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Risk and the Rule of law

Abstract

In this article the author argues for the importance of law even in the face of a global pandemic, suggests some ways that law helps to reveal and articulate the moral issues at stake, and sketches the legal controversies surrounding the Covid-19 lockdown.

Keywords risk, proportionality, government power, rule of law, legitimacy

At the height of the level 4 lockdown, the degree of trust in the New Zealand government was registered at close to 90%. Every lunchtime the prime minister and the hitherto unknown director-general of health, Ashley Bloomfield, briefed the nation on the number of confirmed and probable cases of Covid-19 and described the measures that we needed collectively to take to respond to the threat the disease presented. In what was a mixture of public health advice, command with a threat of sanction, and moral exhortation, we were told to wash our hands, stay in our bubbles (or be fined or prosecuted), and to be kind.

The nation was in thrall to medical experts – the public health specialists, epidemiologists, vaccine specialists – who led the public debate. The most important of these was the director-general, himself public health trained though this is not a formal requirement of the office, and, importantly, the official in whom the Health Act 1956 vested the legal powers to lead the government's infectious disease response. It was he, and not the prime minister or minister of health, in whom the most important legal powers to make the orders effecting lockdown reposed.

Initially at least, the official messaging went much further than the legal orders appeared to allow (Geddis and Geiringer, 2020; Rishworth 2020). In contrast to the medical experts, however, the legal experts were strikingly quiet. The academic lawyers had been reluctant publicly to air their views and misgivings about the legal bases for the measures, even if they appeared to be broadly in agreement with the measures themselves. Public interventions risked presenting the law and legal expertise in its worst light – the vehicle of pedants who are unable to see the 'bigger picture' or participate fully in 'Team New Zealand'. It was not until the alert level was reduced to level 3, and Parliament was once again able to meet, that some of the country's top public lawyers began openly to question the legal bases for the exercise of what were unprecedentedly coercive powers.

At that point some public lawyers were willing publicly to describe the legal authority for the lockdown as 'highly debatable', 'deserving further consideration',

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'going beyond the necessary', incurring 'ongoing legal risk' (Geiringer and Geddis, 2020), and as 'legally questionable' and conferring 'undesirable' levels of discretion (Hopkins, 2020). Others were more sanguine and 'benevolent' about whether there was already sufficient legal authority (Knight and McLay, 2020). All seemed to agree that there should be legislation to clarify the powers under which the response would be based in future. As one commentator observed: 'The legitimacy that sustained us through level 4 will likely now need to be backed up by new, water-tight, hard law' (Hopkins, 2020). At the time of writing, at least three legal cases had commenced in the courts challenging the legality of the measures taken at levels 4 and 3, and the Epidemic Response Committee, chaired by the leader of the opposition, then Simon Bridges, had requested to see the legal advice which provided justification for the measures. Subsequently, some of the advice to the police was proactively disclosed.

That there should be doubt and uncertainty about the powers and their extent should not surprise; neither should it render the government's exercise of its powers necessarily illegal nor law the domain of pedants. Important values are at stake here, and vigilance and debate about such values is essential to secure our present and future liberties. The general default setting of most public lawyers is to read statutes against a presumption of personal liberty. The usual expectation is that, if Parliament wants to confer powers which derogate from liberty, it must do so with 'irresistible clarity'. And when the executive (by which I mean to include police) exercises such powers by way of orders and rules, it should do no more than is necessary by way of limiting rights. In the context of emergency powers, however, the same lawyers will be very reluctant to confer broad liberty-invading powers on officials in advance of an actual emergency, lest those powers be used for nefarious ends. And when it comes to whether the implementation of such powers has limited rights more than necessary, the liberty calculus will also be more than usually complex.

The usual presumption that government *necessarily* impedes liberty by its exercise of power is not always true and is made particularly complicated in the context of a global pandemic. Many people positively wanted to stay in lockdown in order to protect themselves and their families. The government's exercise of power allowed employees and contractors *not* to have to attend their places of work and allowed parents to keep children safely at home and away from school and childcare centres. On the other hand, certain commensurate freedoms which also reflect the values of human dignity and the sanctity of life were curtailed, such as the freedom to receive medical treatment in the form of hospital diagnostic and elective procedures. In a trade-off between health and other measures of well-being, people were prohibited from visiting dying loved ones (the subject of a successful legal challenge in *Christiansen v Director-General of Health* [2020] NZHC 887) or attending funerals and tangihanga. While there was provision to allow children to see their separated parents, in complex blended families difficult choices still had to be made between children and other vulnerable loved ones. Religious services and sporting and cultural events were cancelled. Other, less commensurate freedoms, such as the freedom to trade in goods and services, were curtailed. People's livelihoods in businesses were threatened and sometimes destroyed by the disease and/or the government's response to it. I say *less* commensurable, but in ordinary times we regularly trade health off against cost and at some point the government was going to need economic activity to pay for the pandemic response and to keep the healthcare sector going.

