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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



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DESIGNING FOR LEGITIMACY: A SYSTEMS PERSPECTIVE

*Sarah Kerkin**

Legitimacy is a core tenet of a constitutional framework and should be a critical goal for all legislative and policy design. Public confidence in the legitimacy of individual decision-making processes not only affects the smooth functioning of those processes, but shores up the legitimacy of underpinning constitutional settings.

Legitimacy can be designed for by taking a systems perspective. This article posits a working theory of legitimacy that brings together some key constitutional norms with three levers that particularly influence decision-makers' behaviour. The legitimacy triangle offers a relatively simple way of thinking about legitimacy and building it into policy and legislative design. The three levers of transparency, accountability and participation will tend to drive design towards compliance with the constitutional norms at the triangle's centre.

The approach is illustrated by examples drawn from the Canterbury earthquake recovery. The legitimacy triangle is sufficiently flexible to accommodate even extraordinary circumstances such as disaster recovery.

I INTRODUCTION

Constitutions provide the "means to distinguish between the constitutional (legitimate) use and the unconstitutional (abuse) of public power".¹ Legitimacy is, thus, a core tenet of a constitutional

* PhD (Well), LLM(Hons) (Auck), BA. Chief Advisor to the Deputy Secretary Policy, Ministry of Justice. This article is based on a workshop on designing for legitimacy which I presented at the symposium "Advancing Better Government through Legislative Stewardship". It is drawn from a working theory of legitimacy developed through a systems analysis of how constitutional norms and values influence decision-makers in the course of my doctoral research: see Sarah Kerkin "Here There be Dragons': Using Systems Thinking to Explore Constitutional Issues" (PhD thesis, Victoria University of Wellington, 2017).

The remarks in this article are the author's personal views and do not represent government policy or the position of the Ministry of Justice.

1 Edward Willis "Constitutional Authority: Legitimising the Exercise of Public Power in New Zealand" [2014] NZ L Rev 265 at 266.

framework and should be a critical goal for all legislative and policy design. Public confidence in the legitimacy of individual decision-making processes not only affects the smooth functioning of those processes, but shores up the legitimacy of underpinning constitutional settings.

Legitimacy can be designed for by taking a systems perspective. This article posits a working theory of legitimacy that brings together some key constitutional norms with three levers that particularly influence decision-makers' behaviour. The relationship between the norms and levers is illustrated by the legitimacy triangle, which offers a relatively simple way of thinking about legitimacy and building it into policy and legislative design. The three levers of transparency, accountability and participation will tend to drive design towards compliance with the constitutional norms at the triangle's centre. The approach is illustrated by examples drawn from the Canterbury earthquake recovery.

II WHY TAKE A SYSTEMS PERSPECTIVE OF LEGITIMACY?

Systems thinking is the art and science of making reliable inferences about [behaviour] by developing an increasingly deep understanding of underlying structure.²

A systems perspective casts light on how something works in the real world: it helps to identify how an initiative or institution will be viewed in practice, rather than in theory. Broadly speaking, the systems discipline seeks to unpack and demonstrate the relationships between different parts of a system in order to gain a better understanding of the system's operation and the consequences of change within it or to its environment.

A strand of the systems discipline, soft systems thinking, is particularly useful for thinking about social systems. Soft systems thinking uses models as analytical frameworks to structure a process of inquiry into a real world situation, to gain insights and promote creative problem solving.³

Soft systems methodologies acknowledge a subjective dimension to people's understanding of a system by recognising that, to some degree, people's understanding of a system is influenced by their

2 Barry Richmond "Systems Thinking/System Dynamics: Let's Just Get on with It" (1994) 10(2–3) *System Dynamics Review* 135 at 139.

3 Robert L Flood and Michael C Jackson *Creative Problem Solving: Total Systems Intervention* (Wiley, Chichester, 1991) at 4. In this context, "system" is used as a metaphor. Applying a system perspective does not assume that the thing under observation is actually a system. Rather, the question to be asked is whether applying a system perspective can encourage a richer understanding of how the thing operates in the real world. If the systems-based inquiry is fruitful, it can justifiably be used. See also Peter Checkland "From Optimising to Learning: a Development of Systems Thinking for the 1990s" (1985) 36 *Journal of the Operational Research Society* 757; and John Mingers "Can Social Systems Be Autopoietic? Assessing Luhmann's Social Theory" (2002) 50 *The Sociological Review* 278.

own mental models,⁴ and their preconceptions.⁵ This subjective approach resonates with Matthew Palmer's theory of constitutional realism, which:⁶

... emphasises the real-world impact of the exercise of public power. According to this perspective the meaning of ... a constitution, exists in the understandings and actions of those people involved in the application and interpretation of that law or constitution.

Constitutional realism suggests that the most reliable guide to the nature and extent of a constitution's power is in the beliefs and behaviour of the people governed by it.⁷ This suggestion resonates strongly with the systems paradigm's interest in how things *really* work.

III WHAT IS LEGITIMACY?

When viewed in the context of a constitutional framework, legitimacy informs our understanding of what public power ought to be able to do and why it ought to be exercised in a particular way.⁸ Using a metaphor can take legitimacy out of the realm of the theoretical and abstract, and ground it as a touchstone for design purposes.

David Easton uses the metaphor of a reservoir, defining legitimacy as a "reservoir of goodwill" that allows people to maintain confidence in institutions' long-term decision-making.⁹ Viewed this way, legitimacy enables institutions to weather short-term shocks and crises without significant loss of public confidence. Diffuse goodwill helps people to accept or tolerate decisions to which they are opposed or the effects of which they see as damaging to their wants.¹⁰ For instance, while voters will not agree on which political party should form the government, in a well-functioning democracy, most voters will accept the election result because they view the electoral process as legitimate.

4 Mental models reflect the beliefs, values and assumptions that people personally hold, and they underlie people's reasons for doing things in particular ways. Mental models are generally unconscious and "undiscussable": Kambiz E Maani and Robert Y Cavana *Systems Thinking, System Dynamics: Managing Change* (2nd ed, Pearson, Auckland, 2007) at 15.

5 John Brocklesby "The What, the Why and the How of Behavioural Operational Research – an Invitation to Potential Sceptics" (2016) 249 *European Journal of Operational Research* 796 at 799; and Peter Checkland *Systems Thinking, Systems Practice* (Wiley, Chichester, 1981) at 155.

6 Matthew SR Palmer "What is New Zealand's Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office-holders" (2006) 17 *PLR* 133 at 134.

7 Matthew SR Palmer "Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution" (2006) 54 *Am J Comp L* 587 at 593.

8 Willis, above n 1, at 271.

9 David Easton *A Systems Analysis of Political Life* (Wiley, New York, 1965) as cited in James L Gibson, Gregory A Caldeira and Lester Kenyatta Spence "Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-based Experiment" (2005) 58 *Pol Res Q* 187 at 188.

10 At 188.

Easton's metaphor is a predominantly sociological view of legitimacy: legitimacy is described as it is perceived by those who are subject to, and protected by the constitution. However, the metaphor also seems to draw on two other perspectives of legitimacy. The first views legitimacy as a legal matter: constitutions are legitimate when created, revised and enforced according to established law (a legal perspective). The other views legitimacy in terms of how political power ought to be arranged (a philosophical perspective).¹¹

In Easton's metaphor, goodwill and public confidence arises in part from institutions being given power in accordance with the constituted society's accepted *norms* and using it consistently with those norms. Because a constitution reflects and protects its constituted society, its rules, principles and conventions reflect the constituted society's beliefs about how public power *ought* to be distributed. Thus, institutional legitimacy depends upon institutions making decisions according to the rules, principles and conventions of the constitution, and consistently with the prevailing constitutional culture. By simultaneously resting on the legal, sociological and philosophical frames for legitimacy, Easton's metaphor can be seen as a constitutionally realist perspective on legitimacy.

