# *Was New Zealand Prepared with an Appropriate Legal Framework to Respond to COVID-19?*

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New Zealanders have had bad experiences of the executive's exercise of extraordinary emergency powers. The response of constitutional lawyers and officials over time has been to confer emergency powers in a relatively narrow and specific way and to ensure there is sufficient parliamentary oversight. Paradoxically, the New Zealand Government recently faced the allegation that while its initial response to COVID-19 was proportionate and justified, it technically acted outside of its legal powers.[1] In this short comment, I briefly set out the history of emergency powers in New Zealand and ask questions about how a court should approach its statutory interpretation task given that context.

In 1845, 1846, 1847, 1860 and 1863, the government invoked martial law against certain Māori whom it treated as "rebels" — including those Māori engaged in passive resistance at Parihaka. Subsequent Indemnity Acts passed by the New Zealand General Assembly in 1860, 1865, 1866, 1867 and 1888, retrospectively validated the actions of the officials (including magistrates) acting in excess of legal powers or relieved them of potential civil and criminal liability.[2] Such declarations of martial law are better viewed as suspensions of law rather than as exemplars of a "special" kind of law.

At later points in New Zealand's history, extraordinary emergency powers did take as their source explicit legislative authority, but that authority was often conferred in very broad terms. The test of whether a state of emergency existed was often left entirely to the uncontrolled judgement of the executive. The Public Safety Conservation Act 1932, for example, conferred on the executive the power to declare an emergency whenever it judged "public safety or public order … to be imperilled".[3] The initial Proclamation of Emergency under the Act was made on 1 September 1939 in anticipation of the outbreak of World War II and the rules made under it concerned essential wartime administration such as conscription. The 1932 empowering statute, however, remained part of the law and in 1951 was used by Prime Minister Holland to send in troops to break the waterfront strike. Associated regulations imposed censorship, conferred sweeping powers of search and arrest and made it an offence for citizens to assist

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1 *Borrowdale v Director-General of Health* [2020] NZHC 2090.

2 The United Kingdom Government disallowed the Indemnity Act 1866 (NZ) in 1877. See John E Martin "Refusal of Assent – A Hidden Element of Constitutional History in New Zealand" (2010) 41 VUWLR 51 at 52, n 3.

3 Section 2.

strikers and their families with food and other means of subsistence. The 1932 Act was not repealed until 1987.

The Economic Stabilization Act 1948 was written in a similar style, and with a similar absence of safeguards. Originally a statute for post-war economic reconstruction, it conferred on executive government broad powers to make any regulations "necessary or expedient" for the promotion of economic stability.[4] Notoriously, it was used to prohibit the use of personal vehicles for one day a week during the oil shocks of the 1970s, and between 1982 and 1984 was used to freeze wages and prices and suspend the work of the arbitration courts. It too remained part of New Zealand law until repealed in 1987.

Against this background, it is unsurprising that the Law Commission's 1991 Final Report on Emergencies pursued two major themes.[5] It was concerned that the assessment of whether an emergency that would trigger extraordinary powers existed should not be left to the Prime Minister's judgement alone, and that a state of emergency should be time limited.[6] The Law Commission counselled against a single statute granting wide emergency powers. It recommended instead that a sectoral approach be taken to prepare for particular kinds of emergency.[7] Strikingly, however, while the Law Commission acknowledged the powers of Medical Officers of Health under s 70 of the Health Act 1956, it had a great deal more to say about biosecurity threats to agriculture than about epidemics.[8]

Parliament revisited the issue of New Zealand's preparedness for an epidemic in 2006, introducing the Epidemic Preparedness Bill and associated reforms to the Health Act in the wake of an avian flu scare. It took the recommended sector-specific approach, though a more general police power to give directions for the purpose of containing an emergency continued to be available in the Civil Defence Emergency Management Act 2002.[9] The new multi-partisan measure purported to address gaps in the Health Act and the Health (Quarantine) Regulations 1983 — in particular in relation to the power to quarantine arrivals by aircraft. It gave Medical Officers of Health powers to give public notices closing premises and requiring infection control mechanisms, powers to take land, buildings and vehicles needed for the control and treatment of epidemics, and powers to require people to remain in place.[10] It authorised police to assist Medical Officers in the exercise of their powers.[11]

