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**THE ROLE OF HUMAN RIGHTS DURING A STATE OF  
EMERGENCY**

A review of Emergency Provisions in constitutions, the applicability of Human Rights throughout their duration, and a recommendation for a New Zealand constitutional Emergency Provision.

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## *I Introduction*

New Zealand has a rich history of an unwritten constitution following in the Westminster tradition. However, there is increasing discussion about the need for a written constitution as our nation develops and matures.<sup>1</sup> New Zealand has a near unique opportunity in this potential constitution drafting process. Unlike most constitutions that have been developed after times of conflict, New Zealand will be able to approach this process from a position of relative peace. However, if any resultant constitution is to be durable, in addition to providing an effective distribution and limitation on state power in times of peace, it must be able to survive situations of turmoil. Most constitutions have provisions that allow for extraordinary powers to be granted, and some basic rights to be derogated from, in situations of emergency, in order for the public order to be restored as soon as possible. This comes from an acceptance that there are some situations in which the normal separation of powers, and legal process is not capable of delivering a timely response to an imminent threat to the nation, or that the required response requires a temporary departure from legal norms. Any written constitution for New Zealand should have a provision for such emergency measures in order for the constitution to remain relevant in times of turmoil.

Emergency provisions, while assisting a constitution to remain relevant in times of turmoil, often allow the executive to take extreme measures, with fewer, if any, checks from the other branches of government. Although this helps to facilitate a timely response, this power is open to potential abuse. Therefore, it is important that any provision inserted into a constitution for New Zealand is drafted in a manner that limits any potential for abuse, whilst remaining sufficiently wide in scope for necessary actions to be taken, if and when there is an emergency situation.

This paper will look at the historical and theoretical background to such provisions and how they have been drafted, interpreted and implemented overseas. It will look at current and historical legislation that has been enacted in New Zealand to allow the grant of emergency powers, and make recommendations for a potential future provision, with reference to the proposal for a New Zealand constitution as drafted by Geoffrey Palmer and Andrew Butler in *Constitution Aotearoa*.<sup>2</sup>

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<sup>1</sup> An example of this is the Constitution Conversation in 2013, with the final report published in November 2013 which recommended that the Government continue an ongoing conversation about the constitution. See <http://www.ourconstitution.org.nz/The-Report>

<sup>2</sup> For an explanation of the Constitution Aotearoa project see <http://constitutionaotearoa.org.nz/about/> and <http://constitutionaotearoa.org.nz/constitution/read-chapters/proposed-constitution-full-text/>.

## *II Historical Perspective*

It has long been accepted that there are situations in which the normal rules cannot apply if the state is to survive and be able to return to the usual order in a timely manner. As such, many historical regimes implemented procedures to deal with emergencies. Many features of modern emergency management provisions have origins in these historical regimes.

### *A The Roman Dictator*

The concept of an emergency provision has been a feature of constitutional drafting since ancient times. The ancient Romans had a constitutional arrangement in which an emergency institution was a recognised, and regular instrument of government. This emergency institution was manifested in the position of a Dictator. The Dictator's function was solely to uphold the constitutional order. In order to achieve this, the Dictator was given extraordinary powers, as required to defend the Republic. However, there were well-defined constitutional restrictions on his power in order to prevent any abuse of his position.<sup>3</sup>

The Dictator was completely separate to the basic structure of government. Dictators were appointed by consuls, and by convention, no Dictator could be appointed without Senate approval.<sup>4</sup> Their term was limited to six months, or the end of the term of the appointing consuls, and could not be renewed. The Dictator was expected to stand down following the end of crisis that had led to his appointment. In the later period of the Roman Empire, consuls did not lose their imperium (authority) upon appointment of a Dictator. They continued to function and conducted independent activities, unless ordered otherwise by the dictator.<sup>5</sup> The dictator did not have the power of an absolute monarch. They would refer questions of policy to the Senate, in the same way as the consuls did.<sup>6</sup> The Dictator could not initiate new legislation, nor could they change the basic character of the state or its institutional framework. They were expected to restore safety. As such they could not embark on any aggressive act of war against an external enemy, their role was merely defensive.<sup>7</sup>

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<sup>3</sup> Oren Gross "Constitutions and Emergency Regimes" in *Comparative Constitutional Law* Tom Ginsburg & Rosalind Dixon (eds) (Edward Elgar 2011) pp. 334-355.

<sup>4</sup> Above n 3.

<sup>5</sup> Clinton Keys "The Constitutional Position of the Roman Dictatorship" (October 1917) 14:4 *Studies in Philology*, *The University of North Carolina Press* 298 at 299.

<sup>6</sup> At 299.

<sup>7</sup> Gross, above n 3.

The key limitations on the Dictator's power were the exceptional nature of the circumstances that could lead to appointment, and the temporary nature of the role.<sup>8</sup>

However, just as the use of modern emergency provisions can be met with disapproval from the public, the office of the Roman Dictator was not always a popular with Roman citizens, and by 300BC, the Dictator's powers were subject to a right of appeal and a tribune's veto.<sup>9</sup> Despite this eventual limitation on its use, the key features of the Roman dictatorship have informed the development of many modern constitutional emergency regimes. Features such as; the temporary nature of the role, the requirement for recognition of exceptional circumstances, appointment according to constitutional norms, separation of those declaring emergency from those exercising dictatorial power, appointment for well defined and limited purpose and with the ultimate goal of upholding the constitutional order rather than changing or replacing it, can be recognised in many modern constitutions.<sup>10</sup>

### *B The Royal Prerogative*

Relevant to any discussion of emergency powers in New Zealand, or any other constitutional monarchy, is the role of the Royal Prerogative.

The Royal Prerogative can be defined as;<sup>11</sup>

The special rights, powers, and immunities to which the Crown alone is entitled under the common law. Most prerogative acts are not performed by the Government on behalf of the Crown. Some, however are performed by the sovereign in person on the advice of the Government (e.g. the dissolution of parliament) or as required by constitutional convention...

The Crown has limited powers of legislating under the prerogative... It does so by Order in Council, ordinance, letters patent, or royal warrant... In foreign affairs, the sovereign declares war, makes peace and international treaties... under the prerogative... The sovereign is head of the armed forces, and, although much of the law governing these is now statutory, their disposition generally remains a matter for the prerogative. There is a prerogative power, subject to the payment of compensation, to expropriate or requisition private property in times of war or apprehended war...

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<sup>8</sup> Gross, above n 3.

<sup>9</sup> Encyclopaedia Britannica "Dictator – Roman Official" (2017) Encyclopaedia Britannica <<https://www.britannica.com/topic/dictator-Roman-official>>.

<sup>10</sup> Gross Above n 3.

<sup>11</sup> Graham Gooch and Michael Williams *A Dictionary of Law Enforcement* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 2015, published online 2015).

If a statute confers on the Crown powers that duplicate prerogative powers, the latter are suspended during the existence of the statute unless it either abolishes them or preserves them as alternative powers.

However, the definition of the prerogative and its scope is not settled. Dicey regarded the prerogative as encompassing all non-statutory powers of the Crown.<sup>12</sup> Blackstone considered the scope of the prerogative to be narrower, considering it to be rights that the King alone enjoyed.<sup>13</sup> While there, to this day, remains debate on the exact definition of and scope of the prerogative, there is no doubt that it remains a valid source of the sovereign and the executive's authority.

In effect, the royal prerogative is the residue of any powers of the sovereign not regulated by Parliament through legislation.<sup>14</sup> Following the English Civil War, exercise of these powers is in the name of the sovereign, but nearly always at the discretion of the government of the day.<sup>15</sup> Typically, governments value the prerogative as it gives authority for major aspects of executive action and can be exercised independently of Parliament. While parliament can call the executive to account for actions taken under the prerogative, this is only after the action has already taken place.<sup>16</sup>

English law has long recognised the ability of the monarch to invoke the Royal Prerogative or martial law in times of Emergency. Martial law was not generally accepted by the Kings Courts, however this did not prevent the use and acceptance of martial law in times of emergency.<sup>17</sup> Martial law was less an operation of law, but rather the application of arbitrary principles, as required by the circumstances. While not accepted

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<sup>12</sup> See A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 424: "The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."

<sup>13</sup> See Sir William Blackstone, 1 *Blackstone's Commentaries on the Laws of England* 239:

"By the word 'prerogative' we usually understand that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity. It signifies, in its etymology, (from prae and rogo) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others; and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the Crown

<sup>14</sup> B V Harris "Replacement of the Royal Prerogative in New Zealand" (2009) 23(3) *New Zealand Universities Law Review* 285 at 287.

<sup>15</sup> At 287.

<sup>16</sup> At 287.

<sup>17</sup> Kim Land Scheppele "North American Emergencies: the use of emergency powers in Canada and the United States" (1 April 2006) *International Journal of Constitutional Law* 4(2) 213-243.



in times of peace, it was an accepted use of the King's Power in times of emergency. Blackstone commented;<sup>18</sup>

For martial law, which is built upon no settled principles, but which is entirely arbitrary in its definitions, as Sir Matthew Hale observes, in truth and reality no law, but is something indulged, rather than allowed as a law... and therefore it ought not to be permitted in a time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.

It is clear that any use of martial law was only accepted when it was impossible for the normal legal order to continue. However, as with the use of the modern emergency provision, the exact nature of circumstances in which it could be invoked was unclear.

While it is important to note that use of the prerogative is now significantly limited, the prerogative sits behind any legislative developments. As will be discussed later, there are a number of New Zealand statutes that legislate for the declaration of a state of emergency, however, none are sufficiently broad to render the prerogative irrelevant in modern New Zealand.

### *III Justification Of and Use Of the Modern Emergency Provision*

Many modern constitutions appear to be guided by the principles of the Roman Dictator in their drafting of emergency provisions. However, the situations in which the emergency provision is invoked, and the limitations on power granted during an emergency have evolved. The foundations of the emergency provision can be located in a desire to respond to the threat of war, however, emergency provisions have been legitimately used to permit extraordinary powers to be granted to branches of government following natural disasters,<sup>19</sup> and in response to industrial strikes.<sup>20</sup> The purpose of the office of the Roman Dictator was to restore legal order by whatever means necessary,<sup>21</sup> limitations on power were due to the desire for the position to be temporary. In contrast, criticisms made the power granted under a modern emergency provision are less often about the scope of power granted but rather regard the potential for breaches of basic rights.<sup>22</sup> As such, while it is useful to be informed by the historical foundations of such

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<sup>18</sup> William Blackstone, *Commentaries on the Laws of England* (1765-1769), Book I, Ch 7 at 400.

<sup>19</sup> See the Civil Defence Emergency Management Act 2002 (CDEMA) as an example.