While a metaphor helps to conceptualise legitimacy, it is not a definition. It leaves questions open. What triggers the goodwill? What undermines it? Does this view of legitimacy encompass substantive – normative – matters or is it purely procedural?

For design purposes, legitimacy has both procedural and normative dimensions. It includes considerations of the constraints that ought to be placed on public power, based in part on historical precedent. Historical precedent has "traditionally been vital to sustaining legitimacy in an unwritten constitutional context".¹² It still retains a meaningful degree of influence through the ongoing application of constitutional convention, although representative democracy is probably now the dominant source of law's legitimacy under New Zealand's constitutional arrangements.¹³

Resonating with, and reinforcing, these sources of legitimacy is New Zealand's constitutional culture. Subjective cultural expectations inform our values and beliefs, particularly the norms that are essential to our nation's identity and values.¹⁴ Without a culture to reinforce it, the principles and institutions of constitutional government would largely be reduced to words on paper.¹⁵ This

11 Joel Colón-Ríos "New Zealand's Constitutional Crisis" (2011) 24 NZULR 448 at 450.

12 Willis, above n 1, at 266. See also Hanna Fenichel Pitkin "The Idea of a Constitution" (1987) 37 J Leg Ed 167 at 169.

13 Willis, above n 1, at 266–267. See also Andrew Geddis "Parliamentary Government in New Zealand: Lines of Continuity and Moments of Change" (2016) 14 ICON 99 at 102.

14 Matthew SR Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 567.

15 See Doni N Gewirtzman "Our Founding Feelings: Commitment, and Imagination in Constitutional Culture" (2009) 43 U Rich L Rev 623; and Jason Mazzone "The Creation of a Constitutional Culture" (2005) 40 Tulsa L Rev 671.

relationship suggests that, to create and assess legitimacy, we must consider New Zealand's constitutional culture and the expectations of the state created by that culture. Constitutional culture influences not only what goes into a constitution, but also how it is interpreted, applied and used.¹⁶

New Zealand's constitutional culture reflects values that tend to be long-held and cumulative rather than fluctuations in public opinion responding to current political events. Some constitutional norms run more deeply than others and change more slowly, and the resilience of political culture means that the influence of institutions on it will not necessarily be felt immediately.¹⁷

Fiona Barker and Palmer have assessed New Zealand's political and constitutional culture respectively. The key elements they have identified include authoritarianism, liberalism, fairness and egalitarianism and pragmatism.¹⁸ These values combine in sometimes conflicting ways. For instance:

- (1) While the expectation of a fair state and a "fair go" is often expressed in policy terms as support for collective solutions to inequalities, it begs the question of what particular things ought to be equalised. New Zealanders can be intolerant of differences manifested in law and successive governments have struggled to achieve a broad social consensus on reflecting in legislation the nature of the Treaty protections afforded to Māori, outside of Treaty settlement legislation.¹⁹

16 Palmer, above n 6, at 134.

17 Fiona Barker "Political Culture: Patterns and Issues" in Raymond Miller (ed) *New Zealand Government and Politics* (5th ed, Oxford University Press, 2010) 13 at 18; and Palmer, above n 14, at 567.

18 Barker, above n 17, at 18. For broader discussions on pragmatism and whether it is genuinely a part of New Zealand constitutional culture, see also Constitutional Arrangements Committee *Inquiry to Review New Zealand's Existing Constitutional Arrangements* (August 2005); David Hackett Fischer "Constitutional Traditions and Values in Open Societies: A Comparative Inquiry" (2014) 12 NZJPIL 1; Patrick Moloney "Ideology: Populism, Pragmatism and Liberalism" in Raymond Miller (ed) *New Zealand Government and Politics* (5th ed, Oxford University Press, 2010) 77; Matthew SR Palmer "Open the Doors and Where Are the People? Constitutional Dialogue in the Shadow of the People" in Claire Charters and Dean R Knight (eds) *We, the People(s): Participation in Governance* (Victoria University Press, Wellington, 2011) 50; and Christopher Pouwels "Does New Zealand Have a 'Pragmatic' Constitution?" (2015) 21 Auckland UL Rev 41. Pouwels disputes that the typical New Zealand approach to constitutional reform is pragmatic; he also considers that a pragmatic approach to constitutional reform is not desirable. Thus, even if New Zealand did take a pragmatic approach to constitutional reform, Pouwels considers it is not necessarily a virtue we should extol.

19 For instance, the state has never recognised Tikanga Māori by putting it on a legal footing, either by incorporating it into state structures and processes, or by recognising it as sitting alongside the state. See Law Commission *Maori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 26–27. However, at the same time, the general tolerance for settlements of historic breaches can be seen as a manifestation of the value of fairness.

- (2) While New Zealanders generally appear to expect a strong government to take control in times of crisis, there is also an expectation that government, and those who operate it, do not "see themselves as 'superior' to the governed."²⁰
- (3) Both authors have identified a distinct ambivalence to the use of public power. There can be an expectation that governments act decisively, particularly in times of crisis, but there is also a strong distrust of those whom we elect to power.²¹ This ambivalence manifested in widespread early political support for sweeping powers for the Canterbury Earthquake Recovery Authority and its responsible Minister, followed by growing resentment at central government "interference" in the redesign of Christchurch's central business district and the approach to the recovery more generally.²²

Public law is a vast and nuanced field but, for the purposes of legislative design, legitimacy norms can be aggregated into three broad themes: constitutional propriety, legality and procedural fairness.²³

20 Palmer, above n 14, at 576.

21 Barker, above n 17; and Palmer, above n 14, at 275–277. A 2015 survey found that 25 per cent of respondents trusted Members of Parliament (up from 18 per cent in 2013), 31 per cent trusted local councillors and 44 per cent trusted people who work for the government. The same survey found that 75 per cent of respondents trusted police officers and school teachers, 87 per cent trusted doctors and nurses and 93 per cent trusted the fire service. The results were not significantly different from a similar survey done in 2013. See Research New Zealand "Trust and confidence in Members of Parliament compared with local councillors, lawyers, journalists and others such as those working in the Ambulance Service, the Fire Service and the Police" (June 2015) <www.researchnz.com>.

22 For example, see Barnaby Bennett "Christchurch Convention Centre: The Closer I Look the Less It Makes Sense" (19 April 2015) Making Christchurch <www.makingchristchurch.com>; Glenn Conway and Lois Cairns "How Is the New Council Getting on?" *The Press* (online ed, Christchurch, 16 April 2014); Lianne Dalziel "Dalziel: Turning Disaster into Opportunity" Scoop <www.scoop.co.nz>; Charlie Gates "Council Designer Regrets Share an Idea Didn't Go Further" *The Press* (online ed, Christchurch, 30 August 2015); Chris Hutching "Brownlee Admits Convention Centre Doubts as CERA's Relevance Fades" *National Business Review* (New Zealand, 22 June 2015); Georgina Stylianou "Convention Centre Will Cost \$500 Million" *The Press*, (online ed, Christchurch, 8 August 2014); and Georgina Stylianou "Green MP: Locals Need Voice in Rebuild" *The Press* (online ed, Christchurch, 16 November 2014). There was also litigation over decisions about rezoning and the quantum of payment to particular classes of property owners in the residential red zone (discussed below).

