(2016) 18 *Flinders Law Journal*

TURNING EMERGENCY POWERS INSIDE OUT: ARE EXTRAORDINARY POWERS CREEPING INTO ORDINARY LEGISLATION?

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When people's life and property, or even the very integrity of the state, is endangered by an extraordinary event such as a natural disaster or military incursion, ordinary processes may have to give way to emergency powers. Most modern democracies provide for such powers by way of emergency legislation. By creating these powers through the ordinary law-making process and allowing elected representatives to decide on their propriety, such emergency law gains democratic legitimacy. However, this legislative approach to emergency powers bears its own dangers: by couching extraordinary powers in ordinary legislation, they have the potential to be normalised. Two recent examples from New Zealand illustrate this concern: legislation passed for the purpose of expediting the recovery process of the earthquake-stricken Canterbury Region, and a statute ousting elected regional councillors over water management concerns. Both Acts contain extraordinary powers, yet neither are they marked as such, nor are they created in response to a traditional emergency.

I INTRODUCTION

The concept of emergency powers within constitutional systems is millennia old. The classic European idea of emergency powers originated in the Roman Republic, where the elected Senate would give up its power to a Dictator in times of emergency — the nature of which was commonly war-like. The Dictator had absolute power for the duration of the emergency, and was expected to return power to the Senate as soon as the emergency ceased. This concept of

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extraordinary and total executive power during emergencies was prevalent among European constitutions until the twentieth century.[1]

However, over the course of that century, and in the context of increasing democratisation and two World Wars, the thought of complete executive authority, even during extraordinary times, became less palatable.[2] Most advanced democracies, even if they provide for extra-legal emergency provisions, have not made use of such since the middle of the twentieth century.[3] Instead, they have progressively codified their emergency regimes as an expression of democratic legitimisation of emergency powers.

The ubiquity of the use of the legislative model of emergency powers underlines its theoretical and practical success; it enables parliamentary control of the executive during times of emergency and allows the tailoring of appropriate extraordinary powers to meet the nature of the pertinent emergency. Overall, the legislative model makes emergency powers more legitimate and proportionate. Yet, codifying emergency powers may have unintended consequences. The very factor which legitimises these emergency powers — their codification into the ordinary legal system — also normalises them. This bears the danger that the use of some emergency powers can cross the line from the extraordinary to the ordinary.

This paper is going to explore the possibility that the use of the legislative model of emergency powers may lead to executive creep, ie to an increasing power shift from the legislature to the executive.

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1 John Ferejohn and Pasquale Pasquino, 'The law of the exception: A typology of emergency powers' (2004) 2 *International Journal of Constititional Law* 210, 223.

2 David Bonner, *Emergency powers in peacetime* (Sweet & Maxwell, 1985) 1.

3 A notable exception is France. Art 16 of the *Constitution of France 1958* enables the activation of a *pouvoir exceptionneles* [state of exception] and art 36 provides for the possibility of an *état de siege* [state of siege]. The French President has made use of these provisions in 1961 to deal with the Moroccan crisis, and more recently to deal with the Paris unrests in 2005 and the terrorist attacks in Paris in 2015.

Part II of the paper will discuss the two emergency regimes most prevalent in modern democracies: the Neo-Roman model, which relies on extra-legal mechanisms or constitutional norms in the form of higher law to deal with emergency situations, and the legislative model, which provides for emergency powers by way of ordinary legislation. The potential disadvantageous effects of the latter model will be discussed in Part III, particularly the concern that when emergency powers are created through ordinary legislation, it can be difficult to distinguish them from ordinary executive powers. This may lead to a normalisation of emergency powers, and, in the worst case, to the possibility to introduce extraordinary powers not as the *ultima ratio* in a desperate crisis, but merely for sake of convenience. Part IV will illustrate this concern by looking at two recent examples from New Zealand. The *Canterbury Earthquake Recovery Act 2011* (NZ) provided the executive with powers exceeding those available during national disasters for the sake of expediting the region's recovery from the devastating earthquakes of 2010-12. The *Environment Canterbury (Temporary Commissioners and Improved Water Management Act) 2010* (NZ) replaced elected councillors with government appointed commissioners because of an alleged inability to process resource consent applications speedily enough. The paper concludes that in both examples the extent of powers conveyed were inappropriate — not just because they were disproportionate to the situation, but also because it is doubtful that these situations could be regarded as emergencies at all. Rather than necessity, it was convenience which compelled Parliament to provide the executive with extraordinary powers.

Both examples used in this paper are concerned with situations surrounding environmental (water management, natural disasters) and economic (resource consents and economic recovery) concerns. Similar points regarding legislated extraordinary powers can be made about legislation concerned with the security of the population, particularly anti-terrorism legislation. However, the scope of this paper is limited to natural and economic emergency legislation.

