EXTRAORDINARY POWERS AND POLITICAL CONSTITUTIONALISM

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Abstract

During times of emergency situations extraordinary powers may be vested in the executive in order to prevent or reduce its impact. Emergency legislation is usually explicit about its extraordinary nature and requires triggers that enable the executive to use extraordinary powers. However, in recent times, New Zealand's parliament has passed legislation that contains extraordinary powers, yet does neither draw attention to its extraordinary status, nor requires any triggers. As these acts did not directly deal with a threat to life or property, but instead likely had an economic purpose, it appears that Parliament created extraordinary powers out of convenience, rather than necessity. Due to New Zealand's political constitution, acts of parliament cannot be challenged in court. This approach bears the danger of executive creep, where the executive gets more and more power in order to "get things done", with little regard to constitutional safeguards.

I. Introduction

In 2010, the New Zealand Parliament passed the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act) in response to an alleged inability of the regional council, Environment Canterbury, to effectively manage Canterbury's water resources.[1] Between 2006–2008, Environment Canterbury had failed to meet the vast majority of statutory time limits when processing resource consent applications.[2] Canterbury is the home of a large part of both irrigated land and water consumption in New Zealand, and the government decided to pass urgent legislation to rectify the situation. The ECan Act was passed under urgency in March 2010, and it contained several constitutionally significant provisions. *Inter alia,* it provided for the replacement of elected councillors by appointed commissioners, established extensive regulation making powers, and restricting access to the Environment Court.

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1 Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 [ECan Act] (30 March 2010) 661 NZPD 9927; (30 March 2010) 661 NZPD 9930.

2 Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008* (June 2009) Appendix 4; see also (30 March 2010) 661 NZPD 9927.

One year later, the Canterbury Earthquake Recovery Act 2011 (CER Act) was passed in response to the ongoing earthquakes in the Canterbury region. In particular, the February earthquake had had devastating effects on the city, causing many casualties and making large parts of Christchurch uninhabitable. After 10 weeks of a state of emergency, the CER Act was meant to facilitate and expedite the recovery efforts and the rebuild of the region. To that end, it contained extensive executive powers reminiscent of those available during a state of emergency, such as the power to enter or restrict access to premises and roads, control the dissemination of information, and the requisition of property. In addition, the Act contained substantial regulation making powers.

Extraordinary public powers, such as the ones contained within these two Acts, are usually reserved for emergency situations in which ordinary public powers are not sufficient to effectively deal with a crisis. Ordinary constitutional processes are too slow to respond to the immediate needs of the population, so that they must be restricted to enable swift help and relief to those affected. We are therefore accustomed to extraordinary powers in the form of emergency powers provided for by emergency legislation.

Neither of the situations that led to the passing of the ECan Act and the CER Act can be described as emergencies in the traditional sense. While both addressed issues that required solutions, neither case required immediate action. Both situations could have arguably been resolved through normal, or at least less severe means. It may therefore be that the powers created by these Acts are inappropriately broad.

In general constitutional theory, the propriety of emergency powers is determined by establishing the constitutional norm, whether the power in question derogates from that norm, and whether this derogation is justified.[3] However, the constitutional system in New Zealand does not provide for legal means to evaluate the propriety of statutory powers. While the exercise of public powers by the executive can be judicially reviewed, the content of these powers cannot. The reason, of course, is that Parliament is sovereign and its legislation beyond legal reproach. The only way to hold it accountable for its actions is through political means, that is, general elections. This approach to constitutionalism is called political constitutionalism, and it relies on a constitutionally conscientious legislator and a constitutionally aware constituency.[4]

This paper argues that the constitutional safeguards provided in this way have not been working as sufficiently as they could. It appears that Parliament has, on occasion, provided for excessively extraordinary statutory powers (such as in the case of the ECan Act and the CER Act) out of convenience rather than necessity. The paper will first explore the concept of extraordinary

3 John Ferejohn and Pasquale Pasquino "The law of the exception: A typology of emergency powers" 2004 2(2) ICON 210 at 222, 223.

4 Mark Tushnet *Comparative Constitutional Law* (Edward Elgar Publishing, Cheltenham, 2014) at 47.

powers in New Zealand. It will show that, due to the lack of supreme law, no statutory power is technically extraordinary. Any derogation from constitutional norms is justified by the fact that Parliament is supreme. In order to determine what is extraordinary, we have to therefore rely on an explicit statement by Parliament that a given power is extraordinary (for example, powers provided for by the Civil Defence Emergency Management Act 2002, which are available only when a state of emergency is declared). However, taking the literal meaning of "extraordinary", we can find other statutory powers that are extraordinary, not because they have been labelled as such, but because they are unusually broad compared to other statutory powers. The paper will then explore ways to evaluate the propriety of extraordinary powers and how these ways interact with our system of political constitutionalism. It will argue that while such extraordinary powers, particularly those provided for by the ECan Act and the CER Act, are constitutionally "legal", they may not be "legitimate". It will conclude that it may be time to revisit our concept of parliamentary sovereignty and introduce limited review powers as a "soft" check on parliamentary legislation.

II. Extraordinary Powers in New Zealand

When speaking of extraordinary powers, we usually think of powers available to the executive during times of emergency. The constitutional concept of emergency powers dates back at least to the time of the Roman Republic.[5] When Rome was threatened by a crisis (generally a threat of invasion of its territory), the elected Senate would derogate all governmental powers to an appointed Dictator. The mandate of this Dictator was to do anything necessary to avert the threat and resolve the crisis, after which power was transferred back to the Senate and ordinary government resumed. The modern state relies on a set of constitutional rules in order to facilitate and guarantee transparent and limited government.[6] Constitutional processes and procedures slow down decision-making, but a crisis situation does not allow for careful and slow contemplation. The executive may need to be freed from time-consuming bureaucracy and constitutional safeguards. This capacity to suspend constitutional norms and empower the executive may find its justification in the concept of necessity, or it may be inherent to the nature of sovereignty.[7] Regardless, the welfare of the population outweighs the need of strict adherence to constitutionalism: "the constitution is not a suicide pact."[8]

5 Victor V Ramraj "Emergency powers and constitutional theory" 2011 41(2) HKLJ 165 at 170.

6 Tushnet, above n 4, at 49.

7 Carl Schmitt said that "[s]overeign is he who decides on the exception.", Carl Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab MIT Press 1985) (1922) at 5; see also generally Giorgio Agamben *State of Exception* (University of Chicago Press, Chicago, 2005) at 1–31.