<sup>20</sup> (19 November 1984) 68 GBP D HC 58W.

<sup>21</sup> Gross, above n 3.

<sup>22</sup> See *A and others v Secretary of State for the Home Department; X and another v Secretary of State for Home Department* [2004] UKHL 56 [Belmarsh], *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57, and *Quake Outcasts v Minister for Canterbury Earthquake Recovery on appeal from Minister for Canterbury Earthquake Recovery v Fowler Developments* [2015]

provisions, they need to be reassessed in light of modern conditions. Limitations on use and the scope of power granted differ in different jurisdictions, however, general trends can be identified.

#### A *The Declaration and Definition of Emergency*

The first issue in the application of emergency provisions is defining the type and scale of emergency in which it is appropriate to invoke such provisions. There is no uniform method of defining an emergency in constitutions. Some constitutions make almost no mention of emergencies. The USA, Belgium and Japan are examples of this.<sup>23</sup> Regarding the difficulties of defining emergency, Alexander Hamilton stated;<sup>24</sup>

[It] is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can be widely imposed on the power to which the care of it is committed.

As a result of such thinking, regulation of emergencies is not found in the constitution of the United States, but is instead largely left to ordinary statutes.<sup>25</sup> While the Constitution allows for congress to suspend the writ of Habeas Corpus in “cases of rebellion or invasion” where the public safety may require it,<sup>26</sup> and to “provide for the calling forward of the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”,<sup>27</sup> most emergencies are dealt with by executive decree, as permitted by ordinary legislation.<sup>28</sup>

Many constitutions, particularly those from South American and Latin nations, draw distinctions between different factual circumstances under which a declaration of emergency is constitutionally permissible.<sup>29</sup> This classification of emergency allows different restrictions, such as restrictions on duration, the scope of power, and the possibility of derogation from constitutional rights and safeguards, to be applied in different circumstances.<sup>30</sup> The same approach can be observed in the Canadian

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NZSC 27, [2016] 1 NZLR 1 [*Quake Outcasts*] as examples of litigation following use of emergency measures and alleged breaches of rights.

<sup>23</sup> Gross Above, n 3.

<sup>24</sup> As cited in Gross, above 3.

<sup>25</sup> Scheppele, above n 17.

<sup>26</sup> The Constitution of the United States of America, Art 1 s 9(2).

<sup>27</sup> Article 1 s 8 (15)

<sup>28</sup> Scheppele, above n 17.

<sup>29</sup> Gross above, n 3.

<sup>30</sup> Gross, above, n 3.

Emergencies Act 1985 which splits emergencies into four categories; Public Welfare Emergencies, Public Order Emergencies, International Emergencies, and War Emergencies, each having different restrictions on use and the scope of powers granted.<sup>31</sup> While the Canadian Emergencies Act 1985 is not ‘constitutional’ per se, it does have a constitutional outcome in that it regulates the distribution of power. This approach of differentiating between emergencies is common, but not universal. South Africa for instance does not differentiate. The South African constitution allows for only one kind of emergency regime following a declaration of emergency.<sup>32</sup>

While the declaration of an emergency does not always lead to a derogation from human rights, often, states of emergency allow for a temporary derogation from human rights in order for necessary actions to be taken. In this case, international law is an additional source of regulation. In the case of natural disasters this derogation is often in the form of restricting access to property, and public spaces in addition to powers of requisition.<sup>33</sup> While this restricts freedom of access and breaches rights to property, it allows emergency response agencies and officials to do their job in a timely manner, and seeks to prevent further risk of injury or loss of life. In cases of a terrorist attack or war this might mean temporary derogation from normal criminal procedure in order to mitigate the risk of attack.<sup>34</sup> The need to temporarily derogate from basic and well-respected rights is acknowledged in most international human rights treaties and conventions, and provision is made for facilitating this derogation in limited circumstances.<sup>35</sup> Therefore, the definition of emergency needs to take into account international law definitions. It is possible that the definition provided in a constitution of a state of emergency may include

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<sup>31</sup> Emergencies Act RS C 1985 c22.

<sup>32</sup> Gross, above n 3, see the Constitution of the Republic of South Africa 1996, s 37 and the State of Emergency Act 1997 (SA).

<sup>33</sup> As an example see the CDEMA, above n 19, ss 86 - 90.

<sup>34</sup> See Terrorism Prevention and Investigation Measures Act 2011 (UK).

<sup>35</sup> See the International Covenant on Civil and Political Rights (opened for signature 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171, [ICCPR], art 4, and European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 Nov 1950, entered into force 3 Sept 1953) 213 UNTS. 221[ECHR], art 15 League of Arab States, Revised Arab Charter on Human Rights (22 May 2004, entered into force 15 March 2008) reprinted in Int’l Hum. Rts. Rep. 893 (2005) [Arab Charter], art 4, and American Convention on Human Rights ‘Pact of San Jose, Costa Rica’ Organisation of American States (OAS) 1144 UNTS 143 (22 November 1969, entered into force 18 July 1978) [ACHR], art 27(1)

wider circumstances; say permitting for derogations from usual standards of resource management,<sup>36</sup> however, international human rights law can provide some guidance.

Article 4 of the International Covenant on Civil and Political Rights (ICCPR), allows for derogations to all but a limited number of rights listed in the Covenant in situations that “threaten the life of the nation”.<sup>37</sup> This creates a high standard for the definition of ‘emergency’. It is, however, possible that emergency measures, say permitting for executive action to be taken that do not breach human rights, but instead allow for temporary derogation from other laws may be taken in lesser situations, and therefore be included within any constitutional definition of emergency. As such, the definition provided in a constitution may be wider than that made at international law. In contrast the International Covenant on Economic, Social and Cultural Rights (ICESR) does not prohibit any derogation from rights, but only allows for limitations on the rights contained in the Covenant where it is for the purpose of “promoting the general welfare in a democratic society”.<sup>38</sup> This limitation, however, could be invoked in ordinary circumstances, and therefore gives little assistance in constructing a definition of emergency.

While not binding on New Zealand, other international agreements have similar clauses, which can provide guidance on how New Zealand should define ‘emergency’. The European Convention on Human Rights allows for derogation from most rights contained in the convention “as strictly required by the exigencies of the situation”<sup>39</sup> The Arab Charter imposes the same restrictions in times of “public emergency which threatens the life of the nation”.<sup>40</sup> A similar provision can be found in the American Convention on Human Rights where by a State Party may take measures derogating from its obligations under the convention, “in times of war, public danger, or other emergency that threatens the independence or security of a State Party”.<sup>41</sup>

These international human rights instruments tend to have a higher threshold of emergency than is required by constitutional definitions of emergency. This is likely

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<sup>36</sup> A derogation from a requirement in the Resource Management Act 1991 was at issue in *Canterbury Regional Council v Independent Fisheries Ltd*, above n 22.

<sup>37</sup> ICCPR, above n 35, art 4.

<sup>38</sup> International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 4.

<sup>39</sup> ECHR, above n 35, art 15(1).

<sup>40</sup> Arab Charter, above n 35, art 4.

<sup>41</sup> ACHR, above n 35, art 27(1).

because the scope of the constitutional emergency is wider than allowing for derogation from human rights and also includes temporary suspensions of other laws and for delegation of powers in order to facilitate timely response. However, the definitions provided in international human rights instruments can provide guidance to the definition that should be adopted in any potential New Zealand constitution. Regardless of any provision in a New Zealand Constitution, New Zealand will remain bound by its obligations following ratification of the ICCPR. Guidance on the interpretation of Article 4 of the ICCPR suggests that for a state to be able to avail itself of the right to derogate, the emergency must be of an “exceptional and temporary nature”.<sup>42</sup> Although not binding on New Zealand, decisions in the European Court of Human Rights (ECtHR) illustrate how the standards of international law have been applied to the actions of individual states. The *Lawless*<sup>43</sup> case established that the court was competent and had jurisdiction to examine the conformity of states with Article 15 of the ECHR.<sup>44</sup> The *Greek case (Denmark, Norway, Sweden and the Netherlands v Greece)*<sup>45</sup> established four criteria for a public emergency for the purposes of Article 15. To be considered a public emergency;<sup>46</sup>

- (1) It must be actual or imminent.
- (2) Its effects must involve the whole nation.
- (3) The continuance of the organised life of the community must be threatened.
- (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

Although this was in an adjudicatory proceeding, and as such does not formally bind any future court, it was considered to establish a high standard for suspension of a constitution, or the human rights provisions contained within it, as a result of obligations

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<sup>42</sup> CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency CCPR/C/Rev.1/Add.1 (2001), at [2]

<sup>43</sup> *Lawless v Ireland (No 3)* [1961] 1 EHRR 15.

<sup>44</sup> At [45].

<sup>45</sup> European Commission of Human Rights. European Court of Human Rights. *The Greek Case*: report of the commission (1970) Application No 3321/67 *Denmark v Greece*, Application No 33322/67 *Norway v Greece*, Application No. 3323/67 *Sweden v Greece*, Application No 3344/67 *Netherlands v Greece*. Strassbourg: The Commission.

<sup>46</sup> At 70, [113].

of being a party to the ECHR.<sup>47</sup> However, since this decision in 1969, there has been a softening by the ECtHR of this rule like criteria.<sup>48</sup>

The decision of the ECtHR in *A and Others v The United Kingdom (Belmarsh)*<sup>49</sup> demonstrates the softening of the ECtHR, and illustrates a more flexible approach. Following the terrorism attacks of 9/11, the United Kingdom enacted the Anti-terrorism, Crime and Security Act 2001 (ACSA). This Act was enacted to address the “continuing” threat posed by international terrorism to citizens of the United Kingdom.<sup>50</sup> In order to protect citizens of the UK, the ACSA permitted the arrest and prolonged detention of foreign nationals suspected of posing a security threat to the UK.<sup>51</sup> The United Kingdom informed the Secretary General of the Council of Europe that they had “decided to avail itself of the right of derogation” provided by Article 15 of the ECHR, in order to allow for the breach of the right to liberty and security in Article 5 of the Convention. While acknowledging the requirement in the ICCPR that the emergency be temporary in nature,<sup>52</sup> the ECtHR found that the court had never formally incorporated this requirement, and that the duration of the emergency went to the determining whether the response was proportional, not whether or not it was an emergency,<sup>53</sup> citing examples of threats posed by action in Northern Ireland as an example of a situation that might not be strictly temporary but in which use of emergency measures was justified.<sup>54</sup> Importantly, the ECtHR, declined to question the views of the national courts, and the actions of the government, unless the response was completely inappropriate, finding that;<sup>55</sup>

...the court accepts that it was for each Government, as the guardian of their own people’s safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom’s executive and Parliament on this question. In addition, significant weight must be

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<sup>47</sup> Evan J Criddle “Protecting Human Rights During Emergencies: Delegation, Derogation and Deference” in E J Criddle (ed) *Human Rights in Emergencies* (Cambridge University Press, Cambridge, United Kingdom, 2016) 32 at 38.

