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Legality in times of emergency: assessing NZ's response to Covid-19

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ABSTRACT

In response to the Covid-19 pandemic, the New Zealand government has acted to restrict individual freedoms. The legality of the government's actions has been the subject of public attention and litigation in the courts. In this article, we take a theoretical view of the question of legality in times of emergency. We characterise the challenges that emergencies pose to the ordinary legal constraints on public power, such as formal limitations requiring statutory authorisation, protection of individual rights, and institutional safeguards against abuse. We then relate these challenges to timeless questions in legal theory, including questions about the subjection of political power to legal rules, about the differences between mere pretence and robust commitments to legality, and about law's legitimate authority and its legitimate coercion. Focusing on questions most relevant to the New Zealand context, we first examine the values associated with the authorisation of governmental action by legal rules, and explain why a formal fixation on 'authorisation' is not enough to serve these values. We then show how legality's value in supporting law's authority and guarding against illegitimate coercion depends (at least in part) upon its even operation amidst the contextual and contested realities of the exercise of public power.

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Introduction

In ordinary circumstances, law governs the operation of government: constitutional law defines the competences of governmental institutions, administrative law controls their everyday operation, and individual rights delineate the outer limits of their powers. It does so in order to protect persons from arbitrary exercises of public powers to which they are vulnerable, by insisting that governance must be exercised through rules and not simply through threats or use of force. An ideal of 'legality', or what is often described as 'the rule of law', is supposed to protect persons by subjecting governmental power to the requirements of legal rules and principles, and the supervision of legal institutions.[1] Circumstances of emergency challenge law's control over government action. The need

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for a decisive response challenges constitutional structures, favouring swift executive action over slower legislative processes, while the extraordinary character of the emergency calls into question the adequacy of the usual legal restrictions on administrative power and the ordinary balance between the empowerment of government and the protection of individual rights.

Much contemporary media and academic attention focused upon 'the legality of lockdown', and the question of whether the government, at various stages of their response, acted within formal limits set out in legislation (e.g. Geddis and Geiringer 2020; Knight and McLay 2020; Rishworth 2020).[2] That reveals only part of the story. We will argue that the pandemic emergency demonstrates the importance of legal constraints upon governmental action, found not only in adherence to legal rules, but also in practices and principles of legality. These insist that public power must be authorised by legal rules, but also require that those rules must be consistent with the protection of persons and the restriction of power. Not just any rules will do, and even good rules must still be applied and understood in light of broader institutional arrangements and practices that use law as a constraint on public power. This is why any fixation with authorisation alone is misleading and may even be harmful. Enactment of rules that accord too much discretionary power to the executive might satisfy those who wish to see formal authorisation for each governmental action, but would still be an affront to the principles of legality.

Disagreement about the meaning of 'the rule of law', and the content of principles of legality (cf Waldron 2002; Krygier 2016, 2019), means there is no uncontested answer to the question of how to evaluate the legality of governmental action in this time of emergency. We can, however, examine important challenges emergencies pose to the ordinary operation of law. We focus on two related dimensions to identify points of continuity and discontinuity of legality. The first lies in the propensity of governments to observe rule-governed limits to their powers. We explore in this context the different mechanisms deployed by the New Zealand government during the Covid-19 pandemic and analyse their dependence on rule-governed or exceptional approaches to emergency response. The second lies in the broader practices and principles of legality, beyond rule-following, which give effect to principles of legality in order to limit law's coercive impact on the lives of persons subject to the law. Here we examine some of the ways in which failures to live up to the ideal of legality can undermine law's authority and lead to unjustified coercion.

We invoke here an ideal of legality that goes beyond mere conformity to legal rules. Legality in this sense includes a commitment to certain constraints on what legal rules should be. This more demanding understanding of legality is committed to law's forms (including having legal rules that are general, public, clear, and prospective, are consistently applied, and can guide reasoned decision-making)[3]; as well as a secured role for the courts in scrutinising government action.[4] So, for example, retroactive laws and laws removing the supervision of the ordinary courts can be formally valid, but still fail to meet the principles of legality. It is important that such an ideal of legality is not in service of itself, nor is it ultimately in service of those who wield public powers. It is an ideal that rests on values. Overall adherence to these principles of legality, as a constraint on public power, serves those who are subject to that power and subject to law (Dyzenhaus 2006). Principles of legality support respect for persons as subjects of the authority of law, and not (or not only) the objects of state coercion.[5] In a pandemic

emergency in which the actions of those subject to the law are crucial to the successful response to the crisis, it is all the more important that law's ordinary respect for subjects be maintained.