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4 Section 11.
5 Law Commission *Final Report on Emergencies* (NZLC R22, 1991).
6 At [1.31]–[1.35] and [5.33]–[5.38].
7 At [1.2]–[1.3], [1.5], [1.22]–[1.24], [2.14], [2.31], [4.1], [4.3]–[4.11] and [5.1].
8 Discussion of infectious disease outbreaks is limited to three paragraphs: [9.16]–[9.18].
9 Section 91.
10 Epidemic Preparedness Bill, cls 18 and 19.
11 Clause 20.

Informed by the Law Commission's report of the previous decade, the parliamentary focus on the Epidemic Preparedness Bill in Committee seems to have been on how such extraordinary powers were to be triggered. It was determined the decision to issue an epidemic notice should not be the Prime Minister's alone, and should instead further require the agreement of another Minister and the written recommendation of the Director-General of Health.[12] Other concerns centred on parliamentary oversight (the issue of whether there ought to be a War Cabinet or special select committee was thought to be better left to politics rather than legislation),[13] and the ongoing application of the New Zealand Bill of Rights Act 1990 (NZBORA) and other constitutional legislation, especially in relation to the apparently extensive powers given to modify existing legislation by regulation in the event of an epidemic. These powers would later prove so narrowly written that they were sometimes less useful than they appeared. The power to modify existing legislation by regulation, for example, arguably did not extend to situations in which the disruption had been caused not by the epidemic itself but by government measures to control it.

While the new Epidemic Preparedness Act 2006 provided for the extension of the list of quarantinable diseases and powers, the main provisions in s 70 of the Health Act continued largely untouched. Once the extraordinary powers had been triggered by an epidemic notice, declaration of emergency under the Civil Defence Emergency Management Act or by a Medical Officer of Health with the authority of a Minister (or all three as appeared to be the case in relation to COVID-19), Medical Officers of Health were given the power to make orders requiring "persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated, quarantined, or disinfected as he thinks fit".[14] It was this power that was relied on to order the lockdown of the population at large and national isolation measures. The scope of the power was one of the issues challenged in *Borrowdale v Director-General of Health*.[15]

At first glance these provisions, which had been lifted almost word-for-word from the Health Act 1920,[16] appear quite narrowly framed. The reference to "disinfected", for example, tends to suggest that the powers in the list were only to be exercised on an individualised basis, rather than in relation to the public at large. This framing would limit the effectiveness of the powers to combating diseases such as plague, yellow fever and typhoid, which could be locally and relatively slowly spread by mosquitos, fleas in

12 (5 December 2006) 636 NZPD 6900. See the remarks of Hon Pete Hodgson at 6900, Hon Shane Ardern at 6902, Hon Darien Fenton at 6904 and Hon Brian Connell at 6985.
13 Hon Shane Ardern at 6902 and Hon Brian Connell at 6986.
14 Health Act 1956, s 70(1)(f).
15 *Borrowdale*, above n 1.
16 Section 76(1)(f).

the case of plague and yellow fever, and infected drinking water or food or faeces in the case of typhoid.

How should a court read these provisions? Should it read the powers expansively to allow government the necessary powers to deal with the current pandemic or should it read the powers narrowly to limit the infringements on individual rights, constrain the powers of the executive and render the lockdown illegal until the enactment of the COVID-19 Response Act 2020? Notwithstanding Lord Atkin's admonition that the laws "speak the same language in war as in peace", how should laws written in anticipation of a genuine emergency be understood?[17]