II EMERGENCY REGIMES

Thomas Hobbes regarded all law as a kind of emergency law, as without law the world would be in a state of disorder.[4] While such classification of law was necessary as a foundation for Hobbes' social contract theory, modern constitutional theory views emergency law as distinct from the ordinary legislative regime. Emergency law, and the executive powers it creates, generally has three main characteristics: 1) it is extraordinary law that only applies during some form of recognised emergency situation; 2) it confers executive powers beyond what is ordinarily available; and 3) it is effective only for the duration of the emergency or until another set time.[5]

As such, emergency provisions generally provide for the temporary derogation of constitutional norms and safeguards. This is often justified by the assertion that ordinary constitutional institutions are unable to cope with the abnormal pressures and requirements of emergency situations.[6] The temporary and limited suspension of the constitutional order is accepted as a necessary step for its very preservation. Indeed, rather than a threat to the constitutional order, this is seen as a commitment to constitutionalism and forms the normative basis for emergency provisions in modern democracies.[7] Emergency powers allow the constitutional system to be insulated and protected from the emergency situation, which may otherwise be unable to cope with the crisis and thus lead to its demise.[8] Therefore, while the purpose of emergency powers on a humanitarian level is to enable swift and effective help to the affected population, on the constitutional level they enable the preservation — and if necessary, the restoration —

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4 Thomas Hobbes, *Leviathan* (Collins, 1962) 144; Austin Sarat, 'Toward New Conceptions of the Relationship of Law and Sovereignty under Conditions of Emergency' in Austin Sarat (ed), *Sovereignty, Emergency, Legality* (Cambridge University Press, 2010) 1-15, 3.

5 Bonner, above n 2, 7.

6 Ibid 7; Ferejohn and Pasquino, above n 1, 210.

7 Victor V Ramraj, 'Emergency powers and constitutional theory' (2011) 41 *Hong Kong Law Journal* 165, 168.

8 Ferejohn and Pasquino, above n 1, 210.

of order, and ultimately, of the state. This means that emergency powers are fundamentally conservative.[9]

The necessity for emergency provisions is accepted among modern democracies to such an extent that a study on emergency powers around the world by the Venice Commission found that most of the participating countries[10] provided for special provisions regarding emergency situations.[11]

In order to ensure the *ultima ratio* nature of emergency powers, their use is generally contingent on the existence of a recognised state of emergency. Emergencies are characterised by the inability of state actors to deal with the pertinent crisis situation within the ordinary legislative framework.[12] In such situations, there is potential for widespread harm or injury to life and property, and organisations and services, which ordinarily do not have to cooperate, must realign and cooperate.[13] They range from armed conflicts to disturbances of the peace and public order, from threats to essential services to natural disasters, from terrorism to dangers to the economy.[14] For example, in New Zealand, a civil defence emergency can be declared only if the situation is caused by a large-scale happening such as an earthquake, storm, leakage of dangerous

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9 Ibid 233.

10 Of the 32 participating countries, 28 were European, two North American, and two Asian.

11 Ergun Özbudun and Mehmet Turhan, *Emergency Powers* (European Commission for Democracy Through Law (Venice Commission), CDL-STD (1995) 012, 1995), 2.

12 New Zealand Law Commission, *Final Report on Emergencies* (NZLC R22, 1991), [2.2]-[2.3].

13 Ibid; Enrico L Quarantelli, *Organizational Behavior in Disasters and Implications for Disaster Planning* (Disaster Research Center, 1985) 5-6; see also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) art 4.

14 *Study of the Right of Everyone to be free from Arbitrary Arrest, Detention and Exile*, UN Doc E/CN4/826 Rev 1, 1965, 184.

substances, epidemics, or warlike acts, that endangers the public or property, and which cannot be dealt with by emergency services.[15]

Although emergency provisions are almost ubiquitous among modern democracies, the regimes that govern the use of emergency powers can traditionally be divided into two main approaches: the Neo-Roman Model, which provides for the suspension of the constitutional order and the creation of an exceptional government during times of emergency, and the Legislative Model, which keeps the constitutional order intact but provides emergency powers through regular legislation.

A *The Neo-Roman Model*

As its name implies, the Neo-Roman model finds its roots in the emergency provisions of the ancient Roman Republic. In times of crisis, the Roman Senate would appoint a dictator for a predetermined period of time. The dictator had practically unlimited powers to ensure that the emergency was dealt with and the constitutional order restored. Once that was the case, the dictator would return power to the Senate.[16] This concept of exceptional government during emergencies experienced a renaissance in European constitutions in the nineteenth and twentieth century, albeit in a somewhat modified form.[17] Ferejohn and Pasquino state that the main features of the Neo-Roman emergency model are threefold: first, the primary purpose of emergency powers is to restore the constitutional order as quickly as possible; second, the agency determining the existence of an emergency is separate from the agency exercising the emergency powers; and third, the regulation and oversight of emergency powers happens *ex ante* and

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[15] *Civil Defence Emergency Management Act 2002* (NZ); see also *Emergencies Act 1985* (CA) s 3; *State Emergency and Rescue Management Act 1989* (NSW) s 4; *Disaster Management Act 2003* (QLD) s 14 which uses the term "disaster" instead of "emergency".

[16] Ramraj, above n 7, 170.

[17] Examples are the French Constitution (see above n 3) and art 48 of the Constitution of the Weimar Republic.

ex post the emergency, but not during the emergency.[18] In essence, the Neo-Roman model creates a super-constitutional emergency government. It is intentionally separated from the ordinary constitutional order so that it can effectively deal with the emergency while insulating and protecting the constitution. And it is regulated in advance and reviewed in retrospect, but it is free to act however it deems necessary during the time of crisis.