Another example of ambivalence can be seen in the significant groundswell support for a new voting system during the 1990s. Mixed member proportional representation was viewed as a way of curbing the power of the executive and better representing the views of the electorate through more direct representation in Parliament. Paradoxically, however, there is still a distrust of list Members of Parliament and perception that they have no mandate independent of their party: Electoral Commission *Report of the Electoral Commission on the Review of the MMP Voting System* (29 October 2012) at [2.22].

23 See Sarah Kerkin "'Here There be Dragons': Using Systems Thinking to Explore Constitutional Issues" (PhD thesis, Victoria University of Wellington, 2017), Figure 5.2 at A42 for a more detailed treatment of the norms summarised here.

These themes are classificatory: they simply provide a way of aggregating and describing a plethora of constitutional rules, principles and conventions.

A Constitutional Propriety

The theme of constitutional propriety aggregates the constitutional provisions that help decision-makers decide whether they *should* make the decision in question. Constitutional propriety requires consistency with a range of norms that are a recipe for acting reasonably and proportionately, with due respect for the inherent dignity of those affected by laws and decisions. The norms include:

- (1) *Human rights norms*, including those set out in the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and international human rights covenants ratified by New Zealand.
- (2) *Common law norms*, such as freedom from arbitrary arrest and detention, and from unreasonable search and seizure. These norms include protection of property interests, such as compensation for compulsory acquisition. They also require that public powers must derive from law,²⁴ and constrain use of the "third source" of authority.²⁵
- (3) *Treaty obligations*. The Treaty of Waitangi created a partnership that needs to be worked out in practice in changing circumstances. The Treaty partners must act reasonably, honourably, and in good faith.²⁶ The relationship is based on foundations of reciprocity and mutual benefit, which means that the needs of both cultures must be provided for. The Crown must actively protect Māori interests within reason.²⁷ Redress is consistent with the fiduciary obligations in Treaty partnership.²⁸

Propriety also requires consistency with constitutional values: because the constitution reflects the constituted state, it needs to resonate with the society it protects.²⁹

24 *Entick v Carrington* (1765) 19 St Tr 1029. See also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 26–27.

25 See generally BV Harris "Government 'Third Source' Action and Common Law Constitutionalism" (2010) 126 LQR 373. The third source was discussed extensively in the *Quake Outcasts* litigation: see *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588, [2014] 2 NZLR 587; and *Quake Outcasts v Minister for Canterbury Earthquake Recovery on appeal from Canterbury Earthquake Recovery v Fowler Developments Ltd* [2015] NZSC 27, [2016] 1 NZLR 1 [*Quake Outcasts*].

26 Te Puni Kōkiri and Ministry of Justice *Crown-Māori Relationship Instruments: Guidelines and Advice for Government and State Sector Agencies* (September 2006) at 77.

27 At 93.

28 At 100.

29 John Salmond *Jurisprudence* (7th ed, Sweet & Maxwell, London, 1924) at 154.

B Legality

The theme of legality aggregates the constitutional principles that help decision-makers to decide whether they *can* make the decision in question. This theme overlaps to some extent with propriety and is primarily concerned with the rule of law, which is, as Jeremy Waldron observes:³⁰

... the requirement that government actions must, by and large, be conducted under the auspices of law, which means that, unless there is very good reason to the contrary, law should be created to authorize the actions that government is going to have to perform.

The rule of law serves two functions. First, it imposes legal restraints on the executive by requiring compliance with existing law and by imposing legal limits on law-making powers.³¹ In this first function, we see protections against arbitrary power.³² It requires the law to be neutral, certain, stable, accessible, general and prospective.³³ Second, the rule of law maintains order and coordinates behaviour and transactions amongst citizens.³⁴ This second function means that citizens can order their lives in accordance with the rules, confident that others will do likewise and that transgressions or social disruptions will "provoke a response from legal institutions charged with enforcing legal requirements and resolving disputes consistent with applicable legal norms."³⁵

When designing institutions or decision-making processes, a crucial component of legality is the functional separation between those responsible for making, administering and enforcing the law.³⁶ Waldron observes three close-knit principles that work both separately and together as touchstones of political legitimacy:³⁷

- (1) The principle of the separation of powers (of the functions of government) from one another;
- (2) The principle that counsels against the concentration of too much political power in the hands of any one person, group or agency; and

30 Jeremy Waldron "Separation of Powers or Division of Power?" (24 April 2012) Social Science Research Network <www.ssrn.com> at 24.

31 Brian Z Tamanaha "A Concise Guide to the Rule of Law" (September 2007) Social Science Research Network <www.ssrn.com> at 3.

32 Joseph, above n 24, at 150.

33 At 151.

34 Tamanaha, above n 31, at 6.

35 At 7.

36 At 4.

37 Waldron, above n 30, at 1.

- (3) The principle of checks and balances, which requires the ordinary concurrence of one government entity in the actions of another.

These principles derive from the idea that "oppressive laws are less likely if the law-makers are ordinary citizens and have to bear the burden of the laws they make themselves".³⁸ In other words, centralised power risks autocracy and capricious or unfair application of the law. To protect against this, an articulated law-making process is needed "so that the various aspects of law-making and legally authorized action are not just run together into a single gestalt".³⁹

C Procedural Fairness

The theme of procedural fairness aggregates the constitutional rules and principles that guide *how* decisions must be made. As a Westminster-based system, New Zealand's constitutional rules and principles protect against arbitrariness and unfairness by requiring decisions to be both substantively lawful and procedurally fair. Procedural protections include the rules of natural justice which promote informed and accurate decisions that instil a sense of fairness and also require that decisions be made consistently and fairly, with "equal treatment for those similarly placed".⁴⁰ Rules against bias ensure that decision-makers have no personal interest affected by the decisions and that they do not have an ulterior, fraudulent or malicious purpose. Collectively, these requirements seek to protect against the obvious sources of unfairness or unreasonableness in decision-making.

Decisions are unlikely to be accepted as legitimate if they fail to meet standards of natural justice or are unreasonable, inconsistent or unfair. Any procedural defects are likely to inflame a sense of grievance at any perceived unfairness in the substantive decision.

D How Compliance with the Norms Creates Legitimacy

The reservoir of goodwill metaphor defines goodwill as people's acceptance of decisions as legitimate even when the decisions are contrary to their interests. If acceptance of decisions is one precursor to legitimacy, other precursors are people's trust and confidence in the system within which decisions are made and in the decision-makers themselves. If people lack this trust and confidence, they are unlikely to have much confidence in the decisions made, or in the underlying system.

These precursors are mutually reinforcing: confidence in the system settings (including decision-making procedures, constraints and safeguards) is likely to drive acceptance of decisions made consistently with those settings, even if individual decisions are not what people would wish. Similarly, trust and confidence in decision-makers is likely to boost trust that decision-makers will make the system settings work properly. Where decisions are accepted, that will tend to reinforce

38 At 13.

39 At 24.

40 *Daniels v Attorney-General* HC Auckland M1615-SW99, 3 April 2002 at [136].

confidence in the settings used to make those decisions. That reinforced confidence will likely flow through to augment confidence in decision-makers.