As it transpired, the High Court in *Borrowdale* took a relatively expansive and purposive approach to the provisions conferring special powers on Medical Officers of Health. It did so using numerous ordinary and some exceptional approaches to interpretation. The Court's forensic exploration of the statutory history of the provisions and how they had previously been used is a commonplace method of statutory interpretation and was applied in the usual way. The Court found, for example, that the same wording had been interpreted widely in the past to restrict movement and impose "something approaching a nationwide quarantine" during the 1925 polio epidemic.[18] The Court invoked the Interpretation Act 1999[19] to authorise a "fair, liberal, and remedial construction" of the provisions, giving them an "ambulatory" reading so that they were capable of applying to the particular characteristics of COVID-19.[20] The ability to interpret a statute to adapt to new circumstances, the Court said, "assumes particular significance when the statutory provisions in question date back over 100 years and yet are called upon to respond to entirely modern events".[21] It read the text "textually, purposively and contextually",[22] and "dynamically and in light of its purpose".[23] Notably, the measures taken by the government to publicise its measures also took a purposive and ambulatory reading of the statute. Public lawyers would have been the first to object if the government had confined itself to notices in newspapers, television and radio, as set out in the statute.

Ordinarily, however, we would also bring a rights lens to bear and read powers that restrict civil and political rights narrowly in order to restrict the extent of the executive's powers. What was exceptional about the Court's approach was that it favoured purposive interpretative techniques over a narrower reading of the provisions that the NZBORA arguably required, or alternatively, that the Court neglected to take account of the

17 *Liversidge v Anderson* [1942] AC 206 (HL) at 244 (dissenting).
18 *Borrowdale*, above n 1, at [54].
19 In particular, ss 5 and 6.
20 At [103]–[104].
21 At [104].
22 At [119].
23 At [114].

purposes of the NZBORA alongside those of the Health Act. In doing so, it gestured towards the obligations on governments to promote public health recognised by international instruments including the International Health Regulations issued by the World Health Organization,[24] the "lesser priority on human rights"[25] in a pandemic and the role of s 5 of the NZBORA as allowing only "reasonable rights",[26] yielding to "the greater good"[27] and accommodating "the rights of others and the legitimate interests of society as a whole".[28] The temporary nature of the s 70 powers and the procedural protections surrounding when they could be invoked were also emphasised.[29]

On balance, I think the Court was correct in its approach to statutory interpretation for two reasons, which I do not have space to elaborate fully here. The first is a theoretical point about the nature and origins of rights. I would not agree with the Court that this is a case where rights should be given a lower priority or even one in which rights should *simply* be forced to yield to the greater good. I agree with John Rawls that civil and political rights are conditional on the satisfaction of certain basic needs — which, in my view, includes the right to be protected from others and to protect oneself from others during a pandemic.[30] This idea is not fully captured by the structure of the NZBORA, which recognises freestanding rights and then allows limits on rights reasonably justified in a free and democratic society.[31] A pandemic that poses an existential threat to human life, in my view, represents an exceptional challenge to the operation of the NZBORA and does not simply involve the ordinary weighing of the societal interest against individual rights.

The second reason is hinted at in the judgment, but I would have given it greater emphasis. The Court suggests that the limits on rights contemplated by s 70 are not capable of justification in advance.[32] Lawyers and legislators in Western liberal democracies who share a memory of the abuse of emergency powers will be wary of designing standing legislation which confers unambiguously *clear*, broad, prospective and temporally unlimited emergency powers that cater to all contingencies. Given the concerted parliamentary focus on *limiting* the conferral of emergency powers in advance, a court should bring a liberal reading to the statutory words when the emergency is a genuine one and the response is proportionate. Moreover, pandemics have particular political features that

24 At [41]–[43]; and World Health Organization *International Health Regulations* (3rd ed, WHO Press, Geneva, 2016).
25 At [70].
26 At [86].
27 At [100].
28 At [95].
29 At [102]–[103].
30 John Rawls *Political Liberalism* (Columbia University Press, New York, 1993) at 7.
31 Section 5.
32 *Borrowdale*, above n 1, at [95].

distinguish them from other forms of emergency, such as threats of terrorism and earthquakes. As the experience of the United Kingdom and the United States has shown, the incentives for Western liberal governments tend to weigh *against acting quickly and with resolve* when faced with a pandemic.