However, this model has some very severe — and obvious — disadvantages. By its very nature, the suspension of the constitution, even if only to a limited extent, empowers the bearer of emergency powers to act outside the rule of law. And because these actions are not reviewable, at least not during the time of crisis, the Neo-Roman model exposes itself to abuse. Nowhere is this example more poignant than in art 48 of the *Weimar Constitution*.[19] The writers of the *Weimar Constitution* provided for a very strong *Reichspräsident* [President], mostly in order to counter fears of a powerful parliament controlled by a left majority.[20] Among other powers, the President had the power to take emergency measures if public safety and order were seriously disturbed.[21] Successive Presidents made increasing use of these provisions, which led to a steady shift of decision-making power from parliament to the President between 1918 and 1933.[22]

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[18] Ibid 235. Remnants of similar super-constitutional emergency powers can also be found in the constitutional systems of the United Kingdom, and through adoption in Australia and New Zealand, in the form of the Royal Prerogative, the doctrine of State Necessity, and Martial Law. It is unclear to which extent these concepts still apply to emergency situations, particularly the latter: see New Zealand Law Commission, above n 12, [4.37]-[4.48].

[19] *Verfassung des Deutschen Reichs 1919* (Germany).

[20] Uwe Wesel, *Geschichte des Rechts* (CH Beck, 1997) 427.

[21] *Verfassung des Deutschen Reichs 1919* (Germany) art 48.

[22] Wesel, above n 20, 428. The powers were used to suspend basic freedoms, to oust democratically elected *Länder* [State] governments, and to pass decrees which circumvented parliamentary legislation. These extreme powers did not go unnoticed at the time; the opposition referred to the office of the President as a *Kaiserersatz* [Kaiser-substitute].

While this is an extreme example, the inherent dangers of the Neo-Roman model are obvious. They are exacerbated by the fact that in contrast to the emergency model of the Roman Republic, the Neo-Roman models of the nineteenth and early twentieth century do not separate the personnel of ordinary and exceptional government:[23] in modern emergency regimes, the executive determines and declares the existence of an emergency, and it wields the resulting emergency powers.

There are some proponents of a revised Neo-Roman model. They posit that the advantages of the model, the insulation and protection of the constitutional order and the separation of ordinary and exceptional government, are worth preserving. As long as the emergency powers of the exceptional government are strictly regulated and a robust oversight mechanism exists, the Neo-Roman model may be preferable to other emergency regimes.[24] Nonetheless, the use of the Neo-Roman approach to emergency regimes in modern democracies has fallen out of use since the latter half of the twentieth century.[25] Even in countries which provide for the supra-constitutional emergency provisions, the focus has shifted to a different model of emergency powers: the legislative model.

B *The Legislative Model*

In contrast to the Neo-Roman model, in the legislative model emergency powers remain within the ordinary constitutional system. They do not originate from higher constitutional law and are not sui generis powers. Rather, they are created by way of parliamentary procedures, through ordinary legislative acts. In a way, it is

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[23] John Ferejohn and Pasquale Pasquino, 'Emergency Powers' in Robert E Goodin (ed), *The Oxford Handbook of Political Theory* (Oxford University Press, 2006) 333, 338.

[24] William E Scheuerman, 'Emergency powers' (2006) 2(1) *Annual Review of Law and Social Science* 257, 283; see also Bruce Ackerman, 'The Emergency Constitution' (2004) 113(5) *Yale Law Journal* 1029, 1047 who proposes a system of increasing parliamentary super-majorities necessary to uphold the state of emergency.

[25] Ferejohn and Pasquino, above n 1, 216.

questionable whether such emergency powers are extraordinary at all: they are an executive power created through legislation, exactly as any other executive power.[26] The difference to ordinary powers, of course, lies in the quality of emergency powers, particularly their effects on constitutional norms, procedures, and individual freedoms.

The main difference between emergency powers under the Neo-Roman model and the legislative model does not lie in the extent of the powers, but in the framework surrounding those powers. The integration of emergency powers into the ordinary constitutional framework has two main advantages: first, emergency powers are subject to ordinary, well-established, and independent safeguard and control mechanisms; and second, they enjoy more democratic legitimacy.

Since the emergency regime operates within the general legislative framework, it does not create a parallel system of exceptional government. Instead, the emergency regime is subject to the same review procedures as ordinary legislation. That means that oversight of emergency powers is not just exercised *ex ante* and *ex post*, but also *interim*. The legislature creates the emergency provisions in advance of the emergency crisis, and thus controls their scope. It can make the provisions as general or as specific as it deems necessary in order to deal with the situation. This ability to tailor emergency provisions to a specific emergency situation allows the law-maker to circumscribe the resulting powers and limit them to the extent necessary to deal with the specific situation.[27] In contrast, Neo-Roman emergency provisions are necessarily broad. They are general norms, often providing more information about the scope and limitations of the emergency powers beyond which the bearer of these powers may do what is necessary to deal with the crisis.

[26] David Dyzenhaus, 'The 'Organic Law' of Ex Parte Milligan' in Austin Sarat (ed), *Sovereignty, Emergency, Legality* (Cambridge University Press, 2010) 16, 17. Indeed, Dicey struggled with the question of Emergency Law in England: Albert Venn Dicey, *Introduction to the study of the law of the constitution* (Macmillan and Co, 7th ed, 1908), 538-55.

[27] New Zealand Law Commission, above n 12, [4.3].

Specific emergency legislation is therefore less open to misuse than Neo-Roman emergency powers.

On a more conceptual level, because emergency powers under the legislative model are created by a legislature, they tend to be more legalistic. As mentioned, constitutional and extra-constitutional emergency powers tend to be very broadly defined, and lend themselves to very wide interpretation. In contrast, legislative emergency powers are generally drawn up in the language of the law, as legislative drafting is a parliament's primary way of decision-making.[28] Parliamentary procedures are designed to uphold democratic principles and the rule of law, and rules that apply to the drafting of ordinary legislation also applies to the drafting of emergency legislation. It is therefore less prone to being open to interpretation or filled with loopholes.

