the right to freedom of thought, conscience and religion (art. 9 ECHR), the freedom of expression (art. 10 ECHR) and the freedom of assembly (art. 11 ECHR) during a state of emergency.

The prohibitions on public manifestations is one of the emergency powers that is used even more than the suspension of elections. For example, the French constitution allows the executive to forbid any "*cortèges, défilés et rassemblements de personnes sur la voie publique"* (processions, parades and public gatherings) when it is not able to ensure people's security.[112] As we have seen in chapter 3, this led to the prohibition of a dozen of protests after the attack on the Bataclan in Paris. Similarly, according to the Civic Freedom Tracker, 141 countries in the world took measures that affected the freedom of assembly during the COVID-19 pandemic.[113] Now, just as the postponement of elections may be perfectly legitimate in times of crisis, assembly bans may too. Indeed, people in large groups can be an easy target for enemies of the state. However, if scholars expect public opinion to correct executive overreach, it has to be taken into account that the right to protest is often suspended in times of crisis. It means that people cannot get together and publicly express their discontent with governmental policies as much as they would in normal circumstances.

Contrary to the freedom of assembly, most well-functioning democracies do not limit the freedom of speech in the strict sense of the word. Although there are some cases in which democracies have shown their 'true nature' during a crisis and seized the moment to silence public watchdogs, this only occurred in democracies that were already unstable before. For example, both the Hungarian and the Russian government used the corona crisis to introduce a prison sentence of up to five years for anyone who would spread 'falsehoods' about the COVID-19 virus.[114] Luckily, there are not many other cases known in which democracies have created or executed laws that deliberately silence critical journalists or exercises other forms of censorship in times of crisis. In most (if not all) liberal democracies, critical opinions can still be published and alternative facts can still go viral.

However, freedom of expression in the broader sense of the word is challenged during emergencies in a number of ways. A fundamental part of the freedom of expression is the right to receive information and ideas without interference by public authorities.[115] Yet one of the measures that is often used by the executive in times of crisis is the ability to keep certain information about emergency measures classified. Under the guise of national security, emergency constitutions and crisis legislation allow information to stay secret that is usually open to the public.[116] For example, in a man's attempt to prove that he was unlawfully held and tortured in Guantanamo Bay, the US government responded that they could not classify any information about interrogation methods "*without risking undue harm to the national security*".[117] Again, state secrecy in times of crisis may be perfectly legitimate. Crisis management such as the invasion of a terrorist group or the purchase of lifesaving resources cannot be properly executed when information about preparations is made public.[118] However,

[112] Article 8 of the '*Loi n° 55-385 du 3 avril 1955 relatif à l'état d'urgence'*.
[113] International Center for Not-for-Profit-Law (ICNL). *COVID-19 Civic Freedom Tracker*: https://www.icnl.org/covid19tracker/
[114] Alkiviadou & Mchangame 2020; Datuashvili 2020.
[115] See *inter alia* article 10 of the European Convention of Human Rights and article 19 of the International Covenant on Civil and Political Rights.
[116] Ferejohn & Pasquino, p. 210.
[117] NBC News. (April 26, 2021). *High court to hear Guantanamo prisoner's state secret case.*
[118] Thompson 1999, p. 182.

the power to conceal information from the public does make it is very difficult for people to evaluate the performance of their government.[119]

Moreover, it is more likely that the public approval of political leaders will suddenly and substantially grow during a crisis, than it is that people will increasingly scrutinize their leaders. As is well known, citizens tend to "*'rally round the flag*" during a crisis. Indeed, the popularity of president George Bush increased with 39% to 91% two weeks after the attack on the World Trade Centre.[120] Similarly, the popularity of Dutch prime minister increased from 45% to 75% during the outbreak of the COVID-19 pandemic.[121] As Hetherington and Nelson have demonstrated, the significance of political leaders has more to do with people's emotions than with the actual performance of executive in times of crisis.[122] Scholars have argued that this could either be because people are attracted to the executive as a symbol of national unity or because politicians leave journalists with nothing to report because of their unwillingness to criticize the executive.[123]

The popularity of political leaders in times of crisis in turn could lead to self-censorship of the few who do not agree with governmental policy. Mainstream media could decide not to publish controversial opinions because it could give rise to unrest and more panic. For example, the chief editor of the Dutch daily *Volkskrant* argued at the beginning of the COVID-19 pandemic that it is important for both scientists and journalists in times of panic not to make things worse by contradicting each other.[124] Privacy experts have also argued that emergency measures that reduce citizens privacy, such as the warrantless interception of private communication and the retention of private data, has a similar effect on political rights. According to Dragu: "*It can threaten people's willingness to express themselves openly and explore new ideas with others, including "questionable" others*".[125] This makes the constraints of mass opinion and "*highly educated and politically involved elites*" on executive action a lot less vigorous than Posner and Vermeule were hoping for.