New Zealand's constitutional culture means that the public is more likely to accept decisions that meet people's expectations of fairness. Where decisions do meet those expectations, people are likely to accept both the decisions and the underlying system settings. Conversely, a manifestly unfair decision, or a decision driven by personal interests, is likely to undermine public confidence that the settings can protect against this kind of outcome.

One further important precursor to legitimacy is that the legality and procedural fairness norms discussed above require the state to observe some constitutional bottom lines, so people can live their lives without fear of autocratic or arbitrary state interference. These norms ensure the rules of the game are accessible and that they work as intended.

The confidence built by the everyday operation of these norms is likely to be unspoken, even unconscious. Unconscious or not, the experiential confidence to order and live one's life is likely to reinforce confidence in the settings that make it possible to do so.

IV DESIGNING LAW FOR LEGITIMACY

A The Importance of Appreciating the Role of Constitutional Norms

An important first step in designing a decision-making process or legislation is to ground it in an appreciation of the applicable constitutional norms and how they combine to ensure that decisions are legal, appropriate, and are procedurally fair. This grounding should help decision-makers to see the useful purpose of constitutional norms rather than starting from the position that constitutional proprieties are procedural burdens that unnecessarily slow down decision-making.

In Canterbury, this approach would have required identifying the types of decisions that needed to be made and, for those decisions, identifying any checks and balances that would inappropriately slow decision-making without assuming that all checks and balances needed modification in all circumstances. This approach would assist decision-makers to find modifications or alternatives to checks and balances that would achieve the protective goal without the negative effect on timely decision-making.

B Three Levers Reinforce Compliance with Norms

If the norms and culture described above are the heart of legitimacy, the question is how they are reflected and implemented in day-to-day decision-making by constitutional actors. A discernible pattern in perceptions of legitimacy over constitutionally significant decisions and actions suggests that three levers are particularly likely to boost perceptions of legitimacy. The levers are: transparency, accountability and participation mechanisms. While there are bound to be exceptions, and the levers

are unlikely to have equal weight in all contexts, these three levers seem to incentivise decision-makers' voluntary compliance with constitutional norms. The relationship is shown in Figure 1.⁴¹

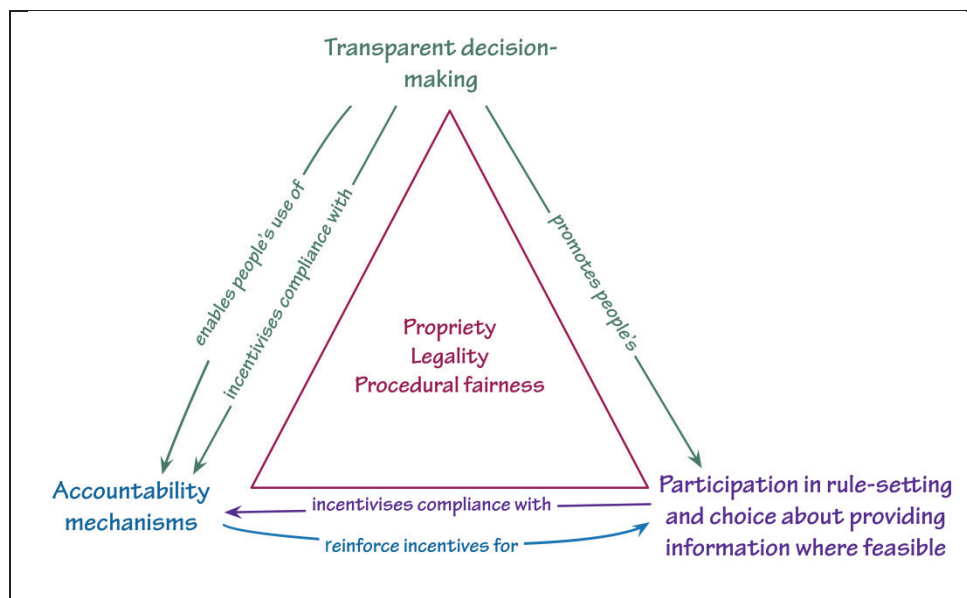


Figure 1: the Legitimacy Triangle

Why these three levers? Three examples illustrate how these levers can highlight legitimacy gaps and (sometimes) drive decision-makers towards more legitimate approaches. They are: the legislative responses to the Canterbury earthquakes, the Government's approach to red zone decisions in greater Christchurch, and the Government's response to the *Hamed v R* decision.⁴² Each example emphasises different approaches taken to the levers in the context at hand.

After the Canterbury earthquakes, the Canterbury Earthquake Response and Recovery Act 2010 was passed in a single day with unanimous support. It gave the executive the power to modify almost all primary legislation by Order in Council (a Henry VIII clause) for a broadly-stated set of purposes related to response and recovery supported by privative clauses shielding government decisions from

41 The legitimacy triangle and its logical basis is developed in Kerkin, above n 23, Figure 5.1 at A41. The approach has been developed in the context of New Zealand's constitutional system and with an appreciation of New Zealand's constitutional culture. I leave it to others to assess the approach's applicability in other constituted societies.

42 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

judicial review. A group of academics circulated an open letter expressing dismay at the legislative response, noting that:⁴³

... over and over again history demonstrates that unconstrained power is subject to misuse, and that even well-intentioned measures can result in unintended consequences if there are not clear, formal measures of oversight applied to them.

The academics' primary concern appears to have been that removing *accountability* requirements would remove safeguards at a time when the executive's instincts were to act authoritatively and pragmatically. That concern met with a sceptical public response, which Geddis described as "is this really a problem?"⁴⁴ It is possible that public sympathy with the plight of Cantabrians combined with the cultural tolerance for pragmatism to create a stronger willingness to trust the executive than might exist in more normal circumstances. That meant many people and the news media would have viewed the academics' concern as somewhat abstract hand-wringing. As a Labour Member of Parliament, the Hon Clayton Cosgrove MP, put it, "there's been a lot of latte-drinking people who have the luxury to contemplate the constitutional niceties. That's wonderful if you're not digging sewage out of your own home."⁴⁵

The combination of pragmatism and a tolerance for (mild) authoritarianism seems to emphasise a belief that we could have constitutional protections against arbitrary and unfair state action, or we could have a timely recovery from the earthquakes, but we could not have both. In short, New Zealanders had to – and were prepared to – trust the executive to use its expanded powers wisely and fairly.

The second example relates to the executive's decisions relating to the residential red zone in greater Christchurch. The Canterbury Earthquake Recovery Act 2011 ("the Act") established a hierarchy of documents that took priority over planning and zoning documents, central to which was the recovery strategy.⁴⁶ The statutory processes for developing the recovery strategy and recovery plans included public notification and hearings.⁴⁷ These statutory documents had to accord with the purposes of the Act.⁴⁸

43 Andrew Geddis "An Open Letter to New Zealand's People and Their Parliament" (28 September 2010) Pundit <www.pundit.co.nz>.

44 Andrew Geddis "Someone Give That Man a Latte" (15 April 2011) Pundit <www.pundit.co.nz>.

45 Adam Bennett "Emergency Legislation Bulldozes Laws – Christchurch Earthquake" *New Zealand Herald* (online ed, Auckland, 11 November 2010).