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In calculating those trade-offs, the government was required by the Civil Defence Emergency Management Act 2002 to take a precautionary approach in the face of scientific uncertainty (s7). That is, the government was not, or not only, required to weigh the risk to life and health against other comparative measures of risk to life and well-being. Rather, it was required to weigh the ordinary risks to life and well-being against the risk of *catastrophic* collective harm in the form of huge numbers of deaths all at once and an existential threat to the population at large. Whether and how the likelihood of widespread catastrophic harm does or should affect the risk calculus is not uncontroversial in moral terms. But the idea that even a small risk of catastrophic harm should weigh more heavily than a higher likelihood of less serious harm has a certain intuitive appeal. This precautionary element further complicates the liberty calculus against which the statutory powers in the Health Act are capable of being read. And all this at a time when much was still unknown about the disease, when other jurisdictions were building outdoor morgues to house the dead, and in advance of the level 4 lockdown appearing to be successful in excluding community contagion and preventing the hospital sector from becoming overwhelmed. Against this background it is not surprising that lawyers have been divided both about how to interpret the powers conferred on the director-general to make orders under the Health Act and whether they went further than necessary in limiting rights (Geddis and Geiringer, 2020; Knight and McLay, 2020).

I do not intend to rehearse the full detail of the arguments about the extent of the power to make the lockdown orders here. Section 70(1)(f) (under which the 3 April order was made) authorises the director-general to make an order requiring 'persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated, quarantined, or disinfected as he thinks fit'. On its face it looks to confer broad power. Geddis and Geiringer (2020) doubted that the terms of the lockdown qualified as 'isolation' or 'quarantine' given the wide scale exemptions which attached to essential workers and services. Their stronger contextual argument was that section 70(1)(f) was unlikely to have been intended to authorise a *national* lockdown, but rather to authorise restrictions on an individual-by-individual basis where those persons or businesses infected, or likely to become infected, by the disease could be identified, individually notified, contained, tested, disinfected and treated. This argument was supported by the fact that there was no requirement of a general notice (such as attached to the exercise of the director-general's power to close businesses) in relation to section 70(1)(f) orders.

'Isolation' and 'quarantine' are not defined in the act itself but definitions helpful to the government do appear in the World Health Organization Health Regulations 2005, which are binding on New Zealand. 'Isolation' is the term applied to restrictions imposed on people who are 'ill or contaminated' so as to prevent spread, while 'quarantine' is the term applied to 'suspect persons who are not ill' who can be separated from others and have their 'activities restricted ... in such a manner as to prevent the possible spread of infection or contamination'. Presented with a virus which is highly contagious, is commonly asymptomatic and can be transmitted by an asymptomatic carrier, manifests as a variable range of symptoms, has a long incubation period, and can result in serious illness or death, it is plausible to read the provision as empowering the range of restrictions on every person on the basis that each person indeed *could* be ill or suspect. Taking the precautionary approach mandated by the Civil Defence Emergency Management Act 2002, all could be considered suspect and subject to restrictions.

The notification provisions might well cause us to pause. Recourse to the legislative history, however, also goes some way to assisting the government's broader reading. The 1956 Health Act, like its predecessor, the Health Act 1920, envisages the possibility of a national response by empowering the director-general of health to exercise the powers of the medical officer of health in any district. Looking further, we find that the main provision relied upon for lockdown (s70(1)(f)) is lifted word for word out of the Health Act 1920 (s76(1)(f)). Unlike the 1956 act, though, the earlier act did not contain a separate provision empowering business closures at large by general notice, but only empowered the closure of places of public amusement where people are 'accustomed to assemble' (s76(1)(m)), which does not go as far. The implication is that the wording of section 76(1)(f) was originally intended to confer very broad powers, including the power to close businesses. It was first enacted in 1920 in the aftermath of 'Spanish' influenza, and in response to a critical inquiry (Rice, 1988). The provision was reenacted in the Health Act 1956 in the middle of a polio outbreak. It would be surprising if Parliament had not intended to confer broad powers in section 70(1)(f), which in turn seems to have originated in the Bubonic Plague Prevention Act 1900, section 4(1).