<sup>48</sup> At 38.

<sup>49</sup> *A and Others v United Kingdom* App. No 3455/05 (ECtHR, 2009).

<sup>50</sup> At [11]

<sup>51</sup> Anti-Terrorism, Crime and Security Act 2001 (repealed) (UK), s 23.

<sup>52</sup> General comment 29, above n 42.

<sup>53</sup> *A and Others v United Kingdom*, above n 49 at [178]

<sup>54</sup> The ECtHR cited the cases of *Ireland v United Kingdom* App No 5310/71 [1978] ECHR 1, *Brannigan and McBride v United Kingdom* (1933) 17 EHRR 539, and *Marshall v United Kingdom* App No. 41571/98 (2001)

<sup>55</sup> *A and Others v United Kingdom*, above n 49 at [180]

accorded to the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency.

As such, the European court shared the view of the majority in the House of Lords that there was an emergency threatening the life of the nation.<sup>56</sup>

Following decisions such as *Belmarsh*, and the increasing threat of international terrorism, emergency can be considered less of a finite state, but rather it can be a prolonged and of indeterminate length at the point when measures are implemented. As such, modern emergencies might better be termed periods of heightened tension.<sup>57</sup> It is no longer possible to create a clear distinction between exception and norm. Thankfully declarations of war are infrequent and, at least in jurisdictions comparable to New Zealand, emergencies where the ‘life of the nation’ is at risk are rare. Emergency provisions are rarely enacted solely when the existence of the state is under threat, rather they are applied when there is an exceptional circumstance, or threat of such a circumstance, that while not threatening the existence of the state, generally poses some threat to public safety in which the ordinary legal response is found wanting. The state of emergency becomes a means of justifying the use of exceptional measures by the executive. While not justifying the same measures as in periods of war, such exceptional measures need to be permitted by the constitution in order for it to remain durable, and albeit in a limited form relevant, throughout these periods of heightened tension. Ideally, however, it should not allow for actions that are disproportionate to the circumstances. As such any provision in a constitution allowing for a state of emergency to exist needs to be able to address emergencies of different scales and types.

### *1 Normative approach to defining ‘Emergency’*

In normative terms the approaches to defining emergencies can be divided into two frameworks.<sup>58</sup> One framework for human rights during emergencies, insists on naming and differentiating between types of emergency (the type-oriented model),<sup>59</sup> the other does not distinguish between types of emergencies (the undifferentiated model).<sup>60</sup>

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<sup>56</sup> *A and Others v United Kingdom*, above n 49, and *Belmarsh*, above n 22.

<sup>57</sup> Thomas Poole “The Law of Emergency and Reason of State” (2016) LSE Law, Society and Economy Working Papers 18, at 2.

<sup>58</sup> James W Nickel “Two Models of Normative Frameworks for Human Rights During Emergencies” in E J Criddle (ed) *Human Rights in Emergencies* (Cambridge University Press, Cambridge, United Kingdom, 2016)56 at 56.

<sup>59</sup> at 57.

<sup>60</sup> at 57.

The type-oriented model has the advantage of not requiring reliance on proportionality and severity analysis,<sup>61</sup> and allows for clarification of what derogations are permissible in what circumstances, allowing for greater protections on citizens to remain in lesser emergencies.<sup>62</sup> However, the drawing of the boundaries between categories of emergency, and the appropriate response in each is difficult. It is likely that what society considers acceptable will change over time. In contrast, the undifferentiated model allows for greater flexibility, and might be able to adapt to unforeseen situations. Although the undifferentiated model does not explicitly list categories of emergency, it still recognises that different types of emergency require different responses, by requiring a proportional response.

An example of the type-oriented approach can be found in the Canadian Emergencies Act of 1988. A broad definition of national emergency provides that;<sup>63</sup>

- a ***national emergency*** is an urgent and critical situation of a temporary nature that
- (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
  - (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada
- and that cannot be effectively dealt with under any other law of Canada.

Emergencies are then divided into the following categories;

1. Public Welfare Emergencies,<sup>64</sup>

... an emergency that is caused by a real or imminent

- (a) fire, flood, drought, storm, earthquake or other natural phenomenon,
- (b) disease in human beings, animals or plants, or
- (c) accident or pollution

and that results or may result in a danger to life or property, social disruption, or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.

2. Public Order Emergencies,<sup>65</sup>

... an emergency that arises from threats to the security of Canada, and is so serious as to be a national emergency.

3. International Emergencies,<sup>66</sup> and

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<sup>61</sup> At 67.

<sup>62</sup> at 70.

<sup>63</sup> Emergencies Act, above n 11, s 3.

<sup>64</sup> Section 5.

<sup>65</sup> Section 16.

<sup>66</sup> Section 27.



... an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence that is so serious as to be a national emergency.

#### 4. War Emergencies.<sup>67</sup>

...war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency.

Each type of emergency can be declared by the Governor-General, however, allow different for forms and scope of power to be granted. As such it is clearly acknowledged that the response necessary for a natural disaster is very different to that required by a situation of war, and the limits of power to be granted in each emergency are clearly defined.

In contrast, the approach in international human rights instruments as described above is predominately one of the undifferentiated approach. It is, however, not entirely undifferentiated. While the human rights instruments discussed above apply in all situations and their derogation clauses in all situations of emergency, there are additional conventions, such as the Geneva Conventions, that govern the acts permissible by states during periods of war. These additional requirements mean that in effect distinction is drawn between war and non-war emergencies.<sup>68</sup>

Both the type-oriented and the undifferentiated approaches can be observed in practice. Each has merit. As will be discussed in my proposal for New Zealand below, I suggest that these models do not need to be mutually exclusive in the overall response to emergencies and that one may supplement the other.

#### *B Authority to Invoke an Emergency Provision*

One of the key limitations on the Roman Dictator's power was that the Director could not be self-appointed, instead he was appointed by consuls.<sup>69</sup> However, part of the premise of the modern emergency provision is that it allows for fast action to be taken where not all branches of government have sufficient information. It typically grants the executive, or members of the executive greater power as they are typically deemed to have access to the most information. Typically it is the executive who declares that there is an emergency, and is then granted additional authority. While this situation is not ideal in terms of maintaining a separation of powers, it is accepted due to the time sensitive nature of emergencies. It is the executive who is in the best position to make a decision

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<sup>67</sup> Section 37

<sup>68</sup> As an example see the Geneva Conventions.

<sup>69</sup> Gross, above n 3.

and therefore we permit them to do so. In order to limit potential abuses, limitations are borrowed from the example of the Roman Dictator. The additional powers granted are usually temporal in nature, and cannot be extended without ratification from the legislature.

*C Normative Models of the Scope of the Powers granted following a declaration of Emergency and Interpretation of Human Rights in the State of Emergency*

The second issue regarding the application of emergency powers is determining the scope of power that should be granted, and any limitations that should be placed on it. The following theories give some guidance on the scope of powers that might be granted, and potential any limitations on them.

*1 Logic of Public Emergency*

The Logic of Public Emergency framework can be compared to use of the prerogative to facilitate a response to emergency situations. It relies on a clear separation between the operation of normal law and abnormal a-legality in times of emergency.<sup>70</sup> Thomas Poole defines the basic structure of this framework as there being;<sup>71</sup>

An assertion that fundamental interests are at stake driv[ing] a claim that normal legal pathways and norms are to be suspended and superseded by abnormal, but in the circumstances, necessary methods.

This model has value in analysing the historical use of emergency powers and is heavily influenced by the thinking of Carl Schmidt. Schmidt contended that in a state of emergency, use of emergency provision led to a suspension of the law. The state of exception created following a declaration of emergency allowed for the sovereign to act in a space beyond the law, as the legal order had been used against itself to temporarily suspend itself.<sup>72</sup> This model relies heavily on an ability to draw a clear distinction between norm and exception, between a period of calm and a period of emergency, and presumes that there is an on/off dynamic to the use of emergency powers. While this model can explain use of prerogative powers, where it is clear that the state is acting outside 'normal' authority, and where there is an assumption at the end of the emergency the state will return to its normal function, it fails to explain use of extra-ordinary authority that extends past the initial emergency, or power that is derived from the

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<sup>70</sup> Poole, above n 57, at 4.

<sup>71</sup> At 4.

<sup>72</sup> David Dyzenhaus "Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order" (2006) 27(5) *Cardozo Law Review* 2005 at 2015.

operation of normal legal mechanisms.<sup>73</sup> Laws enacted under the premise of emergency measures, have tended to remain on the books, long after the end of the emergency,<sup>74</sup> and states are more often than not the plea for extra-ordinary authority is made through normal, or near normal, legal channels.<sup>75</sup> The Logic of Public Emergency however, fails to account for the normalisation of emergency laws and as such cannot accurately be applied to modern uses of emergency provisions.<sup>76</sup>

## 2 *Logic of Legal Liberalism*

The Logic of Legal liberalism framework treats any claims by government regarding the existence of a public emergency with scepticism, and considers that they should be subject to checks, ideally by the courts.<sup>77</sup> Should any additional powers be deemed absolutely necessary, it suggests that these are given through the usual legal frameworks, and be subject to external checks, such as through judicial review and the application of normal public law principles.<sup>78</sup> This framework is grounded in the idea that all are subject to the law, and that equality before the law is not changed in any way during turbulent times.<sup>79</sup> Thus any exercise of state power in an emergency, should be subject to the same limitations and checks as it would in ordinary circumstances. However, this framework, in its attempt to compensate for the overreach of state power made under the guise of emergency action, can be criticised for ignoring the facts. This framework fails to positively constrain state power and instead places all the attention on negative constraints in constitutions such as checking institutions and judicial review. It is potentially an overestimation of the capacity of the normal legal regime to respond to emergencies.<sup>80</sup> Furthermore, it ignores the practical application of how general principles are actually applied in situations of heightened tension.<sup>81</sup> For this framework to result in an effective protection of human rights, Courts need to be willing to question the actions of the executive. However, precedent suggests that where there are policy and political considerations, as there almost always are in emergency situations, courts are reluctant to question the decisions made by the executive from a position of hindsight.<sup>82</sup> As such, while there is appeal in subjecting actions taken in an emergency to the usual checks and

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<sup>73</sup> Poole, above n 57, at 5 and 6.

<sup>74</sup> At 6.

<sup>75</sup> At 9.

<sup>76</sup> At 6.

<sup>77</sup> At 6.