8 *Terminiello v City of Chicago* 337 US 1 (Jackson J, dissenting).

Unlike during the time of the Roman Republic, emergency powers today do not generally suspend the constitutional order wholesale.[9] Instead, emergency law tends to respond to the particular needs of the pertinent emergency situation. Which constitutional norms are modified, to what extent, and which extraordinary powers are awarded, depends on the specific situation. Emergency law is tailored towards the requirements of the executive to be able to deal with the crisis situation. For example, extraordinary powers created by the Civil Defence Emergency Management Act 2002 enable the government to deal with natural disasters such as floods and earthquakes. Civil defence emergency management groups have powers to evacuate, clear buildings and roads, create emergency shelters, and direct resources.[10] The Health Act 1956 allows for isolation and quarantine of people in the case of an epidemic.[11]

A. Formal versus Functional Emergency Powers

New Zealand uses the legislative model of emergency law, whereby extraordinary powers for emergency situations are created through ordinary legislation. This stands in contrast to the Neo-Roman model, where extraordinary powers are provided on a constitutional level, that is, they are inherent to the constitutional system.[12] As constitutional provisions tend to be general in nature, constitutional emergency powers tend to be very broad and sweeping. The executive is given a *carte blanche* to deal with the crisis. The Neo-Roman model was popular in Europe during the early 20th century. However, it has given way to the legislative model in most modern democracies for two reasons: (1) the Neo-Roman model is associated with authoritarian regimes, where emergency powers are used to gain influence and suppress the opposition;[13] (2) under the legislative model, emergency law gains additional democratic legitimacy, as it is created by a popular assembly of representatives.[14]

Because emergency powers are created for specific situations under the legislative model, they tend to be spread widely across the statute book. In its review of the legislative response to national emergencies, the Regulations Review Committee has identified 59 pieces of legislation that contain "statutory

9 With the possible exception of Martial Law. However, it is disputed whether Martial Law is still applicable in the NZ context, see NZ Law Commission *Final Report on Emergencies* (1991) at [4.46].

10 Civil Defence Emergency Management Act, Part 5.

11 Health Act 1956, Part 4.

12 Remnants of such broad inherent powers can be seen in New Zealand in the concepts of the royal prerogative, state necessity, and possibly Martial Law; see NZ Law Commission, above n 9, at [4.33]–[4.48].

13 See, for example, Hitler's "legal" rise to power thanks to emergency powers provided for by Art 48 of the Weimar Constitution.

14 Ferejohn and Pasquino, above n 3, at 215.

powers of those exercising public power in an emergency."[15] These range from general emergency powers in dedicated emergency statutes, such as the Civil Defence Emergency Management Act 2002, to more specific powers in cases of epidemics, threats to food safety, hazard substance emergencies, fires, terrorism and war. Although some jurisdictions create one all-encompassing piece of emergency legislation,[16] the New Zealand Law Commission strongly advised against this in its Final Report on Emergencies.[17] It said that such legislation tended to create broad and ill-defined extraordinary powers akin to those under the Neo-Roman model.

All of the statutory powers identified by the Regulations Review Committee are formally designated as powers to be used in case of a pre-defined emergency situation. However, looking only at formal emergency powers does not reveal the full picture of extraordinary powers in New Zealand. It does not uncover such public powers that are formally ordinary, but functionally extraordinary. New Zealand's strong adherence to the concept of parliamentary sovereignty means that, strictly speaking, all statutory powers are ordinary. As there is no higher law than parliamentary legislation, there is no difference between a statutory power created for everyday use by the bureaucracy and one created for exceptional use in times of crisis. Both powers are created through the same legislative process and subject only to review by Parliament itself. To this end, Dicey himself proclaimed that emergency law cannot exist in England.[18]

Of course, while there may be no formal difference between ordinary and emergency law in New Zealand, there certainly is a functional one. Emergency law is meant to be exceptional; emergency powers are excessive, as they must enable swift and effective emergency response. For that reason, such powers are meant to be only temporary, as once the crisis is averted there is no need for such powers.

In political systems where constitutional norms are supreme law, the difference can be measured by the extent to which the powers infringe on constitutional norms, and this determination is adjudicated by a court or some other form of constitutional entity. Parliament in New Zealand, on the other hand, is not subject to external review, and neither is parliamentary legislation. The only adjudicator who determines whether a statutory power is extraordinary or not is Parliament itself. Emergency statutes generally designate certain powers as extraordinary, in that they are only available when

15 Regulations Review Committee *Interim report on the Inquiry into Parliament's legislative response to future national emergencies* (May 2015) at 6.