Exceptional and rule-governed responses to emergency

Legal rules, including those found in statutes, regulations, and court decisions, are central to the ordinary operation of modern law. Even in ordinary times, however, legal rules do not fully determine governmental action or judicial decision-making. Administrative agencies and courts often employ the exercise of discretion, with varying degrees of constraint. Discretion is an inevitable and, often, valuable, part of the life of the law. And yet, notwithstanding debates over the relations between rules, principles, and discretion (e.g. compare Hart (1961) 2012; Dworkin 1977), it is clear that the existence of rules and their ability to guide behaviour are prominent features of ordinary legality.[6] It is also clear that there is value in rule-following, at least by public officials, and that there are dangers in excessive discretions. When rules identify a particular set of standards to govern behaviour and a particular set of reasons on which to make a decision, adherence to those rules can breed stability and foreseeability that helps subjects organise their own decision-making, while reducing arbitrariness in both administrative and judicial decisions. To subject public power to the governance of rules is also to insist that deviation from these rules will be the basis of criticism, and (ideally) to provide accessible standards upon which subjects can hold public officials to account. Moreover, if rules are general, their universal and even application by those wielding public power is also supposed to ensure formal equality between those subject to the law.[7] These benefits are real and valuable. Even if they are sometimes relegated due to the demands of justice or exigency, they are, in ordinary times, important enough to justify legality's characteristic insistence on rule-governed behaviour by officials and decision-makers.

Some balance between rule-governed behaviour and discretion is required for a law-based order to exist. Whatever balance there is in ordinary times between rule-governed and discretionary decision-making, this balance faces a three-fold challenge in times of emergency.[8] First, emergencies are often unpredictable, which means that effectively responding to the emergency might require governmental action that is not formally authorised by rules. Second, and relatedly, the ability to operate the institutional machinery that generates new rules requires time and resources that are not always available in times of crisis. Third, if there is no broad agreement on what the response to the emergency should be, dependence on authorising rules freshly issued by a deliberative representative legislature could paralyse the government, preventing any response at all.

These defining features of emergencies make it harder for the executive to effectively address crises within the rules that ordinarily govern its actions, and may tempt the executive either to promulgate self-serving legal rules expanding their discretion, or to dispense with rules altogether. This difficulty is acknowledged by law, which offers a menu of options to deal with emergencies from within the law. Law's responses to emergencies range from rules bestowing extraordinary power on the executive to suspend ordinary laws, through to moderate shifts in the level of discretion accorded to public institutions and officials. Although all of these responses can arguably be seen as available

according to law, they do not all sit equally comfortable with the principles of legality. The danger is that although these powers are authorised by law, their substance might undermine law's protections against arbitrary or unconstrained discretionary power.

With these challenges in mind, and directly evaluating governmental action in both actual and manufactured emergencies, it is possible to locate different governmental reactions to crises along a spectrum between rule-governed and exceptional action. At one end of the spectrum is the exercise of wholly exceptional emergency powers. Such reaction to an emergency is foreign to the normal order of legality, answering to a 'higher law of necessity', obeying Cicero's ancient adage: *salus populi suprema lex esto*.[9] It is at the heart of some traditional mechanisms for dealing with emergencies, such as the Roman dictatorship, the continental *état de siège*, or the English institution of martial law. In twentieth-century Western legal thought, this notion of emergency powers as the inverse of rule-governed behaviour was developed in the work of the German jurist Carl Schmitt. Schmitt, first a staunch critic of the Weimar Republic and later an avid supporter of the Nazi regime, identified the exercise of emergency powers with the broader notion of *exception*, understood as the suspension of the legal order in favour of a moment of (unconstrained) political decision.[10]

For Schmitt, exceptions to rules are pervasive in the ordinary operation of law: in the passing of legislation, in administrative action, and in every judicial decision. According to this view, no decision is ever the product of rule-application (Schmitt 1922). Rather, every decision involves an unruly moment of exception, which is wholly arbitrary from the perspective of the existing rule. Setting a critical theme that resonated both on the left and the right,[11] Schmitt accused liberal ideology of using notions of 'legal neutrality' and 'the rule of law' in order to mask the reality of government.[12] The resulting vision of law and government is stark. Government emerges as the province of political decisions, while rule-governed legality is diminished to an irrelevant pretence (Schmitt 1932). At moments of a threat to the existence of the state, the use of emergency powers does away with that pretence. Declaring a state of emergency explicitly suspends the legal order in favour of sovereign, political action that is free from legal constraints, allowing sovereignty to take centre-stage unmasked. Moreover, the comprehensive nature of such an emergency demonstrates the conditional state of legality in general, which applies (even as a pretence) only as long as it is not suspended by a sovereign power.

The Schmittian understanding of emergency is as a situation in which law recedes, but state power continues to uphold order (Dyzenhaus 1997). This is true regardless of whether the power to declare an emergency is bestowed on the executive by a valid rule. The existence of such authorising rules that allow for the suspension of law does little more than acknowledge the reality of state power beyond the order of legality (Schmitt 1922). The inclusion of comprehensive emergency provisions within liberal constitutions shows the defining limit of the sort of law-governed liberalism that Schmitt deplored (Dyzenhaus 1997).[13] Although one might say that these rules satisfy the healthy desire to have all governmental action formally authorised by law, their substance undermines the idea that law can constrain political power. They position the response to emergency beyond the order of legality.

Diametrically opposed to Schmitt's celebration of the exceptional nature of emergency powers is the view that ordinary legal rules continue to govern unchanged the operation of government at times of emergency. According to this view, ordinary legal rules apply

'equally in war and in peace',[14] setting the competences and limits of governmental power. Invoking extraordinary emergency powers is, according to this view, always illegitimate. This position sees the danger in the Schmittian exceptional approach to emergencies: that allowing for the suspension of ordinary laws can often be the first step towards the replacement of the liberal adherence to rules with an authoritarian government, thus endangering the very idea of legality. Those who hold this view conclude that, in order to eliminate this risk, the ordinary beneficial balance between rule-governed and discretionary decision-making must be preserved even in times of crisis.