Conclusion

In this chapter, we have seen that politics and public opinion are insufficient safeguards to correct governments in times of crisis. First of all, it is expected that there will be enough opposition in parliament to hold executives to account when they overreach. Either representatives are lenient, because they belong to the same political party as the executive, or they are susceptible to the same sort of pressure of society as the executive to do as much about the crisis as possible. Subsequently, replacing uncritical representatives by new representatives by calling of elections will probably not help to correct governments. If elections have not been postponed in times of crisis, campaigns will just encourage politicians to evoke even stronger executive powers. Elections may just be the perfect opportunity for demagogues to point a

[119] Ferejohn & Pasquino 2004, p. 232.
[120] Hetherington & Nelson 2003, p. 37.
[121] NY Times. (April 15, 2020). *Coronavirus Has Lifted Leaders Everywhere. Don't Expect That to Last.*
[122] Hetherington & Helson 2003, p. 37-38. See also Mueller 1973.
[123] See for the first school of thought Mueller 1973 (the 'patriotism' school) and for the second line of argument Brody and Shapiro 1991 (the 'opinion leadership' school).
[124] *NPO Radio 1*. (March 19, 2020). Spraakmakers.
[125] Dragu 2011, p. 72.

finger to those who want to uphold constitutional values in times of crisis. When it comes to the hope that public opinion will correct governments in times of crisis, one must not forget that the suspension of political rights is a main feature of emergency powers. Public protests can more easily be banned and free speech can more easily be limited. Although the freedom of expression in the strict sense remains more or less intact, the right to access of information is unstable in times of crisis. Additionally, in times of crisis it is more obvious that people support political leaders than that they adopt a critical stance. It could lead to a chilling effect of a vibrant discussion about the expedience of governmental policy. Altogether, we cannot solely rely on these deficient political rights in order to correct executive overreach. We must continue our search for ways to correct governments in times of crisis in the next and final chapter.

Chapter 5
Courts and test cases

In the last chapter, we have seen that politics and public opinion do not provide enough assurance to be able to correct executives in times of crisis. In this chapter, I will assess the main benefits of the judiciary in light of the previously discussed deficiencies of politics and public scrutiny. Each section will start with a central argument against judicial review in times of crisis. In section 1, I will address the common objections that the judiciary lacks political legitimacy to intervene in the actions of the executive in times of crisis. Next, I will assess whether it is a problem that courts are not always quick enough to intervene in executive overreach. In section 3, I will elaborate on the empirical claim that courts tend to defer to the executives in times of crisis. In each section, I will explain that although there may be downsides to judicial review as a way to correct governments, each of these characteristics of the judiciary may also be beneficial in times of crisis. In section 4, I will furthermore explain how citizens can enhance judicial review by bringing more cases to the courts. I will conclude that courts could pose a good way to correct governments in times of crisis, provided that citizens optimally use this possibility by means of litigation and test cases.

5.1 Legitimacy of the courts

As has already briefly been discussed in chapter 2, the most common objection to judicial review of emergency measures is that courts lack the political legitimacy to intervene in executive decision-making. Similar to the legislator, the judiciary is not as close to the people as the executive and does not have the "*resources, power and flexibility*" to respond accurately to a crisis.[126] In this section, I will assess this objection. I will argue that the lack of political legitimacy could also be beneficial in times in crisis, because it forces the judiciary to review executive action solely based on the law and makes it less susceptible to public pressure.