46 While the Act has now expired, it can be accessed through an advanced search on <www.legislation.govt.nz>.

47 Canterbury Earthquake Recovery Act 2011, ss 12, 13 and 20.

48 Section 10.

The decision dividing greater Christchurch into four zones (including the red zone) according to the extent of land damage and remediation prospects was not made using these statutory processes.⁴⁹ Cabinet also authorised purchase offers for properties in the red zone differentiated according to the nature of the property and the owners' insurance status, without explicit reference to the Act's purpose.

The red zone decisions and the quantum of some offers were litigated. One of the critical issues was whether the decision should have been made using one of the statutory processes (for instance a recovery plan issued under s 16 of the Act). The Supreme Court noted the emphasis in parliamentary debates on public consultation in the recovery. It observed that the zoning decisions were made without consultation,⁵⁰ and that the Canterbury Earthquake Recovery Authority ("the Authority") had noted that the disadvantages included "longer timeframes to complete process" given the need for consultation, and that the community may expect "that their views may change decisions".⁵¹ The majority judgment noted in response:⁵²

That the mechanisms under the Act may not be entirely suitable, convenient or perfectly "aligned" to what the Executive desires to achieve is not a reason for statutory procedures to be bypassed. It is for Parliament to amend the legislation if it is not fit for purpose.

As a matter of policy, the judges seem to have thought that where Parliament has provided for processes with *public participation* and *accountability* mechanisms, those processes ought to be used. These mechanisms were:⁵³

... particularly important because many of the powers in the Act are highly coercive. It cannot have been intended that the safeguards in the Act could be circumvented by acting outside of the Act.

The earthquakes had features of national interest and immediacy, which created a certain tolerance for procedural shortcuts. The third example, the Government's proposed legislative response to *Hamed v R*, occurred in more normal circumstances.⁵⁴ Unsurprisingly, there was a markedly lower tolerance amongst parliamentarians and the media for executive-driven procedural shortcuts, and the example shows the power of *transparency* and *participation* in bringing about changes to both the substance and procedure of law-making.

The *Hamed* judgment concerned the use of unlawful covert video surveillance in evidence. The Government considered it could affect a large number of extant investigations and prosecutions and

49 The best narrative of events is in the Supreme Court's majority judgment in *Quake Outcasts*, above n 25.

50 At [62].

51 At [43]–[44].

52 At [131].

53 At [117].

54 *Hamed v R*, above n 42.

proposed to introduce retrospective validating legislation as a stopgap measure.⁵⁵ The Government wanted parliament to pass the legislation under urgency.

Both the substance of the proposed law and the enactment process were criticised. Dean Knight commented that it was not:⁵⁶

... tweaking the law to reflect Parliament's original intent or ensure the law conforms with people's reasonable understanding of the law. There was no legal basis for covert video surveillance, the Police were aware that covert video surveillance was not legally authorised, but they proceeded anyway.

Passing the law under urgency and without a select committee hearing was viewed as bad process because the law would retrospectively affect fundamental rights and the criminal process.⁵⁷ The call by opposition parties and the news media for changes to both the substance of the law and the procedure for passing it secured a short select committee hearing that included public submissions. The Labour members' commentary stated that "as opposition MPs we would not have been able to scrutinise the bill in any adequate way without having heard from the submitters to the committee."⁵⁸

Submitters' evidence persuaded Parliament that the legislative fix should be short-term and prospective and that it should ensure that all searches would remain subject to the reasonableness standard in s 21 of the New Zealand Bill of Rights Act 1990, as enforced by the courts.⁵⁹ Here, the *transparency* and *participation* levers brought about a modified approach that was more consistent with constitutional norms.

C The Logic Underpinning the Legitimacy Triangle

The legitimacy triangle is predicated on the assumption that a constitution can – and should – protect its citizens even in their hour of greatest need. A constitution that cannot do so risks losing its legitimacy in the eyes of the very people it is supposed to protect.

The three levers at the points of the triangle can help to give effect to the norms at its centre. They can nudge constitutional actors towards actions and decisions that will be perceived as legitimate, assuming that constitutional values influence decision-makers. The public is likely to reinforce that

55 Video Camera Surveillance (Temporary Measures) Bill 2011 (333-1) (explanatory note).

56 Dean Knight "Covert video surveillance and the (c)overt erosion of the Rule of Law" (20 September 2011) LAWS179 Elephants and the Law <www.laws179.co.nz>.

57 Knight, above n 56.

58 Video Camera Surveillance (Temporary Measures) Bill 2011 (333-2) at 6.

59 At 6.

influence, albeit unconsciously, by supporting decisions and processes that are broadly consistent with New Zealand's constitutional culture and challenging decisions and processes that are not.⁶⁰

If constitutional culture influences public expectations of decision-makers and decision-makers are responsive to those expectations, then transparency and public participation should incentivise compliance with constitutional norms. Transparency makes it more likely that people will be watching decision-makers. Participation brings decision-makers into close proximity with those interested in or affected by decisions, which is likely to strengthen their incentives to comply with substantive and procedural norms. Accountability incentivises compliance with norms by providing an enforcement-based lever for those decision-makers who are not otherwise minded to comply with norms. Weakening or removing one or more of the levers alters the interrelationships between the three levers and norms. That can weaken the incentives to comply with norms, which can weaken legitimacy.⁶¹

1 How transparency promotes compliance with norms

Transparency is valuable in its own right. On its own, transparency incentivises compliance with norms because constitutional values influence decision-makers. If we accept that New Zealand's constitutional culture influences public expectations of constitutional actors, and constitutional actors are responsive to public expectations, then transparency should incentivise compliance with constitutional norms. People are more likely to comply with norms if they believe others are watching. As Brandeis famously observed, "publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."⁶²

Transparency mechanisms such as the Official Information Act 1982 and open decision-making processes (for example, published decisions, open judicial and parliamentary procedures) mean decision-makers know their decisions and decision-making procedures will be open to scrutiny by the public. That is likely to incentivise compliance with constitutional norms, assuming that decision-makers would prefer their decisions to be accepted and able to withstand any legal or public challenge. Transparency also builds public understanding of decisions by informing people about the decision-maker's reasons, and understanding is important for acceptance.

Transparency ensures people can access the information they need in order to participate in an informed way and to hold decision-makers to account. In this way, transparency is a foundation for the accountability and participation levers. Limiting transparency is particularly likely to weaken informal accountability and participation mechanisms, such as scrutiny and challenge by interested

60 Gewirtzman, above n 15, at 652–657.

61 Kerkin, above n 23, Figures 5.3–5.5 at A43–A45 show the effects of neutralising each of the three levers.

62 Louis D Brandeis *Other People's Money: And how the Bankers Use it* (Stoke, New York, 1914) at 92, cited in Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) at 229.

members of the public. That will further weaken the incentives to comply with norms by effectively shielding decision-makers from accountability for the decisions. Such shielding can have a corrosive effect on trust and confidence in decision-makers and in system settings.

When limited transparency weakens participation, it can disconnect decision-makers from the public's expectations of fairness. It is reasonable to assume that failure to meet those expectations can undermine the acceptance of decisions, which would weaken goodwill towards those decision-makers and their institutions.⁶³

2 How accountability mechanisms promote trust and confidence in decision-makers and system settings

The very existence of accountability measures incentivises compliance with constitutional norms, assuming that most decision-makers would prefer their decisions to be accepted and able to withstand scrutiny.