In between these two extremes, there is a variety of legal mechanisms that aim to delineate a new balance between rule-governed and discretionary action that is tailored to times of emergency. Such mechanisms often are devised in advance and are authorised by legislation. Their aim is to empower the government to cope with an emergency of a particular type, such as a war, a pandemic, or a natural disaster. Each of these mechanisms involves a particular melange of continuous rule-governed behaviour and exceptional authorisation. On the one hand, these mechanisms allow for additional discretion and suspension of ordinary legal restraints in favour of urgent and decisive action. At the same time, however, these mechanisms try to anticipate emergencies and tailor a rule-based regime that would continue to restrain governmental responses. Such mechanisms thus allow for a more limited deviation from the ordinary balance between rule and exception. They can include special emergency procedures in the legislature, the ad hoc empowerment of certain officials for specific purposes, and changing the standards for judicial protection of individual rights and the delineation of executive powers (Gross and Aoláin 2006). All of these allow for additional discretion and exceptional action while retaining an overall rule-based framework.

One key marker in evaluating a particular mechanism is its location on a spectrum between the exceptional and the ordinary, and the new balance it introduces between rule-governed legality and political decision. This evaluation cannot stop at the formal question of whether governmental action had been authorised by a rule or not. Formal rules that concede too much to exceptional approaches and which authorise excessive discretionary powers unduly remove the response to emergencies from the realm of legality. By that they dangerously give up on the substantive restraint of power and protection of persons. Such deviance from legality, or the interruption of legality, is easiest to spot when it is extreme, as in those countries that have embraced wholesale or widespread suspensions of ordinary laws during the Covid-19 crisis.[15] They can be present, however, even in less dramatic authorising mechanisms on the spectrum between ordinary legality and exceptionalism.

We will come back in later sections to the principles of legality and the importance of their formal and substantive commitments to the restraint of power, which can take a range of forms inlegal doctrines, practices or decisional outcomes. First, we locate New Zealand's response to COVID-19 along this continuum, and in light of the challenge to uphold and not just pay lip-service to legality.

Locating legality in NZ's Covid-19 response

Successive governments have progressively moved New Zealand's emergency framework from one which has featured shameful incidents of the legally authorised suspension of

law, towards an approach which embraces a much thicker conception of legality. Martial law was invoked against Māori 'rebels' in the 1840s and 1860s, and subsequent legislation retrospectively validated the actions of officials (including magistrates) acting in excess of legal powers or relieved them of civil and criminal liability.[16] Such wholesale invocations of exceptional powers did not occur, or were rejected, in the government's response to COVID-19. Even so, elements of exception continue to be detectable.

In any statutory framework of rules conferring extraordinary powers on the government in advance of an emergency, a critical question will be who gets power to decide whether a state of emergency exists. Leaving the decision to the uncontrolled discretion of the executive adopts a rule, but one which effectively allows the executive to decide the appropriate (Schmittian) moment to step outside the order of legality. 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 imperiled'. Initially used for wartime administration, in 1951 Prime Minister Holland used it to declare a state of emergency in order to send troops in to break up the waterfront strike. Associated regulations imposed censorship, conferred sweeping powers of search and arrest and made it an offence for citizens to assist strikers and their families with food and other means of subsistence. The notorious Economic Stabilisation Act 1948 was written in a similar style, and with a similar paucity of safeguards. It was invoked by Prime Minister Muldoon to freeze wages and prices without the scrutiny of Parliament in 1984. Both of these Acts were properly passed by Parliament and conferred power on officials by rules. But those authorising rules delegated almost uncontrolled and unlimited power to the executive. Despite numerous attempts to challenge the orders made under them, both Acts remained part of New Zealand law and available to prime ministers until 1987.[17]

As a consequence of these experiences, lawyers and politicians became suspicious of the practice of conferring general powers on governments to declare an emergency in the public interest. There was a shared, if not fully articulated, intuition that such rules, while useful to governments, fell short of a broader conception of legality. The newly preferred approach was to design rules to govern sector specific kinds of emergencies.[18] Much of the deliberation surrounding the enactment of the Epidemic Preparedness Act 2006 and its associated changes to the Health Act 1965 was also focused on ensuring that the assessment of whether a health emergency triggering extraordinary powers actually existed should not be left to the Prime Minister's judgment alone.[19] The 'politics' of the activation of extraordinary powers was made more rule-bound and required the advice of officials at significant points. Once activated, however, the Epidemic Preparedness Act 2006 allows Acts of Parliament to be modified or suspended by executive regulation. This is plainly an inversion of the usual constitutional rules requiring that the executive should be subordinate to Parliament, that only Parliament can make or unmake law, and that the executive cannot suspend the law. Again there are attempts to maintain more than a veneer of legality. There are *legal* restrictions on what can be modified and the extent of those modifications (e.g. the New Zealand Bill of Rights Act 1990 still applies) and there are mandatory procedures for parliamentary scrutiny after the fact (the latter being a relatively rare legislative intrusion into the internal processes of Parliament, again rendering politics itself more legally rule-bound).