5.1.1 Lack of political legitimacy

Carl Schmitt argued that times of crisis allow for the distribution of an exceptional amount of power to the executive, because it is the only institution capable of understanding what people need and how to provide for this. Out of the three political branches, the executive is the closest to the people; their activities are interwoven throughout society.[127] Aside from protecting public order and security, the president should therefore also be given the discretionary power to be the guardian of the constitution. The judiciary, on the other hand, is most far from the democratic will. According to Schmitt, it would be "*an illegitimate usurpation of the constituent power of the people"* to have a constitutional court perform that task.[128]

Posner and Vermeule endorse Schmitt's analysis and apply it to the modern administrative state. They point out that: "*courts reviewing emergency measures may be on strong legal ground, but will tend to lack the political legitimacy needed to invalidate*

[126] Posner & Vermeule 2007, p. 4-5.
[127] Schmitt 2004, p. xxvi; xxxv.
[128] Vinx 2019.

emergency legislation or the executive's emergency regulations".[129] According to them, deciding what qualifies as an emergency and what would be the most appropriate response is strictly a matter of political judgment. Whereas MPs usually develop their own field of expertise, judges are mostly generalists. The judiciary has even less information and expertise than the legislature and is therefore unsuitable to assess whether emergency measures were appropriate.[130]

This point of Posner and Vermeule is not only descriptive, but also normative. They argue that it is not only that the judiciary is unqualified to review the decisions of executives in times of crisis, but also that it should refrain from it. Given the clear supremacy of the executive's capabilities over that of the judiciary, it would not make sense to allow the judiciary to second guess the actions of the executive.[131]

5.1.2 Judicial independence

Posner and Vermeule are right that the judiciary distinguishes itself because its power is solely legitimized on the basis of its legal expertise. Indeed, the legitimacy of the courts rests on an entirely different basis than the legitimacy of the legislature and the executive. Whereas the power of the legislator is based on its representativeness and the power of the executive is based on its accountability, the authority of the courts is based on the fact that courts must publicly substantiate their decisions by means of a rational application of legal norms and objective standards. The only obligation to which they are bound is the obligation to judge according to the law.

Related to this, judges are also different from executives and representatives because they are usually appointed for life. They are therefore not as susceptible to public pressure as the branches that are, directly or indirectly, accountable to the public. Posner and Vermeule argue that the lack of political legitimacy is a disadvantage, because they are not in touch with the outside world as much as the legislator and the executives are. But this also allows courts to stay far from what Scheuerman has described as a climate of fear that is inconsistent with reasonable public deliberation (see chapter 3). The lack of political legitimacy allows the judiciary to review executive action solely based on its lawfulness, without having to appeal to the prevailing opinion at the moment of crisis. As former President of the Israeli Supreme Court explains, the independence of judges is especially important in times of crisis:

> Because of our unaccountability, it strengthens us against the fluctuations of public opinion. The real test of this independence and impartiality comes in situations of war and terrorism. The significance of our unaccountability becomes clear in these situations, when public opinion is more likely to be unanimous. Precisely in these times, we judges must hold fast to fundamental principles and values; we must embrace our supreme responsibility to protect democracy and the constitution.[132]

Of course, as Cole also emphasizes, we must also not be naïve about the extent to which judges are susceptible to the emotions of crisis situations. The judiciary is not an island. But, as he also

[129] Posner & Vermeule 2010, p. 54.
[130] Ibid., p. 29.
[131] Ibid., p. 54.
[132] President Aharon Barak in Feldman 2006, p. 375.

argues, *"courts are surely less susceptible to those pressures than the politically responsive legislature and executive, and thus there may well be no better alternative"*.[133]

5.2 Timing of the courts

Putting aside the normative claim that courts should not be able to intervene in the actions of the executive in the first place, critics of judicial review also argue on a more practical basis that, were it to be desirable for courts to intervene when executives overreach, those interventions would often come too late. Because the judiciary is dependent upon law suits of individual people, it is inherently reactive. In this section, I will further assess the timing of the courts and argue that the fact that judges are dependent upon people who decide to take their case to the courts could also lead to a more contemplative approach to crises.

5.2.1 Judicial timing

Whereas the legislature can decide to call the executive to account about the legality of executive's actions on their own initiative, courts are reliant on the initiative of private parties to bring suits.[134] Courts can therefore only review if emergency measures are in line with the constitution, if citizens file a complaint about it. Critics of judicial review therefore argue that decisions of the court often come too late to truly have an impact on the executive's behavior. Their dependence upon private parties suing the state or opposing their conviction makes them inherently reactive. The moment executive overreach can be addressed by the courts, the damage it might have had to fundamental rights is already done.