<sup>78</sup> At 6.

<sup>79</sup> At 6.

<sup>80</sup> At 8.

<sup>81</sup> At 9.

<sup>82</sup> *Belmarsh*, above n 22 at [29].

balances provided by the usual legal order, to do so would ignore the realities of the situation. Inherent in the use of emergency powers is that the authority given following the declaration of emergency is extraordinary, it therefore cannot be assessed in the same light as ordinary authority.

### 3 *Reason of State*

Thomas Poole advocates for use of the ‘Reason of State’ framework.<sup>83</sup> He considers this to be a highly descriptive framework that draws attention to claims for authority that invoke the states role as a protective agent as opposed to looking for a formal declaration of emergency.<sup>84</sup> Unlike the Logic of Public Emergency, Poole argues that the Reason of State framework can account for the continuous development of law in this area and can be applied in situations where the special measures are authorised using normal legal means in addition to when there is a formal declaration of emergency. Instead of seeking to define the nature of the authority being exercised, the framework is invoked whenever the state is shown to be acting in its role as *custos* – guardian or protector.<sup>85</sup> However, while Reason of State allows for the normalisation of emergency powers, it retains the notions of secrecy associated with use of prerogative powers in times of emergency. As such, exercise of powers under the reason of state can trigger scepticism and prompt investigation.<sup>86</sup> However, unlike the Logic of Legal Liberalism, by identifying that there are exceptional circumstances, the exercise of the exceptional power can be assessed in a manner consistent with the emergency faced. The Reason of State framework, in being applied whenever the state is acting as *custos*, avoids being caught in the same trap as the Logic of Public emergency, and can be applied even where there is no clear distinction between the exception and the norm and where extra-legal authority is given through ordinary legal means.<sup>87</sup>

Accepting the Reason of State justification of emergency powers allows us to examine the application of human rights during periods of emergency, without needing to precisely define emergency. It allows for a scale of emergency, and therefore of response, to be considered as opposed to a binary conception of normal or emergency to which differences in the measures justified by different emergencies are harder to conceptualise. I argue that the flexibility provided in the Reason of State framework is advantageous. While a declaration of emergency acts as a good signpost to the public that things are not

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<sup>83</sup> Poole above, n 57.

<sup>84</sup> At 9.

<sup>85</sup> At 9.

<sup>86</sup> At 10.

<sup>87</sup> At 9-10.

normal, seeking a clear definition of the emergency can cloud the issue. It is unlikely that an emergency situation will fit neatly into a single definition, nor will seeking a clear definition likely to prevent any abuse of human rights. An approach as explained by the Reason of State framework prevents the procedure surrounding the declaration of emergency from being the focus and enables the arguably more important issue of whether the actions taken were justifiable to be the focus. The express declaration of the state that it is acting under authority granted by a state of emergency is an important signpost. Such a declaration should be required before any derogation from any of the rights in The New Zealand Bill of Rights Act 1990 (NZBORA), or any comparable provisions in a constitution, is permitted. Use of the Reason of State method of analysis allows for a substance over form approach to be taken. However, it is important to note that most international instruments require the express declaration of a state of emergency in order for any derogation from human rights to be permissible. New Zealand's commitment to the ICCPR means that although the Reason of State analysis may be of use while no declaration is in force, it cannot be the basis of the definition of emergency if the response requires the temporary derogation from human rights. As a result of its international commitments, any provision for a state of emergency in New Zealand must require an express declaration of emergency through official channels before any derogation from human rights can be sanctioned.

#### *IV Interpretation of Human Rights during an Emergency*

Even in 'normal' times rights are not absolute. Much of human rights jurisprudence concerns situations where rights are in conflict with one another, and there is necessarily a need for one right to be preferred over another. At other times, rights are expressly breached by legislation, justifying limitations on rights.<sup>88</sup> Arguably the same approach can be applied in periods of emergency. The state has an overriding duty to protect the life and liberty of its citizens. As such this overriding obligation to protect these fundamental rights necessitates the temporary breach of other rights such as the right to not be held without cause, or the right of access, or property. What concessions are permitted depends on the circumstances of the emergency.

Its easy to argue on the face of it that we require the state to make an express declaration of emergency and expressly state the provisions they wish to suspend in order for any suspension of human rights to be valid. However even in 'normal' times, express

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<sup>88</sup> See *Moonen v Film and Literature Board of Review* [1999] 5 HRNZ 224 and *R v Hansen* [2007] 3 NZLR 1 as examples.

declaration is not required for a limitation to be placed on a right. The rights of one individual may infringe the rights of another. Rights do not fit together easily in all circumstances. This inherent conflict is reflected in our human rights statutes and methods of interpretation.<sup>89</sup>

Our current interpretation of human rights in New Zealand requires that any breach “as little as possible”<sup>90</sup> or “no more than necessary”.<sup>91</sup> This same approach has been taken internationally in periods of emergency; breaches must be no more than what is necessary.<sup>92</sup>

As such it is possible that our normal law can apply equally to periods of emergency. Arguably this is legal liberalism at work. However, unlike normal limitations on rights, limitations placed during times of emergency are subject to different factual elements, that may justify higher scrutiny, namely that the state is acting with exceptional power. It is, however, arguable that the normal processes of judicial review are the appropriate check and balance on such power, and that judges are capable of taking into account the exceptional factual scenario when making their decision. The emergency simply becomes part of the factual context of the claim and is taken into account accordingly.

However, this fails to account for the reality that judges are unlikely to question actions of the executive or legislature in periods of emergency.<sup>93</sup> Judges, while able to demand that good reasons be given for the declaration of emergency, once such an emergency has been justifiably declared, do not have the requisite information necessary to second-guess any decision of the executive regarding the response to the emergency.<sup>94</sup>

Furthermore, it remains open to criticism of supporters of the legal black hole theory of constitutional emergencies. This theory suggests that in a state of emergency, no normal limitations placed by the law can exist as the law has been suspended. If, given, the declaration of emergency is not always in situations that threaten the very existence of the state, but merely periods of heightened tension,<sup>95</sup> it is desirable that human rights remain

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<sup>89</sup> See *Moonen v Film and Literature Board of Review*, above n 88, *R v Hansen*, above n 88 and the New Zealand Bill of Rights Act (NZBORA) ss 4,5 and 6.

<sup>90</sup> *Moonen v Film and Literature Board of Review*, above n 88 at [18].

<sup>91</sup> *R v Hansen*, above n 88 at [104].

<sup>92</sup> See the ICCPR, above n 35, art 4 and the ECHR, above n 35, art 15 and *Belmarsh*, above n 22.

<sup>93</sup> See the discussion by Dyzenhaus above n 2 at 2020, regarding the position of Sunstein and Ackerman on judges in emergencies.

<sup>94</sup> Dyzenhaus, above n 72 at 2020 discussing Cass R Sunstein “One case at a time: Judicial Minimalism on the Supreme Court” (1999)

<sup>95</sup> Poole, above n 57, at 2.

enforceable despite the declaration of emergency, albeit that such enforcement may not look the same as it would in other contexts.

The black hole theory fails to take into account that even in jurisdictions with a written constitution the obligations on the state as regarding human rights are not found in that constitutional document alone. International law plays a role and can regulate a number of public emergencies, even where parts of constitution have been suspended.<sup>96</sup> As such, international obligations continue to play a role, even during the state of emergency. International law does not suggest that there are not situations in which basic rights may temporarily be eroded. It does, however, limit derogation to situations where the emergency “threatens the life of the nation”,<sup>97</sup> or threatens the “independence or security of the state”.<sup>98</sup> While arguably the derogation that occurs in reality is much wider than these provisions purport to allow, existence of these international obligations outside of a states ‘sovereign’ ability suspend portions of its own laws give weight to the notion that human rights and the rule of law remain applicable even where portions of the constitution are suspended during emergency.

On the face of most emergency provisions, they are designed to be invoked only in situations that threaten the life of the nation. This appears to be a high threshold, however, in practice they have been used in much wider circumstances. The Emergency Powers Act of 1920 (United Kingdom) allowed for a proclamation by the monarch of a state of emergency when;<sup>99</sup>

...any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life.

This Act was used a total of twelve times to invoke a state of emergency, all being in times of industrial strike. The first being when the Triple Alliance called a strike over a wage dispute in 1921, the last being in 1974.<sup>100</sup> As such it is impossible to conclude that the state of emergency is limited to situations threatening the life of the nation. Arguably, emergency measures are necessary in times of industrial strike in order for the necessities

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<sup>96</sup> Sir Kenneth Keith “Seminar to Laws 520” (Victoria University of Wellington, New Zealand, 19 July 2017).

<sup>97</sup> ECHR, above n 35, art 15; ICCPR, above n 35 art 4(1); Arab Charter above n 34, art 4.

<sup>98</sup> ACHR above n 35, art 27(1).

<sup>99</sup> Emergency Powers Act 1920 (repealed) (UK), s 1.

<sup>100</sup> (19 November 1984) 68 GBP D HC 58W.

of life (food, water, electricity) to be available to the public, however, it does not follow that such measures be allowed as a default to breach human rights. As such, while defining an emergency with sufficient clarity to avoid unnecessary breaches, a method of interpretation that enables any response under a state of emergency to be proportional to the situation should be preferred.

*A Application of Normative Models to the Scope of Powers Granted and the effect on the Interpretation of Human Rights*

In *Belmarsh* the House of Lords found that the detention of a number of foreign nationals without charge or trial under the Anti-Terrorism Crime and Security Act 2001,<sup>101</sup> was illegal. In an 8:1 decision, the Law Lords found that the Act was incompatible with the European Convention on Human Rights.<sup>102</sup> The majority found that while the government was the only one who could declare a public emergency which threatened the life of the nation (for the purposes of Article 15 of the ECHR)<sup>103</sup>, the detention provisions in the Anti-Terrorism Crime and Security Act 2001 were disproportionate, discriminatory and not strictly required by the emergency, and therefore unlawful. Poole found that all three models could make some sense of this decision, but that Reason of State was best suited to explain it.<sup>104</sup> The Logic of Public Emergency, while able to comprehend the decision that the government is able to declare an emergency, is not useful in conceptualisation the analysis on the proportionality of the response.<sup>105</sup> While proponents of Logic of Legal Liberalism would hold the *Belmarsh* decision up as an exemplar, the model fails to account for the reality that the decision was made against an exceptional context. While the House of Lords found that the Act was disproportionate in its response to the emergency faced, the majority found that the government had the authority and discretion to decide whether a state of emergency exists.<sup>106</sup> While the decision in *Belmarsh* can be easily justified using the 'Reason of State' model, it is in the analysis of the events that following the decision that the model is of the most use. In response to the declaration of illegality in *Belmarsh* the UK implemented a regime of control orders,<sup>107</sup>

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<sup>101</sup> Anti-Terrorism Crime and Security Act 2001 (repealed) (UK).