The 1920 Health Act was expressly designed to mandate a science-led approach (ibid., p.14). When read alongside the Epidemic Preparedness Act 2006, the Civil Defence Emergency Management Act 2002 and the WHO Health Regulations 2005, the Health Act 1956 continues the same policy impulse and contemplates a science-led, proportionate and potentially far-reaching response to the problems presented *by a particular disease*. In this case, the section 70 powers were formally triggered by both an 'epidemic notice' in relation to Covid-19 and the 'declaration of a state of emergency'. This broader reading is a respectable one, rendering the orders valid even if some of the applications of the orders may have left something to be desired (for example, why allow cycling but not swimming?). The effect of such a reading is that the government is the one to make the assessment of risk and not the individual, business or family group.

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The disagreement between lawyers about the meaning of the provisions, then, is not merely a disagreement between pedants but is an important disagreement about values and the proper bounds and limits of state authority. For some commentators, the very uncertainty about the breadth of the provisions was desirable. The government would be given the benefit

of the doubt so long as it retained its political legitimacy via large-scale support for its measures. The process of debate and disagreement (both in public and in private) contributed to the ongoing accountabilities of government.

At the time of writing, under level 2 restrictions, it seems that it is much more, but still not quite, business as usual for both politics and the law. The House passed the new COVID-19 Public Health Response Act 2020, carefully tailored to the present emergency. Strikingly, and notwithstanding the ongoing litigation and lawyerly debate about the lawfulness of the government's measures taken under levels 3 and 4, the new legislation does not explicitly validate the earlier Health Act orders. The clear implication is that the government's legal advisors continue to stand by their earlier assessments of the director-general's legal authority.

And the public lawyers got what they wanted: a justification in the explanatory note for the measures taken; and clarity. They got the latter in the form of invasive legal powers vested in constables to search private dwelling places, and persons authorised by the director-general of health to enter marae without a warrant, powers to test, restrictions on gatherings and freedom of movement, powers to detain, and much more. Importantly, these powers now appeared in legislation, over which there is possibility of parliamentary or public oversight, rather than in orders made by the director-general.

The first form of that oversight is the vetting procedure under section 7 of the New Zealand Bill of Rights Act 1990 to ensure that the House is made aware of inconsistencies with protected rights when it considers a bill. Legal counsel in the Ministry of Justice who vetted the bill against the New Zealand Bill of Rights Act found that, despite the restrictions on eight identified protected rights, the limitations on rights were proportionate and consistent. While in ordinary times such limitations on rights would not be justified, the ministry's legal advisor considered that the unprecedented nature of the public health emergency, the actual and imminent threat posed by Covid-19, and its potential to affect all branches of the life of the community was sufficient justification.

The opposition National Party did not agree and viewed the bill as granting too much power. Nevertheless, the bill was passed under urgency. The measure as written would have expired after two years but there was an additional concession that the statute must be renewed every 90 days by a resolution of the House. In an unusual move, the government allowed the act subsequently to be considered by select committee. In addition, orders made under the act must be approved by a motion in the House of Representatives and the territorial orders made by the director-general expire after a month. Importantly, the act is still subject to the New Zealand Bill of Rights Act 1990 and its implementation and the orders made under it remain subject to legal challenges of their reasonableness and proportionality.

The act, for the most part, invites ongoing parliamentary and other forms of scrutiny and re-establishes ordinary ministerial responsibility, with the director-general of health taking a more traditional advisory role. There are clear signals that broader political and economic considerations will have greater weight in the decision making, and already concessions have been made: for example, in the number of persons allowed at funerals and tangihanga.

Lawyers inside the public service worked hard to try to ensure that politics could continue to operate and to promote accountability to the public, and to ensure that there were procedural and other constraints on potential misuses of power. Lawyers outside the public service will undoubtedly monitor the proportionality of the government responses.

At a time when trust in experts was at an all-time low in Western democracies, New Zealand had reason to be grateful to the medical experts who led a clear evidence-based response which (so far) proved successful. Legal expertise during a time of emergency perhaps attracted less popularity both inside and outside government, but its importance in a crisis should not be underestimated. It is responsible in part for emergency legislation that retains parliamentary supremacy. That in itself is no mean feat!

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