When courts eventually do step in, "*as uncertainty fades and emotions cool*", Posner and Vermeule argue that their decisions are mostly ineffective.[135] The plaintiffs may receive compensation for the infringement on their rights, but the invalidity of the executive measure may not get any further attention. When emergency measures are already operative, it is very hard to convince people that these measures should be revoked because of their unlawfulness. According to Posner and Vermeule, officials and the public have then already accepted that this is now the status quo.[136] By the time the prevailing opinion is that these measures have worked well enough, the public presumably does not care that much that the courts have condemned the executive for actions that were not in line with the constitution.

5.2.2 Courts set precedents on a case-by-case basis

Although decisions on the constitutionality of emergency measures may sometimes come too late to prevent executive overreach, this does allow the court to write down lessons for the future. Courts set precedents and can therefore obligate the executive to learn from previous cases of executive overreach. As Cole points out: "*the availability of contemporaneous judicial review to enforce the lessons learned from past emergencies constrains what the executive can do in future ones*".[137] Furthermore, proceedings at court can change the dynamics of the debate on certain emergency measures. The mechanism of *ex post* control give courts the advantage

[133] Cole 2004, p. 1768.
[134] Posner & Vermeule 2010, p. 52.
[135] Ibid., p. 35.
[136] Ibid., p. 52.
[137] Cole 2004, p. 1762.

of hind sight and can therefore review whether emergency measures on a calmer and more deliberative manner. This allows a democracy to learn through trial and error. *Ex post* judicial review can therefore still be of value when it limits the behaviour of executives in the next crisis. Some have even called this a "*slow and organic progression of reason and experience*".[138]

The fact that courts are dependent upon specific cases that are brought forward by citizens who have particularly suffered from emergency measures may also be beneficial for a thorough review on executive actions. It may be the only way in which the necessity, proportionality and fairness of the measures can properly be addressed. As Schmitt explains, the legislature is committed to impersonal, general and pre-established norms (*"if x, then y*").[139] Because the legislature cannot give the executive instructions about specific cases, it may only hold the executive accountable *in abstracto*, for example when it is not acting within the powers conferred upon it by the emergency constitution or crisis legislation. In this position, when one is not confronted with the consequences emergency measures might have for particular individuals, it is a lot easier to be convinced that all necessary measures must be taken in order to combat a threat.

The judiciary, on the other hand, by definition views executive actions in the light of the disproportionate effect it may have in specific cases.[140] Inherent to his job is his power to review the lawfulness of emergency measures *in concreto*. As we have seen in chapter 3, this is where the execution of emergency measures often goes wrong. Innocent people may be detained without a fair trial or lifted from their beds without a proper suspicion. Courts are able to hear anyone who is especially affected by emergency measures. As Cole rightfully points out: "*For a person behind bars, the courts are generally the only hope, because the courts are the only branch of government obligated to consider the legality of his detention*".[141] It may intervene with legal questions when decisions made under emergency measures turn out to be disproportionate or unfair for specific people.[142] It is therefore the first branch of government who will notice when the rights of some are sacrificed in order to make others feel safer.

5.3 Judicial output in practice

Critics have also argued that, when courts do intervene in time, they have the tendency to defer to the executive in times of crisis. As we shall see in this section, this more practical critique on the passivity of courts is also not entirely justified. In a survey on checks and balances during the pandemic, human rights professors Tom Ginsburg en Mila Versteeg found that courts have generally taken an active oversight role during the COVID-19 pandemic. Although the following discussion of some of these cases is not representative for the role of the judiciary in times of crisis, it does show what the judiciary is capable of when executives overreach.

[138] Sir Matthew Hale cited in Scheuerman 2006, p. 266.
[139] Schmitt 2004, p. xxiv.
[140] Cole 2004, p. 1762.
[141] Ibid., p. 1766.
[142] Ferejohn & Pasquino 2004, p. 231; Ginsburg & Versteeg 2020, p. 7.

5.3.1 Deference to the executive

Many scholars have engaged in discussions on the supposed deferral of the judiciary in times of crisis.[143] As Posner and Vermeule argue: *"At the level of constitutional law, the overall record is that courts tend to defer heavily to the executive in times of crisis, only reasserting themselves once the public sense of imminent threat has passed"*.[144] Legal scholars such as Bruce Ackerman usually focus on cases in which the Supreme Court chose the side of the executive in situations of which scholars now agree qualify as major cases of executive overreach. Of this, the case *Korematzu v. US.* is most notorious. In this case, the Supreme Court held that it was constitutional to detain innocent people of Japanese origin during WWII, in order to find out who among them were loyal.[145] According to Ackerman, *Korematzu*: "*serves as a paradigm case representing the "permissive" moment in the cycle of judicial management*".[146] Ackerman furthermore mentions that the Supreme Courts did not intervene when Abraham Lincoln used martial law during and after the Civil War, when antiwar speech was criminalized during World War I and when Joe McCarthy hunted down communists.[147]