<sup>102</sup> ECHR, above n 35.

<sup>103</sup> Article 15.

<sup>104</sup> Poole, above n 57, at 12.

<sup>105</sup> At 12.

<sup>106</sup> *Belmarsh* above n 22 at [26-29]; Poole above n 57, at 13

<sup>107</sup> Prevention of Terrorism Act 2005 (UK), replaced by the Terrorism Prevention and Investigation Measures Act 2011 (UK).



and over a series of cases the limitations on these control orders and the mechanisms required to give sufficient deference to human rights were established.<sup>108</sup>

Thomas Poole in his argument for the Reason of State framework looked at the role of human rights within the Reason of State context.<sup>109</sup> Poole argued that in looking for situations where the state is acting as guardian, we are prompted to ask *quis custodiet ipsos custodiet* or ‘who watches the watchman’.<sup>110</sup> Through identifying that the state is acting with exceptional power, we also identify that there is the potential for abuse of that power. Poole, drawing on the work of David Hume,<sup>111</sup> argued that exceptional claims require exceptional evidence. For Poole this has two elements, which he terms, ‘scrutiny of the exceptional’ and ‘exceptional scrutiny’.<sup>112</sup>

‘Scrutiny of the exceptional’ requires that exceptional circumstances be tested by exceptional means. The more exceptional the situation, the more exceptional the evidence required to justify it will be.<sup>113</sup> Poole uses the *Belmarsh* decision and compares it to the decision of the Australian High Court (HCA) in *Al-Kateb*,<sup>114</sup> to illustrate the value of applying scrutiny of the exceptional. While not concerned with anti-terrorism laws, *Al-Kateb* also concerned the lawfulness of detention of a non-citizen. Unlike the House of Lords, who rendered the decision unlawful in the circumstances, the HCA found that the legislation requiring the removal from Australia “as soon as reasonably practical” was unambiguous.<sup>115</sup> Poole considers this decision wrong, not because it resulted in a violation of fundamental rights, but because the majority examined an extraordinary situation through normal means. He argues, as the Law Lords did in *Belmarsh*, that the HCA should have acknowledged the exceptional nature of the situation when coming to their decision.<sup>116</sup> The Reason of State framework aids identification of such exceptional situations, particularly where the government appears to be acting through normal legal means. Thus ensuring all exercises of emergency powers are subject to scrutiny, in light of their exceptional nature.

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<sup>108</sup> Poole, above n 57, at 20.

<sup>109</sup> At 18.

<sup>110</sup> At 18.

<sup>111</sup> At 18, citing David Hume *An enquiry concerning Human Understanding* (10.8 Stephen Buckle ed, CUP, 2007) at 99.

<sup>112</sup> Poole, above n 57, at 18.

<sup>113</sup> At 18.

<sup>114</sup> *Al-Kateb v Goodwin & Ors* [2004] HCA 37.

<sup>115</sup> At [33].

<sup>116</sup> Poole, above n 57, at 19.

The second mechanism is ‘exceptional scrutiny’, which requires that the procedures used to test abnormal claims are equally as varied to the norm as the claim is.<sup>117</sup> Poole identifies the events following the *Belmarsh* decision, in which the government and judiciary slowly identified the appropriate procedure for the circumstances, as an example of ‘exceptional scrutiny’.<sup>118</sup> The House of Lords decided that terror suspects could not be held without trial.<sup>119</sup> The response to this decision was for the government to implement a system of control orders.<sup>120</sup> The courts permitted these orders to an extent, but in a series of following cases elucidated the procedures required to give sufficient deference to the fundamental rights of suspects. If lawyers could not be permitted to act for suspects, special advocates had to be appointed, and wherever possible, the special advocate had to work with the suspect as close to a lawyer-client relationship as possible.<sup>121</sup> While open proceedings were preferred, where this was not possible hold parts of the proceedings in front of a camera.<sup>122</sup>

In this Poole identifies that the role of rights is not just as a limit on authority, but as a way of engendering a particular style of juridical and political conversation. It prompts deliberation over whether an exercise of extra-ordinary power in exceptional circumstances is may be justified, and if so, how it may be justified. It tames exercise of the Reason of State by subjecting such power to ordinary law and politics through a continued discussion of rights.<sup>123</sup> As explained above, the Reason of State framework cannot be applied directly to any potential use of emergency powers in New Zealand given the express declaration of emergency required by international human rights instruments. However, the principles of it remain relevant to how we might interpret human rights in emergency situations.

### *B Models for Interpretation of Human Rights Law during a State of Emergency*

A significant difficulty in applying Human Rights law is the challenge posed by Carl Schmidt that emergencies, and the potential response to them, are unable to be constrained by law. Schmidt considered that the state of emergency was the law using the

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<sup>117</sup> At 18.

<sup>118</sup> At 20.

<sup>119</sup> *Belmarsh*, above n 22.

<sup>120</sup> Prevention of Terrorism Act 2005 (UK), replaced by the Terrorism Prevention and Investigation Measures Act 2011 (UK).

<sup>121</sup> Poole, above n 57, at 20.

<sup>122</sup> At 20.

<sup>123</sup> At 24.

law to suspend the law.<sup>124</sup> This creates a space beyond the law, where the state is able to act however they think fit, completely unrestrained by any law.<sup>125</sup> Written in the context of the Weimar republic, Schmidt's challenges to the application of human rights law in a state of emergency have some validity and they experienced some resurgence in popularity following 9/11.<sup>126</sup> However, I consider while this approach to be interesting and one that identifies significant legal challenges to any alternative is not one that we should desire to apply. The purpose of an emergency provision is to limit the potential derogation from fundamental norms, acknowledged to be important to the identity of the state – and therefore included in its constitution, as such we should not be so willing to dismiss them. Therefore alternative models need to be considered.

### 1 *International Liberalism*

This model responds to the challenged posed by Schmidt by seeing greater clarity and cogency in the international human rights regime.<sup>127</sup> It aims to prevent potential breaches of human rights, by increasing the legalisation and judicialisation of human rights law at the international level.<sup>128</sup>

In 1994, Joan Fitzpatrick, a proponent of this model, called for reforms of international human rights law that would provide;<sup>129</sup>

- (1) clarification of the threshold of severity to meet the definition of a public emergency justifying suspension of rights;
- (2) stricter and more purely objective application by treaty implementation bodies of the principle of proportionality
- (3) identification of the rights that are functionally non-derogable;
- (4) development of criteria for determining when reservations to derogation clauses or non-derogable provisions are impermissible.

There is definite merit in this approach. The clearer the rules, the more likely courts will be willing to enforce them. However, as identified above, there is significant difficulty in defining what a requisite emergency is. It fails to account for the many political reasons involved in a declaration of emergency,<sup>130</sup> that courts are reluctant to question,<sup>131</sup> or

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<sup>124</sup> Dyzenhaus, above n 72, at 2015.

<sup>125</sup> At 2015.

<sup>126</sup> William F Scheuerman "Human Rights Lawyers v Carl Schmidt" E J Criddle (ed) *Human Rights in Emergencies* (Cambridge University Press, Cambridge, United Kingdom, 2016) 175 at 179.

<sup>127</sup> At 185-186.

<sup>128</sup> At 186.

<sup>129</sup> Joan Fitzpatrick "Human rights in crisis: the international system for protecting human rights during times of emergency" (1994) University of Philadelphia Press, at 224

<sup>130</sup> Scheuerman, above n 126, at 187.

<sup>131</sup> *Belmarsh*, above n 22, at [29].

given its focus on international instruments, the inherent difference in the attitudes of different nations.

## 2 *The Extra-legal Approach*

Unlike the International Liberalism model, this model acknowledges that attempts to codify emergency provisions often backfire as it can normalise the use of emergency powers.<sup>132</sup> In order to prevent the normalisation of emergency measures, proponents of the extra-legal approach attempt to remove the use of emergency measures from the law. While accepting that use of emergency measures are necessary in some situations, they maintain that use of these measures must remain external to the law. In order to limit potential abuse, they require that any use of an emergency measure be publically declared, and its extra-legal nature declared in this declaration, allowing the public to determine retrospectively whether such measures were appropriate.<sup>133</sup> Major proponents of this model, Gross and Ni Aolian defended use of the model as a mechanism of restraining inappropriate uses of power in situations of emergency, stating;<sup>134</sup>

Society may determine that certain extra-legal actions, even when couched in terms of preventing future catastrophes, are abhorrent, unjustified and inexcusable. In such a case, the acting official may be called to answer for her actions and make legal and political amends. She may, for example, need to resign her position, face criminal charges or civil suits, or be subject to impeachment proceedings, Alternatively, the people may approve the actions and ratify them. Such ratification may for be formal or informal, legal as well as social or political.

In this way this theory purports to leave the decision of whether measures were appropriate up to the public, and leave the public to provide the requisite pressure to address any inappropriate action. However, this model, in order for binding consequences on officials to be made, requires legal responses. As such the law is being used to regulate the supposedly extra-legal use of power. While acknowledging that political pressure is a significant limitation on any measures an official takes in an emergency situation, I argue that there remains value in regulating emergency measures with positive law. While allowing in law for use of emergency measures does pose the risk of normalisation, there is merit in establishing clear limits, given the inevitability of situations where the normal rules cannot continue. While political pressure plays a role, this role is more often than not limited to after the fact analysis. Some form of positive limitation on the powers granted, while not a guarantee against breach, increase the

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<sup>132</sup> Scheuerman, above n 126, at 189.

<sup>133</sup> At 189.

<sup>134</sup> Oren Gross and Finnla Ni Aolian *Law in times of Crisis: Emergency Powers and in Theory and Practice* (Cambridge University Press, Cambridge, 2006) at 137.

potential that state officials remain conscious to their obligations to the public throughout the state of emergency.

### 3 *The Fiduciary Theory of Human Rights Law*

This view that there is an on-going responsibility of state actors to protect fundamental human rights throughout an emergency situation is emphasised in the fiduciary theory of human rights law. Evan Criddle and Evan Fox-Decent argue that international law is able to regulate public emergencies through an argument that “human rights are best conceived as norms arising from a fiduciary relationship between states (or state-like actors) and persons subject to their power”.<sup>135</sup> They argue that this theory is able to counter Schimtt’s theory and can reconcile the rule of law and emergency powers.<sup>136</sup> They argue that;<sup>137</sup>

States bear a fiduciary duty to guarantee their subjects’ secure and equal freedom, a duty that flows from their institutional assumption of sovereign powers. International law authorises states to exercise sovereign powers on behalf of their people, but subject to strict legal limitations flowing from the Kantian idea that agents are to be treated as ends always (the principle of non-instrumentalisation) and the republican idea that persons are not to be subject to arbitrary power (the principal of non-domination). On this relational account, human rights are not timeless and absolute moral rights that individuals possess merely because they are human. Rather human rights represent the normative consequences of a state’s assumption of sovereign powers and are thus constitutive of sovereignty’s normative dimension.