Moreover, the parliament is able to restrict or withdraw emergency powers during the emergency, because it can legislate to do so. And because the emergency regime exists inside the ordinary constitutional order, executive actions are often open to judicial review during or after the emergency. Indeed, Cole posits that judges are in the best position to control the executive's powers. Judges decide on specific issues rather than abstract rules, and are therefore better able to evaluate the necessity of the situation and the corresponding actions of the executive. And they are required to give reasons for their decisions, which develops better clarity around the emergency regime for future use.[29] However, we should apply some caution when it comes to the ability of courts to effectively control emergency powers. In the United States, the Supreme Court has in a series of cases grappled with the extent to which constitutional rights applied to detainees of the so-called "War on Terror", and how much power the executive had in determining this question.[30] Although the Supreme Court tended to limit the executive's actions in those cases,

[28] Dyzenhaus, above n 26, 22.

[29] David Cole, 'The Priority of Morality: The Emergency constitution's Blind Spot' (2004) 113 *Yale Law Journal*, 1762.

[30] See, eg, *Hamdi v Rumsfeld* (2004) 542 US 507; *Boumendiene v Bush* (2008) 553 US 723.

it did so by only slim majorities. Moreover, as the European Court of Human Rights mentions in *Ireland v United Kingdom*,[31] courts tend to allow the executive a wide "margin of appreciation" when it comes to emergency powers. Governments are tasked with dealing with the situation, and as they are closest to the operational level of emergency management, they are in the best position to determine which measures are necessary. However, Gross warns that this tendency can lead to an overly deferential judiciary which does not want to be seen to stand in the way of the emergency relief effort.[32]

Overall, proponents of the legislative model say the best way to meet a crisis is through constitutionalism and the rule of law. Dyzenhaus thus concludes that 'law provides moral resources sufficient to maintain the rule-of-law project even when legal and political order is under great stress'.[33]

However, perhaps the strongest argument for the legislative model is that it seems the most democratic approach to emergency regimes. Democratic procedures and principles enable the self-governing nature of democratic states and are the backbone of their constitutions. The derogation from these constitutional norms can only be justified if it enjoys explicit popular support. Parliament, as the primary democratic organ in most modern democracies, therefore has the most legitimacy to decide when and to what extent emergency powers are necessary.[34]

III THE PITFALLS OF THE LEGISLATIVE MODEL

This level of democratic legitimacy makes the legislative model appealing and the preferred approach to emergency powers. Instead

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[31] (1978) ECHR 1.

[32] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) (112) *Yale Law Journal* 1011, 1034.

[33] David Dyzenhaus, *The constitution of law: legality in a time of emergency* (Cambridge University Press, 2006) 65.

[34] Ferejohn and Pasquino, above n 1, 220.

of vesting virtually unlimited powers in the executive, it allows for a more tailored and limited approach. However, despite its many advantages over the Neo-Roman model, it comes with its own drawbacks. These are threefold: 1) a legislature is a large, slow moving institution and may be unable or unwilling to quickly respond to a crisis; 2) the absence of a separate, exceptional government does not keep the legislature at arm's length as an independent check on the executive; and 3) the lack of insulation of the constitutional system during emergencies carries the danger that emergency powers may contaminate the ordinary legal system.[35]

Although the legislature is the most democratic body which can decide on derogation from constitutional norms,[36] it is not always in the best position to create an appropriate emergency regime. One of the advantages of legislated emergency powers is their ability to be tailored to specific crises. However, as emergencies often have unique aspects, they tend to have different requirements even if they are of the same kind. Particularly the severity of an emergency determines the extent of extraordinary powers that are required to effectively and efficiently deal with it. Therefore, emergency legislation drawn up in advance of emergencies may not sufficiently empower the executive. This leads to either more general emergency legislation or to ad-hoc emergency legislation. The former, more general emergency legislation, carries the danger of losing some of its advantages over the Neo-Roman approach. It isn't tailored to the specific emergency and tends to vest broader powers into the executive, thus opening the powers up to abuse.[37] The latter, ad-hoc emergency legislation, means that the legislature has to rush poorly considered and worded legislation. As parliament does not want to be criticised for hindering the emergency response, such legislation tends to also vest more power into the executive than necessary, again creating scope for abuse.[38] Fortunately, most modern democracies have not in the past decades experienced emergencies to the extent that their legislated emergency regimes could not

[35] Ibid 219.

[36] This is arguably also the case in presidential systems, as the legislature includes both majority and minority representation.

[37] New Zealand Law Commission, above n 12, [4.5]-[4.7].

[38] Ibid [4.12].

cope.[39] This has led Ferejohn and Pasquino to propose that the trend from Neo-Roman to legislative model in modern democracies may be put down to the fact that they tend to happen in stable and entrenched democracies with well-functioning parliaments. As these countries have not been beset by war or serious terrorism during that time, they did not require extreme extraordinary measures which a legislature may be unable to provide.[40]

As there is no disinterested, independent exceptional government in the legislative model, entrusting the legislature with the decision over the scope of emergency powers arguably works best in a strong polyarchic constitutional system. The stronger the separation of powers and the more control there is on the legislature, the more safeguards are in place to protect against misuse of emergency powers. On the other hand, the less polyarchic a country is, meaning the fewer checks and balances exist between the branches of government, the more diminished the advantages of the legislative model become. New Zealand, as an extremely weak polyarchic country, serves as an ideal example. Its parliament is virtually unfettered by outside control. New Zealand subscribes to one of the most absolute forms of parliamentary sovereignty in the world.[41] The judiciary is capable of only the weakest form of legislative judicial review.[42] Parliament is constituted in a single chamber, which eases the passage of legislation.[43] And as the executive almost

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[39] Note, however, that the *Civil Defence and Emergency Management Act 2002* (NZ) includes only such rudimentary emergency recovery provisions that the New Zealand Parliament had to rush the *Canterbury Earthquake Recovery Act 2011* (NZ) in order to deal with the effects of the Canterbury Earthquakes of 2010-11; see (12 April 2011) 671 NZPD 17898 (Gerry Brownlee).