5.3.2 Procedural interferences

However, proponents of judicial review subsequently point at the examples in which the Supreme Court did step in. In this context, the case *Hamdi v. Rumsfeld* is often mentioned.[148] In this case, it was decided that the constitutional right to a fair trial entitled everyone accused of being an enemy combatant to be heard. It furthermore argued that: "*a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive […] it most assuredly envisions a role for all three branches when individual liberties are at stake"*.[149] This decision gave rise to a lot more cases in which the suspension of habeas corpus rights of Guantanamo Bay detainees were condemned by the Supreme Court.[150]

A definite verdict on whether or not the Supreme Court and other courts of well-functioning democracies tend to defer to the executive in times of crisis requires extensive case law research. This is not the place for such research. However, as Ginsburg and Versteeg show with an extensive survey of judicial review of over a hundred democracies during the COVID-19 pandemic, courts often do step in when executives overreach. In over half of the democratic countries Ginsburg and Versteeg surveyed, courts have played an important role in limiting executives. These cases illustrate what courts are actually capable of. Especially when it comes

[143] This debate generally focusses on the role the American Supreme Court played in reviewing the suspension of habeas corpus rights (the only right the US constitution allows the executive to suspend in times of crisis).
[144] Posner and Vermeule 2010, p. 53.
[145] Ackerman 2004, p. 1043. *Korematsu v. United States*, 323 U.S. 214 (1944).
[146] See Ackerman 2006, p. 63. Many have made this point before. See *inter alia* Gross 2003 and Rossiter 1948 for an early description of judicial deferral in times of crisis.
[147] Ackerman 2004, p. 1029 et seq.
[148] See *inter alia* Cole 2016, p. 15; Dyzenhaus 2006, p. 48; Fatovic 2009, p. 273.
[149] *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–6 (2004).
[150] See *inter* Boumediene v. Bush, in which it was established that any detainee of Guantánamo Bay had a right to judicial review and Hamdan v. Rumsfeld, in which it was decided that the Geneva Convention applied to every Al Qaeda detainee.

to the procedural integrity of executives, courts have repeatedly interfered.[151]

Courts have mostly stepped in when executives did not meet constitutional requirements, such as the obligation to ask the parliament's permission to limit fundamental rights. One of those examples is the District Court of The Hague, that sent the executive back to the legislator in order to ask permission for the Dutch curfew, because it limited people's freedom of movement.[152] Although the Court of Appeal eventually overturned this decision, it did motivate the Dutch government to draw an Act of Parliament and discuss it in parliament.

Courts have also stepped in when executives took action that were not listed in emergency constitutions or crisis legislation as possible emergency measures. For example, in Israel the prime minister decided to track people's cellphones in order to know whether people who were infected with the coronavirus obeyed the obligation to stay in quarantine. According to Israeli law, this data could only be used for matters of national security, with the approval of the Secret Service Subcommittee of Parliament. In effect, the Supreme Court of Israel suspended the program and decided that such measures were only allowed when the legislator had formally issued a law aimed at suspending the right to privacy for reasons of public health. The court also decided that journalists who had to stay in quarantine could not be tracked by this program. Due to the importance of the freedom of the press, there would be too grave a danger that possible secret sources would be revealed.[153]

5.3.3 Interventions on necessity, proportionality and equality

Other than procedural interventions, Ginsburg and Versteeg also found cases in which the courts engaged in substantive reviews of rights restrictions. These were mainly cases in which it was decided that restrictions on rights were not necessary, proportional or equally applied.[154]

When it comes to necessity, a number of courts have pulled the executive back in line because it did not provide good reasons as to why COVID-19 measures were necessary to fight the virus. In Italy, for example, the city of Messina obligated all visitors to register on their website 48 hours upon visiting. The Council of State subsequently decided that this measure arbitrarily restricted the right to privacy, as the executive was unable to explain why this would contribute to the prevention of COVID-19.[155] In France, a local court pointed out to the mayor of Saint-Ouen-sur-Seine that he was unable to justify how a curfew would help to control the virus. Given that plenty of measures had already been taken in order to prevent gatherings at night, it could not simply be assumed that the curfew would have additional value.[156] Another appealing example in which a court stepped in because governments seemed to take measures merely to put the people at ease was when the High Court of South Africa deemed some COVID-19 measures not rationally connected to their intended goal. For example, the