Other extraordinary powers to respond to a pandemic are set out in s 70 of the Health Act 1956 and require procedures for their activation.[20] Section 70(1)(f) gave power to

Medical Officers of Health (including the Director-General) to make orders requiring 'persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated, quarantined, or disinfected as he thinks fit'. It was this power which was relied on to order the lockdown of the population at large and national isolation measures. At first glance these provisions are apparently quite narrowly framed. The reference to 'disinfected', for example, tends to suggest that the powers in the list are only to be exercised on an individualised basis rather than in relation to the public at large. Such a reading 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.

How should laws written in anticipation of a genuine emergency such as s 70 (1)(f) later be read and understood? Should a court apply the techniques of ordinary statutory interpretation or adjust these for extraordinary circumstances? 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 thus render the lockdown illegal until the enactment of the COVID-19 Public Health Response Act 2020?

These were some of the issues confronting the court at first instance in *Borrowdale v Director-General of Health* (currently on appeal to the Court of Appeal).[21] As it transpired, the High Court in *Borrowdale* took a relatively expansive and purposive approach to the provisions. It did so using numerous ordinary and some moderately exceptional approaches to interpretation. So, for example, the Court's forensic exploration of the statutory history of the provisions, tracing their nineteenth century origins, and identifying their remedial purpose are commonplace methods of statutory interpretation. The Court found 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.[22] It invoked the Interpretation Act 1999 which mandates a 'fair, liberal, and remedial construction'[23] and an ambulatory reading so that the provisions are capable of applying to the new particular characteristics of COVID-19.[24] 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'.[25] It read the text 'textually, purposively and contextually',[26] 'dynamically and in light of its purpose'.[27]

Ordinarily, however, courts would also bring a rights lens to bear on statutory interpretation as required by the New Zealand Bill of Rights Act 1990 and would read powers which purport to restrict civil and political rights narrowly to constrain the extent of the executive's powers.[28] What was perhaps exceptional about the Court's approach was that it favoured expansive interpretative techniques over a more narrow reading of the provisions, (or, to put it another way, it did not read the Health Act through the rights-protecting purposes of the NZ Bill of Rights or read protected rights themselves dynamically). Emphasising the temporary nature of the s 70 powers and the procedural protections surrounding when they could be invoked, it gestured towards the obligations on governments to promote public health recognised by international instruments, the 'lesser priority on human rights'[29] in a pandemic and the role of s 5 in the NZ Bill of Rights Act as allowing only 'reasonable rights',[30] 'yielding

to the greater good'[31] and accommodating 'the rights of others and the legitimate interests of society as a whole'.

Given these and other questions surrounding the extent of the government's powers to act, it is not surprising that once Parliament was again able to meet, it enacted the COVID-19 Public Health Response Act 2020, which sets out prospectively and clearly the government's wide powers to deal with COVID-19 specifically. Enacted at a point when the *Borrowdale* challenge to the legality of the lockdown had commenced in the High Court but before it had been decided, it is striking that Parliament did not take the step of retrospectively validating any of its actions even 'for the avoidance of doubt'. Rejection of such an extraordinary (though not unprecedented) action represents an important commitment to the continuity of legality in times of emergency. The use of an authorising (retroactive) rule would have been contrary to the principles of legality. In particular, it would have undermined judicial review of governmental action during the emergency.

The Act leaves intact the standing statutory regime for dealing with future emergencies: it is temporary (expiring every 90 days unless reenacted by Parliament, and being automatically repealed two years after commencement); and the scrutiny of Parliament is preserved. These factors are in keeping with the use of law to operate specific and special responses tailored to a particular emergency. Yet there is cause to be concerned whether the Act's formally clear, general, prospective rules are sufficiently supportive of legality. It meets the objections made by the *Borrowdale* critics of the absence of clear authorising rules, but it does so in a way that may endanger liberty and legality more insidiously – by enacting rules that recognise the reality of necessity, bestowing broader exceptional powers on the executive.

The Act has drawn criticism for the manner in which it was prepared and passed: under urgency, without meaningful consultation with Māori or the Parliamentary and public scrutiny to which legislation is ordinarily subjected. Despite surviving a s 7 vetting process for compliance with the NZ Bill of Rights Act, it has attracted criticism for its substantive impositions upon rights and freedoms that are ordinarily protected and respected in New Zealand law (for instance, it authorises the police to enter private homes without a warrant, and provides for authorised persons – including though not only police – to enter marae without prior consent) (see Human Rights Commission 2020). Neither the broader human rights concerns nor provisions directly affecting the Treaty relationship were exposed to public deliberation. Amidst these shortcomings, the government eventually adopted the extraordinary approach of submitting the Act to Select Committee scrutiny after it was passed – a process with political significance though without any immediate legal effect on the Act itself.

Does this narrative confirm Schmitt's view that the law's claims to constrain power is a chimaera and that in fact exceptions to rights and hence to the law are pervasive? We do not think so. Rather, it indicates just how demanding legality is. Rule following, which has been the focus of the litigation and much of the commentary, is not sufficient by itself. Legality also comprises the practices and principles engaged in getting the rules right.