The cornerstone of Criddle and Fox-Decent’s argument is that states “bear an obligation to safeguard their subject’s equal freedom during emergencies – even if this requires derogation from form human rights norms such as the freedoms of expression, movement and peaceable assembly”.<sup>138</sup> They make a distinction between peremptory and non-peremptory human rights. Peremptory human rights, such as prohibitions against genocide, slavery, torture, racial discrimination and prolonged arbitrary detention, are fundamentally inconsistent with the state’s obligation to guarantee the public’s safety and freedom, and as such can never be justifiably derogated from.<sup>139</sup> In contrast, non-peremptory rights, such as the freedoms of expression and movement, although widely accepted as basic human rights, are not necessary for the state to protect in all circumstances. In order to fulfil its fiduciary duty to guarantee secure and equal freedom

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<sup>135</sup> Evan J Criddle and Evan Fox-Decent “Human Rights, Emergencies and the Rule of Law” (2012) 34(1) *Human Rights Quarterly* 39, at 39.

<sup>136</sup> At 39.

<sup>137</sup> At 40-41.

<sup>138</sup> At 41.

<sup>139</sup> At 41 and 55.

for its people, these non-peremptory rights may be limited.<sup>140</sup> Such limits are not limited to emergency situations. For example, we require tobacco companies to place health warnings on packaging. This violates their right to freedom of expression, however, such limitation is a proportional and reasonable response given the unilaterally imposed risk posed by tobacco.<sup>141</sup> In such situations, states fulfil their fiduciary duty by restricting other rights.

While this approach, completely undermines Schmidt's challenge by presenting human rights as an obligation that precedes the law and is inherent in the states assumption of responsibility over its citizens, it is arguably too theoretical to have a significant practical impact.<sup>142</sup> This fiduciary theory may help to explain why there is a willingness to accept derogation from some rights in some circumstances; however, the theory is of limited use outside of jurisdictions where the concept of a fiduciary is well established. As a creation of equity, the notion of a fiduciary has limited worth outside jurisdictions with a common law tradition. It is also open to a wide interpretation. Therefore while it may have use in helping Judges to assess a response, it should not be enacted as a minimum standard. If we are accepting the constitutional emergency provision as last resort on restraining state power, subject to proportionality analysis of any measures taken, any limitations on it should be clear and not left open to wide interpretation.

*C International Law statements on non-derogation.*

While provisions are usually drafted with the best intentions, given the reality of an emergency situation, rarely is a limitation on the scope of powers granted under an emergency provision going to be strictly followed. I propose that it is better to have a more fluid approach. While the fiduciary theory explained above may be too theoretical for effective application, the result of creating a list of rights that cannot be derogated from in any situation with the balance of rights being possible to suspend, subject to analysis on whether they are a proportional response to the situation is a plausible approach. This arguably is the approach currently taken at international law. With the exception of the African Charter of Human Rights,<sup>143</sup> most international human rights

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<sup>140</sup> At 56.

<sup>141</sup> At 56-57.

<sup>142</sup> Scheuerman, above n 126, at 197.

<sup>143</sup> African Charter on Human and People's Rights 21 ILM 58 (27 June 1981, entered into force 21 October 1986).

instruments make explicit mention of rights that are not to be derogated in any situation. While the approach is relatively uniform, the content of such provisions is not.<sup>144</sup>

The ICCPR provides that the; right to life, the right not to be subjected to cruel inhuman or degrading treatment or punishment, freedoms from slavery and servitude, freedom from imprisonment solely on failure to meet contractual obligations, freedom from retroactive criminal punishment, the right to recognition as a person before the law, and the freedoms of conscience, thought and religion, cannot be breached in any circumstance.<sup>145</sup> The ECHR has a more limited scope of rights that may not be derogated from. It provides that the, right to life (except in respect of deaths resulting from lawful acts of war), freedoms from slavery and servitude, freedom from torture and the right not to be punished without law, are not to be derogated from.<sup>146</sup> While this is a significantly more limited in scope than the ICCPR, there is a further requirement that any measures taken are consistent with any obligations that a state has at international law.<sup>147</sup> As such in effect the scope of non-derogable rights contained in the ICCPR applies to nations signatory to the ECHR. The Arab Charter of Human Rights provides that;<sup>148</sup>

Such measures or derogations shall under no circumstances affect or apply to the rights and special guarantees concerning the prohibition of torture and degrading treatment, return to one's country, political asylum, trial, the inadmissibility of retrial for the same act, and the legal status of crime and punishment.

The American Convention on Human Rights has the widest list of non-derogable rights. It provides that the; right to juridical personality, right to life, right to humane treatment, freedom from slavery, freedom from ex post facto laws, freedom of conscience and religion, the rights of the family, the right to a name, the rights of a child, the right to nationality, the right to participate in government, or the judicial guarantees necessary to protect the mentioned rights, cannot be derogated from.<sup>149</sup> It also provides that any derogation is not “inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex language, religion or social origin.”<sup>150</sup>

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<sup>144</sup> Evan J Criddle “Introduction – Testing Human Rights Theory During Emergencies” in E J Criddle (ed) *Human Rights in Emergencies* (Cambridge University Press, Cambridge, United Kingdom, 2016) 1 at 3.

<sup>145</sup> ICCPR, above n 35, art 4(2).

<sup>146</sup> ECHR, above n 35, art 15(2).

<sup>147</sup> Article 15(1)

<sup>148</sup> Arab Charter, above n 35, art 4(b).

<sup>149</sup> ACHR, above n 35, art 27(2).

<sup>150</sup> Article 27(1).

In light of the numerous statements at international law on which rights can, or cannot be derogated from in emergency situations, a domestic provision in a constitution may seem redundant, particularly if it is a mere restatement of international obligations, as unlike the obligations owed at international law, where the state may be held to account by other nations, the constituent are the only ones able to hold the state to account for breaches of the constitution, and often the constituent have far less resource than other states do to hold a state to account, short of revolution (in which case the constitution would become irrelevant). However, a constitutional provision might not be as redundant as it appears at first instance. When faced with a genuine emergency, domestic requirements are more likely to be influential over office holders than international obligations.<sup>151</sup> Furthermore, it allows for the individual state to add to the requirements of international law, which are a necessarily a minimum in order to get consensus between states, with requirements that better reflect the attitude of the individual state.

#### *V How does New Zealand regulate Emergency Response?*

In line with our tradition of an unwritten constitution, New Zealand's response to emergencies has largely been in an ad hoc manner. Legislation has been enacted in a response to events, and while general legislation exists, its broad scope means that further legislation and regulation is necessary in many situations. While each of these statutes is not constitutional per se in scope, they legislative approach taken to date in New Zealand may inform the approach we choose to take in any potential constitutional provision.

#### *A Historical Legislative Provisions*

The authority of the executive to invoke a state of emergency has never been in doubt in New Zealand. The royal prerogative enables the executive to recommend that the sovereign (or their representative in New Zealand) declare a state of war. However, from early in our history, there have been a number of statutes that clarify the rights of the executive to invoke a state of emergency. Following the outbreak of World War I, the War Regulations Act 1914 was enacted. It was not until the War Regulations Continuance Act 1920 was enacted, well after the armistice, that these emergency provisions ceased to have effect. The Continuance Act retained many of the restrictive measures contained in the War Regulations Act. A similar approach was taken following the outbreak of World War II. The Emergency Regulations Act 1939 was enacted. This was not repealed until 1947 with the enactment of the Emergency Regulations Continuance Act 1947. This Act remained in force until 1964. While enactment of such

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<sup>151</sup> Gerald L Newman "Constrained Derogation in Positive Human Rights Regimes" in E J Criddle (ed) *Human Rights in Emergencies* (Cambridge University Press, Cambridge, United Kingdom, 2016) 15 at 26.



legislation was undoubtedly justified in the time of war, the longevity of the Continuance Acts demonstrate the trend that emergency provisions often remain in force long after the end of the emergency. General powers of regulation of emergencies were regulated by the Public Safety Conservation Act 1932 (PCSA), which was repealed in 1987.<sup>152</sup> These historical provisions all demonstrate the grant of wide discretionary powers to the executive in times of emergency. Current provisions tend to be more limited in scope.

### *B Current Legislative Provisions*

The nature of the New Zealand constitution means there is no one source of emergency powers. Instead, there is a collection of statutes that provide for extraordinary powers to be granted, and for the derogation of human rights in some circumstances. While none of the statutes discussed below are strictly constitutional in scope, they significantly regulate the distribution of power, and are therefore relevant.

#### *1 Civil Defence Emergency Management Act 2002*

The Civil Defence Emergency Management Act 2002 (CDEMA) is the main source of emergency powers currently in New Zealand statute.

Emergency is defined in s 4 as;

...a situation that –

- (a) is the result of any happening, whether natural or otherwise, including without limitation, any explosion, earthquake, eruption, tsunami, land movement, flood, storm, tornado, cyclone, serious fire, leakage or spillage of any dangerous gas or substance, technological failure, infestation, plague, epidemic, failure or disruption to an emergency service or lifeline utility, or actual or imminent attack or warlike act; and
- (b) causes or may cause loss of life or injury or illness or distress or in any way endangers the safety of the public or property in New Zealand or any part of New Zealand; and
- (c) cannot be dealt with by emergency services, or otherwise requires a significant and coordinated response under this Act

Part 4 of the Act establishes the procedure for the declaration of an emergency. Under s 66, the Minister may declare a state of emergency if it appears that an emergency, of such “extent, magnitude or severity” that it is, or is likely to be beyond the resources of civil defence emergency management, has occurred or may occur. The state of emergency only exists for seven days,<sup>153</sup> but may be extended.<sup>154</sup> Parliament must sit following a

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<sup>152</sup> Public Safety Conservation Act Repeal Act 1987.

<sup>153</sup> CDEMA, above n 19, s 70.

declaration of emergency, but there is no requirement for parliament to ratify any declaration of emergency.<sup>155</sup>

The CDEMA 2002 does not however provide any wide authority for a breach of human rights.

## 2 *International Terrorism (Emergency Powers) Act 1987*

While it is arguable that the International Terrorism (Emergency Powers) Act 1987 (ITEMA) has been impliedly repealed by the Civil Defence Emergency Management Act 2002 as the definition of emergency provided in the CDEMA 2002 is wide enough to include international terrorism, the grant of additional powers above those granted by the CDEMA means that the ITEMA remains relevant.