16 Emergencies Act RSC 1988 c 22.

17 NZ Law Commission, above n 9, at [4.11].

18 Albert Venn Dicey *Introduction to the Law of the Constitution* (5th ed, MacMillan and Co, London, 1897); in response to the Privy Council decision in *Ex Parte DF Marais* (1902) AC 109, Dicey later conceded that martial law could be established by an act of Parliament, Albert Venn Dicey *Introduction to the study of the law of the constitution* (7th ed, Macmillan and Co, London, 1908) at 538–555; see also David Dyzenhaus "The 'Organic Law' of Ex Parte Milligan" in Austin Sarat (ed) *Sovereignty, Emergency, Legality* (Cambridge University Press, Cambridge, 2010) 16–57 at 42–53.

certain conditions are met; for example, during a state of emergency under the Civil Defence Emergency Management Act 2002,[19] when an epidemic notice is issued by the Prime Minister under the Epidemic Preparedness Act 2006,[20] a biosecurity emergency is declared under the Biosecurity Act 1993,[21] or when the Prime Minister believes on reasonable grounds that an international terrorist emergency exists.[22] In each of these cases it is clear that the statutory powers in question only become available upon a clearly defined and urgent situation.

But what if Parliament, by oversight or design, creates a functionally extraordinary power without a clear signpost and which is not subject to strict conditions? In lieu of legal mechanisms to determine the extraordinary nature of such public powers, it may be difficult to detect and distinguish extraordinary powers from ordinary ones.

From a conceptual point of view extraordinary powers follow a certain structure. In order to determine that a provision is extraordinary, we require (1) a norm and (2) a derogation.[23] That means that if the pertinent power is a derogation of ordinary public powers, it must be extraordinary. There are thus two ways of detecting them within the New Zealand context: by comparing "ordinary" statutory provisions with those usually only available during exceptional times; and/or by looking for statutory powers that are so extreme that they are commonly regarded as exceptional.

Both the CER Act 2011 and the ECan Act 2010 illustrate statutory powers that are not formally designated as emergency powers but which contain powers usually deemed extraordinary.

B. Canterbury Earthquake Recovery Act 2011

The CER Act 2011 was passed in order to aid and expedite the recovery of the Canterbury region following the earthquakes of 2010-12.[24] It established a dedicated authority responsible for facilitating the recovery process – the Canterbury Earthquake Recovery Authority (CERA); CERA was tasked to develop a recovery strategy and recovery plans;[25] and the Act created a range of statutory powers to enable CERA and the Minister for Earthquake Recovery to effect the recovery efficiently. Among other powers, the Act provided for the ability to control gathering and dissemination of information,[26] enter

19 Civil Defence Emergency Management Act, Part 5.
20 Epidemic Preparedness Act 2006, ss 4, 5.
21 Biosecurity Act 1993, s 144.
22 International Terrorism (Emergency Powers) Act 1987, s 6.
23 See Ferejohn and Pasquino, above n 3, at 222.
24 Canterbury Earthquake Recovery Act, s 3. The Act was repealed and replaced on 19 April 2016 by the Greater Christchurch Regeneration Act 2016.
25 At ss 11–26.
26 At ss 29–32.

premises and restrict access to buildings and roads,[27] demolish and erect buildings,[28] and requisition property.[29]

While these powers certainly enable and aid the recovery of an earthquake-struck region, they are strongly reminiscent of such powers which had been identified by the Law Commission as typical emergency powers.[30] Even more pertinently, they broadly mirror powers available under the Civil Defence Emergency Management Act 2002 during a state of emergency.[31] That means that the CER Act provided for the continuation of several public powers that are usually reserved for a situation which requires a formal declaration and the availability of which is limited to a seven-day period.[32] It is difficult to argue, then, that the powers created by the CER Act are merely ordinary statutory powers. If such powers are extraordinary during a state of emergency, they are certainly extraordinary in the absence of such a state.

The Act even included provisions that did not apply during a state of emergency. It empowered CERA to compulsorily acquire real property. This power went beyond the ordinary compulsory acquisition powers under the Public Works Act 1981, under which a decision acquire property can be challenged in the Environment Court.[33] In contrast, the CER Act excluded the ability to appeal most decisions made under the Act, including the decision to acquire property compulsorily.[34] Both the compulsory acquisition powers of CERA and the extent to which appeals are limited is clearly out of the ordinary.

Perhaps the most unusual power under the Act was the ability of the Governor-General to create provision by Order in Council and on the recommendation of the Minister for Earthquake Recovery necessary for the purposes of facilitating and expediting recovery.[35] Such a general power to create regulations is usually referred to as a "Henry VIII" clause, as it essentially allows government by decree. Effectively, the executive can create law without the normal parliamentary oversight, and such law can override other primary legislation.[36] The Law Commission regarded such sweeping regulation-making powers as justified only where either the exact measures to deal with an emergency or the nature of the emergency cannot be predicted.[37]

27 At ss 33–34, 45–47.
28 At ss 38–43.
29 At ss 52–59.
30 NZ Law Commission, above n 9, at [3.106].
31 Civil Defence Emergency Management Act, Part 5.
32 At s 70.
33 Public Works Act 1981, ss 23–27.
34 Canterbury Earthquake Recovery Act, s 68; only the amount of compensation for compulsory acquisition may be challenged, s 69(1)(a).
35 At s 71.
36 Tim Macindoe and Lianne Dalziel "New Zealand's response to the Canterbury earthquakes" (paper presented to Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, July 2011).
37 NZ Law Commission, above n 9, at [5.69]–[5.71].

This strongly suggests that Henry VIII clauses are extraordinary and should be used only in extraordinary cases.[38]

C. Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010

The ECan Act also has exceptional constitutional effects and provides for a range of unusual powers. The main effect of the Act is the replacement of democratically elected regional councillors by Government-appointed commissioners.[39] This, in effect, undermines the population's right to elect its own regional representatives and thus undermines democratic principles. Of course, the ability to vote in regional elections has been granted by Parliament in the first place and is thus derived from Parliament's original competency to govern over regional matters.[40] Nevertheless, a derogation from a democratic right, once granted, is not a matter to be taken lightly. Such a step is clearly exceptional, particularly as it only applies to one region – only residents of the Canterbury region have lost their voice on regional council matters.