Accountability mechanisms provide an enforcement-based lever for those decision-makers who are not minded to comply with norms. In this way, accountability measures are a safety net. Neutralising accountability removes a direct means of controlling decision-makers' behaviour, which may weaken the signals that decision-makers should comply with norms. It may also weaken public trust and confidence in decision-makers and in the system settings. Trust and confidence is likely to have a reinforcing effect on decision-makers' behaviour: when they are trusted and their decisions accepted as legitimate, they are likely to enjoy high levels of public goodwill and see their decisions being complied with without resort to enforcement mechanisms. If decision-makers want to maintain that state, they are likely to comply with the norms that got them there.

3 How participation mechanisms promote acceptance of decisions

Participation mechanisms are the primary means of providing natural justice for people personally affected by decisions. Participation mechanisms promote accurate decisions by being a vehicle for people to test and challenge a decision-maker's information and assumptions. People are somewhat more likely to accept decisions that are based on accurate information and assumptions and where they understand the decision-maker's assumptions, even if they disagree with the decision.⁶⁴ In this way, structuring a decision-making process to include participation can significantly promote public

63 This argument is derived from a conceptual system model developed in my thesis. See "Chapter V: Legitimate Decision-Making in Canterbury Earthquake Recovery: Two Systems Analyses" in Kerkin, above n 23, at 133.

64 See for example Gibson, Caldeira and Spence, above n 9.

acceptance of decisions: for instance, participation in disaster recovery planning processes and structures can make residents feel personally invested in the plan.⁶⁵

Participation in decision-making processes (for example, through the right to be heard, or through public consultation or deliberation processes) brings constitutional actors into close proximity with those interested in, or affected by, their decisions. Such proximity is likely to strengthen decision-makers' incentives to follow correct procedures and to comply with substantive norms. It will help them to meet people's expectations of fairness through a better understanding of what those expectations are.

In these ways, the levers of transparency, participation and accountability mechanisms promote decision-makers' compliance with constitutional norms and values. That should promote public trust and confidence in decision-makers and acceptance of their actions and decisions. Combined, these factors create legitimacy.

V VIEWING CANTERBURY EARTHQUAKE RECOVERY THROUGH THE LEGITIMACY TRIANGLE

The legitimacy triangle throws aspects of the Canterbury earthquake recovery into relief. The triangle does not define legitimacy as universal consensus. It assumes that, in a healthy, functional constituted society, disagreement will manifest in ways that conform with social norms, comply with the rule of law and seek to effect change within existing constitutional mechanisms. In Canterbury, peaceful movements were established to lobby for change or draw attention to aspects of the recovery their members found unsatisfactory and to inject a citizen perspective.⁶⁶

To maintain public trust in the constitution's ability to protect its people, the law enabling recovery needs to be designed in such a way that it does not become a choice between constitutional propriety and a timely recovery.

A Constitutional Norms in Extraordinary Times

Recovery processes following a natural disaster move through phases. The early days of response are dominated by immediate safety concerns and the challenges of meeting day-to-day necessities. In Canterbury, short-term expedient decision-making was needed to meet immediate safety and public welfare needs. Rapid and timely decision-making was needed to give Cantabrians some certainty in

65 Doug Millen *Deliberative democracy in disaster recovery: reframing community engagement for sustainable outcomes* (University of Western Sydney, Sydney, 2011) at 7.

66 For instance, CanCERN established itself as a network of community organisations. See Suzanne Vallance "Community, Resilience and Recovery: Building or Burning Bridges?" (2011) 3(1) Lincoln Planning Review 4. Greening the Rubble is a community organisation focused on re-vegetating barren sites. See Simon Swaffield "Place, Culture and Landscape After the Christchurch Earthquake" in Helen Sykes (ed) *Space Place and Culture* (Future Leaders, Albert Park (VIC), 2013) 8.

an uncertain world, to strengthen their trust and confidence in the recovery. It was important that, even here, decision-makers were ultimately accountable to guard against the risk of disproportionate, arbitrary or unfair decisions.

Popular approaches to facilitate participation are often criticised for depending on community consensus-building and on time-intensive deliberation, which is not conducive to time-constrained post-disaster recovery.⁶⁷ The experience of the Waimakariri District Council suggests this criticism is not inevitable. The Council engaged the community "to undertake their own recovery by delegating, coordinating, facilitating, enabling and mobilising the community's own strengths and assets."⁶⁸ The approach was commended by the Minister for Canterbury Earthquake Recovery in April 2011: "You have been a great example of how to engage constructively with your community, and your leadership during these challenging times has also been a comfort to your residents."⁶⁹

Not all recovery decisions are equally urgent. As time passes and a new normal stabilises, people have more space to think about longer-term matters such as the future of their city. At this point, not allowing the people adequate opportunities to participate in the redevelopment of their city would risk undermining public trust and confidence. Divya Chandrasekhar has shown that when stakeholders' recovery priorities are not met by the recovery process, they may choose not to participate.⁷⁰ Inviting participation would create more confidence in, and acceptance of, decision-makers and their recovery-related decisions, which is consistent with the philosophy underpinning the Civil Defence Emergency Management Act 2002.⁷¹

Trust and confidence in the recovery process can reinforce trust and confidence in the underlying constitutional settings by demonstrating that the constitution could protect its citizens at their most vulnerable. That confidence would have a ripple effect, enabling the wider constitution to withstand shocks and crises like extraordinary events and natural disasters that require short-term, expedient decision-making. However, rapid decision-making without checks or balances risks of arbitrary or

67 Divya Chandrasekhar "Digging deeper: participation and non-participation in post-disaster community recovery" (2012) 43 *Community Development* 614 at 614.

68 Suzanne Vallance "An evaluation of the Waimakariri District Council's integrated and community-based recovery framework following the Canterbury earthquakes: implications for urban resilience" (2015) 33 *Urban Policy and Research* 433 at 447.

69 At 434.

70 Chandrasekhar, above n 67, at 625.

71 Robert David Kipp *From cold war to Canterbury: the New Zealand experience in emergency management* (PhD dissertation, University of Canterbury, 2016) at 56.

unfair decision-making, which would undermine public trust in both the recovery itself and in the constitution's ability to protect its people.⁷²

Checks and balances were thus needed to ensure transparent decision-making, accountable decision-makers and proportionate opportunities for participation in decision-making. Checks and balances need to include substantive and procedural protections that protect against arbitrary or unfair decision-making and ensure decisions meet people's expectations of fairness. Combined, these factors should strengthen public acceptance of decisions, which promotes their legitimacy and should reinforce trust and confidence in the constitutional settings facilitating those decisions. As discussed above, accountability measures should reinforce trust and confidence in decision-makers, which further promotes legitimacy.

Legitimacy tends to be self-reinforcing. A situation characterised by high legitimacy tends to reinforce trust and confidence in decision-makers and constitutional settings, making the system more resilient. Where people have a high level of trust in institutions, their trust is more likely to withstand one-off shocks and crises. In such a situation, legitimate decisions should be more enduring and less likely to be revisited.⁷³

Canterbury's earthquake recovery showed that fast decision-making should not always trump participation. Some decisions may be sufficiently important and have sufficiently long-term effects that they require public engagement despite any resulting loss in speed. Experience in Canterbury also showed that even some apparently technical decisions, such as the affixing of building safety placards and the designation of land as requiring particular earthworks to rebuild, had social and/or economic dimensions.⁷⁴ These "technical issues" became political because of their resonance with the constitutional values of egalitarianism and fairness, and the norms of democracy and public participation.