International terrorist emergency is defined in s 2 as;

- ... a situation in which any person is threatening, causing, or attempting to cause –
- (a) the death of, or serious injury or serious harm to, any person or persons; or
  - (b) the destruction of, or serious damage or serious injury to, -
    - (i) any premises, building, erection, structure, installation, or road; or
    - (ii) any aircraft, hovercraft, ship or ferry or other vessel, train or vehicle; or
    - (iii) any natural feature which is of such beauty, uniqueness, or scientific, economic, or cultural importance that its preservation from destruction, damage or injury is in the national interest; or
    - (iv) any chattel of any kind which is of significant historical, archaeological, scientific, cultural, literary, or artistic value or importance; or
    - (v) any animal –
- in order to coerce, deter, or intimidate –
- (c) the Government of New Zealand, or any agency of the Government of New Zealand; or
  - (d) the Government of any other country, or any agency of the Government of any other country; or
  - (e) any body or group of persons whether inside or outside New Zealand, - for the purpose of furthering, outside New Zealand, any political aim.

However, as with the CDEMA, this Act provides no wide-ranging authority to derogate from human rights.

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<sup>154</sup> Section 71.

<sup>155</sup> Section 69.

#### 4 *Defence Act 1990*

The Defence Act 1990 allow for use of the Armed Forces to assist the police (civil power) in times of emergency.<sup>156</sup> However no definition of emergency is given. This requires that any use of the Armed Forces under action taken under the ITEMMA 1987, be authorised by the Prime Minister.<sup>157</sup>

#### 5 *The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*

The New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993 are the key statements on Human Rights in New Zealand. Neither provide clear statements on whether there are any circumstances in which the rights they enact may be derogated from, however, neither is supreme law, and legislation that is in conflict with the rights stated may be enacted.<sup>158</sup>

Section 5 of NZBORA provides that;

The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

While not providing a clear statement on how to interpret human rights legislation in situations of emergency, it is clear that New Zealand legislation permits the limitation of rights as required by the situation.

#### 6 *Earthquake Response Legislation*

The response to the Canterbury earthquakes, and then the later response to the Kaikoura earthquakes present an interesting case study of emergency provisions in a non-war state. They are particularly relevant, to the New Zealand discussion on emergency provisions as Civil Defence emergencies are the most likely to affect New Zealand. While natural disasters do not threaten the life of the state in the same way that a war is likely to, the protection of the public requires extraordinary measures to be implemented in a short period of time, and in the case of extreme national disaster the derogation from some rights, in order to protect citizens. For example, someone's right to property may be breached, as was done in the creation of a red zone following the Canterbury Earthquakes. Access was restricted almost instantly in order to prevent further injury. Such measures, at least in the initial response are rarely protested, however they are governed by similar if not the same principles to derogation from fundamental rights in extraordinary situations.

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<sup>156</sup> Defence Act 1990 s 9.

<sup>157</sup> Section 9(4).

<sup>158</sup> NZBORA, above n 89, s 4.

Comparison of the approaches taken following two recent disasters can provide important insight into the New Zealand perspective on the use of emergency powers. While the circumstances surrounding the Christchurch and Kaikoura earthquakes are not identical, and therefore some difference in approach is to be expected, an evolution of the legislative approach can be identified, even within the relatively short timeframe between the two disasters.

The Canterbury Earthquake Response and Recovery Act was enacted ten days after a magnitude 7.1 earthquake near Darfield. It permitted for the Governor-General to make Orders in Council, on the recommendation of a Minister, to grant an exemption from, modify or extend any enactment except;<sup>159</sup>

an exemption from or a modification of a requirement or restriction imposed by the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972 or the New Zealand Bill of Rights Act 1990.

In contrast, the response to the Kaikoura Earthquake was far more limited. Instead of allowing a wide ranging power to exempt from, modify or extend any provision in any enactment, a list of Acts that an exemption, modification or extension could be provided for by an Order in Council was given.<sup>160</sup>

While the differences in approach are interesting, the restrictions placed in both these Acts are unlikely to be of great influence in informing a potential constitutional provision. The difficulties in defining categories of emergency explained above, mean that any constitutional provision is likely to be broad in scope.

## *VI Do Derogation Clauses/Emergency Provisions actually help to Protect Human Rights?*

Before considering the content of any provision in a New Zealand constitution providing for a state of emergency to be declared permitting temporary derogations from human rights or the suspension of other constitutional norms, it is important to pause and consider whether such a clause will actually have the intended effect of protecting human rights in emergency situations. The derogation clause is generally understood to be a response to the concern that normal human rights standards may impede any efforts by a state to maintain public order during an emergency.<sup>161</sup> However, it remains uncertain whether such clauses are a mere concession to the sovereign prerogative, or are they

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<sup>159</sup> Canterbury Earthquake Response and Recovery Act 2010 (repealed), s 6.

<sup>160</sup> Hurunui/Kaikoura Earthquake Recovery Act 2016, s 7 and Schedule 2.

<sup>161</sup> Criddle, above n 144, at 3.

intended to advance human rights<sup>162</sup> Derogation clauses in international treaties have largely been ineffective at preventing abuse, given the prolonged state in which the clauses have been invoked.<sup>163</sup> However, it does not automatically follow that a provision of similar effect in a constitution is without value. While at international law the effect of such provisions arguably far less than the drafters intended, value remains in the provision;<sup>164</sup>

Despite the connotations of the term, derogation from a human rights treaty provision in a time of genuine emergency can be consistent with the concept of a human right, so long as the distinction between suprapositive rights and their positive law embodiments is borne in mind. Indeed a properly designed derogation mechanism, applied in good faith and with sufficient international oversight, can be a valuable component of a positive international human rights regime, increasing the protection of many rights in normal times and enabling the protection of life and health in times of emergency.

The merit of any clause needs to be considered with respect to the alternative possible responses.<sup>165</sup> Such a clause can provide certainty over a minimum standard that is to be applied in *all* circumstances – breach of which is considered abhorrent by all, can provide, albeit limited, protection even in the gravest of emergency situations. This ensures that the values embodied in the constitution are not forgotten amidst the effort to restore order. A derogation clause can provide a degree of certainty, but the actual line remains blurred in most cases at international law as other treaties add to obligations, and interpretation varies between states.<sup>166</sup>

As such there is a need for domestic enactment if such clauses are to be properly effective.<sup>167</sup> As discussed above, it is a domestic provision over an international obligation that office holders in an emergency are likely to turn their minds to.<sup>168</sup> Additionally, it gives an opportunity for states to modify and build on international requirements in order to better respect the views of their constituent. Therefore, the

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<sup>162</sup> At 4.

<sup>163</sup> At 5.

<sup>164</sup> Neuman, above n 151, at 31.

<sup>165</sup> At 28.

<sup>166</sup> At 29.

<sup>167</sup> Emile M Hafner-Burton, Laurence R Helfer and Christopher J Fariss “Emergency and Escape: Explaining Derogations From Human Rights Treaties” in E J Criddle (ed) *Human Rights in Emergencies* (Cambridge University Press, Cambridge, United Kingdom, 2016) 83 at 85-86.

<sup>168</sup> Neuman, above n 151, at 26.

potential that it is a mere restatement of international obligations, a provision in a New Zealand constitution would be of value.

## *VII Proposal for a New Zealand Constitution Emergency Provision*

### *A How should New Zealand Define Emergency in its Constitution?*

In accepting the need for a constitution to identify situations where constitutional norms cannot apply, or that the situation requires a modified legal regime in order for efficient and timely management, there is a consequential requirement to define when such exemptions from the normal order are to be permitted. In light of the wide range of situations which might require extraordinary powers to be granted to a branch of government, organisation or individual, it is tempting to suggest that the definition of emergency is framed in a way which allows for clear categorisation based on the severity of the emergency in order to minimise any potential abuses of power or breaches of human rights. Such an approach would allow clear, and entrenched limits on any additional powers granted. However, I doubt that this approach will give the protection it purports to offer.

Even if under a New Zealand constitution, courts were given the power to declare legislation and actions of the executive as unconstitutional, the tradition of parliamentary sovereignty means that it would only be in clear cases of breach that the courts would be likely to make such a declaration. Even in the context of an undifferentiated approach, common law courts have been reluctant to question the actions of the executive in making the declaration of emergency. The House of Lords, in the *Belmarsh* decision,<sup>169</sup> considered that given the political nature of the decision that needed to be made, significant weight should be applied to the judgement of the Home Secretary, his colleagues and Parliament.<sup>170</sup> In order for the appellants in this case to displace the Secretary of State's decision to invoke emergency powers, they would have needed to show strong legal grounds in support of their application.<sup>171</sup> As such, the court did not overrule the decision that there was a state of emergency; rather they rendered the response illegal, as it was disproportionate to the scale of the emergency faced.<sup>172</sup> In addition, a court would be assessing the decision with hindsight, and as such is less likely to question the decisions of officials taken in the moment with the information they had at

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<sup>169</sup> *Belmarsh* above n 22.

<sup>170</sup> At [29].

<sup>171</sup> At [29].

<sup>172</sup> At [42].

the time. If the approach taken in *Belmarsh* is replicated, any misclassification of an emergency is unlikely to be rectified or questioned. Therefore, if there are different categories of emergency, granting different powers, the temptation exists for the executive to classify an emergency as more severe than it actually is (or claim that the information they had at the time indicated that it was more severe) in order to justify more extreme measures for improper purpose.

As such, I propose that any provision in a constitution for New Zealand, should not attempt to classify emergencies based on severity. A broad definition leaves room for the courts to assess the response to the emergency on grounds of proportionality and what was necessary in the situation, rather than the legality of any decision made to declare a state of emergency.

This is in contrast with the approach preferred by the Law Commission in their reports on Emergencies in the early 1990's.<sup>173</sup> The Law Commission recommended a sectoral approach.<sup>174</sup> The Law Commission noted the concern that;<sup>175</sup>

A new "National Emergencies Act" might tighten up the procedures for control of emergency action by Parliament; include specific provisions aimed at ensuring that there was to be no derogation from named individual rights; and facilitate intervention by the courts. The fact remains that a general emergency statute even with these safeguards would impose few restraints on a New Zealand Government, supported by a majority in the House of Representatives, in declaring a state of emergency and assuming wide emergency powers if it chose to do so.

In light of this concern, the Law Commission recommended;<sup>176</sup>

An alternative approach to the handling of emergencies is to include such emergency powers as may be required in sectoral legislation; that is, legislation tailored to the needs of particular kinds of emergency. Although there can still be difficulties in reaching a desirable degree of precision, this legislation can more readily define the emergency, set out the powers that are available to a government should that emergency arise, and describe the procedure by which those powers can be invoked. Safeguards appropriate to the situation can be included.