[40] Ferejohn and Pasquino, above n 1, 216.

[41] Mark Elliott, 'Interpretative Bills of Rights and the Mystery of the Unwritten Constitution' (2011) 4 *New Zealand Law Review* 591.

[42] New Zealand's courts have to rely on statutory interpretation to challenge parliamentary Acts. Particularly in the context of the New Zealand *Bill of Rights Act 1990* (NZ), courts will generally interpret statutes in line with that Act, unless Parliament specifically states that a provision is effective despite the *New Zealand Bill of Rights Act 1990* (NZ); See, eg, *R v Pora* (2001) 2 NZLR 37.

[43] Moreover, Parliament frequently uses a procedural device called "urgency" to expedite the passage of legislation even further: see Claudia Geiringer, Polly Higbee and Elizabeth McLeay, *What's the Hurry? Urgency in the New*

always holds the decision-making majority in Parliament, it wields an enormous amount of power.

Yet, the biggest threat emanating from the legislative model may be that it normalises executive powers that are otherwise extraordinary. By using the language and tools of law, the boundaries between extraordinary and ordinary powers may start to blur and emergency provisions may become embedded in the legal system.[44] The ordinary constitutional system is not insulated from the crisis under the legislative model, and emergency legislation can have permanent effects on it. This is most obvious where emergency legislation has been enacted but not repealed once the emergency has past. A prominent example is the Canadian *War Measures Act 1914*. The Act was drafted to enable the Canadian government to adequately respond to the British Empire's declaration of war against Germany. Not having been repealed at the end of World War I, it was again invoked during World War II. The Act was only repealed after the Canadian government came under criticism for using it to combat a Quebec separatist group in 1970.[45] Emergency powers are meant to be temporary, only to be used for the emergency for which they were created. If they are enduring, they change and transform the constitutional system permanently.[46] For that reason, modern emergency legislation usually contains sunset clauses for emergency powers.[47]

Zealand Legislative Process (Victoria University Press, 2011) 69; Sascha Mueller, 'Where is the Fire? The Use and Abuse of Urgency in the Legislative Process' (2011) 17 *Canterbury Law Review* 316, 316-17.

44 Ferejohn and Pasquino, above n 1, 219.

45 New Zealand Law Commission above n 12, [4.13]. Similarly, in New Zealand, emergency powers under the *Public Safety Conservation Act 1932* (NZ) was used to break a dockworkers' dispute in the Waterfront Dispute of 1951, and powers under the post-war Economic Stabilisation Act were extensively used in the early 1980s, which contributed to the constitutional crisis of 1984.

46 Carl Schmitt, *Dictatorship. From the Origin of the Modern Concept of Sovereignty to the Proletarian Class Struggle* (Polity Press, 2013); See also Joseph Alois Schumpeter, *Capitalism, socialism, and democracy* (Routledge, 5th ed, 1994) 296, who, rather more dramatically, refers to permanent emergency powers as a dictatorship.

47 See, eg, *Civil Defence Emergency Management Act 2002* (NZ) s 70(3); *Emergencies Act 1985* (CA) s 7(2); *State Emergency and Rescue Management Act 1989* (NSW) s 35; *Disaster Management Act 2003* (Qld) s 71.

IV EXTRAORDINARY POWER CREEP

More subtle, and thus more concerning, is a form of cross-contamination of emergency and ordinary powers. This is the case where powers akin to emergency powers are provided for in non-emergency legislation.

Although one of the biggest advantages of legislative emergency powers is that they come in the form of ordinary legislation, this can also be a weakness. As mentioned earlier, legislative emergency powers are not really extraordinary powers, at least not formally. They are created in the same way as ordinary executive powers, and they are controlled in the same way as ordinary executive powers. In a sense, they are the same type of powers on a spectrum of executive action. Parliament empowers the executive to build roads and schools, to provide essential services, to keep public order, and to deal with crisis situations. Particularly in a weak polyarchic system with near absolute parliamentary supremacy, there is no meaningful formal distinction between ordinary and extraordinary powers.

This is not to say that in a system like New Zealand's there are no extraordinary powers. Ordinary executive powers are available on a day to day basis, and they operate within accepted constitutional rules. They are generally reviewable, and they must stay within the legislative mandate that created them. Powers can thus be regarded as extraordinary if they provide for an exceptional extent of executive power and if they are subject to less oversight and fewer safeguards. In its *Final Report on Emergencies*, the New Zealand Law Commission listed 10 categories of emergency powers characteristic of an emergency.[48] These range from the direction of people to the requisition of property, spending and raising public money, alteration of legal rights (in particular with regards to access to courts and legal remedies, and 'general, non-specific powers'. The last category appears to be a catch-all category, as it includes 'provisions that authorise any action that is necessary in the circumstances'. This is likely meant to include more general

[48] New Zealand Law Commission, above n 12, [3.106].

derogations from the constitutional order, such as limiting political rights (eg delaying elections etc) and increasing executive powers generally (eg extended regulation-making powers).