B The Legitimacy Triangle can Promote Constitutional Self-Correction

The three levers discussed earlier can work together to enhance the constitution's resilience. When an external stimulus pushes public power in a direction that may be inconsistent with constitutional norms, the constitution may respond by pulling back to a point of relative consistency with norms. This self-correction was apparent in the executive's use of the Henry VIII clause in the Act.

72 The relationships discussed here are explored as a series of causal loops in pt 5.3.4 in Kerkin, above n 23, at 169–174.

73 At 169–174.

74 Rachel Brookie "Governing the Recovery from the Canterbury Earthquakes 2010–11: The Debate over Institutional Design" (June 2012) Victoria University Institute for Governance and Policy Studies <www.igps.victoria.ac.nz>; David Middleton and Richard Westlake *Independent Review of the Response to the Canterbury Earthquake, 4 September 2010* (Ministry of Civil Defence and Emergency Management, GEN.MCDEM.0004, May 2011); and generally Vallance, above n 68.

The Henry VIII clause came in for strong criticism during parliamentary consideration. On paper, there were few safeguards to constrain the executive's use of the clause and two privative clauses sought to restrain judicial review of it. In theory, the Henry VIII clause could have been used to create legislative change that was only tangentially connected with Canterbury's earthquake recovery. That possibility was signalled in the House of Representatives. In his third reading speech, the then-Minister for the Environment, the Hon Nick Smith, observed that the Henry VIII clause would permit legislative amendments "only if they directly relate to the recovery from, and the response to, the Canterbury earthquake."⁷⁵ Two paragraphs on, Dr Smith explained how the Henry VIII clause would enable legislation to improve air quality in the region.⁷⁶

One issue I am considering as Minister for the Environment is that it might be sensible, given the number of fatalities that have occurred historically around earthquakes and chimneys, and given that I think this House shares a desire to improve the air quality of Canterbury, for us to pass some extra Orders in Council to ensure that wherever possible we eliminate the chimneys and move Christchurch, Ashburton and other communities to having a cleaner air quality.

Yet, despite these shortcomings, the Henry VIII clause was used proportionately, reasonably and with care. The Regulation Review Committee's inquiry into its operation did not identify anything to cause the Committee particular concern.⁷⁷ In only one instance was the validity of an order made under the Henry VIII clause successfully called into question, due to an irregularity in the Canterbury Earthquake Recovery Review Panel's composition.⁷⁸ After surveying every order made between 2011 and 2014, I concluded that the orders had been carefully crafted, and were proportionate and defensible.⁷⁹ I wondered why such power had been exercised with such restraint, given the weakness of the formal accountability measures.

In the context of earthquake recovery orders, there was a tension between the constitutional values of authoritarianism and pragmatism on the one hand and the norm of restraint on the other. This tension might have been expected to play out over the course of some years: decisions characterised by a high level of pragmatism would likely have been publicly accepted early on, but would have become harder to justify as more time elapsed. Over time, as individual decisions started to have a

75 (14 September 2010) 666 NZPD 13960.

76 (14 September 2010) 666 NZPD 13960. Of the 185 people killed in the earthquakes, only 12 died in suburban locations: see New Zealand Police "List of Deceased | New Zealand Police" (9 February 2012) <www.police.govt.nz>. Some of those deaths might have been attributable to chimneys, but I have not been able to source any data to verify that.

77 Regulations Review Committee *Orders in Council Made Under the Canterbury Earthquake Response and Recovery Act 2010* (December 2010).

78 Regulations Review Committee *Investigation into the Canterbury Earthquake District Plan Order 2014: Report of the Regulations Review Committee* (10 December 2015).

79 Kerkin, above n 23, at 263.

cumulative impact on legitimacy, a rebalancing towards restraint and away from pragmatic, authoritarian approaches could be expected (a constitutional self-correction, in effect).

A systems analysis has revealed two possible, and mutually compatible, explanations for the self-correction apparent in the earthquake recovery.⁸⁰ First, the conflict of norms and values (restraint versus pragmatism and authoritarianism) may have created opposing influences on decision-makers, which manifested in how they complied with constitutional norms or, indeed, which norms they complied with. How decision-makers respond to that conflict will be influenced by the relative weight they give to constitutional values, New Zealanders' (and their own) ambivalence to public power and the ways in which they are held accountable. In this way, the early restraint shown in Orders in Council might have been due to decision-makers being aware that decisions made in the short-term may have consequences for long-term legitimacy.

A second possible explanation is that the constitutional norms of restraint, legality, parliamentary supremacy and representative democracy were strongly embedded in the public service and ministers and so counterbalanced against the then prevailing values of pragmatism and authoritarianism, which were also influencing decision-making. The levers of transparency, accountability and participation can help to reinforce this process by casting a light on the decisions made and by giving decision-makers incentives to consider whether their decisions (and the decision-making process used to make them) are likely to be considered legitimate by the people.

When extraordinary powers are exercised with restraint, decisions become more predictable. Greater predictability creates the certainty that enables people to order and live their lives without being worried about (or even necessarily aware of) the constitutional system and the state. That will strengthen public perceptions of legitimacy and will start the process of re-stabilising the norms that have been disrupted by extraordinary circumstances.⁸¹

C A Particular View on the Role of Constitutional Norms was Evident

The Act evidenced a considered approach to the decisions needed to effect recovery by identifying and empowering the decisions that would be made and establishing a mechanism for making decisions that could not be foreseen in the still unfolding context. However, the Treasury noted that gaps in the regulatory impact analysis (attributable to the significant time pressures and limited information available) made it "difficult to judge whether the proposed option is proportionate to the problem".⁸² Knight observed a cognitive dissonance in the Act: while there were references to collaboration,

80 At 297. These explanations have not yet been tested with the decision-makers concerned, which would make an interesting and valuable research project.

81 At 185–186.

82 Cabinet Paper "Paper 2: Canterbury Earthquake Recovery: Proposed Powers" (28 March 2011) at [108].

coordination and cooperation, the legislative scheme was drawn in command and control terms.⁸³ Kipp suggests this was a reaction to the Civil Defence Emergency Management Act's approach to recovery as "voluntary cooperation and collaboration absent any coercive elements".⁸⁴ That permissive, cooperative framework was not effective in the face of coordination and cooperation difficulties amongst local authorities in Canterbury.⁸⁵

The Act showed a desire for recovery activities to have a clear legal basis, which suggests a respect for the rule of law and, possibly, a desire to reduce the risk of legal challenge. However, other aspects of the recovery approach suggested a level of scepticism about the value of public participation. For instance, in parliamentary debates on the Act, the Minister for Canterbury Earthquake Recovery noted:⁸⁶

There will be debate about what international literature tell[s] us about these events and the recovery from them, but in my estimate the thing that comes through most clearly is that too often a discussion held in a room with a lot of people putting forward ideas is confused for action.

D How Transparency Helped – and Could Have Been More Helpful

In Canterbury's earthquake recovery, a measure of transparency was achieved by making the Authority subject to the Official Information Act 1982. For the executive, this is the most straightforward transparency intervention: the Official Information Act comes with a known set of decision-making criteria and machinery. In practice, the Authority adopted a practice of proactive release of information and all key government decision-making documents were released on its website.⁸⁷

That policy extended to the proactive release of departmental officials' advice to the Canterbury Earthquake Recovery Review Panel ("the Panel") about draft Orders in Council, as well as the Panel's recommendations. The Panel did not tend to give reasons for its decisions and its advice was often confined to a short recommendation to the Minister.⁸⁸ While it is reasonable to assume that the Panel

83 Local Government and Environment Committee *Hearing of Evidence on the Canterbury Earthquake Recovery Bill: Report of the Local Government and Environment Committee* (14 April 2011) at 77–78.