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<sup>173</sup> Law Commission *First Report on Emergencies: Use of the Armed Forces* (NZLC, R21, 1990); Law Commission *Final Report on Emergencies* (NZLC R22, 1991).

<sup>174</sup> Law Commission, *Use of Armed Forces*, above n 173 at [32]-[42].

<sup>175</sup> At [34].

<sup>176</sup> At [35].

I, however, do not believe that this is the best approach to take when drafting a provision for a constitution. The Law Commission report was concerned with ordinary legislation, not a constitution. I propose that the constitution should provide a broad definition of emergency, in effect to limit any potential use of the prerogative and ensure that all actions taken under the guise of an emergency meet a minimum standard. Ordinary legislation can supplement this constitutional provision and make further classification as required. These ordinary statutes can be amended, and replaced as needed, leaving the constitutional provision to regulate the residual categories, and allow the courts to assess any actions taken under the constitutional provision on a proportional basis without needing to question the declaration itself.

Part 16 of Constitution Aotearoa concerns emergencies. Section 118 (1) provides that;

Where in the opinion of the Prime Minister, within the State or any part of it –

(a) A grave threat to national security or public order has arisen or is likely to arise

(b) A grave civil emergency has arisen or is likely to arise,

the Head of State may, by Order in Council, make provision to the extent strictly necessary by the exigencies of the situation and reasonably justified in a democratic society, suspending in whole or in part, absolutely or subject to conditions, any of the provisions of this Constitution set out in paragraph (3).

This definition is very broad, and could include a wide variety of situations. However, the requirement that any provisions made are “to the extent strictly necessary” places a higher test than the proportionality test required by the ECHR and applied in *Belmarsh*. As such, the breadth of this provision may be appropriate. The courts, as discussed above, are unlikely to question the declaration of emergency, but are likely to question the proportionality and appropriateness of the response following the declaration. Such a broad provision, means it is unlikely that any declaration of emergency be left to the prerogative therefore making all uses of emergency power in New Zealand subject to the test of being ‘strictly necessary’ to the situation. Furthermore, while the constitutional definition is broad it may be supplemented by ordinary legislation, adopting the sectoral approach recommended by the Law Commission. Sectoral ordinary legislation specifying which powers are appropriate in different categories of emergency allow for the establishment of norms in situations such as following an earthquake – a situation which New Zealand faces with some frequency, however, maintains a broad provision to ensure minimum standards are maintained in even in emergencies not previously envisaged by the legislature.



*B Who should have Authority to Declare a State of Emergency in New Zealand?*

Article 118(1) provides that it is the Prime Minister who is able to declare a state of emergency in New Zealand. To this, I recommend that the Governor-General, on the advice of Ministers also be permitted to declare a state of emergency. If a constitutional provision is to govern all declarations of emergency in New Zealand, while maintaining our status as a Constitutional Monarchy, some provision should be made to allow the sovereign (or their representative) to declare an emergency. In addition, by specifying the Governor-General or sovereign's power to declare a state of emergency in the constitution it ensures that the same minimum standards are applied to exercise of this power as when the declaration is made by an elected official.

Another important factor in establishing who has authority to declare a state of emergency, is to establish what is necessary to ratify any actions made under such a declaration.

Constitution Aotearoa does not specify that ratification of the declaration of a state of emergency is necessary, rather it requires that any orders made subsequent to the ratification are ratified. This is set out in Article 118(5)-(7);

- (5) Unless the urgency of the situation makes it impracticable to obtain approval under this Article, an Order in Council under this Article shall not be made unless a draft of the order has been approved by a resolution by a majority of 75 per cent of all the members of the House of Representatives.
- (6) An Order in Council that has been made without having been approved in draft under paragraph (5) ceases to have effect unless, within 14 days after it has been made, it is confirmed by resolution, by a majority of 75 per cent of all the members of the House of Representatives.
- (7) The validity of an Order in Council made under this Article may be challenged in proceedings for judicial review.

I am not convinced that this is the best approach. While parliamentary ratification and the availability of judicial review proceedings are desirable, these provisions may not adequately enable such a process. Assuming the approach that the constitutional provision has a broad definition of emergency, supplemented by ordinary legislation governing different categories of emergency, situations where the constitutional provision alone is governing the emergency, are only likely to be in the gravest and most unpredictable of emergency situations. As such, while a sitting of Parliament should always be preferred, it might not always be possible. Therefore an alternative method of providing a check in a timely manner should be available. The Hurunui/Kaikoura Earthquake Recovery Act 2016 may provide some guidance on an appropriate procedure for ratification should a sitting of Parliament not be possible. Under the

Hurunui/Kaikoura Earthquake Recovery Act 2016, for a Minister to recommend that an order be made, a draft of the order has to be provided to the Committee of the House of Representatives responsible for the review of disallowable instruments, or if the House of Representatives is adjourned, to each leader of a political party represented in Parliament.<sup>177</sup> While an exact replica of this approach would be inappropriate, to require that any orders made following a declaration of emergency be subject to parliamentary ratification or approval from the leaders of parties if Parliament is unable to sit, may be appropriate. Given the likely extremity of any emergency, and therefore the increased likelihood that drastic measures are necessary, where ratification of Parliament is not possible, a shorter timeframe for ratification may also be appropriate. I therefore recommend the following amendments to the suggested provisions in Constitution Aotearoa (amendments are in italics and underlined);

- (5) Unless the urgency of the situation makes it impracticable to obtain approval under this Article, an Order in Council under this Article shall not be made unless a draft of the order has been approved by a resolution by a majority of 75 per cent of all the members of the House of Representatives.
- (6) An Order in Council that has been made without having been approved in draft under paragraph (5) ceases to have effect unless, within 7 days after it has been made, -
  - (a) it is confirmed by resolution, by a majority of 75 per cent of all the members of the House of Representatives; or
  - (b) if the House of Representatives is unable to sit, confirmed by unanimous resolution of the leaders of all political parties represented in Parliament –
    - (i) If a leader of a political party cannot be contacted after reasonable efforts have been made, a representative from the party may act on the leader's behalf for the purposes of paragraph (6)(b).
- (6A) If the situation makes it impossible to contact any representatives for the purposes of a resolution under paragraph (6)(b)(i), the order may be extended for 7 days. An order extended under this paragraph may only be extended once.
- (7) The validity of an Order in Council made under this Article may be challenged in proceedings for judicial review.

*C Scope of Power to be Granted and Potential for Derogation from Human Rights*  
 Given the reluctance I have expressed to define or classify the requisite situation of emergency, or the appropriate response in constitutional documents, any powers granted

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<sup>177</sup> Hurunui/Kaikoura Earthquake Recovery Act 2016, s 8.

would be very wide-ranging. While there is a reluctance to rank human rights, it is generally accepted that some rights are more important than others. I therefore propose, that given the wide range of powers that could be granted, it would be advantageous to create a list of rights that may not be derogated from in any circumstance. While it is entirely plausible that there are situations in which rights on this list are in conflict, and so may be breached, it means action can be bought in respect of them regardless of the state of emergency.

The approach taken at international law, and New Zealand's commitment to the ICCPR means that adhering to a list of non-derogable rights is already a requirement on anyone acting under the authority granted by a declaration of emergency. The list provided in the statute therefore, might be a mere restatement of international obligations, as an affirmation of our commitment. However, it also presents an opportunity for New Zealand to make its own statement on what we consider to be our minimum set of rights.

The emergency provisions proposed in part 16 of Constitution Aotearoa expressly distinguishes between rights that may be suspended in times of emergency, and those that cannot be derogated from in any way, regardless of circumstance. It provides that provisions in the constitution protecting; the right not be deprived of life, freedom from slavery, freedom of thought conscience and religion, equality before the law, freedom from discrimination, rights of persons charged, the minimum standards of criminal procedure, and prohibition of retroactive penalties and double jeopardy, cannot be derogated from in any situation.<sup>178</sup> In effect, these are the same as the requirements imposed by New Zealand's commitment to the ICCPR.<sup>179</sup> In addition to this list of rights, given New Zealand's history of colonialism, I recommend that in order to give effect to the principles of the Treaty of Waitangi, that a provision similar to that in the American Convention of Human Rights whereby any derogation cannot be made if it involves discrimination on the grounds of race, language or social origin be included. Ideally, it should not need to be stated that actions taken should not be on the basis of racial discrimination, to make it clear that even in situations of emergency, where many legal norms are temporarily abandoned, that as New Zealanders we do not accept discrimination based on race is a powerful statement.

Constitution Aotearoa places other restrictions on what parts of the constitution may be suspended following a declaration of emergency. Only Part 12, Articles 75-106

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<sup>178</sup> Constitution Aotearoa, above n 2, s 118(4).

<sup>179</sup> ICCPR, above n 35, art 4(2)

concerning the Bill of Rights, Articles 28 and 29 concerning the duration of Parliament, Article 48 concerning the availability of legislative information and article 50 concerning urgency may be suspended.<sup>180</sup> All other provisions in the constitution cannot be suspended. Given the focus on the applicability of Human Rights following a declaration of emergency in this essay, I will not comment further on these provisions.

### *VIII Conclusion*

The state of emergency presents a challenge to the continued effort to maintain basic human rights. Inherent in the nature of an emergency is an acceptance that the normal order cannot apply. In order for any eventual written constitution for New Zealand to remain durable throughout times of emergency, provision should be made for temporary measures that enable for a timely response to be conducted. However, use of similar provisions the across multiple jurisdictions has not been limited to situations where the life of the nation is under threat. As such, in drafting any provision, it must be acknowledged that the provision is likely to be invoked in times of ‘heightened tension’ in addition to true emergencies. While allowing for temporary derogation form human rights norms is acceptable in situations of true emergency, and should be provided for in order to make it clear what derogations are acceptable, and which would be inconsistent with the obligations of the state to protect its citizens throughout the period of emergency. The difficulties connected with categorisation of emergencies and elucidating the exact measures appropriate for all potential emergency situations means I suggest that any constitutional provision be broad in scope as to form a minimum standard that is durable over time. This constitutional provision should then be supplemented by ordinary legislation that addresses more common and easily conceived emergencies. This creates the risk that the additional authority granted in an emergency is normalised. However, given the unfortunate inevitability that we will encounter emergency situations, I contend that in order to give continued effect to basic human rights, creating established and documented limits on the authority to be granted is the best way forward.

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<sup>180</sup> Constitution Aotearoa, above n 2, s 118 (3).

## Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises 14,652 words.

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