The Act further contained a range of provisions designed to effect the purpose of the Act. Joseph identifies four unusual constitutional aspects of the Act which are in contravention of rule of law principles: (1) parts of the Act apply to one specific water conservation order and is thus *ad hominem* rather than general; (2) as a consequence of the *ad hominem* provisions, those parts have retrospective effect; (3) it contains a Henry VIII clause by allowing the responsible Minister to override certain provisions of the Resource Management Act 1991; and (4) it restricts the ability to challenge changes to the regional plans in the Environment Court.[41]

These provisions of the CER Act and the ECan Act are clearly extraordinary. In the context of the latter, the Ministry of Justice referred to the removal of elected councillors and the deferral of local body elections as of "constitutional significance."[42] Yet, neither Act required the existence of an extraordinary situation or a specific action to be taken before these powers became available (such as a public declaration of a state of emergency). As such, these provisions are formally ordinary powers; the Regulations Review Committee's interim report mentioned neither Act as a source of emergency powers. This shows that whether statutory powers are formally extraordinary in New Zealand depends solely on what Parliament declares to be extraordinary. It also shows

38 Stephen Argument "Henry VIII clauses – Fact Sheet" (November 2011) ACT Legislative Assembly <www.parliament.act.gov.au>.

39 Environment Canterbury (Temporary Commissioners and Improved Water Management) Act s 9. The Act has been repealed and replaced by the Environment Canterbury (Transitional Governance Arrangements) Act 2016 on 9 May 2016. The new Act allows for seven elected and six appointed members, at s 9.

40 Local Electoral Act 2001, s 19E.

41 Philip Joseph "Environment Canterbury Legislation" (2010) *NZLJ* 193.

42 Cabinet Paper "Response to Review of Environment Canterbury" (29 March 2010) at [102].

that the group of public powers that are formally extraordinary do not include all functionally extraordinary public powers.

III. When is the use of extraordinary powers appropriate?

However, neither Act stood in a constitutional vacuum. They responded to what could be perceived as exceptional circumstances: earthquakes which had devastated large parts of the Canterbury region and a potential water management crisis. It is therefore arguable that these powers, whether they were formally recognised as extraordinary or not, were appropriate for the respective situations. As discussed above, however, there are no constitutional mechanisms to determine the propriety of such extraordinary powers. Without the ability to review statutory powers or a standard against which to measure them, there is a danger that extraordinary powers are normalised and start creeping into ordinary legislation unrecognised.[43]

A. A taxonomy of extraordinary powers

The presence of a legislative review structure does not mean that the determination of whether a statutory power is appropriate is always clear. In the United States, Bernadette Meyler has created a taxonomy of extraordinary powers and the extent to which they can justifiably interfere with constitutional norms.[44] She describes three categories of emergency situations: political, natural, and economic. Political emergencies are situations that have been created directly through human actions. They encompass such events as internal or external armed conflicts (war, civil war, incursions, rebellions, and so on) as well as terrorist attacks. Natural emergencies are, as the name suggests, naturally occurring disasters and force majeure events such as earthquakes, floods, and volcanic eruptions.[45] And economic emergencies are those events that severely and negatively impact the economy of a country. Examples of this are the Great Depression of the 1920s and 1930s or the Greek financial crisis.[46]

Each of these types of emergencies may impact constitutional norms in different ways. The existence of a political emergency may put the very integrity of a country, and thus its constitutional order, at risk – particularly if the country is under occupation or threat of occupation. Consequently,

43 Ferejohn and Pasquino, above n 3, at 219; Oren Gross "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" 2003 (112) Yale LJ 1011, at 1090.

44 Bernadette Meyler "Economic emergency and the rule of law" 2007 56(2) DePaul Law Review at 539.

45 Some argue that the emergency created by natural events is "man-made", as it often is a result of vulnerabilities in the design and construction of buildings and infrastructure, see NZ Law Commission, above n 9, at [2.23].

46 See Gross, above n 43, at 1025.

it may be more easily justifiable to veer from applying strict constitutional procedures if the very existence of the constitution is in peril. Immediate and extensive action may be required, and more intensive infringements on constitutional norms and individual liberties may therefore be acceptable.[47]

Natural disasters, on the other hand, tend to be localised to a specific area of a country. During such emergencies, the primary concern of the state is not the long-term preservation of the constitutional order, as it is not endangered. Rather, the focus is on coordination of emergency services and resources for the rescue effort, as well as general infrastructure concerns in the affected area. Extraordinary powers tend to focus on facilitating rescue efforts and providing emergency relief by expediting decision-making processes and restricting individual rights to movement and property.

Finally, economic emergencies endanger the economic stability of a country, and as such the closely related political and social stability. Therefore, a grave threat to a country's economy can be a threat to the integrity of the state and, thus, its constitutional order. However, not every threat to the economy warrants constitutional derogation: the economy is under constant threat from ordinary events such as unemployment, currency fluctuations, and other adverse events.[48] The threat must therefore be of such severity that only extraordinary action can mitigate long-term adverse effects on the state as a whole. Government action thus generally focusses on fiscal action such as taxation and subsidies. Unless the emergency happens extremely suddenly, however, there is generally no need for extraordinary public powers because the lack of immediacy allows for more moderate and ordinary response.[49] In fact, the Law Commission identified only a few emergency provisions "that might be classified as economic" in New Zealand,[50] while the Regulatory Review Committee identified only one.[51]

Each emergency requires its own set of responses and the extent of derogation from ordinary constitutional processes depends on the specific circumstances of the situation. However, Meyler's taxonomy can act as a guideline. It posits that certain types of emergencies, particularly economic ones, do not require as severe measures as other types of emergencies. As seen above, infringements on political rights, such as the right to vote, to freely assemble, or to other democratic processes, and individual rights, such as the right to life, freedom, or opinion, are less justifiable than infringements on economic rights, which is mainly the right to property.[52] Therefore, as economic emergencies tend to be less urgent or immediate than political or natural emergencies, extraordinary powers that infringe on constitutional

47 At 1026.
48 Meyler, above n 44, at 565.
49 Gross, above n 43, at 1026.
50 NZ Law Commission, above n 9, at [3.104].
51 Under s 9(2) Defence Act 1990, the Armed Forces may be used to provide public services; Regulations Review Committee, above n 15, at 70.
52 Meyler, above n 44, at 565.

norms and processes relating to political and individual rights are less likely to be appropriate.