[151] Ginsburg & Versteeg 2020, p. 1.
[152] District Court of The Hague. (February 16, 2021). ECLI:NL:RBDHA:2021:1100.
[153] Ginsburg & Versteeg, p. 30. See also THE MEDIA LINE (Apr. 27, 2020). *Israeli High Court: Legislation Required to Regulate COVID-19 Mobile Tracking.* https://themedialine.org/headlines/israeli-high-court-legislation-required-to-regulate-covid-19-mobile-tracking/
[154] Ginsburg & Versteeg, p. 5.
[155] Ibid., p. 34. See also *Consiglio di Stato.* April 7, 2020. Nr. 00260/2020.
[156] Ginsburg and Versteeg 2020, p. 34. See also Bloomburg. (April 8, 2020). *Virus Curfew in French Town Blocked in First Rebuke of Lockdowns*. https://www.bloomberg.com/news/articles/2020-04-08/virus-curfew-in-french-town-blocked-in-first-rebuke-of-lockdowns.

government was not clear about why it decided to close the beaches. According to the court: "*it can hardly be argued that it is rational to allow scores of people to run on the promenade but were one to step a foot on the beach, it will lead to infection*".[157]

On the question of proportionality, the federal and regional courts of Germany have taken up "*a flurry of cases*".[158] Most of the complaints concerned cases in which the rights limitations allegedly were disproportionate to the health objective they served. Although definitely not all of these complaints have been honored, the *Bundesgefassungsgericht* corrected the executive in a number of cases. For example, it held that an absolute ban on protests and worship in Mosques was an infringement on the right to assembly and freedom of religion. Arguing that it would be more proportionate to assure that everyone would keep their distance, it deemed these absolute bans on gatherings not in line with the constitution.[159] Given the constant renewal of the state of emergency after the attack on the Bataclan, it is also remarkable that the French *Conseil d'Etat* argued that the burden on fundamental rights become greater the longer limitations continue. After nine weeks of complete lockdown, the highest court of France therefore decided that some of these limitations had to be lifted.[160]

Some courts have even decided upon the unequal distribution of the burden of COVID-19 measures. For example, the High Court of Malawi prevented the executive from proclaiming a lockdown entirely. According to the court, it would be unfair to the poor and vulnerable to force everyone to stay at home. Because the government did not take enough precautionary measures to assure the weak to suffer unequally compared to the rich and healthy, it decided that the proclamation of a total lock down was unconstitutional.[161]

5.4 Provoking the judiciary

As the examples of judicial activism during the COVID-19 pandemic show, courts have the potential to correct governments when i) executives have not used the right legal basis, ii) executives have not sufficiently explained why emergency measures are necessary, iii) measures are proportionate given the toll they take on individual rights and iv) the burden of measures on certain individuals or groups are unfairly distributed. However, courts cannot do this alone. As Posner and Vermeule also acknowledge, the main reason why courts react slowly or not at all, is because they are dependent upon the initiative of private parties to bring suits.[162] As Cole rightfully points out: "*the formal mechanisms of constitutional law – the separation of powers, a Bill of Rights […] and judicial review – are not enough to sustain liberty*".[163] The only way in which it is possible that courts will respond quickly and effectively to executive

[157] Ginsburg & Versteeg 2020, p. 34. See also Mail & Guardian (June 3, 2020). *Judge trashes entire lockdown regime as constitutionally flawed*. https://mg.co.za/coronavirus-essentials/2020-06-03-judge-trashes-entire-lockdown-regime-as-constitutionally-flawed/
[158] Ginsburg & Versteeg 2020, p. 33.
[159] Constitutionnet. (April 30, 2020). *Coronavirus Lockdown-Measures before the German Constitutional Court*. https://constitutionnet.org/news/coronavirus-lockdown-measures-german-constitutional-court
[160] Ginsburg & Versteeg 2020, p. 34-35. See also LE FIGRARO. (May 18, 2020). *Déconfinement: le Conseil d'Etat ordonne de lever l'interdiction de réunion dans les lieux de cultes.*
[161] Ginsburg & Versteeg 2020, p. 32. See also NEWS24. (April 28, 2020). *Malawi Court Indefinitely Bars Virus Lockdown.* https://www.news24.com/Africa/News/malawi-court-indefinitely-bars-virus-lockdown-20200428.
[162] Posner & Vermeule 2010, p. 52.
[163] Cole 2016, p. 29.

overreach, is when citizens bring their cases in front of courts. This last section will therefore briefly discuss what citizens could do to provoke more judicial decisions about the constitutionality of emergency measures.