How one evaluates rights compliance during this time depends on how one understands the nature of rights themselves and their relation to notions of legality – both controversial issues in legal theory which we do not take a position on here. Some theorists contend that genuine rights trump all collective concerns. According to one view of the

way in which rights are embodied in the NZ Bill of Rights, individual rights can, with sufficient justification, routinely be allowed to yield to society's collective interests. On another view, the present context is not a routine case of balancing individual rights against collective interests, because the way a pandemic foregrounds 'the safety of the people' brings the background conditions of liberty to the fore.

Contrary to Schmitt's view that what happens in an emergency unmasks how much law serves only as a veneer in ordinary times, the existence of an emergency may, in fact, reveal a political community's deeper commitments to legality's foundational value of respect for persons and its disciplining of power to that end.

The application of power under legality: ultra vires or ultra virus?

To understand these deeper commitments, we need to consider the values that a political community seeks to protect when trying to preserve a balance between rule-governed and discretionary decision-making in times of crisis. Whilst we can appreciate the efficacy and necessity of discretionary decision-making when there is a radical shift in circumstances, even where the discretionary powers are authorised by the law, how those laws are applied engages an important dimension of legality. Where rules are applied, not merely as a veil to authorise emergency powers, but to identify the reasons for which (even broad) powers can be exercised, rules provide accessible, stable, and predictable, standards to which public officials can be held. To explore this, we can examine the initial four Orders issued by the Director-General of Health. An examination of these Orders can help us isolate the values of legality in times of emergency, to show why it matters that rules are not only the right rules (rules that serve to protect subjects rather than those wielding public power), but that they are also clear (and clearly publicised), and that they be applied both to constrain and to supervise governmental decision-making. We can then begin to isolate how these principles relate to a specific set of concerns with the exercise of legal authority and coercion in times of emergency.

For some, the concrete question at the time of the initial four Orders, and then later in judicial review proceedings, was whether these Orders exceeded the empowering provisions (i.e. *were ultra vires*). More abstractly, the question becomes whether the issuing of the Orders was a rule-governed activity. On this point, the legal advice to government, the academic commentary, and the first cause of action in High Court in *Borrowdale*, centred around the specific language of s 70(1)(m) and (f). It is noteworthy how the commentary and analysis side-lined the broader context of virus infection rates and economic forecasts, in favour of a narrower focus on the specific text and the meaning of 'persons' (rather than 'people') in s 70(1)(f) and 'all premises' (rather than 'all locations') in s 70(1)(m). Whilst these interpretative questions were never in a vacuum, quarantined from competing civil liberties and basic needs, they were nonetheless interpretive questions (perhaps even common place or 'garden variety' interpretive questions for administrative law). As interpretive questions, there was a narrowly focused evaluation of the meaning of legal rules, blinkered from the general evaluation of the government's response to the pandemic.

This narrow focus is the product of a particular practice that treats legal rules as representing standards that ought to govern official behaviour, that accepts that the application of such rules are at the exclusion of other reasons that they may otherwise seek

to act upon, and accepts that deviation from these rules will be the basis of criticism (Hart (1961) 2012, p. 90, 137). Regardless of the interpretive finding in *Borrowdale* (whether or not the orders were *ultra vires*), this practice of viewing legal rules as the basis upon which public officials may have authority over others, and demarcating the reasons upon which such officials can act, is something that is distinctive of legality, even in the time of emergencies. Once officials accept the application of rules, whether or not a reason for action is excluded by the rule depends upon the interpretation of the rule, and in particular, a disciplined approach to interpretation that is informed by the value of having accessible, stable and predictable standards to which public officials can be held. Hence, interpretation in light of the principles of legality is distinctively valuable, as it can reduce both the risk of arbitrary decision-making and the unauthorised use of coercive power.

Against this backdrop, we can appreciate why the exercise of broad discretionary powers, even when it is authorised by rules, can threaten the values of legality. When a rule's language does not succeed in narrowing the reasons upon which a person can act, the rule does not provide a limited set of reasons upon which they may exercise power. For example, if there was no 'clear and fixed' meaning of an 'essential businesses' in Order 1 (issued on 25 March 2020 under s70(1)(m) of the Health Act 1956), then it would not be possible to criticise the Director-General of Health for any misapplication of the requirements in Order 1. Without a sufficiently clear and confined meaning, the power to open or close a business would be an arbitrary power. It is not the conferral of discretion that generates arbitrary power, but the application of indeterminate or vacuous standards. We can appreciate how the use of indeterminate statutory powers thus generates the potential for unchecked discretion, all the while retaining the pretence of a rule-based framework. Unclear rules keep no one in check. Legality therefore requires the exercise of authority not just to be sanctioned by a set of legal rules, but the rules themselves must isolate a particular set of reasons upon which a person can act, and upon which others can criticise that action.