Meyler writes within the much stricter rights-based context of US jurisprudence. Nevertheless, the underlying premise of her taxonomy applies to the New Zealand constitutional context as well. We can use it as a framework to better evaluate the extraordinary powers created by the CER Act and the ECan Act.

B. Applying the taxonomy of extraordinary powers to the CER Act and the ECan Act

As previously discussed, the extraordinary powers provided for by the CER Act were largely similar to, or even exceeded, those available during a state of emergency under the Civil Defence Emergency Management Act. These powers affected people's property, but also their freedom of movement[53] and access to the courts; it also affected the constitutional relationship between Parliament and the executive in form of the Henry VIII clause. Such powers are quite drastic, but are arguably appropriate in the context of a devastating natural disaster which requires quick and decisive response. In its "Inquiry into Parliament's legislative response to future national emergencies", the Regulations Review Committee suggested that the powers conferred in the CER Act were broadly appropriate, even though some of the powers, in particular the Henry VIII clause, was broader than it needed to be.[54] The Committee suggested, among other things, that emergency powers should be bespoke for each emergency and only confer powers that are strictly necessary; to that end, executive discretion when using such powers should also be limited to the extent necessary to deal with the emergency; and executive action should remain judicially reviewable.[55]

However, the Committee did not address how to determine whether a legislated emergency power is necessary in any given emergency. This is because it did not investigate the different natures of emergencies. It simply accepted the Government's point of view that the recovery of the Canterbury region amounted to a national emergency, which required the CER Act to convey extraordinary powers. It failed to consider that, unlike the Civil Defence Emergency Management Act, the CER Act did not respond to the earthquakes directly. Rather, as its name suggests, the purpose of the Act was to aid the recovery of the region, not to respond to the immediate effects of the

53 Both property and freedom of movement were particularly affected by the so-called "Central City Red Zone", an exclusion zone around the Christchurch Central Business District enforced by the New Zealand Army. This exclusion zone remained in effect for two years; see "Christchurch CBD Cordon Reduction Map" Rebuild Christchurch (26 June 2016) <www.rebuildchristchurch.co.nz>.

54 Regulations Review Committee *Inquiry into Parliament's legislative response to future national emergencies* (December 2016) at 18.

55 At 19-24.

earthquakes. The need for a speedy recovery from natural disasters arises in part out of social and individual needs of the affected population. To be sure, in the months following the February earthquake there was much need for reinstating essential services and demolishing dangerous buildings. However, the main concern of the Act was to facilitate the rebuild of the region, and the primary focus of the rebuilding effort was economic. Without proper roads, a robust system of essential services, and a functioning city centre, the local economy would have receded catastrophically. The purpose of the Act was therefore to mitigate an economic disaster, rather than a natural one.

According to Meyler's taxonomy, this means that extraordinary powers should have been limited to what is strictly necessary in the context of an economic emergency. Initially, powers that exempted CERA from certain provisions of the Resource Management Act or that facilitated public works were arguably appropriate, as they streamlined bureaucracy and thus expedited the recovery process. On the other hand, the restriction of access to the courts and especially the Henry VIII clause were arguably excessive.[56] Admittedly, the Orders in Council resulting from the Act were largely aimed at streamlining and reducing bureaucracy.[57] But each order that overrode parliamentary legislation could have been made by Parliament. At that stage, there was no urgency that required immediate action. As such, several of the extraordinary powers under the Act seem out of proportion and thus inappropriate.

The nature of the situation to which the ECan Act responded is somewhat more difficult to discern. As Canterbury is a major source of fresh water in New Zealand, the lack of water management strategies arguably poses an environmental threat. However, the main reasons given for introducing this legislation were the economic importance of water, both to the Canterbury region and New Zealand as a whole.[58] Many of the arguments relied on the fact that Environment Canterbury did not meet statutory timelines relating to consent applications and the resultant adverse economic effects. As such, removing elected councillors, barring access to the Environment Court, and the Henry VIII clause appear excessive for a situation that is more akin to an economic emergency than a natural disaster.[59]

It can even be argued that, neither during the aftermath of the Canterbury earthquakes, nor during the difficulties with Environment Canterbury, an emergency situation existed at all. In emergency management theory, there

56 See also Andrew Geddis, "An Open Letter to the People of New Zealand and their Parliament" Pundit (28 September 2010) <pundit.co.nz>.

57 "The Canterbury Earthquake Recovery Act 2011" Department of the Prime Minister and Cabinet (12 August 2016) <cerarchive.dpmc.govt.nz>.

