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Permitted Unlawfulness: The New Zealand Coronavirus Lockdown

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"Limitation is essential to authority. A government is legitimate only if it is effectively limited." – ***Lord Acton***

It is a study both troublesome and perplexing. To what end can a state trample on human rights ostensibly to preserve such objects a public health? The coronavirus lockdowns have become a feature of global politics and relentless mandatory intrusion, the health department made sovereign, assisted by vigorous policing. States have used, and continue to use all manner of measures to confine individuals to homes, mask them, restrict movement, while, in some cases, shutting them up as dissenters and hurrying them into obscurity. The end sought: viral suppression, flattening the curve, elimination. But what might be saved in terms of health will be lost in terms of liberties.

One country made the brave, somewhat quixotic journey to battle the coronavirus to elimination. New Zealand's Ardern government was determined to quash it. In doing so, it imposed one of the most onerous of lockdowns over the course of March and April, 2020.

It was not without controversy, and Wellington lawyer **Andrew Borrowdale** took issue with its sheer expansiveness. A particular point of interest for him were the early stages of the five-week lockdown, specifically the calls between March 26 and April 3 by **Prime Minister Jacinda Ardern** and her officials for New Zealanders to stay home under pain of penalty. The timing is important here as the stay home restrictions were only formally passed on April 3.

The country's 1956 Health Act provides for what is called a "Section 70" notice, issued by a Health Officer to restrict movement. This can be done if the relevant minister has issued an Epidemic Notice pursuant to the Epidemic Preparedness Act of 2006. This, the Prime Minister did on March 24. Unfortunately for Ardern, the Director-General of Health Ashley Bloomfield's Section 70 notice, which came into effect on March 26, only covered the closure of businesses. It was, in other words, defective. There had been, for instance, no formal instrument legitimising the need for New Zealanders to stay at home in their "bubbles" or not go to such public spaces as the beach.

In an assessment by insolvency practitioner and columnist Damien Grant, Ardern proceeded to imperially "issue a slew of orders that were outside her remit. Parliament had deliberately kept that power out of our elected representatives and placed it into the hands of competent medical officials." Those elected representatives were now running amok – at least for a short time.

Other officials also did the same. The then police commissioner **Mike Bush**, charges Grant, was operating outside his jurisdictional remit in saying "you're better to stay on the comfort of your own couch or your own home than be cooling yourself on a very cool bench in a police cell."

The result of this bungling in drafting was only rectified by another Section 70 notice, designed to square the implemented lockdown measures with what authorities could legally do. But it had taken nine days of over-extended and illegitimate power.

The finding by the New Zealand Supreme Court was not exactly a sweeping triumph for Borrowdale or his lawyer Tiho Mijatov, who had argued that generous and permissive interpretations of such health provisions should not happen even during the course of a pandemic emergency. The court took with one and gave with another. But with that, Borrowdale had made a salient and pressing point. The three judges acknowledged that, even during "times of emergency, and even when the merits of the Government response are not widely contested, the rule of law matters." The executive was not entitled to behave absolutely.

While the court dismissed two out of the three grounds, they did accept Borrowdale's first contention, in part. They noted announcements by the executive between March 26 and April 3 stating or implying that all New Zealanders needed to "stay at home and in their 'bubbles' when there was no such requirement." These duly limited "certain rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990, including in particular, the rights to freedom of movement, peaceful assembly and association." The court accepted "that the requirement was a necessary, reasonable and proportionate response to the COVID-19 crisis at that time" but it "was not prescribed by law."

The substantive effect of the decision will be minimal, even if the lesson on illegitimate power is telling. Prosecutions for breaching the lowdown rules will remain, for the most part, valid. **Attorney General David Parker** emphasised the didactic point behind the measures: the State as instructor and guide on how to cope with a dangerous pandemic. "The Government was trying to educate people about the health risks and transition them quickly to take actions that curtailed normal freedoms like staying at home to stop the spread of the virus." He claimed these actions to be a success. "In the end the measures taken by the government worked to eliminate COVID-19, save lives and minimise damage to our economy."

The virus, however, has shown a guile to throw off epidemiologists, health specialists, and politicians. Like Galileo's observation on the earth, it moves. Even the harshest measures have not guaranteed elimination. Where there is mobility, there is transmission. Even the most sedentary of people will eventually feel the urge to step outside. COVID-19, and more lockdown measures, are now in place in Auckland. To date, Ardern's reassurance, and one that may have to be revised in due course, is that community transmission has been prevented. She is bound to be more legally attuned this time around.

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