84 Kipp, above n 71, at 56.

85 At 187.

86 (12 April 2011) 666 NZPD 18129 per the Hon Gerry Brownlee.

87 The Authority was disestablished on 18 April 2017 and its information and publications were archived, but are still publicly available from <www.ceraarchive.dpmc.govt.nz>.

88 See for instance Canterbury Earthquake Recovery Review Panel *Report and Recommendation of the Review Panel: Canterbury Earthquake (Local Government Act 2002) Order 2011* (15 June 2011); *Report and Recommendation of the Review Panel: Canterbury Earthquake (Social Security Act) Order (No 2) 2010 Amendment Order 2012* (7 March 2012); and *Report and Recommendation of the Review Panel: Canterbury*

agreed with the justifications offered by departments, by providing more explanation about its reasons, the Panel could have created a body of decision-making jurisprudence. Such jurisprudence would have helped departments learn from the experience of others and informed the public about the acceptable tolerances within which the Henry VIII clause could be used. Reflecting that, the Hurunui/Kaikōura Earthquakes Recovery Act 2016 includes such a requirement.⁸⁹

Transparency seemed to play an influential role in the constitutional self-correction discussed above.⁹⁰ While it is likely to be due to a number of factors, the Authority's proactive release of official information meant departmental officials had a good idea their advice would be released publicly. That would likely have strengthened other existing incentives to ensure the advice was robust and constitutionally defensible. As a result, the executive-made law was able to withstand parliamentary scrutiny and did not contravene the rule of law.

E Accountability Limitations were an Unnecessary Irritant

The Act contained a number of accountability limitations. Of primary interest here are the privative clauses that purported to limit the courts' ability to judicially review use of the Henry VIII clause. The first privative clause, s 74(2), provided that the Minister's recommendation for an Order in Council was not reviewable. While the Minister had to take into account the Act's purposes and the Panel's recommendations, the Minister would have been free to ignore those statutory requirements.⁹¹

The second privative clause, s 75(5), provided that Orders in Council had the force of law as if they were enacted as a provision of the principal Act. The Legislation Advisory Committee explained to the Select Committee that this was a weak-form privative clause relying on the constitutional protection of legislation made by Parliament. Parliament-made law is not reviewable by the courts due to parliamentary sovereignty, whereas courts can review legislative instruments made using a delegated law-making power to ensure they are within the scope of the delegation.⁹²

Submitters to the Select Committee recommended that both privative clauses be omitted, but they were enacted unchanged. The same privative clauses appear in the Hurunui/Kaikōura Earthquake Recovery Act 2016, which suggests they have acquired precedent value, at least for the time being.

The privative clauses attempted to limit the executive's formal legal accountability by shielding certain decisions from judicial review. Accountability mechanisms could have reduced the risk of

Earthquake (Tax Administration Act) Order (No 2) 2011 (30 September 2011). All are available from: <www.ceraarchive.dpmc.govt.nz>.

89 Section 14(6).

90 See above at 85–87 of this article.

91 Local Government and Environment Committee, above n 83, at 45.

92 At 45.

modifying normal decision-making procedures in response to extraordinary circumstances. As it was, this aspect of the Act unnecessarily reduced trust and confidence in the regime over the course of its life. While the limitation of accountability for issuing Orders in Council was not unduly problematic in practice, this policy decision created unnecessary constitutional tension and perceptions of questionable legitimacy that could have been avoided at little or no cost.

F Avoiding Public Participation Became a Problem

Public participation presented a particular challenge for the recovery. Particularly in the early stages of the recovery, pace was a necessary part of the solution to get people into warm, weathertight homes, to repair core infrastructure and to shore up the Canterbury economy. A lack of pace could have significantly undermined public trust and confidence in the recovery. At the same time, participation is a key way for decision-makers to test their assumptions and to build public acceptance of decisions.

The Act did contain some participation mechanisms, particularly for the recovery strategy and recovery plans. This appears consistent with the disaster recovery literature. In post-disaster recovery, participation is critical because "it helps create a shared understanding of local hazard risk and vulnerability, improves recovery and mitigation decision efficacy, and builds social capital".⁹³ Where the executive used these mechanisms, little controversy followed. The problems seemed to arise when the executive pushed up against the limits of its powers, particularly when it seemed to do so to avoid participation requirements. For instance, the Supreme Court held the executive to account for acting in accordance with the primary recovery mechanisms – the recovery strategy and recovery plans – which were envisaged for significant decisions such as the red zone, precisely because they enabled public participation in those decisions. Failure to use those mechanisms had denied people the chance to participate in decisions affecting their futures – and to inform executive decision-making.⁹⁴

Another set of litigated decisions also raised participation issues. The Minister for Canterbury Earthquake Recovery used s 27 of the Act to amend the Canterbury regional policy statement to provide for urban development of designated greenfield areas. The proposed change to the regional policy statement had been contested since before the earthquakes and was subject to ongoing litigation. The earthquakes created a "pressing need for land to be freed up for urban residential subdivision".⁹⁵ The Minister considered that "there was no prospect of the Environment Court resolving the ... appeals quickly and that council officers involved in those appeals were required for earthquake recovery planning".⁹⁶

93 Chandrasekhar, above n 67, at 614.

94 *Quake Outcasts*, above n 25.

95 *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810 at [5].

96 At [5].

Taking a broad view of earthquake recovery, the Minister's concern seemed reasonable. The earthquakes had destroyed considerable infrastructure and rendered it impracticable to rebuild in some areas. Dealing with recovery in the context of an urban development strategy was not unreasonable. The problem was that the Minister knew his preferred course of action would bring extant proceedings to an end. The Court of Appeal observed that the fact that issues pre-dated the earthquake did not, of itself, take the decisions outside the Act's purposes.⁹⁷ That said, the Court disagreed with the Minister's use of s 27 to amend the regional policy statement because:⁹⁸

It is not at all clear from the evidence why a short-term "neat solution", which precluded public participation, was necessary, rather than merely expedient ... for a long-term problem which would be addressed in the Recovery Strategy, the draft of which had already been publicly notified.

This litigation showed how a decision's legitimacy could be undermined when a process was already underway and the decision-maker changed the direction of travel without warning. The detrimental effect of removing opportunities for participation seemed particularly instrumental in the court's decision.

The decisions discussed above are only a tiny proportion of Canterbury's earthquake recovery decisions, and do not fundamentally undermine the recovery's overall legitimacy. But they served to weaken legitimacy, probably unnecessarily given that key elements of the contested decisions were ultimately remade following more compliant – and participatory – processes.

VI CONCLUSION

Consciously designing for legitimacy is not particularly hard when following some rules of thumb. The legitimacy triangle (Figure 1) offers a relatively simple way of thinking about legitimacy and building it into policy, legislative or process design. The three levers of transparency, accountability and participation will tend to drive the design towards compliance with the norms at the triangle's centre. The levers work together to help the constitution self-correct, which can mitigate design flaws to some extent.

The legitimacy triangle is sufficiently flexible to accommodate even extraordinary circumstances such as disaster recovery and it reminds us that even then, it is important to keep replenishing the reservoir of goodwill that maintains public confidence in the legitimacy of our constitution and its decision-makers.

97 *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [101].

98 At [134].

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