58 Ministry for the Environment, above n 2; see also (30 March 2010) 661 NZPD 9927.

59 See also Ike Kleynbos and Ann Brower "Changes in urban and Environmental Governance in Canterbury from 2010 to 2015: Comparing Environment Canterbury and Christchurch City Council" 2015 11 Policy Quarterly at 46; Neil Gunningham and Cameron Holley "Natural Resources, New Governance and Legal Regulation: When does collaboration work?" (2011) 24 NZULR 309.

is a clear distinction between emergency response and emergency recovery.[60] The former requires extraordinary powers in order to respond to an acute threat to people's life and/or property, while the latter does not require such powers, as the immediacy of the situation has passed. By the time the CER Act was passed, most if not all acute threats had passed. Any action taken under extraordinary powers could have been achieved through ordinary acts of Parliament, following ordinary constitutional processes, without further endangering life or property unduly. Similarly, it can be argued that it is doubtful that the situation leading to the ECan Act can be considered an emergency. The decrease in processing consent applications within statutory time limits can be correlated to a 40 per cent increase in dairy farming in the region over the same time.[61] Although this raises issues which needed to be addressed, the government already had abilities within the Resource Management Act and the Local Government Act to respond to these.[62] Moreover, by the time the Act was passed, Environment Canterbury had increased processing times to levels similar to other Councils.[63]

IV. Extraordinary Powers and Political Constitutionalism

Applying Meyler's taxonomy to the two Acts suggests that their use of extraordinary provisions is, at least to a certain extent, inappropriate. Both statutes contain constitutionally significant extraordinary provisions which appear disproportionate to the requirements of their respective emergencies; it is even unclear whether the situations could be deemed emergencies at all.

As mentioned before, however, Meyler writes in a different constitutional context. The constitutional system of the United States is not only more rights-based than New Zealand's, but it is also designed to spread public power more evenly between the branches of government.[64] American constitutionalism (as well as that of many other modern democracies) emphasises the desire to limit government power. It does so by institutional arrangement, that is, a clear separation of powers and a consequent system of governmental checks and balances. Each branch of government has limited competencies and can, to a further or lesser extent, control the actions of the other branches. In particular, it aims to limit both executive and *legislative* power. It is based on the liberal democratic ideal that individual rights must be protected from all

60 NZ Law Commission, above n 9, at [2.25]–[2.29].

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

62 Cabinet Paper, above n 42.

63 Environment Canterbury *Annual Report 2009/2010* (2010) at 70.

64 Jo Eric Kushal Murkens "Constitutionalism" in Mark Bevir (ed) *Encyclopedia of political theory* (Sage Publications, Thousand Oaks (CA), 2010),at 288.

government action, even that of the legislature. As Kushal Murkans puts it: "The *raison d'être* of constitutionalism is the legalization of political rule."[65]

This legalisation comes in the form of legal review mechanisms, wherein the actions of each branch is controlled through judicial means. This concept of constitutionalism requires the existence of some kind of higher law, which establishes these legal mechanisms and provides a standard against which public actions can be evaluated.[66] These rules must not stem from ordinary legislation, as that would allow the legislature to sidestep the controls and thus put it into a superior position. Legal review is generally undertaken by some form of judicial body. In the United States and Canada, for example, this form of constitutional review is undertaken by the ordinary courts.[67] Other jurisdictions employ a specialised Constitutional Court for review of parliamentary legislation, in recognition of the distinctly political aspect of its role.[68]

That means that any powers created by the legislature, be they extraordinary or not, are subject to systemic scrutiny and can be found to be unjustified, and thus void, within the wider constitutional context. In such a constitutional system, Meyler's taxonomy has clearly defined borders. Constitutional norms and individual rights are defined within rules superior to ordinary legislation. Any infringement on such rules can thus be measured against a clear norm, against standards set by the constitution. Of course, this does not mean that the outcome of such an exercise is always clear – the justification for infringements is still up for debate. However, higher law provides for a clear standard of constitutional norms, and legal review mechanisms create a forum in which the propriety of extraordinary public powers can be assessed.

The New Zealand political system does not allow for legal mechanisms to review legislative power. Constitutional compliance is instead achieved through political means.[69] Tushnet explains that the political safeguard lies in the democratic process and the resulting accountability of members of the legislature to the electorate.[70] Parliamentarians are elected on the basis that they represent the views of their constituents. As such, as long as the constituents have an interest in constitutional compliance, the legislature will too. The legislator relies on their constituents' favour in order to be re-elected, and, therefore, will act in their interest. If the constituency is indifferent to constitutional considerations, they have delegated their decision on these matters to the elected legislator. Other political mechanisms, such as a robust legislative process, are meant to ensure constitutional compliance *ex*

65 At 294.
66 At 288.
67 Tushnet, above n 4, at 48.
68 At 49.
69 Mark Elliott "Interpretative Bills of Rights and the Mystery of the Unwritten Constitution" 2011 NZLR 591 at 609.
70 Tushnet, above n 4, at 46.

ante. Particularly the select committee stage provides a forum for reasonable discussion and public input around constitutional considerations.[71]

Political constitutionalism is a necessary consequence of parliamentary sovereignty: there cannot be fundamental law that reigns supreme over parliamentary legislation. Nor can there be any state actor that can find parliamentary legislation void. The legislature is considered the political actor whose powers are neither derived from, nor controlled by any other constitutional entity. The only way to hold Parliament directly accountable for its actions is through the political process of democratic elections. Within such a system, Meyler's taxonomy is meaningless, as public powers cannot be measured against a fundamental standard provided for by higher law. The propriety of extraordinary powers cannot be decided through legal mechanisms; it can only be decided at the ballot box.