5.4.1 Suing the state

First of all, the state can be held liable for any wrongful act. This is the case when an action or inaction by the government is contrary to an obligation resting on the state, such as the obligation to take emergency measures in line with the constitution. As Cole argues: "*the defence of liberty depends as much or more on citizens engaging collectively to fight for the values they believe in than it does on the courts and the lawyers who appear before them*".[164] In the end, there has to be a plaintiff willing to sue the state when executives overreach. Given the amount of power an executive is given in times of crisis, it is important that citizens are not afraid to turn to courts quickly and decisively. The decision of the District Court of The Hague was provoked by an activist group, the decisions of the Bundesverfassungsgericht by a collective of fanatic lawyers and the decision of the Malawi High Court was provoked by a human rights group. These are all examples of people who are committed and willing to protect the ideals of constitutional democracy, despite the panic that may exist during an emergency.

5.4.2 Breaking the law

The common way to challenge the executive is to sue the state. There is, however, another way to test the constitutionality of emergency laws. Citizens could also provoke a confrontation between the executive and the judiciary by simply breaking the law. For example, citizens who are convinced that the legal basis of a curfew is unsound, may decide to leave the house after curfew, in order to receive a fine. When suspects subsequently have to answer to the court, they will argue that they cannot be convicted on the basis of the law in question, because that law itself is unconstitutional. If the emergency measures in question indeed turn out to be unconstitutional, the judiciary will then turn to the executive of the legislature in order to command it to change its policy.

Cases in which the constitutionality of the law is questioned by breaking it, are also known as 'test cases'. They have also been described as borderline cases of civil disobedience.[165] Where the addressee of civil disobedience is society, the addressee of test cases is the judiciary. Furthermore, where practitioners of civil disobedience usually aim to convince society that a law that is generally thought to be binding should be changed, instigators of test cases break a law because they argue that the law is null and void to begin with. That is, he or she supposes that the court will agree and therefore technically only breaks the law in a formal sense, as it is understood and described by the executive, but not in the material sense. As María José Falcón y Tella explains: "*For those for whom the unjust law is not law, there would not even be unlawfulness, and there would never have been illegality, because there was no law*".[166]

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[164] Ibid., p. 32.
[165] Falcon Y Tella 2004, p. 316.
[166] Ibid., p. 316. Depending on whether one holds a positivist account of the law or adheres to natural law, one could discuss further whether breaking the law in order to test its constitutionality is actually an illegal act. However, for the purpose of this thesis, what matters is that it is possible to provoke a decision of the judiciary about the constitutionality of emergency measures by breaking the law.

When all other instruments that could help to correct executive overreach in time of crisis are exhausted, breaking the law may sometimes be justified because it is the only way in which the government will listen. When the legislator fails to call the executive to account, elections won't help to put the executive back on the right track and political rights have been suspended due to a state of emergency, the only way to point out the unlawfulness of emergency measures (besides suing the state for wrongful acts) may be to break that measure and explain yourself in front of a court.

Conclusion

Judicial review may be the only way in which citizens can ensure that executive overreach is corrected. Especially in times of crisis, the fact that courts are not as close to society and cannot be called to account by other branches of government, may be beneficial. They may not possess the information and expertise to decide which measures would be most suitable, but their independence and impartiality does allow them to review whether the measures that were taken by the executive are in line with the constitution. It strengthens judges to keep their heads cool, no matter what the prevailing public opinion is. Indeed, judicial review may come too late to intervene when it matters most. Citizens can only file a case when their rights have already been infringed. Yet this may be the only way in which people who are especially harmed by emergency measures get the attention they deserve. Besides the compensation that these individuals get when the judiciary proves them right, it also helps to codify lessons for the future. The debate about whether or not courts do enough to correct executives has not been settled yet. But constitutional courts have shown during the COVID-19 pandemic how they are able to step in when executives use competences that are not prescribed by law. Moreover, some courts have even intervened when executives did not explain the necessity, proportionality or fairness of measures. Although judicial review may not be the solution to all executive overreach, it poses a good remedy to bring the importance of constitutional values back on the table.