Beyond these ways in which clarity of language is necessary for rules to constrain power, we can also appreciate why the exercise of public power beyond the governance of legal rules threatens law's deeper commitments. When a public official (such as the Prime Minister) employs 'imperative language' in statements that 'conveyed that there was a legal obligation on New Zealanders to … stay home and remain in their bubble',[32] we expect that claim to authority, accompanied by a coercive regime of fines and other punishments (including prison sentences), to be authorised by the law. However, according to the High Court in *Borrowdale*, for the nine days between Order 1 and Order 2 (issued on 3 April under s 70(1)(f) of the Health Act 1956), the obligations under Order 1 (issued under s 70 (1) (m)) were not as extensive as those public statements implied. On one hand, this might seem to be a pedantic concern about an oversight in speech writing, in the context of interpretive disagreement around the meaning of s 70(1)(m), especially since the same requirements could have been (and were nine days later) imposed under s 70 (1) (f). On the other hand, the public statements implied an authorisation from the law that could not be located in enacted legal rules at the time. A commitment to viewing the law not merely as a series of legal rules, but as standards of official conduct, uses the otherwise pedantic details of paragraphs (f) and (m) to determine whether there is a legal basis to officials' demands, and whether, on

that basis, there are grounds to criticise their exercise of power. In comparison, the Government in the United Kingdom, as Tom Hickman explains, used a 'fusion of criminal law and public health advice in the coronavirus guidance as a *sui generis* form of regulatory intervention that sits outside the regime of emergency governance established by Parliament' (Hickman 2020, p. 3). The value of the rules therefore depends on a broader practice of legality, involving other officials and lawyers, which is committed to applying the rules, rather than exploiting the 'normative ambiguity' between rules and guidance (Hickman 2020, p. 1).

Moreover, following the easing of the lockdown restrictions (in Order 3 on 24 April under paragraphs 70(1)(m) and (f), and then under 'Order 4' with the use of the newly enacted Response Act), the concern for the commitments of legality remains. Broad discretionary powers, which are needed in times of emergency, still ought to be exercised according to a legal standard that can identify the reasons for which those powers can be exercised. Without such reasons, those who are subject to the burdens and demands of public power are deprived of both the ability to question the legal basis of that power, and – as we shall turn to consider – the ability to organise their behaviour around its terms. Whilst the former ability concerns how laws are applied and how legality constrains public powers, the latter matters for the question whether law has legitimate authority over subjects.

Law's authority and law's coercion: ideals and reality under emergency

The Prime Minister's 'imperative language' raises a key concern about public power that is amplified in times of crisis. The particular mechanisms through which the New Zealand response is being effected impact not only upon what officials can do, but also upon private persons and their subjection to law. So far, our emphasis has been on the value of legality for constraining governmental power. The final point we wish to make is that this substantive restraint is important for evaluating law's authority over subjects – law's capacity to obligate subjects – and the ways in which an ideal of legality figures in that evaluation. Law's constraints on public power can be seen as requirements for law to have legitimate authority over persons, while officials' departures from those constraints could mean that persons subject to law are not being served by legitimate legal authority, but are simply being coerced to comply with orders in ways that disrespect them as persons.[33]

More concretely, the subject side of the story of legality in times of emergency asks why all of this matters. Does it matter whether the Prime Minister obliges, advises, or coerces subjects to stay home? What, if anything, is the difference between these forms of power (and their values), in general, and as highlighted in times of emergency? Those questions require attention to the ways in which legal constraints on public power are important to justifying law's authority over persons.

The Crown's arguments about the first nine-day period suggested not that it was wielding *extra*-legal powers, but that it was exercising *sub*-legal advisory or influential power. (Specifically, that the demand to 'stay home in your bubble' was an advisory and not a mandatory requirement, much like the advice to 'wash our hands' … .) The High Court's rejection of that argument confirms that when state power interferes directly with private freedoms, it must be exercised through and in accordance with

law. This confirms at least some of the ways in which law's authority is different from both advice and coercion. Those distinctions are amplified when both safety and liberties are on the line, and when rules are not merely used to guide subjects' behaviour, but to trigger coercive consequences (including criminal convictions and sentences) for breaching the rules. The practice and principles of legality make it possible for law to operate as authority, and not as fudging or nudging advice, nor coercive disrespect for persons without legal authorisation. The upshot of the unlawfulness found in *Borrowdale* is that purported punishment for violations become illegal *and thus illegitimate* threats of force.[34] In the absence of lawful authorisation for the start of lockdown, the requirement to stay home was neither advisory nor authoritative, but illegitimately coercive.

What would it take for law to have legitimate authority, in this context? For a start, it would take rule-governed behaviour, but that doesn't yet answer the question, which is complicated by the variety of theoretical debates over what might legitimate authority itself, and whether law's authority is distinctive in that regard.[35] Legal rules might purport to bind subjects, but whether they do so might depend (for example) upon law's capacity to coordinate large-scale collective responses to the pandemic crisis, to resolve problems of disagreement about the most effective or most important response, or in other ways to serve subjects. It is clear that effective responses to the pandemic continue to require both a coordinating mechanism, a variety of specialist and expert guidance, and choices between values that may be either equally or differently important. Law is not the only tool for achieving those ends – and so governmental authority that is exercised through law is entangled, in important ways, with the personal or 'charismatic' authority (Weber (1921) 1978) of a popular political leader, with the epistemic authority of health and economic experts, with local community leadership in private and in public organisations of various scales, and, perhaps most visibly, with Māori authorities (with their own instances of rule-based authority, charismatic authority, health and economic expertise, and localised knowledge and capacity).