Still, legislative emergency provisions reside within the ordinary legal framework and are thus less distinct from the ordinary constitutional order. Traditionally, therefore, emergency legislation was demarcated from ordinary legislation by clearly signposting its status as extraordinary legislation. They have names that signal their nature: for example, the *Civil Defence Emergency Management Act 2002* in New Zealand, the *Emergencies Act 1985* in Canada, or the *Disaster Management Act 2003* in Queensland. Furthermore, such Acts generally require a clear and unambiguous signal to show that the extraordinary powers are being invoked. A state of emergency has to be publicly declared before the executive can make use of such powers, which puts the government under the spotlight and scrutiny.[49]

Not all emergency powers are found in specifically designated emergency legislation. The *Health Act 1956* (NZ) establishes the public health system in New Zealand. It regulates the health sector's administration, establishes Health districts and local health boards. It also contains a Part about outbreaks of infectious diseases.[50] Under certain circumstances, the medical officer, who is appointed under the Act, has a range of powers that are akin to emergency powers. The medical officer can compulsorily acquire public or private real or personal property which they deem necessary for the treatment or transport of patients, or for the storage or disposal of bodies. They can redirect planes, prioritise the supply and dispensation of medicine, enter premises and isolate persons who are likely to spread the infectious disease.[51] They may even quarantine whole areas to

[49] See, eg, *Civil Defence Emergency Management Act 2002* (NZ) s 66; *Emergencies Act 1985* (CA) ss 6, 17, 28, 38; *State Emergency and Rescue Management Act 1989* (NSW) s 33; *Disaster Management Act 2003* (Qld) s 69.

[50] *Health Act 1956* (NZ) pt 3.

[51] Ibid ss 71, 74C, 74D, 77, 79.

prevent the spread of such an outbreak.[52] These powers clearly fit the classification of emergency powers — powers to direct people and control their movement, powers relating to the requisition of property, provision of essential utilities (such as medicines) and the restriction of people's freedoms.[53] However, it is unclear whether these powers necessarily are extraordinary. This depends on the extent to which they are used. The quarantine of a single patient diagnosed with tuberculosis differs greatly from action taken during a widespread epidemic. The problem is that the Act is not clear on when these powers are considered extraordinary and when they are not. Although these powers can be explicitly invoked when a state of emergency has been declared under the *Civil Defence and Emergency Management Act 2002* (NZ) (CDEMA), they can also be invoked simply under the authority of the Minister of Health.[54]

Incorporating emergency provisions into regular legislation causes the line between ordinary and extraordinary powers to blur. This raises the concern that this line could shift, and that what should be considered extraordinary powers become ordinary. In New Zealand, two recent events have exposed the danger of this practice. The *Canterbury Earthquake Recovery Act 2011* (NZ) (CER Act) includes many provisions which closely resemble, or even exceed, emergency powers; and the *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010* (NZ) (ECan Act) ousted elected local government representatives and vested extraordinary powers in the executive.

A *Canterbury Earthquake Recovery Act 2011* (NZ)

The *Canterbury Earthquake Recovery Act 2011* (NZ) (CER Act) was passed in the aftermath of the devastating earthquake that hit Christchurch in February 2011. The earthquake caused 185 deaths, widespread destruction of buildings and infrastructure, and disruption of essential services such as power and water. Within 24

[52] Ibid pt 4.
[53] New Zealand Law Commission, above n 12, [3.106].
[54] *Health Act 1956* (NZ) s 71.

hours, the New Zealand government declared a national state of emergency under the *Civil Defence Emergency Management Act 2002* (NZ) (CDEMA), only the second in the history of New Zealand.[55] This allowed the Minister and the civil defence emergency management groups to enter or restrict access to premises, undertake works and demolish structures, requisition private property, direct people, and generally provide disaster relief in the form of emergency shelters and provisions for the affected population.[56] The emergency powers were necessary to provide search and rescue support, support for the police, and expedited reinstatement of infrastructure and essential services. Since many buildings in the more densely built-up central business district were suspected to be in danger of collapsing, an exclusion zone was erected surrounding the entire district and enforced by the New Zealand Army. This "Central City Red Zone" remained in place for more than two years. The state of emergency was extended nine times before it was eventually lifted on 30 April 2011.[57]

As its name implies, the purpose of the *Canterbury Earthquake Recovery Act 2011* (NZ) was to aid and expedite the recovery of the Canterbury region.[58] In addition to increasing resources to the region and forming a dedicated authority for the rebuild (the Canterbury Earthquake Recovery Authority), the Act created extensive executive powers both for the Minister for Canterbury Earthquake Recovery and the Canterbury Earthquake Recovery Authority (CERA). Many of these powers strongly resemble those which the New Zealand Law Commission in its *Final Report on Emergencies* has classified as powers typically used in emergency legislation.[59] The government could require information, enter premises, erect or demolish works, direct local government to take or stop taking action, and acquire or dispose of property — compulsorily if

[55] The only other time was during the Waterfront Dispute 1951: see above n 45.
[56] *Civil Defence Emergency Management Act 2002* (NZ) pt 5.
[57] Under s 70 of the *Civil Defence Emergency Management Act 2002* (NZ), a national state of emergency expires after seven days, unless it is extended for another seven day period (s 71).
[58] *Canterbury Earthquake Recovery Act 2011* (NZ) s 3.
[59] New Zealand Law Commission, above n 12, [3.106].