The weakness of political constitutionalism is twofold: the legislature may be unaware that a constitutionally problematic provision is embedded deeply within an otherwise ordinary piece of legislation; and legislators may not be conscientious when it comes to constitutional matters.[72] The former can be relatively easily remedied by creating mechanisms which vet proposed legislation for potential constitutional inconsistencies. In New Zealand, an example of such a mechanism is the Attorney-General's statutory role of reporting inconsistencies of any newly introduced Bill with the New Zealand Bill of Rights Act 1990.[73] The latter is not as easily mitigated, and is therefore the basis of much of the criticism levelled at political constitutionalism.[74]

In practice, however, the theoretical difference between legal constitutionalism with its legal review mechanisms and political constitutionalism may not be significant. The threat of the constituency's wrath and the parliamentarian's own constitutional conscience may be sufficient to provide adequate protection of constitutional provisions. In addition, even in jurisdictions in which parliament reigns supreme, the judiciary still plays a part in policing constitutional compliance – it can raise attention to constitutional issues in a "weak form" of judicial review.[75]

The effectiveness of weak form judicial review depends, however, on the goodwill of the government, and, in particular, parliament. Elliott investigates the effects of bills of rights in political systems with unwritten constitutions and parliamentary sovereignty, namely the United Kingdom and New Zealand.[76] Among other things, he addresses the effectiveness of weak form judicial review in the context of political constitutionalism. He finds that

71 JF Burrows and RI Carter *Statute law in New Zealand* (4th ed, LexisNexis, Wellington (New Zealand), 2009) at 87–95.

72 Tushnet, above n 4, at 47.

73 New Zealand Bill of Rights Act 1990, s 7.

74 Murkens, above n 64, at 292, Tushnet, above n 4, at 45.

75 As opposed to the 'strong form' judicial review that can bar parliamentary legislation; see Tom Ginsburg and Rosalind Dixon *Comparative constitutional law* (Edward Elgar, Cheltenham (UK), 2011) at 271.

76 Elliott, above n 69.

New Zealand Bill of Rights Act and the Human Rights Act 1998 (UK) have a transformative effect on their respective countries' constitutions. Both countries' courts have the ability to declare statutory provisions inconsistent with their bills of rights, although only in the United Kingdom is this a statutory power.[77] Elliot finds that in the United Kingdom, this weak form approach to judicial review is exceptionally effective: out of 19 declarations of incompatibility, 18 were remedied by the government.[78]

The United Kingdom government's tendency to react so favourably to the courts' declarations may, of course, not wholly result from their strong desire for constitutional compliance. Other political factors are likely at play, such as the European Convention on Human Rights and the resulting questions about the hierarchical relationship of United Kingdom courts and the European Court of Human Rights; and the United Kingdom's membership in the European Union.[79]

These considerations do not exist in New Zealand. According to Elliot, it appears that the New Zealand government is not as likely to follow the courts' findings.[80] For example, in *R v Hansen*[81] the Supreme Court opined that s 6(6) Misuse of Drugs Act 1975 could not be interpreted in consistence with the right of presumption of innocence contained in s 25(c) New Zealand Bill of Rights Act. Yet, a decade later, the provision remains on the statute books.

Another sign that New Zealand legislators may not be very conscious of, or even conscientious about, constitutional processes is their use of the urgency motion during the legislative process. Urgency allows Parliament to expedite the legislative process by omitting one or several of the stand-down periods between legislative stages (for example, between the Committee of the Whole House stage and the Third Reading stage).[82] Parliament makes use of the motion relatively frequently, albeit mostly in a way that appears constitutionally unproblematic.[83] However, in its most extreme form, urgency allows Parliament to omit *all* stand-down periods as well as the Select Committee stage altogether.[84] In this form, a Bill can be introduced and passed in a single sitting. The only requirement for passing the motion is that

77 Human Rights Act (UK), s 4; see also Claudia Geiringer "On the Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613.

78 Elliott, above n 69, at 61.

79 Murkens, above n 64, at 293.

80 Elliott, above n 69, at 612–613; citing Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] NZ L Rev 443 at 467–472; and Claudia Geiringer "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?" (2007) 11 Otago LR 389 at 397–401.

81 *R v Hansen* (2007) NZSC 7.

82 Burrows and Carter, above n 71, at 85, 86.

83 Sascha Mueller "Where's the Fire: The Use and Abuse of Urgency in the Legislative Process" (2011) 17(2) CantLR at 328.

84 Standing Orders of the House of Representatives 2014, SO 58.

the moving minister give reasons for using urgency. There are no standards regarding the reasons, and they cannot be challenged.[85] Passing legislation at such speed is a substantial derogation from the ordinary legislative process and can, as such, be regarded as an extraordinary legislative power. It is justifiable during exceptional situations, yet it is employed with concerning frequency.[86]

Both the CER Act and the ECan Act were passed in one sitting under urgency. It is arguable that the former Act was urgently required in order to be able to lift the state of emergency which, at the time, had been in force for 10 weeks. However, in view of the fact that, in many respects, the Act functionally extended the state of emergency for five years, a few more weeks of deliberation may have resulted in an Act with fewer sweeping and more appropriate extraordinary powers.[87] As for the latter Act, as mentioned above it is not clear that there was an urgent situation which had to be dealt with in the first place. Even if the water management of the region was heading towards an economic and environmental disaster, it had been doing so for several years and the disaster would not have manifested itself within the next few days of introducing the legislation. This was an ongoing event which did not require urgent and immediate legislation.

V. Legality, Legitimacy, and No 8 Fencing Wire

Within the New Zealand system of parliamentary sovereignty and political constitutionalism, neither Act can be regarded as "unconstitutional". Parliament can create public powers, ranging from benignly ordinary to extremely extraordinary. It is accountable only politically, to the public in general elections. The CER Act and the ECan Act may have included excessive powers and been passed in a constitutionally concerning manner, but they were passed entirely within Parliament's competency.

What Parliament does and what it ought to do are, of course, not the same. Dyzenhaus distinguishes between the *power* of sovereign parliaments to act and their *authority*.[88] He bases this claim on Dicey's discussion of Parliament's ability to legislate for Martial Law, which requires the existence of a statute which is unconstitutional, as it suspends parliamentary sovereignty, but nonetheless valid.[89] Admittedly, neither the CER Act nor ECan Act impact on Parliament's sovereignty, perhaps with the exception of the Henry VIII clauses. But even those do not suspend its sovereignty, as Parliament can withdraw its delegation to legislate at any stage.