Crucially for the ongoing application of legality under emergency, governmental authority exercised through statutes and Orders stands in complex relations to mana whenua exercising rangatiratanga through tikanga. Those relations must be evaluated in light of constitutional obligations under Te Tiriti as well as questions of political equality. An evaluation should take into account the very real limitations upon the ways in which the state and its law can serve Māori communities, often resulting directly from distrust born of illegal abuses of state power and the coercive applications of law over those communities. That concern can shed further doubt on whether the pandemic response reveals robust commitments to rule-governed legality that protect subjects equally against arbitrary and coercive power, and treats persons equally as subjects of law's authority. The values served by the ideal of legality ring empty if legality fails to serve subjects evenly, if law coerces some more than others. One can wonder whether subjects can and should accept law as a legitimate authority in such circumstances.

The full evaluation of the response to Covid-19 must include ongoing concerns for the ways in which that response navigates relationships under Te Tiriti to address earlier and persistent failures. For example, an evaluation of the Response Act suggests that, while both the Act's lack of meaningful consultation with Māori and the lack of a reference to Te Tiriti might be seen as quite ordinary (though not thereby excusable) constitutional failures – shared with plenty of other important statutes – the failure is made particularly

pronounced by the importance of Māori and governmental authorities working together in order to meet the needs of persons vulnerable both to the pandemic and its response.

Emerging analyses of the response examine the importance of mana whenua authority both in independent and cooperative or coordinative practices, as well as diverse applications of tikanga as adapted to the pandemic (Charters 2020; Curtis 2020; Jones 2020). Beyond the evaluation of extraordinary and prominent practices such as the use of roadblock checkpoints (e.g. Harris and Williams 2020; Taonui 2020), academic commentary also points to the more ordinary role of Māori authorities located in communities that the state is unable or at least poorly equipped to serve on its own, raising doubts over its legitimate authority (Johnston 2020). While a full evaluation of those matters is beyond the scope of this work, it is important that the contextual and subject-centred understanding of the ways in which commitments to legality can help to protect subjects against arbitrary power, and can support the legitimacy of law's authority and coercive force, thus rests upon the complex circumstances of subjection and authority in Aotearoa New Zealand.

Conclusion

According to the view of the High Court in *Borrowdale*, the New Zealand government acted beyond its rule-prescribed competences for the first nine days of the first lockdown. It is significant, though, that at no point did the government invoke powers that would have been hostile to the principles of legality. The principles of continued governance through general, public, clear, and prospective rules, reasoned decision-making, and subjection to supervision from the courts, have not been openly challenged (thus far), and have been largely upheld by the ordinary operation of legal institutions.

The litigation and many of the media debates around the 'legality of lockdown' centred on the question whether governmental action was authorised by statutory rules. This is understandable, since, as we have seen, adherence to rules is a key dimension of legality. However, criticism of the lack of formal authorisation, without sufficient regard to the greater ideal of legality and its effective restraint on power and protection of persons, is dangerous and should be avoided. It might lead the government of the day (through Parliament) to pass ever-broader authorising rules which satisfy the point of formality but would pose a more severe threat to the values served by legality, at least as an ideal. Overly broad and indeterminate use of statutory powers can give rise to unchecked discretion, while only retaining the pretence of a rule-based framework.

The overall adherence to the principles of legality – not only to proper authorisation – is significant for those who are subject to law and to executive power. It recognises the value inherent in seeing persons not only as means for the successful resolution of the crisis, but also as agents deserving of treatment as such. In light of this, we can begin to examine whether imposed 'Orders' and freshly authorised restrictions could be a genuine exercise of legitimate authority, guiding people's collective response to a crisis – making possible effective courses of action which are unavailable to persons by themselves. If law presents and represents a shared standard that governs behaviour evenly, it may enable us to act *together* on the reasons that apply to us separately.

If law is to do all that then it must meet a standard beyond mere formal authorisation. This standard involves both formal and substantive restrictions on what law can be –

restrictions that are often taken for granted in ordinary times (at least in New Zealand). But our expectations from law should not diminish in times of crisis. On the contrary, in times of increased vulnerability and intense disruption, it is as important as ever to adhere to the principles of legality and demand such adherence from those who wield public power.