necessary.[60] These powers broadly reflect the extraordinary powers provided for during a state of emergency under the CDEMA.[61] The CER Act thus provided for a continuation of the government's emergency powers beyond the lifting of the state of emergency. Not only that, but it went further and vested powers in the Minister and CERA that the government did not have during a state of emergency. Most decisions made under the Act could not be appealed in court.[62]

The broadest power, however, was a "Henry VIII" clause, which allowed the Minister to grant exemptions, modify or extend any provision of any parliamentary piece of legislation for the purposes of the CER Act.[63] In its report, the New Zealand Law Commission asserted that emergency provisions should only delegate law-making powers in two cases, particularly if they include powers to override legislation: if the emergency measures necessary to deal with the emergency cannot be predicted, or where the exact nature of the emergency is impossible to know in advance.[64] It is arguable that the necessary powers to deal with the recovery of Christchurch were unknown at the time the CER Act was passed, due to the extent of the destruction.

Section 93 of the CER Act provides for a sunset clause: the Act was to expire within five years of its commencement.[65] However, there are two issues with this period. First, it is unclear whether the Canterbury recovery efforts were an emergency situation at all, warranting the extent of extraordinary power that it did. While the initial response to the earthquake certainly required extensive executive powers, it is doubtful that the recovery required the same — particularly months and years down the line. The purpose of sunset clauses is to ensure the temporary nature of emergency

60 *Canterbury Earthquake Recovery Act 2011* (NZ) pt 2, sub-pt 4.
61 *Civil Defence Emergency Management Act 2002* (NZ) pt 5.
62 *Canterbury Earthquake Recovery Act 2011* (NZ) s 68.
63 Ibid s 71. This power had been available to the Minister since the September 2010, *Canterbury Earthquake Response and Recovery Act 2010* (NZ) s 6.
64 New Zealand Law Commission, above n 12, [5.69]-[5.71].
65 This has indeed happened on 19 April 2016, when the Act was repealed.

powers and restrict them to the period of emergency, when ordinary procedures are not sufficient to deal with the extraordinary event. The recovery phase after the earthquakes would be unlikely to fit the definition of an emergency in the CDEMA. Once the search and rescue efforts had been concluded and essential utilities restored, no person's life or body was still endangered.[66] And at least outside the City Centre Red Zone, little property was endangered. It is unlikely that the CER Act was a piece of emergency legislation at all, it simply expedited ordinary executive functions and freed the recovery effort from the inconvenient shackles of constitutional procedures. Even if the immediate recovery efforts required extraordinary powers, five years was an unnecessarily long period. Second, upon the CER Act's expiry, the *Greater Christchurch Regeneration Act 2016* (NZ) was passed. While this Act does not include some of the more extraordinary powers of the CER Act, such as the "Henry VIII" clause, it continues to grant the executive many of the powers that are generally only available under a state of emergency. The *Greater Christchurch Regeneration Act* (NZ) is due to expire within five to six years.[67] That means that the expiry of many of the extraordinary powers is 10 years, for a situation that can hardly be described as an emergency.

There is nothing wrong with expediting recovery efforts, particularly if such a large part of the population is affected as was the case in the Canterbury region. However, emergency recovery is very distinct to emergency response. Only the latter justifies the invocation of powers which do away with constitutional norms. The CER Act went as far as impinging on one of the most sacred principles of New Zealand constitutionalism: although it was sanctioned by Parliament, s 71 of the CER Act arguably ousted the sovereignty of New Zealand's Parliament.

[66] The exception was ongoing mental distress, but the CER Act did not deal with this.

[67] The majority of the provisions expire after five years, with the exception of provisions relating to the transfer of assets, liabilities and land, which expire after six years, see *Greater Christchurch Regeneration Act 2016* (NZ) s 151.

B *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010*

Perhaps a more extreme example of extraordinary powers creeping into ordinary legislation in New Zealand is the ECan Act. Environment Canterbury is a regional government body responsible, inter alia, for processing resource consents for the Canterbury region. Between 2006 and 2008, processing of consent applications within the statutory timeframe fell from 72 per cent to 29 per cent. As a the large majority of both irrigated land and water consumption of New Zealand is located within Canterbury, the central government decided to act decisively with the situation in 2010. It said that Environment Canterbury was incapable of effectively dealing with the consent applications and that the lack of coherent water management required swift action.[68] Within two days, it introduced and passed the ECan Act under urgency in March 2010.

The most constitutionally extraordinary effect of the ECan Act was that it replaced the democratically elected regional councillors with government-appointed commissioners.[69] These commissioners were vested with powers greatly exceeding those of democratically elected regional councillors. They could impose moratoria on categories of resource applications and were not bound at all by pt 9 of the *Resource Management Act 1991* (NZ), which deals with water management order.[70] Moreover, similar to the CER Act, the ECan Act contains a provision allowing the responsible Minister to make regulations that may override specific provisions of the *Resource Management Act 1991* (NZ). And finally, it provides that certain decisions made under this Act cannot be reviewed by the courts.[71]

Joseph lists four principles of the rule of law that the ECan Act contravenes: it is *ad hominem*; has retrospective effect; includes a

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68 (30 March 2010) 661 NZPD 9927; (30 March 2010) 661 NZPD 9930.

69 *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010* (NZ) pt 2.