85 At SO 57.
86 Mueller, above n 83, at 316.
87 Green Party MP Kennedy Graham raised this concern during the First Reading of the bill (12 April 2011) 671 NZPD 17907.
88 Dyzenhaus, above n 18, at 42–53.
89 At 49.

But, the distinction between power and authority raises an interesting possibility: that there is a difference between a statutory power's constitutional legality and its moral legitimacy. Parliament is free to create public powers, but it should do so within reasonable limits. The legislature holds the trust of the people that it will uphold democratic principles and constitutional ideals. In an ideal world, therefore, the discrepancy between legal and legitimate parliamentary action would be minimal.

Unfortunately, New Zealand has a history of misused extraordinary powers.[90] When dockworkers refused to work overtime after failed wage negotiations in 1951, the government of the day interpreted this as strike action and activated its extraordinary powers under the Public Safety Conservation Act 1932 (PCSA), as it regarded the dockworker's action a threat to New Zealand's economy.[91] By way of regulation, freedom of expression and assembly were restricted and picketing was declared an offence, among other things. Similarly, the Economic Stabilisation Act 1948 (ESA) enabled the Governor-General to create regulations when deemed necessary for the purpose of promoting economic stability. Over the next four decades, governments took frequent advantage of these powers, in particular the Muldoon government in the late 1970s and early 1980s. The excessive use of the ESA at the time led Shelton to lament that there was a growing divergence between constitutional theory and practice, and that "the coherence of the constitution [was] breaking down".[92] The examples discussed in this article suggest a renaissance of economic extraordinary powers.

A tendency apparently exists that governments purport an economic emergency to justify the necessity of extraordinary powers. Meyler argues that this preference to label an event an economic emergency is a result of the popular view that the economy is an uncontrollable force, with which one cannot negotiate.[93] Governments can, therefore, merely react to such a force and thus remove the issue of responsibility for the crisis. That also makes the notion that extraordinary powers are appropriate in such situations more compelling.[94]

The question remains why there are so few political consequences if these extraordinary powers are as constitutionally concerning as this article suggests. Although both the PCSA and the ESA were repealed after the end of the Muldoon era, it took many decades and over 200 regulations before this happened. And while there was some initial public concern about the

90 GWR Palmer and Matthew Palmer *Bridled power: New Zealand's constitution and government* (4th ed, Oxford University Press, Oxford, 2004) at 209–212.

91 Public Safety Conservation Act 1932, s 2(1).

92 D Shelton *Government, the Economy and the Constitution* (LLM Thesis, Faculty of Law, Victoria University of Wellington, 1980) at 392; cited in: Palmer and Palmer, above n 90, at 210.

93 Meyler, above n 44, at 552.

94 At 547, 548.

extent of extraordinary powers under the CER Act and the ECan Act, the government was still in power after two general elections.[95]

The problem lies in the fact that, for political constitutionalism to effectively control excessive government powers, it requires conscientious legislators and a well-informed constituency. As seen above, the history of Parliament's constitutional conscientiousness is spotty at best. This weakness in the political system is exacerbated by the fact that New Zealand's adherence to parliamentary sovereignty is likely the strongest of all modern democracies.[96] The United Kingdom has two parliamentary chambers acting as a check and it is bound to an international human rights regime through its Human Rights Act. New Zealand has neither. Furthermore, our parliamentary system creates a close personal proximity between the legislature and executive, so that the latter plays a major part in creating its own extraordinary powers. And, if the spectre of economic decline is a constant part of the government's rhetoric, constitutional concerns take a backseat in the minds of the constituency facing a purported economic crisis.

This is not to say that the executive is malevolently usurping Parliament's powers. Both the CER Act and the ECan Act were addressing legitimate issues. While these issues likely did not require extraordinary powers (or at least not the extent of these powers), it was more convenient to simply empower the government and "get on with it", unburdened by constitutional processes and bureaucracy. However, this approach to constitutionalism is not sustainable in the long term. Convenience is not a viable replacement for constitutional principle. A sustained use of extraordinary power runs the risk of normalising it. If the use of extraordinary power is not temporary but long term, the powers cease to be extraordinary and will become constitutionally transformative – thus fulfilling Shelton's prediction.[97]

VI. Conclusion

The lack of constitutional safeguards allows Parliament to create extraordinary public powers that are not designated as emergency powers, and are therefore used in non-emergency and ordinary situations. This blurs the line between ordinary and extraordinary powers and may normalise the use of extraordinary powers. As the examples of the CER Act and the ECan Acts show, such blurred lines allow extraordinary powers to be created for the sake of convenience rather than necessity.

95 Andrew Geddis, "An Open Letter to the People of New Zealand and their Parliament" Pundit (28 September 2010) <pundit.co.nz>; Philip Joseph "Environment Canterbury Legislation" 2010 NZLJ 193.

96 Tushnet, above n 4, at 41.

97 Ferejohn and Pasquino, above n 3, at 223.

In its final report on the legislative response to national emergencies, the Regulations Review Committee found that the powers extended to the government by the CER Act had been too extensive.[98] This assessment was particularly due to the broad law-making powers and the lack of safeguards in the Act. But the Committee's recommendations may not be sufficient, as they only extend to formally designated emergency powers and leave the determination of which powers are necessary to Parliament. It may be time to revisit the extent of parliamentary sovereignty in New Zealand. No other modern democracy applies it as strictly as we do, and we should consider adding our own restrictions on Parliament's powers. It is both unnecessary and unrealistic to change our constitutional system wholesale and introduce some form of strong judicial review of legislation. It may be enough to introduce a formal way for our courts to declare a statutory provision to be inconsistent with constitutional principles, and strengthen legislative vetting process before a Bill is introduced in Parliament. This represents an interesting midway point between political and legal constitutionalism, and it allows Parliament to retain its sovereignty.

98 Regulations Review Committee, above n 54, at 18.