Notes

1. This is not all 'the rule of law' does, but it is the aim of the rule of law most pertinent to the analysis of the NZ pandemic response. Our goal here is not to intervene in debates over other values the rule of law might serve. For a detailed account of key controversies, see Waldron (2002, 2008).
2. These are not the only concerns drawing scholarly and media commentaries. As we indicate in part V, an important body of commentary also highlights the particular challenges of responding to the pandemic in ways consistent with the relationship under Te Tiriti and respect for tikanga (e.g. Charters 2020; Johnston 2020).
3. These are the core principles to which the thinnest theories of the rule of law are committed, even as they disagree over whether these are morally valuable or merely principles that make law more effective in guiding conduct (and whether, if morally valuable, they are distinctive to law) (compare Fuller 1958, 1964; Hart, 1958; Raz 1979, 2019). A second key dispute debates whether this ideal of legality is part of the concept of law itself, or is merely an understanding of 'good law'. Our position argues that there is moral value in the principles of legality highlighted here, but for the present purpose we do not seek to take a position on the more analytic implications of those debates, as examined in e.g. Bennett (2007, 2011).
4. The supervisory role of the courts adds an important institutional dimension to the more abstract principles. It insists that those principles must be upheld through the institutionalised check on government action, not simply entrusted to governments themselves. See Raz (1979).
5. The question whether law has legitimate authority, or is merely coercive, divides key work in legal theory. For analysis see e.g. Ripstein (2004). For a leading view in which law claims (and may have) morally legitimate authority, see Raz (1986); while the contrary position, emphasising law's coercive impact (and its potential justification), see Dworkin (1986).
6. That orthodox position is sometimes thought to be denied by strands of 'legal realism', but that view misrepresents the core of legal realist approaches. The importance of legal rules would only be contested by the most extreme forms of rule-scepticism, which is a widely criticised and not widely held position in legal theory. For discussion see Dagan (2004).
7. No reference list can hope to capture the nuanced positions on this subject. In addition to the works of Dyzenhaus, Raz, and Waldron cited elsewhere in this work, leading contemporary scholars continuing to produce fresh work on the rule of law/legality include Rundle, Krygier, and Postema.
8. This list does not exclude other challenges, or indeed particular challenges that are pertinent or pronounced in different legal orders. Both the foundational/general and special challenges are examined across the essays in Ramraj (2009). On the particular constitutional' challenges of emergencies in New Zealand, in particular those arising from the Canterbury Earthquake, see Hopkins (2016).
9. 'The safety of the people ought to be the highest law.' Cicero, *De Legibus* III.3.VIII.
10. There is a voluminous contemporary literature exploring the significance of Schmitt's work for legal theory, and not only for the question of emergencies. We cannot engage all of this here, but see most recently, Meierhenrich and Simons (2019).
11. For a contemporary attack on liberalism from the left along similar lines, see Benjamin ([1921] 1986).
12. Schmitt ([1928] 2000).

13. Schmitt and his contemporaries were embroiled in a discussion surrounding one such rule: Article 48 of the constitution of the Weimar Republic. Article 48 authorised the President to take extensive emergency measures. It was continuously used by conservative courts in Germany to erode constitutional safeguards, and was ultimately used to topple the Weimar Republic and transfer totalitarian power to its Chancellor, Adolf Hitler.
14. Davis J in *Milligan* 120. Cf. *Liversidge*.
15. E.g. Hungary, where rules passed have effectively authorised rule by decree.
16. In 1845, 1846, 1847, 1860 and 1863, the government invoked martial law – including against those Māori engaged in passive resistance at Parihaka. Indemnity legislation was passed by the General Assembly in 1860, 1865, 1866, 1867 and 1888. The UK Government disallowed the Indemnity Act 1866 (NZ) in 1877 see Martin (2010, fn 3).
17. *Hewett v Fielder* [1951] NZLR 755; *Brader v Ministry of Transport* [1981] 1 NZLR 73; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] NZLR 374.
18. Sir Geoffrey Palmer, then President of the New Zealand Law Commission contributed significantly to the Select Committee's deliberations drawing on an earlier report: see the NZ Law Commission (1991).
19. The agreement of another Minister and the written recommendation of the Director-General of Health is required before an Epidemic Notice can be issued. The special powers under s 70 of the Health Act 1956 can also be triggered by a declaration of emergency under the Civil Defence Emergency Management Act 2002 which requires Parliament to meet, or by a Medical Officer of Health. Sir Geoffrey Palmer, then President of the New Zealand Law Commission contributed significantly to the Select Committee's deliberations drawing on an earlier report: see the NZ Law Commission (1991). The New Zealand experience of the Christchurch earthquakes has also influenced the legal regime for pandemics. See Hopkins (2020).
20. Section 70 powers are triggered by a medical officer of health authorised by the Minister, or the declaration of a state of emergency made under the Civil Defence Emergency Management Act 2002 (which requires Parliament to meet), or by the issuance of an epidemic notice under the Epidemic Preparedness Act 2006. All three forms of authorisation were evident in the response to COVID-19.
21. *Borrowdale v Director-General of Health* [2020] NZHC 2090. See Geiringer and Geddis (2020), Knight (2020), Rodriguez Ferrere (2020), McLean (2020), and Wilberg (2020).
22. Above n 23 at [54].
23. Above n 23 [103].
24. Section 6 Interpretation Act 1999.
25. Above n 23 [104].
26. Above n 23 [119].
27. Above n 23 [114].
28. New Zealand Bill of Rights Act, s 6 requires a rights-consistent interpretation.
29. Above n 23 [70].
30. Above n 23 [86]. See the methodology the majority develops in *R v Hansen* [2017] NZSC 7 to create a Bill of 'reasonable rights' i.e. subjecting rights to reasonable limits before attempting a rights consistent interpretation of the statute.
31. Above n 23 [95].
32. At *Borrowdale* (HC) [191].
33. In legal theory, the idea that legality's constraints on public powers are among the conditions of subjects' obligations to obey the law, is associated with Lon Fuller, and couched in the language of 'reciprocity'. Fuller (1964). For analysis see Kristen Rundle (2012, 2016).
34. For Kelsen, force that is authorised through law, and only such force. Kelsen ([1945] 1961, p. 21): 'Law makes the use of force a monopoly of the community'.
35. Matters on which we as co-authors are also divided.

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