70 Ibid ss 34, 49.

71 Ibid ss 64-68.

Henry VIII clause; and bars access to the courts.[72] With the addition of the fact that the Act ousts democratically elected representatives, these powers are undoubtedly outside ordinary constitutional norms. This clearly makes these emergency powers and the Act a piece of emergency legislation. However, nothing in the Act indicates this. There is no declaration of a state of emergency, and no special oversight mechanism. And the equivalent of a sunset clause has been delayed three times so far. The Act originally provided for a return to fully elected councillors in 2013. In 2013, the date was pushed to 2016. Currently, the government is planning to allow ECan to have half elected and half appointed commissioners in 2016, and a fully elected Council in 2019.[73] The purpose section simply states that the Act is meant to replace the current councillors and to provide the Council with 'powers it would not otherwise have'.[74]

Even more so than after the Canterbury Earthquakes, it is highly doubtful that there was an emergency that required this reaction. The decrease in processing efficiency by Environment Canterbury in the mid-2000s directly correlated with a 40 per cent increase in resource consent applications, likely due to a sharp increase of dairy farming in the region.[75] Taking into account that Canterbury is a drought-prone area, the water catchment areas of which are either fully or overly allocated, it is understandable that the resource consent process concerning water resources would be under extreme pressure.[76] There may have been an issue to resolve, but this issue did not threaten the life or bodily integrity of any person nor their

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72 Philip Joseph, 'Environment Canterbury Legislation' (2010) *New Zealand Law Journal* 193.

73 Chris Barclay, 'Transition to democratically-elected ECan under way', *Stuff.co.nz* (online), 8 July 2015 <http://www.stuff.co.nz/the-press/news/70062865/transition-to-democraticallyelected-ecan-under-way>.

74 *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010* (NZ) s 3.

75 Ministry for the Environment, *Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008* (ME 937, 2007) app 1: this was by far the largest increase of any region of New Zealand.

76 Bill Kaye-Blake et al, *Water Management in New Zealand: A road map for understanding water value* (Public Discussion Paper, Working Paper 2014/01, New Zealand Institute of Economic Research, 2014) 10.

property. The situation could have been dealt with using less extensive and less constitutionally extraordinary powers.

V BETWEEN A ROCK AND A HARD PLACE

Both the CER Act and the ECan Act illustrate the danger of normalising extraordinary powers. In both cases the legislature was comfortable enough with the provision of extremely extraordinary powers during times of non-emergency and very limited provisions for special safeguard.[77]

The legislative model is preferable over the Neo-Roman model because it allows emergency powers to be used in more democratically legitimate ways. Democratic legitimacy is an important part of modern constitutions and the legislated emergency provisions thus provide for more constitutional integrity. Yet, the lack of constitutional isolation means that by using ordinary legislation to create extraordinary powers, the constitutional order itself will slowly change.

The examples shown in this paper seem specific to particular situations within a specific jurisdiction; they could be regarded as exceptions rather than to a systemic fault of the legislative model. However, less obvious examples of this may be found in jurisdictions all around the world. The perception of the very nature of what constitutes an emergency is changing. The idea that an emergency is an isolated incident which can be dealt with using temporary extraordinary powers is being re-examined.[78] Taylor suggests that just because a situation is predictable, its effects are not

[77] Other than sunset clauses, with an expiration period of five years in the case of the CER Act, and an initial three years which has currently been extended to nine in the case of the ECan Act. In addition, the CER Act provides for a review panel to advise on regulations passed under the Act (ss 72-76). This panel is appointed by the responsible Minister.

[78] Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law* (Foundation Press, 2nd ed, 2006) 842.

necessarily less disastrous.[79] As such, events such as droughts, pandemics, even economic downturn or unemployment can be seen as emergencies requiring extraordinary powers. The most prominent examples are likely both domestic and international terrorism, an on-going threat to the safety of the population and the integrity of the constitutional order. All of the above have the potential to severely harm large parts of a population, and all of them could exist for the long term.

A constitutional system must be flexible and adapt to the needs of its citizens. Our traditional conception of emergency powers does not sit well with long-term or permanent threats.[80] Such events may require constitutional change. However, this change and its long-term effects must be well-considered. Currently, many pieces of emergency or emergency-like legislation is reactionary. It is passed rapidly in response to some crisis or another, without proper consideration as to how it affects the constitutional order as a whole and whether it does so appropriately. In particular, for every bit of power that is shifted to a state actor, appropriate safeguards need to minimise the scope for misuse of those powers. In the end, the location of powers within a constitutional system is not as important as the robustness of the system itself.

Of course, both the *Canterbury Earthquake Recovery Act 2011* (NZ) and the *Environment Canterbury (Temporary Comissioners and Improved Water Management) Act 2010* (NZ) were created and operate within the rules of the constituitonal system of New Zealand. They were passed using the accepted process for creating legislation, and it is entirely within parliament's powers to create the provisions it did. *De lege lata*, the statutes are constitutionally legitimate. However, the frequency with which parliament has taken this route of convenience and the lack of introspection when it passed these statutes raises concerns that, if continued, this trend has the potential to substantially alter the constitutional order. Yesterday, extraordinary powers were reserved for extraordinary emergency

[79] AJW Taylor, *Disasters and Disaster Stress* (AMS Press, 1989) 10.
[80] Ferejohn and Pasquino, above n 1, 233.

situations. Today, they are used for exceptional non-emergency situations. Tomorrow, they could be used in any piece of legislation.