Conclusion

This thesis started with the question how citizens of liberal democracies can correct their governments when executives overreach in times of crisis. I found the following. In times of crisis, executives are given a considerable amount of power that normally belongs to the legislator. Once the state of emergency is activated, constitutions allow the executive to rule by decree and suspend fundamental rights to a further extend than normal. Democracies therefore usually adopt normal crisis legislation in order to better control the executive in times of crisis. However, this type of legislation seemingly constrains the executive, but actually codifies such an amount of discretionary power to the executive that it is practically unbound. Moreover, in the first instance of a crisis, executives usually do not attach much importance to legislative restrictions. It just assumes it will eventually grant the power to do whatever it takes to combat the threat or employs a creative reading of the law in order to find the competences it needs.

This massive attribution or delegation of political power can lead to executive overreach. Because political leaders want to show the public that they are capable of taking strong and decisive action, they may rush into action and choose legal routes that are not in line with the constitution. The unpredictability of modern crises may furthermore motivate executives to constantly renew emergency powers, because new dangers are always lurking. The high expectations of the public in combination with the impossibility of knowing exactly what measures will prevent the risk may also motivate the executive to take action of which the effectiveness has not been demonstrated or that take a disproportionate toll on the lives of some in order to put others at ease. This is constitutionally undesirable. Whenever there is time, political leaders should consult parliament so representatives can deliberate about the extent to which security measures may limit people's fundamental rights. Furthermore, governments must always provide good reasons to limit the rights of citizens and may not sacrifice the rights of some solely so that others feel safer. Finally, restrictions must not go further than strictly required. Political leaders must repeatedly assess whether the measures are worth the impact they have on people's lives.

Unfortunately, the hope that opposition by politicians and public opinion will pose a sufficient safeguard to correct governments when they overreach is unwarranted. The dynamic of a crisis is such that parliamentarians may be just as susceptible to public pressure as executives are. Once the legislature has recognized an emergency and has given the executive a full mandate to deal with it, it is politically difficult to criticize those powers afterwards. Moreover, elections are often postponed in times of crisis and politicians often gain more popularity by arguing that others are not taking enough measures, than when they are defending the constitution. Elections will therefore more often amplify the derogation of constitutional values than it will correct executive overreach. Although individual citizens may be more willing to criticize their government than their representatives, their means of uttering their discontent are impaired in times of crisis. Because of possible security risks, a total ban on public manifestations is an often-used emergency measure. For this same reason, information about governmental policy that is usually open for the public can become confidential. Public watchdogs may also be less critical on the malfunctioning of governments because they do not want to disturb the national unity that usually arises in times of crisis.

Courts have the potential to circumvent these deficiencies. Its unaccountability and independence requires the judiciary to legitimate its authority solely by publicly substantiating decisions by means of a rational application of legal norms and objective standards. Their lack of political legitimacy makes them less susceptible to public pressure as the legislature is. Indeed, opponents of judicial review may be right that judicial intervention of executive overreach may come too late. But the fact that courts are dependent upon individuals who file cases also allows democracies to learn from their mistakes on a case by case basis. Courts can codify these lessons based on the undesirable effects emergency measures had for specific individuals. Moreover, evidence suggests that judicial intervention is not always too late. Whether courts have sufficiently intervened when executives overreached in the past is still heavily debated. However, a recent analysis of judicial intervention during the COVID-19 pandemic shows what courts are capable of. The judiciary repeatedly interfered when executives failed to ask the consent of the legislator or took action that was not prescribed by law. Some courts even corrected the executive when it was unclear whether measures were necessary, proportionate or when the burden of these measures was not fairly divided. Courts are therefore the designated institutions to correct governments in times of crisis, but their potential can only be optimized when citizens more often sue their governments when they think their political leaders are overreaching or even break the law when they are determined that emergency measures are unconstitutional.

Although the judiciary may be the most reliable way to correct governments in times of crisis, none of the suggested controlling mechanisms can assure that executives perfectly adhere to their constitutional obligations. Crises such as the COVID-19 pandemic show that security threats are not only a test for public safety, but also for constitutionalism. It is therefore important that citizens keep close track of the constitutionality of emergency measures and take action when executives overreach. The more a democracy practises with ways in which executives can be corrected, the more it is expected that political leaders are pointed at the value of the constitution and hopefully eventually start to correct themselves.

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